



Notice of instrument: Amendments to Retailer authorisation guideline

December 2014

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Inquiries about this publication should be addressed to:

Australian Energy Regulator

GPO Box 520

Melbourne Vic 3001

Tel: (03) 9290 1444

Fax: (03) 9290 1457

Email: AERInquiry@aer.gov.au

AER Reference: 51467

Amendment Record

Version	Date	Pages
1.0	December 2014	13

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Shortened forms

Shortened form	Long form
ACCC	Australian Competition and Consumer Commission
AEMO	Australian Energy Market Operator
AER	Australian Energy Regulator
ASIC	Australian Securities and Investment Commission
guideline	Retailer authorisation guideline
NEM	National Electricity Market
Retail Law	National Energy Retail Law
Retail Rules	National Energy Retail Rules
RoLR	Retailer of Last Resort

Nature and authority

Introduction

This Notice accompanies the revised AER Retailer authorisation guideline. These documents have been developed and published in accordance with the retail consultation procedure set out in clause 173 of the National Energy Retail Rules (Retail Rules). The guideline will take effect from publication.

The AER consulted on the guideline in October 2014 in relation to the amendments which streamlined a number of requirements in the July 2011 version 1.0 of the guideline. The AER received one submission, which it took into account in developing the final guideline.

Authority

The National Energy Retail Law (Retail Law) allows us to make and amend the AER's Retailer authorisation guideline in accordance with the retail consultation procedure.¹

Role of the guideline

The Retail Law requires anyone who is selling energy to hold a retailer authorisation (or to be exempt from the requirement to hold an authorisation). To assist potential applicants, we have developed a guideline under the Retail Law, which:

- specifies the information that we require in an application for retailer authorisation
- explains how we will apply the entry criteria for an applicant for a retailer authorisation
- provides information about
 - the surrender or transfer of retailer authorisations and
 - the revocation of retailer authorisations.²

The purpose of the guideline is to assist potential applicants for retailer authorisation to understand both the nature of information required for an application for authorisation, and to explain the process that we follow in assessing and deciding applications.

Definitions and interpretation

In this notice, key words and phrases have the meaning given to them in:

- the shortened forms, or
- if not defined in the shortened forms, the Retail Law and Retail Rules.

¹ Retail Law, s. 61; Retail Rules, r. 173

² Retail Law, s. 117

Version history and effective date

The superseded version of the guideline is version 1.0 (July 2011).

The current version of the guideline is version 2.0 (December 2014).

Overview

The AER's Retailer authorisation guideline (guideline) provides information to applicants and potential applicants on how to apply for an energy retailer authorisation and what they need to include in their applications. It also contains information on how we assess applications against the entry criteria set out in the Retail Law, which are:

- the organisational and technical capacity criterion—the applicant must have the necessary organisational and technical capacity to meet the obligations of an energy retailer
- the financial resources criterion—the applicant must have resources or access to resources so that it will have the financial viability and financial capacity to meet the obligations of an energy retailer
- the suitability criterion—the applicant must be a suitable person to hold an energy retailer authorisation.³

The AER started accepting authorisation applications from mid-2011 in anticipation of the proposed start of the National Energy Customer Framework (NECF) in July 2012.⁴ Since then we have approved 17 applications for electricity retailer authorisation and four for gas authorisation. This has given us an opportunity to gauge the effectiveness of the guideline and to identify areas for improvement. In particular, we see several areas in which the guideline can be streamlined and information requirements clarified and, in some instances scaled back. We consider this will provide clearer guidance for potential applicants and more broadly, reduce regulatory burden on market entrants. We have also separated the information requirements for start-up and existing businesses where they are different.

³ Retail Law, s. 90

⁴ The ACT and Tasmania adopted the NECF in July 2012, South Australia in February 2013, and New South Wales in July 2013.

Amendments to the guideline

Our amendments to the guideline are summarised below. The revised guideline is also available on our website at www.aer.gov.au.

Introduction and general particulars

The introductory section of the guideline has been simplified. It also includes additional details about the application assessment process and about the processes for withdrawing applications and amending authorisations. The guideline clearly notes we do not charge authorisation fees or application fees.

The guideline also clarifies the AER's role in assessing applications, namely to establish whether applicants have the capacity and resources to enter the energy retail market. It notes ongoing prudential assessments are made by the Australian Energy Market Operator (AEMO) and in the event of retailer failure, customers of the failed retailer will be transferred to a Retailer of Last Resort (RoLR).

The guideline now also expands on the differences between, and circumstances in which, a retailer authorisation (as opposed to a retail exemption) will be appropriate, and has been amended to give greater certainty as to when the AER will consider a sale to be made "at premises". The guideline also makes clear that an authorised retailer cannot also hold a retail exemption.

