Notice of draft instrument

AER Compliance Procedures and Guidelines

National Energy Retail Law, Retail Rules and Retail Regulations

23 March 2011

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Contents

Shortened forms

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

Retail consultation procedure

This notice and the attached draft AER Compliance Procedures and Guidelines (the guideline) have been published in accordance with the retail consultation procedure set out in cl. 173 of the National Energy Retail Rules. As part of this consultation, the AER has also released a draft Statement of Approach to Compliance with the National Energy Customer Framework (the statement of approach).

The AER invites comments on the attached draft guideline and Statement of Approach. Responses to this consultation will inform the AER's approach to compliance under the National Energy Customer Framework (the Customer Framework) and the development of its final guideline and statement of approach.

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

Written submissions on the draft guideline and statement of approach are invited by Friday, 6 May 2011. Submissions can be sent electronically to: AERInquiry@aer.gov.au with the title "Draft AER Compliance Procedures and Guidelines – attn Lynley Jorgensen", or by mail to:

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

Submissions provided by email do not need to be provided separately by mail.

PLEASE NOTE:

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 asked to:

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

The AER does not generally accept blanket claims for confidentiality over the entirety of the information provided. 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 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 it, please refer to the *ACCC–AER information policy: the collection, use and disclosure of information*, which is available on the AER website under 'Publications'.

1 Requirement to develop procedures and guidelines

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

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

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

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

The guideline will apply to all regulated entities in participating jurisdictions from the date of commencement. The AER may amend the guideline at any time in accordance with the retail consultation procedure.[8]

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

2 Context in which draft procedures and guidelines have been prepared

The Customer Framework is the final stage in the transition to national regulation of the energy markets. The Ministerial Council on Energy's (MCE's) consultation on the Customer Framework started in 2006 and included extensive consultation on two exposure drafts in 2009 and 2010.

Under the Customer Framework, the AER will assume the compliance monitoring and enforcement role previously undertaken by the various jurisdictional regulators.

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

The AER has used this consultation and feedback to develop the draft guideline and Statement of Approach released with this notice. The AER will use comments on these drafts to assist it in developing the final guideline and Statement of Approach in time for the implementation of the Customer Framework on 1 July 2012.

The draft guideline and statement of approach have been prepared by reference to the National Energy Retail Law (South Australia) Bill 2010, introduced in November 2010. At the same time, the MCE released the National Energy Retail Rules and Regulations to be made. The national legislation giving effect to the Customer Framework passed both houses of South Australian Parliament without amendment on 9 March 2011, and received Royal Assent on 17 March 2011. The MCE agreed on 10 December 2010 that jurisdictions would work toward a common target date of 1 July 2012 for commencement of the Customer Framework.

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

3 Issues involved in the preparation of procedures and guidelines

As noted above, this is the third stage of the AER's public consultation on its approach to compliance with the Customer Framework and the development of the guideline. Submissions received in response to the issues paper released in April 2010 guided us in the development of draft decision in December and the release of a preliminary draft guideline and statement of approach for consultation.

Responses to the December draft decision were largely supportive. These responses have informed the development of the draft guideline and statement of approach released with this notice, and allowed us to further refine our proposed approach. All submissions received are available on the AER website.

Key issues raised in submissions, and the approach the AER has taken to them in the draft guideline and statement of approach, are summarised in Appendix A to this notice. There are, however, a number of issues raised by stakeholders on the introduction and implementation of the guideline and statement of approach, and on the Customer Framework itself, which are usefully discussed here.

Submissions noted the current uncertainty around transitional arrangements to implement the Customer Framework in participating jurisdictions. The Customer Framework is a combination of pre-existing, modified and new obligations on regulated entities, and regulated entities suggested that transition to the new framework will take time. The potential for jurisdictional variations in the application of the Customer Framework was identified as a particular source of uncertainty. In this context, regulated entities sought clarity on how the AER would approach its compliance functions, and how the guideline would apply, in the period following commencement of the Customer Framework.

The draft guideline, and accompanying statement of approach, have been developed with regard to the National Energy Retail (South Australia) Bill 2010 (which was passed by South Australian Parliament without amendment and received Royal Assent on 17 March 2011), and the initial Retail Rules and Regulations released by the MCE on 5 November 2010. While the nature of any jurisdictional departures from the Customer Framework on a transitional or ongoing basis have yet to be confirmed, the draft guideline and statement of approach have been developed with a view to accommodating any such differences in the same way as national obligations in the initial Retail Law and Rules. For example, any obligations that apply in addition to the Customer Framework in a particular jurisdiction will be captured by the same range of monitoring tools and mechanisms applied to the national framework.

We recognise that changes in the nature of regulatory obligations may require corresponding changes to business systems and practices, to ensure that compliance can be achieved and effectively monitored by regulated entities. For this to happen, the internal policies, systems and procedures by which regulated entities monitor their own compliance will also need to be reviewed, and where necessary amended. The MCE engaged in extensive consultation on development of the Customer Framework prior to the public release, in November 2010, of the National Energy Retail (South Australia) Bill 2010 and the National Energy Retail Rules and Regulations to be

made. This has allowed a considerable period of time for regulated entities to begin planning these changes. Our expectation is that regulated entities will continue this preparatory work between now and 1 July 2012, to ensure their readiness to comply with obligations under the new Retail Law and Rules from the date of commencement of the Customer Framework. Processes for implementation in each participating jurisdiction are continuing in consultation with regulated entities and other key stakeholders, and will allow regulated entities to refine their systems in time for commencement.

