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Mr Tom Leuner
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Australian Energy Regulator
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Draft AER Compliance Procedures and Guidelines

Dear Tom

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

Transitional Arrangements and Compliance on 1 July 2012

The AER Notice of Draft Instruments states that the National Energy Customer Framework (NECF) is a combination of pre-existing, modified and new obligations on regulated entities. The AER also noted that jurisdictional variations in the application of NECF is an area of ongoing uncertainty.

The AER recognise that any changes in the nature of the regulatory obligations may require corresponding changes to business systems and processes to ensure compliance can be achieved, however a number of areas have yet to be agreed at the detailed level.

Further the AER recognises that the nature of these jurisdictional departures on a transitional or ongoing basis continues to be an area of uncertainty. There is no clear plan or timeframe either from the Jurisdictional Implementation Group (JIG) or the jurisdictions on when the transitional plan and remaining jurisdictional arrangements will be known. Businesses at best may know the regulatory framework design of the remaining jurisdictional arrangements if they are well informed about the drafting instructions provided for development of the Application Act around Q4 2011. The reforming of the remaining jurisdictional regulations into a new instrument need only be completed by 30 June 2012.

Customer classifications and changes in the connection framework may involve changes to market and business IT systems and processes. AEMO consultation on any changes to the market procedures in this area will only be completed by around March 2012, allowing virtually no time to implement or undertake industry testing prior to 1 July 2012. These timeframes also assume that

there is no reliance on any jurisdictional regulatory decisions which may not have been made at the detailed level prior to procedure changes being developed and consultation commencing.

The NECF Bill has been available since November 2010, the AER state that this has allowed considerable time for regulated entities to begin planning these changes. The AER expect that regulated entities will continue the preparatory work between now and 1 July 2012. This view takes no account that businesses are not aware of the jurisdictional transition plan and remaining jurisdictional requirements, ie the final detailed scope of the co-regulatory framework.

On the basis that arrangements are still being developed, the businesses expect that there will need to be some transitioning in to the compliance framework. The businesses are disappointed with the AER view of readiness on 1 July 2012 and consider that this is unrealistic given the uncertainties and the continuing development of the transitional plan, co-regulatory framework and the detailed transaction/implementation work.

Compliance Procedures and Guidelines

Reporting obligations

The compliance regime has changed from reporting of actual and possible breaches to actual and possible future breaches that the regulated entity believes are highly likely to occur. The businesses consider that the compliance reporting framework should be limited to actual breaches that are material in nature.

The AER class a Type 1 reporting obligation as a breach that is likely to have a critical impact on customers or which is likely to become widespread in the short term (1-3 months). A Type 2 reporting obligation is a breach that is likely to have a significant impact on customers or which is likely to become widespread in the medium term (3-6 months).

Retail Rules 116 places an obligation on a retailer that they must not arrange for the de-energisation of a customer on life support. The equivalent obligation on the distributor is Rule 120. These are currently obligations with a critical customer impact that warrant Type 1 reporting.

Rule 118 requires that a retailer use its best endeavours to arrange for de-energisation in accordance with a customer's request. The AER by including whole divisions or subdivisions of the NERR considers that this is of an equivalent critical impact on customers. The businesses consider that this approach is consistent with the AER description of Type 1 and 2 reporting obligations.

The businesses recommend that the Type 1 reporting obligations be limited to obligations of critical customer impact. In addition, Type 1 reporting obligations should be described in AER Compliance Procedures and Guidelines at the individual Rule level.

The businesses process a high volume of transactions for the mass market each day.

The businesses consider that it is far more practical to deem a level of satisfactory compliance for Type 2 and Type 3 reporting.

The businesses recommend that the AER adopt the following clarification as to the degree of non-compliance which constitutes a reportable non-compliance in line with advice provided by ESCOSA to Envestra:

'For many obligations a compliance level above 95% would be considered indicative of a very high level of compliance. In such a situation, incidental breaches would not collectively constitute a breach worthy of being reported pursuant to (ESCOSA's) Guideline No 4. On the other hand a compliance grade of 80% would arguably require reporting against Guideline No 4.'[i]

Reporting Frequency

The AER Compliance Procedures and Guidelines provides for subsequent variation of reporting frequency in clause 3.6.7 depending on the level of the number of breaches being increased, maintained or reduced over a two year period. Clause 3.6.10 outlines the AER's consideration of any change in reporting frequency and 3.6.11 outlines the AER's notification process to the regulated entity.

Clause 3.6.9 appears to place limitations so that any move from 6 monthly reporting to yearly reporting is maintained forever and similarly that a move to three monthly reporting is maintained. The ability of the AER to change reporting frequency under 3.6.7 in line with compliance behaviour is subject to these limitations of 3.6.9.of never changing reporting.

The combination of clause 3.6.7-3.6.8, 3.6.10 and 3.6.11-3.6.14 appear adequate to meet the AER's intent of increased reporting levels where there are increased levels of breaches over time and providing the AER with the discretion to reduce the frequency of reporting after a certain period of good behaviour.

The businesses suggest that the AER consider removing clause 3.6.9 and the lead in clause in 3.6.7 which makes it subject to 3.6.9.

Audit Reports

The AER Compliance Procedures and Guidelines clause 4.6.1 provides for audits conducted or arranged by the AER to have a final copy of the audit report available to the regulated entity within timelines set out in clause 4.3.1. The intent of this clause is to provide the regulated entity with a reasonable opportunity to review the final report for errors of fact. However the reference to clause 4.3.1 appears inappropriate. Clause 4.3.1 states that the AER will determine the terms of reference of an audit whether the AER contracts the auditors or whether the regulated entity does. Clause 4.3 is about the AER defining the terms of reference for an audit and providing the regulated entity with an opportunity to comment on the draft terms of reference.

The reference to clause 4.3.1 in clause 4.6.1 should be deleted. A timeframe of 20 business days should be provided to the regulated entity to allow a reasonable opportunity for review of a final audit report.

Similarly the reference to clause 4.3.1 in clause 4.6.2 is incorrect and should be removed. The AER should also be provided with 20 business days to review a final audit report where the audit was instituted under 4.1.1 (b).

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

[i] ESCOSA letter to Envestra dated 15 November 2004 (words in brackets added)