

Registered Office

- Level 3
- 501 Blackburn Road
- Mt Waverley Vic 3149 Australia
- Telephone (03) 8540 7800
- Facsimile (03) 8540 7899

14 February 2011

Ref Nos UE.SU.01

Mr Tom Leuner
General Manager, Markets Branch
Australian Energy Regulator
GPO Box 520
Melbourne VIC 3001

E-mail: AERInquiry@aer.gov.au

Dear Tom

United Energy Distribution and Multinet (the businesses) appreciate the opportunity to provide comments on the AER Draft decision on Approach to Compliance with the National Energy Retail Law (NERL), Rules and Regulations, the Draft AER Compliance Procedures and Guidelines and the Draft Statement of Approach.

The businesses note that there is a significant transition planning exercise to move to the NECF and we are yet to understand the timing of the move in Victoria and the approach with the current jurisdictional obligations.

The AER consultation papers do not provide any guidance on how this compliance framework might be implemented. For example, what transitional period will be employed once we move to NECF? If large sections of the NECF are not implemented for some time, then the compliance reporting framework outlined in the Procedure and Guideline should be delayed whilst some other aspects outlined in the Statement of Approach proceed.

The businesses suggest that there needs to be some discussion about how the businesses move into this new framework and an appropriate transition timeframe.

Compliance Procedures and Guidelines

4.6 Audit Reports

Whether the AER or the regulated entity engages the auditor, the regulated entity should be provided an opportunity to review the draft audit report and ensure that the audit represents the facts of the matter and controls in place accurately, before an audit report is finalised and provided to the AER. This also allows any audit recommendations to be more meaningful in light of the businesses IT system and process capability.

The businesses recommend a new clause 4.6.3 be added to clarify that the regulated entity has been provided a draft copy of the final audit report and has agreed to the findings and recommendations.

A1. Pro-forma – Type 1 Obligations

For a Type 1 breach of obligation or possible breach of obligation, a proforma CEO signed letter in Appendix A1 and the reporting template in Appendix A3 are proposed to be completed and sent to the AER within 5 business days of the breach occurring.

The businesses do not object in principle to the CEO providing a verification statement, although note that there is no power in the NERL for the AER to require one. This should be contrasted with section 155(c) of the NERL and section 28M(d) of the NEL, both of which provide a specific power for a RoLR regulatory information notice and a regulatory information instrument respectively to require that the information specified in the notice/instrument be verified by way of statutory declaration by an officer of the company.

Section 281(3) of the NERL provides that the Compliance Procedures and Guidelines must provide for the manner and form in which regulated entities must submit information and data to the AER; a verification statement does not fall within the scope of 'information and data'.

In these circumstances, the businesses are particularly concerned by the proposed acknowledgement to be given by the CEO concerning Division 137 of the Criminal Code.

It would appear that Appendix A1 has been crafted to approximate the form of a statutory declaration but, as noted above, there is no legislative authority to do so. Moreover, it requires a personal acknowledgement of liability when the liability will be that of the company. Section 274 of the NERL places an obligation on the regulated entity, not any individual.

Accordingly, the proposal that without legislative authority an individual be compelled to 'solemnly and sincerely declare' and further acknowledge the operation of the Criminal Code in relation to a criminal offence that would not be committed by that individual is wholly inappropriate.

The AER has a responsibility under section 137.1 to take reasonable steps to inform the regulated entity of the existence of the offence against sub-section (1) but it cannot discharge that responsibility by requiring an acknowledgement from an individual of that offence by a party other than him or her.

In the absence of legislative authority for the AER to require a verification statement, the businesses nevertheless will be happy to voluntarily ask the CEO to provide such a statement but will not ask the CEO to give the proposed acknowledgement.

If the AER wishes to publish a form of statement that the businesses might voluntarily consider, the businesses consider that the compliance statement wording is inconsistent with other compliance statement wording already used in the industry compliance statements with the Essential Services Commission (ESC). The businesses suggest that the last two paragraphs in A1 and A2 be replaced with the following which is modelled on the current compliance reporting statements in Victoria adjusted to reflect obligations of the regulated entities under the NERL.

[Business] had effective policies, systems and procedures, established and observed, in accordance with the relevant provisions of the AER's Compliance Procedures and

*Guidelines, to efficiently and effectively monitor compliance throughout the period covered by the report.
The information and data in this report is submitted in the manner and form required by the AER's Compliance Procedures and Guidelines.*

The businesses comments apply equally to proposed Appendix A2.

B Classification of regulatory obligations

The AER Compliance Procedures and Guideline lists the Type 1, Type 2 and Type 3 reporting obligations as various parts or divisions of the NERL and NERR.

Given the nature of Type 1 reporting, this needs to be limited to significant customer impact items eg disconnection of a life support customer as opposed to entire divisions of the Law/Rules.

In addition classification of a premise or NMI as residential or business, and small or large, market or non market customer will change over time and industry will need to agree not only on the communication of these parameters but also on the frequency of the review process and the implications on the retailer/customer of changing the categories. Given that this is not static data, it is unclear what the value is of having it as a compliance reporting obligation. More frequent review and updating of these thresholds could result in a customer moving above and below the threshold which may not be in the interests of the customer concerned.

The businesses suggest that the AER consult separately on the obligations assigned in each reporting category so that they are more meaningful and appropriate. The ESC went through this process and it resulted in more clarity of the requirements which would certainly be beneficial under this new regulatory framework and may also flesh out implications between NECF and the remaining jurisdictional regulatory obligations.

The AER could provide greater clarity if the relevant obligations were paraphrased and linked to the specific NERL/NERR clause and assigned to a reporting obligation for a retail and/or distribution regulated entity. This would provide a consistent level of clarity with the Victorian framework for this type of compliance reporting obligation. Providing the obligations in excel format would also provide consistent obligation phrasing for reporting purposes.

Statement of Approach

4.2.1 Market Intelligence and information

The AER Draft Decision notes that complaints and market intelligence may reflect customer dissatisfaction with a level of service and not necessarily a breach of the NERL/NERR. The AER notes that submissions cautioned the use of such data and the detrimental impact that this may have on a regulated entities reputation if it was misinterpreted in public reports.

The AER recognises the limitations of this type of complaints data and intends to develop a robust platform for further examination of this type of data to ensure that it is objectively reviewed. The AER states they will work with both the ombudsman scheme and the regulated entities concerned.

The AER Statement of Approach paper in section 4.2.1 should reflect the same positions as the AER has stated in the Draft Decision. A further sentence should be added to the first paragraph in 4.2.1 to reflect that any information gathered from the sources listed in 4.2.1 needs to be worked through with the regulated entity concerned.

4.2.3 Targeted reviews of obligations under the Customer Framework

The Statement of Approach states that regulated entities are likely to be approached on a 6 monthly basis for information related to targeted reviews.

This is a more onerous position than the AER Draft Decision where the AER considers that participation should be balanced over time so that an individual regulated entity can expect to be involved in at least one targeted review each year. The Statement of Approach should reflect that targeted reviews will be balanced and will involve at least one targeted review per year.

The businesses prefer a steady workflow, with no more than one targeted review per year per business. The businesses don't object to the principle of targeted reviews for new/changed obligations, however the AER should be mindful of resourcing issues.

Please feel free to call me on 8540 7819 if you wish to discuss any aspects of this submission further.

Yours sincerely

Verity Watson
Manager Regulatory Strategy