Draft

Retailer authorisation guideline

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AUSTRALIAN ENERGY REGULATOR

Contents

Glossary and definitions

AEMO	Australian Energy Market Operator
AER	Australian Energy Regulator
ACCC	Australian Competition and Consumer Commission
ASIC	Australian Securities and Investments Commission
Associate	has the same meaning it would have under Division 2 of Part 1.2 of the *Corporations Act 2001* (Cth) if ss.13, 16(2) and 17 did not form part of that Act
Control	is defined as in s.50AA of the *Corporations Act 2001* (Cth)
De facto director	includes any person who has not been validly appointed as a director but who acts in the position of a director
Director	includes any person appointed to the position of director, or who is appointed to the position of an alternate director and is acting in that capacity, regardless of the name that is given to their position
Insolvency official	is defined in s.122 of the Retail Law to mean a receiver, receiver and manager, administrator, provisional liquidator, liquidator, trustee in bankruptcy or person having a similar or analogous function
Officer	is defined as in s.9 of the *Corporations Act 2001* (Cth)
Retail Law	National Energy Retail Law
Retail Rules	National Energy Retail Rules
RoLR	retailer of last resort
Shadow director	includes any person who has not been validly appointed as a director but with whose instructions or wishes directors are accustomed to act in accordance with

Introduction

This guideline is designed to help applicants understand the process for assessing energy retailer authorisation applications and for the transfer, surrender and revocation of retailer authorisations. It explains the procedures the Australian Energy Regulator (AER) follows when assessing an application for a retailer authorisation (and for its revocation, surrender or transfer) and sets out the information required to assess an authorisation application. The AER may, where it considers it appropriate, require additional information.

We advise potential applicants to consult with us prior to and while preparing an application for a retailer authorisation. We will run information sessions (on request from a prospective applicant) to provide advice and guidance on entering the energy market as a retailer.

The regulatory framework

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

The AER is responsible for the enforcement of the National Energy Retail Law (Retail Law)[1] and National Energy Retail Rules (Retail Rules).[2] This includes responsibility for the regulation of electricity and gas retail markets (other than retail pricing) in most jurisdictions. The framework does not apply to retail energy markets in Western Australia or the Northern Territory.

The statutory objective of the Retail Law is to promote efficient investment in and efficient operation and use of energy services for the long term interests of energy consumers with respect to price, quality, safety, reliability and security of supply of energy.

The AER is required to develop a Retailer authorisation guideline under s.117 of the Retail Law.

Further information about the AER and its role can be found on the AER website at www.aer.gov.au.

The requirement to be authorised

Section 88 of the Retail Law prohibits a person from engaging in the retail sale of energy unless the person has obtained a retailer authorisation or is exempt from the requirement to obtain an authorisation. A breach of this provision attracts a civil penalty. The AER is responsible for issuing and revoking retailer authorisations.

An authorisation is granted on a national basis—that is, it allows the holder to engage in the retail sale of the specified form of energy (electricity or gas) in all participating jurisdictions and to all contestable classes of customers. The AER has no discretion to

[1] The Retail Law can be accessed at: *Insert link*

[2] The Retail Rules can be accessed at: *Insert liny*

offer an authorisation that limits the jurisdictions in which the retailer can operate or restricts the sale of energy to particular classes of customers.

Retail exemptions

Some businesses engaging in energy retailing activities are exempt from the requirement to hold a retailer authorisation. Exemptions can be granted by the AER on an individual basis or can be deemed to apply to a defined class of energy suppliers. Some deemed exemption categories require registration by the retailer before the exemption will apply.

For deemed exemptions, we cannot determine for an individual whether or not they fall within the class of exempted persons. The entity engaging in the activity must take its own legal advice, and if necessary seek either an individual exemption or a retailer authorisation. Further information on exemptions and a link to the *Exempt selling guideline* can be found at [*link to be provided in final guideline*]. The *Exempt selling guideline* sets out the circumstances when it may be appropriate for an entity to seek exempt seller status.[3]

Entry criteria

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

- the applicant has the necessary 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.

The AER may only issue a retailer authorisation where the applicant satisfies all of the entry criteria. If the criteria are not met, we may approve an authorisation application subject to conditions relating to satisfaction of the entry criteria. In these circumstances, the authorisation would take effect (be issued) once the AER is satisfied that all conditions have been met.

Our approach to applying the entry criteria is set out in this guideline.

Consequences of retailer authorisation

The enforcement and compliance framework in the Retail Law applies to holders of retailer authorisations. Retailers must be able to comply with the Retail Law and Retail Rules, as well as any relevant provisions of the National Electricity Law and

[3] At the time of writing, an exempt selling guideline is not available. A draft is expected in November 2010.

Rules, National Gas Law and Rules and jurisdictional energy legislation, prior to commencing retail operations.[4]

The AER will monitor retailers' compliance with obligations under the energy laws that it administers. If a retailer fails to meet its obligations, the AER has a range of options including revocation of the authorisation.

The AER's approach to enforcement and compliance is set out in the *Statement of approach to retail market compliance* and the *Retail compliance procedures and guidelines* available at [*link to be provided in final guideline*].[5]

[4] The AER is not in a position to assess an applicant's compliance with jurisdictional or technical regulations (or enforce any non-compliance). Compliance with these obligations may, however, be relevant to the consideration of an applicant's organisational and technical capacity. The AER will therefore consult with relevant jurisdictional or technical regulators and seek confirmation that the applicant is in a position to meet any jurisdictional or technical requirements prior to issuing a retailer authorisation.

