



Issues paper

Retailer authorisation guideline

March 2010

© 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	ii
1 Introduction	1
2 Public consultation process.....	2
3 Process for assessing retailer authorisations.....	4
4 Entry criteria and information requirements.....	5
4.1 Organisational and technical capacity criterion.....	5
4.2 Financial resources entry criterion.....	6
4.3 Suitable person criterion	6
5 Issues subsequent to the grant of a retailer authorisation.....	8
5.1 Dormant authorisations.....	8
5.2 Transfer of authorisation.....	8
5.3 Surrender of authorisation.....	8
5.4 Revocation of authorisation	8
5.5 Relationship of business authorisation to exempt seller arrangements	9

Glossary and definitions

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 IIIA of the *Trade Practices Act 1974* (Cth).

The AER is responsible for the economic regulation of the 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.

It is likely that the AER will assume responsibility for the enforcement of the proposed 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. It is currently understood that the AER will not undertake this role in Western Australia, the retail electricity market in the Northern Territory and some retail gas markets.

Under Part 5 of the proposed Retail Law, the AER will be 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 will be 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. 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.

The attached draft guideline constitutes the first step in the AER's consultation process. It is based on the second exposure draft of the National Energy Customer Framework (released November 2009) and will be updated following passage of the final framework.

This issues paper has been prepared to facilitate consultation on the draft guideline. For convenience, the AER's main issues have been set out as a series of questions. We also welcome any comments on issues not specifically raised in this paper.

Transitional arrangements including, for example, the process for transitioning jurisdictional retail licenses to national authorisations, are not covered in these documents.

2 Public consultation process

This issues paper and draft guideline have been published to provide an opportunity for preliminary consultation in preparation for the hand-over of retail functions to the AER.

The AER is likely to be required to publish several guidelines, including a Retailer authorisation guideline, as part of its new role under the proposed Retail Law and Retail Rules.

Upon the passage of the Retail Law, the AER will be seeking stakeholder comment on the guidelines under a ‘formal’ prescribed consultation process (as set out in the Retail Law). This may have to occur within a tight timeframe. Accordingly, the AER is undertaking preliminary consultation during 2010 to provide stakeholders with as much opportunity as possible to consider the key issues and comment on the preparation of draft guidelines.

The issues papers and guidelines prepared as part of this preliminary consultation process are based on the second exposure draft of the National Energy Customer Framework (released November 2009).¹ Any changes to the framework prior to its passage through South Australian Parliament may result in changes to the content of the guidelines and issues papers.

How to make submissions to this issues paper

The AER invites comments on the draft guideline and issues paper. 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 **30 April 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

¹ <http://www.ret.gov.au/Documents/mce/emr/rpww/default.html>

information is truly regarded as confidential. The identified information should genuinely be of a confidential nature and not otherwise publicly available. In addition to this, parties must identify the specific documents or relevant parts of those documents which contain confidential information. The AER does not accept documents or parts of documents which are redacted or ‘blacked-out’.

For further information regarding the AER’s use and disclosure of information provided to us, please refer to the *ACCC–AER information policy: the collection, use and disclosure of information* on our website under ‘Publications’.

Next steps

Once the Retail Law is passed, a ‘formal’ prescribed consultation on the guideline will occur.

3 Process for assessing retailer authorisations

Jurisdictional regulators and government agencies involved in retailer licensing have tended to adopt a rigorous approach to licence applications. The licensing process is intensive and involves the provision of a considerable amount of information. We consider it appropriate to maintain the rigour of current jurisdictional approaches, while trying to ensure that the retailer authorisation guideline and process are as clear and user friendly as possible. A rigorous process is justified because:

- retailers are delivering an essential service
- there is considerable cost and disruption to the market from retailer failure events
- it helps to avoid subsequent instances of noncompliance with retailer obligations that are costly to both energy customers and market participants.

Although rigorous, we will assist applicants to understand the application process. In practice, the retailer authorisation process will usually begin well before the submission of a formal application. The guideline is intended to encourage applicants to engage with the AER before and during the process of preparing their applications. We may offer briefings to explain our expectations to prospective applicants.