The draft statement of approach recognises the introduction of new obligations (or the variation of existing ones) as a relevant factor in assessing the likelihood that a breach will occur. The relative 'newness' of obligations in the Retail Law and Rules will, where applicable, be taken into consideration as we target our monitoring activities and determine which monitoring mechanisms (including audits) are best applied. It will also be considered in determining the appropriate enforcement response in the event that a breach of a 'new' obligation is identified. However, these decisions must be made on a case by case basis. It is not possible for the AER to fetter its discretion to use particular monitoring or enforcement mechanisms available to it under the Customer Framework. Nor can it pre-judge such decisions on an in principle basis by committing not to use them for a pre-determined transitional period.

Submissions also sought clarity as to the interaction of the AER's compliance reporting requirements and reports currently required by jurisdictional regulators, and how any duplication with jurisdictional reporting requirements would be managed.

Our expectation is that the potential for duplication between obligations under the Customer Framework and those that currently apply under jurisdictional energy laws will be managed through reviews conducted in each jurisdiction in the development of legislation to give effect to the transition to the national framework. Jurisdictional compliance reporting regimes are expected to fall away when the Customer Framework commences, so that no duplication of this nature is anticipated.

Where information required by the AER for compliance monitoring purposes is already collected by another agency, we will endeavour to coordinate requirements so that submission of the same information to multiple agencies is not required.

4 Possible effects of procedures and guidelines

On 1 July 2012 regulated entities will transition to the single, national Customer Framework. The AER will monitor compliance with the Customer Framework from that date. The guideline establishes key elements of our compliance monitoring regime, and will assist the AER in its compliance and monitoring functions by:

- specifying compliance reporting requirements for regulated entities which will enable us to monitor their compliance with obligations under the Customer Framework, and

- creating a framework for compliance audits, and in particular the recovery of costs associated with audits of regulated entities.

The guideline will create a streamlined national structure for regulated entities to adhere to. The centralising of current jurisdictional regimes in a single framework, with accountability to a single regulator, will create savings for regulated entities in management of these obligations. Our proposal to limit the scope of reporting obligations to those obligations for which we expect alternative sources of information to be insufficient should bring about further savings.

Our adoption of tiered immediate, six-monthly and annual reporting requirements is consistent with approaches in most participating jurisdictions, and should not pose significant changes for regulated entities. The initial frequency of reporting established in the guideline will be subject to variation in response to regulated entities' compliance behaviour so that over time, the reporting burden of each regulated entity will ultimately be determined by its own performance.

The guideline will also provide regulated entities with guidance on how to establish and observe internal compliance policies, systems and procedures to enable efficient and effective monitoring of their own compliance with the Customer Framework. Adoption of the widely recognised Australian Standard on Compliance Systems (AS-3806) provides considerable scope for regulated entities to meet the required standard in a way that is suited to their individual operating environments. Development of processes by reference to the standard is understood to be consistent with current industry best practice, so that little or no change to existing internal processes should be required.

Regulated entities may need to make adjustments to internal compliance reporting systems to ensure compliance with the new, national guideline from the date of commencement. Our approach seeks to minimise these costs by taking existing jurisdictional arrangements into account in developing the AER's own requirements, so that a smooth transition can be achieved and associated costs are not expected to be material. By consulting on and releasing the guideline ahead of the transition date, we have sought to give regulated entities adequate time prior to 1 July 2012 to identify and implement any changes required before the obligations imposed by the guideline take effect.

A. Summary of issues raised in submissions

Issue raised	AER response
Approach to compliance and key elements of the AER's compliance regime	
Encouraging compliance with the Customer Framework Submissions emphasised the importance of communication between the AER and regulated entities, and an open and frank dialogue with all retail market stakeholders to implement an effective compliance regime. There was strong support for the principle that cooperative approaches to building a strong compliance culture in the retail market would ultimately reduce the need to resort to enforcement action.	The draft statement of approach released with this notice reflects our continued commitment to this approach.
Dynamic approaches to compliance Submissions encouraged the AER to assess how regulated entities operate under the compliance regime established under the Customer Framework, and to review the regime over time to ensure that it balances the needs of consumers and the effective operation of the market with regulated entities' compliance costs.	The AER regularly reviews its approach to the roles and functions assigned to it under the current energy laws, and will do the same for its new roles under the Customer Framework. Our approach to compliance with the Customer Framework on its commencement will be reflected in the statement of approach and guideline we are currently developing in consultation with stakeholders. We will review the effectiveness of our approach and of the framework for reporting and auditing established by the guideline as the Customer Framework commences and regulated entities work to achieve compliance with the new framework. Our approach to compliance with the Customer Framework will be dynamic, and will evolve with observed compliance behaviour in the retail market.

