



9 July 2010

General Manager
Markets Branch
Australian Energy Regulator
GPO Box 520
Melbourne, VIC 3001
AERInquiry@aer.gov.au

Thank you for the opportunity to comment on the Issues Paper: *Approach to Compliance with the National Energy Retail Law, Rules and Regulations, 31 May 2010*.

The Energy & Water Ombudsman NSW (EWON) investigates and resolves complaints from customers of electricity and gas providers in NSW, and some water providers.

EWON believes that an effective compliance regime is essential to the operation of a competitive retail market, and to ensure that the consumer protection measures in the retail framework are appropriately implemented.

Our submission addresses those questions raised in the Issues Paper that are relevant to our experience of customer issues. For ease of reference we have adopted the same question numbering in this response.

Proposed approach to compliance

Q1: 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? (eg publications, targeted presentations, one-on-one discussions, public forums.)

EWON supports the AER's stated goal to maintain a culture of openness and transparency with all interested stakeholders. Consultation, publications and where relevant face to face meetings or forums all have relevance in particular circumstances. Information reporting will provide a strong basis for informed contributions to ongoing improvements to a compliance regime.

EWON already has a Memorandum of Understanding (MOU) with the AER, and holds regular quarterly meetings where information is exchanged. This MOU is dated 8 June 2009, and is subject to review at intervals of no more than two years. We anticipate it will need revising in due course to include aspects of the AER's compliance role.

EWON currently prepares a quarterly report for the Independent Pricing and Regulatory Tribunal (IPART), providing an overview of issues and trends raised by customer complaints in relation to the energy industry as well as a breakdown of specific complaints that may give rise to consumer protection issues. Where an issue with a particular retailer or distributor becomes of particular concern, EWON will provide reports about customer issues on a more regular basis.

We anticipate supplying reports to the Australian Energy Regulator in a similar manner, and would be pleased to discuss any changes required to their current content and format. In particular, we would see value in liaising with other jurisdictional energy ombudsman to develop a consistent approach to this reporting.

Monitoring compliance

Q2: Are these appropriate indicators of the impact of a breach of provisions?

Q3: What other factors may be relevant?

EWON endorses a broad approach to the factors to be considered in assessing the risk of a breach of compliance obligations. The impact of the national energy retail objectives, the remedies available and the numbers of people affected are all key indicators of risk which could be a trigger for effective compliance action.

In assessing how people are likely to be affected, EWON supports the first six proposed indicators. However we have concerns about the seventh one, which states:

*Does the breach create unjustified administrative costs for others?
(eg the AER, the ombudsman, customers, other regulated entities?)*

EWON thinks that rather than use the term '*unjustified administrative costs*', terminology such as '*significantly increased workload*' would more accurately reflect industry experience for both customers and other stakeholders.

EWON would also suggest a supplementary indicator be included:

Does the breach create a significant increase in complaints to the ombudsman?

Q4: Are these factors appropriate indicators of the likelihood of a breach of provisions?

Q5: What other factors may be relevant?

We note that the AER will consider the likely complexity and visibility of a breach, and the access the AER and other parties (including customers, ombudsman schemes and other businesses) will have to information likely to reveal a breach.

In the course of investigating a customer complaint, EWON regularly requests information from the relevant retailer or distributor. Examples include billing records, voice recordings of marketing calls, customer contact logs, and network records in relation to supply interruptions. Section 407 of the proposed National Energy Retail Law makes the provision of such information on request mandatory, and this is a civil penalty provision.

Where a breach appears to be systemic rather than a one-off occurrence, EWON will raise this issue at a senior level within the company so measures can be taken to address the process or activity that is giving rise to the breach. Systemic breaches will also be reported to the regulator.

Mechanisms for monitoring compliance

Q6: What are the strengths and weaknesses of these information sources as an input to the AER's compliance monitoring?

We note that energy ombudsman schemes are seen as a primary source of information on potential incidents and areas of non-compliance, and EWON anticipates providing current information on customer complaints in a form and manner as required by the Australian Energy Regulator.

One qualification in relation to these reports is that while EWON's [Constitution](#) makes no distinction between small and large retail customers, the vast majority

of complaints investigated by EWON are from small retail customers. As a result, EWON's reports are not necessarily a comprehensive source in relation to large business customers.

Another qualification is that EWON's complaint statistics include situations where we do not conduct a formal investigation of the customer's complaint:

- *General enquiries* – a customer may contact EWON because they want information about a particular issue such as their rights in relation to energy marketers, details of the solar bonus scheme, or placement of a particular network asset in their street. They do not have a formal complaint against a retailer or distributor at this stage.
- *Complaint enquiries* – a customer may contact EWON about a disputed bill or other issue, but they have not contacted their supplier in the first instance. The customer is referred/transferred to their supplier and invited to contact EWON again if they are not satisfied with the outcome.
- *Refer to Higher Level (RHL)* - a customer has contacted their provider, usually at contact centre level, but they have not been able to resolve their dispute. Where appropriate, we offer to refer them to a more senior officer in the company they are complaining about. If the customer agrees to this, EWON does not investigate the complaint, so will not obtain any information about potential compliance breaches unless the customer contacts us again.

Although there has been no formal investigation of the complaints in these situations, we consider that complaint statistics on Enquiries and RHLs provide valuable indications of the issues of concern for energy consumers.

Retailer and distributor reporting

Q9: 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?

EWON's experience is that the self-reporting of breaches by retailers to IPART does not always reflect the level of complaints raised by customers with EWON.

