



# **Statement of approach: compliance with the National Energy Retail Law, Retail Rules and Retail Regulations**

July 2011

Version 1

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### **Amendment record**

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## Shortened forms

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ACCC	Australian Competition and Consumer Commission
ACCC/AER Information Policy	<i>ACCC–AER Information policy: The collection, use and disclosure of information</i> , available from the AER’s web site
AER	Australian Energy Regulator
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. <i>(A Retailer, a distributor or any other person identified in the national energy Retail Rules as a regulated entity.)</i>
Retail Law	National Energy Retail Law
Retail Regulations	National Energy Retail Regulations
Retail Rules	National Energy Retail Rules

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# 1 Introduction

National legislation to create a new National Energy Customer Framework (Customer Framework) passed both houses of South Australian Parliament in March 2011, and received Royal Assent on 17 March. The Customer Framework, comprising the National Energy Retail Law (Retail Law), National Energy Retail Rules (Retail Rules) and National Energy Retail Regulations (Retail Regulations), has been developed through extensive consultation by the Ministerial Council on Energy (MCE).

The Australian Energy Regulator (AER) is an independent statutory authority that is part of the Australian Competition and Consumer Commission (ACCC). The AER will monitor, investigate and enforce compliance by regulated entities<sup>1</sup>—primarily energy retailers and distributors—with the Retail Law and Rules, and report to stakeholders on compliance.<sup>2</sup> These functions are underpinned by a framework for auditing and compliance reporting set out in AER Compliance Procedures and Guidelines (Procedures and Guidelines) developed in consultation with stakeholders. This Statement of Approach explains the AER’s approach to monitoring compliance and investigating possible breaches of obligations under the Retail Law or Rules, and how the AER will determine the appropriate response to identified breaches.

The AER also monitors the wholesale electricity and gas markets and is responsible for compliance monitoring, investigations and enforcement under the National Electricity Law and Rules and the National Gas Law and Rules. The AER’s Statement of Approach to compliance and enforcement under the national electricity and gas frameworks, and related reports, are available on its website ([www.aer.gov.au](http://www.aer.gov.au)).

## 1.1 AER functions and powers under the Retail Law

The AER will have the following functions and powers under the Retail Law:

- to monitor compliance with obligations under the Retail Law and Rules
- to report on compliance by regulated entities with obligations under the Retail Law and Rules
- to investigate breaches or possible breaches of obligations under the Retail Law or Rules
- to institute and conduct proceedings in relation to breaches of obligations under the Retail Law or Rules.<sup>3</sup>

Further to these functions and powers, the Retail Law provides the AER with a range of information gathering powers. These include powers to impose binding reporting

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<sup>1</sup> s. 2 of the National Energy Retail Law defines a regulated entity as a retailer, distributor or other person identified in the National Energy Retail Rules as a regulated entity.

<sup>2</sup> s. 204, National Energy Retail Law.

<sup>3</sup> s. 204, National Energy Retail Law.

requirements on regulated entities,<sup>4</sup> conduct audits,<sup>5</sup> compel the production of information and documents,<sup>6</sup> and obtain and exercise search warrants.<sup>7</sup>

The Retail Law also sets out the AER's statutory enforcement powers, including action that can be taken by the AER if a breach is identified, and the types of orders and penalties the AER can seek through the courts.<sup>8</sup>

## **1.2 AER compliance procedures and guidelines**

The Retail Law requires the AER to develop and publish AER Compliance Procedures and Guidelines that set out how and when regulated entities must submit information and data to the AER.<sup>9</sup>

The Procedures and Guidelines support compliance with obligations under the Retail Law and Rules by:

- requiring regulated entities to submit information and data relating to compliance in accordance with the Procedures and Guidelines
- requiring regulated entities to establish and observe policies, systems and procedures to monitor their own compliance in accordance with the Procedures and Guidelines
- explaining how compliance audits will be conducted and how the costs of audits will be recovered.

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<sup>4</sup> s. 281, National Energy Retail Law.

<sup>5</sup> ss. 275, 276, National Energy Retail Law.

<sup>6</sup> s. 206, National Energy Retail Law.

<sup>7</sup> s. 309, National Energy Retail Law.

<sup>8</sup> Part 13, National Energy Retail Law.

