Notice of final instrument

Retailer authorisation guideline

July 2011

AUSTR
ENERG
REGUL

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Glossary and definitions

AER	Australian Energy Regulator
ACCC	Australian Competition and Consumer Commission
Retail Law	National Energy Retail Law
Retail Rules	National Energy Retail Rules
RoLR	retailer of last resort

1 Purpose of the Retailer authorisation guideline

Under the Retail Law, the AER will be responsible for issuing, amending 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.[1] Authorisations granted by the AER will apply nationally, allowing the holders of authorisations to engage in the retail sale of energy (electricity or gas) in all participating jurisdictions and to all contestable classes of customers.

To support this role, the AER is required to develop a *Retailer authorisation guideline* (the guideline) to assist applicants to understand the process for obtaining energy retailer authorisations. The guideline specifies the approach the AER will take, and the information the AER will require, in assessing applications for retailer authorisations against the entry criteria, being:

- the applicant has the organisational and technical capacity to operate as a retailer
- the applicant has the financial resources, or access to resources, to operate as a retailer
- the applicant is a suitable person to hold a retailer authorisation.[2]

If the criteria are not met, the Retail Law allows the AER to approve an authorisation application subject to conditions relating to satisfaction of the entry criteria. Where this occurs, the authorisation would only take effect (be issued) after all conditions are satisfied. The guideline provides guidance on the circumstances in which the AER will approve an authorisation application subject to conditions.

The guideline also outlines the approach the AER will take regarding the transfer,[3] surrender[4] or revocation[5] of retailer authorisations.

The guideline will apply to all regulated entities in participating jurisdictions and prospective new retail market entrants following publication. However, any authorisation granted by the AER will not take effect until commencement of the Retail Law.

The AER may amend the guideline at any time in accordance with the retail consultation procedure.[6]

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[1] Section 88 National Energy Retail Law.
[2] Section 90 National Energy Retail Law.
[3] Section 103 National Energy Retail Law.
[4] Section 105 National Energy Retail Law.
[5] Section 107 National Energy Retail Law.
[6] Section 117 National Energy Retail Law.

2 Development of the guideline

Under the Retail Law, the AER will assume the retailer authorisation role previously undertaken by the various jurisdictional regulators or government departments. To fulfil the retailer authorisation role, the AER has developed a *Retailer authorisation guideline*.

This notice and the attached guideline have been developed and published in accordance with the retail consultation procedure set out in clause 173 of the National Energy Retail Rules. The guideline will take effect from publication.

The AER commenced consultation on approaches to its retailer authorisation role with the release of an issues paper and draft guideline in March 2010. A revised draft guideline was released for consultation in November 2010. Following these processes, the AER undertook a final round of consultation in May 2011under the retail consultation procedure. Submissions received by the AER in response to these processes were taken into account in developing the final guideline.

As advised in the MCE Standing Committee of Officials Bulletin No. 190 on 21 March 2011, all activities carried out by the AER prior to the commencement of the Retail Law (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 valid and take effect on commencement of the Retail Law.

The AER also notes the MCE Standing Committee of Officials Bulletin No. 191, dated 12 April 2011, which outlines the arrangements for transitioning jurisdictional retail licences to national retailer authorisations. The transition of existing retailers (those holding a state or territory retail licence in a participating jurisdiction on 12 April 2011) will be determined by jurisdictions and implemented through application legislation. These retailers will continue to have obligations under current licensing regimes up until 30 June 2012, and may be subject to some transitional arrangements beyond this date.

Any retailer that is granted a jurisdictional licence after 12 April 2011 who wishes to retail energy beyond 1 July 2012 will need to apply to the AER for a national retailer authorisation (or exemption). The AER will start accepting applications for authorisation from **3 October 2011**.

3 Issues involved in the preparation of the guideline

As noted above, the AER undertook its final stage of public consultation in May 2011. Comments and submissions received in response to the final consultation have informed the guideline. Submissions received were largely positive and supported the AER's proposed direction. All submissions and the AER's response to them for all rounds of consultation undertaken can be found on the AER's website.[7]

Set out below is the AER's response to the key issues raised in submissions received from the May 2011 consultation process.

3.1 Entry criteria and information requirements

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

3.1.1 Organisational and technical capacity criterion

Jurisdictional or technical regulation

In the third and final round of consultation on the guideline, the AER stated:

> The AER considers that the jurisdictional or technical regulator with responsibility for ensuring compliance with an obligation is best placed to assess whether an applicant has the capacity to comply. Accordingly, for jurisdictional or technical obligations, the AER remains of the view that it is sufficient to consult with the relevant jurisdictional or technical regulators and seek confirmation that the applicant is in a position to comply.

