Notice of final instrument

AER Compliance Procedures and Guidelines

National Energy Retail Law, Retail Rules and Retail Regulations

July 2011

© Commonwealth of Australia 2011

This work is copyright. Apart from any use permitted by the Copyright Act 1968, no part may be reproduced without permission of the Australian Competition and Consumer Commission. Requests and inquiries concerning reproduction and rights should be addressed to the Director Publishing, Australian Competition and Consumer Commission, GPO Box 3131, Canberra ACT 2601.

Contents

Shortened forms **2**

1 Purpose of the AER Compliance Procedures and Guidelines **3**

2 Development of the guideline **4**

A. Summary of issues raised in submissions **5**

Shortened forms

ACCC	Australian Competition and Consumer Commission
ACCC/AER Information Policy	ACCC–AER Information policy: The collection, use and disclosure of information, available from the AER's web site
AER	Australian Energy Regulator
Electricity Law	National Electricity Law
Electricity Rules	National Electricity Rules
Gas Law	National Gas Law
Gas Rules	National Gas Rules
Procedures and Guidelines	The AER compliance Procedures and Guidelines, developed under s. 281 of the National Energy Retail Law
regulated entity	Has the meaning given in s. 2 of the National Energy Retail Law. *(A Retailer, a distributor or any other person identified in the national energy Retail Rules as a regulated entity.)*
Retail Law	National Energy Retail Law
Retail Regulations	National Energy Retail Regulations
Retail Rules	National Energy Retail Rules
Statement of Approach	Statement of Approach: compliance with the National Energy Retail Law, Retail Rules and Retail Regulations

1 Purpose of the AER Compliance Procedures and Guidelines

The AER will be responsible for monitoring compliance by regulated entities with their obligations under the Retail Law and Rules from the date of commencement in each participating jurisdiction.[1] To support this new role, the Retail Law empowers the AER to develop AER Compliance Procedures and Guidelines (the guideline).[2]

The guideline specifies the manner and form in which regulated entities are to submit information and data to the AER relating to their compliance with the Customer Framework.[3] These requirements to submit information and data are binding on regulated entities, and non-compliance may attract civil penalties or infringement notices.[4]

The Retail Law also requires compliance audits to be conducted according to the Compliance Procedures and Guidelines.[5] The guideline provides information on how audits will be carried out, and how the costs payable by regulated entities for compliance audits will be determined.[6]

Under the Retail Law regulated entities will be required to establish policies, systems and procedures to enable them to efficiently and effectively monitor their compliance with the requirements of the Customer Framework.[7] The guideline provides guidance on how these internal frameworks must be established and observed.

The guideline will apply to all regulated entities in participating jurisdictions from 1 July 2012.

The AER may amend the guideline at any time. Any amendments to the guideline will be made in accordance with the retail consultation procedure.[8]

---

[1] s.272 National Energy Retail Law
[2] s.281 National Energy Retail Law
[3] s.281(3) National Energy Retail Law
[4] s.274 National Energy Retail Law
[5] s.277 National Energy Retail Law
[6] ss.278(1),281(2)(b) National Energy Retail Law
[7] s.273(i) National Energy Retail Law
[8] s.281(2)(5) National Energy Law

2 Development of the guideline

This notice and the attached AER Compliance Procedures and Guidelines (the guideline) have been developed and published in accordance with the retail consultation procedure set out in cl. 173 of the National Energy Retail Rules. The AER has also released a final Statement of Approach to Compliance with the National Energy Retail Law, Retail Rules and Retail Regulations (the statement of approach) to accompany the guideline.

The guideline will take effect on 1 July 2012. As advised in the Ministerial Council on Energy's Standing Committee of Officials Bulletin No. 190 on 21 March 2011, all activities carried out by the AER prior to the commencement of the Retail Law (such as consultation, making instruments and decision-making) will be supported by appropriate transitional provisions enacted by participating jurisdictions to ensure instruments and decisions made as a result of these activities are validly made under the Retail Law and Rules and take effect on commencement of the Retail Law.