<sup>9</sup> s. 281, National Energy Retail Law.

## 2 Encouraging compliance with the Retail Law and Rules

The AER is responsible for monitoring, investigating and enforcing compliance with obligations under the Retail Law and Rules in each participating jurisdiction. The purpose of these functions is to ensure that consumers receive the full benefit of the protections provided by the Retail Law and Rules. Compliance with the Retail Law and Rules will contribute to achievement of the National Energy Retail Objective. This objective seeks to promote efficient investment in, and efficient operation and use of, energy services for the long term interests of consumers of energy with respect to price, quality, safety, reliability and security of supply of energy.<sup>10</sup>

The AER will work closely with regulated entities to assist them:

- with understanding their obligations under the Retail Law and Rules; and
- to develop appropriate programs to manage their compliance.

In adopting this approach, the AER recognises that effective prevention of contraventions of obligations under the Retail Law and Rules is preferable to the AER taking enforcement action after a breach has occurred.

The AER encourages regulated entities to develop strong compliance cultures and to continuously review their compliance policies, systems and procedures to ensure that they are effectively monitoring compliance with obligations under the Retail Law and Rules. Ultimately, responsibility for compliance rests with each regulated entity.

The AER aims to educate and inform energy customers and consumer groups about obligations under the Retail Law and Rules and consumer protections available to them under the Retail Law and Rules. By doing so, the AER will encourage consumers to seek the remedies available to them from regulated entities they deal with, as well as pursue ongoing grievances with energy ombudsman schemes and the AER where appropriate.

The AER aims to inform and educate stakeholders on compliance issues, and will make information on best practice compliance with obligations under the Retail Law and Rules readily available to both regulated entities and consumers. The AER will publish reports detailing its monitoring activities under the Customer Retail Law and Rules and outlining key areas of interest to stakeholders.

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<sup>10</sup> s. 13, National Energy Retail Law.

### **3 Key elements of our approach**

The AER has four core compliance functions and powers under the Retail Law: monitoring, inquiry/investigation, enforcement, and reporting information.

We will monitor regulated entities' compliance with obligations under the Retail Law and Rules, on an ongoing basis, to identify areas where breaches may be occurring. Our approach to compliance monitoring is discussed in section 4.

Where issues are identified through our monitoring activities, the AER will make inquiries and investigate the matter to determine whether a breach of the Retail Law or Rules has occurred. This process of inquiry and investigation will generally involve detailed discussions with the relevant regulated entity and other parties concerned. As part of this process we are likely to request information using voluntary or compulsory information gathering mechanisms. Discussion of our inquiry and investigation processes is included in section 5.

Where the AER considers that a breach has occurred, we will take steps to correct the relevant behaviour and restore compliance. There are a range of enforcement options available to us. In each case we will select the enforcement option best suited to the relevant circumstances. Our approach to enforcement is discussed in section 6

Communication and the provision of information on compliance are essential to our compliance functions. In order to build awareness of compliance practices in the energy retail market and assist with consumer education, we will report on our compliance activities on our website. This information is in addition to the Statement of Approach and the AER Compliance Procedures and Guidelines. Our approach to compliance reporting is discussed in section 7.

## 4 Monitoring compliance

Market monitoring is an ongoing activity, and a significant part of the AER's compliance regime. Monitoring provides the foundation for the AER's other compliance and enforcement roles. The AER will use a wide range of surveillance and information gathering methods to identify conduct that could breach obligations under the Retail Law and Rules. Potential breaches identified through monitoring activities are likely to be escalated for further inquiry or investigation.<sup>11</sup>

### 4.1 Targeting monitoring activities

The AER's monitoring activities will encompass the full range of obligations set out for regulated entities in the Retail Law and Rules. In determining the intensity and type of monitoring appropriate for each obligation, we will assess the likely impact of a breach of the obligation, and how likely it is that a breach will occur. The greater the expected impact and likelihood of a breach, the more vigorous and intensive our monitoring activity is likely to be.

This targeted approach to monitoring will ensure that compliance and monitoring costs for regulated entities—and ultimately for their customers—are justified by the benefits of monitoring.

The targeting process will be dynamic and flexible, and will be regularly reviewed in response to new information to ensure it remains up-to-date and relevant. The sections below explain how we propose to assess the potential impact and likelihood of a breach when deciding which monitoring mechanisms to adopt for each obligation.

