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Thank you for the opportunity to comment on the Retail Policy Working Group - National Regulation for Distribution and Retail Regulation: *Supplementary Working Paper (April 2007)*.

Established in 1998, EWON is the approved independent dispute resolution mechanism for customers of electricity and gas providers in NSW, and some water providers. Our aim is to provide fair, equitable and independent investigation and resolution of customer complaints. We work with the key stakeholders – providers, community, government, regulators – to improve the standard of service delivery for the benefit of NSW consumers.

EWON has a jurisdiction to investigate complaints relating to both retail and distribution functions.<sup>1</sup> In the 2005-06 financial year, EWON closed 6066 files relating to retail issues, and 1134 regarding distribution issues.

EWON has noted in previous submissions to the Retail Policy Working Group that it has been difficult in some areas to comment other than in broad terms in the absence of greater detail regarding the issue of enforcement.<sup>2</sup> We are therefore pleased that the Supplementary Working Paper addresses this critical area.

In our previous submissions we have emphasised the value in regulators having a variety of enforcement mechanisms available to them. This ensures that the

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<sup>1</sup> At present electricity retailers, electricity distributors and gas retailers are required to be members of an approved Ombudsman scheme (EWON) as a condition of their operating licence/authorisation. At present, gas distributors do not have such an obligation.

<sup>2</sup> For instance, it was difficult to address the merits or otherwise of a Law/Rules approach to business authorisation, rather than a licensing regime, in the absence of discussion of enforcement. See the Energy & Water Ombudsman NSW, submission to *Retail Policy Working Group - National Regulation for Distribution and Retail Regulation: Working Paper 3*, February 2007, 7-9.



approach selected is both adequate and appropriate for the task, there is sufficient flexibility to allow for efficient response times from both regulators and utilities, and the enforcement regime does not pose undue compliance burdens on industry (that ultimately impact the broad customer base). It appears that the enforcement regime outlined in the Supplementary Working Paper broadly achieves this goal.

We have provided below some specific comments on the enforcement mechanism proposals and on issues raised in the discussion on the objectives of the National Electricity Law and National Gas Law. For ease of reference we have adopted the same ordering as the Supplementary Working Paper.

### *Enforcement mechanisms*

#### **3.3(b) Mechanisms to support compliance monitoring**

EWON welcomes the detailed commitment to ongoing monitoring and compliance activity. In particular, we welcome the intention to build into the national framework Rules that address the following:

- a. a requirement for regulated entities to establish systems and procedures to monitor regulatory compliance;*
- b. a requirement for regulated entities to notify the regulator of any breach of licence conditions*
- c. an obligation on regulated entities to undertake periodic compliance audits using an independent auditor and to provide the result of the audit to the regulator.’<sup>3</sup>*

These approaches to regulation are, for the most part, common to current jurisdictional regulators and as such form the minimum enforcement infrastructure for the national regulator. To these, EWON would add the following as useful and important approaches to regulation.

- a. a clearly delineated ‘own motion’ power, enabling the national regulator to require unscheduled regulatory audits, ie. to audit individual entities where general non-compliance is indicated (for instance, via repeated or systemic complaints to a jurisdictional energy ombudsman) and/or to audit a number of entities for compliance with a specific requirement.

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<sup>3</sup> [Allens Arthur Robinson] *Retail Policy Working Group – National Framework for Distribution and Retail Regulation*: Supplementary Working Paper, April 2007, 7.



- b. an authority for the national regulator to conduct audits itself, without recourse to external auditors. In some instances, this may be a more cost and time-efficient option for the regulator and utility.
- c. an authority to stipulate response times for regulated entities to address indications of non-compliance, ie. to ensure that serious breaches continue to be reported quickly to the regulator so as to allow for material assessment, while lesser non-compliances can be reported periodically and in aggregate.
- d. a right for the national regulator to elect, where the non-compliance is of an order that warrants it, to publish results of audits publicly.
- e. early, and more frequent, auditing of new market entrants.<sup>4</sup>

An enforcement regime that combines these mechanism with the powers that derive from the ability to require enforceable undertakings, issue infringement notices and institute civil action, is appropriate for an essential services industry.

### **3.4 Court based enforcement mechanisms**

EWON supports the range of mechanisms available to the national regulator to seek to enforce compliance through the courts. We note the Supplementary Working Paper states that ‘it will be necessary to review the initial obligations in the distribution and retail package to prescribe by regulation those that should constitute civil penalty provisions’ and presume that this review will seek comment from stakeholders, notably the utilities and current jurisdictional regulators.<sup>5</sup>

### **3.5 Infringement notices**

EWON supports the proposed inclusion of the power to issue infringement notices in the National Gas Law. We consider that the ability to issue such notices to regulated electricity and gas entities is a positive means of addressing potentially serious non-compliance in an efficient and economical way, particularly as civil action is likely to be very rare.

