

Comments – First Exposure Draft of the National Energy Customer Framework: Law, Rules, Regulations and Contracts

Organisation commenting: **AER**

Draft National Energy Retail Law		
Part 1 – Preliminary		
Section	Subject Matter	Comment
103	Definitions – “energy”	A consequence of the definition of energy is that where the Retail Law and Retail Rules refer to “form of energy”, it could be both gas and electricity. Please refer to our comments on clause 507 of the Retail Law for what may be unintended consequences of this definition.
103	Definitions – “GSL scheme”	The definition of ‘GSL Scheme’ should include a guaranteed service level (GSL) scheme set by the AER under national energy legislation. See, for example, clause 6.6.2 of the National Electricity Rules, which allows the AER to set GSLs as part of its service target performance incentive scheme.
103	Definitions – “hardship customer”	The definition of “hardship customer”, which defines such customers by reference to their identification under the retailer’s customer hardship policy, does not contemplate the identification of hardship customers by third parties, such as financial counsellors.
103	Omitted definition – “payment plan”	“Payment plan” is defined in the Retail Rules but is referred to in the Retail Law as well – it should be defined in the Retail Law. See further comments below on the Retail Rules definition of “payment plan”.
103	Omitted definition – “transfer”	The term “transfer”, which is used in Part 5 of the Retail Law (the retailer authorisation regime) should be defined. The definition of “transfer” should address not only changes to the legal identity of the entity which holds the retailer authorisation, but also changes in the ownership of the entity which holds the authorisation. The AER should be able to consider an application to

		transfer the authorisation in circumstances where there is a change in ownership greater than or equal to 20% or any significant change in structure altering effective control of the business holding the authorisation. In these circumstances, the AER would provide guidance to parties on whether it considers an application for approval of a transfer is required.
106	Meaning of customer	The definition of “customer” in section 106 implies that a customer is only a retail customer and not a distribution customer as well.
111	Local area retailers	The Explanatory Memorandum states “For new connections, the designated retailer will be a local area retailer who will be identified by jurisdictional instrument”. However, the Retail Law, while defining the local area retailer, does not establish their responsibility for new connections.

Draft National Energy Retail Law		
Part 2 – Relationship between retailers and small customers		
Section	Subject Matter	Comment
219	Informed consent	The Retail Rules should address any requirements for contemporaneous written notations which are used to evidence informed consent.
233(2)(a)	Minimum requirements for customer hardship policy	Section 233(2)(a) should also contemplate identification of hardship customers by a third party, for example a financial counsellor.

Draft National Energy Retail Law		
Part 3 – Relationship between distributors and customers		
Section	Subject Matter	Comment

Draft National Energy Retail Law		
Part 4 – Relationship between distributor and retailers		
Section	Subject Matter	Comment
406	Formation of default retail support contracts	Under this clause, default retail support contracts apply where there is no other contract or arrangement between a retailer and distributor in relation to the sale and supply of energy to the shared customer. As many distributors and retailers currently have network use-of-system agreements under their respective jurisdictional regulatory frameworks, the AER questions whether these agreements will continue under the national framework.
408	Negotiated retail support contracts	Since the retail support terms and conditions are taken to form part of a negotiated retail support contract, the contract does not seem to be negotiable.

Draft National Energy Retail Law		
Part 5 – Authorisation of retailers and exempt selling regime		
Section	Subject Matter	Comment
501	Requirement for authorisation or exemption	There is some circularity in section 501, which prohibits a person selling energy to customers unless the person is a retailer or an exempt seller. However, “customer” is defined in section 106 as being a person who purchases energy from a retailer. This may possibly defeat the object of the proposed exemption framework.
507	Notice of decision to grant application	The definition of “energy” as “electricity or gas or both” means that section 507(b) could be interpreted as allowing for one retailer authorisation to authorise the selling of both gas and electricity. We assume that this is not the intention, as section 513 suggests that two separate retailer authorisations are required to sell electricity and gas. The AER supports separate retailer authorisations to sell electricity and gas respectively, as this would simplify the operation of the surrender and revocation provisions.
514-517	Transfer of retailer authorisation	Please refer to our comments above on the need for a definition of “transfer”. The AER should have some discretion to determine whether a change in controlling interests, or a change in the ownership of a parent company, which does not change the corporate entity holding the retailer authorisation, should be treated as a transfer for the purpose of the Retail Law.
529(a)	Public Register of Authorised Retailers and Exempt Sellers	The reference to “other particulars” in paragraph (a) seems to duplicate the “other particulars” permitted by paragraph (b).