Issue raised	AER response
Relationship between the guideline and the statement of approach Stakeholders suggested that the proposal to release a separate statement of approach in addition to the guideline required under the Retail Law could lead to confusion, as obligations and operating arrangements for regulated entities would be spread over two documents. It was also noted that the guideline is subject to the retail consultation procedures whereas the statement of approach is not. On this basis it was recommended that the detail of the compliance structure be largely merged into one document.	The Statement of Approach and the guideline serve different purposes that are best achieved through separate documents. The guideline is an administrative instrument targeted specifically to regulated entities, and imposes binding obligations on regulated entities. As contemplated by the Retail Law, the guideline sets out the manner and form in which regulated entities must submit information and data on their compliance with the Customer Framework. The guideline also establishes a standard for the development of regulated entities' internal compliance policies, systems and procedures. The guideline further sets out the framework for carrying out compliance audits and audit costs payable by regulated entities. The statement of approach has been developed to provide additional, contextual information not only to regulated entities but to all retail market stakeholders. It explains the AER's approach to achieving and monitoring compliance, how we will respond to potential breaches, and the factors we are likely to consider in making enforcement decisions. The Customer Framework does not require the AER to publish a statement of approach, or to consult on its development. However, the AER has chosen to consult on the statement of approach using the same process required for the guideline itself, to ensure that stakeholder views can be taken into account.
Targeting monitoring activities	
Targeting monitoring activities Stakeholders generally supported the AER's	The AER has maintained the approach to targeting monitoring activities proposed in its draft decision, as reflected in the draft Statement of Approach circulated with this notice. In determining how compliance with an obligation or group of obligations can be most

Issue raised	AER response
proposal approach to target its monitoring activities on the basis of the likelihood and potential impact of a breach of an obligation. Stakeholders recognised the need for careful attention to compliance during the transitional period. However, submissions cautioned against a preference for intrusive monitoring simply because an obligation is new.	effectively monitored, the draft Statement of Approach notes that our targeting process will be dynamic and flexible, and that we will look to the potential impact of a breach, and the likelihood of that breach, in determining the appropriate monitoring tools. In looking at the likelihood and impact of a breach, we will examine a range of factors which are set out in sections 4.1.1 and 4.1.2 of our draft Statement of Approach. The draft Statement of Approach recognises that the 'newness' of an obligation may indicate a higher likelihood of breach. However, other factors (such as the incentives driving compliance behaviour and past compliance performance) are also considered, so that a balanced assessment can be reached.
Market intelligence and information	
Use of market intelligence and information Submissions recognised that market intelligence and information is a valuable source of information for the AER. Stakeholders noted that while complaints are not an indication that a breach has occurred, a high number of complaints against a regulated entity in on a particular issue may point to an area which requires further investigation by the AER. Regulated entities cautioned against over-reliance on these sources sought stronger confirmation in the Statement of Approach that the AER will provide regulated entities with an opportunity to respond to any issues before a	In response to stakeholder concerns, we have amended the Statement of Approach (section 4.2.1) to confirm our intention to engage with regulated entities on specific issues raised via market intelligence, unless there are specific circumstances which suggest that such consultation is not warranted. Information collected from a variety of sources – regulated entities, customers, consumers groups and energy ombudsman schemes will provide us with a useful indicator of where breaches may be occurring. We remain committed to the development of processes to capture market intelligence and information. However, we understand that it is important to take have a full understanding of the incident before we take action on alleged breaches. Whilst we still propose to collect market information as an important tool for compliance monitoring, we recognise that the use of market intelligence necessarily involves an

Issue raised	AER response
decision on compliance is made.	objective assessment of relevant information before any breaches are established. In most cases, the AER will endeavour to consult with all concerned parties in order to gain a complete understanding of the circumstances of the incident(s). Our Statement of Approach notes the various sources of market information that we may look to in targeting our monitoring activities. Section 4.2.1 of our draft Statement of Approach notes that market information does not necessarily establish a breach, rather, it points to issues that may warrant further inquiry by the AER.
Targeted compliance reviews	
General support was expressed for the use of targeted compliance reviews in the manner outlined under the Statement of Approach. Submissions sought clarification on the proposed timing of such targeted compliance reviews, and how many reviews a regulated entity should expect to be subject to each year.	The AER intends to conduct at least one targeted compliance review every six months. The regulated entities targeted by each review may differ, for example where a review relates solely to obligations placed on retailers. There may also be circumstances in which a review is staggered over time, for example so that distributors in three jurisdictions are targeted in the first half of the year, and distributors in remaining jurisdictions are targeted in the second. Section 4.2.3 of draft Statement of Approach has been amended to confirm that reviews will occur on a six-monthly basis. Each regulated entity can expect to be subject to at least one review each year. No regulated entity will be subject to more than two targeted compliance reviews under the Customer Framework in a single year.
Retailer and distributor reporting	

Issue raised	AER response
Tiered system of exception reporting Submissions supported the AER's proposal of a three-tiered exception reporting framework, requiring submission of information and data on an immediate, six-monthly and annual basis for Type 1, 2 and 3 obligations respectively.	This approach has been maintained in the draft guideline.
Timing and form of initial reporting of breaches of Type 1 obligations Regulated entities suggested that the guideline allow initial reports of breaches of Type 1 obligations to be reported to the AER either by telephone or by email. Amendments to the period in which initial and written reports on Type 1 obligations must be made were also proposed. Submissions suggested a deadline of the next business day for initial reports under cl. 3.2.1 rather than 24 hours, or a longer period of three business days to allow additional time to investigate the breach and gather the required information.	The AER has amended the guideline to confirm that regulated entities may provide initial reports of breaches of Type 1 obligations by telephone or email. We have also adopted the suggested deadline of one business day from the identification of the breach. We do not consider it necessary to allow an extended period of three business days for initial reports, given that regulated entities will have up to five business days to provide more fulsome accounts of the relevant breach in the written reports submitted under clause 3.2.2.