Minor wording amendments have been made to the 'general particulars' information that we ask applicants to provide. We have also included a new information requirement, namely that applicants provide a registered business address.

Entry criteria

We have revised the background discussions of the entry criteria—removing the overlap between the respective explanations of the information requirements and the requirements themselves and clarifying some of the requirements. We explain why we ask for certain information and have linked our explanations with the specific information requirements. We have removed a number of information requirements that we consider unnecessary to our assessments.

Organisational and technical capacity criterion

Energy market experience

We make clear in the guideline that we expect key staff to have energy retail experience. We also ask applicants who do not have any energy retail experience to detail how they will acquire such experience.

Rather than ask whether services are conducted in-house or out-sourced we ask applicants to advise how retail activities are to be conducted. The specific information requirements for persons holding a share of 20 per cent or more in the business have also been removed. What is important for us when assessing authorisation applications is the experience of those involved in the day-to-day running of the business, not the experience of part-owners.

Business plan

The business plan makes up another key part of the authorisation application assessment. In particular we will request information on the applicant's strategic direction and objectives, and forecast results including assumptions for those forecasts. We do not consider it necessary for applicants to describe identified market opportunities as we consider this area to be covered through the strategic direction and objectives. Similarly applicants should not have to provide financial statements as part of their business plan as these are sought under the financial resources criterion.

Quality assurance and insurance details

Details of quality assurance accreditations and insurance arrangements have not carried much weight in our assessments to date. Many applicants do not hold quality assurance accreditations and while applicants should have appropriate insurance cover, we do not need to know what types of cover and the level of cover they have – managing this is the responsibility of the applicant. We have therefore deleted these information requirements.

Compliance strategy including training and human resources

The compliance strategy forms one of the most important components of the authorisation application, but to date has been one of the areas overlooked or not fully addressed by applicants.

The guideline has therefore been amended to make it clear that applicants must demonstrate an understanding of the Retail Law and Retail Rules, and of their obligations under the Retail Law and Retail Rules. Additionally, applicants should demonstrate an understanding of relevant industry and technical requirements of jurisdictions in which they intend to operate.

Staff training ties in closely to the overall compliance strategy. Rather than seek details of applicants' specific training programs and policies, we have amended the information requirements to instead seek details of how the skills and knowledge gaps of staff will be met, for example, through training or recruitment.

We previously asked for a written declaration from the applicant's director/s (or equivalent) that the applicant's risk management and compliance strategies had been endorsed by the director of the business and subject to an external assurance process (for example, an external audit). This requirement has been amended so applicants need only provide evidence that external assurance has occurred.

We have deleted the information requirements related to the applicant's human resources processes. The application should address human resources issues more broadly in the context of the applicant's compliance strategies and in terms of how skill and knowledge gaps will be filled.

Third parties

Applicants intending to outsource functions to a third-party will be asked to provide evidence of the controls in place for that party's compliance with the Retail Law and Retail Rules. This

is because the authorised entity is ultimately responsible for any compliance failures, regardless of whether these were caused by a third party contractor.

As we routinely ask applicants for this information as part of the application process, it is appropriate that this be reflected in the guideline.

Some retailers will not be registered in the wholesale energy market and will therefore not be covered by the RoLR provisions (for example, embedded network operators). They therefore need alternative arrangements in case their business fails. Such applicants will need to outline these arrangements in their authorisation applications.

Relationships with other regulators

As all NEM jurisdictions move to adopt the Retail Law, it is increasingly unlikely that retailers will have ongoing relationships with jurisdictional and technical regulators, and government departments. We have therefore deleted the information request that seeks information on applicants' arrangements with jurisdictional bodies.

It is important for applicants to demonstrate an awareness of any jurisdictional requirements (technical and other) that apply to energy retailers, but this information is to be provided as part of the compliance strategy.

We understand that retailer authorisation is the first step to market entry, and therefore applicants are unlikely to have finalised agreements with AEMO, distributors or energy ombudsmen until authorisation is granted. However, we expect applicants to have made contact with any relevant bodies and taken steps to establish arrangements. As such, we ask applicants what steps have already been taken and when such arrangements are expected to be completed.

Retailer of Last Resort

The RoLR information request has been moved to the suitability criterion section, as we consider it is more relevant to suitability.

Financial resources criterion

The AER's assessment of an applicant's financial resources is a point-in-time assessment. The AER is not a prudential regulator, and therefore our assessment is not intended to confirm an applicant's ongoing financial viability, only their capacity to meet the entry criteria.

The revised guideline clarifies our primary considerations when assessing an application are the applicant's current financial position and their future financial position—specifically, whether they have sufficient cash, or can access cash, to meet their proposed business activities.

