



# **AER Retailer Authorisation Guideline**

## **Version 2**

December 2014

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## Glossary, definitions and shortened forms

Shortened form	Extended form
AEMO	Australian Energy Market Operator
AER	Australian Energy Regulator
ACCC	Australian Competition and Consumer Commission
associate	has the same meaning it would have under Division 2 of Part 1.2 of the <i>Corporations Act 2001 (Cth)</i> if ss. 13, 16(2) and 17 did not form part of that Act
control	as defined in s. 50AA of the <i>Corporations Act 2001 (Cth)</i>
De facto director	includes any person who has not been validly appointed as a director but who acts in the position of a director
Director	includes any person appointed to the position of director, or who is appointed to the position of an alternate director and is acting in that capacity, regardless of the name given to their position
energy laws	include: (a) national energy legislation; and (b) jurisdictional energy legislation; and (c) the Retail Rules, the National Electricity Rules (NER) and the National Gas Rules (NGR); and (d) instruments made under the Retail Law, the Retail Rules, the NER and the NGR (including the Retail Market Procedures).
Insolvency official	is defined in s. 122 of the Retail Law to mean a receiver, receiver and manager, administrator, provisional liquidator, liquidator, trustee in bankruptcy or person having a similar or analogous function
Officer	as defined in s. 9 of the <i>Corporations Act 2001 (Cth)</i>
Retail Law	National Energy Retail Law
Retail Rules	National Energy Retail Rules
RoLR	retailer of last resort

## About this guideline

This guideline is for businesses wanting to sell energy under the National Energy Retail Law (Retail Law) and need a retailer authorisation. It outlines what you need to do to apply for an authorisation and how we, the Australian Energy Regulator (AER), assess applications. The guideline also explains the processes for the transfer, surrender and revocation of authorisations.

## About the AER

The AER operates under Part IIIAA of the *Competition and Consumer Act 2010* (Cth) and is the national regulator of electricity and gas.<sup>1</sup> Our responsibilities include assessing and approving applications from businesses wanting to sell energy in the retail market.

## The National Energy Customer Framework

The National Energy Customer Framework provides a national framework for the sale of energy (gas and electricity) to customers. It includes the Retail Law, National Energy Retail Rules (Retail Rules) and National Energy Retail Regulations.

Under the Retail Law, anyone who sells energy to people for use at premises must have either a retailer authorisation or a retail exemption.<sup>2</sup> Energy selling covers a wide range of activities, from energy retailing by authorised (licensed) retailers to landlords recovering energy costs from their tenants. Energy 'sales' do not necessarily have to be for profit—passing on energy costs to another person is considered to be a sale. Similarly, 'premises' has a broad meaning, and includes residential homes or other places of residence (for example, a caravan park where tenants reside permanently), shopping centres and commercial sites. If you sell energy and do not have an authorisation or exemption to do so, you may be fined or ordered, by a Court, to remedy the breach.<sup>3</sup>

## Entry criteria

Applicants for a retailer authorisation must demonstrate their capacity to meet the obligations of an energy retailer under the Retail Law and the Retail Rules. We assess applications against the entry criteria set out under the Retail Law,<sup>4</sup> and must be satisfied the applicant:

- has the necessary organisational and technical capacity to operate as a retailer
- has the financial resources, or access to resources, to operate as a retailer
- is a suitable person to hold a retailer authorisation.

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<sup>1</sup> The AER does not regulate the energy markets in Western Australia or the Northern Territory.

<sup>2</sup> Retail Law, s 88. A breach of this provision attracts a civil penalty.

<sup>3</sup> We may issue an infringement notice (s 308 of the Retail Law). We may also apply to the Federal Court under section 44AAG of the *Competition and Consumer Act 2010* (Cth) to order a person to cease the activity that is in breach, or take action to remedy the breach, or implement a specified program for compliance with the Retail Law.

<sup>4</sup> Retail Law, s 90.

Our assessment is intended to establish whether applicants have the capacity and resources to enter the energy retail market. It is a point in time assessment—not an assessment of a business’s ongoing viability. Rather, this is for the Australian Energy Market Operator (AEMO) to determine—it undertakes ongoing prudential assessments of energy retailers to ensure they have sufficient financial capacity to operate in the energy wholesale markets.<sup>5</sup>

In the unlikely event that a retailer fails, their customers will continue to be supplied through a specially appointed retailer, known as a retailer of last resort (RoLR). The RoLR scheme is administered by the AER and provides for the transfer of customers to another retailer in a seamless manner and at short notice.

## **Retailer authorisations**

An authorisation is granted on a national basis—that is, it allows the holder to sell either electricity or gas in all participating jurisdictions and to all contestable classes of customers. We do not have discretion to limit the jurisdictions in which a retailer can operate or restrict the sale of energy to particular classes of customers. Similarly, we cannot exempt retailers from any of their obligations under the Retail Law or Retail Rules.

Retailer authorisations do not have expiry dates. A retailer authorisation will continue until it is revoked or surrendered.

Retailer authorisations are normally required where:

- the seller’s core business is the sale of energy<sup>6</sup>
- the seller’s primary relationship with its customers is the sale of energy and the seller has no other, or an otherwise minor, relationship with the customer (for example, it does not also have a landlord/tenant relationship)
- the seller intends to sell to many customers and/or sell a large volume of energy.

