Notice of draft instrument

Amendments to AER Compliance Procedures and Guidelines

June 2014

AUSTRALIAN ENERGY REGULATOR

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Amendment record

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1	13 June 2014	27

Overview

The Australian Energy Regulator (AER) is Australia's national energy market regulator. Among other functions, the AER is responsible for monitoring, investigating and enforcing compliance with obligations under the National Electricity Law, National Gas Law and National Energy Retail Law, and with Rules and Regulations applying under those laws. Our approach to these functions is set out in a Compliance and Enforcement Statement of Approach, available on our website.[1]

To support the AER's role in monitoring compliance with the National Energy Retail Law (Retail Law), the AER has developed the AER Compliance Procedures and Guidelines (Guidelines). The Guidelines establish an exception reporting framework that applies to all retailers and distributors in jurisdictions that have adopted the Retail Law. Under that framework, retailers and distributors must submit information and data about their compliance with the Retail Law to the AER, at intervals specified in the Guidelines.

The exception reporting framework serves two primary purposes within the AER's compliance monitoring program:

1. to monitor the extent to which retailers and distributors have complied, or failed to comply with, their obligations under the Retail Law and Rules; and
2. to highlight emerging or systemic compliance issues that may warrant further attention (which may include further compliance-based or enforcement-based activity by the AER.

The AER, like other regulatory bodies, is committed to the Government's deregulation agenda. The goal of this deregulation agenda is to identify and remove the burden of unnecessary regulation, while maintaining necessary protections and appropriate safeguards for consumers. We maintain a risk-based approach to compliance that supports informed, proportionate measures to monitor and assess compliance by regulated entities. In the context of the broader shift towards deregulation, we consider that the reporting obligations under the Guidelines can be refined so as to reduce the regulatory burden on regulated entities, while continuing to achieve and promote the AER's compliance objectives. Specifically, we consider that this can be achieved by:

- ensuring regulated entities are providing complete and adequate information to the AER to allow us to effectively measure compliance levels;
- recognising that compliance with certain obligations can be effectively monitored via other mechanisms without imposing additional reporting obligations on regulated entities;
- better aligning reporting requirements with AER internal processes for investigating and responding to breaches, while also recognising that extended reporting requirements may be necessary to identify trends or systemic compliance issues; and
- recognising that certain obligations require greater attention due to the potential for consumer detriment, while other, more technical breaches will present less of a compliance risk.

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[1] http://www.aer.gov.au/node/5876

We consider that refining the Guidelines in this manner will reduce the regulatory burden on regulated entities whilst optimising the reporting process to allow the AER to better prioritise and respond to compliance issues as they occur.

The AER's experience in administration of the Guidelines since 1 July 2012, and feedback from retailers and distributors, suggests a number of inefficiencies in the reporting framework that are limiting its usefulness as a compliance monitoring tool for the AER and for regulated businesses. This notice proposes amendments to the Guidelines to address those inefficiencies, and provides retail market stakeholders the opportunity to comment on those amendments before a final decision is made.

In combination, the amendments proposed in this notice seek to:

- Refine the reporting framework to better balance the need for timely information on levels of compliance with the time required by businesses, and the AER, to investigate, respond to and report on breaches of the Retail Law and Rules in a meaningful way; and

- Improve the quality of reports submitted, so that information provided is reliable, meaningful to an assessment of the extent to which retailers and distributors are meeting their obligations, and allows informed comparison of compliance levels over time and between businesses.

In doing so, the amendments are intended to improve the efficiency and effectiveness of the reporting process as a compliance monitoring tool for retailers, distributors and the AER.

This consultation is limited to the exception reporting framework. Other areas of the Guidelines have not been reviewed as part of this process, and will not be considered as part of the current consultation.

Consultation process

This notice, including draft amendments to the AER Compliance Procedures and Guidelines, has been published in accordance with the retail consultation procedure set out in rule 173 of the Retail Rules.

Written submissions on the draft amendments are invited by 14 July 2014. Late submissions may not be taken into account in the AER's final decision.

Submissions can be sent electronically to: AERInquiry@aer.gov.au with the title "Draft amendments to AER Compliance Procedures and Guidelines".

The AER prefers that all submissions be publicly available to facilitate an informed and transparent consultative process. Submissions will therefore be treated as public documents unless otherwise requested, and will be placed on the AER's website (www.aer.gov.au). Parties wishing to submit confidential information are asked to:

- clearly identify the information that is subject of the confidentiality claim;
- provide a non-confidential version of the submission for publication, in addition to the confidential one.

The AER does not generally accept blanket claims for confidentiality over the entirety of the information provided. Such claims should not be made unless all information is truly regarded as confidential. The identified information should genuinely be of a confidential nature and not otherwise publicly available.

In addition to this, parties must identify the specific documents or relevant parts of those documents which contain confidential information. The AER does not accept documents or parts of documents which are redacted or 'blacked out'.

For further information regarding the AER's use and disclosure of information provided to it, please refer to the ACCC–AER information policy: the collection, use and disclosure of information, which is available on the AER website under 'Publications'.

1 Background

The Retail Law tasks the AER with monitoring, investigating, enforcing and reporting on compliance with the Retail Law and Rules.[2] Our approach to these functions is set out in two documents: a Statement of Approach, and AER Compliance Procedures and Guidelines made under the Retail Law.

The Statement of Approach[3] provides an overview of our approach to compliance and enforcement under the Retail Law. It covers both statutory and non-statutory mechanisms for monitoring, investigating and enforcing compliance, and outlines considerations relevant to our enforcement discretion. The Statement of Approach is not required by the Retail Law. It is an AER initiative, and provides a source of information for regulated businesses and other stakeholders on our approach to compliance functions under national energy laws.

The Guidelines[4] are required under the Retail Law. They support our compliance monitoring role by:

- establishing a process for the management of compliance audits under the Retail Law, and in particular how the costs of an audit conducted by or on behalf of the AER will be recovered from the relevant business;
- establishing an exception reporting framework that specifies how and when retailers and distributors must submit information and data on their compliance to the AER.

