Consultation paper and response to submissions

Retailer authorisation guideline

November 2010

AUSTRALIAN ENERGY REGULATOR

© Commonwealth of Australia 2010

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

Glossary and definitions

AEMO	Australian Energy Market Operator
AER	Australian Energy Regulator
ACCC	Australian Competition and Consumer Commission
NEM	National Electricity Market
Retail Law	National Energy Retail Law
Retail Rules	National Energy Retail Rules
RoLR	retailer of last resort

1 Introduction

The Australian Energy Regulator (AER) is an independent statutory authority that is part of the Australian Competition and Consumer Commission (ACCC) under Part IIIAA of the *Trade Practices Act 1974* (Cth).

The AER is responsible for the economic regulation of electricity networks in the National Electricity Market (NEM) and gas pipelines in jurisdictions other than Western Australia. It also monitors the wholesale electricity and gas markets and is responsible for compliance with and enforcement of the National Electricity Law and Rules and the National Gas Law and Rules.

The AER will also assume responsibility for the enforcement of the National Energy Retail Law (Retail Law) and National Energy Retail Rules (Retail Rules) under the National Energy Customer Framework. This will include responsibility for the regulation of electricity and gas retail markets (other than retail pricing) in most jurisdictions. The AER will not undertake this role in Western Australia or the Northern Territory.

The Retail Law was introduced in the South Australian Parliament on 27 October 2010.[1] It is expected that it will be progressively implemented by jurisdictions between 2011 and 2013.

Under Part 5 of the Retail Law, the AER is responsible for issuing and revoking retailer authorisations. Unless exempt from the requirement, a person must hold a retailer authorisation prior to engaging in the retail sale of energy.

As part of its retailer authorisation role, the AER is required to develop a guideline to assist applicants to understand the process for energy retailer authorisations and for the transfer, surrender and revocation of retailer authorisations.[2] The guideline will explain the procedures for assessing applications for a retailer authorisation and for revocation, surrender or transfer of a retailer authorisation, and set out the information required by the AER to assess a retailer authorisation application against the entry criteria.

1.1 Public consultation process

The AER is undertaking consultation on the draft guideline. It is seeking comments on whether the guideline fully addressing the requirements set out in section 117 of the Retail Law and provides clear guidance to potential applicants on the processes for obtaining a retailer authorisation.

This consultation is occurring prior to the passage of the Retail Law to provide stakeholders with as much opportunity as possible to consider the key issues. The Retail Rules contemplate a 'formal' consultation process (the retail consultation procedure set out in s.173 of the Retail Rules) following passage of the Retail Law.

---

[1] A copy of the Retail law as introduced in the South Australian Parliament can be accessed at http://www.legislation.sa.gov.au/listBills.aspx?key=N

[2] The requirement to develop the guideline, and the information to be included, is set out in s.117 of the Retail Law.

There is an opportunity, however, for the application legislation of participating jurisdictions to 'authenticate' consultation undertaken by the AER to date. The AER notes, however, that this will be a matter for each jurisdiction to determine. If authentication occurs, the AER may not undertake a further round of consultation before finalising the Retailer authorisation guideline (in particular, a further round of consultation is not likely if no significant issues are raised).

The AER initiated consultation on its retailer authorisation role with the release of a draft guideline and issues paper in March 2010.[3] Eleven submissions were received. Those documents were based on the second exposure draft of the National Energy Customer Framework (released November 2009).[4]

This consultation paper and revised draft guideline address issues raised in submissions to the first round of consultation, as well as reflecting changes in the customer framework between the second exposure draft and the Retail Law that was introduced into the South Australian Parliament. Following a review of any submissions on this consultation paper and draft guideline, the AER will update the guideline as necessary. The AER may seek to meet with relevant stakeholders prior to releasing a revised guideline.

1.2 How to make submissions to this paper

The AER invites comments on this consultation paper and revised draft guideline. Submissions can be sent electronically to: AERInquiry@aer.gov.au or by mail to:

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

The closing date for submissions is **22 December 2010**.