[5] At the time of writing, the *Statement of approach to retail market compliance* and the *Retail compliance procedures and guidelines* are not available. Drafts are expected in late 2010.

Part 1: AER process

Applications for authorisation must be submitted both in writing and electronically via email.

Applications should be posted to:

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

And emailed to: AERInquiry@aer.gov.au

The subject line of the email should state 'Application for retailer authorisation: Attn: General Manager, Markets Branch'.

We will receipt all applications and provide details of a contact person at the AER who will respond to any inquiries regarding the application.

Applicants may be required to pay a fee when applying for a retailer authorisation. Where a fee is required, payment must occur at the time the application is submitted.[6] The AER will not commence processing an application until the relevant fee is received. We prefer application fees to be paid by cheque, made out to the Australian Competition and Consumer Commission.

Information provided must be current

The information supplied in a retailer authorisation application or application for transfer of an authorisation must represent the applicant's current position and not a projection of what its position will be when the authorisation (or transfer) takes effect. This applies except where the information requirements explicitly request projections of the position or operation of the applicant.

Dual fuel, gas or electricity

Applicants must specify whether they are seeking a retailer authorisation for the sale of gas or electricity. If applicants are seeking to be a dual fuel retailer, s.100 of the Retail Law requires two applications to be submitted.

Where the same information is required under each application, this information need only be supplied once. However, some information will be specific to an applicant's ability to retail gas or to retail electricity and should be referred to in either the gas or electricity application as appropriate. A separate risk management strategy, for example, should be provided for each activity.

Successful dual fuel applicants will be issued with separate authorisations for their electricity and gas retail activities.

[6] The National Regulations may prescribe fees in respect of any matter under the Retail Law. Also, the AER may charge fees for services it provides under section 44AAI of the *Trade Practices Act 1974* (Cth).

Public consultation process

The AER will publish a notice on its website that a retailer authorisation application has been received and setting out the consultation process. The notice may contain the application in its entirety or details from it. We will also provide details of any application through our stakeholder email update notification processes. Any parties wanting to register for AER updates can do so by emailing a request to AERInquiry@aer.gov.au.

We will not publish any matters identified in an application as confidential if we agree that such information is confidential. Applicants should clearly identify the information and documents that are the subject of the confidentiality claim. Please refer to the *ACCC–AER information policy: the collection, use and disclosure of information* on our website under 'Publications' for further information on the treatment of information provided to us.

The period for consultation will be set out in the notice. Section 91 of the Retail Law requires a consultation period of at least 20 business days from the date of the notice. However, the AER may extend the consultation period at its discretion. We must consider all submissions received within the consultation period before a decision can be made on the application.

During the consultation period we may consult with industry participants, organisations and individuals. We may ask questions and seek documents from third parties relating to the application. Where required, we may also request advice from external experts and consultants.

Conditions

We may, under s.93 of the Retail Law, impose conditions on a retailer authorisation relating to satisfaction of the entry criteria. An authorisation will only be issued—that is, the applicant can only begin retailing—once the AER is satisfied that the conditions attached to its grant are met. If we are not satisfied that the conditions have been met within the specified timeframe, the application is deemed to be refused. The timeframe for meeting conditions will be three months unless extended by the AER.

If we impose conditions on an authorisation, the applicant will be given notice of this. Details on the appropriate format for the formal acceptance of conditions will be provided in the notice. A failure to formally accept the conditions may result in the application being refused (see 'grounds for refusal' below).

Registration with the Australian Energy Market Operator

Applicants may apply to us for a retailer authorisation before applying for registration with the Australian Energy Market Operator (AEMO) or before such registration is completed. However, where registration with AEMO has not been completed at the time the application for authorisation is granted, issue of the authorisation will be conditional on registration being obtained. We may exchange views, documents, data and information with AEMO when assessing an application/s.

AER decision making

Our decision to grant or refuse a retailer authorisation is made by assessing an application against the entry criteria set out in the Retail Law. In assessing the

application, we are guided by the objective of the Retail Law set out earlier. We aim to make a decision within 12 weeks of receiving all relevant information.

Applicants will be given notice of the AER's decision. If the application is granted, the applicant will also be given notice of any conditions which may be attached to the authorisation. AEMO will also be given notice of the decision to grant a retailer authorisation. If the application is refused, a statement of reasons will be provided setting out why the entry criteria were not satisfied or will not be satisfied.

When an applicant is given notice that its authorisation is granted, the notice will specify which form of energy (electricity or gas) it is authorised to sell. If a retailer wishes to sell a form of energy not covered by the authorisation, it is required under s.100 of the Retail Law to apply for a separate authorisation. An authorisation cannot be changed to authorise the selling of another form of energy.

Grounds for refusal

We will refuse an application if there has been:

- a failure to meet any of the entry criteria
- provision of false or misleading information

  Providing false or misleading information in an application for retailer authorisation is a serious offence under the *Criminal Code* (Cth). The maximum penalty for such an offence is 12 months imprisonment.

- a failure to provide required information or meet any conditions attached to a retailer authorisation within the stipulated timeframe.

  - If we impose conditions on an authorisation, the applicant must accept them within 20 business days of receipt of the notice. We may extend this response period if we consider it necessary. If the applicant does not respond within the stipulated period, the application is deemed to be refused.
  - If the applicant responds to the notice accepting the conditions, but after a period of three months has not satisfied the AER that the conditions have been met, then the application is deemed to be refused.
  - Prior to imposing conditions on an authorisation, we may consult with the applicant to discuss whether the three month period to satisfy conditions is feasible in its circumstances. We may extend this period if we consider it appropriate.

