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## 2007-08 SUMMARY REPORT

COMPLIANCE REPORTING BY RETAIL ENERGY  
BUSINESSES

DECEMBER 2008

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Essential Services Commission, *2007-08 Summary Report: Compliance Reporting by Retail Energy Businesses*, December

## PREFACE

The Essential Services Commission (the Commission) published a *Compliance Policy Statement* in November 2006.<sup>1</sup> The statement sets out the way that licensed electricity and gas distribution businesses ('distributors') and energy retail businesses ('retailers') should monitor and report compliance with their regulatory obligations.

The businesses are expected to comply with all obligations at all times, and to have systems and procedures to monitor their compliance. However, from time to time a breach of the obligations will arise. To assist the licensed businesses to identify and report breaches of any regulatory obligations, the Commission published its *Compliance Reporting Manual* (the Manual) in July 2007.

Through the exception-based compliance reporting regime outlined in the *Compliance Manual*, the Commission has endeavoured to implement a system that:

- minimises costs to licensees, by clarifying regulatory obligations and reducing the likelihood of regulatory audits;
- encourages licensees to seek continuous improvement in their internal compliance monitoring systems;
- ensures that licensees' senior management and Board are cognisant of the nature and extent of serious breaches of regulatory obligations and the actions that have been taken to remedy the non-compliance; and
- ultimately contributes to the Commission's goal to protect the long term interests of Victorian consumers with regard to the price, quality and reliability of essential services.

It is imperative that licensees, therefore, have a sound and effective compliance program. If licensees either cannot or will not provide reliable and accurate data in relation to regulatory breaches, the Commission must consider other more intrusive measures to gain confidence in their compliance monitoring systems.

This is the first report outlining the energy retail industry's compliance reporting for the 2007-08 financial year and is to be read in conjunction with the *2007-08 Compliance Report for Victorian Energy Retail Businesses* (Compliance Report) published in October 2008. A separate report analysing the regulatory breaches reported by distributors is also available on the Commission's website, [www.esc.vic.gov.au](http://www.esc.vic.gov.au).

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<sup>1</sup> Essential Services Commission 2006, *Compliance Policy Statement for Victorian Energy Businesses*, November

A key consideration for retailers is to ensure that, when breaches of their regulatory obligations occur, they can quickly identify the breaches, minimise their impact and take action to address those breaches and to review their systems and processes to minimise the likelihood of future breaches.

Remedial actions need to firstly address the breach and then identify any contributory training or system deficiencies that will need to be rectified.

All retailers have met their obligations for providing data in the format outlined in the Manual and reports and summaries have been signed off by the Board and Chief Executive (or equivalent). Encouragingly, most retailers reported breaches of Type 1 obligations to the Commission as soon as they became aware of them.

In the main, retailers have demonstrated appropriate, pragmatic and quick responses to self-identified breaches of their regulatory obligations. The majority of regulatory breaches identified relate to the *Energy Retail Code* (the Code) and the *Code of Conduct for Marketing in Victoria* (the Marketing Code). Also retailers also reported a number of breaches of other Guidelines, the *Gas Market Retail Rules* and in one case, their Retail Licence conditions.

Details of the breaches, the impacts to consumers and the remedial actions undertaken by the retailers are outlined in Chapter 3 of this report.

Despite retailers meeting their reporting obligations, this report highlights areas where the Commission is not satisfied that all retailers' internal compliance monitoring systems are sufficiently robust to permit them to identify and correct all instances of regulatory non-compliance.

Retailers have previously been advised that upon provision of reliable, accurate and timely compliance data that demonstrated robust monitoring systems, they could reasonably expect that future reporting timeframes could be relaxed to further reduce the reporting obligations.

While recognising the extensive efforts a number of retailers have made to meet their reporting obligations, the Commission is not satisfied that these reporting requirements can be reduced for 2008-09. In addition, retailers have implemented a number of projects designed to remedy identified non-compliance and the Commission will need confirmation that these projects have been completed prior to considering any relaxation of individual retailer reporting requirements.

The Commission will address issues about the reporting and internal monitoring systems through a variety of means including:

- ongoing compliance and monitoring activities for the entire retail industry until such time as the Commission ceases to be responsible for these functions;
- seeking reasons, from those retailers' who were required to resubmit or provide additional data as to why regulatory audits should not be conducted in 2009 to determine whether their internal compliance monitoring systems are effective; and
- continuing to meet regularly with EWOV and other regulatory agencies to discuss emerging compliance issues and the appropriate corrective actions.

Where the Commission is unable to obtain sufficient assurance that licensees' compliance monitoring systems are robust, regulatory audits will be undertaken, and, where appropriate, in consultation with other jurisdictional regulators.

The Commission retains responsibility for the regulation of energy retail functions in Victoria until at least December 2009 and consequently intends publishing a second compliance report in late 2009.

**Dennis Cavagna**

**Acting Chairperson**

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The Commission published a *Compliance Policy Statement* in November 2006.<sup>2</sup> The statement sets out the way that licensed electricity and gas distribution businesses ('distributors') and energy retail businesses ('retailers') should monitor and report compliance with their regulatory obligations.

The businesses are expected to comply with all obligations at all times, and to have systems and procedures to monitor their compliance. However, from time to time a breach of the obligations will arise. To assist the licensed businesses to identify and report breaches of any regulatory obligations, the Commission published its *Compliance Reporting Manual* (the Manual) in July 2007.

The Manual identifies the key regulatory obligations against which distributors and retailers must report non-compliance events to the Commission and provides the procedures for how energy distributors and retailers should report breaches of their regulatory obligations.

### 1.1 The purpose of this report

This report analyses the data reported by the licensed retail energy businesses regarding any breaches of regulatory obligations they identified for the financial year 2007-2008. The analysis includes a summary of the overall performance of retailers for the period and provides details of the nature and extent of individual licensees' regulatory breaches for the period and the remedial efforts that licensees may have taken to rectify any breaches.

This report is to be read in conjunction with the Commission's previously published *2007-08 Compliance Report for Victorian Energy Businesses* which outlined the compliance matter reported to the Commission through complaints data provided by the public, the Energy and Water Ombudsman (Victoria) (EWOV) and in certain circumstances, the energy retailers themselves.

### 1.2 The Commission's approach to compliance and enforcement

The Commission's approach to compliance and enforcement is based on the Organisation for Economic Co-operation and Development's framework that

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<sup>2</sup> Essential Services Commission 2006, *Compliance Policy Statement for Victorian Energy Businesses*, November

outlines three conditions for effective compliance.<sup>3</sup> For a regulated business to comply with regulation, three conditions must be satisfied:

- condition 1 — it must *know* and *understand* its obligations
- condition 2 — it must be *able* to comply — that is, regulatory design must take account of the technological possibility of compliance, and ongoing compliance
- condition 3 — it must be *willing* to comply.

The Commission's overall approach is to encourage a culture of compliance among the regulated businesses. To this end, it supports the voluntary adoption by businesses of the *Australian Standard AS3806-2006 Compliance Programs*, which provides principles and guidance for implementing a flexible and effective compliance program within a business.

The Commission has identified eight key elements of good compliance practice required to facilitate satisfaction of the three conditions for compliance. The elements are:

- **Good regulatory design** — regulation needs to be simple, clear, meet its stated objectives, have benefits that outweigh costs and minimise compliance costs
- **Integration of compliance and other regulatory activities** — compliance issues should inform the regulation design stage and the compliance strategy should adjust as the nature of regulation changes
- **High quality engagement with regulated businesses** — regulated businesses need to be consulted both during the development of regulation and once it is in place; communication needs to be straightforward, occur regularly, and be 'culturally' appropriate
- **Provision of information** — regulated businesses need to understand the purpose and objectives of the regulation, know what their obligations are and be informed of the consequences of non-compliance
- **Practical obligations** — requirements must be suitable for the particular regulated businesses and be able to be complied with in the time available and to the required standard
- **Monitoring of compliance** — compliance is unlikely unless the regulator monitors whether it occurs
- **Procedural fairness** — processes and decisions need to be consistent, impartial and ethical to build trust with the regulated businesses and encourage voluntary compliance, and
- **Escalating levels of interference and sanctions in response to non-compliance**—responses to non-compliance generally begin with co-operative approaches to maximise voluntary compliance, with action escalating as far as is needed to achieve compliance; sanctions must be credible threats.

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<sup>3</sup> Organisation for Economic Co-operation and Development 2000, *Reducing the Risk of Policy Failure: Challenges for Regulatory Compliance*, OECD, Paris, [www.oecd.org](http://www.oecd.org), pp. 14–23.

The Commission is committed to adopting a co-operative and persuasive enforcement approach because when this approach is successful it works better than punitive sanctions in accomplishing long-term compliance. However, compliance cannot be based solely on encouraging voluntary compliance, because some businesses still may not comply. Sanctions are necessary for those who do not comply voluntarily.

### **1.3 2007-08 Reporting frequency and methodology**

This report outlines the breaches of regulatory obligations reported by all retailers during 2007-08. Licensed energy retail businesses are required to report for the period 1 July of a year to 30 June of the following year.