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 requested to:

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

The AER does not generally accept blanket claims for confidentiality over the entirety of the information provided and 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

[3] Available on the AER website (www.aer.gov.au) under 'AER future retail functions'.
[4] http://www.ret.gov.au/Documents/mce/emr/rpwg/default.html

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 us, please refer to the *ACCC–AER information policy: the collection, use and disclosure of information* on our website under 'Publications'.

2 Authorisation framework

The Retail Law prohibits a person from engaging in the retail sale of energy unless the person has obtained a retailer authorisation or is exempt from the requirement to obtain an authorisation. A breach of this provision attracts a civil penalty. The AER is responsible for issuing retailer authorisations. The AER also has the power to approve the surrender, transfer and revocation of authorisations.

The retailer authorisation framework is designed to ensure that businesses seeking to undertake energy retail activities satisfy minimum entry requirements. The AER performs a 'gatekeeper' role to ensure that those businesses that are authorised have the capacity to provide the services for which they are authorised and are able to comply with the obligations imposed on retailers.

The AER can only issue a retailer authorisation where an applicant satisfies all of the entry criteria—organisational and technical capacity, financial resources and suitability. An authorisation does not have an expiry date and will continue until it is surrendered or revoked.

The entry criteria are used to assess an applicant's capacity to carry out the functions of a retailer at the time of the application. Once authorised, the AER will monitor retailers' compliance with obligations under the energy laws that it administers. If a retailer fails to meet its obligations, the AER has a range of options available to it including revocation of the authorisation.

2.1 Clarification of the framework

Submissions received during the preliminary consultation process highlighted some misunderstandings about the application process for authorisation (and the authorisation framework more generally) that is set out in Part 5 of the Retail Law. Further, some amendments have been made to the framework since the second exposure draft on which the preliminary consultation was based. The following discussion aims to clarify aspects of the framework as they apply under the finalised Retail Law.

2.1.1 Consultation process

The AER must undertake a public consultation process as part of the assessment of an application for retailer authorisation. The Retail Law sets a minimum public consultation period for applications for retailer authorisation of 20 business days. This period can be extended at the AER's discretion.

2.1.2 Issuing a retailer authorisation

The AER can only issue a retailer authorisation where an applicant satisfies all of the entry criteria. If the criteria are not met, it may approve an authorisation application subject to conditions relating to satisfaction of the entry criteria. In these circumstances, the authorisation would only take effect (be issued) after all conditions are satisfied. The applicant cannot commence retailing activities until the authorisation has been issued.

2.1.3 Electricity, gas or dual fuel authorisations?

Under the second exposure draft of the National Energy Customer Framework, the AER could issue authorisations for retailing electricity, gas or both (dual fuel authorisations). Subsequent amendments to the framework have removed the ability of the AER to issue dual fuel authorisations. Where an applicant wants an authorisation for both electricity and gas retail activities, two applications must be submitted. An authorisation cannot be varied to change or add to the form of energy that the applicant is authorised to sell.

2.1.4 National authorisations

An authorisation is granted on a national basis—that is, it allows the holder to engage in the retail sale of the specified form of energy (electricity or gas) in all participating jurisdictions. The AER has no discretion to offer an authorisation that limits the jurisdictions in which the retailer can operate. Likewise, where an authorisation is revoked, the retailer will be required to cease all retailing activities for the relevant energy type. The AER has no discretion to limit the revocation to particular jurisdictions.

Further, an authorisation provides the right for the holder to retail energy to all contestable classes of customers. The AER cannot impose restrictions on the classes of customers that can be supplied under an authorisation.

2.1.5 Revocation of an authorisation

The AER can revoke an authorisation where the retailer is no longer a participant in the relevant wholesale energy market, or where the retailer has failed to meet its obligations under the energy laws and is unlikely to be able to meet its obligations in the future. A failure of the retailer to continue to satisfy the entry criteria is not a ground for revocation. However, where a retailer no longer satisfies the entry criteria, it is likely to mean that the retailer will be unable to meet its obligations under the energy laws.

Revocation of a retailer authorisation by the AER will trigger a retailer of last resort (RoLR) event. The (former) holder of the revoked authorisation will be subject to the RoLR scheme which sets out a process for matters including the transfer of customers and finalising customer disputes.