## **Retail exemptions**

A retailer authorisation may not be warranted for some types of energy sellers, and in these cases we may exempt businesses from having to be authorised (see AER (Retail) Exempt selling guideline<sup>7</sup>).

A person (that is, the legal entity) selling energy must hold either an authorisation or a retail exemption, in accordance with the Exempt selling guideline, but cannot hold both.

If an exempt seller’s business model changes so that it is more like an authorised retailer the exempt seller will need to apply for a retailer authorisation.

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<sup>5</sup> s. 150 of the Retail Law requires AEMO to notify the AER when they become aware of anything that may affect a retailer’s ability to continue selling energy to its customers. This obligation also applies to retailers.

<sup>6</sup> Section 115(a) of the Retail Law enables the AER to consider ‘whether selling energy is or will be a core part of the exempt seller’s business or incidental to that business’. This distinction is dealt with further in the AER’s [Exempt Selling guideline](#).

<sup>7</sup>The guideline can be found on the AER’s website, [www.aer.gov.au](http://www.aer.gov.au)

## Obligations of an authorised retailer

Retailers must be able to comply with the Retail Law and Retail Rules, as well as any relevant provisions of the National Electricity Law and Rules, National Gas Law and Rules, and jurisdictional energy legislation,<sup>8</sup> before they start selling energy.

We will monitor retailers' compliance with obligations under the energy laws we administer. If a retailer does not meet its obligations we have a number of options available to us, including revoking the retailer's authorisation.

Our approach to enforcement and compliance is set out in the *Statement of approach: compliance with the National Energy Retail Law, Retail Rules and Retail Regulations and the AER Compliance Procedures and Guidelines*. Retailers must meet the reporting obligations contained in these guidelines and the *AER (Retail Law) Performance Reporting Procedures and Guidelines*.<sup>9</sup>

Authorisation applicants should familiarise themselves with these requirements prior to making an application for authorisation.

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<sup>8</sup> Jurisdictional or technical regulators monitor and enforce retailers' compliance with their respective jurisdictional obligations. The AER plays no part in this process.

<sup>9</sup> These documents can be found on the AER's website, [www.aer.gov.au](http://www.aer.gov.au)



# The assessment process for a retailer authorisation

## How to apply

Applications for authorisation can be emailed to: [AERauthorisations@aer.gov.au](mailto:AERauthorisations@aer.gov.au). The subject line of the email should state 'Application for retailer authorisation: Attn: General Manager, Retail Markets Branch'.

We aim to process applications for authorisation, transfer and surrender within 12 weeks of receiving all required information. We generally do not accept applications until they are substantially complete. We may also ask for additional information after accepting an application.

We do not charge an application fee or an authorisation fee.

## Information provided must be current

The information you provide in your application must represent your current position. It should not be a projection of what your position will be when the authorisation (or transfer) takes effect unless the information requirements explicitly request projections.

## Dual fuel, gas or electricity

You should specify whether you are seeking a retailer authorisation to sell gas or electricity. You will need to submit two applications if you wish to be a dual fuel retailer.<sup>10</sup> Where the same information is required under each application, it need only be provided once. However, some information will be specific to your ability to retail gas or to retail electricity and should be provided in the relevant application. A separate risk management strategy, for example, should be provided for each activity.

Successful dual fuel applicants will be issued with separate authorisations for the retail of electricity and gas.

If you wish to sell a form of energy not covered by your authorisation, you must apply for a separate authorisation.<sup>11</sup> An authorisation cannot be changed to authorise the selling of another form of energy.

## Registration with the Australian Energy Market Operator

If you intend to purchase energy through the wholesale market you may apply to us for a retailer authorisation before applying for registration with AEMO. However, we would expect you to have initiated this process before, or at the same time as, you apply for retailer authorisation. Unless you intend to sell energy in an embedded network you will not be able to sell energy until you hold the appropriate AEMO registration.

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<sup>10</sup> Retail Law, s 100.

<sup>11</sup> Retail Law, s 100.

## Public consultation process

Certain aspects of our assessment process are prescribed by the Retail Law and Retail Rules. For example, we must consult on all applications. Once we have received and accepted your application, we will publish a notice on our website:

- stating that the application has been received and
- seeking written submissions on the application from interested stakeholders.

The consultation period will run for at least 20 business days.<sup>12</sup>

In addition to the formal consultation prescribed by the Retail Rules, we may consult with other interested parties, for example, AEMO.

## Confidentiality

We understand that some of the information you provide will be confidential. If it is, we ask that you clearly identify and mark anything you consider confidential and give reasons for each confidentiality claim. Please also advise us of any potential disadvantage disclosing the information might cause. In addition, you should submit both a public and confidential version of the information. You should only remove or black out information in the public version that you consider confidential.

A confidentiality claim, by itself, is not always enough to prevent disclosure. Under the Retail Law and the *Competition and Consumer Act 2010* (Cth), we may disclose confidential information in certain circumstances, for example, where disclosure would not cause detriment, or where any detriment would be outweighed by the public benefit of disclosing the information.