Issue raised	AER response
Adjustment of reporting frequency for individual regulated entities Stakeholders sought confirmation that where the frequency of reporting for an individual regulated entity had been increased in response to poor compliance behaviour, there would be a process for subsequent return to the original frequency when satisfactory levels of compliance were restored.	Clause 3.6.7(c) of the draft guideline makes provision for variation of the reporting frequency required of a regulated entity from three months to six months, or six months to twelve months, where no breaches of the relevant obligations have been identified in four consecutive reporting periods.
Verification of regulated entities' compliance reports Regulated entities submitted that the requirement for a business's CEO to verify compliance reports submitted to the AER was unnecessary, and that approval of reports by area managers would be more appropriate for larger entities.	The AER has amended the guideline to allow the CEO to delegate responsibility for approval of immediate reports on Type 1 obligations to a suitably qualified person within the organisation. Instead, the CEO will be required to approve a consolidated report of all such breaches at the end of every six-month period, and to submit that report together with the report on Type 2 breaches for the relevant period. The AER expects compliance with the Customer Framework to be a priority for regulated entities. This level of scrutiny is consistent with the active commitment of the governing body and top management to effective compliance that permeates the whole organisation envisaged by principle 1 of *Australian Standard AS 3806 – Compliance Programs*.
Consequences of providing false or misleading information to the AER Regulated entities questioned the need for the CEO to directly acknowledge provisions in the Criminal	The pro forma statements for compliance reports in Appendix A of the draft guideline have been amended to require the signatory (be it the CEO or his/her delegate) to confirm that the relevant report has been prepared with all due care and skill and in accordance with the AER Compliance Procedures and Guidelines. The signatory will also be required to confirm that, throughout the period covered by the report, the regulated entity has had

Issue raised	AER response
Code regarding the consequences of providing false and misleading information to the AER. Instead, they suggested that awareness of these provisions was sufficient. They also suggested that the signed assurance required of regulated entities take the form of a declaration that the business has an effective compliance system in accordance with the AER's Compliance Procedures and Guidelines, and that the information has been submitted in accordance with these Guidelines.	effective policies, systems and procedures in place to monitor compliance with the National Energy Retail Law, Rules and Regulations, established and observed in accordance with the guideline. Regulated entities are likely to be aware of the need for quality assurance in submission of compliance reports, and the consequences of providing false or misleading information to the AER. As a safeguard, however, we consider it prudent to reference the relevant laws both in the guideline and the pro forma statement to ensure that proper regard is had to these matters in the preparation and submission of such reports. Both the draft guideline (in cll. 3.1.4 and 3.1.5) and the pro forma statements to be submitted with compliance reports to the AER advise regulated entities and their officers that: ▪ Failure to comply with the AER Compliance Procedures and Guidelines is a breach of the Retail Law, and may attract civil penalties. If a corporation contravenes this obligation to comply with the AER Compliance Procedures and Guidelines, each officer of the corporation is to be taken (under section 304(1) of the Retail Law) to have contravened that provision if the officer knowingly authorised or permitted the contravention or breach, and may be proceeded against whether or not proceedings have been taken against the corporation. ▪ The *Criminal Code Act 1995* (Cth) makes it a serious offence to give false or misleading information to the AER knowing it to be false or misleading or omitting any matter or thing without which the information is misleading.

Issue raised	AER response
Requirement to report "possible breaches" to the AER Submissions expressed concern with the proposal to require reports of possible breaches of obligations (i.e. those identified but not confirmed by the regulated entity) to the AER in addition to confirmed breaches, suggesting this definition was too broad and could lead to significant over-reporting and possible damage to reputation. As an alternative it was suggested that possible breach should be defined as a future breach that the regulated entity believes is highly likely to occur.	The AER has amended the draft guideline to define possible breaches as future breaches that the regulated entity believes are highly likely to occur. The AER expects regulated entities' internal compliance policies, systems and procedures to be sufficiently robust to capture the risk of breach where systems and staff are identified as inadequate to ensure future compliance. As contemplated by *Australian Standard AS 3806 – Compliance Programs*, regulated entities should regularly review their internal compliance policies, systems and procedures to ensure their continued suitability, adequacy and effectiveness in the identification of potential breaches. Such reviews should enable regulated entities to report possible breaches of the Customer Framework on the basis of this revised definition.
Reporting breaches of obligations resulting from high volume or 'mass market' tasks Submissions noted the suggestion in the AER's December draft decision that a reporting threshold for breaches of high volume repetitive tasks may be considered if, after an initial period of observation, it became apparent that the impact of breaches related to high volume, repetitive tasks was immaterial. A commitment to determine an appropriate threshold for high volume tasks in the statement of approach after a reasonable period of review was requested.	The AER will consider regulated entities' compliance with these tasks over an initial period of 2-3 years (or a longer period if information and data collected in that time is insufficient to allow an informed conclusion to be drawn). In doing so we will have regard to levels of compliance reported by regulated entities and to information gathered through other monitoring mechanisms employed by the AER. This may include related market intelligence and information. If, as a result of that review, we are satisfied that introduction of a threshold for reporting such breaches is appropriate we will consult on any necessary amendments to the guideline under the retail consultation procedure. As we have noted in earlier stages of this consultation, the materiality of the number of identified breaches in terms of their overall customer base may be relevant when considering the proportionate response to identified breaches. However, the AER's focus when monitoring compliance with such obligations is the likelihood that they will occur