2.1.6 Surrender or transfer of an authorisation

The AER can approve the surrender of a retailer authorisation if it is satisfied that there are appropriate arrangements for the transfer of customers of the surrendering retailer. The AER can impose conditions on the transfer of customers.

The transfer of a retailer authorisation operates in much the same way as a surrender, except that the AER must assess both the transferor (outgoing) and transferee (incoming) retailers. The AER can only approve the transfer where the transferee satisfies the entry criteria and there are appropriate arrangements for the transfer of any customers of the transferor retailer. It can impose conditions on either the transferor or transferee retailer.

3 Response to submissions from preliminary consultation

Eleven submissions were received on the issues paper and draft guideline under the preliminary consultation process:

- AGL Energy
- Australian Energy Market Operator
- Consumer Utilities Advocacy Centre
- Energex
- Energy and Water Ombudsman of Victoria
- Energy and Water Ombudsman of NSW
- Energy Networks Association
- Ergon Energy
- Integral Energy
- Origin Energy
- TRUenergy

Most stakeholders supported the general approach adopted by the AER in the draft guideline. Copies of all submissions are available on the AER's website (www.aer.gov.au). The following section details the AER's consideration of the submissions received.

3.1 Application process

Information requirement

The draft guideline set out 'information requirements' that detailed all the information that the AER requires to assess an application for authorisation. AGL Energy noted in its submission that there may be circumstances where the AER will not require all this information to assess an application. This issue was not raised in other submissions.

The AER agrees that there is merit in retaining flexibility in the application process. The information requirements set out the information that the AER considers necessary to fully assess an application for authorisation. If, however, an applicant can satisfy the AER that one or more of the information requirements are not relevant to its application, the AER may waive the need for that information to be provided.

Applicant briefings

In the issues paper, the AER asked whether there was any benefit in providing briefings for prospective applicants prior to submission of an application for a retailer

authorisation. Most submissions supported the idea of individual, confidential briefings.

The AER will, on request, provide confidential briefings for prospective applicants prior to submission of an application for a retailer authorisation.

Notification of applications

The draft guideline established that the AER will publish on its website a notice that an application for authorisation has been received. In its submission, the Consumer Utilities Advocacy Centre requested more direct notification in addition to the website update.

The AER, in addition to a website notification, will provide details of any application through its relevant stakeholder update notification processes. Any parties wanting to register for AER updates can do so by emailing a request to AERInquiry@aer.gov.au.

3.2 Entry criteria and information requirements

Persons seeking a retailer authorisation must demonstrate their capacity to meet the obligations of an energy retailer under the Retail Law and Retail Rules. The AER must assess an application against the entry criteria set out in s.90 of the Retail Law.

3.2.1 Organisational and technical capacity criterion

Compliance obligations

In the draft guideline, the AER stated that an applicant is requested to provide a compliance strategy as part of an application for authorisation:

> We will also require you to provide a compliance strategy to demonstrate that you have established, or are in a position to establish, procedures to comply with obligations under the national regulatory framework and state/territory energy regulatory arrangements…
>
> Detailed compliance plans and systems are required to be in place prior to you commencing activity as a retailer.

Submissions from Ergon Energy, Origin Energy, the Consumer Utilities Advocacy Centre and the Energy Networks Association stated that they do not consider the requirement for a compliance strategy to be sufficient. In particular, it was noted that development of a compliance plan may help an applicant to consider how the risks and responsibilities associated with energy retailing will be met. It may also help to identify any shortcomings in respect of an applicant's organisational and technical capacity.

As the Retail Law does not define 'compliance strategy' or 'compliance plan', the AER has amended the draft guideline to clarify that a compliance strategy should demonstrate at a high level how the applicant intends to comply with its regulatory obligations, and estimate the resources required to implement and manage its compliance systems and programs.

The responsibility of ensuring that the compliance strategy of the applicant is effective lies with the director/s, or, where the applicant is unincorporated, the person/s with effective control of the business. The guideline has been amended to require evidence that the compliance strategy has been approved by the director/s (or person/s with effective control) and that it has been subject to an external assurance process (for example, an external audit). This obligation will also apply to an applicant's risk management strategy.

These requirements should address the concerns raised in submissions, without the need for detailed compliance documents to be provided with an application for authorisation.