Each regulatory obligation is classified in the Manual as Type 1, 2 or 3. The Manual also outlines the reporting frequency for each of these breaches. In brief:

- a breach of a Type 1 obligation must be reported immediately;
- breaches of Type 2 obligations are generally to be reported every 6 months; while,
- Type 3 breaches must be reported annually.

A succinct explanation of what constitutes a Type 1, 2 or 3 breach and the corresponding reporting requirements is found in Chapter 2.

Licensees are provided with a standard Excel™ template to facilitate consistency in reporting. The template when submitted must be accompanied by a signed letter from the Chief Executive Officer and the Board confirming that the retailer has had effective and robust compliance monitoring systems in place for the reporting period, and that no other breaches had been identified during the period. Finally, the signatories attest to the fact that the compliance data has been prepared with all due care and in accordance with the requirements outlined in the Manual.

### **1.4 Frequency of regulatory audits**

The Commission's compliance monitoring activities include a program of regulatory audits for licensees. Distribution audits have been conducted annually and retailers have undertaken periodic audits in accordance with the Commission's audit guidelines.

In its Compliance Policy Statement, the Commission stated that the frequency or scope of regulatory audits of an energy business may be varied in response to the compliance reports submitted by that business. The Commission noted that if businesses could demonstrate that their levels of compliance were good, there should be a corresponding reduction in the frequency of regulatory audits.

A number of other factors will also be considered when the Commission is considering whether a regulatory audit is required. Firstly, the Australian Energy Regulator (AER) will become responsible for conducting regulatory audits on the distribution companies from 1 January 2009. The Commission will retain responsibility for monitoring the retail energy businesses with the regulatory obligations until at least 31 December 2009.

Secondly, the Commission, along with other jurisdictional regulators agreed in January 2006 to a co-ordinated approach to regulatory audits to minimise regulatory overlap. The agreement requires the jurisdictional regulators to consult with each other when considering regulatory audits of those retail businesses that operate across multiple jurisdictions to jointly contribute to any proposed audit scopes and to share any information arising from completed audits.

Finally, the Commission had noted in its *Final Decision: Energy Businesses' Compliance Reporting* (July 2007) reporting requirements may be relaxed for those retailers who were established in the Victorian market and whose compliance systems are shown to be robust. Analysis of the data provided by retailers for 2007-08 will therefore serve at least two purposes.

Firstly, those retailers able to demonstrate good levels of compliance and robust compliance monitoring systems may have their reporting obligations extended to twelve months. Secondly, demonstrable evidence of robust compliance monitoring and sustained levels of compliance with regulatory obligations may indicate there is no need for the Commission to undertake further regulatory audits, provided compliance levels are maintained.

## **1.5 Consultation with stakeholders**

A draft of this report was circulated to retailers prior to the publication on the Commission's website. Comments were received from Neighbourhood Energy, TRUenergy and Victoria Electricity which have been incorporated where appropriate.

## **1.6 Structure of this document**

The remainder of this paper is structured as follows:

- Chapter 2 briefly outlines the Type 1, 2 and 3 obligations and the reporting requirements.
- Chapter 3 analyses the data related to regulatory breaches that have been self-identified by energy retailers for the 2007-08 period.
- Chapter 4 summarises the information provided by retailers in relation to self-reported breaches of regulatory obligations and the remedial actions undertaken to resolve these issues. In addition, the Commission's observations regarding the level of retailer compliance are outlined with discussion of any next steps the Commission will take in relation to regulatory breaches.
- Appendix A provides a table summarising the breaches reported by individual retailers.

## 2 | FRAMEWORK FOR CLASSIFYING REGULATORY OBLIGATIONS

The retail licence conditions require that retailers must comply with all the relevant regulatory obligations set under the relevant licences, Codes and guidelines published by the Commission and other relevant Acts and Orders published by the Government.

Licences also require that retailers report any breaches of their obligations.

### 2.1 Classification of regulatory obligations

#### *Type 1 regulatory obligations*

Type 1 regulatory obligations are considered to be those regulatory obligations where non-compliance would have a critical impact on customers and where the impact of that non-compliance increases over time if it is not rectified quickly. All actual or potential breaches of Type 1 obligations must be reported to the Commission immediately.

#### *Type 2 regulatory obligations*

Type 2 regulatory obligations are those where:

- non-compliance would seriously impact on customers; and/or
- the obligation is 'new' or has not been complied with in previous years; and/or
- the impact of that non-compliance increases over time.

A breach of a Type 2 regulatory obligation is to be reported on a 6 monthly basis. However, the Commission may reduce the frequency for reporting breaches of Type 2 obligations if specific distributors or retailers have demonstrated a high level of compliance with these obligations.

#### *Type 3 regulatory obligations*

Type 3 regulatory obligations are all other obligations and breaches are to be reported annually.

### 3 RETAILER REPORTED REGULATORY BREACHES FOR 2007-08

This chapter will analyse individual retailers' compliance with their regulatory obligations and identify common themes. Through the exception-based compliance reporting regime outlined on the *Compliance Manual*, the Commission has endeavoured to implement a system that:

- minimises costs to licensees, by clarifying their regulatory obligations and reducing the likelihood of regulatory audits;
- encourages retailers to seek continuous improvement in their internal compliance monitoring systems; and
- ultimately contribute to the Commission's long term goal of protecting the long term interests of Victorian consumers with regard to the price, quality and reliability of essential services'.

It is imperative that licensees have a sound and effective compliance program. If licensees either cannot or will not provide reliable and accurate data in relation to regulatory breaches, the Commission must consider other more intrusive measures to gain confidence in compliance monitoring systems.

When reporting breaches of regulatory obligations, retailers are required to provide the following information:

- the licensee name;
- the regulatory contact for further enquiries;
- the regulatory obligation that has been breached and the dates where the breach was identified and subsequently rectified;
- details of the cause of the breach, including comments on the impact on consumers;
- the number of customers affected by the breach;
- details of the remedial actions undertaken by the retailer to rectify the breach; and
- any further relevant information.

Table 3.1 (below) summarises, by regulatory instrument, the breaches identified by retailers during 2007-08.

Table 3.1 **Summary of reported breaches by regulatory instrument for 2007-08**

<i>Regulatory Instrument</i>	<i>Type 1</i>	<i>Type 2</i>	<i>Type 3</i>	<i>Total</i>
Code of Conduct for Marketing in Victoria	46	3	2	<b>51</b>
Energy Retail Code	28	36	4	<b>68</b>
Confidentiality and Explicit Informed Consent	-	-	7	<b>7</b>
Electricity Retail Licence	-	1	1	<b>2</b>
Gas Retail Licence	-	-	1	<b>1</b>
Electricity Industry Act 2000	-	-	1	<b>1</b>
Credit Assessment Guideline	-	-	2	<b>2</b>
Gas Market Retail Rules			2	<b>2</b>
<b>Total</b>	<b>74</b>	<b>40</b>	<b>20</b>	<b>134</b>

Source: retailer data as provided to the Commission.

### 3.1 Retailer Compliance with Type 1 obligations

Retailers reported a total of 74 Type 1 breaches of regulatory obligations for the 2007-08 financial year<sup>4</sup>. The majority of recorded breaches related to the *Code of Conduct for Marketing in Victoria* (the Marketing Code). Breaches of the *Energy Retail Code* (the Code) were also recorded.

#### 3.1.1 Summary of Type 1 breaches of the Marketing Code

This section briefly outlines the circumstances leading to Type 1 breaches of the Marketing Code identified by individual retailers, the impact to their customers and the actions taken to remedy the breach when identified and to assist in preventing further breaches from occurring.

##### **AGL Sales (AGL)**

AGL Sales reported a total of six Type 1 breaches of the Marketing Code. Three breaches were recorded for clauses 6.2 to 6.5 with the remainder being recorded for clauses 7.1 and 7.4.

AGL identified that on two separate occasions, its marketing representatives provided misleading information to a prospective customer, who then agreed to transfer to it based on that information. In both cases, AGL advised that it took the following actions:

- an explanation and apology was offered to the customers;
- the first bill was cancelled and the account retrospectively transferred back to the customer's previous provider; and
- a goodwill customer service payment was made.

The third breach of clauses 6.2 to 6.5 relates to AGL's market contracts referring to additional fees that were not contained in the offer made to customers, nor were they published on the AGL website or disclosed to customers at the time of signing the contract. This non-compliance matter is ongoing, and AGL has advised the Commission that a project team has been created to address this specific issue. The Commission will report on the outcome of AGL's efforts to address this specific issue in its *2008-09 Retail Compliance Report*.

Two of the three breaches of clauses 7.1 and 7.4 related to instances where customers were transferred to AGL without providing their explicit informed consent. AGL identified 32 cases where these transfers occurred as a result of human error, misleading conduct by marketing representatives or where customers had provided incorrect detail to AGL staff. In each of these cases, AGL undertook the following remedial actions:

- offered an explanation and an apology
- transferred 30 customers back to their previous retailer, after two customers confirmed that they were happy to remain with AGL; and

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<sup>4</sup>Two retailers, Aurora Energy and Click Energy reported no breaches of regulatory obligations for the reporting period

- applied goodwill customer service payments.

The final breach of Clauses 7.1 and 7.4 arose after a prospective customer provided incorrect address details, which resulted in another unrelated energy account being transferred to AGL. AGL arranged a retrospective transfer back to the previous retailer for the unrelated customer account.

