



ENERGY COMPLIANCE AND ENFORCEMENT POLICY

July 2016



An appropriate citation for this policy is:

Essential Services Commission 2016, *Energy Compliance and Enforcement Policy*, July

With effect from 22 July 2016, this Energy Compliance and Enforcement Policy replaces:

the **Compliance Policy Statement for Victorian Energy Businesses (January 2012)** as modified by the **Interim Approach to Energy Compliance and Enforcement (December 2015)**.

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OUR POLICY

1 PURPOSE OF THIS POLICY

The purpose of this Energy Compliance and Enforcement Policy (**Policy**) is to outline for energy licensees, holders of energy licence exemptions and Victorian energy consumers, our approach to promoting and enforcing compliance with the Victorian energy industry legislation we administer: the *Electricity Industry Act 2000 (EIA)* and the *Gas Industry Act 2001 (GIA)*.

This Policy is made under section 13 of the *Essential Services Commission Act 2001 (ESCA)* and applies to our energy industry compliance and enforcement functions.¹

2 POLICY CONTEXT

2.1 OUR OBJECTIVES

Our objective in regulating the energy industry is to promote the long term interests of Victorian consumers with regard to the price, quality and reliability of energy.² In furthering this objective, we also seek to promote:

- a) a consistent regulatory approach between the electricity and gas industries;
- b) the development of full retail competition; and
- c) customer protections, including assisting customers who are facing payment difficulties.³

Our primary mechanism for achieving these objectives is to license businesses to operate in energy markets in Victoria. Licence conditions include obligations to comply with a range of codes and guidelines that define customer entitlements, and set out processes that must be followed to protect customers.

¹ Section 10AA, ESCA.

² Section 8, ESCA.

³ Section 10, EIA; section 18, GIA.

Our aim in communicating with the energy industry, and monitoring and auditing compliance, is to promote active compliance cultures in all regulated entities. Pro-active compliance cultures are expected to deliver industry-wide compliance, where licence breaches are avoided.

We expect that regulated entities with proactive compliance cultures will:

- interpret obligations in accordance with their purpose and principles;
- have a good understanding of the standard of conduct required to achieve compliance;
- actively identify non-compliance; and
- be cooperative in working with us to address non-compliance.

If breaches do occur, we expect their timely and effective resolution, at the lowest possible cost.

Our aim in using our enforcement powers is to secure compliance of individual regulated entities and across the industry as a whole. We have a range of enforcement powers from penalty notices through to enforceable undertakings and enforcement orders, licence variation, and ultimately licence revocation. Details of our enforcement options are outlined in Appendix A.

2.4 ROLE OF THE OMBUDSMAN

The Energy and Water Ombudsman (Victoria) (**EWOV**) is the primary mechanism for external resolution of energy disputes between a customer and a regulated entity.

EWOV also:

- a) refers potential wrongful disconnection payment cases to us for decision; and
- b) refers potential systemic issues to us for our consideration and possible action.

EWOV is an independent organisation and does not exercise any of our functions or powers.

We work closely with EWOV to ensure a common understanding of the obligations owed by licensees to customers, and the standards of conduct required by codes and guidelines.

3 OUR APPROACH

In achieving our compliance aims we have a range of regulatory options. These include clarifying standards of conduct through communication with the energy industry, issuing and updating guidance, as well as promoting compliance and taking enforcement action.

3.1 OUR GUIDING PRINCIPLES

Our approach to compliance and enforcement will be guided by the following principles:

- a) **responsiveness:** we will undertake our work in a timely manner, ensuring we limit uncertainty for affected stakeholders;
- b) **proportionality:** we will seek to ensure that our response is commensurate with the nature and extent of non-compliance identified;
- c) **consistency:** we will respond to similar situations with a consistency that provides predictability for regulated entities as to our approach;
- d) **accountability:** we will be transparent in our compliance and enforcement processes, and make public the outcomes of our compliance and enforcement actions, in accordance with our statutory reporting obligations.

3.2 PROMOTING AND SECURING COMPLIANCE

How a regulated entity meets its obligations is a matter for the individual entity.

As business practices and technology change, regulated entities may choose to share with us their plans for ensuring they remain compliant.

However, we will not provide regulated entities with individual assurances about whether particular business practices or proposed forms of conduct are or are not compliant.

Nonetheless, in the interest of promoting compliance and sharing best practice we will:

- a) meet with industry and other stakeholders to identify and clarify uncertainties about common compliance issues, through for example regular forums;
- b) publish our compliance and enforcement decisions, and statements of reasons;
- c) consider publishing *Guidance Notes*,⁵ which explain how we will apply this Policy to particular regulatory obligations, such as payment difficulty and disconnection for non-payment of a bill.