In addition, retailers and distributors are required to establish internal processes to monitor their compliance. These must be developed in accordance with requirements under the Guidelines, which currently reference the Australian Standard (AS3806[5]).

The AER may, but is not required to, include additional information in the Guidelines, including non-binding guidance on obligations under the Retail Law and Rules. To date we have not done so, and we do not intend to consider this option in this consultation.

The initial Guidelines were published in July 2011. Minor amendments were implemented in a second version of the Guidelines in June 2012, immediately prior to the commencement of the Retail Law in the Australian Capital Territory and Tasmania.

The Guidelines have remained unchanged since the Retail Law was first applied by the Australian Capital Territory and Tasmania on 1 July 2012. Since commencement of the Retail Law in South Australia and New South Wales, they have applied to retailers and distributors in those jurisdictions also. The Guidelines will apply to retailers and distributors in Queensland and Victoria from the commencement of the Retail Law in those jurisdictions. No further consultation on, or amendments to, the Guidelines are necessary for this to occur.

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2 Retail Law, s. 204(1).
3 http://www.aer.gov.au/node/5876
4 http://www.aer.gov.au/node/16111
5 AS3806: Australian Standard - Compliance programs

1.1 Empowering provisions

The AER is required to make the Guidelines under section 281 of the Retail Law. The Guidelines must provide for the manner and form in which regulated entities are to submit information and data on compliance to the AER, including the date(s) for submission.

Section 274 of the Retail Law (a civil penalty provision) requires regulated entities to submit information and data relating to their compliance with the Retail Law and Rules to the AER as required by the Guidelines.

Section 274 and the corresponding requirements of the Guidelines apply to regulated entities only. A regulated entity is a retailer or a distributor.[6] The Retail Law allows for additional entities to be made regulated entities for this purpose through changes to the Retail Rules, but to date this has not occurred. This means that the AER cannot make other retail market participants, including exempt sellers, subject to reporting arrangements under the Guidelines.

Section 274 and the corresponding requirements of the Guidelines only apply to compliance with the Retail Law, Rules and Regulations: they do not apply to compliance with other parts of energy laws, or to obligations imposed on retailers and distributors under other legislation.

The AER can amend the Guidelines at any time, but must do so in accordance with the retail consultation procedure set out in rule 173 of the Retail Rules. This notice, and the draft amendments herein, are the first step in that consultation process.

[6] National Energy Retail Law, s. 2: Interpretation

2 Review of the reporting framework

This review concerns the information and data on compliance that retailers and distributors must submit to the AER, as required by the Guidelines, under section 274 of the Retail Law.

The Guidelines establish a three tiered exception reporting framework for retailers and distributors, which requires them to report periodically to the AER on failures to comply with specified obligations in the Retail Law and Rules. Depending on the obligation, reports must be submitted within 24 hours of a breach, biannually, or annually.

The exception reporting framework serves two primary purposes within the AER's compliance monitoring program:

1. to measure the extent to which retailers and distributors have complied, or failed to comply with, their obligations under the Retail Law and Rules, and
2. to highlight emerging or systemic compliance issues that may warrant further attention (which may include further compliance-based or enforcement-based action by the AER).

The current framework was established prior to the commencement of the Retail Law on 1 July 2012. We have now completed one annual reporting cycle and three biannual cycles. We have received reports from 32 retailers and 11 distributors, covering conduct under the Retail Law and Rules in four jurisdictions. In that time, retailers and distributors have provided useful feedback about the value and efficiency of the reporting process, the clarity of reporting requirements, and how they might be improved.

The nature of an exception reporting framework is such that the burden of reporting is ultimately determined by the performance of the retailer and distributor: the number of matters that have to be reported is the number of times the retailer or distributor has failed to comply. Nonetheless, common to feedback from businesses is the concern that the cost of reporting in time and resources — particularly for immediate reporting requirements — is disproportionate to its usefulness, and diverts resources from resolution of underlying issues. These observations in part reflect our own experience in administration of the reporting framework, and our assessment of the contribution the reporting framework makes to our compliance monitoring program.

The amendments proposed in this notice seek to:

- Refine the reporting framework to better balance the need for timely information on levels of compliance with the time required by businesses and the AER to investigate, respond to and report on breaches of the Retail Law and Rules in a meaningful way;
- Improve the quality of reports submitted, so that information provided is reliable, meaningful to an assessment of compliance levels, and allows informed comparison of compliance levels over time and between businesses.

In combination, the effect of these amendments should be to improve the efficiency and effectiveness of the reporting process as a compliance monitoring tool.

2.1 Scope of this consultation

This consultation is limited to the exception reporting framework under the Guidelines. It does not extend to other parts of the Guidelines. Nor is it our intention to extend the scope of the Guidelines to include other matters contemplated, but not required, by the Retail Law at this time.

We welcome comments on the reporting framework and the amendments proposed herein, and will consider and respond to these in making our final decision. At this time, however, we will not consider submissions or recommendations relating to elements of the Guidelines, or other aspects of the AER's approach to its compliance and enforcement functions, that are outside the scope of this consultation.

3 Key areas for review

In reviewing the reporting framework we have focussed on the following key issues:

- Whether the current classification of provisions as type 1, 2 or 3, which determines the frequency of reports to the AER, remains appropriate, and whether obligations captured by the Guidelines could be more efficiently monitored through other means;
- Whether the time allowed for submission of reports remains appropriate, particularly for type 1 obligations which are currently reported within 24 hours;
- Whether the requirement that all reports to the AER are ultimately signed by the Chief Executive Officer of the retailer or distributor appropriately reflects responsibility for compliance within all regulated businesses, and whether aggregated reports should be permitted for related regulated entities;
- Whether the information that retailers and distributors are required to include in their reports is clear, and meaningful to an assessment of compliance;
- Whether it is necessary or appropriate for the Guidelines to explain or interpret the obligations imposed under relevant provisions of the Retail Law and Rules, or to establish benchmarks for compliance with those obligations for reporting purposes or otherwise.