The Retail Law also provides, under s.170, that we can refuse an application where the applicant (or an associate) has previously triggered a retailer of last resort (RoLR) event under the Retail Law. The AER will not automatically deny an application from such an applicant, but will subject it to close scrutiny. For further details, see section 2.1 'Organisational and technical capacity criterion' (page 9).

If we refuse an application, the applicant will be given notice in writing stating the reasons for refusal. A notice of the decision will also be placed on our website.

Withdrawal of application

An application may be withdrawn in writing at any time before it is approved by us. If an applicant withdraws its application and subsequently changes its mind, it must submit a new application.

Duration

Retailer authorisations do not have expiry dates. A retailer authorisation will continue until it is revoked or surrendered.

Dormant retailer authorisations

A retailer authorisation will continue in force even if the holder is not actively retailing. Holders of dormant authorisations 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 (see Part 12 of the Retail Law).

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.

Amendment

We may amend a retailer authorisation on the request of the retailer. Such amendments are described in the legislation as 'alterations' and will be used for situations such as a change of business name.

Public register of authorised retailers and exempt sellers

Section 119 of the Retail Law requires the AER to maintain a public register of authorised retailers and exempt sellers. Copies of retailer authorisations will be made available on the public register on our website: www.aer.gov.au/publicregister. Exempt sellers who hold individual exemptions or registered exemptions will also appear on the public register, but exempt sellers deemed to be part of an exempted class without any requirement for registration will not appear. The public register will include a list of the classes of persons for whom deemed exemptions are in force, and a list of the classes of persons for whom an exemption is registrable. Please refer to the *Exempt seller guideline* available at [*link to be provided in final guideline*] for a description of exempted classes of sellers.[7]

[7] At the time of writing, an exempt selling guideline is not available. A draft is expected in November 2010.

Information requirements—general particulars

The AER requires the following information to be provided in an application for authorisation:

1 Your legal name.

2 Your trading name if different to your legal name.

3 ABN or ACN.

4 A registered address for correspondence.

5 A nominated contact person, including their position in the organisation and contact details.

6 The form/s of energy for which a retailer authorisation is sought.

7 The date you intend to commence retail operations.

8 The nature and scope of the operations proposed.

An authorisation covers energy retailing activities in all participating jurisdictions to all contestable classes of customers. However, some obligations (for example, participation in ombudsman schemes) accrue only when retailing in certain jurisdictions and to certain customer classes. The AER therefore requires information on:

9 The jurisdictions in which you intend to retail energy.

10 The type of customers you intend to supply (for example, small customers, small market offer customers or large customers as defined in s.5 of the Retail Law).

Part 2: Entry criteria

Under s 92 of the Retail Law, an applicant must satisfy three entry criteria for the AER to grant a retailer authorisation. These are that it:

- has the organisational and technical capacity to operate as a retailer
- has sufficient financial resources to operate as a retailer
- is a suitable person to hold a retailer authorisation.

We require an applicant to provide information to us to demonstrate that it meets the entry criteria, and can therefore meet the obligations associated with being an energy retailer. Applicants are advised to keep these obligations in mind when responding to the entry criteria and when providing information to support an application.

2.1 Organisational and technical capacity criterion

An applicant must demonstrate that it possesses the necessary organisational and technical capacity to hold a retailer authorisation and carry out the functions of a retailer. Capacity will be assessed by looking at technical and industry experience, technical operations and human resources. The information provided should demonstrate the ability to comply with regulatory obligations imposed on retailers, as well as the ability to administer business processes. Where aspects of the retailing role are to be contracted out, we will require details of these arrangements with third parties (including a copy of any contract/s that have been finalised).

If an applicant currently holds (or has previously held) an energy retailer authorisation or licence in any Australian state or territory, details of this should be provided. An applicant should also provide details of any other energy market experience it has.

Applications should include a summary of the skills and experience of key officers. We would expect key organisational figures to have experience in the energy market and in the operation of a viable business. We will also require applicants to provide details of any retailing and/or energy experience of a person holding 20 per cent or more of any class of shares, or any instrument or right convertible into, exchangeable for or giving the person the right to acquire 20 per cent or more of any class of shares, in the applicant.

An applicant should provide a risk management strategy (including insurance arrangements) covering both operational and financial risks. The Australian standard for risk management (AS/NZS ISO 31000:2009) may be a useful reference point in developing the strategy.

An applicant should also provide a compliance strategy that demonstrates at a high level how the applicant intends to comply with its regulatory obligations, and estimates the resources required to implement and manage its compliance systems and programs. It must also demonstrate that it has established, or is in a position to establish, the required compliance procedures. The Australian standard on compliance programs (AS 3806-2006) may be a useful reference point to assist in developing a compliance strategy and plan. All compliance systems described in the strategy and plan are required to be in place prior to a retailer authorisation being issued. Where

this has not occurred at the time of applying for a retailer authorisation, it may be made a condition of the issuing of an authorisation.

The compliance strategy should include complaint and dispute resolution procedures that are consistent with the Australian standard on complaints handling (AS ISO 10002-2006).

The responsibility of ensuring that the risk management and compliance strategies of the applicant are effective lies with the director/s, or, where the applicant is unincorporated, the person/s with effective control of the business. Evidence should be provided that the risk management and compliance strategies have been approved by the director/s (or person/s with effective control) and that they have been subject to an external assurance process (for example, an external audit).