### ***Australian Power & Gas***

Australian Power & Gas reported one Type 1 breach of clauses 7.1 and 7.4 of the Marketing Code.

A number of agents acting on behalf of Australian Power & Gas failed to obtain explicit informed consent when signing up prospective customers. Australian Power & Gas advised that these agents had either impersonated the customers to complete the sales verification process or had misled the customers into signing the contract. As a result, seven customers were transferred without explicit informed consent.

When Australian Power & Gas became aware of the issue, all the relevant agents were prohibited from undertaking further door to door sales until the completion of its investigation. After conducting its investigation, Australian Power & Gas advised the Commission that it has undertaken the following actions:

- all seven customers with invalid contracts were transferred back to their original retailers;
- the offending agents' employment was terminated, with some sales representatives potentially facing criminal action; and
- additional sales audit processes will be implemented to improve early detection of potential customer issues.

### ***Country Energy***

Country Energy reported eight Type 1 breaches of the Marketing Code.

In the first three breaches, the sales representative failed to obtain the customers' explicit informed consent prior to transferring them. Country Energy reported that this was a result of either a lack of understanding from the customer's part in relation to the transfer, or the sales representative did not obtain the consent of the person authorised to approve the transfer of retailer.

The remaining five breaches involved Country Energy breaching clauses 6.2 and 6.5 of the Marketing Code as the complaints related to potentially misleading and deceptive conduct. The cause of the breaches is as follows:

- the customer transferred to Country Energy after being told that they would not incur a cancellation fee for leaving their current retailer.
- the customer was led to believe that AGL was not Australian owned and he felt compelled to switch to Country Energy.
- in three cases, the customers believed that Country Energy was government owned and that therefore the sales representative was from the government.

Remedial actions generally included additional training and warnings to non-compliant sales representatives.

### ***EnergyAustralia***

EnergyAustralia recorded a single breach of clauses 6.2 and 6.5 of the Marketing Code. Forty-four customers were not mailed the confirmation pack within two days of entering into a contract with EnergyAustralia. EnergyAustralia endeavoured to contact all the 44 customers affected to explain to them the situation, with the following results:

- 33 customers decided to continue with Energy Australia;
- Eight customers chose to terminate their contract; and
- Three customers could not be contacted.

EnergyAustralia also wrote to all 44 customers explaining to them why confirmation packs were not mailed within two days and provided a complimentary \$50 Myer voucher.

### ***Jackgreen (International) Pty Ltd (Jackgreen)***

Jackgreen reported four Type 1 breaches of clauses 7.1 and 7.4 of the Marketing Code.

In the first two cases, the customers alleged that they were misled and did not fully understand the terms and conditions in the contract. In both cases, the customers were transferred back to their previous retailers without any penalties or termination fees.

In the other two cases, Jackgreen identified that there was an incorrect National Meter Identification (NMI) transfer which may have resulted from the input of incorrect data into Jackgreen's system or on the customer's Retail Supply Agreement. In these cases, the affected customers were transferred back to their previous retailers without any penalties or termination fees. Jackgreen conducted an investigation on each Retail Supply Agreement but determined that there was insufficient evidence to conclude that the Retail Supply Agreements were fraudulent in each case.

### ***Neighbourhood Energy***

Neighbourhood Energy reported one Type 1 breach of clauses 6.2 and 6.5 of the Marketing Code.

Neighbourhood Energy identified four sales representatives who had misrepresented that it was offering a 'drought relief discount' whereas the actual discount being offered was a '10 per cent pay on time discount'.

Neighbourhood Energy advised that all affected customers had been contacted and informed that a 10 per cent pay on time discount was the correct offer. Affected customers were offered the option of proceeding with the discount or remaining with their current retailer. Neighbourhood Energy has advised that the following actions have been taken against its sales agents:

- payment was not be made for these sales;

- further training has been provided to each agent; and
- the agents have been advised that further incidents of this behaviour will result in termination of their contract.

### ***Red Energy***

Red Energy reported 13 Type 1 breaches of the Marketing Code.

Nine of the breaches were in relation to the lack of explicit informed consent at the time of entering into a contract with Red Energy, which breached clauses 7.1 and 7.4 of the Marketing Code.

Red Energy also breached clauses 6.2 and 6.5 of the Marketing Code as the remaining four cases related to misleading and deceptive conduct by the sales representative. In some cases, the contract was cancelled before the transfer was completed and in others, a retrospective transfer was subsequently done. The sales representatives concerned were provided with additional training and warnings.

### ***Simply Energy***

Simply Energy reported three Type 1 breaches of the Marketing Code.

Simply Energy breached clauses 6.2 and 6.5 of the Marketing Code for the first two breaches. The first breach related to 331 complaints received that related to various instances of inappropriate sales conduct. At the completion of Simply Energy's case by case investigation, the sales representative against whom a complaint has been made receives feedback on the nature of the complaint. In most cases refresher training is provided to the sales representatives and in some cases, the sales representatives' employment contract is terminated.

The second breach relates to the non-provision of relevant contract information provided to 17 of prospective customers at the time they entered into a contract with Simply Energy. Simply Energy stated that although it is unclear if all of these complaints were actual breaches, it is possible that where a breach occurred, that customers may not have been in a position to make an informed decision on whether to enter into a contract without all the relevant information.

Simply Energy breached clauses 7.1 and 7.4 of the Marketing Code in the third case which involved 99 Simply Energy customers who alleged that their energy supply may have been transferred without them fully understanding the implications of entering into a new contract. Simply Energy acknowledged that in some cases, explicit informed consent was not provided but noted that other customers had initially provided consent but later changed their minds. However, due to errors processing these cancellations, these customers were still transferred without their consent. Simply Energy advised all affected customers that they would be transferred back to their previous retailers without any penalties or termination fees.

### ***Victoria Electricity***

Victoria Electricity reported eight Type 1 breaches related to clauses 6.2 -6.5 and 7.1 – 7.4 of the Marketing Code.

In four of the cases, four elderly customers were transferred without their explicit informed consent. Victoria Electricity established that although the elderly customers provided their verbal consent for a transfer, most of them were not aware of the effects of their actions or the information they provided to the sales representatives. After the complaints were received, Victoria Electricity initiated investigations to determine if a breach occurred by the sales representatives and was unable to locate the voice verification file. Accordingly, in those cases, the sales were deemed invalid and the affected customers were transferred back to their original retailer without any penalties or termination fees.

In another case, Victoria Electricity's senior channels manager was advised that one its representatives had been taken into custody by the police as a result of alleged inappropriate behaviour toward a female customer. Following this incident, Victoria Electricity now insists upon two reference checks and a police check before it employs new sales representatives.

On two other occasions, two customers received a bill from Victoria Electricity addressed to them but with a different National Meter Identification (NMI) number and Meter Identification Reference Number (MIRN). The customers did not believe that they gave their explicit informed consent for a transfer. Victoria Electricity undertook its own investigations and found that it could not locate the voice verification file, accordingly, the sales were deemed invalid. The two customers were transferred back to their original retailer without penalties or early termination fees.

The Commission will seek further information from Victoria Electricity regarding its failure to locate voice recordings to ensure that this deficiency has been addressed.<sup>5</sup>

### **3.1.2 Type 1 breaches of the Energy Retail Code**

This section briefly outlines the circumstances leading to the 28 Type 1 breaches of the Energy Retail Code (the Code) identified by individual retailers, the impact on their customers and the remedial actions undertaken.

#### ***AGL Sales (AGL)***

AGL reported a total of seven Type 1 breaches of the Code.

Three separate breaches of clause 13 were recorded. Two of the breaches affected approximately 21 customers whose properties were wrongfully disconnected. AGL advised that the majority of these wrongful disconnection resulted from incorrect address details being provided to its staff. All customers

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<sup>5</sup> In its submission to this report, Victoria Electricity advised that it was confident that its current processes for recording and storing voice verification files is fully compliant with the regulatory obligations. The Commission notes that these processes would appear sufficient to ensure that the voice verification files are able to be easily accessed in the event of a dispute, but will nonetheless continue to monitor EWOV complaint data to ensure that this breach was an isolated incident.

were subsequently reconnected and compensated in accordance with the wrongful disconnection legislative provisions.

The third breach resulted when approximately 90 customers were issued a reminder notice less than 14 business days from the date of dispatch of the initial account. Apology letters were sent and training was provided to customer service representatives to prevent this reoccurring.

A single breach of clause 14 of the Code was recorded when AGL identified that two sites had been disconnected in error. One site had been disconnected while a customer was negotiating a payment arrangement, while the other breach related to the disconnection of the wrong property.

In both cases, AGL reconnected the customers and made goodwill customer service payments in addition to compensation under the wrongful disconnection legislation.

A single breach of clause 21.1(b) was recorded when AGL identified that 1262 electricity customers on green tariffs had been charged a price increase without the required notification. The lack of notification arose after these customers' accounts had been migrated to AGL's new billing platform. AGL sent an apology letter in June 2008 and also applied a discount on these customers' next accounts.

The final two breaches recorded related to either clauses 24.1(d), 24.2(a) or 24.3(a) which determine when an early termination fee may be imposed and when a contract can be terminated and the notification that should be provided to the customer.

