



# AER Compliance and Enforcement Policy

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Australian Competition and Consumer Commission,  
GPO Box 3131,  
Canberra ACT 2601  
or [publishing.unit@acc.gov.au](mailto:publishing.unit@acc.gov.au).

Inquiries about this publication should be addressed to:

Australian Energy Regulator  
GPO Box 520  
Melbourne Vic 3001

Tel: 1300 585165

Email: [AERInquiry@aer.gov.au](mailto:AERInquiry@aer.gov.au)  
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# 1 Objectives

The Australian Energy Regulator (AER) regulates energy networks, retail and wholesale markets.<sup>1</sup> We recognise that energy is an essential service for Australian households and businesses and critical to the long-term success of the Australian economy. As set out in our Strategic Statement<sup>2</sup> our purpose is to make all Australian energy consumers better off, now and in the future.

Households and businesses need to be confident that the energy markets are working effectively and in their long term interests, so that they can participate in market opportunities as fully as possible. They should be able to trust that we are monitoring and enforcing energy businesses' compliance with the national energy laws and rules. This confidence and trust is particularly important as the market evolves.

Our approach to compliance and enforcement is underpinned by the objectives of the national energy laws, that is: *to promote efficient investment in and efficient operation and use of energy services for the long term interests of consumers with respect to price, quality, safety, reliability and security of supply of energy.*<sup>3</sup>

We aim to support the national energy objectives by:

- Promoting competition in energy markets.
- Effectively regulating electricity and gas networks.
- Protecting consumers in the provision of energy services particularly vulnerable consumers.

This document outlines how we ensure accountability, confidentiality, timeliness, proportionality and fairness in our approach to compliance and enforcement. It outlines the processes we use to maximise the impact and efficiency of our work and it guides the prioritisation of our compliance and enforcement activities.

This policy should be read in conjunction with our Compliance and Enforcement Priorities available on our website.

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<sup>1</sup> The AER regulates electricity networks and covered gas pipelines, in all jurisdictions except Western Australia. We regulate compliance with the laws for the National Electricity Market and spot gas markets in southern and eastern Australia. We regulate compliance with the Retail Law. Our retail energy market functions cover New South Wales, South Australia, Tasmania, the ACT and Queensland.

<sup>2</sup> For more information on the AER's Strategic Statement follow this link: [AER Strategic Statement](#)

<sup>3</sup> Section 7 National Electricity Law, section 23 National Gas Law and section 13 National Energy Retail Law.

## 2 Responsibilities

### 2.1 Our responsibilities

The AER is, amongst other functions, responsible for monitoring, investigating and enforcing compliance with obligations under the National Electricity Law, National Gas Law, National Energy Retail Law and the respective Rules and Regulations (collectively, national energy laws).<sup>4</sup>

The scope of our compliance and enforcement work addresses conduct that:

- significantly harms consumers, in particular those who are vulnerable or disadvantaged
- harms the competitiveness or the operation of energy markets
- harms the security or reliability of the gas and electricity systems
- inhibits consumers' participation in energy markets

We monitor and enforce compliance in the wholesale electricity and gas markets to ensure participants comply with the National Electricity Law and Rules and the National Gas Law and Rules.

We also have monitoring and enforcement roles under the National Energy Retail Law and Rules in the ACT, Tasmania, South Australia, New South Wales and Queensland. This role includes making sure customers are properly protected when entering into contracts with retailers, or when they need particular protections because they are in financial difficulty or require life support equipment. It also includes authorising retailers to sell energy and administering the national Retailer of Last Resort scheme aimed at protecting customers and the market in the event of a retail business failure.

In addition to our economic regulatory functions we also monitor and enforce compliance by network businesses with national energy laws.

Businesses and households are able to contact the AER for information, but we are not a complaint handling or dispute resolution body. We encourage consumers wanting to make a complaint about their gas or electricity service to contact the relevant business in the first instance. Small energy customers can also contact their state or territory energy ombudsman.

### 2.2 Businesses' responsibilities

The national energy laws set out a range of obligations on businesses participating in the energy markets including the provision of network services. It is the responsibility of businesses to be aware of all their obligations under the national energy laws and to ensure they have the proper policies, systems and procedures in place to ensure they are complying with those obligations.<sup>5</sup>

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<sup>4</sup> Including the National Electricity Rules (Northern Territory) published by the AEMC and the relevant parts of the National Electricity (Victoria) Act 2005.