⁵ Guidance Notes will not set out additional obligations on regulated entities, and are not legally binding. They will not be definitive of all circumstances that may arise. However, where we consider that regulated entities have in good faith relied on any examples of compliant conduct set out in the Guidance Note, we will not take enforcement action.

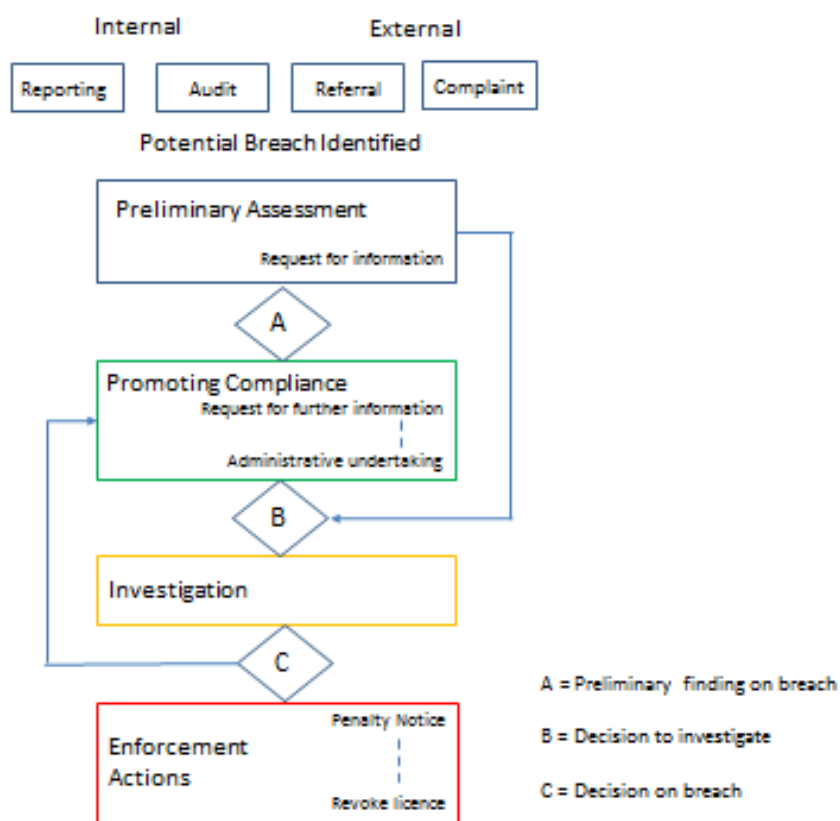
If we consider that these approaches have not provided sufficient clarity about the standard of conduct that we expect from all regulated entities, we may consider making a formal determination,⁶ that will apply to the industry as a whole.

Through licence conditions, we require licensees to have effective compliance monitoring and reporting systems in place. Those systems will be routinely audited to determine whether they are achieving early identification and reporting of non-compliance, and the timely resolution of issues.

Once a potential breach is identified, our primary approach will be to work collaboratively with a regulated entity to address it. However, in certain circumstances we may investigate, and where necessary, take enforcement action to secure compliance.

An overview of our *Compliance – Enforcement Pathway* to promote and secure compliance is illustrated below.

Figure 2: Compliance – Enforcement Pathway



Our *Compliance – Enforcement Pathway* includes four stages, and three key decision points:

- a) **Preliminary assessment** – once a potential breach is identified, we typically seek information from the regulated entity to enable us to make a *preliminary finding* on whether or not a

⁶ A formal determination would set out particular forms of conduct that are deemed to be either compliant or non-compliant with a particular obligation on regulated entities.

breach occurred, and if so what has been done to rectify, remedy and prevent further occurrence.

Following our preliminary assessment we either:

- i. close the matter on the basis that there was no breach; or
- ii. make a preliminary finding about whether there has been a breach; or
- iii. commence a formal investigation; or
- iv. refer the matter to another regulator (e.g. the Australian Competition and Consumer Commission or Consumer Affairs Victoria).

b) Promoting compliance – if we are satisfied that compliance action should be taken, we may request that a formal remediation plan is submitted to us in writing, outlining how the regulated entity proposes to rectify and remedy the non-compliance and prevent reoccurrence.

If we are satisfied that the proposed remediation plan is capable of addressing the non-compliance, we may seek an administrative undertaking from the regulated entity to deliver and report on the agreed plan.⁷ Administrative undertakings will be published on our website.