The national energy retail objective is focussed on the long term interests of energy customers. It is important, therefore, for an applicant to demonstrate in the application that it will be in a position to manage all obligations to customers under the Retail law and Rules. Applications should include details of all employee training policies and programs, and any other policies and procedures in place (or proposed) to assist staff to appropriately interact with customers. This should include, for example, training regarding identification of hardship customers[8] and to ensure appropriate marketing and customer transfer practices as well as policies on the approach to information provision to customers and management of customer information (including privacy and confidentiality issues). Copies of any retail contracts that an applicant has developed may also assist in our assessment of its capacity to appropriately manage the retailer–customer relationship.

An applicant should provide evidence of any agreements and systems in place to facilitate interaction with relevant market participants. This includes, but is not limited to, distribution businesses, AEMO, jurisdictional or technical regulators and contract market participants. Where agreements and systems have not been finalised, it should provide details of any negotiations or steps that have occurred to date. These arrangements will be assessed against the applicant's business plan. It will be a condition on the grant of an authorisation application that these arrangements are finalised.

If an applicant (or an associate) has previously triggered the RoLR provisions of the Retail Law or equivalent state/territory legislation, but are now applying to be granted a new retailer authorisation, the application will be closely scrutinised against the organisational and technical capacity criteria. This will also be the case where an applicant has previously transferred or surrendered an authorisation or licence in circumstances where, if not done, triggering of RoLR provisions would have been likely. If an applicant has previously transferred or surrendered a retailer authorisation in these circumstances, it may demonstrate that it does not possess the ongoing ability to carry out retailer functions or is not a suitable person to be granted a retailer authorisation (see section 2.2).

[8] A customer hardship policy must be developed and submitted to the AER within three months of a retailer authorisation being granted.

Under s.170 of the Retail Law, where an applicant or an associate has previously triggered a RoLR event under the Retail Law, we may grant an authorisation application on the condition that it pays part or all of the costs of the RoLR event.

Information requirements – organisational and technical capacity

The AER requires the following information to be provided in an application for authorisation:

1 Details of any previous experience as an energy retailer, or any other experience in the energy market, including:

- 1.1 The date and location of previous operations
- 1.2 The form/s of energy sold
- 1.3 The scale of operations (including the number and size of customers)
- 1.4 an explanation of which activities were conducted in-house and which were contracted out to third parties
- 1.5 an outline of the relevance of your previous experience to the requirements under the retailer authorisation, national regulatory framework and relevant state/territory energy regulatory arrangements..

2 Details of or any other relevant retail experience.

3 Details of retail and/or energy experience of a person holding 20 per cent or more of any class of shares, or any instrument or right convertible into, exchangeable for or giving the person the right to acquire 20 per cent or more of any class of shares, in the applicant.

4 An organisation chart showing the structure of your organisation.

5 The number of employees, broken down by business unit or other relevant classification.

6 A summary of qualifications, technical skills and experience of your officers, and the relevance of those skills and experience to meeting the requirements of the retailer authorisation. You must demonstrate your capability to work in the energy industry.

7 Details of your human resources policy regarding employee qualifications, including:

7.1 Experience and technical qualifications of employees for the operations they will carry out.

7.2 Relevant industry licences or qualifications.

8 Details of all employee training programs and training policies, and any other policies and procedures that you have in place (or propose to put in place) to assist staff to appropriately interact with customers.

9 A comprehensive business plan, including but not limited to: strategic direction and objectives; identified opportunities in the market place; forecast results; benchmarks and the impact of differing assumptions or scenarios on your financial position.

9.1 If you have been in existence for less than 12 months and have not yet released audited financial statements, the business plan should be accompanied by budgeted financial statements for the next three years.

10 Details of Quality Assurance accreditations you hold.

11 A copy of your compliance strategy:

11.1 Demonstrating your knowledge and understanding of the obligations imposed on authorised retailers and all statutory, industry and technical requirements.

11.2 Outlining how all retailer authorisation obligations and statutory, industry and technical requirements will be met.

11.3 Including all complaint and dispute resolution procedures.

12 A copy of your risk management strategy covering both operational and financial risks.

13 A written declaration from the director/s (or where the applicant is unincorporated, the person/s with effective control of the business) that the applicant's risk management and compliance strategies have been approved and that they have been subject to an external assurance process (for example, an external audit).

14 Any additional information which demonstrates your ability to manage risk and operate in accordance with the Retail Law objective, particularly the long term

15 Details of insurance arrangements, which must be appropriate for the scale of activities to be conducted under the retailer authorisation.

16 Where you may be relying on a third party to provide staff and resources to meet the technical requirements of your retailer authorisation or to fulfil retail roles (such as phone centres or billing), you must:

16.1 State all functions and activities you propose to outsource.

16.2 Provide details of any formal agreement/s to provide services, including confirmation that the third party possesses relevant technical competencies to conduct the proposed activities.

16.3 Provide a summary of the third party's experience in and knowledge of the relevant area.

16.4 Provide evidence of the third party's technical capacity to meet relevant obligations, including any relevant accreditations.

17 Evidence of any membership, or steps taken to obtain membership, of a recognised energy industry ombudsman scheme in the jurisdiction/s in which you intend to retail energy to small customers.

18 Evidence of any agreements and systems in place to facilitate interaction with relevant market participants. This includes, but is not limited to, distribution businesses, AEMO, jurisdictional or technical regulators and contract market participants. Where agreements and systems have not been finalised, you should provide details of any negotiations or steps that have occurred to date.

19 Details of any situation/s where you (or an associate) have previously triggered the RoLR provisions of the Retail Law or equivalent state/territory/foreign legislation, or have transferred or surrendered an authorisation or licence in circumstances where if not done, triggering of RoLR provisions would have been likely.