The Consumer Utilities Advocacy Centre stated that 'at the time of the application all risks, governance, compliance management plans and systems must be in place'. Although the AER considers compliance systems to be integral to the operation of a retail business, it does not consider it essential for these systems to be in place prior to an applicant seeking a retailer authorisation. Compliance systems can be costly to implement and it is not appropriate to require a business to incur this cost before it is clear that they will be able to operate in the market.

The AER can impose conditions on the grant of an application for authorisation related to satisfaction of the entry criteria. If compliance systems are not in place at the time of an application, the AER will make it a condition on the grant of the authorisation application that these systems are implemented. Where conditions are imposed, the retailer authorisation will not be issued until the AER is satisfied that all conditions have been satisfied. This will ensure that all necessary compliance arrangements are settled prior to a participant operating in the market.

Evidence of arrangements with market participants

Energy retailers require interaction with a range of market participants including the market operator, distribution businesses and customers. Retailers may also have dealings with electricity generation businesses, gas producers/shippers and financial markets. The draft guideline was largely silent on information to be provided detailing any arrangements with these market participants.

The Energy Networks Association and the Consumer Utilities Advocacy Centre submitted that information on contractual and system arrangements with distribution businesses is important to show that an applicant has the requisite organisational and technical capacity to carry out the functions of a retailer.

The AER agrees that it is important for a retailer to have arrangements in place with relevant market participants prior to commencing operations. These arrangements will be reviewed as part of the authorisation application process. The AER has therefore amended the draft guideline to request applicants to provide evidence of any agreements and systems in place to facilitate interaction with relevant market participants. This includes, but is not limited to, distribution businesses, the Australian Energy Market Operator (AEMO) and contract market participants. These arrangements will be assessed against the applicant's business plan. Where agreements and systems have not been finalised, applicants should provide details of

any negotiations or steps that have occurred to date. It will be a condition on the grant of an authorisation application that these arrangements are finalised.

Retailer–customer arrangements

The national energy retail objective is focussed on the long term interests of energy consumers. It is important, therefore, that applicants can show that they will be in a position to manage their obligations to customers under the Retail Law and Rules.

In the draft guideline, the AER requested information on employee training programs and training policies that will assist staff of a retailer to appropriately interact with customers. This included information on training staff to identify hardship customers. Origin Energy submitted that it is not appropriate to require retailers to identify customers in hardship, and that the focus should be on customers self-identifying. Under s.44(a) of the Retail Law, retailers are required to have a process for identifying hardship customers. The AER therefore considers it is appropriate to maintain this information request in the authorisation guideline.

Submissions on the issues paper and draft guideline identified additional information that could be provided with an application to show that the retailer–customer relationship is likely to be appropriately managed by the retailer. This information included the applicant's approach to information provision to customers, management of customer information (including privacy and confidentiality issues) and contractual arrangements.

The AER considers that most of the information raised in submissions should be provided as part of an applicant's business plan, compliance strategy or risk management strategy. However, for clarity, it has amended the draft guideline to explicitly request information from the applicant on how it intends to manage the retailer–customer relationship and to ensure that all retailer obligations to customers will be met. This includes evidence, for example, of any policies and procedures for establishing and amending customer contracts, handling of customer information and providing for effective communication with customers.

Jurisdictional or technical regulation

In the issues paper, the AER stated:

> The AER considers it is restricted to assessing the ability of an applicant to comply with energy legislation administered by it. It does not, therefore, intend to consider readiness or ability of the retailer to comply with jurisdictional obligations except where they affect the applicant's ability to meet obligations under the Retail Law, Rules or Regulations. Consequently, the AER will not consider an applicant's readiness to meet jurisdictional obligations such as community service obligations and gas safety cases.

The Energy Networks Association raised concerns that this would 'exclude a number of essential retailer obligations and capabilities' from consideration.

Although the AER considers that jurisdictional or technical regulations may impose important obligations on a retailer, it is not in a position to assess an applicant's compliance with these requirements (or enforce any non-compliance). Compliance with these obligations may, however, be relevant to the consideration of an

applicant's organisational and technical capacity. The AER will therefore consult with relevant jurisdictional or technical regulators and seek confirmation that the applicant is in a position to meet any jurisdictional or technical requirements.

