

I am an energy retailer. Do I need an AFS licence?

Generally speaking, yes.

Am I 'in the business' of providing financial services?

The starting point to determine whether you require an Australian financial services (AFS) licence is whether you are in 'in the business of providing financial services'.¹

Whether a person is 'in the business' of providing financial services is a factual matter and can only be determined on a case-by-case basis. For example, you can still be carrying on a business even if you do not have a profit motive² or even if you are just taking preparatory steps to commence a financial services business.³

However, the cases which have considered when a person is 'in the business' of doing something indicate that the degree to which a person's activities are conducted with system, continuity or repetition generally determines whether they are 'in the business'. That is not to say that substantial one-off transactions would not result in a person being considered to be 'in the business'.

For most energy retailers, hedging their exposure to wholesale electricity spot prices is an essential part of the ordinary course of their business. This means that energy retailers are likely to be 'in the business' of hedging their wholesale spot price exposure, even if this activity forms a minor part of their primary business of electricity retailing.

But are they providing a financial service?

Am I providing a financial service?

Electricity, like grain, wheat or gold, is not a financial product: it is a commodity. However, an electricity base load swap or a peak swap is a derivative (i.e., a financial product) because:

- 1 it derives its value from the underlying commodity, the electricity spot price; and
- 2 does not involve the physical delivery of electricity as it is cash settled.

If an electricity hedge is a financial product, then the next question you need to consider is whether you are providing a financial service in respect of that product.

A person provides a 'financial service' if they, for example:

- 1 provide financial product advice;
- 2 deal in a financial product; or
- 3 make a market in a financial product.

It seems counterintuitive that any person who was only hedging their own exposure would need an AFS licence to do any of those things. You do not need an AFS licence to buy shares on your own behalf so why would you need one to hedge your own risk?

¹ Section 761A of the Corporations Act 2001 (**Corporations Act**)

² Section 18 Corporations Act.

³ ASIC v Matthews (2009) 69 ACSR 559.

There are two main reasons why you might be providing a financial service.

The first reason is that the law deems each party to a derivative contract to be an issuer or 'dealer' even if, in reality, as an energy retailer, you are a price taker not a price maker.⁴ An issuer of a financial product cannot rely on the self-dealing exemption that applies to people who trade on their own behalf in respect of their 'own' products.

The second reason is that some energy retailers operate both a hedging strategy and a trading strategy. The hedging strategy is used to manage risk, while the trading strategy is used by the risk management team to try to make a profit from outright positions. This means you could be providing advice to another market participant if you trade back into the market, or you could be making a market if you are conducting this activity regularly.

So, if you are 'in the business' of providing a 'financial service' then you need an AFS licence.

So I need an AFS licence. What do I do next?

You need to assess whether you have the competence within your organisation to be able to obtain an AFS licence.

We can help you make that assessment and guide you through the licensing process. Our lawyers are experts in financial services licensing and have obtained hundreds of AFS licences and variations across many different industries over the last 20 years.

You will find more information about the licensing process in our [Guide to applying for an AFS licence](#).

For more information, contact:



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⁴ Section 761E(5) Corporations Act.