If we are considering disclosing this information, we will let you know and give you an opportunity to comment in the first instance.<sup>13</sup>

For more information on the ACCC-AER's information policy, please see <https://www.aer.gov.au/node/6280>.

## Our assessment

Our decision to grant or refuse a retailer authorisation will be based on whether or not your application meets the entry criteria set out in the Retail Law and is guided by the objective of the Retail Law.<sup>14</sup> All assessments are made on a case-by-case basis. Although all applicants must meet the Retail Law's entry criteria, the particular requirements will vary between applicants. That is to say, the entry requirements for an applicant planning a small scale gradual entry to the retail market will be different to those where the applicant is planning to enter on a large scale and to acquire customers quickly.

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<sup>12</sup> Retail Rules, rule 173.

<sup>13</sup> The AER may use the information for any purpose connected with the performance or exercise of its functions or powers.

<sup>14</sup> The objective of the Retail Law is to promote efficient investment in, and efficient operation and use of, energy services for the long term interests of energy consumers with respect to price, quality, safety, reliability and security of supply of energy.

## Conditions

We may only issue a retailer authorisation where the applicant satisfies all of the entry criteria. If the criteria are not met, we may approve an authorisation subject to conditions (for example, a condition that an applicant has in place an appropriate compliance policy).<sup>15</sup> Your authorisation will only be issued—that is, you can only begin retailing—once we are satisfied you have met these conditions. If we consider that you have not met the conditions in the specified timeframe, your application will be deemed to be refused. Generally, the timeframe for meeting conditions will be three months.

## Grounds for refusal

We will refuse an application if you:

- failed to meet any of the entry criteria
- provided false or misleading information

**Note, providing false or misleading information in an application for retailer authorisation is a serious offence under the *Criminal Code (Cth)*. The maximum penalty for such an offence is 12 months imprisonment.**

- failed to provide required information
- failed to meet any conditions attached to a retailer authorisation within the stipulated timeframe:
  - you must accept any conditions imposed within 20 business days of receipt of the notice (we may extend this response period if we consider it appropriate). If you do not respond within the stipulated period, your application will be deemed to be refused.
  - if you respond to the notice accepting the conditions, but after a period of three months have not satisfied us that the conditions have been met, then your application will be deemed to be refused.
  - before imposing conditions on an authorisation, we may consult you on whether the three month period gives you sufficient time to satisfy the conditions. We may extend this period if we consider it appropriate.

We may also refuse an application where you (or an associate) have previously triggered a retailer of last resort (RoLR) event under the Retail Law.<sup>16</sup> We will not automatically deny an application from someone who has, but will subject the application to closer scrutiny. For further details, see Suitability criterion below.

## AER decisions

We will advise you of our decision in writing. Our “notice of decision” will specify which form of energy (electricity or gas) you are authorised to sell. It will also include any conditions attached to the authorisation, and details on the appropriate format for formally accepting the

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<sup>15</sup> Retail Law, s 93

<sup>16</sup> Retail Law, s 170

conditions. If you fail to formally accept the conditions your application may be refused (see 'Grounds for refusal' above).

If your application is refused, you will be given a statement of reasons setting out why we consider the entry criteria were not, or will not be, satisfied.

A notice of decision will also be placed on our website.

## **Withdrawal of application**

If you decide you do not want to go ahead with your application you may withdraw it, in writing, at any time. If you do withdraw it and later decide you want to go ahead with your application you will need to submit a new application.

## **Dormant retailer authorisations**

Your retailer authorisation will continue in force even if you are not actively retailing. If you hold a dormant authorisation you must still comply with all the obligations of a retailer, including all information and reporting requirements. You may also be subject to any targeted audit or compliance assessment processes we undertake as part of our compliance monitoring role.

We may place a greater focus on auditing and assessing holders of dormant authorisations at the time they begin or resume retailing. This is to ensure appropriate systems and processes are in place to meet retailer obligations under the energy laws.

## **Authorisation amendment**

You may apply to us to amend your retailer authorisation. Such amendments are described in the legislation as 'alterations' and are intended for such situations as a change of business name.

Requests to amend authorisations should be emailed to: [AERauthorisations@aer.gov.au](mailto:AERauthorisations@aer.gov.au).

## **Public register of authorised retailers and exempt sellers**

Authorised retailers are listed on a public register,<sup>17</sup> along with details of exempt sellers who hold individual exemptions or registrable exemptions: <http://www.aer.gov.au/>.

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<sup>17</sup> Retail Law, s 119

## Required information—general particulars

You should provide the following information in your retailer authorisation application:

- 1 Your legal name.
- 2 Your trading name if different to your legal name.
- 3 ABN or ACN.
- 4 A registered business address and address for correspondence.
- 5 A nominated contact person, including their position in the organisation and contact details.
- 6 The form of energy for which a retailer authorisation is sought.
- 7 The date you intend to commence retailing energy.
- 8 The nature and scope of the operations proposed.
- 9 The jurisdictions in which you intend to retail energy.
- 10 The type of customers you intend to supply (for example, small customers, small market offer customers or large customers as defined in s. 5 of the Retail Law).