Issue raised	AER response
	and the potential impact on affected customers, rather than their materiality in terms of a regulated entities' customer base.
Classification of obligations Stakeholders questioned the application of reporting requirements to divisions or sub-divisions of the Retail Law and Rules, rather than to individual obligations. Submissions expressed concern that this approach would result in classification of non-critical obligations as Type 1, thus requiring immediate reports of any breach. It was recommended that the AER link reporting requirements to individual obligations, especially for Type 1, so that immediate reporting requirements are reserved for breaches where there is a significant impact on a the customer, such as the disconnection of customers with life support equipment. Changes to the classification of a number of individual obligations within the divisions and subdivisions selected by the AER, and recommendations that individual obligations from other divisions be classified, were proposed on this basis.	The draft guideline maintains the classification of obligations as Type 1, 2 or 3 by division or sub-division of the Retail Law or Rules, rather than by individual provision. The obligations in the divisions for which reporting requirements proposed are closely related, so that single course of conduct is likely to be captured by multiple obligations. The AER's proposal to classify groups of related provisions, rather than fragments within a suite of related provisions, reflects our expectation that obligations are approached in context. Individual obligations should not be considered in isolation. The AER expects internal policies, systems and procedures developed by regulated entities to monitor their compliance with the Customer Framework to capture the combined effect of all obligations relating to a particular behaviour, so that this inter-relationship is captured. The AER has reviewed its proposed selection and classification of the sub-divisions and divisions in which the identified obligations sit, taking into account the comments made on the likelihood and potential impact of a breach of the particular obligations raised by stakeholders. When considered in the context of related obligations we are not persuaded that reclassification of these subdivisions and divisions is appropriate. If, over time, it becomes apparent that the level of scrutiny applied to these obligations through reporting requirements is excessive or unwarranted, we will initiate consultation under the Retail Rules to explore appropriate amendments to the guideline.

Issue raised	AER response
Specification of obligations in the guideline Submissions suggested that the guideline paraphrase or otherwise define the actual obligations to which reporting requirements apply, including who is responsible (retailers or distributors) for compliance with that obligation.	The guideline identifies those divisions and sub-divisions of the Retail Law and Rules to which reporting requirements will apply. The onus is on regulated entities to familiarise themselves with those divisions, identify the obligations that will apply to them, and establish appropriate measures both to ensure their compliance and to enable accurate reporting to the AER. Regulated entities should not rely on the guideline to define their obligations under the Customer Framework. We expect each regulated entity to conduct a comprehensive review of the Retail Law, Rules and Regulations to identify and address *all* relevant obligations, and not only those to which reporting obligations apply. It should not be assumed that by excluding certain sections of the Customer Framework from reporting requirements established by the guideline means that compliance with those sections will not be monitored. The guideline, and the AER's role in monitoring compliance with the Customer Framework, should not be relied upon as substitutes for the internal compliance policies, systems and procedures regulated entities are required to develop under the Retail Law to monitor their own compliance with the Customer Framework.
Suggested changes to obligations classified as Type 1, 2 and 3 Several submissions suggested changes to the classification of particular divisions proposed in the draft guideline: ▪ Reclassification of obligations in Part 2, divisions 5 (Explicit informed consent) and 8 (Energy marketing rules) of the Retail Law and Part 2, division 10, sub-division 3 (Energy	The AER is not persuaded to raise the classification of these obligations, and has maintained the proposed Type 2 classifications proposed in the draft decision. All three areas identified will take priority in the AER's compliance monitoring activities in recognition of the significant impact that non compliance can have on customers, and continued reports of complaints and concerns in these areas to energy ombudsman schemes in all participating jurisdictions. However, the AER considers that sufficient information in relation to compliance with these obligations will be available to the AER through other sources (including energy ombudsman schemes and the AER's performance reporting

Issue raised	AER response
marketing activities) of the Retail Rules from Type 2 to Type 1, in recognition of ongoing concerns about the conduct of energy marketers and the vulnerability of low income and disadvantaged customers, particularly those with English language difficulties, to breaches of these provisions. ▪ Reclassification of obligations in Part 2, divisions 6 and 7 (customer hardship and payment plans) from Type 2 to Type 1, due to the critical nature of these protections and the adverse impacts disconnection for non-payment can have on customers if these obligations are not met. Recent increases in complaints to the Energy and Water Ombudsman Victoria about capacity to pay and credit issues were also cited in support of this recommendation. ▪ Reclassification of obligations in Part 2, divisions 4 (Customer Retail Contracts - billing) and 5 (Tariff changes) of the Retail Rules from Type 2 to Type 1 obligation, in recognition that billing complaints represent the largest percentage of complaints handled by the regulated entities internal dispute resolution	regime). This will capture any escalation that may warrant investigation within a six-month reporting period, so that a requirement that individual breaches be reported immediately to the AER is unnecessary. The guideline provides for the frequency of reporting against these obligations to be increased for individual regulated entities who are consistently identified as non-compliant. If, over time, it becomes apparent that the application of additional scrutiny in the form of escalated reporting requirements for all regulated entities is necessary, we will initiate consultation under the Retail Rules on the necessary changes to the guideline.