Amendments to the Guidelines are proposed in most, but not all of these areas, and considered in the sections below.

3.1 Classification of obligations and timing of reports

Our initial classification of obligations for reporting purposes was based on the following principles:

- Type 1 obligations were those for which a breach was considered likely to have a critical impact on customers, which is likely to escalate or become widespread in the short (one to three month) term if it is not rectified quickly. Breaches of these obligations are currently reported initially within 24 hours, followed by a more detailed report within five business days.
- Type 2 obligations were those for which a breach was considered likely to have a serious impact on customers which is likely to escalate or become widespread in the medium (three to six months) term if steps are not taken to rectify it. Breaches of these obligations are reported biannually.
- Type 3 obligations were those for which a breach was considered likely to have a low or limited impact on customers, but may escalate or become widespread in the long (six to 12 month) term if not rectified. Breaches of these obligations are reported annually.

The classification of obligations as type 1, 2 or 3 goes to the frequency of reporting only. It does not reflect an assessment of likely enforcement outcomes where a breach of an obligation is confirmed. Any obligation under the Retail Law or Rules may, if breached, warrant a statutory enforcement response by the AER. That assessment cannot be made until the circumstances of a breach are known, and will continue to be made on a case-by-case basis in accordance with our Statement of Approach.

Our intent in classifying obligations as type 1, 2 or 3 was that compliance issues were identified by businesses, and information provided to the AER, in time to detect issues with the potential to escalate or become widespread so that appropriate steps could be taken to address them before they did.

In practice, the vast majority of breaches reported under all three classes have been rectified (in terms of their impact on affected customers) by the time reports are submitted to the AER. This has even been the case for breaches of Type 1 obligations, despite the short period (24 hours) allowed for submission of reports.

However, we continue to see repeated or common errors contributing to compliance levels over time. The risk that breaches will reoccur or become widespread over time if broader responses are not taken by businesses to address contributing factors remains relevant. It is evident, though, that trends of this nature are best observed over time. Patterns of behaviour often become more apparent when matters are considered together, rather than individually as they arise. This suggests that adjustment of reporting frequencies could in some cases lead to more meaningful reporting and assessment of compliance levels, without compromising the need for vigilance on the part of retailers, distributors or the AER.

Not all obligations under the Retail Law and Rules have been included in the current reporting framework. We do not currently intend to extend the framework in that way. We have, however, had numerous discussions with retailers and distributors about the difficulties encountered in reporting on certain obligations — for example, where they are broad in scope and operate by reference to other energy laws. This has implications for the costs of reporting against those obligations, and raises the question of whether requirements captured by such broad provisions could instead be targeted more specifically through the Guidelines or other mechanisms.

We have also identified areas of the Retail Law and Rules with which compliance, while not directly captured by the current Guidelines, have clear bearing on matters reported to date and may be contributing to reported issues. Inclusion of these matters may encourage more thorough consideration of the interdependency of obligations under the Retail Law and Rules, and how failure to comply with one provision may contribute to a breach of another.

In the sections below we set out proposed amendments to the classification of Type 1, 2 and 3 obligations, and to the timing of reports on type 1 obligations.

No amendments are proposed to the timing of type 2 (biannual) and type 3 (annual) reports, which are currently submitted two months after the end of the reporting period.

3.1.1 Type 1 obligations

Current type 1 obligations for retailers and distributors are set out in appendix A.1 of the Guidelines, and in table 3.1 below.

Table 3.1 Current type 1 obligations

Retailers	Distributors
Retail Law, Part 2, Division 3 (Standing offers and standard retail contracts for small customers), section 22(1): Retailer obligation to make offer to small customers	Retail Law, Part 3, Division 2 (Obligation to provide customer connection services), section 66(1): obligation to provide customer connection services
Retail Rules, Part 6, Division 2 (De-energisation of premises - small customers), rules 111-117: Retailer-initiated de-energisation of premises	Retail Rules, Part 6, Division 3 (De-energisation of premises - small customers), rules 119-120: Distributor de-energisation of premises - small customers
Retail Rules, Part 6, Division 4 (Re-energisation of premises), rule 121: Obligation on retailer to arrange re-energisation of premises	Retail Rules, Part 6, Division 4 (Re-energisation of premises), rule 122: Obligation on distributor to re-energise premises
Retail Rules, Part 7 (Life support equipment), rule 124: Retailer obligations	Retail Rules, Part 7 (Life support equipment), rule 125: Distributor obligations
Retail Rules, Part 8 (Prepayment meters), rule 139(2): Life support equipment	Retail Rules, Part 7 (Life support equipment), rule 126: Registration details kept by distributor
Retail Law, Part 2, Division 6 (Customer hardship) section 43(2): retailer obligations to develop and implement an approved customer hardship policy	
Retail Law, Part 2, Division 7 (Payment plans) section 51: Debt recovery	

The current Guidelines require breaches of a type 1 obligation to be reported to the AER within 24 hours of their identification. A more detailed, written report must be submitted by the Chief Executive Officer or delegate five business days later.

Information submitted in initial, 24 hour reports on the nature and cause of a breach is typically limited. It appears that in many cases little more is known about a reported incident at the time a written report, which must include information on impact and remedy, is submitted five business days later. It is also apparent that while the immediate impact of most type 1 matters can be quickly resolved (e.g. by restoring supply), internal processes retailers and distributors follow to investigate the cause of a breach and consider how best to address the risk of reoccurrence are not completed - and in some cases have not significantly progressed - in the week following identification of a breach.

The majority of individual incidents reported do not lead to further action on the part of the AER. Some provisions have raised no substantive concerns since July 2012. For others, though, we are concerned by what appear to be repeated or common errors in the application of business systems and processes. The interim nature of type 1 reports makes it difficult to assess how well the risk that a breach will re-occur is being managed over time.