#### 4.1.1 Assessing the potential impact of a breach

In considering the potential impact of a breach, the AER is likely to have regard to the following questions:

- How would a breach affect achievement of the National Energy Retail Objective?
- What mechanisms or safeguards are in place to rectify a breach if it occurs?
- How many people are likely to be affected by the breach?
- How are people likely to be affected by a breach of the obligation, including questions such as:
  - would a breach of the obligation hinder or prevent customers' access to essential electricity or gas services?
  - what is the likely financial impact of a breach on customers and other regulated entities?

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<sup>11</sup> The process that follows from such an escalation is discussed separately in section 5.

- are there special considerations relevant to the obligation that would magnify the impact of a breach? (for example, does the obligation relate to customers on life support, or disadvantaged or vulnerable customers?)
- what is the likely impact of a breach on the operation or competitiveness of the retail market? (for example, does the breach give one regulated entity an artificial competitive advantage over others?)
- is the breach likely to impact on another party's ability to comply with its own obligations under the Retail Law, Retail Rules or other parts of the energy laws?
- is the breach likely to create a significantly increased workload for other retail market participants or agencies? (for example, the AER, the energy ombudsman, customers, other regulated entities?)

#### **4.1.2 Assessing the likelihood of a breach**

When considering the likelihood that a breach of an obligation will occur, the AER will take into account factors such as:

- the incentives driving compliant behaviour
- awareness of obligations under the Retail Law and Rules, and whether an obligation is new or has recently been amended, and
- past compliance performance in the retail energy market.

## **4.2 Mechanisms for monitoring compliance**

The key monitoring mechanisms the AER will use are discussed below.

These mechanisms work together to allow the AER to identify breaches or possible breaches of the Retail Law and Rules. Market intelligence and information provides valuable insight into customers' experience in dealing with regulated entities under the Retail Law and Rules, and regulated entities' experience in dealing with each other.

Targeted reviews of publicly available information—such as information on regulated entities' web sites—and of material and information that they are required to submit to the AER, ensure that relevant obligations under the Retail Law and Rules are being met.

Retailer and distributor reporting to the AER ensures that the policies, systems and procedures established by regulated entities to monitor their own compliance with the Retail Law and Rules are working, and that appropriate mechanisms for accountability and reporting are in place.

Targeted compliance reviews examine compliance with particular obligations or groups of obligations, and the effectiveness of regulated entities' policies, systems and procedures as they apply to different parts of the Retail Law and Rules.

Where concerns emerge through any of these mechanisms, compliance audits provide for a comprehensive, independent examination and assessment of those policies, systems and procedures to ensure that they are effective.

#### **4.2.1 Market intelligence and information**

Information received from various stakeholders—including consumers, regulated entities, energy ombudsman schemes or consumer groups—can be used to identify issues that may be of concern to the wider market. This information may not necessarily establish that a breach has occurred, however it may point to potential breaches that warrant further inquiry or investigation. In making inquiries on potential breaches arising out of market information, the AER will seek to engage with the relevant regulated entity or entities. The following sources of information are likely to be particularly important.

##### **Energy Ombudsman Schemes**

Under the Retail Law, all regulated entities are required to participate in State and Territory energy ombudsman schemes.<sup>12</sup> The schemes are designed to empower regulated entities to investigate and resolve small customer complaints and disputes in areas including energy marketing and billing, retail and distribution contracts and contract formation, and distributors' management of the small compensation claims regime. The energy ombudsman schemes are an important source of information for the AER in monitoring compliance with obligations under the Retail Law and Rules. In particular the schemes will assist the AER to identify current and systemic issues experienced by customers in their relationships with regulated entities.

Complaints made by a customer to an energy ombudsman scheme will not necessarily point to a possible breach. However, the nature of complaints, and emerging patterns in complaints, are factors the AER is likely to consider to help target its monitoring and investigative activities.

The AER has established Memoranda of Understanding with each jurisdictional ombudsman scheme to promote effective communication, cooperation and co-ordination and facilitate the exchange of information on complaints.<sup>13</sup>

The AER will work with the ombudsman schemes to ensure, where appropriate, that any information provided to it can be independently verified.

