

## Frequently Asked Questions (FAQs)

### *The Commission's Interim Approach to Energy Compliance and Enforcement*

These FAQs aim to answer questions about:

- how the Commission will develop an *Energy Compliance and Enforcement Policy* for the use of its enforcement powers, taking into account its new and updated enforcement powers in the *Energy Legislation Amendment (Consumer Protection) Act 2015 (the Act)*.
- how the Commission's Interim Approach to the use of its enforcement powers will apply in practice.

The FAQs are grouped according to whether they apply to all energy licensees, or specifically to certain classes of licensee, such as retailers or distributors.

The Commission encourages licensees to obtain independent advice on how the *Act* applies to their particular business.

#### FAQs FOR ALL ENERGY LICENSEES:

**FAQ1:** What will the Commission's regulatory tool kit look like once the *Act* commences?

**A1:** It will include the following regulatory powers:

	<b>OUR REGULATORY POWERS:</b>	<b>Existing Power?</b>	<b>New Power?</b>
<b>LICENSING</b>	Licence revocation	YES	
	Appoint an administrator	YES	
	Licence variation [unilateral] – necessary	YES	
	Licence variation [unilateral] – non-compliance		YES
	Licence variation [by consent]	YES	
<b>ENFORCEMENT</b>	Enforcement Order [Final]	YES	
	Enforcement Order [Provisional]	YES	
	Enforceable Undertaking		YES
	Civil Penalty Notice ( <b>CPN</b> ) – Increased cap from 120 Penalty Units (\$18,200) to 680 Penalty Units (\$103,000)	YES	Updated
	Energy Industry Penalty Notice ( <b>EIPN</b> ) for up to \$20,000 per breach		YES
	Wrongful Disconnection Penalty Notice ( <b>WDPN</b> ) for \$5,000 per breach		YES
<b>COMPLIANCE</b>	Making a determination	YES	
	Administrative Undertaking	YES	
	Initial Investigation: e.g. inquiries and requests for further information, show cause letter, negotiated outcome	YES	
	Communication & consultation	YES	

#### **Consultation on Energy Compliance and Enforcement Policy**

**FAQ2:** What will the Commission's *Energy Compliance and Enforcement Policy* be about?

**A2:** The *Energy Compliance and Enforcement Policy* will set out the Commission's approach to compliance and enforcement of energy licence conditions using its powers under the *Essential Services Commission Act 2001*, as updated by the *Act*, and having regard to the Commission's new objective of promoting protections for customers, including those facing payment difficulties.

**FAQ3:** When will the Commission publish its *Energy Compliance and Enforcement Policy*?

**A3:** Following a consultation in the first half of 2016, the Commission plans to publish its final *Energy Compliance and Enforcement Policy* by the end of June 2016.

**FAQ4:** How will the Commission develop its *Energy Compliance and Enforcement Policy*?

**A4:** As soon as possible after the Regulations for the Energy Industry Penalty Notices (**EIPNs**) are made, the Commission will release a draft *Energy Compliance and Enforcement Policy* for consultation. As part of the consultation process, the Commission intends to:

- invite written feedback on the draft *Energy Compliance and Enforcement Policy*; and
- conduct a series of roundtable discussions to assist licensees and other stakeholders to understand the proposed approach, and prepare their written submissions.

**FAQ5:** Why is there an interim period?

**A5:** There is an interim period to enable the Commission to consult with industry and other stakeholders on the development of its *Energy Compliance and Enforcement Policy*. The interim period runs from the date the *Act* takes effect (anticipated 1 January 2016) until the Commission's *Energy Compliance and Enforcement Policy* is in place.

**FAQ6:** During the interim period, how will the Commission address alleged non-compliance that comes to its attention?

**A6:** The Commission will continue its existing approach of working constructively with energy licensees to achieve compliance. The Commission encourages licensees to self-identify non-compliance at an early stage and report it to the Commission; and to actively take steps to remediate non-compliance as quickly as possible where it is identified, so it does not recur.

As part of its '*Interim Approach to Compliance*', the Commission has outlined five circumstances that will be regarded favourably when determining its response to non-compliance. These are:

- the licensee self-identifies non-compliance at an early stage and reports it to the Commission;
- the licensee actively takes steps to understand and investigate the nature, extent and root causes of its non-compliance;
- the licensee actively takes steps to resolve its non-compliance, such as by committing to a remediation plan with clear timeframes for implementation and/or addressing the customer problem;
- the licensee reviews the progress of its remediation plan at key stages to ensure it is working as intended and, if necessary, adjusts the remediation plan to ensure it has the desired effect;
- the licensee responds in full and in a timely manner to the Commission's inquiries and requests for information and progress updates.

During the interim period, the Commission reserves its right to take enforcement action having regard to the full suite of enforcement options available to it, on a case by case basis.

In considering the use of its enforcement powers, the Commission will continue to prioritise matters involving systemic contraventions and conduct that creates a risk of systemic non-compliance.

As part of its '*Interim Approach to Enforcement*', when determining whether to take enforcement action, the Commission will consider whether the licensee's response to non-compliance is inadequate. The Commission will have regard to:

- **Natural justice** – giving the affected licensee the opportunity to comment and make a submission regarding the Commission’s proposed use of the new or updated enforcement powers available to the Commission;
- **Seriousness of the contravention** – the nature of the alleged contravention(s) and the *extent of risk of harm or actual harm* to customers, including if the Commission does not take enforcement action;
- **Proportionality** – the extent to which taking the enforcement action is necessary to appropriately ensure the contravention is adequately addressed;
- **Reasonableness** – the extent to which the affected licensee has self-reported the non-compliance at an early stage and actively taken steps to identify, resolve and remediate the non-compliance;
- **Cooperation** – the willingness of the licensee to cooperate genuinely with the Commission.