We have looked to address these issues in two ways: first, by reassessing the number and nature of obligations currently classified as type 1; and second by extending the time allowed for submission of reports on type 1 obligations to allow better informed and more meaningful

assessments of compliance, and of what if any action by the AER is necessary or appropriate in response to a breach.

Proposed amendments to Type 1 classifications and reporting arrangements

Type 1 obligations will remain those for which a breach is considered likely to have a critical impact on customers, which is likely to escalate or become widespread in the short (one to three month) term if it is not rectified quickly.

In some cases this likelihood has been reassessed on the basis of performance to date with the result that obligations have been reclassified:

- Retail Law Part 2, Division 7, section 51 (proceedings against hardship customers or customers on payment plans for debt recovery) has been reclassified as Type 2, with reports to be submitted at the same time as other sections in Part 2, Division 7.

- Retail Law, Part 2, Division 6 (Customer hardship) section 43 will also be reclassified as Type 2, and reported with other customer hardship provisions. The obligations to submit and publish a hardship policy (sub-sections 43(2)(a) and (b)) are readily monitored by other means, so that immediate reporting is unnecessary. Implementation of a hardship policy (sub-section 43(2)(c)) is best considered together with the targeted provisions in Part 2, Division 6, which are currently classified as Type 2 obligations. De-energisation of a hardship customer in contravention of rules 107(2) and 120(1)(d) will continue as type 1 obligations.

In others, obligations have been removed from the exception reporting framework in favour of alternative approaches to monitoring compliance:

- Sections 22 and 66 of the Retail Law, which impose obligations on retailers to offer supply and on distributors to connect, have been removed from the exception reporting framework completely in favour of reviews of publicly available information (including that submitted to Energy Made Easy) and complaints to the AER and energy ombudsman schemes.

These amendments have also reduced duplication between requirements for type 1, 2 and 3 reports.

For remaining type 1 obligations, including obligations that protect life support customers, the likelihood of harm appears low but the risks associated with non-compliance remain significant enough that classification against a 'worst case' assessment remains prudent. For those obligations, we have considered how best to balance the need for timely information that allows breaches to be identified before they escalate, with the need for that information to be useful and meaningful to an assessment of compliance.

As the default requirement, we propose to replace the current requirements for immediate (24 hour) and five-day reports with periodic reporting on a quarterly basis. This approach would require a single, written report on all breaches of type 1 obligations to be submitted before the end of the calendar month immediately following each quarter. This arrangement allows retailers and distributors further time after a breach has been identified to assess and address matters, and to prepare reports throughout the quarter. At the same time it maintains the discipline of timely identification and reporting of breaches.

This reduction in reporting frequency, however, would be subject to a requirement that breaches of those type 1 obligations that afford targeted protection to vulnerable customers be notified to the AER immediately (within 48 hours of the breach occurring). These include:

- obligations on retailers and distributors with respect to customers requiring life support equipment;
- obligations on retailers not to de-energise a hardship customer or a residential customer who is adhering to a payment plan; and
- obligations on retailers and distributors not to de-energise or arrange for the de-energisation of a customer for non-payment during an extreme weather event.

This requirement recognises that certain obligations present unique risks for customer safety and wellbeing, and that more immediate action may be required where that risk is apparent or continuing. It also seeks to recognise that certain 'vulnerable' consumers may require greater protection if appropriate relief is not provided when a breach is first identified.

Immediate notification would require information to be provided to the AER in writing regarding the obligation breached, its impact (including any known or potential harm to consumers) and the extent to which it has already been resolved. This is a change from the current requirement that only the nature and cause of the breach be specified, and goes directly to the management of risk and impact. It requires discipline on the part of retailers and distributors in monitoring compliance with this obligation and ensuring that breaches of these provisions receive attention proportionate to the potential impact on customers. In recognition that the actual impact of a breach will not always be significant, we will assess each notification to determine whether further communication is necessary prior to the submission of the quarterly report to confirm that appropriate action is being taken. If satisfied that it is, we will confirm that all further reporting on the matter can be deferred to the periodic Type 1 quarterly report.

Proposed type 1 obligations, and those that will be subject to immediate reporting requirements, are set out in table 3.2.

Table 3.2 Proposed type 1 obligations

Retailers	Distributors	Immediate notification
Retail Rules, Part 7 (Life support equipment), rule 124: Retailer obligations, life support equipment	Retail Rules, Part 7 (Life support equipment) rule 125: Distributor obligations, life support equipment	Retail Rules, Part 7 (Life support equipment), rule 124: Retailer obligations, life support equipment Retail Rules, Part 7 (Life support equipment) rule 125: Distributor obligations, life support equipment
Retail Rules, Part 8 (Prepayment meters), rule 139(2): Life support equipment	Retail Rules, Part 7 (Life support equipment), rule 126: Registration details kept by distributor	Retail Rules, Part 8 (Prepayment meters), rule 139(2): Life support equipment Retail Rules, Part 7 (Life support equipment), rule 126: Registration details kept by distributor
Retail Rules, Part 6, Divisions 1 and 2 (De-energisation of premises - small customers), rules 107(2)*, 111-117: Retailer-initiated de-energisation of premises	Retail Rules, Part 6, Divisions 1 and 3 (De-energisation of premises - small customers), rules 107(3)*, 119-120: Distributor de-energisation of premises - small customers	Retail Rules, Part 6, Divisions 1 and 2, rule 116(1)(a), (d), (h) Retail Rules, Part 6, Divisions 1 and 3, rule 120(1)(a), (d)
Retail Rules, Part 6, Division 4 (Re-energisation of premises), rule 121: Obligation on retailer to arrange re-energisation of premises	Retail Rules, Part 6, Division 4 (Re-energisation of premises), rule 122: Obligation on distributor to re-energise premises	

* Rules 107(2) and 107(3) are the over-arching civil penalty provisions that capture obligations on retailers and distributors respectively regarding de-energisation of small customers. De-energisation of a small customer other than in accordance with Divisions 2 and 3 of Part 6 constitutes a breach of rule 107(2) or (3). While its inclusion does not add to the current reporting requirements (which already capture the relevant rules), its inclusion will provide for more accurate reporting where de-energisation occurs in circumstances not authorised by the Rules (for example, de-energisation of the wrong premises in error).

