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Anna Collyer  
Chair  
Australian Energy Market Commission

Submitted online via: [www.aemc.gov.au](http://www.aemc.gov.au)

Dear Ms Collyer

**Request for rule change – Facilitating positive consumer and market outcomes through the Australian Energy Regulator Guidelines**

AGL Energy (AGL) request the following rule change to improve both customer and market outcomes under legislative binding Australian Energy Regulator (AER) issued Guidelines.

The proposed rule change is in response to the AEMC's comments on the need to investigate the National Energy Retail Rules (NERR) effectiveness in the development and amendment of NERR instruments<sup>1</sup>.

In order for industry participants to operate efficiently and competitively, there must be a reasonable level of certainty and consistency in the development of regulatory obligations. By ensuring this consistency, industry participants can have greater certainty that the services and products offered to customers are competitive, appropriate and future-proofed. In addition, the magnitude of the reform agenda will have a direct impact on cost of living, and all additional regulatory requirements need to be assessed in this light.

Since the Retail Law and Retail Rules commenced in 2012, the AER has had the power to create legislative binding Guidelines on energy market participants. Under the NERR, the AER has some obligations in how to communicate the development and change of these Guidelines.

It is appropriate to place rigour and certainty into the AER's process by introducing mandatory considerations for the AER to ensure market and consumer implications are appropriately assessed. This will help future-proof the AER's processes and the criteria that they apply when developing and amending binding Guidelines that create regulatory obligations.

If you would like to discuss any aspects of our proposal, please contact Con Hristodoulidis, [christodoulidis@agl.com.au](mailto:christodoulidis@agl.com.au)

Regards

*(electronically submitted)*

Elizabeth Molyneux

**General Manager Policy, Markets Regulation and Sustainability**

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<sup>1</sup> Page 24 of the [AEMC Improving consultation procedures in the rules draft determination](#)



## **Facilitating positive consumer and market outcomes through the Australian Energy Regulator Guidelines**

- Submitted by: AGL Energy
- AGL contact: Con Hristodoulidis
- Date: 29 July 2022

### **Statement of issues**

*To ensure there is a consistent test applied to the AER's consideration of the need to amend existing Guidelines and the creation of new Guidelines.*

This rule change proposal aims to improve the efficiency and development of binding obligations on retailers through Guidelines to ensure that such obligations are necessary and balanced between the needs of consumers and positive market outcomes.

### **Request for rule change**

In accordance with Part 10, Division 4 of the National Energy Retail Law (**NERL**), the proponents request that the Australian Energy Market Commission (**AEMC**) make changes to section 173 of the National Energy Retail Rules (**NERR**). Specifically, to create a consistent set of rules around the consultation requirements and criteria for consideration placed on the AER when seeking to either create or amend Guidelines through the power conferred under the NERR.

As required by section 249 of the NERL, we have included a description of the proposed changes to the NERR, a substantive assessment of the nature and scope of the existing issues with the current rules and how the rule change request addresses each of the issues identified. We also include an explanation of how the proposed rule change contributes to the National Energy Retail Objective (**NERO**).

### **Background**

The 2018 Australian Competition and Consumer Commission (**ACCC**) Retail Electricity Pricing Inquiry (**REPI**) report indicates that more Guidelines may be used in the future by the AER to avoid codification of detail regulatory assessment methodologies and processes within the National Electricity Rules.<sup>2</sup> While the ACCC comment was in reference to Network Guidelines, it is possible that this can extend to Retail Guidelines as well.