Once we are satisfied that all of the actions outlined in the remediation plan have been completed in a timely and effective manner, we will consider the compliance issue resolved.

c) Investigation – if we are unable to make a preliminary finding, or the regulated entity does not accept our finding, we may need to investigate the conduct to enable us to decide whether a breach occurred and whether enforcement action should be taken.

We may also need to carry out an investigation if we are not satisfied that the regulated entity has undertaken the agreed compliance actions, or that the actions have been ineffective.

An investigation will gather further information about the conduct and may require the use of our information gathering powers.⁸

d) Enforcement action – if we have reason to believe that a breach of licence occurred, and the particular breach is specified as a contravention in Regulations,⁹ we may issue an energy industry penalty notice.

If we have reason to believe that a regulated entity has not complied with a requirement of the Energy Retail Code relating to disconnecting a customer, and that customer was disconnected in breach of a licence condition, we may issue a wrongful disconnection penalty notice.

⁷ An administrative undertaking is a written assurance given by the licensee in relation to the actions it will take to address non-compliance.

⁸ Our powers to obtain information under the ESCA are not limited to their use in investigation.

⁹ *Essential Services Commission (Energy Industry Penalty Regime) Regulations 2016*.

If we are satisfied there was a breach of a regulatory obligation, we may consider a range of other enforcement options.

The factors that we will have regard to as a non-compliance matter progresses through the *Compliance – Enforcement Pathway*, are outlined in section 3.2.1 below. Further details about our approach to each of the four stages of the pathway are provided in sections 3.2.2 to 3.2.7.

3.2.1 Compliance and Enforcement Factors

In carrying out a preliminary assessment, and deciding how a matter should proceed through the *Compliance – Enforcement Pathway*, we assess the nature of the conduct having regard to the following *Compliance and Enforcement Factors*, to the extent that they are relevant in the particular case:

- a) the risk of harm, or actual harm, to energy customers;
- b) the impact on consumer confidence in Victorian energy markets;
- c) whether the breach was self-identified and reported in a timely manner;
- d) how and in what timeframe any customer complaints about the breach were addressed by the regulated entity;
- e) whether the regulated entity has taken timely and effective steps to investigate the root causes of the breach;
- f) whether the regulated entity has taken timely and effective steps to resolve the breach and prevent its reoccurrence;
- g) whether the regulated entity has taken timely and effective steps to inform consumers about the breach, and offer an appropriate remedy to affected customers;
- h) whether the regulated entity has put in place effective processes to review and report on the progress of remediation;
- i) whether the regulated entity has responded in full and in a timely manner to our inquiries and requests for information or progress updates;
- j) the compliance history of the regulated entity; and
- k) any other relevant matter.

How a matter progresses through each stage of the *Compliance – Enforcement Pathway* is outlined below.

3.2.2 How we identify potential breaches

We identify potential breaches through:

- a) self-reporting by regulated entities;
- b) the findings of compliance audits and the results of investigations;
- c) referrals and systemic issue reports from EWOV; and
- d) reports of potential breaches from other external stakeholders (e.g. consumer representatives, other regulatory agencies, whistle blowers, members of the public and the media).

3.2.3 How we undertake a preliminary assessment

Once we have identified a potential breach, we undertake a preliminary assessment by:

- a) gathering information to better understand the conduct that led to the potential breach;
- b) making a preliminary finding about whether the conduct was in breach of the regulated entity's obligations;
- c) applying the Compliance and Enforcement Factors to decide whether to progress the matter by promoting compliance or to consider commencing an investigation; and
- d) communicating the outcome of the preliminary assessment to the regulated entity.

3.2.4 How we take compliance action

We may require a regulated entity to provide us with further information about the compliance issue, in order to enable us to determine what compliance action is necessary.¹⁰

We may also require a regulated entity to submit a remediation plan outlining how it has or proposes to investigate, rectify and remedy the compliance issue, and prevent its reoccurrence.

Based on the information supplied by the regulated entity, and any other information available to us, compliance actions we may consider include:

- a) issuing a warning letter;
- b) requesting that affected customers are contacted, alerted to the non-compliance, and offered an appropriate remedy;
- c) public disclosure or advertisement of the non-compliance;
- d) seeking an administrative undertaking.

¹⁰ A standard condition of energy licences is to provide us with any information that we request.

We will also ensure that all customers found to be entitled to a wrongful disconnection payment receive them in a timely manner.

3.2.5 How we undertake an investigation

The purpose of an investigation is to gather the information necessary to enable us to perform our functions and exercise our powers. We may gather evidence from regulated entities, third parties that hold information related to the compliance of the regulated entity, or any person who we believe has any relevant information.