AGL identified that approximately 6,000 Victorian customers were not notified of the expiry of their fixed term contracts within one month from the expiration date as required by the Code. The delay in contacting these customers was a result of a price increase event. AGL noted that this breach was limited to small business customers and only for those with contracts that expired between June 2007 and August 2007.

All customers were subsequently contacted and the recontracting process commenced. No further compliance matters were identified by AGL in relation to this matter.

The second breach of clauses 24.1(d), 24.2(a) or 24.3(a) related to three instances where customers were incorrectly charged termination fees due to an administrative error. All three customers received an explanation and an apology and all monies owing were refunded.

### ***Country Energy***

Country Energy reported two Type 1 breaches of the Code.

In the first case, Country Energy breached clause 13 of the Code. One customer's property was disconnected erroneously rather than a final read being performed which Country Energy acknowledges was a one off error.

In the second case, Country Energy breached clause 13 of the Code as it failed to notify the customer of the impending disconnection as well as providing the necessary assistance as required by the Code.

In both of these cases, wrongful disconnection payments were made to the customers. Country Energy is now ensuring that its disconnection process is being continuously monitored.

### ***Origin Energy***

Origin Energy reported three Type 1 breaches of the Code.

The first breach related to reminder notices from Origin Energy not providing customers with an adequate number of days for them to make payments prior to disconnections as outlined in clause 13.1(b) of the Code.

The remaining breaches related to Origin Energy breaching clause 24.3(a) of the Code for gas and electricity, which requires a retailer to provide certain information to customers prior to the expiry of a fixed term contract. Origin Energy identified that it was unable to process fixed term contracts until the implementation of the new customer relationship management system (Siebel) in December 2007. Approximately 5236 customers on a fixed contract were not advised that their contracts are ending and were not given more information on their options prior to the ending of their fixed contracts.

Origin Energy advised the Commission that it aimed to address the backlog once Siebel's functionality has been implemented. The Commission will seek confirmation from Origin Energy that this backlog has been addressed and that it is now fully compliant with Clause 24.3.

### ***Red Energy***

Red Energy reported four Type 1 breaches of the Code.

In three cases, Red Energy breached clause 13 of the Code. These breaches arose in the following circumstances:

- in two instances, there was a delay in the connection to the property, meaning that both customers were without power for a few days.
- the remaining breach occurred when Red Energy disconnected a property without the authorised person's consent.

To resolve these breaches, Red Energy apologised to the customers and wrongful disconnection compensation was paid. The sales representatives were also retrained to reduce the likelihood of the breaches recurring.

The final breach related to clause 14 of the Code which outlines the circumstances when disconnection is not permitted. The customer had advised Red Energy of a new date for disconnection, but an error occurred and this new date was not entered in Red Energy's system, consequently, the customer's property was disconnected earlier than requested. Upon resolution of the matter, a wrongful disconnection payment was made and Red Energy apologised to the customer.

### **Simply Energy**

Simply Energy reported six Type 1 breaches of the Code.

In the first case, Simply Energy breached clause 12 of the Code as it did not have a process in place to monitor the actual consumption of a customer on an instalment plan which is not assessed at the moment. To remedy this breach, Simply Energy stated that it would implement instalment plans for its customers and also provide energy efficiency advice and the availability of independent financial counsellors to the affected customers to remedy the non-compliance. Simply Energy also advised the Commission that it was reviewing its debt management processes for compliance with regulatory obligations which would be completed in May 2008<sup>6</sup>.

In the second and third cases, Simply Energy breached clause 24 of the Code as it failed to write to customers advising them of their options once their fixed contracts had expired. However, Simply Energy noted that there was minimal customer detriment as these customers continued to receive the same discounts and benefits they had originally contracted for.

In the fourth case, Simply Energy breached clause 13 of the Code as it had disconnected seven customers in error. These wrongful disconnections occurred primarily due to service orders being raised referencing an incorrect National Meter Identification number (NMI) or Meter Identification Reference Number (MIRN). Each customer's property was reconnected as soon as possible in addition to a wrongful disconnection payment being paid.

In the last two cases, Simply Energy breached clause 20(a) of the Code, which relates to variations of contractual terms and conditions. In one case, it provided incorrect rates to 397 customers who were moving house for their new premises. Simply Energy wrote to the customers and provided them with the correct rates and permitted disaffected customers to transfer to another retailer without any penalties if they wished.

In the second instance, door to door sales representatives provided 25 new customers with outdated price lists instead of the current 2008 lists. All affected customers were contacted to ensure that they were subsequently provided with the current list. Those customers who could not be contacted by phone were contacted by mail and all customers were advised they were entitled to cancel their contracts without penalty as they were still in the cooling off period.

### **TRUenergy**

TRUenergy reported three Type 1 breaches of the Code.

In the first case, the Commission undertook a review of the early termination fees associated with TRUenergy's Mates Rates product. The Commission determined that the early termination fee of \$90 was not compliant with clause 32 of the Code. TRUenergy undertook to refund the difference between the revised fee and the

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<sup>6</sup> In its submission to the Draft Report, Simply Energy confirmed that the review of its debt management processes had been completed.

\$90 that 55 customers had paid and to inform current customers that the termination fees have been reset<sup>7</sup>.

In the second case, TRUenergy reported that their disconnection notices issued to *Unknown Consumers for Bulk Hot Water*, did not contain EWOV's telephone number which is a breach of clause 28.3 of the Code. TRUenergy advised that it amended its disconnection notices to contain EWOV's number.

In the third case, TRUenergy breached clause 13 of the Code as the disconnection notices issued to *Unknown Consumers for Bulk Hot Water*, did not provide a customer with the 10 days required notice of impending disconnection. Wrongful disconnection payments were made to 39 customers who were affected by this and TRUenergy has provided retraining to those staff involved in the disconnection process.

TRUenergy also conducted an internal audit of the disconnection process to make sure that all regulatory guidelines are being followed and to minimise the incidence of wrongful disconnections.

### **Victoria Electricity**

Victoria Electricity reported two Type 1 breaches of the Code.

In the first case, welcome packs for 14,431 customers were not mailed within two working days as required by clause 23.4 of the Code. After the welcome packs were subsequently sent out, all affected customers were also advised that the cooling off period will start from when they receive their welcome packs. Termination fees would not be applied to customers who were impacted by welcome pack delays.

In the second case, 1314 customers were not notified that their contract was about to expire, a breach of clause 24.3 of the Code. However, Victoria Electricity advised that these customers were not financially disadvantaged as they were still receiving contractual rates even though they were not on a contract.

Victoria Electricity offered three options to the customers:

- the choice to sign up for a new market agreement contract for a future term;
- the choice to leave Victoria Electricity as no cost to them; or
- remain a customer of Victoria Electricity on an open market/default rate with no contractual agreement.

## **3.2 Retailer Compliance with Type 2 obligations**

Retailers reported a total of 40 Type 2 breaches of regulatory obligations for the period. Breaches of the Energy Retail Code accounted for 90 per cent of all Type 2

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<sup>7</sup> For further information in relation to this issue, please see Section 3.3.7 of the *2007-08 Compliance Report for Victorian Energy Businesses* (October 2008) available at [www.esc.vic.gov.au](http://www.esc.vic.gov.au)

breaches, with retailers reporting a total of three Marketing Code breaches. One retailer reported a Type 2 breach of its electricity retail licence.

### 3.2.1 Type 2 breaches of the Energy Retail Code

This section briefly outlines the circumstances leading to Type 2 breaches of the Energy Retail Code identified by individual retailers, the impact to their customers and the remedial actions undertaken.

#### **AGL Sales (AGL)**

AGL reported nine Type 2 breaches of the Code.

Four of the breaches related to clause 3.2 of the Code which details retailers obligations in relation to the frequency of billing to customers, the contents of the bills and outlines the under- and overcharging provisions.

AGL identified approximately 800 sites that had not been billed within the required time, due to a delay in receiving meter data from the distribution businesses. Upon receipt of the data, all affected customers were manually billed and an apology letter was issued.

AGL reported a long-term compliance matter involving approximately 40,000 customers who had not received a bill. AGL first identified this issue in May 2005 and is continuing to work towards minimising the effect on its customers. AGL has kept the Commission informed of developments since this compliance issue was first identified. The Commission will report on this ongoing matter in the *2008-09 Retail Compliance Report*.

The final two breaches of clause 3.2 related to 21 instances where AGL billed customers who had been undercharged (or not billed at all) for a greater period than permitted by the regulations. The bills issued ranged between 1 month and 36 months over the prescribed billing times. AGL notes these breaches occurred due to an administrative oversight.

In all cases, AGL offered an explanation and re-billed the customers in accordance with the Code provisions. Twelve customers also received a goodwill customer service payment.

A single breach of clauses 4.2 and 4.4 of the Code was identified when AGL established that some Victorian electricity customers were not informed on their bill when their bills are based on estimated reads. AGL advises that this error affected those customers who had remained on legacy billing systems. AGL considers that once these customers are migrated to its new SAP billing platform, this non-compliance matter will be remedied.

Two breaches of clause 7.1(b) and (c) and clause 7.2 were reported. The first breach affected approximately 3,000 Victorian gas and electricity customers whose direct debit payments were not taken out of their account on the agreed date. AGL advised that while it considered that the impact on its customers was minimal, should any customers contact it regarding any dishonour fees charged by their banks, AGL would credit their account with the amount of this fee.

