EnergyAustralia
LIGHT THE WAY

15 March 2022

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Level 8
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MELBOURNE VIC 3000

Lodged electronically: licences@esc.vic.gov.au

Dear Commissioners,

Variation of EnergyAustralia Pty Ltd 's electricity and gas retail licences and EnergyAustralia Yallourn Pty Ltd's electricity retail licence

EnergyAustralia is one of Australia's largest energy companies with around 2.4 million electricity and gas accounts in NSW, Victoria, Queensland, South Australia, and the Australian Capital Territory. EnergyAustralia owns, contracts, and operates a diversified energy generation portfolio that includes coal, gas, battery storage, demand response, solar, and wind assets. Combined, these assets comprise 4,500MW of generation capacity.

We refer to the Commission's three letters sent to EnergyAustralia on 31 January 2022 with the following email subject lines:

- ESC - Retail licence review - Variation of gas licence - EnergyAustralia Pty Ltd,
- ESC - Retail licence review - Variation of electricity licence – EnergyAustralia Yallourn, and
- ESC - Retail licence review - Variation of electricity licence – EnergyAustralia; and,
- the subsequent email sent 1 February 2022, extending the submission due date to 15 March 2022.

We understand that this Retail licence variation process provides Retailers two options: to consent to the variation or, to not consent and make a submission as to the reasons why.

We recognise the importance of the licences in regulating the retail sale of electricity and gas in Victoria. We also agree with many of the changes proposed by the Commission, particularly the removal of licence conditions which were duplicated in the relevant legislation and Codes of Practice.

This submission raises our concerns with the proposed revocation of licence clause which we do not agree with. We therefore make this submission to not consent to the variation of our three licences (EnergyAustralia Pty Ltd's electricity retail licence, EnergyAustralia Pty Ltd's gas retail licence, and EnergyAustralia Yallourn Pty Ltd's electricity retail licence).

Revocation of licence clause

Proposed clause

EnergyAustralia has concerns with the proposed revocation clause (proposed clause 6 of the Template Electricity Retail Licence and Template Gas Retail Licence (Templates)).

In its Explanatory table of proposed changes, the Commission summarises one of the versions of the revocation clause which is in some of the retail licences. That version allows for revocation with notice on a number of grounds, including if:

- the Licensee fails to comply with an Undertaking or a Final Enforcement Order, or
- *the Licensee breaches any condition of this licence*

(Note both grounds above are separate to each other, so either one allows for revocation on a standalone basis)

Another clause in that version of the retail licence (typically Clause 8 or clause 14 of the electricity retail licences) then provides a *licence condition which states that the Licensee must comply with listed Codes and any other code* (now Codes of Practice).

Therefore, operating together, a breach of a Code of Practice, is a breach of a licence condition which is then a ground of revocation. We agree with the Commission's comment that its proposed change to list a breach of a Code of Practice directly as a ground for revocation reflects what is already in those versions of the licences.

Clause 6 of the Templates also details the amount of notice before revocation that the Commission must provide.

EnergyAustralia's revocation clause is more appropriate

Our issue is that all three of EnergyAustralia's licences contain a very different revocation clause to that described/proposed above. Eleven other Electricity Retailers have licences with the same wording as our licences. These licences are not limited to old licences, with the dates of these licences being 2007, 2008, 2017 and 2018.

We consider our version of the revocation clause is more appropriate and fairer than the one proposed by the Commission in the Templates.

In effect, EnergyAustralia's licences only allow the Commission to revoke a licence:

- where the Commission has obtained an enforcement order from a court about a breach of a civil penalty requirement, or
- a licensee has given an undertaking about a breach of a Code of Practice; and
- that order or undertaking is then breached by the licensee.

This means the Commission cannot revoke the licence for a breach of Code of Practice alone. Rather, multiple steps must occur before the ability to revoke a licence is triggered. For EnergyAustralia and other licensees with the same revocation clause, the proposed clause would significantly lower the threshold for revocation of the licence.

Our main concern is that the proposed revocation clause does not provide for procedural fairness because the Commission's process for revoking the licence does not provide an opportunity for the licensee to respond to the ESC's decision to revoke the licence by notice.

In contrast, under our current licences, an enforcement order or undertaking must be obtained before the ability to revoke the licence is triggered.

Enforcement orders (now contravention orders) are made by the Court when it has found there has been a breach of a civil penalty requirement (s 53 *Essential Services Commission Act 2001* (Vic)). This means the natural justice considerations arising from court processes apply. Under the proposed revocation clause, these considerations are absent as the Commission is able to decide whether there has been a breach of the Code of Practice and then revoke a licence.

With regard to an undertaking, while court processes do not apply, a licensee agreeing to give an undertaking that is court enforceable for a breach of a Code of Practice, would only occur after an investigation and engagement between the licensee and the ESC. This would still provide some level of procedural fairness and allow for a Retailer to respond to the Commission's investigation into breaches.

Licence revocation is the most severe enforcement action that a regulator can take against a regulated entity and a Licensee should be able to expect that revocation processes are fair. They should allow that a person subject to a revocation decision is able to understand the reason for that decision, and has an opportunity to respond.

We believe that the version of the revocation clause in our licences is preferable and more appropriate.

However, if the Commission were to pursue a similar revocation clause to that proposed (based on any breach of a Code of Practice), we ask that the Commission consult industry on the revocation procedures with procedural fairness in mind.

To this end, we encourage the Commission to at least mirror the AER's equivalent revocation process. The grounds for revocation of a retail authorisation are narrower than the ones proposed by the Commission (see section 107 of the *National Electricity Retail Law* (NERL)). They include a breach of section 88(2) of the NERL by the retailer (relating to purchases in the wholesale market); or that the AER must be satisfied there is a material failure by the retailer to meets its obligations under the energy laws.

In terms of process, a retailer authorisation may not be revoked unless the revocation process has been completed (section 120 NERL), which requires:

- the AER to provide notice of intention to revoke,
- the reasons why the AER considers the grounds for revocation exist
- explicitly provides an opportunity for the authorised retailer to respond to the AER on why the AER should not revoke the authorisation or how the retailer will address the matters identified by the AER.

The AER's Retail authorisation guideline also reflects the above process.[1]

Limiting revocation to breaches of civil penalty requirements in the Codes of Practice or material breaches

We also suggest that the Commission consider limiting the revocation grounds to breaches of civil penalty requirements only. Currently, there are many provisions in the Energy Retail Code of Practice that are unlikely to ever result in serious harm to the retail market or customers even in the most egregious breaches. We believe that the provisions that are made civil penalty requirements under the *Essential Services Commission (Energy Industry Penalty Regime) Regulations 2016* (Vic) are an

[1] AER - Retailer authorisation guideline - December 2014.DOCX (live.com)

existing and appropriate classification to define the obligations which if breached would warrant a revocation of licence.

Alternatively, the Commission could follow the AER's approach of limiting revocation of a licence to material breaches of Codes of Practice (as described above).

In a similar vein, we also note that the ground to revoke the licence for breaches of any condition in the licence is also very broad. We question whether the revocation of a licence is a proportionate response to a failure to provide non-Small customers information under clause 9 of the Standard Electricity Licence conditions (e.g. NMI on the customer's bill), for example.

If you have any questions in relation to this submission, please contact me ([redacted]@energyaustralia.com.au or [redacted]).

Yours sincerely,

[redacted]
Regulatory Affairs Lead