The limited requirement for immediate reports will ensure that critical issues are still identified and given the attention they deserve. For other matters, the overall reduction in reporting frequency will allow for more meaningful observations to be formed over time on the extent to which retailers and distributors are complying with these provisions, and the materiality of any non-compliant conduct. On an individual basis, a breach of an obligation may appear largely inconsequential. As part of a pattern of repeated behaviour, however, it may say something more about a business's management of compliance. Equally, an individual incident may raise significant concerns, but could turn out to be an isolated occurrence in an otherwise well-managed process. Reporting over a longer period will better highlight trends in compliance and emerging issues, and better reflects the AER's own processes for the review and assessment of levels of compliance.

Quarterly reporting has the added benefit of aligning reports on type 1 obligations with quarterly reports under the AER Performance Reporting Procedures and Guidelines. This will allow a combined assessment by retailers, and by the AER, of compliance and performance issues relating to de-energisation of customers for non-payment. It will also allow us to compare the number of non-compliant de-energisations for non-payment with the total number of transactions in the relevant period, and thus indicate an overall level of

compliance. Such context is less readily available for other type 1 obligations, but retailers and distributors are encouraged to include this type of information in their compliance reports. This is discussed further below in our consideration of the content of reports and the relevance of materiality to an assessment of compliance.

Lastly, we propose to remove the provision under the Guidelines for an extension of time for reporting during an extreme weather event. The nature of extreme weather events defined by jurisdictions to date has not proven useful for this purpose — not least because their declaration prevents de-energisation in any case. To date where circumstances are such that resources within a regulated entity have been diverted to manage natural disasters or emergencies we have been able to negotiate alternative reporting arrangements without the need for this provision.

3.1.2 Type 2 obligations

Current type 2 obligations for retailers and distributors are set out in appendix A.2 of the Guidelines, and in table 3.3 below. Type 2 obligations are classified as groups of related obligations, by reference to divisions or subdivisions of the Retail Law and Rules. This means that interdependent obligations can be considered together for reporting purposes. It also means that amendments to these areas of the Retail Law and Rules over time are captured by the reporting framework without the need for amendments to the Guidelines.

Table 3.3 Current type 2 obligations

Retailers	Distributors
Retail Law, Part 2, Division 3: Standing offers and standard retail contracts for small customers	Retail Law, Part 3, Division 2: Obligation to provide customer connection services
Retail Law, Part 2, Division 6: Customer hardship	Retail Law, Part 3, Division 6: Negotiated connection contracts
Retail Law, Part 2, Division 7: Payment plans	
Retail Law, Part 2, Division 5: Explicit informed consent	
Retail Law, Part 2, Division 8: Energy marketing	
Retail Rules, Part 2, Division 10, Sub-division 3: Energy marketing activities	
Retail Rules, Part 2, Division 3: Customer retail contracts - pre-contractual procedures	
Retail Rules, Part 2, Division 4: Customer retail contracts - billing	
Retail Rules, Part 2, Division 5: Tariff changes	

Proposed amendments to Type 2 classifications

Type 2 obligations are those for which a breach was considered likely to have a serious impact on customers which is likely to escalate or become widespread in the medium (three to six months) term if steps are not taken to rectify it. Breaches of these obligations will continue to be reported biannually.

As with our review of type 1 obligations, some provisions have been reassessed on the basis of performance to date and removed from the exception reporting framework in favour of alternative approaches to monitoring compliance:

- As with sections 22 and 66 of the Retail Law (discussed above in our consideration of type 1 obligations), remaining provisions in Part 2, Divisions 2 and 3 and Part 3, Division 2 of the Retail Law imposing obligations on retailers to offer supply under standard retail contracts, and on distributors to provide connection services in accordance with energy laws, have been removed from the exception reporting framework. Instead, compliance with these obligations will be monitored through reviews of publicly available information and complaints to the AER and energy ombudsman schemes.

- Distributor obligations relating to negotiated connection contracts, of which no breaches have been reported to date, have also been removed but will continue to be managed through dispute resolution frameworks under chapter 5A of the National Electricity Rules and part 12A of the National Gas Rules. This means that distributors will have no biannual reporting obligations under the Guidelines.

However, given ongoing concerns with complexity of market retail contracts, and evidence that their promotion and marketing by retailers remains problematic, we have extended the current covering of provisions relating to energy marketing and market retail contracts to include:

- Part 2, Division 10, sub-division 2 of the Retail Rules: Providing information to small customers (including provision of required information when a market retail contract is formed), and

- Part 2, Division 7 of the Retail Rules: Market retail contracts - particular requirements (including notification of price changes and the end of fixed term contracts, application of early termination fees and additional provisions relating to cooling off periods).

While arguably captured already by inclusion of explicit informed consent provisions (as reflected in reports to date), the inclusion of additional provisions around marketing, cooling off provisions and disclosure of information will encourage more specific reporting of compliance by retailers in this area, and help to identify contributing conduct. A number of breaches of billing obligations (also type 2) have also been attributed to provision of inaccurate information when contracts are formed, misapplication of fees and poorly executed price changes. We expect inclusion of these provisions to improve reporting in this area also.

The revised set of type 2 obligations we propose is provided in table 3.4.

Table 3.4 Proposed type 2 obligations

Retailers	Distributors
Retail Law, Part 2, Division 6: Customer hardship	
Retail Law, Part 2, Division 7: Payment plans	
Retail Law, Part 2, Division 5: Explicit informed consent	
Retail Law, Part 2, Division 8: Energy marketing	
Retail Rules, Part 2, Division 10*: Energy marketing activities	
Retail Rules, Part 2, Division 7: Market retail contracts - particular requirements^	
Retail Rules, Part 2, Division 4: Customer retail contracts - billing	
Retail Rules, Part 2, Division 5: Tariff changes	

* The current Guideline only includes Part 2, Division 10, sub-division 3.
^ Part 2, Division 7 is not included in the current Guideline.