The second breach related to approximately 450 customers who were on bill smoothing arrangements with direct debits having multiple payments deducted from their accounts. AGL advised that the error arose during the conversion of customer account data from previous legacy systems to the new SAP billing platform. As part of its remedial actions, AGL advised that it has:

- created a dedicated team to address all bill smoothing issues;
- applied credit management and payment blocks on the identified accounts until such time as the matter is resolved; and
- multiple payments have been reversed back to customers.

The final two Type 2 Code breaches relate to AGL's failure to deal with customer complaints in accordance with the Australian Standard on Complaints Handling, a breach of clause 28.1 of the Code. AGL identified 42 instances where customers:

- were not kept informed of the progress of their complaint;
- complaints were not actioned promptly; or
- the customer had difficulty in contacting AGL's call centre.<sup>8</sup>

AGL noted the impact that the implementation of its Project Phoenix billing program had on its ability to respond to customer complaints. In addition to the broader customer information provided to all AGL customers, AGL offered an explanation and an apology to those customers affected, and provide compensatory customer service payments to some customers.

### ***Australian Power & Gas***

Australian Power & Gas reported five Type 2 breaches of the Code.

In the first three instances, Australian Power & Gas breached clause 3.2 of the Code. In two cases, 168 customers' bills contained errors and incorrect tariffs. In the third instance, 158 customers with Time of Use (TOU)/Type 5 meters did not receive their bills on time as the accounts referred to an incorrect billing cycle flag within the billing system.

Investigations were conducted by Australian Power & Gas's third party supplier to determine the cause of the system issue, with system modifications being completed to rectify the issue. Australian Power & Gas advised that the affected customers' accounts were adjusted accordingly and a letter of explanation was sent with the next bill.

Australian Power & Gas also identified breaches of clause 4.2 of the Code, which outlines the information that must be included on customer accounts. In the first instance, customers with Time of Use (TOU) meters were issued with incorrect bills

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<sup>8</sup> The Commission is aware that in addition to these breaches, significant numbers of AGL customers were unable to make contact with its call centre for extensive periods during December 2007- January 2008, due to a number of reasons including the implementation of Project Phoenix (a billing system implementation) and other technical difficulties. AGL included a bill insert to customers in accounts created after February 2008 apologising for the inconvenience.

that did not identify if the bill was based on an estimated or actual read. Australian Power & Gas advised that a system enhancement would be implemented to ensure that it identifies bills that are wholly estimated and enable them to be flagged as such.

In the second instance, duplicate payments of bills to Australian Power & Gas were processed due to human error. Australian Power & Gas made a manual adjustment to debit the duplicate payments back to the nine customers affected by this issue. Australian Power & Gas has changed its processes to ensure that this does not occur again.

### ***Jackgreen (International) Pty Ltd***

Jackgreen (International) Pty Ltd reported one Type 2 breach of clause 3.2 of the Code which relates to billing cycles. The breach arose from delays in the meter read data being provided from the network. The affected customers were given extra time to pay their bills.

### ***Neighbourhood Energy***

Neighbourhood Energy reported two Type 2 breaches of the Code.

In the first case, Neighbourhood Energy identified that it had not provided details of interpreter services in relevant languages for domestic customers. It has now ensured interpreter service availability for their customers by including details on invoices of the Translating and Interpreting Service in Greek, Italian, Chinese, Vietnamese and Japanese.

In the second case, Neighbourhood Energy breached clause 4.4 of the Code which requires consumption graphs to be included on a customer's bill. The graphs which were displayed on the customer's quarterly invoices showed the usage recorded on the customers' meter, per quarterly meter reading received and not for the monthly period as covered by the bill.

Neighbourhood Energy rectified this matter and took steps to ensure that customer's bills contained graphs that reflected the amount billed per billing period rather than the actual usage recorded on the meter.

### ***Origin Energy***

Origin Energy reported two Type 2 breaches of the Code.

In the first case, 9 per cent of its total national electricity customer base did not receive all relevant information on their bills. Clause 4.2 and 4.4 of the Code require retailers to display minimum information and consumption graphs to be included in a customer's bill. Origin Energy has been unable to display correct data on graphs but had implemented a project to achieve 4 per cent non compliance of total electricity customer base on a national basis.

In the second case, Origin Energy breached clause 3.2 of the Code as customers did not receive a bill every three months for their electricity. Approximately three per cent of total bills issued were greater than 16 days outside the requirement of the Code due to a variety of reasons including delays of meter reads from the distributor. Origin Energy advised that where the bills are more than 17 days late,

the customer will receive a letter explaining that their bill has been delayed and they will be offered extended payment arrangements.

### ***Powerdirect***

Powerdirect reported one Type 2 breach of clause 3.2 of the Code. One of its customers moved into their property on 29 November but failed to receive a bill after four months. Powerdirect back billed the customer but also offered the customer \$50 credit and an agreed payment plan.

### ***Red Energy***

Red Energy reported four Type 2 breaches of the Code.

In two cases, Red Energy breached clause 3.2 of the Code. Two customers experienced a billing delay caused by validation of data issues from the distribution company. The customers received three bills and suffered some financial impact. Red Energy explained the situation to the customers and apologised for the inconvenience caused. The customers were also offered hardship assistance, an extended payment plan and part of their bill was waived as a customer service gesture.

In the third case, Red Energy breached clause 2 of the Code which requires retailers to connect energy supplies as soon as practicable after the customer request. Red Energy arranged to connect a customer's premises to the electricity supply, having noted that the gas supply was already in place. The gas supply was subsequently disconnected at a later date due to human error. Red Energy provided refresher training to the relevant staff to ensure that the incident does not happen again, also apologised to the customer and credited the customer's account as compensation.

In the fourth case, as a customer's meter was not read for approximately 15 months due to access issues, Red Energy breached clause 5.1 of the Code which requires that a customer's bill must be based on actual readings at least once every 12 months. Red Energy contacted the customer to arrange for a meter read which was completed and offered them additional time to pay.

### ***Simply Energy***

Simply Energy reported nine Type 2 breaches of the Code.

In the first case, Simply Energy did not have a letter to send to customers to advise them of their rights to escalate their complaint to EWOV if they remained dissatisfied with Simply Energy's dispute resolution processes which breached clause 28.3 of the Code. A standard letter was developed and will be sent to customers who remain dissatisfied with the outcomes provided by Simply Energy's internal dispute resolution process.

In the second case, when Simply Energy sought to charge gas customers for gas market congestion charges, call volumes and complaints increased. During this period, Simply Energy was, at times, unable to escalate customer complaints due to unavailability of higher level managers. Simply Energy advised that this breach of clause 28.2 of the Code was isolated to a specific period during which gas

congestion was being charged and that call volumes have since returned to forecast levels.<sup>9</sup>

In two other instances, Simply Energy did not meet its obligations to issue bills to electricity and gas customers at least every three and two months as required by clause 3.2 of the Code. Simply Energy failed to issue a bill to less than one per cent of electricity and gas bills during the reporting period. Unbilled energy accounts represent approximately 0.8 per cent of all customer electricity accounts and approximately 0.5 per cent of all gas customer accounts in Victoria.

In the fifth case, Simply Energy received nine complaints from customers relating to delays in connecting energy supplies for customers, which breached clause 2 of the Code where the retailer has an obligation to connect as soon as practicable.

In the sixth case, Simply Energy reported that its use of verbal arrangements for direct debit and credit arrangements did not comply with clause 7.2(b) of the Code which requires that the customer and the retailer agree in writing on a set of conditions as prescribed by the Code. The Commission advised Simply Energy that it would not take any enforcement action given the Commission's intention to review the Code during 2008 and the likelihood that changes will be made to the direct debit arrangements to reflect current banking industry practice<sup>10</sup>.

The final three cases involved breaches of clauses 5.1 – 5.3 of the Code. Simply Energy received complaints from six customers who believed they had been overcharged on their bills, with further complaints from 60 customers who felt their bills were based on inaccurate data.

The third case resulted from Simply Energy establishing that its reconciliation process for bill smoothing was not in place, which may have resulted in those customers on bill smoothing arrangements not having their plans updated. Simply Energy undertook a manual reconciliation of its customers' energy accounts to assess whether customers' bill smoothing are on target. Currently, Simply Energy does not have an automated reconciliation process but is considering this for future system releases.

### **TRUenergy**

TRUenergy reported three Type 2 breaches of the Code.

In the first case, TRUenergy breached clause 4.2 of the Code. Approximately 180 Victorian electricity and gas customers accepted an offer made to them via the TRUenergy Sales Centre. However during the account set up phase these customers were placed on products that had expired and were no longer part of TRUenergy's product range. 100 electricity customers and 80 gas customers were subsequently billed on a different tariff to the product they had consented to.

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<sup>9</sup> For a detailed summary of the Commission's response to Simply Energy's Gas Market Congestion Charge issue, refer to section 3.3.6 of the *2007-08 Compliance Report for Victorian Energy Retail Businesses*, October 2008, available at [www.esc.vic.gov.au](http://www.esc.vic.gov.au).

