



ENERGY COMPLIANCE AND ENFORCEMENT POLICY

Final Decision, March 2019

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Introduction

The commission is Victoria's independent economic regulator of essential services. Primary legislation passed by the Victorian Parliament sets out the objectives and expectations for our regulation of retail energy markets.

The *Essential Services Commission Act 2001* (ESC Act) sets out our overarching objective to promote the long-term interests of Victorian consumers. The commission is also guided by objectives under the *Electricity Industry Act 2000* and *Gas Industry Act 2001* to promote the protections for customers, including in relation to customers who are facing payment difficulty.

The legislation establishing the regulatory framework for the energy industry in Victoria assigns us a range of functions and powers, including the power to grant licences to energy market participants and to create codes and guidelines. It also enables us to use a range of compliance and enforcement tools to ensure energy companies comply with their licence conditions.

Summary of our draft decision

In January 2019, we proposed changes to our Energy Compliance and Enforcement policy.

Overall, our proposed changes move us away from prescribing, in detail, our compliance and enforcement pathway. Instead, and similar to the Australian Energy Regulator's statement, our proposed revised policy sets out our broad approach to compliance and enforcement, including identifying the tools we may use to promote self-compliance with our energy regulatory framework.

We also proposed other changes to the policy. These included revising the policy to reflect the risk-based, intelligence led, outcome-focused approach we will apply to our compliance and enforcement work program. Further, we proposed to continue our strong commitment to work with relevant agencies in delivering our compliance and enforcement work program.

The draft Energy Compliance and Enforcement Policy was released for consultation on 16 January 2019 until 8 February 2019.

Structure of this paper

Chapter 2 - stakeholder feedback on our draft decision

Chapter 3 - our final decision

Appendix A - list of stakeholders providing feedback

Stakeholder feedback on our draft decision

We received seven submissions in response to our draft decision. The list of stakeholders providing feedback is at Appendix A.

Overall, stakeholders supported our draft decision to streamline the policy to facilitate flexible and timely compliance and enforcement action. In particular, the Energy and Water Ombudsman (Victoria) (EWOV) wrote:

“the flexible, broad approach that the draft decision outlines should indeed foster timely outcomes, and assist EWOV in its purpose to resolve complaints and reduce their occurrence”

There were some concerns raised regarding our proposed decision to remove the prescription in the policy. These matters are discussed below.

Removing prescription/preliminary assessment

In our draft decision we proposed to remove prescription from our policy, including removing the compliance and enforcement pathway.

Most submissions supported this approach, including a number of energy retailers. For example, Simply Energy said the removal of prescription provides the “ESC greater flexibility in effectively responding to identified compliance breaches.”

The Consumer Action Law Centre also agreed we should amend our policy to promote flexible and timely action. They noted in their submission that their “caseworkers hear about breaches of energy regulations that have unacceptable consequences for Victorian households.” In their view, “effective enforcement activity is essential to incentivise compliance and avoid these negative outcomes for Victorian households.”

In contrast, Red/Lumo expressed concern that we were removing the compliance and enforcement pathway, including the preliminary assessment stage. They suggested that the preliminary assessment enables the commission to make a quick assessment of the potential breach before it considers progressing the matter further.

Powershop did not raise concerns about the removal of prescription, including the removal of the preliminary assessment stage. However, they suggested we “assess issues in consultation with licensees and arrive at a decision as soon as practicable”.

Our response

We note that most submissions, including energy retailers, agreed with us to remove the prescription from our policy, including removing the compliance and enforcement pathway.

We also agree with the Consumer Action Law Centre and Powershop that we should aim to arrive at a decision as soon as practicable. That is why we are making these changes to facilitate greater flexibility in our approach to compliance and enforcement. Further, we agree that the commission should engage with licensees regarding the breach or potential breach of their energy licence.

In relation to Red/Lumo's comments, we note their concerns regarding the removal of the compliance and enforcement pathway and in particular, the preliminary assessment stage. However, its removal does not mean we will stop assessing matters before determining whether to progress them further. Further, it does not suggest we will not engage with licensees if we decide to progress a matter. Assessing the circumstances of a potential breach is necessary for any regulator due to the volume and complexity of matters before them. What its removal achieves is to enable us to tailor our progression of a matter based on the particular circumstances of the potential breach.