<sup>5</sup> In this document we generally refer to 'businesses', however we can also take enforcement action against individuals.

Under the National Energy Retail Law and Rules, businesses are required to self-report certain breaches. The higher the consequences of non-compliance, the greater the frequency of the reporting to the AER.<sup>6</sup>

We will assist businesses to understand the general nature of the obligations under the national energy laws. However we expect businesses to seek independent legal advice as they consider appropriate in order to understand their own compliance obligations. We also expect businesses to have comprehensive and effective compliance programs and systems in place to manage their obligations. We expect businesses to self-report and cooperate with us when compliance issues arise.

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<sup>6</sup> The AER Compliance Procedures and Guidelines (December 2017) set the frequency of reporting.

## **3 Our approach**

### **3.1 Fostering compliance**

Fostering a culture of compliance is critical to achieving the objectives of the national energy laws. Ultimately, prevention of a breach through our compliance activities is preferable to taking action after the breach has occurred. We are committed to driving a high level of compliance within the energy industry and will use the most appropriate compliance tools available to achieve our compliance objectives.

We will assist businesses to understand the obligations created by the national energy laws by publishing compliance bulletins and guidance notes as well as engaging directly through forums and meetings to identify and address issues of concern. It is not our role, however to provide legal advice to energy businesses in regards to their obligations.

We use industry-wide compliance reviews, compliance audits of businesses, issue compliance checks and publish performance and market reports. These activities are aimed at testing the extent to which businesses are complying with their obligations; promoting market transparency and identifying areas for future compliance and enforcement work.

### **3.2 Applying a risk based approach**

We are selective in the matters we assess and progress either through compliance or enforcement action. We prioritise and focus on matters that provide the greatest overall benefit to both consumers and the energy market. We also seek to pursue matters in the public interest and seek to leverage any outcomes across the sector to inform our work.

We use a risk-based approach to monitoring and assessing compliance matters and conduct risk assessments under the national energy laws to focus our monitoring and compliance activities. We draw on a wide range of information sources and monitoring tools to complement our risk assessments and prioritise our activities.

### **3.3 Working with other agencies**

We work closely with other regulators and government agencies on regulatory issues to share and inform our work in compliance and enforcement, such as state and territory regulators and energy ombudsman schemes.

We also work closely with the Australian Competition and Consumer Commission (ACCC) given our complementary roles in ensuring effectively competitive energy markets and in protecting energy consumers.

The ACCC is the economy wide, consumer protection and competition agency. In addition to the role given to the AER under the national energy laws and rules to protect consumers, the Competition and Consumer Act 2010 provides the ACCC with additional powers to protect energy consumers from misleading or deceptive conduct, unconscionable conduct and unfair practices, and to assess energy mergers and authorisations.<sup>7</sup>

The AER and ACCC also have roles under the Competition and Consumer (Industry Code—Electricity Retail) Regulations 2019 (the Code). The AER sets price caps for standing offers

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<sup>7</sup> ACCC also has a role in wholesale price monitoring as directed by the Commonwealth Treasurer.

for retail electricity supply in certain distribution zones in Australia and the ACCC has enforcement responsibility for compliance with the Code. This includes additional controls over the advertising of offers for retail electricity supply.

The ACCC and AER Information Policy<sup>8</sup> sets out how we share and use information. The Policy provides guidance on the collection, use and disclosure of information between the two agencies. Information (including confidential information) collected by the ACCC may be used by the AER.

We also work with energy market bodies and the Council of Australian Governments Energy Council (COAG EC) on matters of common interest, including compliance and enforcement related issues. In some instances it will be appropriate for us to work jointly with other agencies. In other cases we may refer a matter to another agency more suited to handle the matter. We will always consider which agency is best placed to deal with any particular issue, and will coordinate with other regulators and agencies where appropriate.

### **3.4 Working in a transparent manner**

We are committed to the principles of transparency and accountability in carrying out our compliance and enforcement work. We recognise that subject to confidentiality, publishing the outcomes of our compliance and enforcement activities has a positive effect on influencing industry behaviour.