<sup>10</sup> The Commission's Review of Regulatory Instruments will be finalised in the first half of 2009.

All affected customers received letters advising of the error and the options available to them. These options include continuing supply with TRUenergy on the product they originally accepted when joining, or transferring to another retailer without incurring an exit fee<sup>11</sup>.

In the second case, TRUenergy became aware in September 2007 that it had incorrectly represented the greenhouse gas emissions on a number of electricity bills, a breach of clause 4.2 of the Code. The breach was an unintended consequence arising from an unrelated system charge that resulted in the incorrect set up of how greenhouse gas emissions were calculated. Customers received bills displaying gas emission graphs calculated based on the percentage of renewable energy sourced rather than the reduction being based on the percentage of accredited green energy only.

All green energy customers were sent a letter in November 2007 announcing the change in the display of the emissions graph on their electricity bill. Customers were invited to contact TRUenergy directly or visit TRUenergy's website for further information if they had any concerns or questions.

In the third case, TRUenergy breached clause 3.2 of the Code when 1,144 customers were quoted on a product rate incompatible to the premise meter type. This mismatch caused either no bills to be generated for the account or a zero balance bill to be generated.

The Commission has subsequently been advised by TRUenergy that up to 40,000 customers were affected by this billing system error. The Commission has sought further information from TRUenergy regarding this matter and will report on the outcome of its investigations in the *2008-09 Compliance Report*.

### 3.2.2 Type 2 breaches of the Marketing Code

This section briefly outlines the circumstances leading to Type 2 breaches of the Marketing Code identified by individual retailers, the impact to their customers and the remedial actions undertaken. There were three Type 2 breaches of the Marketing Code reported.

#### ***EnergyAustralia***

EnergyAustralia breached clause 5 of the Marketing Code after contacting a customer who had previously been placed on the EnergyAustralia-International Power Retailer's (EA-IPR) 'Do Not Contact' register some years earlier<sup>12</sup>. EnergyAustralia apologised to the customer explaining that it did not have access to the records created under the previous entity. The customer's details were subsequently updated.

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<sup>11</sup> TRUenergy advises that it is in the process of preparing a permanent fix to this issue, due in March 2009 that will block the selection of expired products at the account set up phase of a new registration. In the interim, TRUenergy has developed a monthly report which is run regularly to capture customers who have been placed on products no longer available.

<sup>12</sup> EA-IPR was a joint partnership between EnergyAustralia and International Power Retailer. The partnership ceased in 2007, with International Power Retailer re-entering the market as Simply Energy in August 2007.

### ***Neighbourhood Energy***

Neighbourhood Energy breached clause 5 of the Marketing Code as it contacted a customer who had previously advised the company that they were not interested. Neighbourhood Energy apologised to the customer and confirmed that they had been placed on its 'Do Not Contact' register. The sales agent concerned was dismissed and further training was undertaken for the other sales agents.

### ***Simply Energy***

Retailers are required to have a dispute resolution process complying with Australian standards so as to comply with clause 10 of the Marketing Code. Simply Energy did not have a letter to send to customers to advise them of their rights to escalate their complaint to EWOV if they remained dissatisfied with Simply Energy's dispute resolution process. A standard letter has been developed and is now sent to customers with unresolved disputes.

## **3.3 Retailer Compliance with Type 3 obligations**

This section briefly outlines the circumstances leading to Type 3 breaches of the Code, the Guideline, the Marketing Code and other regulatory instruments identified by individual retailers, the impact on their customers and the remedial actions undertaken.

### ***AGL Sales (AGL)***

AGL reported a single Type 3 breach of clause 13.5 of the Code when it identified three instances where customers had requested account finalisations which were not processed. In each instance AGL offered an apology, a goodwill customer service gesture and arranged the finalisation of the account.

Two breaches of *Guideline No. 10: Confidentiality and Explicit Informed Consent* (Guideline No. 10) were reported. The first breach related to two instances where AGL was unable to locate the records of a customer's explicit informed consent to enter a contract. AGL advised that it offered an explanation and an apology to these customers.

The second breach of Guideline 10 arose from AGL not publishing a copy of the Guideline on its newly launched website. This omission was rectified in August 2008.

AGL advised that upon the launch of its new website that it had also not published a copy of *Guideline No 4: Credit Assessment*. This omission was rectified in August 2008.

### ***Australian Power & Gas***

Australian Power & Gas reported one Type 3 breach of clause 6.1 of the Marketing Code, in that it provided 21 customers with an acknowledgment letter with rates different to those that they had agreed to and signed for.

Australian Power & Gas re-issued letters with the correct rates.

### ***Powerdirect***

Powerdirect reported two Type 3 breaches.

In the first case, customers received inaccurate bills with correct details on one side but incorrect ones on the other due to mail house printing error. The bills were reprinted and resent to the customers.

In the second case, Powerdirect's website did not contain a copy of Guideline No. 10. Powerdirect subsequently ensured that Guideline No. 10 was placed on its website once the breach was discovered.

### ***Red Energy***

Red Energy reported that it breached the requirements of Guideline No. 10 in relation to a customer's confidentiality. Red Energy apologised to the customer and the sales agent received retraining.

### ***Simply Energy***

Simply Energy reported four Type 3 breaches.

In the first case, Simply Energy breached clause 13.5 of the Code which deals with a customer's right to request disconnection. Twenty-two customers lodged a complaint with Simply Energy on the grounds that Simply Energy did not disconnect their property on the date they requested. Simply Energy advised that these errors were due to human error and that it would continuously monitor its processes to identify any potential gaps to reduce the incidence of errors.

In the second case, Simply Energy breached clauses 26.2 -26.5 of the Code, as it did not have its customer charter available in languages other than English nor had it added a message on customers' bill to inform them that they can obtain a copy of the customer charter free of charge. Remedial steps have been taken to rectify this non-compliance.

In the third case, Simply Energy breached clause 5.5 and 5.6 of Marketing Code after noting that in some cases, its door to door walk sheets did not contain all the information required about the visits and the sales agents. Simply Energy prepared new walk sheets which would capture all the relevant information and also provided refresher training to sales agents to ensure that all worksheets are completed correctly.

In the fourth case, Simply Energy breached the Guideline No. 10 requirements that require it to keep records of verbal consent given by its customers. Simply Energy advised that a procedure was implemented in December 2007 to ensure compliance.

### ***TRUenergy***

TRUenergy reported two Type 3 breaches. TRUenergy discovered that its website did not contain a copy of Guideline No. 10 for electricity and gas. TRUenergy placed Guideline No. 10 back on its website once the breach was discovered.

### **Victoria Electricity**

Victoria Electricity reported two breaches of the Gas Market Retail Rules.

In the first case, Victoria Electricity identified that it had failed to identify that gas meters measure volume in either 100 cubic feet or one cubic meter. Victoria Electricity had acquired 645 customers with imperial meters that measure in 100 cubic feet and had billed them at the rate of 1 cubic meter without incorporating the appropriate multiplier of 2.832 to the consumption calculations. Victoria Electricity advised that it would recoup the unbilled revenue up to 9 months and will provide payment extensions to these customers.

In the second case, Victoria Electricity's IT system did not recognise new non assigned tariffs Codes from January 2006 until September 2006 when the error was rectified. After investigation, 286 customers were found to be entitled to a billing adjustment, with 119 customers receiving a credit of \$200 or more.

#### 4.1 Summary of retail regulatory breaches for 2008-09

This section summarises the circumstances leading to the Type 1, 2 and 3 breaches of the various regulatory instruments reported by retailers in general and outlines the remedial actions subsequently undertaken by retailers.

Notwithstanding that nearly all retail licensees have provided the appropriately executed and signed annual compliance reports, the Commission is concerned that some licensees' internal compliance monitoring systems may not, in fact, be sufficiently robust or existent, so as to give the Commission the required level of assurance.

##### 4.1.1 Marketing Code obligations

The Marketing Code breaches related to two provisions, with 20 breaches of either obligation being recorded:

- clauses 6.2 – 6.5 – where retailers must not mislead customers, must ensure that their marketing representatives meet certain standards of conduct and ensure that certain information is provided to consumers both before the contract is entered into, and within two business days subsequent to the contract formation (23 breaches reported).
- clauses 7.1 & 7.4 Consumer Consent – where retailers must obtain explicit informed consent from consumers able to enter into an energy supply contract. The clauses also outline the obligation for retailers to audit a sample of customers acquired throughout a calendar year to ensure that explicit informed consent was given (23 breaches reported).

Retailers must ensure that they have obtained the customer's explicit informed consent to enter an energy supply agreement. To obtain this consent, retailers and their representatives must obtain the customer's agreement to 'opt in' to an arrangement, provided the customer has sufficient information and authority to enter the agreement.

In order for a person to be considered to have consented to something, that person must know what the consent applies to. Such consent can be provided in writing signed by the customer, by electronic communication signed by the customer or verbally.

Retailers can record this consent through retention of any agreement that the customer signs or through the storage of any recorded conversations where consent has been obtained.

Retailers advised that the majority of breaches of the explicit informed consent provisions were limited to isolated incidents affecting single customers, and broadly resulted from either sales representative behaviour or as a result of isolated system errors.