In IPART's [Energy Licensees' Annual Compliance Report October 2009](#), there are a number of references to IPART comparing the reporting by individual licensees with the complaint statistics reported by EWON. Significant inconsistencies are noted, and follow up action with the licensee may be taken.

While it is noted (at page 20 of the IPART 2009 Report) that customer complaints do not necessarily equate to licensing breaches, they can be indicative of emerging compliance trends and customer concerns. EWON recommends that the AER closely monitors the complaints statistics of EWON and other energy Ombudsman offices to assist in the early detection and resolution of any systemic compliance problems.

Q10: Is the three tiered structure of reporting proposed appropriate?

In summary, the three proposed tiers are:

- Tier 1: Threaten public health or safety – immediate reporting
- Tier 2: Systemic issues likely to escalate – regular reporting eg quarterly
- Tier 3: Infrequent isolated issues – report at end of financial year

EWON notes that in NSW IPART's definition of a Tier 1 reportable matter is significantly broader. EWON would be interested in the AER's reasons for limiting such matters to only issues which threaten public health or safety.

EWON is also concerned about the potential ambiguity between Tiers 2 and 3. For example, where customers complain of misleading marketing practices, there are mechanisms to resolve these under the retail framework, and individual complaints can be resolved on a case by case basis. This would suggest these would be regarded as Tier 3 breaches.

However where significant numbers of these complaints continue to occur in relation to one particular retailer, this implies that this retailer has insufficient processes to ensure compliance, which indicates they would be regarded as Tier 2 breaches.

It would assist all parties if these three tiers were more fully defined by the AER, preferably with some examples, to clarify the intention here.

Q12: What factors should the AER consider in deciding whether or not to impose a reporting obligation in relation to a particular obligation?

EWON supports the AER's expressed aim to minimise the cost and burden of compliance reporting, by imposing reporting obligations only where information cannot be obtained by any other means. If the frequency of reporting becomes particularly onerous for small retailers, we would support a review in due course.

Compliance audits

Q13: What factors should the AER consider in determining when an audit should take place?

EWON supports the auditing role where the circumstances justify this approach, and we also support AER's approach to compliance audits on a case by case basis. While we agree that audits can be an intrusive and costly compliance monitoring tool, there are cases where the cost is justified.

EWON's experience is that on several occasions IPART has used EWON's complaint reports to initiate audit proceedings in cases where non-compliance has been a persistent issue and customers are significantly disadvantaged as a result.

Principles for investigation and enforcement

Q20: How should the results of AER investigations be communicated to the market?

EWON considers that AER investigations are a matter of public interest, and supports transparency in the way the results of these investigations are communicated to the market.

We note the AER's intention to publish the results of the investigations, and from time to time to publish compliance bulletins, though it is not made clear how interested stakeholders are to be made aware of these publications. As a minimum, EWON supports publication in an easily accessible part of the AER website, with alerts as to their publication sent to all interested stakeholders.

We note the proviso that publication would be subject to confidentiality constraints, but consider that communicating the outcome of an investigation and the reasons behind the findings would provide valuable guidance to the market as to the various obligations under the retail framework, and help to improve compliance practice across all participants.

Q21: Are these appropriate objectives for enforcement under the Retail Law?

EWON notes that the primary objective of enforcement is to achieve the best possible outcome for customers, and supports the six aims listed in the Issues Paper.

Q23: Are these appropriate enforcement priorities for the retail framework?

EWON supports the six enforcement priorities listed in the Issues Paper, particularly *'resulting in significant consumer detriment, particularly where that conduct affects disadvantaged or vulnerable customer groups'*.

Q25: Are these appropriate criteria for enforcement decisions under the Retail Law?

Q26: Are there any other criteria that should guide the AER in making enforcement decisions under the Retail Law?

EWON endorses the AER objective to pursue a proportionate response and the key factors to be considered in deciding upon enforcement action.

In addition to the seven factors the AER has indicated it will consider when deciding to take enforcement action, EWON suggests an additional factor:

Whether the regulated entity has co-operated with the energy ombudsman in providing information and assistance relating to a small customer dispute.

Section 407 of the proposed National Energy Retail Law (which is a civil penalty provision) requires retailers and distributors to provide information and assistance relating to a small customer complaint or dispute to the energy ombudsman on request by the ombudsman.

Occasionally a retailer or distributor may withhold co-operation in an attempt to prevent a thorough investigation of a complaint which may disclose a potential compliance breach. EWON would communicate this lack of co-operation as part of its routine reporting, and considers this should be an additional factor which the AER should consider when deciding to take enforcement action.

Compliance reporting

Q30: How do you use compliance reports published by energy regulators?

As previously noted, in IPART's [Energy Licensees' Annual Compliance Report October 2009](#), reference is frequently made to comparing the reporting by individual licensees to the complaint statistics reported by EWON. Any significant inconsistencies are noted, and follow up action with the licensee is taken where appropriate.

Similarly, when EWON receives IPART's annual compliance report, we also look for any disparities with the number of customer complaints we have recorded on particular issues for particular licensees. If these disparities are significant, we have communicated this to IPART.

Q31: Are quarterly compliance reports likely to be useful, or would a different frequency (e.g. six-monthly, annually) be more appropriate?

EWON supports the concept of the AER publishing quarterly compliance reports, as communicating with the market on these issues within a reasonably current time frame should benefit all participants.

If you would like to discuss this matter further, please contact me or Emma Keene, Manager Policy & Projects, on 02 8218 5225.

Yours sincerely



Clare Petre
Energy & Water Ombudsman NSW