##### **The AER's Customer Consultative Group**

The AER has established a customer consultative group to advise it on issues affecting energy customers. This includes advice on any emerging issues the group considers the AER should direct its attention to in monitoring or investigating compliance. The consultative group provides valuable input in addition to the information obtained from energy customers on a day-to-day basis.

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<sup>12</sup> The National Energy Retail Regulations identify these schemes as the Energy and Water Ombudsman (NSW), the Energy and Water Ombudsman (Victoria), the Energy and Water Ombudsman (Queensland), the Energy Industry Ombudsman (South Australia), the Energy Ombudsman (Tasmania) and the ACT Civil and Administrative Tribunal.

<sup>13</sup> These memoranda are available on the AER's website ([www.aer.gov.au](http://www.aer.gov.au)).

## **Energy customers**

The ACCC and AER Infocentre provides an information and complaints service for energy customers. Matters can also be referred to the AER via a designated AER Inquiry email address accessible from its website. By promoting these services the AER will ensure that customers can raise concerns about regulated entities' compliance directly, and receive appropriate advice.

Matters brought to the attention of the ACCC Infocentre that are compliance issues will be referred to the AER for further investigation. The AER records the nature and subject matter of all calls, emails and other correspondence received from customers in relation to energy matters. We will monitor these records to identify trends or patterns (either in the energy retail market as a whole, in a particular region, or in relation to a particular regulated entity) that may suggest underlying compliance issues.

## **AER Performance Regime**

Part 12 Division 2 of the Retail Law creates a performance reporting framework. Under this performance reporting framework regulated entities will provide regular information on their performance by reference to indicators set by the AER in the *AER Performance Reporting Procedures and Guidelines*.

Whilst performance of a regulated entity against the relevant indicators is not necessarily an indication of a compliance issue or a breach of an obligation under the Retail Law or Retail Rules trends identified in relation to performance may indicate underlying compliance issues that the AER may decide to review in more depth.

## **Australian Energy Market Operator (AEMO)**

The AER will work closely with AEMO in monitoring and investigating anomalies in market data that may point to breaches of obligations under the Retail Law and Rules. A Memorandum of Understanding between AEMO and the AER sets out information exchange practices between the two agencies.

### **4.2.2 Targeted reviews of published market information**

Regulated entities have various obligations under the Retail Law and Rules to publish information and documents on their websites. These include obligations to publish prices, contracts, hardship policies, information on small customer complaints and dispute resolution procedures, compensation claims and other information pertinent to customers. We will conduct regular inspections of regulated entities' websites to ensure compliance with publication requirements.

In addition to the reporting requirements set out in the Procedures and Guidelines (discussed below), the Retail Law and Rules require regulated entities to submit certain information (such as standing offer prices) for publication on the AER website. We will review any such information submitted to ensure that it complies with the relevant obligations.

### **4.2.3 Targeted compliance reviews**

The AER will conduct, on a regular basis, targeted compliance reviews of particular obligations under the Customer Framework.

Targeted compliance reviews examine the policies, systems and procedures established by regulated entities to monitor and ensure their compliance with the Customer Framework, as they apply to particular obligations or groups of obligations. The purpose of the reviews is to assess the effectiveness of the systems put in place by regulated entities to manage risk and monitor, measure and achieve compliance over time.

The reviews assist the AER and regulated entities to explore compliance practices. The reviews also assist regulated entities in gaining an improved understanding of the requirements of the Retail Law and Rules.

Targeted compliance reviews may involve requests for information on past compliance with a particular obligation or group of related obligations, and the systems and processes in place to manage compliance. Provisions may be selected in response to:

- market events and observed patterns or trends in compliance or customer complaints (including complaints reported by energy ombudsman schemes and other agencies)
- changes in the regulatory framework that vary obligations under the Retail Law and Rules
- the introduction of new obligations.

The AER will not use statutory information gathering powers for the purposes of these reviews. Instead, reviews are likely to be conducted on a six-monthly basis with relevant regulated entities requested to provide information to assist the AER in its reviews. A review may cover all regulated entities to which the relevant obligation(s) apply, or a targeted group or representative sample.

The AER will publish information about the results of its targeted compliance reviews in compliance reports and newsletters to ensure that lessons learned are shared with other regulated entities and stakeholders.