Customers advised retailers that explicit informed consent may not have been provided as they:

- disputed ever agreeing to a contract,
- did not understand the contractual arrangements, either due to their perceived complexity or language or cognitive barriers;
- agreed to transfer suppliers based on information that was subsequently established to be incorrect or outdated; or
- an unauthorised person (such as a family member or spouse) agreed to the transfer.

In two instances, the retailers identified that a team of sales representatives had deliberately engaged in misleading sales practises that resulted in transfers without consent. At least one retailer identified that its failure to locate the recording of the conversation where the customer allegedly agreed to transfer was a reach of the Marketing Code.

In addition to the similar obligations outlined in the *Trade Practices Act 1974* and *Fair Trading Act 1999*, the Marketing Code requires that retailers and their sales representatives should refrain from acting in a misleading or deceptive manner, should not harass or coerce customers and should provide truthful and comprehensive information to enable an informed purchasing decision.

Breaches of the Marketing Code that related to sales representative's conduct and the provision of information included customers advising retailers that:

- they were told that cancellation fees either would not apply with the new contract or would not be incurred if they transferred from their current retailer when the reverse was true;
- the sales representative misrepresented their association with the Government or another retailer;
- the sales representatives misrepresented the basis or amount of a discount;
- information that retailers are required to provide within a mandated period was not provided;
- sales representatives were too aggressive or pushy, or would not leave the premises until such time as the customer signed documentation; or
- the sales representative made unclear or confusing representations.

Retailers reported three breaches of Type 2 Marketing Code obligations. Two breaches were recorded for clause 5 which outlines the times at which retailers may contact consumers and the information that should be made available to consumers. Retailers are also obligated to maintain 'No Contact' lists, and records of all sales contacts, regardless of whether they are telephone or door to door contacts.

Two Type 3 breaches of the Marketing Code were recorded. One breach related to clauses 5.5 and 5.6 which require a retailer to keep records of all telephone and door to door sales visits. The other breach related to clause 6.1 which requires information to be provided in plain English and be able to be readily understood by consumers.

### ***Remedial actions***

As previously stated, an important component of retailers' reports of Type 1, 2 and 3 breaches is the remedial actions taken by the retailer to rectify the breach. Remedial actions need to firstly address the customer's concerns and then rectify and training or system deficiencies that may have been identified.

Generally, retailers have advised the Commission that in addition to offering apologies to the customers, they will reverse the transfer of the energy supplier (at no cost to the customer) or extend the cooling off periods once they have provided the contractual information. In some cases, changes have been made to verification processes, sales force scripts and marketing collateral to minimise the likelihood of customers not being fully aware of the implications of agreeing to transfer energy suppliers.

Retailers have advised that where it has been established that the sales representative has been at fault, a number of remedial actions ranging from retraining to termination of employment are employed. Retailers have comprehensive service level agreements with third party marketing agencies that prescribe a number of penalties that may be applied in the event that a sales representative acts inappropriately. In extreme cases where sales misconduct is evident over a period of time, the sales channel's contract will be terminated.

Retailers also advised that as a result of breaches being identified, standard operating procedures and correspondence were reviewed and amended to minimise the likelihood of future breaches of this nature. Relevant staff also received refresher training in relation to the regulatory obligations.

### ***Summary***

The Commission is generally satisfied that retailers have responded in a timely manner to breaches of the Marketing Code obligations. It is clear that despite retailers' significant efforts in terms of providing their sales forces with training regarding their obligations to consumers, ensuring that comprehensive marketing collateral is available and that there are robust monitoring processes, regulatory breaches still occur.

The actions of third party sales and marketing companies can have a significant impact on consumer confidence in the benefits that the competitive market is able to provide. Retailers have demonstrated through their remedial actions that they are very aware of the potential damage to their brand and reputation that sales agent misconduct generates. Refresher training for individual sales agents combined with the sanctions enforced against those sales channels that have resulted in market conduct complaints shows that retailers are aware that their compliance with regulatory obligations is dependant on the sales staff they employ.

Clearly, if a sales agent is found to have breached the regulations, and despite further refresher training, continues to do so, retailers are prepared to terminate their employment contracts. Analysis of complaints data and anecdotal evidence indicates that these non-compliant sales staff can usually secure further employment in the retail energy industry. This would suggest that third party sales and marketing firms can have a significant role in reducing market conduct complaints through more rigorous pre-employment checks and ongoing monitoring of sales agents in the field.

The Commission notes that some retailers have had some success in reducing the level of market conduct complaints recorded against them through levying fines on the non-compliant sales channel rather than the individual sales agent.

The Commission will, in accordance with its Memorandum of Understanding with Consumer Affairs Victoria (CAV) continue to monitor retailer behaviour in the market and will refer non-compliant retailers to CAV for possible enforcement action.

#### **4.1.2 Energy Retail Code obligations**

The Type 1 breaches of the Code reported by retailers related to the following provisions:

- clauses 11.2 & 11.4(b) (Payment difficulties) – outlines the process of assessment and assistance to domestic customers experiencing financial difficulties (one breach reported).
- clauses 12.1 & 12.2 (Instalment plans) – the retailers options and requirements when offering an instalment plan (one breach reported)
- clause 13 (Grounds for Disconnection) – the process which must be followed prior to disconnecting a customer (ten breaches reported)
- clause 14 (No disconnection) – when a retailer may not disconnect a customer (one breach reported)
- clause 20(a) (Variations require customer consent) – variations in tariffs and terms and conditions of an energy contract may only be varied by agreement in writing, unless it is a gazetted term or condition (2 breaches reported).
- clause 21.1(b) (Gazette based variations) – rules governing variations to gazetted tariffs (two breaches reported);
- clauses 23.1(a), 23.3 & 23.4 (Cooling off) – the customer’s right to cancel an energy contract (one breach reported).
- clauses 24.1(d), 24.2(a) & 24.3(a) (Termination) – when a retailer may impose an early termination fee, or terminate a contract for a breach (seven breaches reported)
- clause 28.3 (Energy & Water Ombudsman (Victoria)) – the EWOV number must be shown on any disconnection notices (1 breach reported).
- clause 32 (Agreed damages) – terms, conditions and amount of agreed damages payable to a retailer by a customer for breaching their contract (1 breach reported).

Retailers reported ten breaches of clause 13, representing 35 per cent of all Type 1 Code breaches. A breach of this clause may result in a customer being disconnected in circumstances that are wrongful, however not every breach of Clause 13 resulted in compensation being payable as per the legislation<sup>13</sup>.

The reasons for non-compliance with Clause 13 include:

- failure to notify customer at all of impending disconnection of energy supply.
- failure to provide sufficient notice of impending disconnection.
- delays in disconnection or delays occurring earlier than requested.
- unauthorised persons requesting disconnections.

The circumstances under which a retailer may impose an early termination fee resulted in the second highest number of Type 1 breaches. Seven breaches of Clauses 24.1(d), 24.2(a) and 24.3 were recorded for the period, equating to 25 per cent of all Type 1 Code breaches. Retailers identified that the main reasons for breaches of these clauses included incorrect customer management system parameters for expiry dates or a failure to provide required information to customers prior to the expiry of their fixed term contract.

The remaining Type 1 breaches occurred for a variety of reasons mainly related to standard documentation and processes not being provided to customers or followed by staff in all instances.

The Type 2 breaches of the Code reported by retailers related to the following clauses:

- clause 2 (Obligation to Connect) – A retailer must connect as soon as possible (two breaches).
- clause 3.2 (Billing cycles) – Retailer obligations in relation to the frequency of issuing bills to customers, the contents of the bill, the basis for bills, the applications of late payment fees (15 breaches).
- clause 4.2-4.4 (Information and Graphs) – Rules governing the information to be included on a customer's bill and the rules requiring consumption graphs to be included on all bills (eight breaches).
- clauses 5.1 – 5.3 (Basis of the bill) – the bill must be based on actual meter readings at least once every 12 months or based on estimations as per prescribed conditions (four breaches).
- clauses 7.1(b) & (c) & 7.2 (Payment of the bill) – The pay-by-date is not less than 12 days from date of despatch (three breaches).

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<sup>13</sup> The Victorian Government introduced the wrongful disconnection payment (WDP) legislation in December 2004.<sup>13</sup> Section 40B of the *Electricity Industry Act 2000* and section 48A (1) of the *Gas Industry Act 2001* requires a retailer to compensate a customer if it disconnects the energy supply and fails to comply with the terms and conditions of the contract specifying the circumstances in which the supply can be disconnected. Guidance on the minimum contractual terms and conditions for a consumer contract in addition to the process that must be followed prior to the disconnection of a customer's energy supply is set out in the Energy Retail Code (CODE).

- clause 28.1 (Complaint Handling) – A retailer must deal with complaints in accordance with the relevant Australian Standard (two breaches).
- clause 28.2 (Advice on customer’s rights) – The information a retailer must provide to a customer raising a complaint (one breach).

Breaches of clause 3.2 of the Code featured most prominently in the annual retailer compliance data. The breaches related to errors with the bill format, bills being delayed or not being received on time or not representing the agreed tariff rates. Retailers advised that where bills were delayed this may have been the result of delays in meter data being made available from distributors, or where data had been provided missing or incorrect data that was then subject to further internal verification procedures.