Draft National Energy Retail Law		
Part 6 – Functions and powers of the Australian Energy Regulator		
Section	Subject Matter	Comment
613	AER to inform certain persons of decisions not to investigate breaches	The AER considers that where a consumer’s complaint is addressed through referral to the recognised energy Ombudsman scheme in their jurisdiction, the AER should not be required to notify the person in writing of a decision not to investigate the breach. In some circumstances thousands of consumers may be affected by a potential breach.

Draft National Energy Retail Law		
Part 7 – Functions and powers of the Australian Energy Market Commission		
Section	Subject Matter	Comment

Draft National Energy Retail Law		
Part 8 – National Energy Retail Rules		
Section	Subject Matter	Comment

Draft National Energy Retail Law		
Part 9 – National Energy Retail Regulations		
Section	Subject Matter	Comment
902	Specific regulation-making power	The AER queries whether this head of power is sufficient to enable the transfer of files, archives, etc from jurisdictional regulators to the AER where this is necessary.

Draft National Energy Retail Law		
Part 10 – Compliance and performance		
Section	Subject Matter	Comment
1003	Obligation of regulated entities to provide information and data about compliance	<p>The second exposure draft of the Retail Law should clarify the consequences of non-compliance with the reporting obligations under section 1003, including the consequences of providing late or incomplete information. The AER notes that civil penalties apply under the National Electricity Law and National Gas Law where regulated businesses fail to comply with regulatory information instruments, and it is an offence to knowingly provide false or misleading information in purported compliance with a regulatory information instrument. Civil penalties also apply if registered participants fail to meet reporting requirements under clause 8.7.2(e) of the National Electricity Rules within specified timeframes. A civil penalty applies under clause 8.7.2(f) where a registered participant recklessly or knowingly provides misleading or deceptive data to the AER. A similar regime should be included in the National Energy Retail Law, to ensure that the consequences of non-compliance are comparable with those that currently apply to other reporting obligations under national energy legislation. It is important that the AER has effective information gathering powers to successfully undertake its compliance monitoring functions.</p> <p>The AER also notes that section 1003 contemplates annual reporting on compliance. Most jurisdictional regulators have adopted compliance reporting based on categorisation of breaches, with some breaches reported on annually, some quarterly, and some very serious breaches must be reported as soon as possible after they have occurred. The drafting of clause 1003 (and clause 1010) prevents the AER from requiring regulated entities to report serious breaches (such as those in relation to disconnection) more often. It also prevents the AER from increasing the frequency of reporting to address a compliance issue for a particular business or any systemic issues that might have been identified. The provision should be amended to refer to the “<i>date or dates</i>” each year by which information and data must be</p>

		<p>submitted to the AER.</p> <p>Many regulators use periodic (for example, six monthly) and immediate compliance reporting for key regulatory obligations, with annual compliance reporting reserved for more routine regulatory obligations. Annual compliance reporting without the ability to require more frequent reporting by regulated entities, including immediate reporting of serious breaches, may hinder the AER’s ability to promptly respond to serious compliance issues, for example breaches of disconnection procedures. Further, we note that the AER releases quarterly compliance reports in the wholesale market (an approach that is well received by industry participants). We note that if the AER wanted to implement a similar approach in retail the current Retail Law provisions would not enable us to do so.</p>
1010	AER Compliance Procedures and Guidelines	This provision contemplates that regulated entities will provide information and data to the AER by a certain date each year. Please refer to our comments above on section 1003.
1011	Obligation of regulated entities to provide information and data about performance	The second exposure draft of the Retail Law should clarify the consequences of non-compliance with the performance reporting obligations under section 1011, including the consequences of providing late or incomplete information. The AER notes that civil penalties apply under the National Electricity Law and National Gas Law where regulated businesses fail to comply with regulatory information instruments, and it is an offence to knowingly provide false or misleading information in purported compliance with a regulatory information instrument. Civil penalties also apply if registered participants fail to meet reporting requirements under clause 8.7.2(e) of the National Electricity Rules within specified timeframes. A civil penalty applies under clause 8.7.2(f) where a registered participant recklessly or knowingly provides misleading or deceptive data to the AER. A similar regime should be included in the National Energy Retail Law, to ensure that the consequences of non-compliance are comparable with those that currently apply to other reporting obligations under national energy legislation. It is important that the AER has effective information gathering powers to successfully undertake its performance monitoring functions.

