



Notice of draft instrument

## **Retailer authorisation guideline**

3 May 2011

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## Contents

<b>Glossary and definitions .....</b>	<b>4</b>
<b>Retail consultation procedure .....</b>	<b>5</b>
<b>1 Requirement to develop the guideline .....</b>	<b>6</b>
<b>2 Context in which draft procedures and guideline have been prepared .....</b>	<b>7</b>
<b>3 Issues involved in the preparation of procedures and guidelines .....</b>	<b>9</b>
3.1 Application process.....	9
3.2 Entry criteria and information requirements.....	9
3.2.1 Organisational and technical capacity criterion.....	10
3.2.2 Suitability criterion .....	11
3.3 Transfer, surrender or revocation of a retailer authorisation .....	13
3.3.1 Transfer or surrender.....	13
3.3.2 Revocation of authorisation .....	14
<b>4 Possible effects of procedures and guidelines .....</b>	<b>15</b>

## **Glossary and definitions**

AER	Australian Energy Regulator
ACCC	Australian Competition and Consumer Commission
Customer Framework	National Energy Customer Framework
NEM	National Electricity Market
Retail Law	National Energy Retail Law
Retail Rules	National Energy Retail Rules
RoLR	retailer of last resort

## Retail consultation procedure

This notice and the attached draft Retailer authorisation guideline (the guideline) have been published in accordance with the retail consultation procedure set out in clause 173 of the National Energy Retail Rules (Retail Rules).

The Australian Energy Regulator (AER) invites comments on the draft guideline. Responses to this consultation will inform the AER's approach to retailer authorisations under the National Energy Retail Law (Retail Law) and the development of its final guideline.

This is the final stage of the AER's consultation on this instrument. As advised in the Ministerial Council on Energy's (MCE) Standing Committee of Officials Bulletin No. 190 on 21 March 2011, all activities carried out by the AER prior to the commencement of the National Energy Customer Framework (Customer Framework)—such as consultation, making instruments and decision-making—will be supported by appropriate transitional provisions enacted by participating jurisdictions, to ensure instruments and decisions made as a result of these activities are validly made under the Retail Law and Rules and take effect on the commencement of the Customer Framework.<sup>1</sup>

Written submissions on the draft guideline are invited by **31 May 2011**. Submissions can be sent electronically to: [AERinquiry@aer.gov.au](mailto:AERinquiry@aer.gov.au) with the title "Draft Retailer authorisation guideline – attn Ed Mayne", or by mail to:

General Manager, 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](http://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'.

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<sup>1</sup> The National Energy Customer Framework includes the National Energy Retail Law, National Energy Retail Rules and National Energy Retail Regulations.

# 1 Requirement to develop the guideline

Under the Retail Law, the AER will be responsible for issuing, amending and revoking retailer authorisations. Unless exempt from the requirement, a person must hold a retailer authorisation prior to engaging in the retail sale of energy.<sup>2</sup>

Authorisations granted by the AER will apply nationally, allowing the holders of authorisations to engage in the retail sale of energy (electricity or gas) in all participating jurisdictions and to all contestable classes of customers.

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

- the applicant has the organisational and technical capacity to operate as a retailer
- the applicant has the financial resources, or access to resources, to operate as a retailer
- the applicant is a suitable person to hold a retailer authorisation.<sup>3</sup>

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

The guideline also outlines the approach the AER will take regarding the transfer,<sup>4</sup> surrender<sup>5</sup> or revocation<sup>6</sup> of retailer authorisations.

The guideline will apply to all regulated entities in participating jurisdictions from the date of commencement of the Retail Law. For prospective new retail market entrants, the guideline will also apply to any applications for authorisation received following publication of the final guideline. However, any authorisation granted by the AER will not take effect until commencement of the Retail Law.

The AER may amend the guideline at any time in accordance with the retail consultation procedure.<sup>7</sup>

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<sup>1</sup> Section 88 National Energy Retail Law.