Issue raised	AER response
process and energy ombudsman schemes. The potential financial impacts of incorrect billing or application of tariffs, particularly for low income or vulnerable customers, were cited in support of this recommendation.	
Inclusion of additional obligations in the exception reporting framework Submissions also recommended the addition of the following obligations, which the AER had not proposed to classify: ▪ Classification of all remaining divisions of Part 6 of the Retail Rules as Type 1 reporting obligations, in recognition of reported increases of disconnections in Victoria and the fact that breaches of these divisions could result in wrongful disconnection and/or prolonged periods off supply for affected customers. ▪ Classification of obligations in Part 2, division 10, sub-division 2 of the Retail Rules (Providing information to small customers) as Type 1 obligations, in recognition of the vulnerability of low income and disadvantaged customers, particularly those with English	For similar reasons to those outlined above, the AER does not consider it necessary to impose reporting requirements in relation to these obligations. We expect adequate information in relation to these divisions of the Retail Law and Rules to be available to us through other mechanisms, including market intelligence. This will allow timely identification of issues warranting investigation by the AER. If, over time, it becomes apparent that the application of additional scrutiny in the form of reporting requirements is necessary, we will initiate consultation under the Retail Rules on the necessary changes to the guideline. With the exception of the requirement to provide interpreter services (which in isolation can be tested through other means), the obligations in Part 4, division 5 of the Retail Rules differ in substance to those in Part 2, division 9, and include obligations in relation to service standards and guaranteed service level payments that invoke primary obligations that are enforceable under other parts of the energy laws.

Issue raised	AER response
language difficulties, to breaches of these provisions. ▪ Classification of obligations in Part 4, division 5 (distributor obligations to customers) of the Retail Rules as a Type 3 obligation, consistent with the corresponding requirement for retailers' to report on their other obligations under Part 2, division 9 of the Retail Rules.	
Compliance audits	
Decision to audit The use of audits, and the determination of the scope of an audit, on a case by case basis was generally supported in submissions. However, submissions sought guidance on what the AER will consider in its case-by-case assessments. It was also suggested that the AER ensure that each retailer and distributor is covered by an annual compliance audit, with the scope, coverage and timing determined on a case-by-case basis. This would take into account the regulated entity's previous compliance history and those issues identified by the AER through its compliance	The AER has amended the draft guideline to provide further guidance in respect of the factors that the AER will take into account when making the decision to utilise a compliance audit and which type of audit the AER considers is most appropriate to meet the objectives of the audit. These amendments are included in clause 4.2. The draft Statement of Approach confirms that the scope, coverage and timing would be determined on a case-by-case basis, and does not commit to a fixed annual compliance audit program. The AER may, however, decide to audit on an annual basis where the past compliance levels of a regulated entity make it appropriate or the AER has identified issues that require auditing on a yearly basis.

Issue raised	AER response
monitoring activities.	
Determining the scope of the audit The AER's proposal to consult with the relevant regulated entity on the terms of reference for an audit was supported. However, it was suggested that the guideline should specify a minimum period for any round of consultation to ensure that proper engagement occurred, and that a single stage consultation was likely to be insufficient. It was further suggested that the AER should consult with other relevant stakeholders, including consumer groups and ombudsman schemes, as well as the relevant regulated entity to determine the scope of any proposed audit.	The AER has amended clause 4.3 of the draft guideline to provide a minimum of twenty business days for submissions on the AER's proposed terms of reference. The guideline is not intended to preclude multiple rounds of consultation on terms of reference where they are required. If, in determining the scope of an audit and developing the terms of reference, it becomes apparent that additional periods of consultation would be beneficial, it will be open to the AER to seek further input from the relevant regulated entity before proceeding with an audit. The AER may decide in determining the terms of reference, that other interested parties should be afforded the opportunity to provide submissions on the proposed terms of reference, or be consulted upon. Again, this will be determined on a case-by-case basis where such additional consultation would be beneficial.
Appointing the auditors Submissions sought clarification in the guideline on the process for appointing auditors and the skills and experience required of an auditor. The use of tripartite deeds was recommended as a means to ensure the auditor uses recognised audit procedures, and has the required skills and	When procuring audit services, the AER will specify the framework for conducting the audit in the contract of appointment. This framework will include the terms of reference, required deliverables, timeframes and other relevant requirements. Our expectation is that regulated entities will do the same should they be required to appoint an auditor themselves. In appointing any external contractor to perform such an audit the AER must comply with