## Entry criteria

You must satisfy three entry criteria to be granted a retailer authorisation.<sup>18</sup> These are that you:

- have the organisational and technical capacity to operate as a retailer
- have sufficient financial resources to operate as a retailer
- are a suitable person to hold a retailer authorisation.

You must provide us with sufficient information to demonstrate that you meet the entry criteria, and can therefore meet the obligations of an energy retailer. You should back up your claims with evidence of your suitability.

## Organisational and technical capacity criterion

We will assess your organisational and technical capacity to hold a retailer authorisation by looking at your industry experience, operational systems and staff expertise. In your application you should demonstrate your ability to comply with regulatory obligations under the energy laws, as well as your ability to operate as an energy retailer in the National Energy Market (NEM). If you intend to outsource some of your retail functions you will need to provide details of your third party arrangements.

## Energy market experience

We would expect key staff or executives to have experience in the energy market and in the operation of a viable business. For applicants who do not have prior energy market experience, your application should detail how you intend to bring such experience into the business. This could be, for example, by hiring staff with the requisite experience, or working with an experienced consultant. (**Information requirements 1-7**)

## Business plans

Business plans provide the context for many of our information requirements and are essential to our assessment of both an applicant's organisational and technical capacity and their financial capacity. In broad terms, your business plan should describe the business (including the market in which it operates), its objectives and the strategies to be used to achieve those objectives. The business plan should clearly set out operating forecasts for the first years of the business, including anticipated customer growth. It should include revenue and expenses (including all relevant assumptions) and a cash flow analysis based on your operating forecasts. (**Information requirements 8**)

## Compliance and risk management strategies

The national energy retail objective is focussed on the long term interests of energy customers. It is important, therefore, that you demonstrate that you will be in a position to manage all obligations to customers under the Retail Law and Retail Rules.

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<sup>18</sup> Retail Law, s 92

You must be able to demonstrate you have established, or are in a position to establish, the required compliance systems and procedures. If these are not in place when you apply for an authorisation you should indicate how preparations are progressing and when they are likely to be completed. The Australian standard on compliance programs (AS 3806-2006) may be a useful reference point to assist in developing your compliance strategy. All compliance systems described in your strategy should be in place before the retailer authorisation is issued.

Copies of any retail contracts you have developed may also assist in our assessment of your capacity to appropriately manage the retailer–customer relationship.

You should also provide details of your risk management strategy covering both operational and financial risks. The Australian standard for risk management (AS/NZS ISO 31000:2009) may be a useful reference point in developing the strategy.

The responsibility for ensuring the effectiveness of an applicant's risk management and compliance strategies lies with the director/s or, where an applicant is unincorporated, the person/s with effective control of the business. You should provide evidence that the risk management and compliance strategies have been endorsed by the director of the business and have been subject to an external assurance process (for example, an external audit). **(Information requirements 9-12)**

## **Agreements with market participants**

You should provide evidence of any agreements / arrangements you have with distribution businesses, AEMO and energy ombudsmen. Where agreements / arrangements have not been finalised, you should provide details of any negotiations or steps taken to make such arrangements, and when they are likely to be completed.

If you are intending to onsell energy that you buy from an authorised retailer (rather than buy it from the wholesale market yourself) you will need to have back-up arrangements in case your business fails as you will not be covered by the RoLR scheme. For example, you may arrange for the relevant bodies corporate to take over your energy customers. You should outline these arrangements in your application. **(Information requirements 13-14)**

## **Required information—organisational and technical capacity**

You must provide the following information in your authorisation application:

- 1 Details of your (or any related party's) previous experience as an energy retailer including:
  - 1.1 The date and location of previous operations
  - 1.2 The form/s of energy sold
  - 1.3 The scale of operations (including the number and size of customers)
  - 1.4 A description of how the retail activities were conducted.
- 2 Details of any other relevant retail or energy market experience.
- 3 Where you do not have previous energy market experience, how you intend to bring this experience into your business.
- 4 An organisation chart showing the structure of your organisation.

- 5 The number of employees, broken down by business unit or other relevant classification.
- 6 A summary of qualifications, technical skills and experience of your officers, and the relevance of those skills and experience to meeting the requirements of the retailer authorisation.
- 7 Where you may be relying on a third party to provide staff and resources to meet the technical requirements of your retailer authorisation or to perform retail roles (such as operating phone centres or billing), you must:
  - 7.1 State all functions and activities you propose to outsource.
  - 7.2 Provide a summary of the third party's experience in, and knowledge of, the relevant area.
  - 7.3 Provide evidence of the third party's technical capacity to meet relevant obligations.
  - 7.4 Provide evidence of controls in place to ensure the third party's compliance with the Retail Law and Retail Rules.
- 8 A business plan, including but not limited to, strategic direction and objectives, forecast results and detailed assumptions on how you calculated these forecasts.
- 9 Details of your compliance strategy:
  - 9.1 Demonstrating your knowledge and understanding of the obligations imposed on authorised retailers under the Retail Law and Retail Rules and applicable statutory, industry and technical requirements of the jurisdictions in which you intend to operate.<sup>19</sup>
  - 9.2 Outlining how applicable retailer authorisation obligations and statutory, industry and technical requirements will be met (including how compliance breaches will be identified and remedied).
  - 9.3 Including complaint and dispute resolution procedures, developed in accordance with Australian Standard AS ISO 10002-2006 (Customer satisfaction—Guidelines for complaints handling in organisations).
  - 9.4 Demonstrating that any gaps in the skills and / or knowledge of staff have been identified and that appropriate steps have been taken to fill those gaps (for example, through recruitment or training).
- 10 A copy of your risk management strategy covering both operational and financial risks.
- 11 Evidence that your risk management and compliance strategies have been subject to an external assurance process (for example, an external audit).
- 12 Any additional information which demonstrates your ability to manage risk and operate in accordance with the Retail Law objective, particularly the long term interests of consumers (for example, copies of any retail contracts that you have developed).
- 13 Evidence of any membership, or steps taken to obtain membership, of a recognised energy industry ombudsman scheme in the jurisdiction/s in which you intend to retail energy to small customers.