<sup>3</sup> Section 90 National Energy Retail Law.

<sup>4</sup> Section 103 National Energy Retail Law.

<sup>5</sup> Section 105 National Energy Retail Law.

<sup>6</sup> Section 107 National Energy Retail Law.

<sup>7</sup> Section 117 National Energy Retail Law.

## **2 Context in which draft procedures and guideline have been prepared**

The Customer Framework is the final stage in the transition to national regulation of the energy markets. The MCE's consultation on the Customer Framework started in 2006 and included extensive consultation on two exposure drafts in 2009 and 2010.

Under the Customer Framework, the AER will assume the retailer authorisation role previously undertaken by the various jurisdictional regulators. To fulfil the retailer authorisation role, the AER has developed a draft Retailer authorisation guideline as required by the Retail Law.

The AER commenced consultation on approaches to its retailer authorisation role with the release of an issues paper and draft guideline in March 2010. A second round of consultation was conducted in November 2010 with the release of the revised draft guideline and a consultation paper. These papers and written submissions received in response to them are available on the AER's website.<sup>8</sup>

The AER has used this consultation and feedback to develop the draft guideline which is released with this notice. The AER will use comments on the draft to assist it in developing the final guideline in time for the implementation of the Customer Framework on 1 July 2012.

The draft has been prepared by reference to the National Energy Retail Law (South Australia) Bill 2010 introduced in November 2010. At the same time, the MCE released the initial National Energy Retail Rules and Regulations to be made. The Bill was passed by South Australian Parliament without amendment on 9 March 2011 and received Royal Assent on 17 March 2011. The MCE agreed on 10 December 2010 that jurisdictions would work toward a common target date of 1 July 2012 for commencement of the Customer Framework.

This will be the final stage of the AER's consultation on this instrument. As advised in the MCE Standing Committee of Officials Bulletin No. 190 on 21 March 2011, all activities carried out by the AER prior to the commencement of the Customer Framework (such as consultation, making instruments and decision-making) will be supported by appropriate transitional provisions enacted by participating jurisdictions to ensure instruments and decisions made as a result of these activities are valid and take effect on commencement of the Customer Framework.

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

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<sup>8</sup> [www.aer.gov.au/content/index.phtml/itemId/734866](http://www.aer.gov.au/content/index.phtml/itemId/734866).

Any retailer that is granted a jurisdictional licence after 12 April 2011 who wishes to retail energy beyond 1 July 2012 will need to apply to the AER for a national retailer authorisation (or exemption). The AER will coordinate with the MCE's Joint Implementation Group for the Customer Framework to establish the date on which the AER will start accepting applications for authorisation or exemption.



### **3 Issues involved in the preparation of procedures and guidelines**

As noted above, this is the third stage of the AER's public consultation on its retailer authorisations role and the development of the Retailer authorisation guideline. The AER undertook public consultation processes in March and November 2010 and the submissions received in response to these processes have informed the guideline. The AER found that the submissions received were largely positive and supported the AER's proposed direction. All submissions received and the AER's response to the submissions can be found on the AER's website.<sup>9</sup>

Set out below is the AER's response to the key issues raised in submissions received from the November 2010 consultation process.

#### **3.1 Application process**

##### **Information requirements**

The guideline sets out 'information requirements' that detail the information the AER requires to assess applications for authorisation. In their submissions, AGL and Origin stated the authorisation process should be sufficiently rigorous to ensure the continued integrity of the Australian energy market while retaining some flexibility.

The AER considers that its current approach—which requires an applicant to meet all information requirements unless it can satisfy the AER that one or more of the information requirements are not relevant to its application—provides sufficient flexibility without diluting the effectiveness of the retailer authorisation process.

