



12 July 2010

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

By email: [AERInquiry@aer.gov.au](mailto:AERInquiry@aer.gov.au)

Dear Mr Leuner,

## ORIGIN SUBMISSION TO AER COMPLIANCE ISSUES PAPER

Origin welcomes the opportunity to provide views on the Australian Energy Regulator's (AER) Issues Paper *Approach to compliance with the National Energy Retail Law, Rules and Regulations*.

Overall, Origin supports the AER's approach as described in the Issues Paper. Our specific responses to the AER's questions are provided below.

### 1. Openness and transparency

*Q.1 What strategies for communication with retailers, distributors and consumers on compliance practice, and the AER's approach to compliance, are likely to be most effective? (e.g. publications, targeted presentations, one-on-one discussions, public forums).*

Origin supports the range of information described by the AER, where we expect publications such as the statement of approach, the AER Compliance Procedures and Guidelines, the quarterly reports and compliance bulletins will be extremely useful to the industry and our stakeholders. These documents will help retailers and the community understand regulatory requirements and expectations and should enable retailers to comply with the law on a practical level. We are particularly interested in the compliance bulletins, as these will also help Origin to further develop internal training around compliance.

While publications are useful to set the agenda and clarify expectations about compliance practice, these would not be as useful as forms of communication about actual compliance issues that need to be resolved. Origin would expect that problems relating to compliance should be addressed in the first instance through targeted presentations where there are industry issues, and one-on-one discussions where there are specific compliance concerns related to individual businesses.

### 2. Targeting monitoring activities: impact of a breach

*The AER has advised that the factors to be considered in assessing impact of a breach include:*

- *How does the breach affect achievement of the national energy retail objective?*
- *What mechanisms or safeguards are in place to rectify the breach?*
- *How many people are likely to be affected by a breach of the obligation?*

- *How are people likely to be affected by a breach of the obligation?*

*Q.2 Are these appropriate indicators of the impact of a breach of provisions?*

*Q.3 What other factors might be relevant?*

Origin supports the AER's views about the indicators of the impact of a breach of provisions.

### 3. Targeting monitoring activities: likelihood of a breach

*The AER has advised that the below factors will be used to assess the likelihood of a breach.*

- *What are the incentives driving compliance behaviour?*
- *Barometer of regulatory threat, risk of detection*
- *Awareness of the retail framework*
- *Demands of compliance*
- *Past compliance performance*

*Q.4 Are these factors appropriate indicators of the likelihood of a breach of provisions?*

*Q.5 What other factors might be relevant?*

We are not clear about the purpose of the factors. While it appears that analysis of the above factors will be used to help hone the AER's compliance monitoring we question how thinking along these lines will specifically assist the AER in effectively identifying non-compliance. These may well explain why a breach occurred, but what purpose do they serve as a means of detection?

More importantly, if the AER has found that there are behavioural disincentives to comply, that awareness of a law is a problem or that the demands of compliance are too high (so as to almost justify a breach) then we suggest that the AER should be focussed on reducing or removing these impediments to effective compliance rather than waiting for non-compliance to occur. It strikes us as odd that the AER plans to use these as factors to "determine the likelihood of a breach" (whatever that means) rather than address the issue directly by examining the net benefit and complexity of the requirement itself.

We also question the AER's assumption that non-compliance will generally be a strategic choice for a retailer (putting aside the awareness factor already mentioned), and that a retailer will also be more likely to choose to not comply with regulations where it believes it will not be detected. The more likely event is probably that a retailer unintentionally breached a rule, which may have resulted from interpretation or systems issues, but also sometimes happens for a range of reasons that can only be described as accidental. There should be recognition that there are multiple layers of regulation facing each of the participants in the energy market, and these are mapped to complex internal systems and processes where small errors or changes can lead to unintended and substantial consequences.

### 4. Mechanisms for monitoring compliance: Market intelligence and information

*The AER has stated that the following sources of information will feature strongly in its compliance monitoring regime:*

- *Energy Ombudsman Schemes*
- *AER's Customer Consultative Group*
- *ACCC/AER Infocentre*
- *AEMO*



- *Information and documents submitted to the AER*
- *Public information*

*Q.6 What are the strengths and weaknesses of these information sources as an input to the AER's compliance monitoring?*

*Q.7 What other sources of information and market intelligence should the AER consider?*

We expect the above sources to be given due consideration and are satisfied with the breadth of information.