The AER commenced consultation on approaches to its compliance monitoring and enforcement under the Retail Law with the release of an Issues Paper on 31 May 2010, and a stakeholder forum on 21 July 2010 in Sydney (and via video-conference to other capital cities). Responses to the issues paper were addressed in a draft decision, draft Statement of Approach and draft Compliance Procedures and Guidelines released on 10 December 2010. The AER used this consultation and feedback to develop a second draft guideline and Statement of Approach, released on 23 March 2011. These papers, and written submissions received in response to them, are available on the AER's website.

Submissions in response to the draft guideline and statement of approach were taken into account in developing the final guideline and Statement of Approach released with this notice. The issues raised in those submissions and the AER's responses to them are set out in Attachment A to this notice.

A. Summary of issues raised in submissions

Issue	AER Response
Jurisdictional readiness Submissions raised the uncertainty surrounding the implementation of the Retail Law and the general complexity of implementation issues. Regulated entities were concerned that the AER has underestimated the nature and the extent of the tasks required for the introduction of the Retail Law Due to the complexity of implementation stakeholders were concerned that the AER expects full compliance with the customer framework from 1 July 2012, and that the draft guideline and statement of approach did not identify a transitional period after the commencement of the Retail Law and Rules for businesses to establish compliance. Stakeholders from Queensland also identified that the transitional arrangements in that jurisdiction would result in some aspects of the customer framework not applying to them, and thus would require clarification that they would not have to report against those sections.	The customer framework introduces new obligations on regulated entities, and variations to existing obligations in jurisdictional energy laws. The AER understands that the introduction of new obligations (or the variation of existing ones) requires review of, and potentially changes to, the internal systems and processed that regulated entities currently have in place to manage their compliance. We reiterate that all regulated entities should review the Retail Law and Rules to identify their obligations and ensure that they have appropriate systems and processes in place to manage their compliance with the new obligations. We also encourage regulated entities to work closely with members of the National Energy Customer Framework Joint Implementation Group in each jurisdiction as transitional and application instruments to implement the Retail Law and Rules are finalised. The statement of approach released with this notice acknowledges this as a relevant factor in assessing the likelihood that a breach will occur. The relative 'newness' of obligations in the Retail Law and Rules will be taken into consideration as we target our monitoring activities and determine which monitoring mechanisms (including audits) are best applied. The statement of approach also confirms that the AER will consider the time that a regulated entity has had to achieve compliance with a new obligation, and the steps that it has to achieve compliance with that obligation, in determining the appropriate enforcement response in the event that a breach of a new obligation is

	identified. There is no expectation that regulated entities, in those jurisdictions where the customer framework was not applied in full, would have to report on derogated sections of the Retail Law or Rules.
Engagement with stakeholders Stakeholders supported the AER's view that market intelligence may not necessarily indicate a breach of obligations, but expressed concern that the AER has only stated that it will endeavour to engage with the relevant regulated entity in this situation. Stakeholders noted that it was difficult to conceive a situation where the AER could not engage with a regulated entity regarding possible compliance issues, and sought a firm commitment in the AER's Statement of Approach to contact regulated entities where a compliance issue has been identified.	Part 4.2.1 of the final statement of approach released with this notice has been clarified to better reflect the AER's commitment to engage with the relevant party where potential compliance issues are identified through market intelligence and information.

Access to compliance audit reports prior to publication Regulated entities expressed concern that the guideline did not give a firm commitment that regulated entities would be provided with a copy of any audit report prior to its publication. Submissions sought a firm commitment from the AER that it will allow regulated entities to review any audit report prior to finalisation to ensure all facts in the audit are correct.	Clause 4.6.1 of the guideline has been revised to provide that a regulated entity will be given a reasonable opportunity to review an audit report relating to its compliance to identify any errors of fact prior to publication of that report.