Questions for consideration

- 3.1 Would prospective applicants benefit from briefings prior to the submission of an application? If so, please provide details of the form (for example, group or individual sessions) and content of briefings that would be most beneficial for prospective applicants.**

4 Entry criteria and information requirements

To ensure rigour in the authorisation process, the draft guideline requires applicants to provide comprehensive information addressing each criterion. The AER will not commence assessing an application until all information has been provided. The AER may also request further information during the process.

4.1 Organisational and technical capacity criterion

The AER considers that a key requirement of the organisational and technical capacity criterion is the development of effective compliance and risk management strategies.

All relevant compliance plans and systems must be in place prior to commencing retailing to customers. However, at the time of applying for retailer authorisation, the AER will only require the applicant to have in place a compliance strategy. The AER considers that requiring all applicants to provide a full compliance plan and demonstrate that compliance systems are in place at the time of the application is unnecessary (although conditions may be imposed requiring subsequent implementation of compliance systems).

The draft guideline proposed by the AER does not specify the content of the risk management strategy. The strategy should, however, focus on both financial risks (such as those arising from future high wholesale and contract prices and/or lack of liquidity in the contract markets) and operational risks (such as the loss of a contractor or staffing).

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 draft guideline requires applicants to have taken steps to participate in energy ombudsman schemes in the jurisdictions they intend to retail in. Although these schemes are administered by the relevant jurisdictions, energy retailers are required to participate under s. 408 of the proposed Retail Law.

The AER considers that some applicants will require a higher level of scrutiny under this criterion, for example:

- Applicants with a poor compliance track record in another industry.
- Applicants who have previously triggered the retailer of last resort (RoLR) provisions of the Retail Law or equivalent state/territory/foreign legislation.
- Small or unincorporated applicants

The proposed Retail Law provides, under s. 653, that the AER can refuse an application where the applicant (or an associate) has previously triggered a RoLR

event. The AER will not automatically deny an application from such an applicant, but it may demonstrate that an applicant does not possess the ongoing ability to carry out retailer functions or is not a suitable person to be granted a retailer authorisation. The AER will therefore subject such applications to close scrutiny. This will also be the case where an applicant has previously transferred or surrendered a retailer authorisation or licence in circumstances where if not done, triggering of RoLR provisions would have been likely.

4.2 Financial resources entry criterion

The draft guideline requires detailed financial statements from applicants and declarations of financial health from representatives of the applicant and independent external parties.

Applicants must demonstrate sufficient financial capacity to operate for a period of 12 months without reliance on customer takings. When assessing the financial resources of an applicant, the AER will have regard to the business plan provided.

Although the guideline also asks for retailer credit ratings (where available), greater weight will be placed on evidence of funds and ability to repay debt.

4.3 Suitable person criterion

The AER will be guided by the established principles under the ‘fit and proper person’ test in case law when assessing applications against this criterion. Public submissions will inform our assessment of an applicant’s suitability to act as an energy retailer.

The assessment will primarily focus on the past business dealings of the applicant, its officers and associates. In addition, the AER intends to seek information that may show that the applicant is not a suitable person. The AER intends to impose information requirements that are likely to uncover all relevant examples of past behaviour that may impact on an assessment of suitability, but without imposing an undue burden on applicants. For example, the draft guideline limits the information that must be provided on past compliance breaches to those over the past 10 years that have resulted in enforcement action or an enforceable undertaking.

The AER may require applicants to provide a certified criminal history check from the Australian Federal Police.

Questions for consideration

- 4.1 Is it appropriate for the AER to require only a compliance strategy rather than a compliance plan or systems at the time of the application? Please provide any reasons for your view.**
- 4.2 What guidance, if any, should the guideline provide on the types of risks that the AER would expect to be covered by a risk management strategy?**
- 4.3 Is 12 months an adequate period for the assessment of whether a retailer has the financial capacity to operate without reliance on customer takings? Please provide any reasons for your view.**

- 4.4 The AER acknowledges the limitations of financial statements and declarations in establishing an applicant’s financial health. What alternative methods of assessment may be appropriate?**
- 4.5 Does the limitation on information that need to be provided on compliance breaches—being those that have occurred in the past 10 years and that have led to enforcement action or an enforceable undertaking—strike an appropriate balance between ensuring a rigorous assessment and the information burden on applicants? Please provide any reasons for your view.**
- 4.6 What issues or concerns may arise from a requirement for applicants to provide certified criminal history checks?**
- 4.7 What other information requirements not provided for in the draft guideline would be appropriate for the AER to impose? Please provide details of these requirements and the rationale for inclusion.**
- 4.8 Which, if any, of the information requirements contained in the draft guideline seem unnecessary or unduly burdensome? Please provide details and the reasoning behind your comments.**

5 Issues subsequent to the grant of a retailer authorisation

5.1 Dormant authorisations

The draft guideline does not stipulate a timeframe for commencing operations following the issue of a retailer authorisation. There may be sound reasons for an authorisation remaining dormant, such as wholesale or contract price movements that affect the viability of entry into the market.