		<p>The AER also notes that section 1011 and section 1015 contemplate annual reporting on performance. As such, they prevent the AER from adopting the performance reporting practices of some jurisdictional regulators. While all jurisdictional regulators prepare annual performance reports, many require regulated entities to report periodically through the year on certain matters such as market shares and the number of customers on standard contracts and market contracts. The AER may also require more frequent reporting (for example, in relation to hardship) to promptly identify any emerging trends. The provision should therefore be amended to refer to the “<i>date or dates</i>” each year by which information and data must be submitted to the AER.</p>
1015(5)	AER Performance Reporting Procedures and Guidelines	<p>Please refer to our comments above on section 1011 in relation to annual reporting of performance information and data.</p>
1016	National hardship indicators	<p>The relationship between the national hardship indicators and the AER Performance Reporting Procedures and Guidelines is unclear in subsection (1) of this provision. It is unclear whether national hardship indicators are meant to be part of the AER Performance Reporting Procedures and Guidelines or a standalone instrument. The drafting of clause 304(1) of the Retail Rules suggests that the national hardship indicators will be contained in a standalone instrument, but this should be clarified.</p>

Draft National Energy Retail Law		
Part 11 – Enforcement		
Section	Subject Matter	Comment

Draft National Energy Retail Law		
Part 12 – Evidentiary matters		
Section	Subject Matter	Comment

Draft National Energy Retail Law		
Part 13 – General		
Section	Subject Matter	Comment

Draft National Energy Retail Rules		
Part 1 – Preliminary		
Rule	Subject Matter	Comment
103	Definition of “payment plan”	As payment plans are referred to in the Retail Law, this definition should be elevated to the Law. The definition should not be limited to plans which require the payment of “all arrears”. Some payment plans may involve the waiver of part of the arrears.

Draft National Energy Retail Rules

Part 2 – Customer retail contracts

Rule	Subject Matter	Comment
208	Responsibilities of designated retailer in response to request for sale and supply of energy	A timeline for the provision of the information specified in section 208(1) should be stipulated. It is unclear whether the requirement in section 208(1)(b) would extend to provision of details of the recognised energy industry ombudsman scheme.
214(1)(q)	Contents of bills – telephone number for fault enquiries	The rules should require some explanation on the bill that the fault enquiries number is for the local distribution business. The inclusion of comparative consumption data would also be beneficial in bills.
216	Apportionment	The apportionment arrangements for dual fuel customers are unclear. Usually, if the customer does not specify otherwise, electricity charges are paid first.
218	Billing disputes	In relation to the drafter’s note under section 218(2), it may be appropriate to include an explicit requirement that retailers must inform customers of the details of the recognised energy industry ombudsman scheme during a billing dispute.
222(3)	Payment difficulties	The distinction between hardship customers and customers experiencing payment difficulties is unclear.
223(2)(c)(ii)	Shortened collection cycle	The purpose of this provision is unclear.
236	Cooling off period and right of rescission – market retail contracts	The Retail Rules (or the marketing rules) should require retailers to provide customers with a copy of the market retail contract within a stipulated timeframe.

Draft National Energy Retail Rules		
Part 3 – Customer hardship regime		
Rule	Subject Matter	Comment

Draft National Energy Retail Rules		
Part 4 – Relationship between distributors and customers		
Rule	Subject Matter	Comment
407	Customer service standards and GSL schemes	The note under clause 407 suggests that guaranteed service level (GSL) payments are found only in jurisdictional energy legislation. GSL payments are also a feature of the national energy legislation and may be set by the AER (see for example clause 6.6.2 of the National Electricity Rules, which allows the AER to set GSLs as part of its service target performance incentive scheme).
411	Definitions – “unplanned interruption”	The definition of “unplanned interruption” should also address “Act of God” outages such as outages due to a storm or other event, where maintenance is required following the event.
414(a)	Unplanned interruption – 24 hour telephone service	The requirement to provide an estimate of the time when supply will be restored should be a requirement to provide a time estimate for each affected suburb or geographic area, as customers do not usually know their nearest zone substation.