Annual Audits Submissions agreed there was a need for audits to be conducted on a case-by-case basis, but differed on the issue of regular compliance audits. Consumer groups argued that regular compliance audits would test compliance systems so that the reliability of the processes put in place by regulated entities to collect data, and the accuracy of compliance and performance data provided to the AER by regulated entities, are assessed regularly. Regulated entities maintained that audits should be on a case-by-case basis and that the frequency of audits should be determined in response to potential issues identified by or to the AER, rather than through a fixed program of audits.	Nothing in the statement of approach and guideline released with this notice precludes the AER from determining that an audit of a regulated entity or group of entities is required on an annual basis. However, the AER has retained the flexibility to make such a determination on a case-by-case basis. This approach allows for a flexible and targeted audit program that will allow for a more cost-effective review of compliance in the industry. We will closely examine all information and data submitted by regulated entities under this guideline, and other guidelines and instruments under the Retail Law and Rules. We will also test that information and data against other information available in the market to identify potential anomalies or inconsistencies. Where concerns arise as to the reliability of a regulated entity's processes to collect data on its compliance or performance as required under the Retail Law and Rules, or where questions arise as to the accuracy of that data, the AER is able to specifically target an audit to determine any non-compliance. However, the AER does not consider that a commitment to annual audits for this purpose is necessary at this time.

Distributor recovery of audit costs Distribution businesses sought confirmation that the costs of an audit under the Retail Law would be recognised as a legitimate expense in the entity's price determination.	As noted when the draft procedures and guidelines were released in March 2011, forecasts of expenditure required to meet regulatory obligations imposed by the Retail Law and Rules in the delivery of regulated distribution services will be considered under the National Electricity and Gas Rules. These forecasts will be considered in the same way as expenditure to meet other regulatory obligations.
Classification of Type 1 reporting obligations by reference to individual provisions Stakeholders reiterated their concern that the AER had not identified the individual obligations to which reporting requirements will apply with sufficient clarity. Stakeholders consider that the imprecise wording of a number of the provisions targeted for compliance reporting could lead to disparate interpretations being applied to the circumstance under which an obligation may be considered to have been breached. It was also suggested that classification of an entire division of the Retail Law or Rules for reporting purposes in preference to classification of isolated provisions within a division would detract from the importance of individual obligations.	The statement of approach identifies the different factors that the AER has considered, and will continue to consider over time, when imposing reporting requirements on obligations and determining the appropriate frequency of reporting. We have reviewed the classification of obligations proposed in the draft guideline released in March 2011 in light of submissions. As a result of this review, we have amended the procedures and guidelines so that a Type 1 classification (requiring immediate reporting of a breach of an obligation) is identified by reference to individual provisions in the Retail Law and Rules. Obligations classified as Type 2 (six-monthly reporting) and Type 3 (annual reporting) are still classified by reference to Parts and Divisions in the Retail Law and Rules. We remain of the view that obligations under the Retail Law and Rules should be considered in the context of their combined effect, and that strategies to achieve compliance should reflect this. We expect regulated entities to develop internal