If there is any uncertainty about the application of the ‘*Interim Approach to Compliance*’, ‘*Interim Approach to Enforcement*’ and the updated *Compliance Policy Statement for Victorian Energy Businesses (January 2012)* following the commencement of the *Act*, the Commission encourages licensees to bring the issue to its attention.

**FAQ7:** During the interim period, how will the Commission interact with the Energy and Water Ombudsman (Victoria) (EWOV)?

**A7:** EWOV remains the primary mechanism for resolving disputes between customers and energy businesses. The Commission will continue to consider any matter referred to it by EWOV.

#### **FAQs FOR RETAIL LICENSEES ONLY:**

##### ***Wrongful Disconnection Penalty Notices (WDPNs)***

##### **Issuing WDPNs:**

**FAQ8:** Can the Commission issue a retailer with a WDPN for a contravention of an *Energy Retail Code* obligation that contributes to a wrongful disconnection, when the wrongful disconnection occurred before 1 January 2016 (the date from when the *Act* is expected to take effect)?

**A8:** No, the Commission is unable to issue a retailer with a WDPN for a wrongful disconnection that occurred before 1 January 2016. This is because the *Act* operates prospectively and cannot apply to earlier contraventions.

**FAQ9:** What is the Commission’s interim approach to issuing a WDPN?

**A9:** When deciding whether to issue a retailer with a WDPN during the ‘interim period’, the Commission will have regard to the five circumstances that will generally be regarded favourably as part of its ‘*Interim Approach to Compliance*’, and its case by case approach as part of its ‘*Interim Approach to Enforcement*’, as mentioned above at the answer to FAQ6.

The power to issue a WDPN aims to deter conduct that creates the risk that a customer will experience a wrongful disconnection, and emphasises the importance of compliance with the *Energy Retail Code*.

**FAQ10:** How will the Commission’s approach to issuing a WDPN affect a retailer’s obligation to make a payment to a customer for wrongful disconnection?

**A10:** A retailer’s obligation to pay customer compensation for wrongful disconnection remains a statutory condition of licence. A retailer must continue to meet this obligation. Where there

is dispute as to whether a disconnection was wrongful, EWOV may refer the dispute to the Commission for decision. Separate to this, the Commission will have a new power to issue a WDPN on the commencement of the Act. This new power seeks to emphasise the importance of licensee compliance with the *Energy Retail Code*.

**FAQ11:** What happens to any penalties paid by energy retailers in response to a WDPN?

**A11:** The penalty is payable into the Consolidated Fund.

**FAQ12:** Will the Commission issue a WDPN in all cases where it finds that a disconnection was wrongful?

**A12:** The power to issue a WDPN is separate from the Commission's decision on whether a disconnection was wrongful.

The power to issue a WDPN aims to deter conduct that creates the risk that a customer will experience a wrongful disconnection, and emphasises the importance of compliance with the *Energy Retail Code*.

The Commission will decide on a case by case basis, in accordance with the principles set out in its *'Interim Approach to Enforcement'*, whether to issue a WDPN when it has formed a reasonable belief that a disconnection was wrongful.

**FAQ13:** How will the Commission treat a payment to a customer as part of the settlement of a disconnection dispute (including when the dispute has been handled by EWOV) for the purposes of deciding whether to consider issuing a WDPN?

**A13:** The Commission does not usually review the outcome of disputes handled by EWOV.

EWOV is the external dispute resolution scheme approved by the Commission to handle energy disputes in Victoria. The Commission understands that EWOV will continue to handle wrongful disconnection payment disputes in accordance with its Charter and usual complaints handling processes.

The Commission expects that a negotiated settlement to a wrongful disconnection dispute (whether achieved with the assistance of EWOV) will be given effect by the licensee, irrespective of any Commission decision on whether to issue a WDPN.

#### **Amount of Penalty:**

**FAQ14:** When issuing a WDPN, can the Commission issue a penalty for an amount below \$5,000?

**A14:** No, the Commission has no discretion to adjust the amount of the penalty. The *Act* makes clear that the penalty for a contravention which may attract a WDPN is fixed at \$5,000.

**FAQ15:** Will a retailer be liable for a penalty exceeding \$5,000 when a wrongful disconnection of one customer, involves contraventions of multiple obligations of the *Energy Retail Code*?

**A15:** No, the Commission will only be able to issue a penalty notice of one \$5,000 penalty. The *Act* makes clear the Commission may issue one penalty of \$5,000 for a contravention of an *Energy Retail Code* obligation that contributes to a customer's wrongful disconnection.

**FAQ16:** Will a retailer be liable for a penalty exceeding \$5,000 when a contravention of the same *Energy Retail Code* obligation affects several customers?

**A16:** If the Commission considers that the use of a penalty notice is an appropriate enforcement option where several customers are affected, the Commission may issue a WDPN in respect of the contravention for each customer.

**FAQs FOR RETAIL AND DISTRIBUTION LICENSEES ONLY:**

***Energy Industry Penalty Notices (EIPNs)***

**Issuing EIPNs:**

**FAQ17:** When will the Commission be able to issue an energy licensee with an EIPN?

**A17:** The Commission will only be able to issue an EIPN once the Regulations commence because the Regulations will specify the types of 'energy industry contraventions' and the penalty amount for which the Commission can issue an EIPN.

**Amount of Penalty:**

**FAQ18:** When issuing an energy licensee with an EIPN, may the Commission determine the amount of the penalty specified in the penalty notice such that it is below \$20,000?

**A18:** No, the Commission has no ability to adjust the amount of the penalty. Whether an 'energy industry contravention' attracts a lesser penalty amount than \$20,000 will be prescribed by the Regulations.