Issue raised	AER response
experience. Further, it was suggested that use of a tripartite deed would make the auditor responsible to both the regulator and regulated entity, thus removing any suggestion of bias. Submissions also noted that tripartite deeds have been used by other regulators to specify the framework in which an audit is to be conducted, and raised concerns that contracts of appointment would not serve this purpose.	the *Financial Management and Accountability Act 1977*, the *Financial Management and Accountability Regulations 1977*, and the Commonwealth Procurement Guidelines. References to these laws and guidelines have been included in clause 4.2.2 of the draft guideline to reflect this requirement. The AER does not consider it necessary to adopt the tripartite deed approach to appointment of auditors. We consider that the objectives identified in submissions are equally achievable through appropriate bilateral arrangements between an independent auditor and the appointing party, be it the AER or a regulated entity. The obligation on an auditor to conduct an audit using recognised procedures and employing recognised skills and experience can be dealt with equally effectively through a robust procurement process conducted by either the AER or the relevant regulated entity as the case may be, and through the resultant contract of appointment. The independence of an auditor and assurances that there are no conflicts of interest can be effectively assessed and in the same way.
Undertaking the audit Submissions recognised that audits can be costly and time-consuming, and that consultation with the audited party can assist in managing this. Regulated entities sought confirmation in the guideline that the AER would consult with the regulated entity subject to an audit both prior to and during the audit process itself.	The draft guideline confirms the AER's intent to consult with the audited party when developing the terms of reference for the proposed audit, and to consider any submissions by the audited party on the proposed terms of reference when finalising the scope of an audit. Arrangements for ongoing consultation between the audited party, auditor and the AER will be considered in developing the terms of reference and framework for the audit, and reflected accordingly.

Issue raised	AER response
Audit reports and assurances Several submissions sought inclusion of a requirement to be consulted regarding the final audit reports and for a draft audit report to be provided to the audited party. These submissions noted that the draft guideline was silent on requirements for audit reports, as well as the requirements surrounding auditor assurances.	The requirement for draft audit reports and the nature of assurance required from an independent auditor are best determined a case-by-case basis with regard to the nature and scope of the audit in question. Consideration of these matters will form part of the AER's consultation on terms of reference. As noted in the draft guideline, where an audit is performed by or on behalf of the AER a copy of the final audit report will be provided to the audited party under timelines set in the terms of reference. The AER will seek to ensure, during this process, that any errors of fact are identified before any decisions on further action are made and the audit findings are publicly released. Where appropriate, the AER may require an independent auditor to produce a draft audit report for review before the report is finalised. In these cases the AER may also give the audited party an opportunity to review the draft report for any errors of fact.
Publication of audit reports Subject to confidentiality concerns, submissions recommended that the findings, recommendations and outcomes of audits should be summarised and made available in the AER's annual, mid-year or quarterly reports and bulletins. Submissions also sought conformation that the AER should ensure that any issues identified	The AER intends to release summaries of the key findings, recommendations and outcomes of audits in its periodic compliance publications. The AER is aware that publication of such reports may raise concerns for the relevant audited party. However, as noted above, the audited party will be given the opportunity to review final audit reports for errors of fact before any public comment on a completed audit is made. In releasing a summary of the audit process the AER will also outline what follow-up activities are required to ensure that any breaches or compliance activities are rectified. In such an event, the AER will publish a summary of the activities taken in its annual, mid-

Issue raised	AER response
through the audit process should be followed up. This would ensure that the relevant regulated entity rectifies any breaches or compliance issues identified within a required timeframe.	year or quarterly reports and bulletins.
Treatment of audit costs in regulatory determinations by the AER under the Electricity and Gas Rules Submissions sought confirmation that the AER would have regard to the costs of compliance audits in distribution determinations and access arrangements made under the National Electricity and Gas Rules.	Frameworks for decisions by the AER on distribution determinations and access arrangements are established under the Electricity and Gas Law and Rules. Costs associated with meeting regulatory obligations, including those imposed under the Customer Framework, are appropriately considered by the AER under those frameworks in accordance with the relevant determination process.
Combined compliance and performance audits The proposed combination of performance and compliance auditing in relation to hardship policies was supported where it was made clear which sections related to performance and which related to compliance.	The draft guideline confirms, under clause 4.5, the AER's intention to combine compliance and performance audits relating to retailer hardship policies. When combining performance and compliance audits for this purpose, the terms of reference and any published reports will clearly identify which sections relate to performance and which to compliance.

Issue raised	AER response
Enquiries and investigations	
Investigation reports Submissions supported the proposed approach to reporting on completed investigations, which would maintain a culture of openness and transparency with all interested stakeholders. Concerns were raised, however, regarding the prospect of the AER reporting on completed investigations without giving the relevant regulated entity sufficient opportunity to verify the facts, rectify the breach and make any claims to confidentiality.	The draft statement of approach maintains the proposed approach to publication of information on completed investigations. In particular, we may choose to report on completed investigations where publication of the outcomes will highlight compliance issues to other regulated entities, customers and stakeholders. The AER will engage with the relevant regulated entity throughout an investigation to ensure that conclusions reached are based in fact. We will also ensure that regulated entities are consulted where a report on an investigation is likely to include information that has been provided by the regulated entity to the AER in confidence. It may not be practical to withhold information on a completed investigation until any breaches identified have been fully rectified. However, any reports on an investigation will include information on those steps that have been taken by the regulated entity at the time of publication, and any future steps to which the regulated entity has committed.
Enforcement	
Guidance on the use of enforceable undertakings Submissions sought confirmation that the AER would consult with stakeholders if it intended to release formal guidance on the acceptance of	The AER does not intend to produce such guidance at this time, and will consult with stakeholders in accordance with the retail consultation procedure set out in the Retail Rules if amendments of this (or any other) nature are made to the guideline in the future.