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<sup>4</sup> EWON recommends for consideration the compliance monitoring program outlined in the Utility Regulators’ Forum, *Compliance Monitoring: Non-pricing energy retail regulation* [November 2006], particularly in relation to the early assessment and auditing of new market entrants to ensure the development of a compliance culture.

<sup>5</sup> Supplementary Working Paper, April 2007, 8.



### 3.6 Administrative remedies

EWON endorses the observation that the national regulator will need to have access to informal actions/remedies in order both to promote and enforce compliance. Typically such actions involve industry consultation on best practice, discussion with (and, likely, training of) certain staff in compliance sensitive areas of a business, and the development of action plans to improve performance by businesses. It is worth noting that the Utility Regulators' Forum observed that *'State regulators currently employ various means for monitoring regulated utilities' compliance, including ... market intelligence where the market provides ad hoc information on regulated utilities' compliance (for example, Ombudsman and competitor complaints, media reports etc)'*.<sup>6</sup> EWON acknowledges that such informal administrative remedies need not be outlined exhaustively in statute.

The Supplementary Working Paper recommends that some of the jurisdictional administrative remedies currently in place (eg. compliance, warning and contravention notices) should not be retained. This is based on the potential for blurring the regulator/adjudicator boundary, and on the presumption that such notices have the potential to arrogate the adjudicatory powers of the court. While there is clear reasoning behind this argument, the loss of these administrative remedies may well reduce the options available for the national regulator to address non-compliance in an efficient, non-litigious way. We believe that the enforcement regime must allow the national regulator to intervene quickly and conclusively to address clear indicators of non-compliance. That noted, it is possible that this could be achieved through informal means and by reference to infringement notices and/or enforceable undertakings.

EWON welcomes the addition of enforceable undertakings to the suite of mechanisms available to the national regulator. As an example of how enforceable undertakings can result in the imposition of swift enforcement in response to misconduct by a retailer, EWON alerted IPART in 2006 to a significant increase in serious complaints about the non-compliant marketing activity of one retailer. IPART subsequently issued the retailer concerned with an enforceable undertaking, and audited their business to ensure their ability to satisfy licence-based operating conditions. The retailer complied with the enforceable undertaking and cooperated with IPART's audit. It is arguable that an enforcement mechanism consisting solely, or primarily, of legal penalties enforced through civil proceedings could not have resolved this non-compliant conduct in as timely a way while keeping compliance enforcement costs to a minimum.

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<sup>6</sup> Utility Regulators' Forum, *Compliance Monitoring (non-pricing energy retail regulation)*, Utility Regulators' Forum Position Paper, November 2006, 11.



### 3.7 Revocation

EWON agrees with the proposition that revocation of business authorisation should remain available as a remedy for deliberate and persistent breaches of market entry requirements. We note that in the absence of a licensing regime, it is important that non-compliance with decisions of a jurisdictional ombudsman should be a ground for revocation of business authorisation (though we acknowledge that this would – and should – only occur after the clear failure of other enforcement actions by the national regulator).

### 3.8 Additional enforcement issues

EWON notes that one criterion upon which the Supplementary Working Paper recommends restriction of private rights of action is the existence of dispute resolution mechanisms, notably the ombudsman schemes. While there are some arguments for maintaining certain limitations on private enforcement actions, it is also the case that Australian energy ombudsmen operate within quite strict limits regarding the quantum of any determination and, in some cases, jurisdictional limits on access by certain categories of customer (eg. large retail customers). Given this, it is clear that such schemes are not able to address all customer concerns in all circumstances. On this basis there is some reason to consider ensuring that in certain circumstances customers are empowered to seek their own remedies for non-compliance. As the Supplementary Working Paper notes that discussion of ‘which, if any, of the new national regulatory obligations should enable private rights of action can best be undertaken at a later stage when the Law and Rules are further developed’, EWON will consider commenting further at that time.<sup>7</sup>

### *Objectives*

The objectives articulated in the National Electricity Law (and, presumably, to be included in the National Gas Law) are not abstract aspirational statements. They have a clear and concrete function to channel the approach and activities of both the Australian Energy Regulator and the Australian Energy Market Commission. As noted in the Supplementary Working Paper,

*The effect of these provisions is that the AEMC and the AER will be required to carry out their respective rule-making and enforcement functions in a manner that will or is likely to contribute to the achievement of the objective.*<sup>8</sup>

<sup>7</sup> Supplementary Working Paper, April 2007, 15.

<sup>8</sup> Supplementary Working Paper, April 2007, 17.