The draft guideline states that a holder of a dormant authorisation will still be required to comply with all the obligations of a retailer, including all information and reporting requirements. They may also be subject to targeted audit or compliance assessment processes undertaken by the AER as part of its compliance monitoring role.

The AER may place a greater focus on auditing and assessing holders of dormant authorisations at the time they begin or resume retailing. This will occur to ensure that appropriate systems and processes remain in place to meet the obligations on an energy retailer under energy laws.

5.2 Transfer of authorisation

The AER will apply the same entry criteria in assessing a transfer application as if the proposed transferee were applying for a new retailer authorisation. It will therefore be recommended that businesses looking to transfer a retailer authorisation engage with the AER at an early stage to prevent delays in the process. If the proposed transferee holds an existing retailer authorisation, we will generally consider them to have satisfied the entry criteria for the purposes of s. 516(2)(a).

The proposed Retail Law provides for the AER to impose conditions on the transfer of a retail authorisation. This is stated to include, without limitation, conditions requiring compliance with energy laws. The AER intends to focus any conditions on ensuring that customers of a retailer are not deprived of any rights under their existing retail arrangement. The draft guideline requires the holder of the retailer authorisation to demonstrate that customers will remain on the same or better terms following a transfer.

5.3 Surrender of authorisation

When a retailer authorisation is surrendered, the proposed Retail Law gives the AER power to impose conditions on the transfer of customers to another retailer following consultation with the Australian Energy Market Operator. As with transfers, the draft guideline requires the holder of the retailer authorisation to demonstrate that customers will remain on the same or better terms following surrender.

5.4 Revocation of authorisation

Section 520 of the proposed Retail Law sets out the circumstances where the AER may decide to revoke a retailer authorisation.

The draft guideline indicates that revocation will be a last resort option, used when there has been a persistent or serious failure to comply with obligations. Assessments will need to be made on a case-by-case basis.

In deciding whether to revoke a retailer authorisation following a breach of a retailer obligation, we will consider factors including the impact of the breach; the circumstances of the breach, including whether it was deliberate; the compliance culture of the retailer and any assistance provided to the AER in investigating the breach.

It is important to ensure that the customers of a retailer are adequately protected in the event of a retailer authorisation being revoked. One aspect of this is to provide customers with an appropriate avenue to raise disputes with the former retailer. The draft guideline does not contain any requirements for retailers to implement procedures for customers to take action against them following revocation of a retailer authorisation. The AER seeks any views on whether it is appropriate to amend the draft guideline to include this requirement, or whether customers are adequately protected through other mechanisms.

5.5 Relationship of business authorisation to exempt seller arrangements

The approach that the AER takes to exempt seller arrangements will affect the decisions of some businesses on whether or not to apply for a retailer authorisation. The AER will develop its exempt seller arrangements through a separate consultation process. This consultation will have due regard to the issues associated with applying for retailer authorisation, including the financial burden and the comprehensive information requirements placed on applicants.

Questions for consideration

- 5.1 Is it appropriate to target retailers who wish to begin or resume retailing after a period of dormancy for compliance audits or monitoring? Please provide any reasons for your view.**
- 5.2 What matters should the AER have regard to, other than the rights of customers, when imposing conditions on the transfer, surrender or revocation of a retailer authorisation?**
- 5.3 What issues may arise, if any, in requiring the holder of the retailer authorisation to demonstrate that customers will remain on the same or better terms following a transfer or surrender of the retailer authorisation?**
- 5.4 Is it appropriate for the AER to require applicants to develop procedures for customers to take action against them following the revocation or surrender of the retailer authorisation? If not, what other protections for customers are / could be provided?**