Issue raised	AER response
enforceable undertakings in the guideline.	
Enforcement Stakeholders expressed broad support for the approach to enforcement decisions proposed in the draft decision. However, greater clarity was sought as to how the AER will engage with a regulated entity where a breach is identified, to provide certainty to regulated entities. Stakeholders noted the importance of allowing flexibility for a range of enforcement responses, and the need to assess enforcement response on a case by case basis. It was noted that enforcement action should be commensurate with the impact and seriousness of the breach, and the circumstances leading to the breach, and that, in appropriate instances, the AER should be ready to take statutory enforcement action against regulated entities to deter non compliant behaviours, and to minimise/prevent negative consumer impacts. It was also recommended that a regulated entity be provided with an opportunity to correct any breach identified before enforcement action is taken by the AER. Clarity was sought on how the AER will	The AER has maintained the approach to enforcement proposed in its draft decision, as reflected in the draft Statement of Approach circulated with this notice. Where a breach of the Customer Framework is identified, appropriate steps to correct the breach and minimise the risk of recurrence will always form part of the AER's response. The decision on the appropriate enforcement response and enforcement tool to a particular breach is, as noted in the draft Statement of Approach, one that must be made on a case by case basis. Actions taken by a regulated entity to correct a breach on its own initiative are, as we have noted previously, a relevant consideration in such decisions. The circumstances surrounding the breach will also be considered. The range of considerations relevant to enforcement decisions is discussed in section 6 of the draft Statement of Approach. In some cases, a breach may be appropriately addressed through administrative resolution by agreement with the relevant regulated entity. In others, however, a statutory enforcement response is warranted. Application of the familiar *enforcement pyramid* model would suggest that immediate recourse to statutory enforcement measures would be the exception rather than the rule, with the majority of breaches resolved cooperatively through administrative arrangements and voluntary commitments. However, the AER can not pre-judge such issues by committing in principle to exhaust administrative options before pursuing a statutory remedy. The AER will engage with the regulated entity when investigating potential breaches to establish whether or not a breach has occurred and, if it has, the nature and extent of that breach. The AER has provided guidance on the relevant factors it will consider in deciding the appropriate enforcement action where a breach is

Issue raised	AER response
communicate with a regulated entity once a breach has been established, and whether the AER would engage with the relevant regulated entity before a decision is made on appropriate type of enforcement action (for example, statutory action or administrative action).	established (see section 6 of our draft Statement of Approach).
AER compliance reports	
Several submissions supported the publication of annual reports, quarterly updates and mid-year reports supplemented as appropriate with compliance bulletins and media releases so that the market is given timely information about compliance. It was argued that frequent and regular updates and reports assist consumer groups in their advocacy work by allowing them to respond more promptly to issues of concern.	The draft Statement of Approach confirms the AER's intention to publish regular compliance reports and bulletins. This will ensure that the market is provided with timely, constructive and informative reports on compliance with the Customer Framework. The information presented in the reports will encourage compliance with the Retail Law and Rules by educating and informing both regulated entities and customers about their rights and responsibilities.
Compliance policies, systems and procedures for regulated entities	
Submissions supported the obligation under the draft guideline to ensure that a regulated entity has a compliance system consistent with AS3806.	The draft guideline maintains the approach proposed in our December draft decision. Regulated entities will be allowed to develop their own internal compliance policies, systems, policies and procedures. These policies, systems and procedures must be established and observed in a manner consistent with the *Australian Standard AS 3806 –*

Issue raised	AER response
	Compliance Programs, which will provide a benchmark for the development of these systems while allowing sufficient flexibility for them to be tailored to meet the requirements of each regulated entity.
Other issues	
Compliance with AER guidelines and instruments Submissions sought confirmation that the AER's compliance monitoring and reporting regimes would capture regulated entities' compliance with guidelines and instruments developed under the Customer Framework.	The guidelines and instruments to be developed under the Customer Framework take effect through obligations to comply with them under the Retail Law and Rules. Some, like the Authorisation and Exempt Selling Guidelines which will guide applicants for retailer authorisations or exemptions, are effectively self-enforcing. Failure to submit an application for authorisation or exemption that complies with these guidelines will result in refusal to grant the relevant permission. Compliance with guidelines of this nature will be captured through the assessment and approval processes they are developed to support. Others, like the Retail Pricing Information Guideline, provide detail as to how primary obligations are to be met (in this example, how retail energy prices are to be presented). Compliance with such guidelines will be captured using the same range of monitoring tools as obligations in the Retail Law and Rules themselves.
Engagement with customers and consumer groups Submissions supported the AER's commitment in the draft statement of approach to engage with consumers and consumer groups and provide information and education on protections available	The draft statement of approach released with this notice reflects our continued commitment to this approach.

Issue raised	AER response
under the Customer Framework.	
Cooperation with the ACCC Submissions supported the AER's commitment to work cooperatively with the ACCC in relation to energy matters under the Customer Framework and Australian Consumer Law, and recommended that when considering enforcement options available under those frameworks the approach which provides the best outcome to consumers be adopted.	The draft statement of approach released with this notice reflects our continued commitment to this approach.