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<sup>19</sup> We do not enforce compliance with jurisdictional obligations.



14 Evidence of any agreements / arrangements in place with key market players within the jurisdictions in which you intend to operate. This includes, but is not limited to, distribution businesses and AEMO. Where agreements / arrangements have not been finalised, you should provide details of any negotiations or steps that have occurred to date and when you expect agreements / arrangements to be completed.

If you are intending only to onsell energy you should provide details of the back-up arrangements you have made in case your business fails.

15 Any additional information that will help us assess your organisational and technical capacity.

## Financial capacity criterion

We must be satisfied that prospective retailers have (or have access to) adequate financial capacity to support their planned retail operations. Our assessment of financial capacity will therefore be informed by your business plan (see “Business plans” above) and approach to managing financial risk (see “Compliance and risk management strategies” above).

In making our assessment we focus particularly on your current financial position (**information requirements 1-7 below**) and your projected financial position, specifically whether you have the financial capacity to meet your proposed business activities (**information requirement 8 below**).

If your business is not expected to be immediately profitable you should have enough cash at hand to meet all expected costs under the business plan or be able to demonstrate you can access the required support, for example, through a bank guarantee or a deed of guarantee from a related party.

In addition to the normal costs of operating a business (for example, staffing, insurance, accommodation) an energy retailer can expect to face a number of other major costs including:

- purchasing energy in wholesale energy markets
- procuring and paying for network services, and meeting any credit support requirements
- providing retail supply services, in particular customer support and billing services
- participating in ombudsman (or similar) schemes.

Your costings should also take into account circumstances where your cash flow is put under short term pressure, for example, by high wholesale prices. You should have sufficient reserves to meet such cash peaks.

Our assessment of financial viability is a one-off entry test designed to satisfy us that your authorisation application meets the entry criteria specified in the Retail Law. It should not be taken as an endorsement of your ongoing financial viability or profitability.

## Required information—financial resources

You must provide the following information in an application for authorisation:

### Existing businesses

- 1 Copies of your audited<sup>20</sup> financial reports for the past 12 months (note, we may ask for the previous two years' reports, if necessary). This information should include:
  - 1.1 All financial statements required by the accounting standards.
  - 1.2 Notes to financial statements (disclosure required by the regulations, notes required by the accounting standards, and any other information necessary to give a true and fair view).
- 2 Evidence of long and / or short term credit rating/s (if available).

### Start-up businesses

- 3 Details and evidence of your current financial position, for example, interim financial statements.

### Existing AND start-up businesses

- 4 If you are part of a group of related companies, and / or party to a partnership, joint venture or alliance agreement with another company, and you are given financial support by that entity, you should provide:
  - 4.1 Details of the ownership structure of the group.
  - 4.2 The contractual arrangements (e.g. alliance contracts, associate contracts, establishment contracts) that define relationships within the group—including shared resources, guarantees, revenue flows, obligations and/or responsibilities.
  - 4.3 Consolidated audited financial statements for the group.
- 5 A written declaration from your Chief Financial Officer, Chief Executive Officer or director/s stating you are a going concern and that the officer is unaware of any factor that would impede your ability to finance your energy retailer activities under the retailer authorisation for the next 12 months. For unincorporated applicants, a written declaration should be provided by the person/s in effective control of the business.
- 6 A written declaration from an independent auditor or your principal financial institution stating that:
  - 6.1 An insolvency official has not been appointed in respect of the business or any property of the business.
  - 6.2 No application or order has been made, resolution passed or steps taken to pass a resolution for the winding up or dissolution of the business.
  - 6.3 They are unaware of any other factor that would impede your ability to finance your energy retail activities under the authorisation.
- 7 Details of any bank guarantees or arrangements or process to access additional capital.

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<sup>20</sup> You must provide an auditor's independence declaration under section 307C of the *Corporations Act 2001* (Cth) to meet this requirement.

- 8 Forecast revenue and expenses to the point where your business is cash-flow positive. This forecast should be consistent with your business plan and highlight all key assumptions and risks.
- 9 Any additional information that will help us assess your financial capacity to operate as an energy retailer.

## Suitability criterion

An applicant must be a suitable person to hold a retailer authorisation.