The strength is that these sources do not place too great a responsibility on the AER or the industry to report on compliance – the AER is not expected to be 'everywhere'. However the associated weakness is that this approach leaves notions of breaches to interpretations that may not match the regulatory framework, and also may mean that the context of the market is not present in an objective or default sense. For example, several of the key information sources, such as Ombudsman Schemes and low-income consumer advocacy reports, will provide views about the effectiveness of the retail market and of retailers' practices that are relevant to a very small sub-section of the community, where context is not provided about the majority of other consumers who have *not* had issues. As another example, sometimes parties claim in public documents that compliance 'breaches' have occurred, but these breaches are not reported to the regulator in question, or supported by evidence about the customer's existence or their claim.

Origin supports all information being used but we do ask that the AER is clear with all stakeholders of their obligations in providing evidence for public statements made about retailer non-compliance, and also that the AER is clear in any public reporting about the context of any non-compliance, which includes the percentage of customers affected (of the total), the degree of the issue, and any relevant information about the more positive experiences of customers.

## 5. Targeted compliance reviews

*The AER has advised that there will be targeted compliance reviews of particular provisions or obligations. The reviews involve writing to a sample of participants in each quarter to request information on their compliance with a particular obligation or group of related obligations. Provisions may be selected in response to:*

- *market events and observed patterns or trends in compliance or customer complaints*
- *changes in the regulatory framework that vary obligations in the retail framework*
- *the introduction of new obligations.*

*AER will publish the results of its targeted compliance reviews in its quarterly compliance reports.*

*Q.8 Is the AER's approach to targeted provision reviews appropriate for energy retail markets? If not, what changes to this approach could be made?*

Origin supports the AER's approach to targeted compliance reviews. However, we are keen to know more about how this will be put into practice, specifically how the AER will define the issues to be addressed and assess materiality.



## 6. Retailer and distributor reporting

*Q. 9 What policies, systems and procedures should regulated entities put in place to ensure the reliability, accuracy and timeliness of reports on compliance to the AER?*

*Q. 10 Is the three-tiered structure of reporting proposed appropriate? If not, what alternative structure should the AER adopt?*

*Q. 11 What frequency of reporting (e.g. immediate, quarterly, six monthly, annual) is appropriate? If not, what frequency should be required?*

*Q. 12 What factors should the AER consider in deciding whether or not to impose a reporting obligation in relation to a particular obligation?*

Origin believes an effective compliance reporting programme, as referenced in AS3806, will accommodate the AER's objectives. We firmly believe the delivery of accurate reports must be suitably supported by appropriate validation, monitoring and review mechanisms (as required by AS3806) to enable quality reporting. The policies, systems and procedures should be developed by each entity in accordance with its own internal requirements, and the focus of the AER should be in this instance on the consistency of the outputs. Any major non-compliance may result in the need to examine the internal processes through an audit process.

Reliability and accuracy is also a function of how clearly the requirements are defined by the regulator. Origin has had significant and unsatisfactory experiences with comparative reporting when seemingly simple concepts such as "disconnection for debt", or "customer numbers" are not very clearly defined by the regulator.

We have no issue with a tiered reporting framework. However, we believe AER should very carefully articulate what may constitute "potential to threaten public health or safety etc" to avoid reporting obligations being set for issues without material effect.

Anything other than compliance breaches meeting the "immediacy" criteria to be established should be reported on an annual basis; otherwise the obligation will invariably become too onerous. Instead, industry participants should be ensuring their internal compliance reporting processes are sufficiently robust and regular to meet both AS3806 principles and the principles of good corporate governance, and where any issues would be covered off with the regulator during the course of normal ongoing interactions.

## 7. Compliance audits

*Q. 13 What factors should the AER consider in determining when an audit should take place?*

*Q. 14 What factors should the AER consider in determining the scope of a compliance audit?*

*Q. 15 What factors should be considered in determining whether an audit is to be conducted by or on behalf of the AER, or by a regulated entity?*

We agree that these are better decided on a case-by-case basis, and according to the principles outlined under 5.1. We ask the AER to note that end of financial year resource constraints make June/July a poor time to audit.

A self-audit should be considered where there is confidence from the AER that the nature of the breach and the historical performance of the company allows for this, but if there is doubt about a company's ability or willingness to carry out a self-audit, this should be carried out by the AER or its agent. We assume that an audit will only occur where there



has already been discussion with the business about rectifying issues and this has not been successful.