	policies, systems and procedures to capture the combined effects of, and interdependencies between, related obligations. Regulated entities will need to manage the distinction between Type 1 obligations within a division and the remaining obligations in that division carefully to ensure that they are meeting their reporting obligations.
Proposed reclassification of obligations Consumer groups submitted amendments to the selection and classification of particular divisions included in the draft guideline, including: ▪ Reclassification of obligations in Part 2, divisions 6 and 7 (Customer hardship and payment plans) of the Retail Law from Type 2 to Type 1. Classification of these obligations as Type 2 in the draft guideline was considered to send a message that these obligations are not critical and less important than following the correct procedures prior to disconnection, despite what was described as a direct link between disconnections and breaches of hardship and payment plan indicators. ▪ Reclassification of Part 2, division 4 of the Retail Rules (billing, payment difficulties and shortened collection cycles) from Type 2 to Type 1, on the basis that some of these obligations can have a critical impact on customers	The AER is not persuaded of the need to increase the reporting frequency attached to these obligations from six-monthly to immediate reporting. This should not be taken as an indication that the AER does not recognise the importance of these obligations and the impact they can have on consumers. As explained previously, the exception reporting framework established under the guideline is not the only means by which the AER will monitor compliance with these obligations. Other mechanisms, such as targeted compliance reviews, will be employed by the AER throughout the year to test both levels of compliance and the appropriateness of internal processes, systems and procedures developed by regulated entities to achieve compliance. Customer hardship, payment plans, management of payment difficulties and disconnections are also key elements of the AER's proposed performance indicators, which will provide important information as to the effectiveness of the protections available under the Retail Law and Rules and the way in which they are implemented by regulated entities. We will also have access to a wealth of information from energy ombudsman schemes and other sources of market intelligence that will help us to identify emerging issues in these areas.

and therefore meet the definition of Type 1 reporting obligations. ▪ The addition of Part 6, division 1 of the Retail Rules (disconnection notices) to the reporting framework, classified as Type 1 obligations. Stakeholders questioned whether sufficient information is available through other sources to adequately identify trends relating to compliance with these obligations. The impact that breaches of the disconnection warning process could have on a customers' ability to obtain assistance, and therefore on the likelihood of disconnection or other adverse impacts in the short term, were noted in support of this recommendation.	We maintain our commitment to only imposing reporting obligations where it is likely that we cannot gather sufficient information from other sources in a timely fashion. If it becomes clear over time that these other monitoring mechanisms are not providing adequate information to allow the AER to monitor compliance, the AER will consider imposing additional scrutiny through reporting requirements in line with the procedures and guidelines. The Retail Rules allow the AER to consult on appropriate amendments to the reporting requirements in the guideline. The guideline also allows the AER to escalate the reporting frequency that applies to an individual regulated entity should it become apparent that their compliance has fallen to an unacceptable level.
Reporting requirements for Type 1 obligations Submissions expressed reservations about the reporting requirements for Type 1 obligations. Stakeholders proposed that Type 1 obligations should only be reported after a possible breach has been investigated and confirmed as a valid breach. Stakeholders considered it is not feasible to make an informed assessment of the cause of the breach without further investigation.	The AER is not persuaded that regulated entities must conduct a full investigation into a possible breach prior to notifying the AER. We maintain that Type 1 obligations reflect critical requirements on industry participants and any breaches or possible breaches a likely to have a critical impact on customers, which could escalate if not rectified quickly. The AER therefore expects to be notified at the earliest juncture so that it may work with the regulated entity to resolve any potential compliance issues. Where there is doubt as to whether a breach has in fact occurred, we expect regulated entities to err on the side of caution and notify the AER that a breach may have occurred. This will allow us to work with the relevant regulated entity as it investigates to determine what has happened and how it can best be addressed. If through this process it becomes apparent that no breach has occurred, and that appropriate systems and processes to manage compliance have been established

