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Dear Ms Constable,

The Australian Energy Regulator (AER) welcomes the opportunity to comment on the release of the fifth Working Paper by Allens Arthur Robinsons (AAR) for the Retail Policy Working Group (RPWG).

The AER generally supports the AAR proposals which set out a suite of monitoring and enforcement mechanisms available to the AER for its compliance monitoring and enforcement functions.

### **Compliance and enforcement across the energy market**

The AER supports the AAR proposals for additional compliance and enforcement mechanisms such as compliance auditing and the ability to accept enforceable undertakings from retailers and distributors.

Past usage of undertakings by the AER and its predecessor, NECA, in response to wholesale market conduct suggests that the availability of enforceable undertakings by consent, may provide for a tailored enforcement response to future breaches. In the past, the AER has accepted both “informal” undertakings that were not enforceable in a court of law as well as undertakings secured as part of decisions of the national electricity tribunal.

Whereas AAR’s proposals are couched in the context of distribution and retail, the AER considers that there would be benefit, ultimately, in considering the extent to

which any additional enforcement mechanisms should apply equally across all Rules and to all participants.

## **Monitoring**

Under section 15 of the National Electricity Law (the NEL) and clause 8.7.1 of the National Electricity Rules (NER), the AER has responsibilities to ensure compliance with the NEL and the NER. The AER has developed a compliance and enforcement strategy to assist it to meet its obligations under the NEL and the NER. The strategy is based upon a bottom-up risk assessment of the NER.

The compliance monitoring approach in the context of the electricity wholesale market benefits from the flexibility to identify and target areas in a responsive way. It also allows the AER to prioritise and allocate resources in light of emerging issues in the wholesale market.

The ultimate design of any prescribed compliance monitoring requirements in the context of the distribution and retail regime should allow similar flexibility to respond to evolving market conditions and behaviour over time. Currently, clause 8.7.2 of the NER allows the AER to establish reporting requirements and monitoring standards for registered participants. Providing discretion in the context of distribution and retail compliance monitoring would enable the AER to minimise business compliance costs, use its resources efficiently, and focus on emerging compliance issues.

## **Authorisation revocation**

The proposal for a revocation power would only, appropriately, allow the AER to exercise this power in response to the most serious situations in the market.

The AER is unaware of any regulator revoking an energy businesses licence in Australia with the need to appoint a retailer of last resort. However, there have been such events in the United Kingdom. For example, in 2006 Zest 4 went into receivership. The regulator (OFGEM) exercised its power to revoke Zest 4's licence, and contemporaneously appointed a new supplier of last resort after receiving notification from Zest 4's administrators of an inability to achieve a trade sale. In this case the regulator relied on financial viability signals from the administrator in making this decision.

In considering this UK example, the AER has identified several issues specific to its role:

- In the case of “lack of financial viability” is the AER’s role perceived as being purely administrative in response to recommendations from other bodies in order to facilitate customer transfer or is the AER expected to continuously assess financial viability itself?
- In the case of licence revocation based on extreme conduct / circumstances<sup>1</sup> which suggest organisational inability, what would the AER’s responsibilities be in respect of advising other parties that a revocation is pending?

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<sup>1</sup> Including not being a “suitable person”

It is important that AAR and the RPWG clarify when and under what circumstances the AER should consider revoking a business authorisation and appointing retailers of last resort.

In its submission to the third working paper the AER argued that as a matter of urgency a timeline needs to be put in place to facilitate the making of policy decisions and for the development of workable legislation and arrangements in respect of ROLR arrangements. The issue of authorisation revocation is inseparable from ROLR and the urgent review suggested by the AER and others should cover authorisation revocation grounds and trigger events.

### **Conduct provisions**

The AER supports the inclusion of private rights of action for particular provisions of the Law and Rules by designating certain provisions as “conduct provisions” similar to the concept used in the Gas Pipelines Access Law. A right of private enforcement would be most relevant where access obligations and liabilities are owed by one party to another (for example, requirements to comply with the outcome of arbitration proceedings, and provisions relating to the misuse of a person’s confidential information). The parties themselves will have the best understanding of the information and facts involved and may be best placed to present these to a court.