We note in the revised guideline some additional costs retailers should take into account such as energy purchases, network fees and credit support, and the need for businesses to have sufficient cash to cover short-term pressures, like high wholesale prices.

Financial statements

We have simplified the number of declarations and reports that applicants' key officers are required to provide and now only ask that the applicant's Chief Financial Officer/Chief Executive Officer/director confirm that the applicant is a going concern and that they are unaware of any factor that would impede the applicant's ability to finance their energy retail activities for the next 12 months. As under the previous guideline, applicants must provide external assurance of the applicant's financial viability.

Given also our focus on applicants' current cash positions, we consider that we do not need three years' worth of financial reports in all instances and that generally 12 months is enough to demonstrate whether a business is profitable or not. We note, however, that we may ask for the previous two years reports if this is not the case.

Forecasts, ASIC documents, and credit ratings

Forecasts and key assumptions are essential to an authorisation application. Under the information requirement for forecasts, applicants are asked to highlight key assumptions and risks. The specific reference to risk management strategies is therefore considered redundant and we have removed it.

We have retained requests for such key information as forecasts, financial statements, details of any guarantees, and auditor declarations, and have removed or simplified those information requests that did not contribute greatly to our assessment of financial capacity.

Specifically, we have deleted the requirement to provide information submitted to ASIC under Chapter 2M of the *Corporations Act 2001* (Cth).

Additionally, as many applicants are new market entrants they do not have credit ratings. Lack of a credit rating is not detrimental to an applicant's assessment but has proven useful where applicants have provided this information. We will therefore retain this information request, but have removed references to particular credit rating agencies and will require it only if one is available.

Applicants that are part of a larger group structure

We have made a number of amendments to the information requirements for applicants that are part of a group of companies or a partnership.

Most importantly, we now only require information relating to the group or partnership where the applicant relies on another entity in the group for financial support. Additionally, we consider it unnecessary for the ownership structure of the group to be traced back to a natural person and this requirement has been deleted.

Finally, we do not consider it necessary for an officer of a parent company to provide a declaration that the applicant is a going concern and that they are not aware of any factor that would impede their ability to operate as an energy retailer for the next 12 months. An officer of the applicant entity is already required to provide this declaration and therefore the additional declaration is redundant.

Suitable person criterion

We have made only minor amendments to this section of the guideline

As noted in the organisational and technical capacity section above, we have moved the information requirement on whether an applicant has triggered a Retailer of Last Resort event to the suitability criterion of the guideline.

Secondly, we consider it unnecessary for each member of the applicant's management team to sign a declaration that they have not been disqualified. We have amended the guideline so that a declaration from the CEO (or equivalent), on behalf of the management team, is all that is required. Declarations should address all bankruptcies, not just overseas ones.

Information on the transfer and surrender of a retailer authorisation

Since developing our guideline in 2011, we have had one application to surrender a retailer authorisation. On 14 March 2014, the AER approved applications from Australian Power and Gas (APG) to surrender its electricity and gas retailer authorisations. As part of our decision to allow the surrender we imposed a number of conditions on APG. One of those conditions was to inform the AER when all conditions had been met and customers transferred to the incoming retailer, AGL. Additionally, APG was obliged to ensure that transferred customers would be no worse off under their new AGL contracts.

We approved APG's application to surrender because we were satisfied the arrangements in place for the transfer of APG's customers were appropriate.

Arising out of this surrender process, we have developed a set of principles to guide our assessment of surrender applications, and we have amended the guideline to include these principles. We consider similar principles should also apply to the transfer of a retailer authorisation.

We have not yet undertaken a process to revoke a retailer authorisation, and have not proposed any changes to the revocation process explained in the guideline.

Principles for approving the transfer of a retailer authorisation

In assessing an application to transfer a retailer authorisation, we will assess the incoming retailer as if they were an applicant for authorisation, and will apply the Retail Law entry criteria. Transfer applications must demonstrate the transfer of customers will be appropriately managed to minimise any disruptions. We have developed three principles to help guide our decision on a transfer application, namely that:

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

- customers have all the necessary information to make an informed choice about their energy service.

These principles have been added to the guideline to provide transfer applicants with greater clarity, and improve the transparency of our assessment process.

Principles for approving the surrender of a retailer authorisation

When assessing an application for surrender of a retailer authorisation, the retailer must demonstrate its customers will continue to be supplied, and therefore any arrangements to transfer customers to another retailer should be outlined in the application. As part of our assessment of APG's application to surrender its retailer authorisations we developed three principles to guide our assessment of surrender applications, namely that:

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

We have included these principles in the guideline to help applicants prepare their surrender proposal, and to improve transparency for all interested parties.