Origin would prefer that retailers (under appropriate circumstances) can choose an auditor, where we would choose from a range of pre-approved auditors.

#### 8. Cost of compliance audits

*Q.16 Is it preferable to set out standard payment arrangements and default periods within which regulated entities must pay the costs of an audit to the AER in the AER Compliance Procedures and Guidelines, or to determine these matters on a case-by-case basis?*

*Q.17 Where the scope of a single audit covers more than one retailer or distributor, how should the costs of that audit be allocated between the entities concerned?*

Origin believes that payment arrangements for audits should be decided on a case-by-case basis, noting our previous comment that in many instances, retailers should be allowed to appoint, and fund, an agreed audit process from a pre-determined set of auditors.

Where the scope of a single audit covers more than one party we believe that the costs should be shared equally by all parties. While some may argue that allocation by market share is appropriate, we would disagree as the issues to be addressed will generally be process driven (that is, did a party have an appropriate process in place) and not size-related.

#### 9. Interaction of compliance and performance audits on hardship policies

*Q.18 Is it appropriate to combine compliance and performance audits in relation to retailers' hardship policies?*

*Q.19 Where the scope of a single audit covers both compliance and performance issues, how should the costs of the audit be allocated?*

We do not think it is appropriate to combine compliance and performance audits in relation to retailers' hardship policies unless the AER is particularly clear in any resulting reports which issues (of any identified) relate to compliance and which do not.

We have significant concerns about the AER's view of 'performance' of a retailer's hardship program, as we have already submitted to the AER's financial hardship indicator consultation process. There has already been a blurring of terms so as to imply that the AER's desired social policy outcomes (policy outcomes that have not been agreed upon or even tested in a broader policy arena) might be linked to 'performance' and therefore perhaps 'compliance'. We would want to see these issues resolved.

The costs of any audit should be assessed on a case-by-case basis and allocated according to what makes sense. There will rarely be an audit that is 50/50 compliance and performance. There will generally be a driving factor which could be identified as a compliance issue or something else.

#### 10. Investigations

*Q.20 How should the results of AER investigations be communicated to the market?*

The AER should adopt a "de-sensitised" approach to ensure the purpose and tone of communicating results is about learning from mistakes rather than public shaming, which may draw unnecessary and unconstructive media attention. In addition, communication of results should be limited to the facts and the law to ensure the reporting is both accurate and balanced.

The method of communication could be via special bulletins and by regular compliance reports, both of which would benefit industry participants' education and monitoring programs. However, particularly where a special bulletin is published, consideration should be given to whether the nature of the issue itself will identify the industry participant involved, and, if so, whether this is appropriate.

## 11. Objectives of enforcement

*The AER has stated that it will aim to:*

- *resolve the matter efficiently and in a timely manner*
- *ensure that the offending conduct stops and deter future offending conduct*
- *minimise any damage to customers, other regulated entities and the market*
- *clarify interpretation of the Retail Law, Regulations and Rules*
- *encourage the effective use of compliance policies, systems and procedures*
- *in appropriate circumstances, punish offenders by imposing fines or penalties.*

*Q.21 Are these appropriate objectives for enforcement under the Retail Law?*

*Q.22 Are there other objectives that should guide the AER in enforcement of the Retail Law, Rules and Regulations?*

Origin supports the above objectives for enforcement. However we note that implementation of the objectives is key, and it is unclear how the AER would seek to fulfil these objectives in an operational sense. For example, how will the AER fulfil *minimise any damage to customers* (objective 3) beyond already *resolving the matter* (objective 1) or *ensuring the offending conduct stops* (objective 2). We assume that these objectives were meant to be read as overlapping principles rather than as independent issues.

## 12. Enforcement priorities

*The AER has noted that it will exercise discretion in directing resources to those matters that will provide the greatest overall benefit in achieving the national energy retail objective. The AER will give priority to enforcement in matters that involve conduct:*

- *of significant public interest or concern*
- *resulting in significant consumer detriment, particularly where that conduct affects disadvantaged or vulnerable customer groups*
- *demonstrating blatant disregard for the retail framework*
- *involving significant new or emerging market issues*
- *that is industry wide, so that enforcement action is likely to have a widespread educative or deterrent effect*
- *of a person, business or sector that has a history of previous breaches of the energy laws.*

*Q.23 Are these appropriate enforcement priorities for the retail framework?*

*Q.24 Are there other matters that the AER should consider in determining its Retail Law enforcement priorities?*

Origin agrees that the AER's stated enforcement priorities are appropriate. We do not at this time have any suggestions about further matters to be considered.