### What is a suitable person?

The question of whether a person is suitable to retail energy goes beyond an assessment of financial and organisational capacity. A person's character or reputation is relevant to any assessment as it provides an indication (or public perception) of likely future conduct.<sup>21</sup>

We may therefore be guided in our assessment of suitability by case law on what it means to be a 'fit and proper' person. For example, we may look to your previous commercial dealings, as well as of other officers, associates and any other entity that exerts control over your business activities (as applicable). Any assessment will look at the degree of honesty and integrity shown in those commercial dealings and whether you are likely to contribute to the national energy retail objective. We will have particular regard to whether there has been—or may have been—improper conduct in previous commercial dealings.

### Prior revocation or refusal of a licence or authorisation

We will have regard to whether you or your company directors have previously held a licence / authorisation in the energy industry (or any another industry) that has been revoked, and the reason for the revocation, and whether a previous application for a licence / authorisation in any industry has been refused, and the reason for the refusal. **(Information requirements 1.2-1.4)**

Similarly, we will consider whether you (or an associate) have previously triggered, or would likely have triggered,<sup>22</sup> the RoLR provisions of the Retail Law or equivalent state / territory legislation. **(Information requirement 1.5)**

Where an applicant or an associate has previously triggered a RoLR event we may grant an authorisation application on the condition they have paid part or all of the costs of that RoLR event.<sup>23</sup>

### Your compliance background

As part of our assessment we will consider your compliance history, and the compliance history of your associates, other businesses where your officers have held an officer

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<sup>21</sup> See, for example, *Australian Broadcasting Tribunal v Bond and Others* (1990) 94 ALR 11.

<sup>22</sup> This refers to any instances where, had the person not transferred or surrendered an authorisation or licence, a RoLR event would likely have been triggered.

<sup>23</sup> Retail Law, s 170

position, and any other entity that exerts control over your business activities. (**Information requirements 1.1, 2, 4-6**)

## Criminal convictions

We may request a certified copy of a national criminal history check (no more than 12 months old) to confirm this information. (**Information requirement 3**)

## Required information—suitability

You must provide the following information in your application for authorisation:

- 1 For you and your associates, any other business where your officers have held an officer position and any other entity that exerts control over your business activities—details of:
  - 1.1 any material failure<sup>24</sup> to comply with regulatory requirements, laws or other obligations over the previous 10 years, including infringement notices or other enforcement action (including voluntary administrative undertakings) being taken by a regulatory body.
  - 1.2 any previously revoked authorisations, authorities or licences held in any industry and the reason/s for the revocation.
  - 1.3 any failed authorisation, authority or licence applications in any industry and the reason/s the application was unsuccessful.
  - 1.4 any past or present administrative or legal actions in relation to an authorisation, authority or licence in any industry.
  - 1.5 any situation/s where you (or an associate) have previously triggered the RoLR provisions of the Retail Law or equivalent state/territory/foreign legislation, or have transferred or surrendered an authorisation or licence in circumstances where if not done, triggering a RoLR event would have been likely.
- 2 Details of any offences or successful prosecutions under any territory, state, Commonwealth or foreign legislation (including, but not limited to, the *Australian Securities and Investments Commission Act 2001* (Cth), *Competition and Consumer Act 2010* (Cth)<sup>25</sup> and the *Corporations Act 2001* (Cth)) relevant to your capacity as an energy retailer, or written confirmation that no offences have been committed against, or been prosecuted under, any such legislation. This information must be provided for:
  - your current director/s (or shadow / de facto director/s), and any other person that exerts control over your business activities
  - if your business is unincorporated, the person/s with effective control of the business
  - all persons who are responsible for significant operating decisions for your business.

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<sup>24</sup> When determining whether a breach is material or not we will consider, for example, the impact of the breach and the frequency of the breach (that is, is it a one-off or systemic breach).

<sup>25</sup> On 1 January 2011 the Australian Consumer Law came into effect which saw the *Trade Practices Act 1974* renamed the *Competition and Consumer Act 2010*. Any offences or successful prosecutions under the *Trade Practices Act 1974* should be detailed in response to the suitability criterion.

- 3 Upon request, a criminal history check conducted within the past 12 months for persons listed under information requirement 2.
- 4 Written declarations from your Chief Financial Officer (or Chief Executive Officer):
  - 4.1 that members of your management team have not been disqualified from the management of corporations;
  - 4.2 about the record of bankruptcy of your management team (including in any overseas jurisdiction).
- 5 Full names and current residential addresses of all your officers.
- 6 Details of policies and procedures addressing the probity and competence of officers and any other key management staff.
- 7 Any additional information that will assist us in our consideration of the character and past performance of your officers.

# Revocation, surrender and transfer

## Revocation

We may revoke a retailer authorisation if:

- a retailer has materially failed to meet its obligations under the Retail Law and Retail Rules or other applicable energy legislation; and we have reason to believe it will not be able to meet its obligations in the future
- for electricity, a retailer is not a registered participant for purchasing electricity as required by s. 11(4) of the *National Electricity Law*
- for gas, a retailer is not registered under the relevant gas market schemes.<sup>26</sup>

In addition, we may revoke a retailer authorisation where a retailer has triggered a RoLR event.

