



**Notice of draft
instrument:
Amendments to Retailer
authorisation guideline**

October 2014

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Shortened forms

Shortened form	Long form
ACCC	Australian Competition and Consumer Commission
AEMO	Australian Energy Market Operator
AER	Australian Energy Regulator
ASIC	Australian Securities and Investment Commission
guideline	Retailer authorisation guideline
NEM	National Electricity Market
Retail Law	National Energy Retail Law
Retail Rules	National Energy Retail Rules
RoLR	Retailer of Last Resort

Nature and authority

Introduction

This Notice, and the accompanying consultation draft, present proposed amendments to version 1.0 of the AER's Retailer authorisation guideline.

The consultation draft streamlines a number of requirements of the current guideline.

The nature and purpose of the proposed amendments, and their possible effects, are explained in this notice.

Authority

The National Energy Retail Law (Retail Law) allows us to make and amend the AER's Retailer authorisation guideline in accordance with the retail consultation procedure.¹

Role of the guideline

The Retail Law requires anyone who is selling energy to hold a retailer authorisation (or to be exempt from the requirement to hold an authorisation). To assist potential applicants, we have developed a guideline under the Retail Law, which:

- specifies the information that we require in an application for retailer authorisation
- explains how we will apply the entry criteria for an applicant for a retailer authorisation
- provides information about
 - the surrender or transfer of retailer authorisations and
 - the revocation of retailer authorisations.²

The purpose of the guideline is to assist potential applicants for retailer authorisation to understand both the nature of information required for an application for authorisation, and to explain the process that we follow in assessing and deciding applications.

Definitions and interpretation

In this notice, key words and phrases have the meaning given to them in:

- the shortened forms, or
- if not defined in the shortened forms, the Retail Law and National Energy Retail Rules (Retail Rules).

¹ Retail Law, s. 61; Retail Rules, r. 173

² Retail Law, s. 117

Version history and effective date

This notice has been prepared for consultation purposes only.

The current version of the guideline is version 1.0 (July 2011).

1 Overview

The AER's Retailer authorisation guideline (guideline) provides information to applicants and potential applicants on how to apply for an energy retailer authorisation and what they need to include in their applications. It also contains information on how we assess applications against the entry criteria set out in the Retail Law, which are:

- the organisational and technical capacity criterion—the applicant must have the necessary organisational and technical capacity to meet the obligations of an energy retailer
- the financial resources criterion—the applicant must have resources or access to resources so that it will have the financial viability and financial capacity to meet the obligations of an energy retailer
- the suitability criterion—the applicant must be a suitable person to hold a energy retailer authorisation.³

The AER started accepting authorisation applications from mid-2011 in anticipation of the proposed start of the National Energy Customer Framework (NECF) in July 2012.⁴ Since then we have approved 15 applications for electricity retailer authorisation and 4 for gas authorisation. This has given us an opportunity to gauge the effectiveness of the guideline and to identify areas for improvement. In particular, we see several areas in which the guideline can be streamlined and information requirements clarified and, in some instances scaled back. We consider that this will provide clearer guidance for potential applicants and more broadly, reduce regulatory burden on market entrants. As the information requirements for start-up businesses are sometimes different, we have specified any that are.

³ Retail Law, s. 90

⁴ The ACT and Tasmania adopted the NECF in July 2012, South Australia in February 2013, and New South Wales in July 2013.

2 How to make submissions

This notice and the accompanying consultation draft of the Retailer authorisation guideline have been prepared in accordance with the retail consultation procedure set out in rule 173 of the National Energy Retail Rules.

Interested parties are invited to make written submissions on the draft guideline by close of business, 14 November 2014. Late submissions may not be taken into account.

Submissions should be sent electronically to: aer inquiry@aer.gov.au and should be in Microsoft Word or other text readable document form.