##### **Notification of applications**

The guideline states that the AER will provide details of any applications on its website and through its relevant stakeholder update notification process. Parties can register to receive AER updates by emailing a request to [AERInquiry@aer.gov.au](mailto:AERInquiry@aer.gov.au).

In its submission, Origin recommended the AER also publish a notification of application in a national newspaper, to 'ensure a wider field of potentially interested stakeholders will be informed of the application'.

The AER considers that national advertising of authorisation applications would not provide any substantial benefit or transparency to the retailer authorisation process, and so does not warrant the additional cost. Accordingly, the AER has maintained its approach to notification of applications and will look to improve its notification processes to better target relevant stakeholders.

#### **3.2 Entry criteria and information requirements**

Entities seeking a retailer authorisation must demonstrate their capacity to meet the obligations of an energy retailer under the Retail Law and the Retail Rules. The AER

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<sup>9</sup> See <http://www.aer.gov.au/content/index.phtml/itemId/734866>.

must assess an application against the entry criteria set out in section 90 of the Retail Law.

### **3.2.1 Organisational and technical capacity criterion**

#### **Compliance obligations**

The guideline requires applicants to provide to the AER a compliance strategy that demonstrates, at a high level, how the applicant intends to comply with its regulatory obligations. The guideline also requires applicants to demonstrate that they have established, or will be able to establish, compliance procedures and for these strategies and procedures to be externally assessed.

The Energy and Water Ombudsman of New South Wales (EWON) and Victoria (EWOV) both supported the requirement for an applicant for retailer authorisation providing an externally assured compliance strategy to the AER as part of the authorisation process. Further, AGL and Origin both supported the AER's views that it is not appropriate to require a business to incur the cost of creating and implementing a compliance system prior to an application being made.

#### **Evidence of arrangements with market participants**

The guideline requires applicants to provide evidence of any agreements and systems in place to facilitate interaction with relevant market participants. This includes, but is not limited to:

- distribution businesses
- the Australian Energy Market Operator
- jurisdictional or technical regulators
- contract market participants.

Origin supported the amendments to the guideline requiring applicants to provide evidence of arrangements with market participants to the AER. Origin noted however, that arrangements need only be demonstrated in those jurisdictions in which the applicant intends to be an active retailer.

The AER has amended the guideline to clarify that evidence of market arrangements is only required for the jurisdictions in which the applicant proposes to engage in retail activities.

#### **Retailer–customer arrangements**

The national energy retail objective is focussed on the long term interests of energy consumers. To ensure that the retailer authorisation framework achieves this objective, applicants must show that they will be in a position to manage their obligations to customers under the Retail Law and the Retail Rules. The draft guideline requires applicants to provide details of all employee training policies and programs, and any other policies and procedures in place (or proposed) to assist staff to appropriately interact with customers.

Origin submitted that:

Given that there are requirements in place for an applicant to provide a compliance strategy and plan, it is not clear to Origin why the inclusion of an explicit request for information on how it intends to manage the retailer-customer relationship will improve the authorisation process. We believe this requirement could significantly add to the cost of the authorisation process, without demonstrable benefits accompanying it.

The AER considers that, given the national energy retail objective, it is appropriate to require additional detail on an applicant's ability to meet obligations that will have a direct and material impact on energy customers. The details sought should be readily available to an applicant and are unlikely to significantly add to the cost of the authorisation process.

### **Jurisdictional or technical regulation**

In the second round of consultation on the guideline, the AER stated:

Although the AER considers that jurisdictional or technical regulations may impose important obligations on a retailer, it is not in a position to assess an applicant's compliance with these requirements (or enforce any non-compliance). Compliance with these obligations may, however, be relevant to the consideration of an applicant's organisational and technical capacity. The AER will therefore consult with relevant jurisdictional or technical regulators and seek confirmation that the applicant is in a position to meet any jurisdictional or technical requirements.<sup>10</sup>

In its submission, the Consumer Utilities Advocacy Centre (CUAC) stated 'the AER's inability to assess whether an applicant for retailer authorisation, is able to comply with jurisdictional obligations, is a serious flaw of the National Energy Customer Framework' and that it was 'concerned that this process would result in inappropriate applicants being issued with authorisations'.