We may also revoke a retailer authorisation if a retailer fails to participate in the relevant energy ombudsman scheme/s or to meet obligations under the relevant scheme/s in jurisdictions where it retails to small customers.

In deciding whether to revoke a retailer authorisation following a breach of a retailer obligation, we will consider a number of factors. These include the impact of the breach; the circumstances of the breach (including whether it was deliberate); the compliance history of the participant and any assistance provided to us in investigating the breach.

## Revocation process

We must follow a specific process in considering whether to revoke an authorisation.<sup>27</sup> We may not revoke a retailer authorisation until we have completed that process (this requirement does not apply to revocations where the participant has triggered a RoLR event).

Under this process, we will give a retailer written notice of our intention to revoke its authorisation and the reasons for this. The notice must state that the retailer has the opportunity to respond by a date specified in the notice. The response date will be no less than 10 business days after giving notice. In response, the retailer may outline why its authorisation should not be revoked and demonstrate how it intends to manage the issues raised in the revocation notice.

We must consider a retailer's response and decide whether to proceed with the revocation. We will not revoke the authorisation if we are satisfied the retailer can address the issues in the notice. We will revoke the authorisation if steps identified in the retailer's response to address the issues in the notice are not completed in an agreed timeframe, or if we are not satisfied the response demonstrates that the retailer can address the issues.

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<sup>26</sup> Retail Law, s 107

<sup>27</sup> Retail Law, s 120

If we revoke an authorisation, the revocation notice will be published on our website with the reasons for the decision. Details of any conditions related to the transfer of customers will also be published. We will inform AEMO and relevant distribution businesses of our decision.

## Effect of revocation

Revocation is a last resort and will only be used if a retailer has shown a persistent or serious failure to comply with their obligations under the Retail Law and Retail Rules. This is because a decision to revoke an authorisation will have flow-on effects to retail customers and third parties.

If an authorisation is revoked, we will set a date when the revocation will take effect.

Where the AER revokes a retailer's authorisation, this will trigger a RoLR event. At the date the revocation takes effect the retailer's customers will be transferred to a Retailer of Last Resort.<sup>28</sup> We may, after consulting with AEMO, impose conditions on the transfer of the retailer's customers to another retailer.

## Transfer

Retailer authorisations can be transferred in certain situations, for example where there is a change in the legal entity holding the retailer authorisation.

To transfer an authorisation, a joint application must be made to the AER, that is by the retailer holding the authorisation (transferor) and the proposed transferee (incoming retailer). The application must be submitted both in writing and electronically via email.

Applications should be posted to:

General Manager  
Retail Markets Branch  
Australian Energy Regulator  
GPO Box 520  
Melbourne VIC 3001

And emailed to: [AERauthorisations@aer.gov.au](mailto:AERauthorisations@aer.gov.au)

The subject line of the email should state 'Application for transfer of retailer authorisation: Attn: General Manager, Retail Markets Branch'.

We encourage applicants to only consider transferring an authorisation where the transferee is not yet authorised. This is so retailers do not hold multiple authorisations. Where the transferee is already authorised, customers can be transferred through a commercial agreement that does not need our approval, so long as the transfer requirements in the Retail Law and Retail Rules are met.

We will assess the transfer application as if the proposed transferee were applying for a new retailer authorisation under the Retail Law. In other words, we will use the same entry criteria and assessment process, including consultation process, as for an authorisation application.

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<sup>28</sup> Retail Law, Part 6

Applications must demonstrate the transfer of customers will be appropriately managed to minimise any disruptions. Applicants must show that all retail customers will either be transferred to the proposed transferee or another retailer.

We will grant the transfer application if we determine that the proposed transferee satisfies the entry criteria. Additionally, we have developed principles to help guide us in deciding whether to approve a transfer of a retailer authorisation, namely that:

- customer transfers are managed appropriately, as required by the Retail Law, and that customers have continuity of supply
- customers do not suffer unnecessary detriment as a result of the transfer (particularly where customers may not have the opportunity to provide their explicit informed consent for the transfer) and
- customers have all the necessary information to make an informed choice about their energy service.

Following a transfer, the transferring retailer will no longer be a retailer for the purposes of the Retail Law. To ensure customers are not disadvantaged we can impose conditions on a transfer that continue to apply to the transferring retailer beyond the transfer date.<sup>29</sup> For example, we may require them to maintain membership of relevant energy ombudsman schemes for 12 months after the transfer of the authorisation. Further, we could require a transferring retailer to deal with disputes between it and small customers as if the retailer were still authorised.

Other conditions may include an obligation on the transferring retailer to pass on details of customers receiving concessions or who rely on life support equipment, or an obligation to inform the customers of the change in retailer and their rights and obligations under the new arrangement.

If the transfer application is approved, we will notify the incoming and outgoing holder of the retailer authorisation. We will include any conditions in the notice to the applicants. If we refuse a transfer application, the applicants will be given written notice stating why the application was refused.

If a transfer application is approved we must set a date at which the transfer will take effect. This must be no later than six months after the decision to grant the transfer is made.

