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Consumer Utilities Advocacy Centre

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31 May 2011

Mr Tom Leuner
General Manager, Markets Branch
Australian Energy Regulator
GPO Box 520
Melbourne VIC 3000

By email: AERinquiry@aer.gov.au

Dear Mr Leuner,

AER Draft Retailer Authorisation Guideline; Notice of Draft Instrument Retailer Authorisation Guideline (3 May 2011)

The Consumer Utilities Advocacy Centre Ltd ("CUAC") is an independent consumer advocacy organisation. It was established to ensure the representation of Victorian consumers in policy and regulatory debates on electricity, gas and water. In informing these debates, CUAC monitors grass roots consumer utilities issues with particular regard to low income, disadvantaged and rural consumers.

We welcome the opportunity to comment on the AER's Draft Retailer Authorisation Guideline ("draft guideline") and the Notice of Draft Instrument Retailer Authorisation Guideline ("Notice of draft instrument") both dated 3 May 2011. We have been involved in the AER's consultation on retailer authorisation and have submitted responses to the AER's papers on retailer authorisation 30 April 2010 and 3 December 2010. We are generally supportive of the draft guideline. However, we still have three major concerns which we mention below.

Material failure to comply with regulatory requirements

In accessing the suitability of an applicant for retailer authorisation, the AER will consider "any material failure to comply with regulatory requirements."[1] We note that

[1] AER, Draft Retailer Authorisation Guideline (3 May 2011), at 19, 35: "Any material failure to comply with regulatory requirements, laws or other obligations over the previous 10 years, including all circumstances that resulted in infringement notice or other enforcement action (including undertakings) being taken by a regulatory body."

in response to CUAC's submission on 3 December 2010, the AER has, in the Notice of draft instrument, clarified what constitutes "material failure to comply with regulatory requirements":[2]

> The AER considers that non-compliance may be considered material based either on the impact of the breach, or the systemic nature of the activity. It would include, but not be limited to, any non-compliance that resulted in formal enforcement powers being used by the relevant regulator. There may be examples of material failure where formal enforcement powers were not used (for example, where the non-compliant party negotiated an administrative resolution such as a voluntary undertaking).[3]

We suggest that this definition of "material failure to comply with regulatory requirements" be included in the draft guideline itself.

Jurisdictional or technical regulation

We had, in our submission on 3 December 2010, expressed concerns with the inability of the AER to assess whether an applicant is able to comply with jurisdictional obligations. In response to CUAC's comments, the AER has stated:

> The AER considers that the jurisdictional or technical regulator with the responsibility for ensuring compliance with an obligation is best placed to assess whether an applicant has the capacity to comply. Accordingly, for jurisdictional or technical obligations, the AER remains of the view that it is sufficient to consult with the relevant jurisdictional or technical regulators and seek confirmation that the applicant is in a position to comply.[4]

In Victoria, the current regulatory framework is underpinned by a licensing and enforcement regime overseen by the Essential Services Commission of Victoria ("ESCV"). We are concerned that inappropriate applicants will be issued with authorisations under the National Energy Customer Framework ("NECF") and will continue to raise this with the Victorian Government during the consultation process for the implementation of the NECF.

We note that the AER's view is that "the jurisdictional or technical regulator with the responsibility for ensuring compliance with an obligation is best placed to assess whether an applicant has the capacity to comply." However, our understanding is that this is dependent on whether Victorian-specific functions are conferred on the AER.

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[2] AER, Draft Retailer Authorisation Guideline (3 May 2011), at 19, 35.

[3] AER Notice of Draft Instrument, Retailer Authorisation Guideline (3 May 2011), at 12.

[4] AER Notice of Draft Instrument, Retailer Authorisation Guideline (3 May 2011), at 11.

This is currently one of the issues which CUAC has responded to in the Department of Primary Industries' April 2011 Issues paper on Victorian Licensing Arrangements.[5]

Transfer of authorisation

The AER, has in the Notice of draft instrument stated that:

> [u]nder the National Energy Retail Law ("NERL") the AER's assessment against the entry criteria for retailer authorisations is limited to the entity that is seeking to perform the retail functions. A change of ownership of an entity (the retailer) does not fall within the scope of a 'transfer' under the Retail Law provided that the legal entity remains unchanged.[6]

We are concerned that the NECF and the draft guideline do not sufficiently address scenarios where a failed authorised retailer is acquired by another corporate entity, including an acquisition through a deed of arrangement. The implication is that the corporate entity acquiring the failed authorised retailer may takeover the failed retailer's authorisation, without any assessment as to whether the corporate entity satisfies the entry criteria (that is, organisational, technical, financial capacity etc).

We cite the following as an example. Jackgreen International Pty Ltd was suspended by the Australian Energy Market Operator ("AEMO") after it was placed in voluntary administration by its board of directors on 18 December 2009. In Victoria, Jackgreen had around 3,000 customers; in New South Wales 47,000. Creditors of Jackgreen International Pty Ltd subsequently accepted a deed of arrangement from Greenbox IP Pty Ltd which meant that GreenBox IP Pty Ltd acquired Jackgreen International Pty Ltd including its retailer licence. On 7 March 2010, the AEMO reinstated Jackgreen International as a market participant in the National Energy Market ("NEM"). Jackgreen International Pty Ltd and GreenBox IP Pty Ltd merged; they changed their name to GreenBox Group on 29 December 2010. Based on the AER's above comments, our understanding is that under the NECF and the draft guideline, this would not amount to a "transfer" requiring an assessment of whether the new company is able to operate a viable energy business.

Therefore, we believe that there may be a gap in the national framework. It is essential that where a failed authorised retailer is acquired by another corporate entity, (whether through a deed of arrangement, takeover, or other means) that the AER be empowered to conduct a due diligence process to consider whether the acquiring entity has the ability to meet the obligations of an energy retailer under the NECF. This protection needs to be afforded to Australian consumers and must be addressed in the national framework. We suggest that

[5] Department of Primary Industries, Victorian Licensing Arrangements – Issues Paper (April 2011), at 24-25. http://new.dpi.vic.gov.au/energy/policy/national-energy-customer-framework/victorian-licensing-arrangements-issues-paper

[6] AER, Notice of draft instrument, Retailer Authorisation Guideline (3v May 2011), at 13.

the AER bring this matter to the attention of the NECF Joint Implementation Group so that they may examine this. CUAC will continue to raise this issue with the Victorian Government. The transitional package needs to have adequate safeguards for Victorian consumers should a failed retailer be acquired by another business.

Thank you for the opportunity to participate in the consultations on retailer authorisation. If there are any queries on the above, please contact the undersigned at (03) 9639 7600.

Yours sincerely,

Jo Benvenuti
Executive Officer

Deanna Foong
Senior Policy Officer