### **4.2.4 Retailer and distributor reporting**

Regulated entities are required under the Retail Law to develop policies, systems and procedures to enable them to efficiently and effectively monitor their compliance with the requirements of the Retail Law and Rules, including mechanisms to self-identify breaches.<sup>14</sup>

Some of this information will be required to be provided to the AER under the reporting framework set out in the Procedures and Guidelines. These Procedures and

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<sup>14</sup> s. 273, National Energy Retail Law.

Guidelines require regulated entities to periodically report on their compliance with selected obligations by identifying any breaches within a reporting period. The obligations to which this reporting regime applies are set out in the Procedures and Guidelines.

Once selected, obligations will be divided into three types:

- type 1 regulatory obligations where a breach is likely to have a critical impact on customers, which is likely to escalate or become widespread in the short (one to three month) term if it is not rectified quickly, or
- type 2 obligations where a breach is likely to have a serious impact on customers which is likely to escalate or become widespread in the medium (three to six months) term if steps are not taken to rectify it, or
- type 3 obligations where a breach is likely to have a low or limited impact on customers, but may escalate in the long (six to 12 month) term if not rectified.

Different reporting frequencies apply to each group of obligations, reflecting the severity of the impact of a breach on customers and the likelihood that it will escalate in the short, medium or long term if action is not taken to rectify it. All breaches or possible breaches of Type 1 obligations must be reported to the AER as soon as practicable, but no later than the next business day after being identified, with a written report to follow within five business days. Regulated entities are required to report breaches or possible breaches of Type 2 obligations to the AER on a six-monthly basis. Breaches or possible breaches of Type 3 obligations are required to be reported to the AER on an annual basis. These timelines may be varied in accordance with the Procedures and Guidelines.

Regulated entities will be required to include information in their reports to the AER on steps they have taken to remedy any breaches they have identified within the reporting period. Regulated entities must also report on any measures they have implemented to manage risk of reoccurrence.

#### **4.2.5 Compliance audits**

The Retail Law makes provision for two types of compliance audits:

- audits conducted by the AER (or on behalf of the AER by contractors or other persons engaged by the AER for that purpose)<sup>15</sup>
- audits conducted by or on behalf of a regulated entity at the request of the AER.<sup>16</sup>

The purpose of a compliance audit is to conduct a complete review of policies, systems and procedures put in place by a regulated entity to ensure that it is aware of its obligations under the Retail Law and Rules. Further these audits aim to identify whether the regulated entity has in place appropriate and functioning internal control

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<sup>15</sup> s. 275, National Energy Retail Law.

<sup>16</sup> s. 276, National Energy Retail Law.

mechanisms for identifying, monitoring and ensuring compliance, identifying breaches or possible breaches, and reporting and correcting any such breaches.

Audits can be used to assess compliance with specific obligations or groups of obligations under the Retail Law and Rules, and may target individual retailers or distributors or groups. Audits may be applied as a result of observed patterns or trends in the market that suggest a breach or possible breach, or in response to particular conduct on the part of a regulated entity or entities.

An audit might include a review of:

- historical and current levels of compliance by the regulated entity, and the veracity of information on compliance reported by the regulated entity to the AER
- the effectiveness of policies, systems and procedures used by the entity to monitor its compliance with the requirements of the Retail Law and Rules as they apply to the obligations in question
- how well those policies, systems and procedures are implemented and maintained, and/or
- the appropriateness of responsibility levels and communication protocols for compliance in the regulated entity's business.

Where an audit identifies issues of poor compliance or breaches or possible breaches of the Retail Law or Retail Rules, the audit process may also include recommendations for improvements in compliance practice to address those issues. In addition, where appropriate, enforcement action may be contemplated in accordance with section 6.

Where appropriate, and subject to confidentiality constraints, the key findings and recommendations from audits may be included in the AER's compliance reports. This is so that other regulated entities can benefit from these detailed reviews in managing their own compliance.

The AER acknowledges that audits can be intrusive and costly for regulated entities. The AER therefore considers that the scope, coverage and timing of audits are best determined on a case-by-case basis taking into account any consultation with the relevant regulated entities.