We may need to use our information gathering powers to undertake the investigation. These powers include the power to obtain information from regulated entities,¹¹ or our general powers to obtain information necessary to perform our functions or exercise our powers.¹²

During an investigation, we will make all information requests in writing, and in accordance with any relevant notice provisions.

Once an investigation is concluded we may decide, in accordance with the applicable legislation, that:

- a) we have reason to believe that a breach occurred; or
 - b) on the balance of probabilities a breach occurred;
- and that as a result;
- c) compliance action is sufficient to address the breach; or
 - d) there is a need to take enforcement action.

3.2.6 How we take enforcement action

Our decisions about which enforcement action(s) to take will be informed by the compliance outcomes we aim to secure, including:

- a) stopping the contravening conduct;
- b) addressing the impact of the contravention on customers; and
- c) ensuring future compliance by the regulated entity and regulated entities generally.

All enforcement action(s) we take are governed by the relevant legislation and legal procedure.

¹¹ Section 37A, ESCA.

¹² Section 37, ESCA.

3.2.7 Due process and procedural fairness

In exercising any power, we will comply with all legal and government policy requirements including model litigant principles.

All investigations and enforcement actions will be undertaken in accordance with the requirements of procedural fairness.

The exercise of some of our enforcement powers is also regulated by particular statutory requirements.

The application of an enforcement power in a particular situation will take account of the relevant circumstances of the case.

Privacy law applies in relation to any information collected about individuals.

4 REPORTING

We are required to publicly report on our energy compliance and enforcement actions.¹³

Public reporting provides transparency of the compliance and enforcement outcomes we seek to achieve and can:

- a) enhance trust and confidence in the integrity of the Victorian energy regulatory framework;
- b) assist regulated entities to compare their compliance levels with their industry counterparts and to identify areas for improvement; and
- c) assist energy customers to make informed decisions about their choice of regulated entities.

In accordance with our statutory reporting obligations, we will publish on our website:

- information about the outcome of each enforcement action taken against an energy licensee and the name of that licensee;
- an annual comparative performance report (with quarterly updates) for each energy retailer, regarding compliance, enforcement actions, performance and outcomes.

As outlined in section 3.2, we will also publish all administrative undertakings by regulated entities.

We will publish information on other compliance actions undertaken by a regulated entity, if we consider that it is necessary to promote protections for Victorian energy consumers.

¹³ Subdivision 3, ESCA.

APPENDIX A: OUR ENFORCEMENT OPTIONS

Energy Industry Penalty Notices (EIPNs): If we have reason to believe an energy licensee has contravened a condition of licence, of a type and in circumstances prescribed by Regulations, we may issue a penalty notice for \$20,000 for the particular contravention (or any lesser penalty amount prescribed by the Regulations).

Wrongful Disconnection Penalty Notices (WDPNs): If we have reason to believe an energy retailer has contravened an Energy Retail Code obligation that amounts to the wrongful disconnection of a customer from their energy supply, we may issue a penalty notice for \$5,000 for the particular contravention.

Civil Penalty Notices: If a determination or condition of licence has been contravened or is being contravened, we may issue a Civil Penalty Notice. The notice may direct that the contravention cease or that rectification occur within the time period specified in the notice. Failure to comply with the notice may attract a monetary penalty of up to 680 penalty units.

Enforceable Undertakings: We may accept a written undertaking from an energy licensee regarding any matter that relates to our statutory functions or powers. We may enforce compliance in court if the licensee fails to comply with the terms of its written undertaking. The court may make a range of orders, including directing that the licensee: comply, pay compensation or damages, and/or pay an amount equal to any financial benefit attributable to the breach of the undertaking.

Enforcement Orders: If a determination or condition of licence has been contravened or is likely to be contravened, we may make an enforcement order that requires compliance or rectification. We can make two types of enforcement orders: *provisional*, that apply for a short duration (7 days, unless we withdraw it earlier); or *final*, that may apply indefinitely, or for the period we specify, whether as a first step or following non-compliance with a provisional order. Failure to comply with an enforcement order is a criminal offence and may result in substantial monetary penalties that accrue for each day that the contravention continues. We may also apply to the court for an injunction and/or declaration to address non-compliance with the order.

Licence variation: If an energy licensee has contravened or is contravening a condition of licence, we may vary the licence or condition of licence without the energy licensee's consent. The manner in which the energy licensee must rectify or prevent any future contravention will be specified in the varied licence or licence condition.

Licence revocation: We may revoke an energy licence in accordance with the process set out in the licence. In respect of most energy licences we have issued, we may revoke the licence if an enforcement order has not been complied with.