## 13. Assessment criteria for enforcement action

*The AER has said that it will consider on a case-by-case basis:*



- *the nature and extent of the conduct that forms the breach, including the period over which it extended and the circumstances in which the breach took place*
- *whether the breach was deliberate*
- *whether the breach arose out of the conduct of senior management or at a lower level*
- *the damage or detriment caused by the breach, including the number of customers affected*
- *any action taken by the regulated entity to rectify the breach and avoid a recurrence*
- *whether the regulated entity has a corporate culture conducive to compliance, as evidenced, for example, by the effectiveness of the its compliance policies, systems and procedures, educational programs and disciplinary or other corrective measures employed in identifying and responding to breaches*
- *whether the regulated entity has cooperated with the AER in relation to the breach and investigation—for example by initiating contact in relation to the breach or providing evidence the AER was otherwise unaware of.*

*Q.25 Are these appropriate criteria for enforcement decisions under the Retail Law?*

*Q.26 Are there other criteria that should guide the AER in making enforcement decisions under the Retail Law?*

Origin agrees that the AER's criteria for enforcement decisions are reasonable and appropriate.

#### 14. Enforcement options

*Q.27 In what circumstances will it be appropriate for the AER to use administrative enforcement action? In what circumstances will it be inappropriate?*

*Q.28 In what circumstances will it be appropriate for the AER to accept an enforceable undertaking? In what circumstances will it be inappropriate?*

*Q.29 In what circumstances will it be appropriate for the AER to use statutory enforcement action? In what circumstances will it be inappropriate?*

Origin expects that the vast majority of compliance issues would be managed internally and cooperatively with the AER as part of the business as usual relationship in terms of keeping the AER informed where required.

However, we recognise that administrative enforcement action may be appropriate where cooperation fails and the AER is not satisfied that an industry participant is taking reasonable steps to close out a specific compliance issue in a reasonable timeframe and where non-compliance is systemic and the industry participant shows no willingness to remedy the non-compliance.

More onerous forms of action - enforceable undertakings and statutory enforcement action - should only be commenced in the most extreme cases where there is a clear and flagrant breach with industry-wide implications and the industry participant shows no willingness to remedy the breach.

#### 15. Compliance Reporting

*Q.30 How do you use compliance reports published by energy regulators? What should the objectives of the AER's compliance reports be?*



*Q.31 Are quarterly compliance reports likely to be useful, or would a different frequency (e.g. six-monthly, annually) be more appropriate?*

*Q.32 Are there other matters that the AER might usefully include in its compliance reports?*

*Q.33 Are combined retail compliance and performance reports preferable to separate reports on compliance and performance?*

Origin uses the compliance reports published by energy regulators as a source for further internal investigation on any issues of concern, and to shape our ongoing internal education about compliance issues.

Origin supports AER issuing compliance reports on a quarterly basis, as this would enable industry participants to stay well informed on current compliance issues impacting the industry throughout the year, would have the benefit of feeding in to compliance monitoring and education programs.

We do not want compliance and performance reports to be combined. Compliance is a very specific issue with very real legal, reputational and financial implications for non-compliance. 'Performance' is another aspect entirely, and is not related to retailers' regulatory obligations other than through reporting.

Introducing performance reporting into the more significant issue of compliance will by definition start to confuse and/or combine the issues in the minds of stakeholders. This is not appropriate. In particular, we would not want any negative regulatory views of retailer performance to be interpreted by readers of the reports as non-compliance.

#### **16. Compliance policies, systems and procedures for regulated businesses**

*Q.34 Is AS 3806 an appropriate model for compliance policies, systems and procedures for regulated entities?*

*Q.35 If not, what are its limitations, and how might they be addressed?*

*Q.36 What other models should the AER consider?*

Origin supports the AER's view that retailers establish and observe compliance policies, systems and procedures in a manner consistent with AS 3806, as amended from time to time.

We would be happy to discuss any aspect of this submission further with the AER, and at your convenience.

If you have any queries about this submission please contact Dr Fiona Simon in the first instance on (03) 8665 7865.

Yours sincerely

[signed]

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