If “conduct provisions” are adopted, consideration should be given to the significant differences between the electricity and gas sectors and the access arrangements put in place prior to determining which provisions may be designated as “conduct provisions”. In some circumstances, there may be a case to designate particular provisions of the National Gas Law (NGL) as conduct provisions, but it may not be appropriate to designate the equivalent provision of the NEL as a conduct provision.

### **Use of lower courts**

The AER supports making provision in the NEL and NGL for proceedings to be brought in lower courts such as the Federal Magistrates Court and jurisdictional district and magistrates courts for matters within their jurisdictional limits. Such arrangements would provide a less costly forum for private litigants to enforce “conduct provisions”. Making allowance for the use of lower courts has the potential to benefit not only market participants and energy users, but also the AER by ensuring that the most appropriate and efficient forum can be selected according to the nature of enforcement proceedings.

### **NER dispute resolution process**

The AER is responsible for appointing the National Electricity Market Dispute Resolution Adviser, and the AER’s monitoring functions under the NER include assessing the effectiveness of the NER dispute resolution mechanism. The dispute resolution process contained in chapter 8 of the NER has primarily been used for electricity wholesale market and technical disputes. The NER chapter 8 dispute resolution process is limited to disputes involving registered participants, NEMMCO and connection applicants. The NER chapter 8 dispute resolution process is gradually

being displaced in electricity network regulation, with the NER now providing for commercial arbitration of transmission pricing disputes, and exposure draft distribution rules providing for AER arbitration of distribution access disputes. In addition, the Exposure Draft National Gas Law provides for AER arbitration of gas access disputes.

There is an ongoing role for the NER chapter 8 dispute resolution process in the wholesale electricity market, in particular in disputes arising under chapters 3 and 7 of the NER. The following matters should be considered prior to any decision to replicate the NER chapter 8 process in the gas legislation or to retain its current jurisdiction over certain distribution and retail disputes arising under the NER:

- the absence of a gas national wholesale market
- the smaller monetary amounts which tend to be involved in distribution and retail non-price disputes relative to the monetary amounts involved in electricity wholesale market disputes
- the relatively intensive nature of the Dispute Resolution Panel process provided for in chapter 8 of the NER
- the MCE's proposal to provide for AER arbitration of distribution access disputes
- the requirement to be (or be deemed to be) a registered participant in order to access the NER chapter 8 dispute resolution process
- the availability of small customer dispute resolution schemes including Ombudsman schemes for customers which have a dispute with their distributor or retailer
- the current tendency to address disputes between distributors and retailers through jurisdictional arrangements, notwithstanding that the chapter 8 NER dispute resolution procedures can be invoked in some disputes arising between electricity distributors and retailers under the NER.

The AER considers there should be consistency in the dispute resolution mechanisms used for distribution and retail disputes in the gas and electricity regimes. To achieve consistency across gas and electricity, consideration should be given to making explicit provision for the dispute resolution mechanisms which apply to distribution and retail disputes. Tailored dispute resolution arrangements may be required for the different types of disputes which may arise, including:

- access disputes for the purposes of the access arbitration provisions of the NEL/NGL
- small customer disputes which are overseen by State/Territory dispute resolution schemes

- non-access related disputes between distributors and retailers, including purely commercial disputes which may be suited to commercial arbitration or other forms of alternative dispute resolution.

Any distribution and retail dispute resolution arrangements should be consistent across gas and electricity regulation. If a decision is made to apply the chapter 8 NER dispute resolution process to non-access related disputes arising in both electricity and gas distribution and retail, consideration should be given to tailoring the process to suit the circumstances of those disputes.

Finally, many disputes which arise in the distribution and retail context will involve entities which are not market participants. Where these disputes are not within the jurisdiction of small customer dispute resolution schemes, the extension of “conduct provisions” to the electricity legislation would enable a private right of action.

Thank you for the opportunity to comment on the Supplementary Working Paper. The AER looks forward to ongoing involvement in this consultation.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Michelle Groves', with a long horizontal flourish extending to the right.

Michelle Groves  
Chief Executive Officer  
Australian Energy Regulator