Risk-based approach

In our draft decision, we proposed that we would apply a risk-based approach to how we undertake compliance and enforcement activities. In particular, the revised policy states we will focus our efforts towards conditions which give rise to (or risk) harm to consumers or the broader energy market.

Most stakeholders supported our proposal to adopt a risk-based approach to compliance. AGL wrote that they supported our proposal to take a risk-based approach, which focuses "efforts towards conditions which give rise to (or risk) harm to consumers, which promote the long-term interests of Victorian energy consumers." However, Red/Lumo suggested we need to give clear detail of how this approach will work.

Our response

We agree with Red/Lumo that the policy may benefit from some further detail regarding how we will apply a risk-based approach. Therefore, we propose to include the following under the heading 'Risk-based approach' in the policy:

We conduct risk assessments of the energy framework and focus our activities on those obligations which give rise to the greatest harm. This can include analysing and ranking each obligation to determine the risk and impact on consumers, businesses and other stakeholders.

Promoting awareness and a compliance culture

In our compliance and enforcement policy, we set out how we will promote and secure compliance. This includes meeting with industry and other stakeholders to identify and clarify uncertainties about common compliance issues, publishing guidance notes and making compliance and enforcement decisions. However, the policy states that we will not provide regulated entities with

individual assurances about whether particular business practices or proposed forms of conduct are or are not compliant.

In response to our draft decision, stakeholders felt we needed to ensure we promote awareness of obligations and legislative changes.

Simply Energy submitted that compliance monitoring activities should not just be about reprimanding contraventions but also about “promoting awareness and educating industry participants about their obligations”. AGL Energy commented “...there needs to be ability for a retailer to seek clarification from the commission on a new or changed obligation...” Alinta Energy submitted “...the commission should be comfortable in providing direction to participants on their level of compliance with prescribed obligations.”

Our response

In response, as already provided for by our policy, we agree that the commission has a role in assisting the regulatory community to understand its regulatory obligations. Where appropriate, the commission will publish guidance on new regulatory obligations, as we did for the new payment difficulty framework (Part 3 of the Energy Retail Code). However, the commission will continue to not provide legal advice nor will we dictate the manner in which licensees are to ensure compliance. Licensees should seek their own independent legal advice if required.

Complaints process

The Consumer Action Law Centre (CALC) has suggested we adopt a public complaints register and a “super complaint process”. CALC define a “super complaint” as a complaint made by a consumer organisation which is prioritised and fast tracked for action by the regulator and requires a public response within a specific period.

Our response

We consider these proposals have merit; however, we consider they require further consideration before implementing. We will update the sector on our consideration of these matters through our essential news updates and energy market report.

Implementation

Unlike other submissions, Red/Lumo wrote to us about the implementation of the revised policy. In particular, Red/Lumo stated existing enforcement actions should be grandfathered. Further, Red/Energy noted that due to the changing regulatory environment, the revised policy should not be implemented until there is clarity regarding how new energy reforms may interact with this policy. Red/Lumo also questioned whether there was sufficient time for consultation.

Our response

We note Red/Lumo's contribution regarding the implementation of the policy. In particular, we acknowledge their comments regarding the commencement date of the policy.

We consider it is important for the policy to take effect immediately to deliver certainty to the sector regarding our approach to compliance and enforcement. Further, we consider its immediate effect will enable us to provide for a timely and effective compliance and enforcement work program which delivers in the long term interests of consumers.

We also acknowledge their concerns regarding our consultation. In response, we note consultation was open for three and a half weeks and publicised on our website and social media channels. We consider this process promoted appropriate engagement on our draft changes to the policy.

Final decision

Our final decision is to adopt the draft Energy Compliance and Enforcement Policy that was published on 15 January 2019, with the following amendment to the risk-based approach section:

We conduct risk assessments of the energy framework and focus our activities on those obligations which give rise to the greatest harm. This can include analysing and ranking each obligation to determine the risk and impact on consumers, businesses and other stakeholders.

The policy will take effect immediately upon publication on the commission's website.

Appendix A – List of stakeholders providing feedback

Powershop Australia Pty Ltd (Powershop)

Alinta Energy Retail Sales Pty Ltd (Alinta)

Simply Energy (Simply Energy)

AGL Energy Limited (AGL Energy)

Red Energy Pty Ltd and Lumo Energy (Australia) Pty Ltd (Red and Lumo)

Consumer Action Law Centre (CALC)

Energy and Water Ombudsman (Victoria) (EWOV)