Alternatively, submissions can be sent to:

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

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

PLEASE NOTE:

The AER prefers that all submissions be publicly available to facilitate an informed and transparent consultative process. Submissions will therefore be treated as public documents unless otherwise requested, and will be placed on the AER's website (www.aer.gov.au). Parties wishing to submit confidential information are asked to:

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

The AER does not generally accept blanket claims for confidentiality over the entirety of the information provided. Such claims should not be made unless all information is truly regarded as confidential. The identified information should genuinely be of a confidential nature and not otherwise publicly available.

In addition to this, parties must identify the specific documents or relevant parts of those documents which contain confidential information. The AER does not accept documents or parts of documents which are redacted or 'blacked out'.

For further information regarding the AER's use and disclosure of information provided to it, please refer to the *ACCC–AER information policy: the collection, use and disclosure of information*, which is available on the AER website under 'Publications'.

Please direct enquiries about this notice and the draft guidelines, or about lodging a submission, to the Retail Markets Branch of the AER through aer inquiry@aer.gov.au.

3 Proposed amendments

Our proposed amendments to the guideline are summarised below. These amendments are included in the consultation draft guideline which is also available on our website at www.aer.gov.au.

We also welcome any additional suggestions for improvements to the guidelines.

3.1 Introduction and general particulars

We propose to simplify the introductory section of the guideline. We have also included further details about the application assessment process and about the processes for withdrawing applications and amending authorisations. The guideline makes clear that we do not charge authorisation fees or application fees.

The draft guideline also clarifies the AER's role in assessing applications, namely to establish whether applicants have the capacity and resources to enter the energy retail market. It notes that ongoing prudential assessments are made by the Australian Energy Market Operator (AEMO) and that in the event of retailer failure, customers of the failed retailer will be transferred to a Retailer of Last Resort (RoLR).

We propose minor wording amendments to the 'general particulars' which are sought from applicants. We have also included a new information requirement, namely that applicants provide a registered business address.

3.2 Entry criteria

We have revised the background discussions of the entry criteria—removing the overlap between the respective explanations of the information requirements and the requirements themselves and clarifying some of the requirements. We explain why we ask for certain information and have linked our explanations with the specific information requirements. We propose removing a number of information requirements that we consider unnecessary to our assessments.

3.2.1 Organisational and technical capacity criterion

Energy market experience

We make clear in the draft guideline that we expect key staff to have energy retail experience. We also ask that applicants who do not have any energy retail experience detail how they will acquire such experience.

In the revised guideline, rather than ask whether services are conducted in-house or outsourced we will ask applicants to advise how retail activities are conducted. We also propose removing information requirements for persons holding a 20 per cent or more share in the business. What is important for us when assessing authorisation applications is the experience of those involved in the day-to-day running of the business, not the experience of part-owners.

Business plan

The business plan makes up another key part of the authorisation application assessment, so we propose amendments to simplify the elements we are looking for. We propose amendments to request information on the applicant's strategic direction and objectives, and forecast results including assumptions for those forecasts. We do not consider it necessary for applicants to describe identified market opportunities as we consider this area to be covered through the strategic direction and objectives. Similarly applicants should not have to provide financial statements as part of their business plan as these are sought under the financial resources criterion.

Quality assurance and insurance details

Details of quality assurance accreditations and insurance arrangements have not carried much weight in our assessments to date. Many applicants do not hold quality assurance accreditations and while applicants should have appropriate insurance cover, we do not need to know what types of cover and the level of cover they have. We therefore consider these information requests can be deleted.

Compliance strategy including training and human resources

The compliance strategy forms one of the most important components of the authorisation application, but to date has been one of the areas overlooked by applicants—that is, a number of applicants have provided insufficient information in response to this information request.

We propose to amend the compliance strategy information requirement to make it clear that applicants must demonstrate an understanding of the Retail Law and Retail Rules, and of their obligations under the Retail Law and Retail Rules. Additionally, applicants should demonstrate an understanding of relevant industry and technical requirements of jurisdictions in which the applicant intends to operate.