Increasingly more obligations are being placed on retailers through the development and amendment of AER Guidelines under both the NERL and NERR. This includes:

- Benefit Change Guidelines (NERR, 48B)
- Retail Pricing Information Guideline (NERL, s61)
- Compliance and Reporting Guideline (NERL, s281)

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<sup>2</sup> ACCC REPI Report recommendation 18

<https://www.accc.gov.au/system/files/Retail%20Electricity%20Pricing%20Inquiry%E2%80%94Final%20Report%20June%202018.pdf>



- Performance Reporting Guideline (NERL, s286)
- Hardship Guidelines (NERR, 75A)
- Retailer of Last Resort (**ROLR**) Guideline (NERL, Division 4)
- Better Bills Guideline (NERR, subrule 25(1) – taking effect from March 2023)

These Guidelines are also increasing in their prescriptive nature, creating significant and restrictive regulatory obligations on retailers. For example, the 2018 End Benefit Notice Guideline is highly prescriptive, including designating zones for information and mandatory language for the headline of notices to customers. Further, the Better Bills Guideline contains information on the type of information a bill must contain, the location of the information on the bill and adherence to the Guideline’s bill design principles.

There are currently 47 listed Guidelines on the AER website that apply to the retail sector. Given the growth and number of AER Guidelines and their proposed scope, it is appropriate to now ensure that the AER formalise their consultation processes and the relevant tests applied to ensure that the market experiences consistent, measurable and proportionate regulatory obligations imposed through such Guidelines.

The screenshot shows the AER website's 'Guidelines & reviews' page. It features a navigation menu with categories like Wholesale markets, Networks & pipelines, Retail markets, Consumers, About us, Industry information, Publications, and News. Below the navigation, there's a section titled 'Guidelines & reviews' with a sub-header 'The AER has various roles under the National Energy Retail Law and National Energy Retail Rules including developing a range of guidelines. Current, open and historical guidelines and reviews are listed below.' To the left of the table are filters for Type, Sector, and Segment. The table itself lists various guidelines with columns for Title, Sector, Segment, Type, Status, and Effective date.

Title	Sector	Segment	Type	Status	Effective date(asc)
Better Bills Guideline	Electricity, Gas	Retail	Guideline	Current	4 Aug 2022
Retail Exempt Selling Guideline review 2021-22	Electricity, Gas	Retail	Guideline	Open	1 Jun 2022
Compulsory notice guidelines	Electricity, Gas	Transmission, Distribution, Retail, Wholesale, Consumer matters	Guideline	Current	1 Feb 2021
Retailer reliability obligation - Opt-in guideline	Electricity	Retail, Wholesale	Guideline	Current	1 Jul 2020
Retail Pricing Information Guidelines review 2019	Electricity, Gas	Retail	Guideline	Open	1 Oct 2019
Retailer reliability obligation - Interim forecasting best practice guideline	Electricity	Retail, Wholesale	Guideline	Historical	20 Sep 2019
Retailer reliability obligation - Interim contracts and firmness guideline	Electricity	Retail, Wholesale	Guideline	Current	30 Aug 2019
Retailer reliability obligation - Interim market liquidity obligation guideline	Electricity	Retail, Wholesale	Guideline	Current	30 Aug 2019

AGL submitted<sup>4</sup> to the AEMC Rule change consultation on the proposed amendments to the National Electricity Rules (NER) made the Australian Energy Market Operator’s (AEMO) to improve the National Energy Rules consultation process, that the Retail consultation procedures also involved limited consultation and lacked an obligation on the AER to consider the costs and wider market implications of changes against the benefits. However, AGL noted that harmonising the Rules and Retail consultation procedures would not resolve these issues.

The AEMC in the Draft Determination agreed with AGL and supported AGL’s recommendation for the need of a separate investigation into the NERR consultation procedure and process is warranted:

<sup>3</sup> [Guidelines & reviews | Australian Energy Regulator \(aer.gov.au\)](#)

<sup>4</sup> [AGL - ERC0323 - Submission to the consultation paper.pdf \(aemc.gov.au\)](#), page 2



*“The Commission notes AGL’s concerns regarding the Retail consultation procedures, and agrees that a separate investigation focusing on the NERR may be a better avenue to explore these issues, given the significant differences in the nature and impact of NER and NERR instruments”<sup>5</sup>*

The AEMC notes that the NERO does not necessarily require the AEMC to conduct a fulsome cost benefit analysis nor is it always feasible to do so:

*“A NERO assessment does not require a full, formal cost-benefit analysis of a rule change against the status quo and alternate options. In many cases (including this one, [this refers to the better billing rule proposal]) it would be very difficult to put accurate dollar values on the costs and benefits of specific changes the NERR for the different regulatory approaches.”<sup>6</sup>*

Further, the AEMC also noted that under the NERL, there is no general requirement for the AER to promote or have regard to the NERO for all of its functions. The AER’s regulatory functions are defined in section 204 of the NERL, and section 205 outlines that the AER must, in performing or exercising an AER regulatory function or power, does so in a manner that will or is likely to contribute to the achievement of the NERO. However, the making of Guidelines is not a specific power or function captured by section 204. Section 204 has a general clause regarding AER regulatory function or power (section 204(1)(f)) and these functions and powers are defined as:

- (a) the AER performance regime under Division 2 of Part 12;
- (b) a retailer authorisation under Part 5;
- (c) an AER exempt selling regulatory function or power;
- (d) the AER Retail Pricing Information Guidelines and price comparator;
- (e) approval of deemed AER approved standard connection contracts under Division 5 of Part 3;
- (f) the RoLR scheme under Part 6<sup>7</sup>

Hence, most of the Guidelines made by the AER are not required to be assessed against the NERO and there is no obligation on the AER to conduct a cost benefit and market analysis in making a Guideline. This is further exacerbated by the AEMC acknowledging that it does not necessarily have to conduct a fulsome cost benefit assessment as part of fulfilling the NERO assessment and that it would be difficult for the AEMC to conduct such an assessment when clarity around the final AER Guideline is not available at the time of making their final Determination.

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<sup>5</sup> AEMC, Draft Determination, [Improving consultation procedures in the rules](#), page 24

<sup>6</sup> [RRC0036 Bill contents and billing requirements - Final determination \(aemc.gov.au\)](#), page 37

<sup>7</sup> [National Energy Retail Law \(South Australia\) Act 2011 \(legislation.sa.gov.au\)](#), page 31



## Current rule

If the AER is required to create an instrument (such as a Guideline) under the NERL or NERR, the NERR sets out under Part 12 the Retail Consultation Procedure that the AER must follow. The AER also follow this consultation procedure when seeking to amend Guidelines.<sup>8</sup>

Under Section 173, the NERR states the AER must proceed as follows:

- (a) Prepare a draft instrument.
- (b) Publish the draft instrument on the AER website with a notice which:
  - a. states why the instrument is required;
  - b. provides reasonable details of the context, issues and possible effects of the instrument; and
  - c. invites submissions and comments with a minimum 20-business day period.
- (c) Publish the final instrument on the AER website with the reasons for making it.

As outlined above, there are no rules relating to the tests that the AER must apply or what outcome the AER should seek in the making and amendment of these Guidelines. There is no requirement for broader economic considerations, impacts to investment, competition or the market or how these balance with any proposed benefits to be delivered to consumers.

As a result, the AER may introduce obligations through the Guideline that are marginally or theoretically beneficial for consumers but at significant cost to industry. No cost-benefit analysis is currently required, and the AER is not required to demonstrate how it took stakeholder feedback into consideration.

## Focus for AEMC rule change

AER mandatory Guidelines represent regulatory obligations for retailers, and while formed outside of the NERR, have the same effect on retailer operations and interactions with consumers. It is important therefore, for the same level of rigour and governance to be applied to the AER as is currently applied to the AEMC in ensuring appropriate regulatory outcomes.

### *Ensuring best regulatory practice*

The AEMC acknowledges that regulation may be necessary in the case of market failure or to safeguard safe, secure and reliable supply of energy to consumers.<sup>9</sup> The Australian Government Guide to Regulation defines 'regulation' as: 'any rule endorsed by government where there is an expectation of compliance, including legislation, regulation, quasi-regulation (such as Guidelines and forms) and any other aspect of regulator behaviour which can influence or compel specific behaviour by business, community organisations or individuals'.<sup>10</sup>

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<sup>8</sup> This is referenced in AER Guideline consultations, see for example: 2018 RPIG consultation, p.4.  
<https://www.aer.gov.au/system/files/Notice%20of%20Final%20Instrument%20-%20Retail%20Pricing%20Information%20Guidelines%20-%20Version%205%20-%20April%202018.pdf>

<sup>9</sup> AEMC Guide December 2016

<sup>10</sup> <https://www.jobs.gov.au/deregulation-agenda>



Given the binding and mandatory nature of AER Guidelines, we request the AEMC introduces a rule change that will codify best regulatory practice requirements on the AER to help provide consistency and a clear set of expectations within the energy industry.