3.1.3 Type 3 obligations

Current type 3 obligations for retailers and distributors are set out in appendix A.3 of the Guidelines, and in table 3.5 below. Like type 2 obligations, type 3 are classified as groups of related obligations, by reference to divisions or subdivisions of the Retail Law and Rules. Our expectation that breaches of these obligations presented a low risk of escalation over a reporting year has been borne out by reports to date.

Table 3.5 Current type 3 obligations

Retailers	Distributors
Retail Rules, Part 1, Division 2: Consumption threshold matters	Retail Rules, Part 1, Division 2: Consumption threshold matters
Retail Rules, Part 1, Division 3: Classification of customers	Retail Rules, Part 1, Division 3: Classification of customers
Retail Rules, Part 2, Division 9: Other retailer obligations*	Retail Rules, Part 4, Division 6: Distributor interruption to supply
Retail Rules, Part 6, Division 2: Retailer-initiated de-energisation of premises^	

* Part 2, Division 9 includes referral to interpreter services, provision of information to customers, and retailer obligations relating to customer transfers.
^ When obligations in Part 6, Division 2 that have already been classified as type 1 are excluded, this includes rule 118 (Request for de-energisation by customers) only.

Proposed amendments to Type 3 classifications

Type 3 obligations will continue to be reported annually. We have, however, reduced the number of obligations captured by this classification where no breaches have been reported to date:

- Provisions relating to consumption threshold matters and the classification of customers (as residential or business, small or large) under Part 1 of the Retail Rules have not raised concerns in any jurisdiction to date.
- Nor have retailer obligations in relation to customer-requested de-energisations under Part 6, Division 2 of the Retail Rules - the only element of that Division reserved as a type 3 obligation.

These obligations have therefore been removed from the exception reporting framework. We will, however, continue to monitor customer complaints to the AER and to energy ombudsman schemes for any incidents that do arise under these provisions.

The current classification of Part 4, Division 6 of the Retail Rules (Distributor interruptions to supply) as type 3 obligations will remain unchanged. Annual reporting on these provisions is consistent with annual reports on interruptions under the National Electricity Law and Rules, and allows consideration of compliance levels in the context of performance in this area. Specific obligations for the protection of life support customers will, as discussed above, remain classified as type 1.

Under the proposed amendments, Part 2, Division 9 of the Retail Rules relating to the process for customer transfers would remain as the only retailer obligations in this category. Incidents reported under these provisions are largely transfers in error, which arise when incorrect data is used to execute a customer transfer in market systems. While resultant transfers are not compliant, these incidents are perhaps better considered in terms of relative performance over a longer period of time. We would, however, welcome submissions on whether it is more efficient to include these in biannual reports as type 2 obligations. That would allow them to be considered and reported together with related provisions on customer transfers, cooling off periods and explicit informed consent.

Table 3.6 Proposed type 3 obligations

Retailers	Distributors
Retail Rules, Part 2, Division 9: Other retailer obligations	Retail Rules, Part 4, Division 6: Distributor interruption to supply

3.2 Signatories to biannual and annual reports, and reporting requirements for related businesses

3.2.1 Current requirements

The current Guidelines require that all biannual and annual compliance reports are signed by the Chief Executive Officer of the retailer or distributor.

No signature is required for an initial report on a type 1 obligation, but written reports on type 1 obligations must be signed by the Chief Executive Officer or a delegate appointed for that purpose. To ensure that all breaches of type 1 obligations are ultimately reviewed by the Chief Executive Officer, a consolidated report on type 1 obligations must be submitted with each biannual compliance report, signed by the Chief Executive Officer.

Several businesses have queried the appropriateness of the current requirement for the Chief Executive Officer to sign compliance reports to the AER. Concerns have been raised in relation to the practicality of obtaining approval at that level within timeframes allowed for reporting. Additionally, some businesses have complained that the Chief Executive Officer is not appropriately held accountable for these reports given their role in management of compliance by the regulated entity. This has been the case particularly for retail businesses that choose, for reasons of their own, to operate a number of separate authorised retailers each of which is separately bound by the Retail Law and Rules. Such businesses have also argued that they should be permitted to submit a single, aggregated report for all related entities rather than attributing conduct specifically to the authorised retailer against whom action would arise in the event that an enforcement response was warranted.

At this time we are not convinced by these arguments. Our view that a regulated entity's commitment to compliance should be supported at the highest levels of the organisation remains unchanged, irrespective of the size of an organisation or the number of regulated entities it operates. This position is consistent with the requirement under part 2 of the Guidelines that processes, systems and procedures put in place by a retailer or distributor to monitor their compliance should be established and observed in a manner consistent with the current Australian Standard. Nor, in that context, are we satisfied a case has been made that the number of reports required under the Guideline creates a significant impost in seeking that level of approval.

Requirements for signatories to all written reports submitted under the Guidelines (for type 1, 2 and 3 obligations) will be the same. In each case, reports are to be submitted under the authority (and signature) of the Chief Executive Officer or Managing Director of the regulated entity.

While we appreciate the preference of related businesses to submit aggregated reports, we remain of the view that where a commercial decision has been made to distribute liability for compliance across a number of separate authorised retailers, reports should be submitted separately for each business.

We are open to further submissions on this issue as part of this process.

3.3 Content of reports

3.3.1 Current content requirements

Reports under the current Guidelines must include the following information about each breach of the Retail Law and Rules reported:

- the obligation which is the subject of the breach, including relevant provisions
- the nature of the breach and the reasons for that breach

- the date that the breach occurred, including (where relevant) the date on which the breach commenced and any days during which it continued before being identified by the regulated entity

- the extent and impact of the breach, including the customer category affected, number of customers and/or other regulated entities that have or are likely to have been affected, and the impact, whether financial or non-financial (if any)

- details of actions taken or planned to be taken to rectify the breach and to prevent it from reoccurring.