Where an audit is carried out by or on behalf of the AER (e.g. by a person or contractor engaged by the AER for that purpose<sup>17</sup>), the Retail Law allows the AER to

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<sup>17</sup> Where the AER engages a contractor or other person to conduct an audit on its behalf, it must comply with the *Financial Management and Accountability Act 1977* (Cth), the *Financial Management and Accountability Regulations 1977* (Cth), and the Commonwealth Procurement Guidelines.

recover the costs of the audit from the relevant regulated entity or entities.<sup>18</sup> The Procedures and Guidelines set out a framework for the recovery of audit costs.

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<sup>18</sup> s. 278, National Energy Retail Law.

## 5 Inquiries and investigations

Where breaches or possible breaches of obligations under the Retail Law or Retail Rules are identified through our monitoring activities, or reported to the AER by regulated entities, we will undertake enquires and/or an investigation to determine whether a breach has occurred, and if so the nature and extent of the breach.

The AER will typically seek information by way of a letter as the first step in an investigation. However, if the AER has reason to believe that a person is capable of providing information or documents that are relevant to our monitoring, investigative and enforcement functions, the Retail Law allows the AER to compel production where necessary.<sup>19</sup> The AER is also able to use search warrants.<sup>20</sup>

The AER can use information obtained under the Retail Law for purposes connected with its functions and powers under the National Electricity and Gas Laws as well as those under the Retail Law and Rules.<sup>21</sup> Similarly, information obtained by the AER under the Electricity or Gas Law can be used for the purpose of our functions and powers under the Retail Law or Rules.<sup>22</sup> The AER may also share information with the ACCC, AEMO and other agencies as permitted by the *Competition and Consumer Law 2010* (Cth).<sup>23</sup>

The AER may choose to report on the outcomes of investigations where it is useful to highlight compliance issues to other regulated entities, customers and stakeholders. Where we consider publication appropriate, we may release this information through investigation reports, compliance bulletins or quarterly reports.

The AER will seek to 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. In some circumstances 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.

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<sup>19</sup> s. 206, National Energy Retail Law.

<sup>20</sup> s. 309, National Energy Retail Law.

<sup>21</sup> s. 220(1), National Energy Retail Law.

<sup>22</sup> s. 220(2), National Energy Retail Law.

<sup>23</sup> s. 44AAF, *Competition and Consumer Act 2010* (Cth).

## 6 Enforcement

The Retail Law provides the AER with a range of possible enforcement responses to breaches of obligations under the Retail Law and Rules. These responses fall loosely into two categories: administrative resolution and statutory enforcement action.

By taking enforcement action the AER seeks to build compliance with obligations under the Retail Law and Rules for the benefit of customers by:

- stopping the breach and the behaviour that constituted the breach
- correcting the damage that the breach has caused
- preventing the same behaviour from recurring, and deterring other regulated entities from repeating it, and
- clarifying the operation of the Retail Law, Rules and Regulations.

### 6.1 Enforcement options

In determining an appropriate enforcement response, the AER will consider a range of factors. Each case will be assessed on its merits, with regard to all relevant circumstances. Some of the factors that may be relevant to the determination of an appropriate enforcement response include:

- the circumstances in which the breach took place
- the period over which the breach extended
- whether the breach was deliberate or avoidable if reasonable compliance practices had been followed
- whether the breach arose out of the conduct of senior management or lower level staff
- whether the regulated entity gained financially from the breach, and if so the amount of the financial gain
- the impact of the breach, and the damage or detriment suffered by customers or third parties, which may include consideration of:
  - the number of customers affected or likely to be affected, and whether the conduct affected disadvantaged or vulnerable customers
  - the nature of the impact on the affected customers (for example, physical harm to customers, a substantial detriment to quality of life, or widespread significant financial harm)
  - whether that impact is likely to be ongoing, and
  - the ability of affected customers to obtain relief without intervention by the AER.

Enforcement responses may also be informed by the regulated entity's own actions in relation to a breach including:

- the level of cooperation with the AER (and where applicable the relevant ombudsman scheme), and in particular whether the regulated entity itself identified the breach and approached the AER voluntarily
- action taken or planned by the regulated entity to rectify the breach and avoid a reoccurrence
- whether the regulated entity has a corporate history of compliance, as evidenced, for example, by the effectiveness of its compliance policies, systems and procedures
- any previous unsuccessful attempts to resolve past breaches through administrative enforcement options.