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

### **3.2.2 Suitability criterion**

#### **Review of compliance history**

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

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<sup>10</sup> AER, Consultation paper and response to submissions: Retailer authorisation guideline, November 2010

CUAC requested guidance from the AER as to what constitutes a ‘material failure to comply with regulatory requirements’.

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

This information request should provide sufficient scope for the AER to obtain relevant information to assess an applicant’s suitability, whilst ensuring applicants are not overly burdened by the information requirements.

### **Criminal history checks**

The guideline requires applicants to provide details of any unspent convictions (in Australia and overseas) for the following persons:

- the current director/s (or shadow / de facto director/s) of the applicant, its associates and any other entity that exerts control over the applicant’s business activities
- the holding company and its director/s (or shadow / de facto director/s)
- if the applicant is unincorporated, the person/s with effective control of the business
- any person/s holding 20 per cent or more of any class of shares, or any instrument or right convertible into, exchangeable for, or giving the person the right to acquire 20 per cent or more of any class of shares, in the applicant.

There was general support in submissions regarding the information requirements pertaining to criminal histories and/or criminal history checks of relevant officeholders. Origin, however, ‘remains concerned with the approach the AER would take with respect of confidentiality and disclosure of criminal history’.

With regard to the confidentiality of information provided to the AER as part of the retailer authorisation process, the guideline states:

[The AER] will not publish any matters identified in an application as confidential if we agree that such information is confidential. Applicants should clearly identify the information and documents that are the subject of the confidentiality claim.

The guideline also refers applicants to the ‘*ACCC-AER information policy: the collection, use and disclosure of information*’ for further particulars of how the Australian Competition and Consumer Commission / AER treats information provided to it.<sup>11</sup> The processes for dealing with information outlined in this information policy apply to all information gathered by the AER, including sensitive

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<sup>11</sup> Available at: [www.aer.gov.au/content/index.phtml/tag/aerPublications/](http://www.aer.gov.au/content/index.phtml/tag/aerPublications/).

business or personal information. The processes are designed to ensure that information is not used inappropriately within the organisation.

### **3.3 Transfer, surrender or revocation of a retailer authorisation**

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

#### **3.3.1 Transfer or surrender**

##### **Obligations of former retailers post transfer**

Once a retailer authorisation has been transferred, the former holder of the authorisation is no longer a ‘retailer’ for the purposes of the Retail Law. Section 103(5) of the Retail Law, however, gives the AER the ability to impose conditions on a transferor that can continue beyond the transfer date. Section 105(5) of the Retail Law provides an equivalent ability to impose conditions on retailers that are looking to surrender a retailer authorisation.

The majority of submissions supported the requirement in the guideline for a former holder of a retailer authorisation to maintain membership of relevant energy ombudsman schemes for a period of twelve months following transfer or surrender. However, Origin stated that ‘it was not clear whether the role of the guideline was to specify a non-authorised retailer’s status as a member of an ombudsman scheme, regarding whether the retailer is required to pay fees to the ombudsman, or if they are a voting member of the scheme’. The AER’s focus is on retaining access of the retailer’s customers to dispute resolution through the ombudsman. The form of membership applied to a former retailer is a matter for the individual ombudsman schemes to decide.

##### **Definition of ‘transfer’**

The Public Interest Advocacy Centre (PIAC) submitted that ‘the guideline does not clearly address the situation where an authorised retailer is acquired by another corporate entity’ including whether the acquiring entity would be assessed against the entry criteria. Further, PIAC noted that neither the Retail Law nor the guideline specifies a definition of ‘transfer’ of authorisation and that there is no provision that indicates that the acquisition of an energy retailer through a deed of arrangement would amount to a transfer of retailer authorisation.