In combination, this information allows us to confirm whether the conduct described constitutes a breach of the Retail Law or Rules, and to conduct an initial assessment of the matter(s) reported under the Statement of Approach to determine whether further action by the AER is necessary or appropriate to their resolution.

Appendix B.3 of the Guidelines provides a template that can be used for all reports. The template is available in an Excel file on request. Alternatively, we have allowed businesses to prepare their own templates using appendix B.3 as a guide, provided that all required information is provided.

In January 2013 we wrote to businesses to provide guidance on the submission of biannual and annual reports that would reduce repetition where multiple breaches of the same provision are reported over six to 12 month periods. Our intent was to minimise the reporting burden on regulated entities whilst still ensuring that the AER receives sufficient information for its compliance monitoring functions.

The guidance allowed reports to group breaches of Type 2 and 3 obligations together for the purposes of compliance reports as a single line entry in the reporting template where:

- they have arisen from a single error or incident, or where multiple customers have been affected by the same breach or incident, or

- they have arisen from the same driver, for example, a recurring error or systemic issue.

In proposing this, we made it clear that the content requirements specified in the Guidelines must still be met if multiple breaches of the same provision were reported together, and asked that:

- the date of the first incident and of the most recent incident be provided, and the number of breaches that have occurred in each month of the reporting period be identified. In this way, reports would indicate whether the number of breaches has increased, decreased or remained constant throughout the reporting period.

- reports continue to include the period over which such breaches have extended, by providing the shortest and longest periods over which a breach continued, and the average duration of breaches of the relevant provision.

- where multiple customers were affected by breaches of the same provision, we asked that the reports continue to include details of the impact on customers, for example by providing the maximum, minimum and average financial impact of a breach.

We also included guidance for businesses in the AER Retail Energy Market Update: Compliance (July – December 2012) released in March 2013 after those reports had been submitted.

The majority of businesses have not followed this guidance. A significant proportion of reports have not provided complete information on the conduct identified as in breach, or sufficient detail to inform an assessment of causation, impact or materiality. This has limited our ability to draw meaningful conclusions about trends in compliance, and the materiality of any non-compliant conduct reported. It has also made it difficult to compare levels of compliance between businesses.

Our review of the Guidelines has therefore considered how we can clarify what information and data is to be submitted on breaches of the Retail Law and Rules to improve the quality of reports.

3.3.2 Proposed amendments to content requirements

Information and data required

The basic content of compliance reports will remain unchanged. However, the Guidelines (and reporting template) will be clarified to make our expectations more explicit. This will change nothing for businesses that are currently reporting correctly. It should, however, make it easier for others to submit complete reports.

The obligation which is the subject of the breach, including relevant provisions

Reports must clearly identify both the section or rule (including sub-sections/clauses) of the Retail Law and Rules that has been breached, and explain the specific requirement(s) within that section or rule the retailer or distributor reports has not been satisfied.

A disturbing number of obligations cited in reports have no bearing on the incidents to which they are linked. Other incidents clearly have implications for a number of reportable provisions but are attributed only to one. The requirement to specify the relevant requirement(s) in drafting a report should ensure that proper attention is paid to the matters reported and their implications for compliance.

The nature of the breach and the reasons for that breach

Reports must describe the conduct identified as a breach of the relevant requirement. This could be an act or omission. Acts or omissions resulting from error can still constitute a breach of the Retail Law and Rules.

It will not be sufficient for reporting purposes to simply restate the requirement not met. Reports must also explain why that conduct occurred, or was allowed to occur - for example:

- whether the conduct was consistent with internal processes or procedures, and
    - if not, why the inconsistent act or omission occurred, or
    - if so, why internal processes or procedures allowed or supported the act or omission that gave rise to breach.

- whether the conduct resulted from system error or system failure, rather than the act of a person or persons
- whether the conduct was isolated or part of a course of conduct
- whether quality assurance processes, checks or balances were in place that should have identified the conduct in question before a breach arose.

The date that the breach occurred, including (where relevant) the date on which the breach commenced and any days during which it continued before being identified by the regulated entity

Reports must identify the date on which the breach occurred, and the period over which it remained unresolved.

For the vast majority of provisions captured by the reporting framework, individual breaches will arise for each customer affected. Where multiple breaches of the same provision are reported together, reports must therefore include:

- the date of the first incident and of the most recent incident
- the number of breaches that have occurred in each month of the reporting period
- the shortest and longest periods over which an individual breach remained unresolved
- the average period over which breaches remained unresolved.

In this way, reports will reveal whether the number and materiality of breaches has increased, decreased or remained constant throughout the reporting period.

The extent and impact of the breach, including the customer category affected, number of customers and/or other regulated entities that have or are likely to have been affected, the nature of the impact, and the impact, whether financial or non-financial (if any)

Reports must identify the number of customers affected by any breach. The Guidelines also require that the category of customers affected be identified. Customer categories under the Retail Law and Rules relevantly include residential customers and small business customers. For some obligations, additional categories including hardship customers, customers on payment plans and life support customers will be relevant to the question of compliance and the impact a breach may have. For others, the distinction between customers on standard retail contracts and those on market retail contracts is critical to an assessment of compliance.

The Guidelines also require information on the impact that a breach has had on affected customers and/or other regulated entities.

Reports to date have rarely identified breaches as having an impact on other regulated entities (though several have alleged contributing behaviour on the part of others). Discussion of the impact on customers has been variable. Periods off supply due to non-compliant de-energisation of premises or un-notified planned interruptions appear to be readily identified. Detail of financial impacts on customers has been surprisingly absent from reports even

where they indicate billing errors, unauthorised changes of contract or price, or that compensation has been paid or charges reversed.

It is difficult to see how this requirement could be made more plain. While we are open to submissions in this area, we are not currently minded to impose more prescriptive requirements relating to the impact of a breach. Compliance with this requirement will, however, require greater commitment from businesses to both reporting requirements and related customer service issues.