20 Any additional information that will assist us in considering your organisational and technical capacity.

2.2 Financial resources criterion

In line with the objective of the Retail Law, we must be satisfied that prospective retailers have (or have access to) adequate financial capacity to provide reliable retail services to customers and maintain the integrity of energy wholesale markets.

To meet the 'financial resources' criterion an applicant must demonstrate its capability to meet the following retailer financial obligations:

- make energy purchases in wholesale energy markets
- procure and pay for network services, and meet any credit support requirements
- provide retail supply services, in particular billing services.

We will also consider whether an applicant has sufficient financial resources to meet other obligations of retailing such as business-to-business systems and participation in energy ombudsman schemes (where relevant).

An assessment of financial capacity must be informed by an applicant's business plan and risk management strategy. An applicant should demonstrate that it has the financial capacity to support its planned strategy for engaging in the market, but also to continue to operate in circumstances where it is exposed to risks such as high wholesale prices. As a stress test, we will consider an applicant's capacity to operate as an energy retailer for a period of 12 months without reliance on customer takings.

To demonstrate that it is a going concern, an applicant should submit financial statements for the past three years. If it is a new entrant and does not have financial statements going back to this period, an applicant should provide details of bank guarantees.

Evidence of a credit rating from agencies such as Standard & Poor's, Fitch or Moody's may assist an application, but is not essential. While credit ratings may assist our consideration of this criterion, we will place greater weight on evidence of funds and ability to repay debt.

We will work with AEMO to ensure our assessment of an applicant's ability to make energy purchases in wholesale energy markets takes account of AEMO's prudential requirements. If an applicant is already registered with AEMO, this may facilitate our consideration of its ability to satisfy the financial resources criterion.

An applicant should demonstrate that it is able to procure and pay for network services. This includes the ability to pay distribution use of system charges to electricity distributors and/or reference tariffs to gas distributors. We must be satisfied that an applicant is also able to provide adequate credit support to distributors in accordance with the requirements of the National Electricity Rules and National Gas Rules (as applicable). Where these arrangements have not been finalised at the time the application for authorisation is granted, issue of the authorisation will be conditional on finalisation occurring.

Incorporated entities should provide a written declaration from their director/s that they are unaware of any factor that would impede their ability to finance energy

retailer activities under the authorisation for the next 12 months. For unincorporated applicants, a written declaration to this effect should be provided by the person/s in effective control of the business.

Generally we will only require financial documents relating to the company making the application and written declarations from the director/s of that company (or the person/s in effective control of the business). However we may also request this information from parent or related companies if we consider it necessary.

We may also undertake checks with the National Names Index on the ASIC website.

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 should not be taken as an indication of a retailer's ongoing financial viability or profitability. 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. Further, s.150 of the Retail Law requires a retailer or AEMO to notify the AER when they become aware of anything that may affect a retailer's ability to maintain continuity of the sale of energy to its customers.

Information requirements – financial resources

The AER requires the following information to be provided in an application for authorisation:

1 Copies of your audited financial reports for the past three years including:

- 1.1 All financial statements required by the accounting standards.
- 1.2 Notes to financial statements (disclosure required by the regulations, notes required by the accounting standards, and any other information necessary to give a true and fair view).
- 1.3 Director's declaration that the financial statements comply with accounting standards, give a true and fair view, have been made in accordance with the *Corporations Act 2001* (Cth) and that there are reasonable grounds to believe the company/scheme/entity will be able to pay its debts as and when they fall due.
- 1.4 Director's report.
- 1.5 Auditor's report.

2 A copy of any other document, record or information that you have been required to submit to ASIC under chapter 2M of the *Corporations Act 2001* (Cth) over the past three years.

3 Evidence of long and/or short term credit rating/s from agencies such as Standard & Poor's, Fitch or Moody's.

4 If you are part of a group of related companies, and/or party to a partnership, joint venture or alliance agreement with another company, you should provide:

4.1 The ownership structure of the group, including proportions of equity held. This should be traced through to the individual, natural persons who are the ultimate beneficial owners of the company. Details must be provided for any persons holding at least a 5 per cent interest in the company.

4.2 The contractual arrangements (e.g. alliance contracts, associate contracts, establishment contracts) that define relationships within the group—including shared resources, guarantees, revenue flows, obligations and/or responsibilities.

4.3 Consolidated audited financial statements for the group.

5 Forecast revenue and expenses for at least the first 12 months of operations, consistent with your business plan. This forecast should highlight all key assumptions and risks, along with all relevant risk management strategies.

6 A written declaration from an independent auditor or your principal financial institution stating that:

6.1 An insolvency official has not been appointed in respect of the business or any property of the business.

6.2 No application or order has been made, or resolution has been passed or steps have been taken to pass a resolution, for the winding up or dissolution of the business.

6.3 They are unaware of any other factor that would impede your ability to finance your energy retail activities under the authorisation.

7 A written declaration from the Chief Financial Officer, Chief Executive Officer or director/s stating that you are a going concern and that the officer is unaware of any factor that would impede your ability to finance your energy retailer activities under the retailer authorisation for the next 12 months. We may also request this declaration from an officer of your parent company or related

8 Details of any bank guarantees.

9 Any additional information that will assist us in our consideration of your financial capacity to meet the requirements of, and all obligations under, the retailer authorisation, national regulatory framework and relevant state/territory energy regulatory arrangements.

2.3 Suitability criterion

An applicant must be a suitable person to hold a retailer authorisation.

What is a suitable person?