	and implemented, no further action need be taken.
Reporting requirements during extreme weather events Stakeholders also suggested there should be a general exemption from having to meet the tight timeframes for the initial reporting of Type 1 obligations in the event of extreme weather events as defined by the Retail Rules. During this time resources will be diverted away from non emergency activities to focus on restoring safe supply and it is unreasonable for regulated entities to report within the timeframes under such circumstances.	The AER has amended the guidelines to establish alternative reporting requirements that will apply to affected regulated entities during extreme weather events. The AER agrees with stakeholders that the primary obligation on an industry participant during an extreme weather event is to focus on emergency activities and restoring safe supply to customers. Therefore the AER has amended the guideline to allow for breaches of Type 1 obligations to be reported to the AER no later than 20 business days from detection of the breach, once an extreme weather event, as defined under the Retail Rules, has been declared.
Consequences of providing false or misleading information to the AER Submissions questioned the need to include, in the pro-forma reporting template, an explanation of penalties under the Criminal Code for the provision of false or misleading information to the AER.	The provisions of the Criminal Code identified apply irrespective of their inclusion in the pro-forma report. However, we consider it prudent to record this in the pro-forma reporting templates for the benefit of those responsible for the final approval of these reports and their submission to the AER. These provisions are also noted in the guideline itself.
Requirement for CEO sign off on reports to the AER Regulated entities noted that the guideline allowed a delegate appointed by the CEO to sign immediate reports where breaches of Type 1 obligations are identified, and questioned the need for the CEO to sign consolidated reports of such breaches at the end of every 6 month	The guideline released with this notice reflects continued support throughout this consultation for the adoption of *Australian Standard 3806 – Compliance Systems* (AS3806) as an appropriate basis for internal compliance systems to be developed by regulated entities under the Retail Rules. Fundamental to AS3806 is the principle that a regulated entity's commitment to compliance be supported at the highest levels of the organisation.

reporting period. Stakeholders considered this to be unnecessary and that all reports submitted to the AER should be able to be approved by a delegate appointed by the CEO.	The AER maintains that, in accordance with AS3806, it is appropriate for the CEO of a regulated entity to take responsibility for the quality and reliability of information provided to the AER about a regulated entity's compliance. The requirement for a regulated entity's CEO to approve reports submitted to the AER ensures that this commitment to compliance is demonstrated at the highest levels in the organisation.
Variation of reporting frequencies for individual regulated entities Submissions sought clarification of the provision, in the draft guideline, for the variation of reporting frequencies that apply to individual regulated entities in response to their compliance levels.	Clause 3.6 of the guideline has been redrafted to clarify the operation of these provisions. With the exception of immediate reporting obligations for Type 1 obligations, the commitment to a maximum reporting frequency of once per quarter and a minimum reporting frequency of once per year have been maintained. Any increase or decrease in the reporting frequency required of a regulated entity will be triggered by observations of compliance over four consecutive reporting periods or a period of 24 months (whichever is the lesser). A decision to increase or decrease reporting frequency is not guaranteed, and will remain subject to the considerations set out under the new clause 3.6.6.
Thresholds for compliance with high volume tasks Regulated entities reiterated their concern that the AER has not identified a compliance threshold for high volume tasks. Regulated entities recommended the AER adopt benchmark for acceptable levels of compliance, which if met would mean that breaches did not need to be reported to or actioned by the AER.	As explained in the earlier stages of this consultation, the AER intends to consider the appropriateness of a threshold for acceptable compliance with high volume tasks when sufficient information on levels of compliance with the new Retail Law and Rules is available to do so. Regulated entities will be expected to report any breaches of Type 1, 2 or 3 obligations to the AER in accordance with the procedures and guidelines. The