Details of actions taken or planned to be taken to rectify the breach and to prevent it from reoccurring

Lastly, reports must include information on steps taken or planned to address reported breaches. Again, the level of information provided in reports has been variable. Amendments proposed reflect our expectation that, as a minimum, a business's response to a breach of the Retail Law or Rules will include measures to:

- correct the underlying act or omission
- restore the affected customer(s) to their original position (where appropriate, through financial compensation)
- reduce the risk that the same or similar conduct will occur again.

Reports will continue to require completion dates (or expected completion dates) for each of these measures, and confirmation of whether the matter is ongoing or considered by the business to be satisfactorily resolved.

Format of reports

The reporting template in Appendix B.3 of the Guidelines will be updated at the end of this consultation to reflect the requirements of the amended Guidelines.

To support consistency and reduce the risk that information or data is omitted, use of the revised template will be compulsory for all retailers and distributors. We therefore welcome suggestions on what format is best suited to this purpose.

3.4 Materiality and guidance on what the Retail Law and Rules require

Retailers and distributors have variously sought:

- guidance on interpretation of the Retail Law and Rules, what they require, and/or what the AER would accept as compliant with a particular obligation;
- guidance on what the AER considers necessary to meet an obligation to use best or reasonable endeavours to meet an obligation where those terms are applied in the Retail Law or Rules; and
- the introduction of a materiality threshold for reporting, so that businesses need only report breaches they consider to be material or systemic in nature.

3.4.1 Current requirements

The current Guidelines identify the provisions of the Retail Law and Rules to which reporting requirements apply. Any breach of those provisions must be reported, regardless of its nature, cause or consequence.

The Guidelines do not purport to explain or interpret provisions of the Retail Law and Rules that have been classified as type 1, 2 or 3 for reporting purposes. Questions have been raised as to what should be reported where an obligation requires a business to apply 'best' or 'reasonable endeavours'. Obligations to use best or reasonable endeavours to achieve an outcome or objective occur in a range of contexts. What constitutes best endeavours cannot be determined in advance, and must be judged objectively on the facts of a particular case. What is sufficient in one case may not be sufficient in another, and vice versa. It would not be appropriate for the AER to introduce a bright-line threshold for compliance where the Retail Law and Rules do not. Nor have we done so for reporting purposes.

Nor do the Guidelines provide benchmarks for reportable behaviour. To do so may create undesirable incentives for businesses to manage compliance by reference to reporting parameters rather than the obligations that they relate to. Where an incident arises and the question of compliance is not clear, businesses are required to report only where they believe a breach is reasonably likely to have occurred. Our view has been that it is better to report a potential breach and retract the initial assessment in a subsequent report or correspondence if investigation confirms that no breach has occurred, than to leave matters that cause concern unreported.

Ultimately, responsibility rests with businesses to identify and meet their obligations under the Retail Law and Rules. We encourage businesses to continuously review their obligations and the effectiveness of their compliance policies, systems and procedures to ensure that they are complying with them.

In developing the current Guidelines we considered, and rejected, submissions that businesses should be permitted to apply a materiality threshold to reporting requirements. Measures proposed have been largely quantitative, and more akin to performance indicators than an assessment of compliance. An assessment made by a business, for that business, was considered unlikely to be an objective measure of materiality. We were also concerned that a reporting threshold would create incentives to downplay the materiality of a breach to reduce the burden of reporting, or to defer the question of materiality to longer-term assessments at the expense of early detection and prevention.

While materiality may be relevant to the appropriate enforcement response when a breach is identified, our view was and remains that an assessment of materiality is only relevant after a breach has been identified. It is irrelevant to the initial question of whether a breach has occurred. Instead, the current Guidelines deal with the question of materiality by including, in the information that must be submitted in a report, information that goes to the materiality of a breach (for example, its nature, causation, and impact on customers or other businesses). This information is taken into account in the AER's assessment of the matter in accordance with the Statement of Approach. Despite the emphasis on materiality in feedback on the reporting framework, reports submitted provide little or no information of the nature proposed as a reporting threshold.

3.4.2 Proposed amendments

While we are open to new arguments on these matters as part of this consultation, we are not proposing to change our approach to these issues at this stage.

We have, however:

- Reviewed the Guidelines to make sure it is clear that potential, but unsubstantiated, breaches do not have to be reported (leaving it open, of course, for businesses to do so if they think it prudent);
- As discussed above, proposed amendments to better align compliance reporting with performance reporting cycles on related indicators, to allow better consideration by businesses and the AER of the context in which breaches are arising and of levels of compliance overall.[7]

When amendments to the Guidelines are finalised, revisions will be made to reporting templates to reflect these changes.

3.5 Other matters

3.5.1 Submission of reports

The current Guidelines allow submission of written reports by email or by post, and initial reports on type 1 obligations by email or telephone.

Email has been the most common method of submission, and appears the most reliable. To reduce delays in processing of reports once received, a dedicated email address will be created for reports under the Guidelines.

We propose to remove the facility to report by post, which has been rarely used and, when it has, has led to duplication and in some cases delays in receipt of reports.

We also propose to remove the facility for reports by telephone. Again rarely used, the need for a written record of a report made by telephone to be settled has meant in practice that there is little efficiency gained through this option.

3.5.2 Process for nil returns

The current Guidelines only require submission of reports where breaches of relevant obligations have been identified. Where no breaches have been identified, no report is technically required.

Most businesses who have not identified reportable breaches have nonetheless adopted a practice of confirming this by email or letter at the time reports would have been due. This practice has been useful to us in identifying when reports are late, as distinct from not

[7] Full alignment with annual performance reporting cycles for distributors under the National Electricity and Gas Rules has not been possible given deadlines under the Retail Law for publication of the AER's annual compliance reports.

required. It is therefore one that we propose to formalise in the amended Guidelines. We understand that a similar requirement applies to businesses reporting compliance to the Essential Services Commission in Victoria.

A short pro-forma statement has been prepared for this purpose, and if adopted will be included as an appendix to the Guidelines.