The AER may be guided in its assessment of suitability by case law on what it means to be a 'fit and proper' person. The courts have provided guidance on the question of what it means to be a fit and proper person in the context of those seeking authorisation to conduct regulated activities. They have indicated that context is important in determining whether someone is a fit and proper person. A person's character or reputation is relevant to the determination as it provides an indication of (or public perception of) likely future conduct.[9]

The question of suitability to conduct energy retailing goes beyond an assessment of financial and organisational capacity. We may look to previous commercial dealings of the applicant, as well as of its officers, associates and any other entity that exerts control over its business activities (as applicable). Any assessment will look at the degree of honesty and integrity shown in those commercial dealings and whether the applicant is likely to contribute to the national energy retail objective and act in the long term interest of consumers.

We will, therefore, require that an applicant provide a range of information to enable us to assess its suitability, with particular regard to whether there has been actual improper conduct or may have been improper conduct in previous commercial dealings.

Failure to comply with regulatory requirements

To assess the standard of honesty and integrity shown in previous commercial dealings, we will require a compliance history for the applicant, its associates, other businesses where its officers have held an officer position and any other entity that exerts control over its business activities. In particular, the applicant should provide details of any material failure by any of these businesses to comply with regulatory requirements, laws or other obligations over the previous 10 years, including all circumstances that resulted in an infringement notice or other enforcement action (including undertakings).

[9] See, for example, *Australian Broadcasting Tribunal v Bond and Others* (1990) 94 ALR 11.

Prior revocation or refusal of a licence or authorisation

We will have regard to whether an applicant or its company directors have previously held a licence/authorisation in the energy industry (or any another industry) that has been revoked, and the reason for the revocation. We will also have regard to whether a previous application for a licence/authorisation in any industry has been refused, and the reason for the refusal.

Disqualified directors

An applicant should provide written declarations from members of its management team stating that they have not been disqualified from the management of corporations. We may conduct searches of the ASIC registers for disqualification from being a company director (www.asic.gov.au) to confirm this information. We may also conduct searches using the National Personal Insolvency Index (www.itsa.gov.au) managed by the Insolvency and Trustee Service Australia to determine whether company directors or major shareholders (if applicable) are registered as bankrupt or are insolvent under the *Bankruptcy Act 1966* (Cth).

We require a written declaration from an applicant's Chief Financial Officer (or Chief Executive Officer) or its director/s regarding the applicant's record of bankruptcy in any overseas jurisdiction.

Criminal convictions

We will require details of any unspent convictions for any offences that are relevant to an applicant operating as an energy retailer (this may include, for example, offences involving fraud or dishonesty, or negligence or recklessness in relation to business practices) for the following persons:

- the current director/s (or shadow / de facto director/s) of the applicant, and any other person that exerts control over the applicant's business activities
- if the applicant is unincorporated, the person/s with effective control of the business
- all persons who are responsible for significant operating decisions of the business.

We may request a certified copy of a national criminal history check (no more than 12 months old) to confirm this information.

The categories of persons listed above must also declare unspent convictions for relevant offences from overseas jurisdictions. We may request a criminal history check from countries in which the person has lived in the last 10 years to confirm this information.

Information requirements – suitability

The AER requires the following information to be provided in an application for authorisation:

1 For the applicant, its associates, any other businesses where its officers have held an officer position and any other entity that exerts control over its business activities—details of:

1.1 any material failure to comply with regulatory requirements, laws or other obligations over the previous 10 years, including all circumstances that resulted in an infringement notice or other enforcement action (including undertakings).

1.2 any previously revoked authorisations, authorities or licences held in any industry and the reason/s for the revocation.

1.3 any failed authorisation, authority or licence applications in any industry and the reason/s the application was unsuccessful.

1.4 any past or present administrative or legal actions in relation to an authorisation, authority or licence in any industry.

2 Details of any offences or successful prosecutions under any territory, state, commonwealth or foreign legislation (including, but not limited to, the *Australian Securities and Investments Commission Act 2001* (Cth), *Trade Practices Act 1974* (Cth) and the *Corporations Act 2001* (Cth)) that are relevant to your capacity as an energy retailer, or written confirmation that no offences have been committed against, or been prosecuted under, any such legislation. This information must be provided for:

- the current director/s (or shadow / de facto director/s) of the applicant, and any other person that exerts control over the applicant's business activities
- if the applicant is unincorporated, the person/s with effective control of the business
- all persons who are responsible for significant operating decisions of the business.

3 Upon request, a criminal history check conducted within the past 12 months for persons listed under information requirement 2.

4 Details of whether any director/s (or shadow / de facto director/s) are disqualified, including written declarations from members of your management team stating that they have not been disqualified from the management of corporations.

5 A written declaration from your Chief Financial Officer (or Chief Executive Officer) or your director/s regarding your record of bankruptcy in any overseas jurisdiction.

6 Full names and current residential addresses of all officers of the applicant.

7 Details of policies and procedures addressing the probity and competence of officers and any other key management staff.

8 Any additional information that will assist us in our consideration of the character and past performance of your officers.

Part 3: Revocation, transfer and surrender

3.1 Revocation

Grounds for revocation

Section 107 of the Retail Law states that we may revoke a retailer authorisation if:

- a retailer has materially failed to meet its obligations under the Retail Law and Retail Rules or other applicable energy legislation; and we have a reasonable apprehension that it will not be able to meet its obligations in the future
- for electricity, a retailer is not a registered participant for purchasing electricity as required by s.11(4) of the National Electricity Law
- for gas, a retailer is not registered under the relevant gas market schemes
- a retailer has triggered a RoLR event.