### **6.1.1 Administrative resolution**

In many cases administrative resolutions, such as undertakings, revisions to internal processes or improved compliance training, may provide the most efficient outcome. The AER is more likely to consider a matter suitable for administrative resolution in circumstances where the effect of an actual or potential contravention is limited, and the regulated entity has taken (or agrees to take) appropriate steps to bring the contravention to an end and to remedy any harm done.

A decision by the AER to resolve a matter administratively does not remove the regulated entity's responsibility for the actual or potential contravention, nor does it indicate an acceptance or approval of the regulated entity's conduct. Rather, it represents an acknowledgement by the AER that the breach is relatively minor and/or that the regulated entity has taken active steps to stop the conduct and remedy any harm done. In each case the AER will reserve its right to take statutory enforcement action if the particular circumstances change or the information on which the AER based its initial assessment is subsequently found to have been incomplete, inaccurate or misleading.

### **6.1.2 Statutory enforcement action**

#### **Infringement notices**

The Retail Law and Rules contain a number of civil penalty provisions.<sup>24</sup> If the AER has reason to believe that a person has breached an obligation imposed by a civil penalty provision, it has the power to issue an infringement notice.<sup>25</sup> The penalty payable under an infringement notice is \$4 000 for a natural person or \$20 000 for a body corporate.<sup>26</sup>

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<sup>24</sup> For lists of civil penalty provisions, see s. 4(1) of the Retail Law and schedule 1 of the Retail Regulations.

<sup>25</sup> s. 308, National Energy Retail Law.

<sup>26</sup> s. 279, National Gas Law

Payment of an infringement notice will result in the closure of the AER's investigation and payment does not require the regulated entity to admit to a breach, or to accept liability in respect of a breach. Once the AER has issued an infringement notice, it cannot initiate court proceedings in relation to the act or omission that is the subject of the infringement notice, unless it revokes the infringement notice within the payment period specified in the notice or the regulated entity does not pay the penalty.

Failure to pay the penalty under an infringement notice is likely to result in litigation. The AER can also take further action should the breach reoccur after the payment of an infringement notice.

### **Enforceable Undertakings**

Under the Retail Law, the AER may accept a written undertaking from a regulated entity in connection with any matter in relation to which it has a function or power under the Retail Law or Retail Rules.<sup>27</sup> Enforceable undertakings are given voluntarily. The AER cannot compel a regulated entity to give an enforceable undertaking. Further, the AER is not required to accept an undertaking proffered by a regulated entity.

Enforceable undertakings can provide tailored solutions which directly address the conduct that has given rise to the alleged breach. For example, an enforceable undertaking might include commitments to:

- stop the behaviour that led to the breach
- provide redress for parties affected by the breach
- introduce measures to help prevent future breaches by the regulated entity concerned
- introduce new systems to address the compliance issues
- provide general education and deterrence through public awareness
- conduct audits of compliance with the undertaking.

Where the AER considers that an enforceable undertaking has been breached, it can seek orders from the court. These include declaration of a breach or injunctions preventing further conduct. If the court finds that there has been a breach of an enforceable undertaking it can:

- order the person to comply with the enforceable undertaking
- issue an order directing the person to pay to the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach

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<sup>27</sup> s. 288, National Energy Retail Law.

- issue any orders it considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach, and
- make any other order that it considers appropriate.

### **Civil proceedings**

The AER may institute proceedings in court in relation to an alleged breach of obligations under the Retail Law and Rules. This is most likely in circumstances where the breach:

- has resulted, or is likely to result, in significant customer detriment, particularly where that conduct affects disadvantaged or vulnerable customer groups
- demonstrates blatant, ongoing or serious disregard for obligations under the Retail Law and Rules
- is widespread, so that enforcement action is likely to have a widespread educative or deterrent effect
- is that of a person, business or sector that has a history of previous breaches of the energy laws
- is of significant public interest or concern, or
- involves new or emerging market issues.