## **Required information—transfer**

You must provide the following information in your application for transfer of an authorisation:

- 1 Transferees must provide the same information that is required in an application for authorisation under this guideline.
- 2 Transferors must provide a statement of reasons for the transfer of the retailer authorisation.
- 3 Transferors must indicate the preferred timing for the transfer to take effect.

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<sup>29</sup> Retail Law, s 103(5)



- 4 Transferors must provide documentation demonstrating that appropriate arrangements have been made for the transfer of customers and that the supply of energy to customers will not be compromised by the transfer.

## Surrender

If a retailer wishes to cease operating, or no longer requires a retailer authorisation, it can apply to us to surrender its authorisation. The application must set out the reason/s for surrendering the retailer authorisation.

As with transferring an authorisation, a retailer seeking to surrender its authorisation must demonstrate its customers will continue to be supplied, and that disruptions will be minimised. Any arrangements to transfer customers to another retailer should be outlined in the application.

We will consider the following principles in deciding whether to approve an application to surrender a retailer authorisation, namely that:

- any customer transfers arising from the surrender are managed appropriately, as required by the Retail Law, and that customers have continuity of supply
- customers do not suffer unnecessary detriment as a result of being transferred to another retailer (particularly where customers may not have the opportunity to provide their explicit informed consent for the transfer) and
- customers have all the necessary information to make an informed choice about their energy service.

We may, after consulting with AEMO, impose conditions on the surrendering retailer. These conditions can, without limitation, require the surrendering retailer to continue to abide by requirements of energy laws, and can continue to apply beyond the surrender date.<sup>30</sup>

We will ensure arrangements are in place to allow former customers to bring a dispute against the retailer following surrender of the authorisation. This would be the same process as outlined above for the transfer of a retailer authorisation.

The application must be submitted both in writing and electronically via email.

Applications should be posted to:

General Manager  
Retail Markets Branch  
Australian Energy Regulator  
GPO Box 520  
Melbourne VIC 3001

And emailed to: [AERauthorisations@aer.gov.au](mailto:AERauthorisations@aer.gov.au)

The subject line of the email should state 'Application for surrender of retailer authorisation: Attn: General Manager, Retail Markets Branch'.

We will set a date for the surrender to become effective. The date must be no longer than six months from the date the surrender application is approved.

We will publish a notice of our decision to approve the surrender on our website. The notice will state the reasons for the decision and any conditions imposed on the surrender.

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<sup>30</sup> Retail Law, s 105(5)

If we refuse an application, we will give the applicant written notice stating why the application was refused.

### **Required information—surrender**

You must provide the following information in an application for surrender of an authorisation:

- 1 A statement of reasons why you wish to surrender your retailer authorisation and why surrender is the best course of action.
- 2 Preferred timing for the surrender to take effect.
- 3 Documentation demonstrating appropriate arrangements have been made for all customers and the supply of energy to customers will not be compromised by the surrender.

## Enforcement

Once an application for a retailer authorisation is granted, it will come into operation on a date advised by us or, where conditions have been imposed, when we are satisfied the conditions have been met. The retailer is then bound by the requirements in the Retail Law and Retail Rules for energy marketing and energy sales activities. An applicant should therefore ensure it has systems and procedures in place to enable it to comply with all retailer obligations and to monitor its performance and compliance.

We may take enforcement action where a retailer has failed to comply. Civil penalties may apply and certain activities may attract criminal sanctions. We may revoke an authorisation where a retailer has materially failed to meet its obligations and we have a reasonable apprehension it will not be able to meet its obligations in the future.

We will directly monitor retailers' compliance with their regulatory obligations, including through the use of compliance audits.

Retailers will also be subject to jurisdictional regulatory requirements and therefore should contact relevant jurisdictional bodies to ensure they are aware of these obligations. The AER does not have a role in enforcing jurisdictional compliance.

### AER enforcement action

Under the Retail Law a person must not sell energy unless they hold a current retailer authorisation or have been exempted from the requirement for authorisation. Civil penalties apply if this provision is breached or if there is an attempted breach.<sup>31</sup> We may commence proceedings if we consider a provision has been breached.<sup>32</sup> If the court finds there has been a breach it may order a civil penalty.<sup>33</sup>

A decision by the AER to refuse a retailer authorisation, or the revocation, transfer or surrender of an authorisation, are not subject to merits review. The AER's decisions are, however, subject to judicial review (covering questions of law only) under the *Administrative Decisions (Judicial Review) Act 1977 (Cth)*.

Once a revocation, transfer or surrender of a retailer authorisation is complete, the retailer must cease all retailing activities. Failure to do so could attract the civil penalties discussed above.

The Federal Court also has powers to make orders on application by us under s. 44AAG of the *Competition and Consumer Act 2010 (Cth)*, including orders requiring a retailer to do one or more of the following:

- cease the activity that is in breach
- take action to remedy the breach
- implement a specified program for compliance with the Retail Law.

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<sup>31</sup> Under s. 299 of the Retail Law an attempted breach is considered an actual breach.

<sup>32</sup> Retail Law, s 289

<sup>33</sup> Retail Law, s 291

We will treat any attempt by a person to sell energy prior to obtaining an authorisation, or following the revocation, transfer or surrender of an authorisation, with the utmost seriousness.