Failure by a retailer to participate in the relevant energy ombudsman scheme/s or to meet the obligations under the relevant scheme/s in jurisdictions where it retails to small customers could also result in its retailer authorisation being revoked.

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

Revocation process

We must follow a specific process (set out in s.120 of the Retail Law) in considering whether to revoke an authorisation and may not revoke a retailer authorisation until completion of that process. However, the process does not apply for revocations where the participant has triggered a RoLR event.

Under the formal process, we will give a retailer notice in writing of an intention to revoke its authorisation and the reasons for this. The notice must state that the retailer has the opportunity to respond by a date specified in the notice. The response date will be no less than 10 business days after giving notice. The retailer's response may indicate why its authorisation should not be revoked and demonstrate how it intends to manage the issues raised in the revocation notice.

We must consider a retailer's response and decide whether the revocation will proceed. We will not revoke the authorisation if we are satisfied the retailer can address the issues in the notice. We will revoke the authorisation if steps identified in the retailer's response to address the issues in the notice are not completed in an agreed timeframe, or if we are not satisfied the response demonstrates that the retailer can address the issues.

If we revoke an authorisation, the notice of revocation will be published on our website with the reasons for the decision. Details of any conditions related to the transfer of customers will also be published. We will inform AEMO and relevant distribution businesses of the decision.

Effect of revocation

Revocation is a last resort and will only be used if a retailer has shown a persistent or serious failure to comply with the obligations of being a retailer. This is because a decision to revoke an authorisation will have flow on effects to retail customers and third parties.

If an authorisation is revoked, we will set a date when it will take effect.

Where the AER revokes a retailer's authorisation, this will trigger a RoLR event. Customers of the retailer at the date the revocation takes effect will be transferred under the RoLR scheme in Part 6 of the Retail Law. We may, after consulting with AEMO, impose conditions on the transfer of the retailer's customers to another retailer.

3.2 Transfer

The application for transfer of a retailer authorisation must be made jointly by the retailer holding the authorisation and the proposed transferee (incoming retailer). The application must be submitted both in writing and electronically via email.

Applications should be posted to:

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

And emailed to: AERInquiry@aer.gov.au

The subject line of the email should state 'Application for transfer of retailer authorisation: Attn: General Manager, Markets Branch'.

We will receipt all applications and provide details of a contact person at the AER who will respond to any inquiries regarding the application.

Applicants may be required to pay a fee when applying to transfer a retailer authorisation. Where a fee is required, payment must occur at the time the application is submitted.[10] The AER will not commence processing an application until the relevant fee is received. We prefer application fees to be paid by cheque, made out to the Australian Competition and Consumer Commission.

The AER encourages applicants to only seek to transfer an authorisation where the transferee retailer is not yet an authorised retailer. This is to prevent authorised retailers from holding multiple authorisations. Where the transferee retailer is already authorised, a transfer of customers can be achieved through a commercial agreement that does not require regulatory approval.

[10] The National Regulations may prescribe fees in respect of any matter under the Retail Law. Also, the AER may charge fees for services it provides under section 44AAI of the *Trade Practices Act 1974* (Cth).

We will apply the same entry criteria in assessing the transfer application as if the proposed transferee were applying for a new retailer authorisation under Division 2, Part 5 of the Retail Law. The consultation process is the same as for applications for retailer authorisation. It is recommended that businesses looking to transfer a retailer authorisation engage with the AER at an early stage to prevent delays in the process.

All applications must demonstrate that the transfer of customers will be appropriately managed. The applicants must show that all retail customers will either be transferred to the proposed transferee or another retailer. An application may be granted with conditions attached to ensure that a transfer of an authorisation is completed in a way that minimises the disruption for energy customers. The conditions can, without limitation, require the transferor to continue to abide by requirements of energy laws. The AER may impose conditions including an obligation on the transferor (outgoing) retailer to pass on details of customers receiving concessions or using life support equipment, or an obligation to inform the customers of the change in retailer and their rights and obligations under the new arrangement.

Following a transfer, the transferor will no longer be a retailer for the purposes of the Retail Law. The transfer process must therefore contain protections to ensure that customers are not disadvantaged. Under s.103(5) of the Retail Law, the AER can impose conditions on a transfer that continue to apply to the transferor beyond the transfer date. For example, the AER may require the former retailer to maintain membership of relevant energy ombudsman schemes for 12 months following the date of the transfer of the authorisation. Further, the AER could impose an equivalent obligation to s.141(4) of the Retail Law (under the RoLR scheme) that provides for disputes between a retailer and small customer to be dealt with as if the retailer was still authorised.

We will grant the transfer application if we find that the proposed transferee satisfies the entry criteria and demonstrates that issues concerning retail customers and third parties are adequately managed. If the transfer application is approved, we will notify the incoming and outgoing holder of the retailer authorisation. If conditions are imposed, this will be included in the notice to the applicants. We will also notify AEMO and relevant distribution businesses, and publish a notice of the transfer on our website. If we refuse a transfer application, the applicants will be given written notice stating the reasons why the application was refused.

We aim to process transfer applications within 12 weeks. If a transfer application is approved we must set a date at which the transfer will take effect. This must be no later than six months after the decision to grant the transfer is made.

Information requirements – transfer

The AER requires the following information to be provided in an application for transfer of an authorisation:

1 Transferees must provide all information as required in an application for authorisation under this guideline.

2 Transferors must provide a statement of reasons for the transfer of the retailer authorisation.

3 Transferors must indicate the preferred timing for the transfer to take effect.

4 Transferors must provide documentation demonstrating that appropriate arrangements have been made for the transfer of customers and that continuity of the supply of energy to customers will not be compromised by the transfer.