In EWON's submission to Working Paper 1, we noted the following:

*The electricity market objective, as outlined in the National Electricity Law, seeks to balance the interests of electricity businesses and consumers such that the long term benefits of a secure and mature market can be shared between consumers and investors. The Working Paper questions if the presence of the phrase 'long term' may inhibit the ability of the AEMC and the AER to 'give effect to equity issues and shorter term consumer welfare considerations'.<sup>9</sup>*

*EWON believes that it is important to recognise the significant efforts energy retailers have made in recent years to work with customers and other key stakeholders to ensure that lighting, heat and power remain within reach of everyone. The development of various assistance measures, particularly customer hardship programs, has provided a necessary flexibility in credit management that has allowed customers to more effectively manage limited resources. Such developments, together with an increased attention to consumer protection for energy customers on the part of the jurisdictional ministers, suggest that equity and consumer welfare issues are already significant considerations for the large majority of energy retailers.*

*While it is clearly the case that retailers are not, and cannot be expected to be, the welfare providers of last resort, they are well situated to identify and address many of the indicators of disadvantage and to educate customers about managing their demand. There is also an obligation on government to provide sufficient support to social programs to ensure vulnerable customers are protected, and to provide legislative leadership to create a compliance regime to ensure industry best practice. Community welfare organisations have a key role in distributing emergency and other forms of assistance, and providing financial counselling. There is an obligation on external dispute resolution schemes such as EWON to assist customers to resolve their disputes with retailers in a timely, efficient and effective way and to continue to raise with key stakeholders the nature of the issues raised by customers. Finally, there are the specific responsibilities of regulators to ensure that services are provided to consumers in the context of a healthy market that respects the differential capacities of customers and provides a degree of protection for those least able to protect themselves.*

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<sup>9</sup> [Allens Arthur Robinson] Retail Policy Working Group – National Framework for Distribution and Retail Regulation: Working Paper 1, November 2006, 45.



The Supplementary Working Paper establishes a binary argument that consumer interests and regulatory costs balance out the need for any articulation of consumer protection in the Law(s). EWON questions whether this may be a hasty conclusion, particularly as no established mechanism has been cited that satisfactorily indicates that the addition of references to consumer protection in the Law will create an unsatisfactory regulatory burden on market participants. EWON's experience suggests that energy businesses – particularly those staff who work with customers – often welcome the certainty that accompanies regulated consumer protection. Time and again EWON has been told by energy businesses that clearly defined rules remove arbitrariness in decision-making, reduce secondary costs (eg. ombudsman complaints, Ministerials, adverse media, reputation risk), and promote a culture of compliance. For this reason we are surprised that, without qualification, the Supplementary Working Paper concludes that 'the current objective is both adequate and appropriate in balancing these competing views'.<sup>10</sup> We do not see consumer protection as either an undue regulatory or cost burden, or as discretionary.

EWON is strongly of the view that *explicit* reference to the protection of consumers – particularly consumers whose access to energy is compromised through financial hardship, geography or other potential social inequity – is required in the Law(s). Electricity (and, for some, gas) is not a discretionary supply or service and it is hard for many of us to imagine how life can be reasonably conducted without it. On this basis alone, a national Law should ensure that the objective adequately encompasses the needs of all consumers, including those most in need. To do so would not only be an appropriate legislative response but also provide specific guidance to the AER and the AEMC in the conduct of market oversight.

It is also possible that if too great a weight is given to the cost of consumer protection, leading to it being omitted from the objectives, there is the potential for jurisdictional authorities to seek derogations or other local responses to provide ongoing certainty for their constituencies. Such action would complicate the move to national consistency. EWON considers that a better approach would be to commence national regulation with careful protections in place for consumers (which would likely reduce the motivation for jurisdictional variances) and, as and when market competition develops and matures, consumer protections that are no longer necessary could be phased out.

The Supplementary Working Paper states that 'the extent and manner in which [social and environmental objectives] are to be addressed is a wider policy issue

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<sup>10</sup> Supplementary Working Paper, April 2007, 18.



beyond the scope of this paper'.<sup>11</sup> By inference, the Paper suggests that social and environmental considerations should be contained in 'other legislative instruments and policies'<sup>12</sup> and not be included in the objectives listed in the Law(s). EWON considers that there may be several unintended outcomes should sustainability not be articulated as an objective in the national energy laws. One is that the explicit references to economic considerations in the objective (eg. 'to promote efficient investment')<sup>13</sup> may create a precedence over environmental/social considerations in regulatory decision-making. Another, of a more general nature, is that environmental/social concerns will have to be imposed – or at best grafted into – the energy market, rather than integrated as an essential component of its philosophy and operation.

If you would like to discuss this matter further, please contact me or Brendan French, Deputy Ombudsman, on 82185250.

Yours sincerely

**Clare Petre**  
Energy & Water Ombudsman NSW

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<sup>11</sup> Supplementary Working Paper, April 2007, 20.

<sup>12</sup> Supplementary Working Paper, April 2007, 21 (quoting SCO in response to NGL submissions).

<sup>13</sup> Supplementary Working Paper, April 2007, 17.