Staff training ties in closely to the overall compliance strategy. Rather than seek details of applicants' specific training programs and policies, we have amended the information requirements to instead seek details of how the skills and knowledge gaps of staff will be met, for example through training or recruitment.

The current guideline requests a written declaration from the applicant's director/s (or equivalent) that the applicant's risk management and compliance strategies have been approved and subject to an external assurance process. We propose to amend this requirement so that applicants must only provide evidence that external assurance has occurred.

We propose to delete the information requirements related to the applicant's human resources. The application should address human resources issues more broadly in the context of the applicant's compliance strategies and in terms of how skill and knowledge gaps will be filled.

Third parties

Applicants intending to outsource functions to a third-party will be asked to provide evidence of the controls that are in place to ensure the party complies with the Retail Law and Retail Rules. This is because the authorised entity is ultimately responsible under the Retail Law and Retail Rules for any compliance failures, regardless of whether these were caused by a third party contractor.

As we routinely ask applicants for this information as part of the application process, it is appropriate that this be reflected in the guideline.

Some retailers will not be registered in the wholesale energy market and will therefore not be covered by the RoLR provisions (for example, embedded network operators). They therefore need alternative arrangements in case their business fails. Such applicants will need to outline these arrangements in their authorisation applications.

Relationships with other regulators

As all NEM jurisdictions move to adopt the Retail Law, it is increasingly unlikely that retailers will have ongoing relationships with jurisdictional and technical regulators, and government departments. We therefore propose to delete the information request that seeks information on applicants' arrangements with jurisdictional bodies.

It is important that applicants demonstrate an awareness of any jurisdictional requirements (technical and other) that apply to energy retailers, but this information is to be provided as part of the compliance strategy.

We understand that retailer authorisation is the first step to market entry, and therefore applicants will be unlikely to have finalised agreements with AEMO, distributors or ombudsman schemes until authorisation is granted. However, we expect that applicants will have made contact with any relevant bodies and taken steps to establish arrangements. As such, we ask applicants what steps have already been taken and when such arrangements are expected to be completed.

Retailer of Last Resort

We propose to move the RoLR information request to the suitability criterion section, as we consider that it is more relevant to suitability.

3.2.2 Financial resources criterion

The AER's assessment of an applicant's financial resources is a point-in-time assessment. The AER is not a prudential regulator, and therefore our assessment is not intended to confirm an applicant's ongoing financial viability, only their capacity to meet the entry criteria.

The revised guideline clarifies that our primary considerations when assessing an application are the applicant's current financial position and their future financial position—specifically, whether they have sufficient cash, or can access cash, to meet their proposed business activities.

We note in the revised guideline some additional costs that retailers should take into account such as energy purchases, network fees and credit support, and the need for businesses to have sufficient cash to cover short-term pressures, like high wholesale prices.

Financial statements

We currently ask that applicants' financial statements include various directors' declarations and reports and an auditors' report. We consider these redundant given our focus on applicants' cash positions and the fact that elsewhere, we require similar declarations from the applicant's Chief Financial Officer/Chief Executive Officer/director and an independent auditor.

We also consider that we do not need three years' worth of financial reports and that generally 12 months is enough to demonstrate whether a business is profitable or not.

Forecasts, ASIC documents, and credit ratings

Forecasts and key assumptions are essential to an authorisation application. Under the information requirement for forecasts, applicants are asked to highlight key assumptions and risks. The specific reference to risk management strategies is therefore considered redundant and we propose to remove it.

Outside of key information such as forecasts, financial statements, details of any guarantees, and auditor declarations, the current guideline requests other types of information that add little to our assessment of financial capacity and can be removed or simplified.

Specifically, we propose to delete the requirement to provide information submitted to ASIC under Chapter 2M of the Corporations Act 2001 (Cth).

Additionally, as many applicants are new market entrants they do not have credit ratings. Lack of a credit rating is not detrimental to an applicant's assessment but has proven useful where applicants have provided this information. We therefore propose to retain this information request, but remove references to particular credit rating agencies and require it only if one is available.