The AER may also consult with jurisdictional and technical regulators, where relevant, to confirm details provided in an application about the compliance history of the applicant and key staff.

3.2.2 Financial resources criterion

Assessment of financial capacity

The draft guideline and issues paper outlined that the AER would review an applicant's ability to meet financial obligations throughout the supply chain. These include wholesale market participation, network charges and credit support, the provision of retail supply services, and regulatory obligations. This assessment would be informed by the applicant's business plan. As a stress test, the guideline also required applicants to demonstrate sufficient financial capacity to operate for a period of 12 months without reliance on customer takings.

Submissions, including from AGL Energy, Origin Energy, and Ergon Energy confirmed the importance of any assessment of financial capacity being done with reference to the applicant's business plan and risk management strategy. These submissions, as well as those from the Energy Networks Association, the Consumer Utilities Advocacy Centre, Integral Energy and Energex, also stressed the importance of ensuring that the applicant can cover all network charges and credit support requirements. The AER has, therefore, amended the draft guideline to draw more attention to these factors in the assessment of financial capacity.

Energex and the Energy Networks Association submitted that credit support arrangements should be in place prior to an application for authorisation being granted. The AER considers that it is sufficient that an applicant has initiated discussions with the relevant distributor(s) at the time of applying for the retailer authorisation. However, where these arrangements are not finalised at the time the AER grants the application for authorisation, it will be made a condition of the grant that the arrangements are put in place. That is, the retailer will be unable to retail until the arrangements have been finalised.

Ongoing financial review

In the draft guideline, the AER stated:

> Our assessment of financial viability is a one-off entry test designed to satisfy us that an applicant's retailer authorisation application should be approved…
>
> It is not the AER's role to make ongoing financial assessments of a retailer's financial viability or provide comfort about the financial capacity of retailers that have commenced operations. Ongoing prudential assessments are undertaken by AEMO to ensure retailers have sufficient financial capacity to operate in the relevant wholesale markets.

In their submissions, Ergon Energy and Energex raised concerns with this approach and suggested that the AER should have regard to a retailer's ongoing financial viability as part of its monitoring and compliance program.

As discussed in section 2 above, the AER cannot use the failure of a retailer to continue to meet the entry criteria (including the financial capacity criterion) as justification to revoke an authorisation. However, s.150 of the Retail Law requires a retailer or AEMO to notify the AER when they become aware of anything that may affect a retailer's ability to maintain continuity of supply to its customers. Where this occurs, the AER can act under the 'contingency event' provisions in Part 6, Division 3 of the Retail Law dealing with retailer of last resort events.

The AER considers that the requirements under s.150 of the Retail Law provide for sufficient ongoing assessment of a retailer's financial position. Where a market participant is aware of any circumstances that may affect the ability of a retailer to maintain continuity of the sale of energy to customers, it should raise this with the AER.

3.2.3 Suitability criterion

Review of compliance history

In the draft guideline, the AER stated that:

> we require you to provide details of any failure to comply with regulatory requirements, laws or other obligations over the previous 10 years that has resulted in an infringement notice or other enforcement action.

The Consumer Utilities Advocacy Centre noted that there have been few cases of enforcement action being taken against retailers in the energy sector and therefore expressed doubts as to whether this requirement strikes an appropriate balance between ensuring a rigorous assessment and the information burden on applicants.

The AER notes the Consumer Utilities Advocacy Centre's concerns. However, it does not see a way of broadening the scope of the information request without requiring the applicant to provide details of all breaches of regulatory requirements (which is likely to expose a large number of 'minor' breaches that do not assist in the assessment of an applicant's suitability). Additionally, where no formal action has been taken against the applicant, this may demonstrate that the previous regulator was satisfied with the way the applicant resolved any issues and so does not warrant further examination.

The AER welcomes any further comments on ways to expand the assessment of an applicant's compliance history without imposing an undue information burden on the applicant.

Criminal history checks

In the draft guideline, the AER required details of any unspent convictions (in Australia and overseas) for the following persons:

- The current director/s (or shadow / de facto director/s) of the applicant, its associates and any other entity that exerts control over the applicant's business activities.