This should include undertaking a market analysis, including a cost benefit assessment of proposed Guideline amendments to ensure that any proposed benefits for customers are appropriately balanced against costs or impacts to innovation, competition and broader market implications.

#### *Cost-benefit analysis*

Cost-benefit analysis are important tools to be used in the setting of regulation, including binding rules on industry such as mandatory Guidelines. Regulators must continue to challenge themselves in only recommending changes where it can be satisfied that the benefits of the change outweigh the costs, this includes considering potential alternative approaches and the likely effect of any changes it proposes to implement into the regulatory framework. For these purposes, a regulatory impact assessment approach could be adopted by the AER to ensure that Guidelines implement an approach that represents the least-detrimental in terms of ensuring consumer protections balanced against competition and industry costs.

The rule change should also place greater rigour on the AER's assessment and use of stakeholder submissions as currently invited under section 173 of the NERR.

#### **Potential amendment**

##### *Mandatory considerations for the AER under 173*

(2) the AER must proceed as follows:

- (a) the AER must, after such consultation (if any) as the AER considers appropriate and assessment of the *mandatory considerations*, prepare a draft statement; and
- (b) the AER must publish, on its website and in any other way the AER considers appropriate, the draft instrument together with a notice:
  - i. stating why the instrument is required; and
  - ii. stating why, on balance, the consideration of the *mandatory considerations* supports the drafting of the instrument in its current form; and
  - iii. giving reasonable details of the context in which, the draft instrument has been prepared, the issues involved and the possible effects of the instrument; and
  - iv. inviting written submissions and comments on the draft instrument within a period (at least 20 business days) stated in the notice);

...

(6) the *mandatory considerations* in 173(2) are:

- (a) whether the draft instrument is reasonably likely to produce a public benefit or saving; and
- (b) whether the draft instrument is likely to promote competition and innovation in retail markets



- (c) whether the draft instrument is reasonably likely to cause detriment, cost or inefficiency to any person or class of persons; and
- (d) whether the draft instrument promotes the public benefits contemplated in (a) and (b) in a way that minimises detriments, costs or inefficiencies in (c); and
- (e) whether any residual detriment caused by the draft instrument is acceptable in light of the NERO.

In light of the proposed changes, the AER's Consultation process should also be amended to align with the 'mandatory considerations' and ensure fulsome consultation of these considerations. Specifically, the AER should undertake two rounds of consultation, rather than the current one round requirement on the Draft Instrument. The first to consider the nature and extent of the issue and identify feasible options as part of the 'mandatory considerations', the second to consider a Draft Instrument.

### **Expected potential impacts**

The potential impacts for making this rule change are expected to be minimal. The AER already conducts consultation in accordance with Section 173 of the NERR. This proposal simply seeks to strengthen Section 173 to provide greater certainty and transparency for those impacted by Guideline obligations.

The AER will retain discretion, this rule change request simply seeks to introduce greater rigour on to the process to ensure that Guidelines take into consideration both the interests of consumers and market/competition impacts.

### **National Energy Retail Objective**

The NERO as stated in the NERL is:

*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.*

The proposal to introduce greater rigour around the consideration and application of a cost-benefit analysis in line with a regulatory impact assessment, makes it more explicit that the AER must meet the NERO by ensuring that regulation is made in the case of market failure or to safeguard safe, secure and reliable supply of energy to consumers. It provides a greater level of certainty to industry participants on the AER approach and considerations when developing or amending Guidelines and will improve transparency and consistency of decision-making.