3.3 Surrender

If a retailer wishes to cease operating, or no longer requires a retailer authorisation, it can apply to us at any stage to surrender its authorisation. We must decide whether to approve the surrender. The application must set out the reason/s for surrendering the retailer authorisation.

The retailer must demonstrate there will be continuity of supply to its customers, and for premises where it is the financially responsible market participant. Any arrangements for the transfer of customers to another retailer should be outlined in the application. We may, after consulting with AEMO, impose conditions on the transfer of customers. These conditions can, without limitation, require the surrendering retailer to continue to abide by requirements of energy laws.

We will ensure that arrangements are in place to allow former customers to bring a dispute against the retailer following surrender of the authorisation. This would be the same process as outlined above for the transfer of a retailer authorisation. Under s.105(5) of the Retail Law, the AER can impose conditions on a surrender that continue to apply to the surrendering retailer beyond the surrender date.

The application must be submitted both in writing and electronically via email.

Applications should be posted to:

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

And emailed to: AERInquiry@aer.gov.au

The subject line of the email should state ‘Application for surrender of retailer authorisation: Attn: General Manager, Markets Branch’.

We will receipt all applications and provide details of a contact person at the AER who will respond to any inquiries regarding the application.

Applicants may be required to pay a fee when applying to surrender a retailer authorisation. Where a fee is required, payment must occur at the time the application

is submitted.[11] The AER will not commence processing an application until the relevant fee is received. We prefer application fees to be paid by cheque, made out to the Australian Competition and Consumer Commission.

We aim to process surrender applications as promptly as possible. We will set a date for the surrender to become effective. The date must be no longer than six months from the date the surrender application is approved.

We will publish notice of our decision to approve the surrender on our website. The notice will state the reasons for the decision and any conditions imposed on the surrender. We will give notice to AEMO and relevant distribution businesses of the decision.

If we refuse an application, the applicant will be given written notice stating the reasons why the application was refused.

Information requirements – surrender

The AER requires the following information to be provided in an application for surrender of an authorisation:

1 A statement of reasons why you wish to surrender your retailer authorisation and why surrender is the best course of action.

2 Preferred timing for the surrender to take effect.

3 Documentation demonstrating that appropriate arrangements have been made for all customers and that continuity of the supply of energy to customers will not be compromised by the surrender.

[11] The National Regulations may prescribe fees in respect of any matter under the Retail Law. Also, the AER may charge fees for services it provides under section 44AAI of the *Trade Practices Act 1974* (Cth).

Part 4: Enforcement

Requirements on holder of a retailer authorisation

Once an application for a retailer authorisation is granted, it will come into operation on a date advised by us or, where conditions have been imposed, when we are satisfied that the conditions have been met. Once it comes into operation, the retailer is bound by the requirements in the Retail Law and Retail Rules in relation to energy marketing and energy sales activities. Retailers must be able to comply with the legislation, including reporting requirements, prior to commencing operations.

Retailers will also be subject to jurisdictional regulatory requirements. The AER has no enforcement role over matters administered by jurisdictional regulators. Retailers should engage with jurisdictional regulators to ensure they are aware of their obligations.

We encourage potential applicants to discuss these issues with us before making a formal application. An applicant should ensure it has systems and procedures in place that will enable it to comply with all the obligations of a retailer and to monitor its performance and compliance.

Failure to comply may lead to enforcement action by us. Civil penalties may apply and certain activities may attract criminal sanctions. We may revoke an authorisation where a retailer has materially failed to meet its obligations and we have a reasonable apprehension that it will not be able to meet its obligations in the future.

We will directly monitor retailers' compliance with their regulatory obligations, including through the use of compliance audits.

AER enforcement action

Under the Retail Law a person must not sell energy to a retail customer unless it holds a current retailer authorisation under Part 5 or it is selling energy pursuant to an exemption under Division 6 of Part 5. Civil penalties apply if this provision is breached or if there is an attempted breach. Under s.299 an attempted breach is considered an actual breach. If we consider that a provision has been breached, we may commence proceedings under s.289. If the court finds there has been a breach, a civil penalty may be ordered under s.291.

Our decisions to refuse a retailer authorisation, or on the revocation, transfer or surrender of an authorisation are not subject to merits review. Decisions of the AER are, however, subject to judicial review (covering questions of law only) under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

Once a revocation, transfer or surrender of a retailer authorisation is complete, the retailer must cease carrying on retailing activities. A failure to cease retailing activities may attract the civil penalties discussed above.

The Federal Court also has powers to make orders on application by us under s.44AAG of the *Trade Practices Act 1974* (Cth), including orders requiring a retailer to do one or more of the following:

- cease the activity that is in breach
- take action to remedy the breach
- implement a specified program for compliance with the Retail Law.

We will treat any attempt by a person to sell energy prior to obtaining an authorisation, or following the revocation, transfer or surrender of an authorisation, with the utmost seriousness.

Schedule 1: Information requirements

This schedule is a re-iteration of the information requirements set out at the end of each relevant section of this guideline. Schedule 1 should be used as a checklist to assist applicants in completing an application, but note the list below is not exhaustive and we may request further information. Applicants should also provide any additional information that may be relevant to the application.

We will not process applications for retailer authorisation until we receive all information required under this guideline.

Requirement for further information

If we require further information to process an application for a retailer authorisation, we will advise the applicant in writing. It is preferable for us to receive any additional information as soon as possible so that the application may be processed in a timely manner.

[*Update with finalised information requirements*]