- The holding company and its director/s (or shadow / de facto director/s).

- If the applicant is unincorporated, the person/s with effective control of the business.

- Any person/s holding 20 per cent or more of any class of shares, or any instrument or right convertible into, exchangeable for or giving the person the right to acquire 20 per cent or more of any class of shares, in the applicant.

The draft guideline also provided that the AER could request the persons from whom a criminal history was requested to obtain a criminal history check to confirm this information.

Most submissions, including from Ergon Energy, the Consumer Utilities Advocacy Centre and the Energy Networks Association, supported the AER obtaining information on unspent convictions. The submissions noted that such information is commonly required for persons employed at senior positions in organisations, and for participation in sectors such as the financial services industry.

Origin Energy, however, submitted that:

> It is neither appropriate nor necessary for the AER, as an energy regulator, to have the power to compulsorily require a wide range of people connected with the applicant to disclose highly sensitive personal information about themselves in order to determine whether the applicant, which is a commercial entity, can retail electricity. The disclosure of such personal information to the AER will do nothing substantive to assist in protecting consumers and the participants in the National Electricity Market from the risk that the holder of a retail licence will fail.

As discussed in section 2 above, the AER must assess an applicant against the entry criteria, with reference to the national energy retail objective. This analysis must go beyond an assessment of the 'risk that the holder of a retail licence will fail'. The suitability of an applicant can be only assessed by reference to those persons in a position to control the applicant's business activities. The criminal history of those persons, therefore, is clearly relevant to an assessment of the applicant's suitability to hold a retailer authorisation.

Origin Energy also raised concerns that the information requirement does not target the people whose individual decisions could relevantly impact the applicant's conduct or the type of criminal conduct that could impact on the operation of a retailing business. The AER notes these concerns and has revised the draft guideline to target the information that it considers relevant to an assessment of suitability. The categories of persons from whom this information is requested have also been altered to better reflect those persons who can exert control over the operations of the retailer.

3.3 Transfer, surrender or revocation of a retailer authorisation

In its draft guideline, the AER set out the process it would adopt for the transfer, surrender or revocation of a retailer authorisation.

Most concerns in submissions to the issues paper and draft guideline centred on the requirements attached to the transfer of customers under a revocation, surrender or transfer of a retailer authorisation. In particular, submissions discussed:

- the requirement for customers to be transferred on the same or better terms and conditions under a surrender or transfer process
- whether the process to ensure the resolution of any outstanding customer disputes with the surrendering/transferor retailer is sufficient.

To fully discuss these issues and the amendments to the AER's position in the draft guideline it is necessary to provide some background information on the circumstances where the bulk transfer of retail customers can occur and the regulatory requirements that apply in each case.

There are a number of circumstances where a retailer may undertake a bulk transfer of customers:

- A RoLR event (including where triggered by the revocation of an authorisation)
- Transfer of an authorisation.
- A trade sale of customers—that is, customers are transferred but the retailer authorisation remains with the transferor.[5] This may occur independently or as part of a process to surrender the retailer authorisation.

The regulatory requirements on the retailer differ under each of these circumstances.

3.3.1 RoLR event or revocation

Where the AER revokes a retailer's authorisation, this will trigger a RoLR event. The transfer of customers of the failed retailer will therefore be subject to the RoLR scheme in Part 6 of the Retail Law.

The RoLR scheme provides basic protections for transferred customers:

- Customers are transferred onto the standing offer tariff of the RoLR.
- Under s.141(4), complaints or disputes between a failed retailer and a small customer (whether the complaint or dispute arose on, before or after the transfer date) may continue to be dealt with as if the failed retailer's authorisation has not been revoked.

[5] A trade sale may also involve the sale of the entire retail business. In these circumstances, however, there is no transfer of customers. That is, customers are still supplied by the same retailer (the legal entity holding the retailer authorisation).

- Under s.136(3) of the Retail Law, the AER can impose requirements on the failed retailer and designated RoLR in relation to the transfer of customers. This power is duplicated under the revocation process (s.120(7)(b)) that allows the AER to, after consulting with AEMO, impose conditions on the transfer of customers to another retailer. These conditions can include a requirement on the failed retailer to continue to abide by energy laws.