Draft National Energy Retail Rules		
Part 5 – Relationship between distributors and retailers		
Rule	Subject Matter	Comment

Draft National Energy Retail Rules		
Part 6 – De-energisation of premises		
Rule	Subject Matter	Comment
610	When retailer must not arrange de-energisation	<p>Clause 610(5) should be amended to apply this rule to market retail contracts. It is not clear why, for example, hardship customers who are on a payment plan and complying with that payment plan could be de-energised if they were on a market retail contract. In particular, the premises of <i>all</i> customers on life support systems (whether on standard retail contracts or market retail contracts) should not be de-energised unless requested by the customer.</p> <p>If clause 610 continues to apply to market retail contracts, a cross reference should be made to clause 614 so that it is absolutely clear in clause 610 that life support customers on market retail contracts cannot be de-energised.</p> <p>Clause 610 should be amended to clarify that customers who have applied to join a retailer’s hardship program, and are waiting for acceptance into the program, cannot be de-energised.</p>
612	Request for de-energisation	It is not clear why this provision does not also apply to market retail contracts.

Draft National Energy Retail Rules

Part 7 – Life support equipment

Rule	Subject Matter	Comment
703	Distributor obligations	Under clause 413, distributors must provide at least 4 business days notice of a planned interruption to each affected customer. Clause 703(2)(c)(i) requires distributors to provide customers with life support equipment at least 4 business days notice of a planned interruption – that is, the same amount of notice as distributors must provide to any affected customer under clause 413. Generally, customers on life support have received more notice of planned interruptions. If it is the intention that life support customers receive 4 days notice, clause 703(2)(c)(i) is redundant.
Part 7 generally	Authorised life support systems	The explanatory memorandum notes that a list of authorised life support systems would be kept and maintained by the AER, but there is no obligation in Part 7 for the AER to perform this function.

Draft National Energy Retail Rules

Part 8 – Prepayment meter systems

Rule	Subject Matter	Comment
803(6)	Prepayment meters – emergency credit	The emergency credit arrangements (\$10 for electricity and \$5 for gas) are based on existing emergency credit levels in South Australia and Tasmania. If the emergency credit levels are reviewed in those jurisdictions prior to implementation of the National Energy Customer Framework, the emergency credit levels in the rules should be reviewed to reflect prevailing jurisdictional arrangements.
813	Prepayment meters – Life support systems	Clause 813 of the Retail Rules and section 230 of the Retail Law are not drafted consistently. Clause 813 requires the customer to inform the retailer if the customer <i>has or requires</i> a life support system, whereas the obligations in section 230 of the Retail Law only apply where the customer <i>requires</i> a life support system. The provisions should be drafted consistently, and should include a positive obligation on retailers to ascertain, during the marketing stage, whether a customer has or requires a life support system.
816(2)	Payment difficulties and hardship	Where a retailer’s prepayment meter management system identifies instances of a small customer’s self-disconnection in accordance with clause 816(2)(b), the retailer should also be required to provide information about the retailer’s hardship program.

Draft National Energy Retail Rules

Part 9 – Exempt selling regime

Rule	Subject Matter	Comment
902(c)	Kinds of exemptions	The AER does not grant registered exemptions. Exemptions are not registered until they have been granted. Registered exemptions will include all individual exemptions as required by clause 920 of the Retail Rules, and all persons which have registered their registrable deemed exemption. It is unclear why registered exemptions constitute a separate exemption category.
906(3)	Conditions generally	The AER queries whether the ability to impose a condition on an exempt seller or class of exempt sellers to abide by all or specified rules as if they were a retailer should include the ability to impose conditions to abide by specified requirements of the Retail Law and Retail Rules. An ability to impose conditions relating to requirements of both the Law and Rules would be more consistent with the first two Exempt Selling Policy Principles in clause 908(1)(a) and (b).
907	Conditions for deemed exemptions and registered exemptions	The heading for clause 907 suggests that the AER may impose conditions on registered exemptions, whereas clause 907(1) suggests that the AER imposes conditions on a class of registrable exemptions. This should be clarified.
909	Exempt Selling Policy Factors	A further policy factor could be included, as to whether the exempt supply customers are separately metered. Customers should only be billed for their energy use where their consumption has been metered.