Clauses 4.2 and 4.4 of the Code require retailers to provide certain information on a customer’s bill and to also include graphs that reflect the historical consumption for consumers over the previous twelve month period. Retailers must ensure that bills contain sufficient information to enable a customer to confirm that they have been billed at the correct rate for energy that they have consumed and that if they need clarification, an appropriate contact point for them to make enquiries.

Retailers identified a number of deficiencies including:

- incorrect display of estimated or actual reads.
- payments duplicated on the bill.
- a failure to display, in relevant languages, the contact details for any Telephone Interpreter Service.
- graphs not reflecting usage for the appropriate billing period, or not being available for customer’s billing periods.

Finally, four breaches of clauses 5.1-5.3 were reported. These clauses require that bills must be based on actual readings of the meter, unless the customer has explicitly agreed to some other arrangement. In addition, the clauses outline under what circumstances accounts based on estimated reads can be issued. Retailers claimed that they had failed to read meters once every 12 months as a result of access and meter reader issues, or received complaints regarding the accuracy of the meter read data presented on customer accounts.

### ***Remedial actions***

In terms of those breaches where retailers disconnected energy supply in circumstances not in accordance with the terms and conditions of the customers’ contracts, retailers paid compensation as required by the legislation. Many of the cases where this compensation has been required to be paid have resulted from staff not adhering to established procedures. Retailers advised that when this cause is identified additional training is provided to the staff member to reduce the likelihood of recurring breaches.

Other retailers have implemented system enhancements to ensure that established processes are more visible to staff and are able to be followed. Some system amendments are of a significant scale and the retailers involved in the processes provide regular updates to the Commission as to the progress of their projects.

Additional training has been provided to staff and internal compliance monitoring efforts have increased as well. Where standard documentation has been assessed as being inadequate or lacking in content, retailers have advised the Commission that the necessary amendments have been made and that customers are receiving the information required by the regulations.

At least one retailer has adjusted the quantum of its early termination fees in response to a Commission determination. The Commission is currently reviewing all retailers' early termination fees to ensure that they are compliant with the Code requirements and intends to report on industry compliance with the agreed damages rules of the Code in the future.

Retailers also undertook a range of remedial actions to rectify the breaches listed above, including verbal and written explanations and apologies provided to affected customers, credits provided where appropriate as well as implementing the required billing system amendments. Additional actions including providing required information in a range of other languages.

### **Summary**

Retailers have, in the main, responded pragmatically and quickly to self-identified breaches of the Code obligations. A significant number of Code breaches relate to the retailer's billing functions. Once consumers have made an informed choice and entered into a contractual arrangement they should expect to be billed accurately at the agreed rates and also to be able to seek further information from retailers regarding any billing anomalies.

A number of retailers identified that breaches will only be remedied after IT system upgrades have been made or existing IT system upgrades have been completed. While the Commission appreciates that often these upgrades are of significant scale and that there significant lead time for completion of the projects, retailers must ensure that customers can access all information required to be provided by the regulations. The Commission will continue to seek regular progress reports on a number of the ongoing IT upgrades.

Approximately 35 per cent of the Code breaches identified by retailers are about the disconnection of energy supply, either in circumstances determined as being wrongful (as contemplated by the legislation) or where retailer's customer management systems have failed to manage their customer's expectations. Where disconnection is found to have been wrongful, the Commission notes that retailers are generally aware of their obligations under Sections 40B and 48A of the *Electricity Industry Act 2000* and the *Gas Industry Act 2001* and that their consumers are being appropriately compensated as per the legislation.

Despite this, the Commission has noted some deficiencies in reporting all breaches of the Energy Retail Code that relate to wrongful disconnections and it is evident further work is required to ensure that the volume of breaches for all regulatory obligations reported, actually mirrors the level of compliance within the industry. The Manual clearly states that retailers must report all actual or potential Type 1 breaches as they are identified, and the Commission notes that the majority of wrongful disconnections would correctly be classified as Type 1 breaches.

### 4.1.3 Guideline 10: Confidentiality and Explicit Informed Consent

Seven Type 3 breaches related to the *Guideline 10: Confidentiality and Explicit Informed Consent* were reported. Two retailers had identified that contrary to the Guideline requirements, a copy of the Guideline was not available on their websites.

In two cases, a retailer was unable to locate any copy of its' customers recorded agreement and consent to an energy contract. The remaining breaches related to where consumers objected to the manner in which individual sales representatives utilised their personal information.

#### **Summary**

The Commission is generally satisfied with the overall level of compliance with this Guideline. While the Commission intends to repeal this Guideline as part of its current review of regulatory instruments, licensees' are still obligated to comply with all applicable laws including the *Privacy Act 1988* and the National Privacy Principles.

The Commission notes that in two cases, a retailer was unable to locate a customer's recorded consent to a contract and considers this a potentially serious compliance matter. While instances of this non-compliance may be limited to only two cases, the Commission will nonetheless seek confirmation from all retailers in 2009 that this information is easily accessible and available to customers, upon their request. The results of this investigation will be reported in the *2008-09 Retail Compliance Report*.

While there is the possibility of significant consumer detriment should licensees' fail to have adequate systems to protect consumers' personal information, licensees must seek continuous improvement to avoid further time consuming and costly regulatory intervention.

### 4.1.4 Other guidelines and regulatory instruments

Two breaches of the *Gas Market Retail Rules* were identified by a single retailer, when it established that it had a number of gas customers with imperial meters that measured consumption in cubic feet rather than cubic meters. The retailer recognised that it had subsequently failed to incorporate the necessary multiplier when calculating bills.

#### **Summary**

The Commission is generally satisfied that retailers have taken sufficient remedial steps to address breaches of the other regulatory instruments when they are identified.

A number of these instruments will be repealed as part of the Commission's current regulatory review as a result of them either being duplicated in other legislative or regulatory instruments or being redundant. Retailers are still required, under current licensing arrangements to comply with all applicable laws, Codes and guidelines and the Commission will continue to vigorously monitor compliance levels.

## 4.2 Next steps

The Commission had previously highlighted that retailers upon provision of reliable, accurate and timely compliance data that confirmed the existence of robust monitoring systems could reasonably expect that future reporting requirements would be amended to further reduce the reporting obligations.

While recognising the extensive efforts a number of retailers have made to meet their reporting obligations, the Commission is not satisfied that these reporting requirements can be reduced for 2008-09. In addition, retailers have implemented a number of projects designed to remedy identified non-compliance and the Commission will need confirmation that these projects have been completed prior to considering any relaxation of individual retailer reporting requirements.

The Commission will address the issues identified relating to reporting and internal monitoring systems through a variety of means including:

- continuing ongoing compliance and monitoring activities for the entire retail industry until such time as the Commission loses responsibilities for these functions;
- seeking reasons from those retailers' who were required to resubmit or provide additional data as to why regulatory audits should not be conducted in 2008-09 to determine how effective their internal compliance monitoring systems are; and
- continuing to meet regularly with EWOV and regulatory agencies to discuss emerging compliance issues and the necessary corrective actions.

Where the Commission is unable to obtain the necessary assurance that licensees' compliance monitoring systems are robust, regulatory audits will be required. Where appropriate, those audits will be undertaken in conjunction with other jurisdictional regulators.

Finally, a number of retailers requested that the Commission review the Excel template that was provided to them for reporting purposes. Retailers noted that the template in its current format may be too restrictive, in terms of the data that could be entered, and also was difficult to present to senior managers and their Boards.

The Commission notes that its ongoing review of regulatory instruments has resulted in a number of structural changes to existing regulatory instruments, and will address retailers' concerns at the same time the template is updated to reflect these structural changes.

## APPENDIX A - SUMMARY OF INDIVIDUAL RETAILER NON-COMPLIANCE FOR 2007-08

<i>Regulatory Instrument</i>	<i>Type 1</i>		<i>Type 2</i>		<i>Type 3</i>	
Code of Conduct for Marketing in Victoria	AGL Sales	6	EnergyAustralia	1	APG	1
	APG	1	Neighbourhood Energy	1	Simply Energy	1
	EnergyAustralia	1	Simply Energy	1		
	Country Energy	9				
	Jackgreen	4				
	Neighbourhood Energy	1				
	Red Energy	13				
	Simply Energy	3				
	Victoria Electricity	8				
Energy Retail Code	AGL Sales	7	AGL Sales	9	AGL Sales	1
	Country Energy	2	APG	5	Simply Energy	2
	Origin Energy (Gas)	2	Jackgreen	1		
			Neighbourhood Energy	2		
			Origin Energy (PC)	2		
	Origin Energy (PC)	1	Powerdirect	1		
	Red Energy	4	Red Energy	4		
	Simply Energy	6				
	TRUenergy	3	Simply Energy	9		
	Victoria Electricity	2				
TRUenergy			3			
Confidentiality and Explicit Informed Consent				AGL Sales	2	
				Powerdirect	2	
				Red Energy	1	
				Simply Energy	1	

				TRUenergy	1
Electricity Retail Licence		Origin Energy (PC)	1	Origin Energy (PC)	1
Gas Retail Licence				Origin Energy	1
Electricity Industry Act				Origin Energy (PC)	1
Gas Market Retail Rules				Victoria Electricity	2
Credit Assessment Guideline				AGL Sales	1
				Powerdirect	1