On application by the AER, the court can make a range of orders including one or more of the following:

- a declaration that a person is in breach of a provision or provisions
- if the provision is a civil penalty provision, an order that the person pay a civil penalty of up to \$20 000 for a natural person, or \$100 000 for a body corporate for each breach (and an additional \$2 000 or \$10 000 respectively for every day during which the breach continues)
- an order that the person cease, within a specified time, the act, activity or practice constituting the breach
- an order that the person take such action, or adopt such practice, as the court requires for remedying the breach or preventing a recurrence of the breach
- an order that the person implement a specified program for compliance with the Retail Law and Rules.<sup>28</sup>

Additional types of orders may be specified in the Retail Regulations.<sup>29</sup>

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<sup>28</sup> s. 291, National Energy Retail Law.

<sup>29</sup> s. 291(2)(e), National Energy Retail Law.

If a person is engaging (or is proposing to engage) in conduct that is in breach, the AER can apply to the court for an injunction restraining the person from engaging in the conduct, or requiring the person to take some positive action in relation to the conduct or its effect.<sup>30</sup>

Specific considerations apply to a determination (by the court) of the amount payable in respect of a breach of a civil penalty provision. The Retail Law sets out the following list of matters that the court must take into account when ordering a civil penalty:

- the nature and extent of the breach
- the nature and extent of any loss or damage suffered as a result of the breach
- the circumstances in which the breach took place
- whether the person has engaged in any similar conduct and been found to be in breach of obligations under the Retail Law or Retail Rules in respect of that conduct; and
- in the case of a regulated entity, whether the person has established, and has complied with, policies, systems and procedures as set out in the AER Compliance Procedures and Guidelines.<sup>31</sup>

#### **Revocation of retailer authorisation**

The Retail Law empowers the AER to revoke a retailer authorisation in limited circumstances. Revocation of an authorisation will only be permitted where the AER is satisfied that:

- there has been a material failure by a retailer to meet its obligations under the energy laws, and
- there is a reasonable apprehension that the retailer will not be able to meet its obligations under the Retail Law and Rules in the future.<sup>32</sup>

Revoking a retailer authorisation will prohibit that retailer from selling energy in any participating jurisdiction.

Under the Retail Law, a prescribed revocation process requires the AER to provide reasons for any revocation.<sup>33</sup> The process also provides the relevant retailer an opportunity to show cause why its authorisation should not be revoked and to put present a proposal to address the AER's concerns.<sup>34</sup>

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<sup>30</sup> s. 291(3), National Energy Retail Law.

<sup>31</sup> s. 294, National Energy Retail Law.

<sup>32</sup> s. 107, National Energy Retail Law.

<sup>33</sup> s.120(3), National Energy Retail Law.

<sup>34</sup> s. 120(4), National Energy Retail Law.

## **7 Compliance reporting**

The AER will publish annual compliance reports on its website providing information on its monitoring activities under the Retail Law and on regulated entities' compliance with obligations under the Retail Law and Rules. We may also publish additional information on compliance throughout the year, including quarterly updates and a mid-year report providing information on significant compliance issues and developments. These regular reports may also be supplemented with compliance bulletins or media releases to coincide with significant market events or compliance incidents.

Our objective is to provide the market with timely, constructive and informative reports on compliance with obligations under the Retail Law and Rules. 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.

## 8 Cooperation with the ACCC

Regulated entities operating under the Retail Law and Rules also have obligations under other laws that will apply to their relationship with energy customers. In particular, the Australian Consumer Law (ACL) includes obligations which will apply to Australian suppliers more generally (including in relation to unsolicited consumer agreements).<sup>35</sup> The ACL and Retail Law and Rules operate together, providing the framework within which regulated entities are required to operate.

The AER is part of the ACCC. This has ensured a high level of consistency and close cooperation on energy matters since the AER was established in 2005. This relationship remains important as both the Retail Law and Rules contain obligations which target a range of conduct—including marketing and sales practices—that is also captured by the ACL.

The AER and ACCC will continue to work closely to ensure that misconduct in the energy market is addressed. We will employ the most effective means of addressing consumer harm through cooperative compliance initiatives in the first instance, and complementary enforcement action as required. We will seek to avoid duplication, and ensure wherever possible that a consistent and coordinated approach is employed.

The ACCC and AER will also work closely to provide consistent advice and information to consumers and regulated entities about the obligations that apply to businesses under the Retail Law, Retail Rules and the ACL, and the protections available to consumers.

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<sup>35</sup> Regulations to give practical effect to the Australian Consumer Law provisions contain some exemptions which may apply to some energy retailers or distributors. Transitional periods also apply to some regulations.