Under the Retail Law, the AER’s assessment against the entry criteria for retailer authorisations is limited to the entity that is seeking to perform the retail functions. A change of ownership of an entity (the retailer) does not fall within the scope of a ‘transfer’ under the Retail Law provided that the legal entity remains unchanged.

##### **Surrender of authorisation**

Origin submitted that the surrender process outlined in the guideline ‘raises additional questions with respect to the AER’s approach to the assessment, approval or rejection of such an application’. The AER will only approve an application to surrender a retailer authorisation where it is satisfied that the proposed arrangements satisfy the

requirements set out in the Retail Law (including, for example, the requirement in section 105(3) that there are arrangements to appropriately manage the transfer of retail customers).

Origin also suggested that as part of an application for authorisation, a new retailer demonstrate an ‘understanding of the retailer of last resort (RoLR), transfer and surrender arrangements and the ongoing membership requirements of (potentially multiple) ombudsmen schemes’.

The AER is of the view that, to the extent that these requirements impact on a retailer’s operations, regard should be had to them in the retailer’s risk management and compliance strategies. It does not consider that additional information requirements are necessary to demonstrate an understanding of these requirements.

### **3.3.2 Revocation of authorisation**

Section 107 of the Retail Law provides that the AER may revoke a retailer authorisation in certain circumstances. There was broad support for the AER’s approach in the guideline for dealing with the revocation of authorisations.

EWON supported the AER’s approach and suggested the guideline specifically refer to section 141(4)(b) of the Retail Law, which provides ‘additional protections for transferred customers, where an insolvency official of the failed retailer is also subject to and bound by Part 4, in dealing with complaints between a failed retailer and a small customer’. The AER considers that is not appropriate to include detailed information on the obligations that arise under a RoLR event in the guideline. Rather, these issues will be detailed in the AER’s RoLR Plan, which can be accessed on the AER’s website.<sup>12</sup>

In its submission, PIAC contended that section 142(1) of the Retail Law suggests the AER can exercise a level of discretion when considering whether to revoke the authorisation of a retailer that has triggered a RoLR event. It stated that it was ‘specifically concerned that the process regarding the decision [to revoke] needs to be sufficiently transparent, with the reasons for such decisions being made public, regardless of the outcome of the decision’. The AER considers that the Retail Law requires the AER to revoke a retailer authorisation following a RoLR event. As such, no decision needs to be made.

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<sup>12</sup> [www.aer.gov.au](http://www.aer.gov.au).

## **4 Possible effects of procedures and guidelines**

From 1 July 2012 regulated entities will transition to the single, national Customer Framework. Part of the AER's responsibility under the national Customer Framework is granting retailer authorisations and assessing the transfer, surrender and revocation of authorisations under the Retail Law.

The guideline outlines the process the AER will take in assessing energy retailer authorisation applications and applications for the transfer, surrender and revocation of retailer authorisations. The guideline is designed to help applicants understand these processes, to provide clarity on the information required to apply for a retailer authorisation and to facilitate the AER providing advice and guidance to new entrants to the retail energy market.

Applications for retailer authorisations will be on a national basis, allowing applicants to trade energy (electricity or gas) in all participating jurisdictions under the one authorisation. As such, the guideline will create a streamlined national structure for the creation, transfer, surrender and revocation of retailer authorisations and consequently, will provide costs savings for business that intend to operate in more than one jurisdiction.

The information requirements set out in the guideline enables the AER to ensure that only suitable applicants are granted retailer authorisations, which in turn helps to ensure that retailers will act in the long term interests of energy consumers. It also reduces the likelihood of disruptions to the energy market and customers resulting from the failure of a retailer. As the new national retailer framework does not substantially deviate from the processes already in place at a jurisdictional level, the AER anticipates that the guideline will not impose any significant new barriers to potential new entrants in the energy retail market.