In its submission to the AER, the Consumer Utilities Advocacy Centre (CUAC) stated that it was 'concerned that inappropriate applicants will be issued with authorisations' if the AER did not assess the ability of an applicant to comply with jurisdictional obligations. The AER notes CUAC's concerns however, it reiterates its position that the jurisdictional or technical regulator with the responsibility for ensuring compliance with an obligation is best placed to assess whether an applicant has the capacity to comply. The AER will liaise with jurisdictional regulators regarding the capacity of applicants to comply, however, it is not in a position to assess an applicant against any obligations imposed and enforced at a jurisdictional level. Where the AER is made responsible for enforcing jurisdictional obligations, it will directly consider these obligations as part of its assessment of organisational and technical capacity.

3.1.2 Suitability criterion

Review of compliance history

Pursuant to the guideline, applicants for retailer authorisations are required to provide details of 'any material failure to comply with regulatory requirements, laws or other obligations over the previous 10 years, including all circumstances that resulted in an

[7] See http://www.aer.gov.au/content/index.phtml/itemId/734866.

infringement notice or other enforcement action or enforceable undertaking.' In its previous submission to the AER, CUAC requested guidance from the AER as to what constitutes a 'material failure to comply with regulatory requirements'.

In the notice of draft instrument, the AER outlined what it considered amounted to a 'material failure to comply with regulatory requirements'. The AER stated that:

> Non-compliance may be considered material based either on the impact of the breach, or on the systemic nature of the activity. It would include, but not be limited to, any non-compliance that resulted in formal enforcement powers being used by the relevant regulator. There may be examples of material failure where formal enforcement powers were not used (for example, where the non-compliant party negotiated an administrative resolution such as a voluntary undertaking).

In its most recent submission to the AER, CUAC requested that this definition be inserted into the guideline. Te AER has, therefore, amended the guideline to reflect the above statement and provide further clarification on what constitutes a 'material failure to comply with regulatory requirements'.

3.1.3 Financial resources criterion

Ongoing financial viability

In the guideline, the AER states:

> 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.

Energex reiterated its concerns that under the Retail Law, the AER does not assess, on an ongoing basis, a retailer's financial viability:

> Energex strongly believes that it is important, as part of the licensing regime, to have ongoing assessment of a retailer's financial viability. Energex notes that the draft guideline states that AEMO will undertake ongoing prudential assessments, however AEMO's focus is on the wholesale market settlements and does not include financial considerations outside energy settlements.

Energex advised that it presently has a standing letter (pursuant to section 120 of the *Electricity Act 1994* (Qld)) with the jurisdictional regulator which provides for Energex to notify the regulator where a retailer is in breach of its licensing obligations.

The Retail Law does not provide for the AER to obtain 'standing letters' from market participants. Section 150 of the Retail Law provides that a retailer or AEMO must 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.

As stated in the draft *Retailer of Last Resort plan*, the AER encourages market participants to raise with the AER any concerns with the behaviour of other participants, or where they are aware of any circumstances that may affect the ability of a retailer to maintain continuity of supply to customers.

3.2 Transfer, surrender or revocation of a retailer authorisation

The guideline sets out the process the AER will undertake for the transfer, surrender or revocation of a retailer authorisation.

3.2.1 Transfer or surrender

In its submission to the AER, the Energy and Water Ombudsman Victoria (EWOV) stated that it agreed with the AER's approach for the transfer, surrender and revocation of a retailer authorisation. EWOV particularly welcomed the AER's inclusion of the requirement for former retailers to maintain membership of an ombudsman scheme for 12 months after the surrender of its retailer authorisation.

CUAC expressed some uncertainty in its submission about what circumstances would lead to the transfer provisions being triggered. It had particular concerns where a failed retailer is acquired by another corporate entity. In response to CUAC's submission, the AER has amended the guideline to clarify that the transfer of retailer authorisation process will also be triggered where there has been a change in the legal entity holding the retailer authorisation.

Origin reiterated its view that as part of an application for authorisation, a new retailer demonstrate an understanding of the retailer of last resort (RoLR), transfer and surrender arrangements' and that applicants have 'more than a passing regard to the consequences of an unplanned exit from the market and the impact that this has upon their customers and market participants.'

The AER remains of the view that, to the extent that these requirements impact on a retailer's operations, regard should be had to them in the retailer's risk management and compliance strategies. The AER does not consider that additional information requirements are necessary to determine an applicant's awareness of the consequences of a RoLR event.