We distribute information via various reports including enforcement outcomes and compliance bulletins or reports. These reports may include details of relevant incidents, the main findings, reasoning behind those findings, and outcomes. We also have particular statutory obligations to report annually on our compliance activities.

We will regularly update this Compliance and Enforcement Policy to ensure it reflects our current approach to compliance and enforcement. We will publicly advise stakeholders of any updates to our policy.





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<sup>8</sup> [ACCC and AER Information Policy: collection and disclosure of information](#)



# 4 How we monitor compliance

We use a wide range of information sources and monitoring tools to assess levels of compliance and identify potential breaches of the national energy laws.

	<p><b>Stakeholder Intelligence</b></p> <ul style="list-style-type: none"> <li>• Receiving information from stakeholders (including consumers, businesses, energy ombudsman schemes, government agencies and consumer groups)             <ul style="list-style-type: none"> <li>○ The AER’s Contacts team provide a service for customers and other interested parties to raise concerns about the conduct of energy related businesses.</li> <li>○ The AER’s Customer Consultative Group advises on issues affecting energy customers and any emerging issues the group considers we should direct our attention to.</li> </ul> </li> </ul>
	<p><b>Information Requests and Compulsory Notices</b></p> <ul style="list-style-type: none"> <li>• Issuing energy businesses with information requests to inform our compliance &amp; enforcement activity.</li> <li>• Using statutory information gathering powers to compel the provision of information and documents where necessary<sup>9</sup>.</li> </ul>
	<p><b>Market Surveillance</b></p> <ul style="list-style-type: none"> <li>• Continuous monitoring of electricity and gas wholesale markets, including bidding and rebidding, dispatch and prices, network constraints and outages, and forecasts of demand, production and capacity<sup>10</sup>.</li> </ul>
	<p><b>Business Reporting</b></p> <ul style="list-style-type: none"> <li>• Developing guidelines under the Retail Law that impose an obligation on businesses to identify certain breaches and report them to us within a specified period<sup>11</sup>.</li> <li>• Encouraging businesses to self-report other breaches of obligations under the national energy laws.</li> </ul>

<sup>9</sup> Sections 21 and 28 National Electricity Law; sections 35 and 42 National Gas Law and sections 206 and 309 of the National Energy Retail Law.

<sup>10</sup> In the retail sector this includes reviewing specific information regulated entities are required to publish on their websites including prices, contracts, hardship policies and dispute resolution procedures.

<sup>11</sup> Our Compliance Procedures and Guidelines are made under section 281 of the Retail Law.



### **Audits**

- Undertaking, or requiring businesses to undertake, compliance audits to assess how businesses manage compliance with specific obligations under the national energy laws.
- External audits are managed by our staff and external auditors may be used<sup>12</sup>.



### **Targeted compliance reviews and projects**

- Undertaking targeted reviews of businesses' compliance with a particular obligation or group of related obligations of the national energy laws.
- Undertaking strategic compliance projects to resolve identified compliance problems, inefficiencies or potential risks of harm.

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<sup>12</sup> Where an audit is carried out by or on behalf of the AER under the National Energy Retail Law, section 278 of the National Energy Retail Law allows the AER to recover the costs of the audit from the relevant participant.

# 5 How we enforce compliance

Our approach to compliance focusses on preventing and addressing consumer harm and ensuring the effective operation of the energy market and efficient operations of networks. It enables us to hold to account specific businesses that fail to comply with their obligations under the national energy laws. It allows us to leverage enforcement outcomes across the sector and achieve the strategic benefits of general deterrence.

When taking enforcement action, we seek to:

- stop the unlawful conduct of the business in question
- deter offending conduct both in the specific business and in the industry more generally
- ensure future compliance with the law
- encourage the effective use of compliance programs
- penalise offenders, where warranted.







The diagram above contains a non-exhaustive list of potential factors we consider when deciding on an enforcement approach where it appears a breach has occurred.

Each case will be assessed on its own merits taking into account all the relevant facts and circumstances of the matter. Not every factor will be relevant in every situation and our assessment will be dependent on the circumstances of each individual situation.

We will choose the most appropriate enforcement tools to ensure the best possible outcome for consumers and the industry in a timely manner that manages risk proportionately. We have discretion in deciding whether to take enforcement action and the nature of that action.