Draft National Energy Retail Rules

Part 10 – Retail market performance reports

Rule	Subject Matter	Comment
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1002(b)	Retail market performance report	Under this clause, retail market reviews are to include an indication of the numbers of customers within the categories of small customers and large customers respectively, and an indication of the numbers of customers who have transferred between those categories. Should this read “transfers within those categories” – that is, is it intended to report on which small customers became large, and vice versa, or how many small customers churned and how many large customers churned?
1003(1)(b)	Payment plans for customers	The AER assumes that reporting on the number of customers on payment plans (clause 1003(1)(b)) has been included to identify the number of customers experiencing payment difficulties. However, as section 235(3) of the Retail Law states that “a retailer may extend payments plans, with or without modification, to small customers who are not hardship customers”, the indicator will include customers who choose to go on a payment plan for budgeting reasons. Therefore, the indicator will not be useful in the hardship context. The AER considers that it would be more useful to require reporting on the number of customers who are part of a hardship program.
Clause 1003(1)(d) and (e)	De-energisation of premises; re-energisation of premises	The AER notes that clauses 1003(1)(a) to (g) could be interpreted literally as requiring the AER to report on the matters listed in paragraphs (a) to (g). The AER suggests that the intention of the provision would be better captured by the inclusion of words along the following lines in clause 1003(1): “A retail market activities review in a retail market performance report must include information and statistics on the performance of regulated entities against indicators established by the AER relating to the following activities.”

Draft National Energy Retail Rules		
Part 11 – Consultation for the National Energy Retail Framework		
Rule	Subject Matter	Comment

Draft National Energy Retail Regulations		
Regulation	Subject Matter	Comment
4	Definition of “jurisdictional regulator”	The regulation should nominate a jurisdictional regulator for Tasmania and the Northern Territory.
5	Definition of “Recognised energy industry ombudsman”	The regulation should nominate a recognised energy industry ombudsman for Tasmania and, if relevant, the Northern Territory.
8, 9	Business customers – consumption thresholds	The regulations do not make provision for determining the likely annual consumption for new connections to determine whether new customers are small or large customers.

Draft Model Standard Retail Contract – Schedule 1		
Clause	Subject Matter	Comment
13.4(b)	Return of security deposit	Clause 13.4(b) should set out how the security deposit is to be refunded if the customer moves out.
Glossary	Definitions	The Retail Law definition of “customer retail services” should be included in the definitions in the standard retail contract.

Deemed standard distribution contracts– Schedule 2		
Clause	Subject Matter	Comment
General	Faulty meters and testing	The deemed standard distribution contract makes no provision for faulty meters and testing. It is unclear whether this is solely a retailer responsibility under clause 218(5)(c) of the Retail Rules or whether the distributor is required to reimburse the customer if they are found to have provided a faulty meter.
9.3	Interruptions	Clause 9.3(b) should more explicitly allow for situations where it is reasonable to give no notice at all – eg “whatever notice (if any) is reasonable” or words to that effect.
Schedule 1 - Dictionary	Definitions – omitted definition	“Distribution services” should be defined in the dictionary.
Schedule 1 - Dictionary	Definitions – “GSL scheme”	The definition of “GSL scheme” suggests that guaranteed service level (GSL) schemes are found only in jurisdictional energy legislation. GSL schemes are also a feature of the national energy legislation and may be set by the AER (see for example clause 6.6.2 of the National Electricity Rules, which allows the AER to set GSLs as part of its service target performance incentive scheme).

Retail support terms and conditions – Schedule 3

Clause	Subject Matter	Comment
12.3(b)	Retailer not liable for ongoing distribution charges	If the customer has requested de-energisation and the distributor has failed to do so by a certain date, then it not clear why the customer would be liable for any distribution charges.

National Energy Marketing Rules - Schedule 4

Clause	Subject Matter	Comment
General	Marketing (telephone sales and door-to-door sales) at particular times	The marketing rules make no provision for contact hours. It is undesirable to exclude consistent contact hours from the marketing rules, since the variations between State and Territory laws in this area was the main reason that energy-specific marketing rules were included in the National Energy Customer Framework. There is also no requirement for marketers not to continue marketing or contact a person in future if the person so requests.
2	Timing of disclosure to small customers	Clause 2(1)(b) should specify that disclosure after the formation of the contract must be within the cooling off period.
5	Duties of retail marketers	Clause 5 refers to both “personal contact” and “in person” contact. “Personal contact” is not defined in the marketing context but seems to be different from “in person” contact. It is unclear whether some marketing activities such as text messages and emails may constitute “personal contact”.
7	Record keeping	The reference to “market retailers” should be to “retail marketers”. Retailers should be required to ensure that records are retained for a specified period after the termination of the contract, in case a marketing dispute is still on foot. If information is to be provided verbally (or in a way that does not produce a written record), greater specificity will be required in clause 7 as to what records must be kept and retained. Records should include details of all information provided in the course of a call or visit.