3.3.2 Transfer, surrender or trade sale

A transfer or surrender of a retailer authorisation must be approved by the AER before it can take effect. Trade sales, however, are not subject to an approval process.

A retailer can elect to transfer customers under a trade sale as an alternative to the transfer process in the Retail Law. The choice of process may depend on the circumstances of the transaction. For example, where a retailer is seeking to transfer its authorisation to another existing retailer, a trade sale and surrender process may be more appropriate than a transfer process to avoid the transferee (incoming) retailer holding multiple authorisations.

Given these considerations, it is not appropriate for customer protections under the transfer process to go significantly beyond those available under a trade sale.

Trade sale

Where customers are transferred under a trade sale, the acquiring retailer must comply with the terms of the existing customer contract. Customers may, however, be required to re-establish arrangements such as payment plans and hardship programs with the new retailer.

Questions such as which retailer would have liability for any disputes that arise from conduct of the transferor (outgoing) retailer, and whether all liabilities are also transferred, would need to be resolved by the contracting parties. Regardless of the arrangement, appropriate customer protections will be in place as both the incoming and outgoing retailer will hold authorisations and will be bound by the provisions of the Retail Law and Rules.

Transfers and surrenders

The AER cannot approve a transfer unless it is satisfied that the applicants will appropriately manage issues concerning customers of the proposed transferor. It can impose any conditions on the transfer which may, without limitation, include a requirement on the transferor or transferee to abide by any requirements of energy laws.

The AER will not interfere with the contractual rights of the transferor retailer's customers. The contractual relationship between the transferee retailer and the customers will be the same as if the customers were purchased under a trade sale. The AER may, however, impose additional requirements to ensure that a transfer of an authorisation is completed in a way that minimises the disruption for energy customers. These could include an obligation on the transferor retailer to pass on details of customers receiving concessions or using life support equipment. Further

obligations may be imposed to inform the customers of the change in retailer and their rights and obligations under the new arrangement.

The AER has removed the requirement under a transfer (and surrender) process in the draft guideline that customers are to be transferred on the 'same or better term and conditions'. This requirement is unnecessary as contract law provides for a transferee retailer to take on a contract as it stands.

A distinction between transfers and a trade sale of customers is that, following a transfer, the transferor will no longer be a retailer for the purposes of the Retail Law. The transfer provisions must therefore contain extra protections to ensure that customers are not disadvantaged. This can be achieved by requiring the former retailer to maintain membership of relevant energy ombudsman schemes for 12 months following the date of the transfer or surrender of the authorisation. This obligation would be consistent with the requirements currently in place in most energy ombudsman schemes. Further, the AER could impose a condition, under s.103(5) of the Retail Law, providing for disputes between a retailer and small customer to be dealt with as if the retailer was still authorised. This would be equivalent to the obligation in s.141(4) of the Retail Law (under the RoLR scheme).

Surrender

As with transfers, the AER must consider how the surrender will impact on the customers (or former customers) of the retailer. Its ability to impose conditions is limited to transfer issues and may only be imposed on the surrendering retailer after consultation with AEMO.

The AER will confirm that the surrendering retailer is no longer responsible for the supply of energy to any premises prior to granting an application to surrender. It will also ensure that former customers of the surrendering retailer can bring a dispute against the retailer following the surrender of the authorisation.

An issue raised in submissions is that the surrender process should provide an alternative to the initiation of a RoLR event. This would require the surrender process to not be more burdensome for the retailers involved. A particular concern raised was that having customers transfer under the terms of their existing contract (as required under contract law) may discourage retailers from picking up customers. The AER does not have the authority to aid a transfer of customers by amending the contractual standing of the parties (for example, by declaring that all customers transferred under a surrender process be subject to the standing offer of the transferee retailer). It is limited to ensuring that appropriate arrangements are in place prior to the surrender taking effect.

As for the transfer process, the AER has maintained the requirement that the surrendering retailer maintains membership of relevant energy ombudsman schemes. This requirement is likely to be for 12 months, consistent with requirements under most energy ombudsman schemes. The AER may also impose a condition, under s.105(5) of the Retail Law, providing for disputes between a retailer and small customer to be dealt with as if the retailer was still authorised.