Applicants that are part of a larger group structure

We propose a number of amendments to the information requirements for applicants that are part of a group of companies or a partnership.

Most importantly, we only require information relating to the group or partnership where the applicant relies on another entity in the group for financial support. We propose amendments to this effect. Additionally, we consider it unnecessary for the ownership structure of the group to be traced back to a natural person and propose that this requirement be deleted.

Finally, we do not consider it necessary for an officer of a parent company to provide a declaration that the applicant is a going concern and that they are not aware of any factor that would impede their ability to operate as an energy retailer for the next 12 months. An officer of the applicant entity is already required to provide this declaration and therefore the additional declaration adds little value to our assessment of the application.

3.2.3 Suitable person criterion

We propose only minor amendments to this section of the guideline

As explained in the organisational and technical capacity section above, we propose moving the information requirement on whether an applicant has triggered a Retailer of Last Resort event to the suitability criterion of the guideline.

Secondly, we consider it unnecessary for each member of the applicant's management team to sign a declaration that they have not been disqualified. We propose to amend the guideline so that a declaration from the CEO (or equivalent), on behalf of the management team, is all that is required. Declarations should address all bankruptcies, not just overseas ones.

3.3 Information on transfer and surrender of retailer authorisation

Since developing our guideline in 2011, we have had one application to surrender a retailer authorisation. On 14 March 2014, the AER approved applications from Australian Power and Gas (APG) to surrender its electricity and gas retailer authorisations. As part of our decision to allow the surrender, we imposed conditions on APG, and published a statement of reasons for our decision.

The conditions related to informing the AER when all conditions were met and customers had been transferred to the incoming retailer, AGL. Additionally, the conditions imposed obligations on APG to ensure that transferred customers would be no worse off under their new AGL contracts. Our statement of reasons explained that the surrender was approved because we were satisfied that the arrangements in place for the transfer of APG's customers were appropriate.

Arising out of this surrender process, we have developed a set of principles to guide our assessment of surrender applications, and we propose to amend the guideline to include these principles. We consider that similar principles should also apply to the transfer of a retailer authorisation.

We have not yet undertaken a process to revoke a retailer authorisation, and do not propose any changes to the revocation process explained in the guideline.

3.3.1 Principles for approving the transfer of a retailer authorisation

In assessing an application to transfer a retailer authorisation, we will assess the incoming retailer as if they were an applicant for authorisation, and will apply the Retail Law entry criteria. Transfer applications must demonstrate that the transfer of customers will be appropriately managed to minimise any disruptions. We have developed three principles to help guide our decision on a transfer application:

- that customer transfers are managed appropriately, as required by the Retail Law, and that customers have continuity of supply

- that customers do not suffer unnecessary detriment as a result of the transfer (particularly where customers may not have the opportunity to provide their explicit informed consent for the transfer) and
- that customers have all the necessary information to make an informed choice about their energy service.

We propose that these principles be added to the guideline to provide transfer applicants with greater clarity, and improve the transparency of our assessment process.

3.3.2 Principles for approving the surrender of a retailer authorisation

When assessing an application for surrender of a retailer authorisation, the retailer must demonstrate that its customers will continue to be supplied, and therefore any arrangements to transfer customers to another retailer should be outlined in the application. As part of our assessment of APG's application to surrender its retailer authorisations, we developed three principles to guide our assessment of surrender applications:

- that any customer transfers arising from the surrender are managed appropriately, as required by the Retail Law, and that customers have continuity of supply,
- that customers do not suffer unnecessary detriment as a result of being transferred to another retailer (particularly where customers may not have the opportunity to provide their explicit informed consent for the transfer), and
- that customers have all the necessary information to make an informed choice about their energy service.

As with the principles for transferring an authorisation, we consider these principles should be included in the guideline to help applicants prepare their surrender proposal, and to improve transparency for all interested parties.