## 5.1 Enforcement options

We have a range of enforcement options that are available for us to respond and resolve breaches of the national energy laws, highlighted in the diagram below.

	<p><b>Administrative resolutions</b></p> <ul style="list-style-type: none"> <li>• Accepting a commitment (“voluntary undertaking”) in writing from a business to address non-compliance with national energy laws.</li> <li>• Recommending improvements to businesses’ internal practices, e.g. implementing a compliance program, conducting staff training.</li> <li>• Monitoring compliance with those written undertakings</li> </ul>
	<p><b>Infringement Notices</b></p> <ul style="list-style-type: none"> <li>• Issuing businesses with infringement notices if we consider that a breach has been committed.             <ul style="list-style-type: none"> <li>○ The penalty payable under an infringement notice is currently \$4 000 for a natural person or \$20 000 for a body corporate<sup>13</sup>.</li> </ul> </li> </ul>
	<p><b>Court Enforceable Undertakings</b></p> <ul style="list-style-type: none"> <li>• Accepting a formal commitment (undertaking) in writing from a business in relation to our functions or powers under the national energy laws<sup>14</sup>.</li> <li>• Seeking court orders including declarations of a breach or injunctions if a business has not complied with an enforceable undertaking.</li> </ul>
	<p><b>Civil Proceedings</b></p> <ul style="list-style-type: none"> <li>• Initiating civil proceedings for alleged breaches of conduct provisions and civil penalty provisions of the national energy laws <sup>15</sup></li> <li>• A range of orders can be made including civil penalties, action to remedy the breach, implementation of a compliance program or an injunction to restrain the business from engaging in the conduct.</li> <li>• The national energy laws set out the factors which the court consider in determining a civil penalty to be paid<sup>16</sup>.</li> </ul>

<sup>13</sup> ‘COAG Energy Council review ‘AER powers and civil penalty regime’ underway as at the date of this document

<sup>14</sup> Section 288 National Energy Retail Law, section 59A National Electricity Law and section 230A National Gas Law.

<sup>15</sup> Section 289 National Energy Retail Law, section 59 National Electricity Law and section 229 National Gas Law.

In considering the most appropriate mechanism to address compliance concerns we look at a range of options including:

- **Administrative resolution:** Where detriment flowing from conduct is low. Administrative resolutions may include implementing a compliance program, improving internal operational procedures or conducting staff training. Importantly, a decision to resolve a matter administratively is not acceptance or approval of the conduct, nor does it remove a business's responsibility for the conduct.
- **Infringement notices:** We consider a range of factors when considering whether to seek to resolve a matter through the issuing of an infringement notice. These factors include circumstances where the conduct is less serious, is isolated, there are low levels of harm or detriment, or where the facts are not in dispute. We may issue one or more infringement notices depending on our assessment of the circumstances.
- **Court enforceable undertakings:** Enforceable undertakings can provide tailored solutions to address conduct that has given rise to the alleged breach. For example, an enforceable undertaking might include commitments to undertake an audit to ensure that the business has identified the root cause of the breach and the risk of future breaches is mitigated. We are able to seek court orders including declarations of a breach or injunctions if a business has not complied with an enforceable undertaking.
- **Civil proceedings:** In cases where the conduct is particularly serious, we may consider seeking a court-based outcome to resolve an investigation. We will consider a range of factors when considering whether to commence civil proceedings, including whether the conduct resulted in significant detriment, the business demonstrated a blatant, ongoing or serious disregard for the law, the conduct is widespread and/or the business has a history of previous breaches of national energy laws.
- **Revocation of retailer authorisation:** We have powers under retail energy laws to revoke a retailer authorisation if there is a material failure by a retailer to meet its obligations, and a reasonable apprehension that the retailer will not be able to meet its obligations in the future. Revoking a retailer authorisation prohibits a retailer from selling energy in any participating jurisdiction.<sup>17</sup>

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<sup>16</sup> Section 294 National Energy Retail Law, section 64 National Electricity Law and section 234 National Gas Law.

<sup>17</sup> We are required to provide reasons for any revocation (Section 120(3) National Energy Retail Law) and are required to give the retailer an opportunity to demonstrate why its authorisation should not be revoked and to present a proposal to address our concerns (Section 120(4) National Energy Retail Law).