	AER's response to any breaches will be proportionate to the nature and impact of the breach. The factors we are likely to consider in determining the appropriate response are explained in the Statement of Approach released with this notice.
Requirements to report possible breaches Submissions expressed concern with the requirement to report future possible breaches. Stakeholders were concerned that despite the amendment in the draft guidelines, the concept must be very clear as failing to report a possible breach is subject to the enforcement mechanisms under the Retail Law. Therefore, stakeholders stated that in the interests of certainty, the concept should be removed, but if the AER considers that it should remain, then the AER should provide examples of how it expects the concept to apply. Stakeholders noted that possible breaches are to be reported in the same time frame as actual breaches. Stakeholders were of the view possible breaches of Type 1 obligations should only be reported when they have been adequately investigated and confirmed as being a valid breach as there could be erroneous reporting or difficulties reconciling reports of breaches or possible breaches. Further, it was noted that the concept of future breach does not make sense with respect to Type 2 and 3 reporting. The	As stated in relation to reporting of Type 1 obligations, the AER is not persuaded that regulated entities must conduct an investigation into a possible breach prior to notifying the AER. The AER has included the requirement to report possible breaches to ensure that engagement between the relevant business and the AER occurs at the earliest time. Where a potential compliance issue exists the AER intends to work with the relevant party to ensure that all steps are taken to either rectify the breach when identified or ensure that the breach does not eventuate. The AER is concerned that where possible breaches are not reported the potential for the issue to become widespread or have a more critical impact could increase. The statement of approach includes a commitment from the AER to work closely with participants to understand their obligations, and to develop appropriate responses to potential compliance issues as they are identified. Effective and cooperative prevention of a possible contravention is preferable to the AER taking action after a breach has occurred. The guideline has been amended to reflect that reporting of possible breaches will only be required for Type 1 obligations. This reflects the critical nature of those obligations, and the AER's requirement that it be notified at the earliest possible instance.

relevant submission argues any possible breaches should either have been rectified or become an actual breach by the time a report on the relevant period is submitted. It was also noted that the Type 2/3 pro forma does not refer to possible breaches.	
Consideration of non-financial impacts of breaches Stakeholders drew attention to the guidance provided in the pro-forma template attached to the draft guideline. The guidance required regulated entities to provide a summary of the impact of a breach on customers, and explicitly requested details of financial impacts. This was seen to imply that the AER is only interested in the financial impact of a breach. Therefore, stakeholders recommended that the AER amend the guidance to clarify that regulated entities should include more than just financial impacts.	The AER has amended the pro-forma attached to the guideline to require both the financial and non-financial effects of each breach to be provided by the regulated entity. This amendment recognises that some breaches may not have a significant financial impact, but may impact on customers in various other ways. Section 4.1.1 of the statement of approach identifies various potential impacts, in addition to the financial impact. The AER expects regulated entities to include details of these non-financial impacts where breaches of an obligation are reported.
Audit consultation process Submissions expressed support for the AER's decision to recognise the need for a consultation period regarding the audit scope in the guideline. There was some concern however, that the AER did not provide adequate detail in the statement of approach or guideline on the consultation process, including the ability to conduct multiple rounds of consultation.	The AER has amended the statement of approach to highlight the commitment to consult with relevant parties in determining the scope, coverage and timing of any audits. Both the statement of approach and guideline provide for a consultation process that reflects the AER's commitment to consult with regulated entities, whilst ensuring that the process remains flexible and can be tailored to reflect the complexities of any given audit. The consultation process set out in the guideline will allow for multiple rounds of

	consultation where appropriate, with audits surrounding more complex compliance issues or involving multiple parties more likely to require additional consultation.
Distributor and retailer interaction Regulated entities sought clarification around the reporting requirements of obligations where they acted on information provided by other participants. Particularly where non-compliance has occurred as a result of a failure by a regulated entity to meet its obligations. Submissions suggested that the guideline should clearly allocate responsibility for reporting breaches. It was also proposed that possible breaches for Type 1 obligations should only be reported after adequate investigation and the breach has been confirmed as a valid breach and the responsibility for that breach, be it retailer or distributor has been allocated.	Where a regulated entity's ability to comply with an obligation is dependent on the actions of another party it remains imperative for the regulated entity to develop appropriate processes and systems to manage these interdependencies. The fact that the actions of another party may contribute to a breach of an obligation by a regulate entity does not change the fact that a breach has occurred. We expect such breaches to be reported in the same way as any other. The pro-forma reporting template has been amended to allow regulated entities the opportunity to identify where the actions of other parties may have contributed to a breach. It is important for the AER to be made aware of all relevant circumstances surrounding a breach of the customer framework. This will allow the AER to identify issues of contributory behaviour and work with the relevant regulated entities to ensure that appropriate systems and processes to ensure compliance with related obligations are in place.