



# ENERGY COMPLIANCE AND ENFORCEMENT POLICY

Draft for Consultation

APRIL 2016



**Energy Compliance and Enforcement Policy**  
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**April 2016**

**When finalised, this Energy Compliance and Enforcement Policy is intended to replace:**  
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 provide energy licensees, holders of energy licence exemptions and Victorian energy consumers with our approach to promoting and enforcing compliance with the Victorian energy industry legislation we administer: the *Electricity Industry Act 2000* and the *Gas Industry Act 2001*.

## 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.<sup>1</sup> 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.<sup>2</sup>

Our primary mechanism for achieving these objectives is to licence businesses to operate in energy markets in Victoria.

### 2.2 OUR ROLE AS ENERGY REGULATOR

Victorian energy licence holders (licensees) are authorised to engage in certain regulated activities, subject to meeting their obligations as set out in the conditions of their licence. These conditions include statutory licence conditions, and conditions that we determine in accordance with legislation.

We also issue Codes and Guidelines which set certain standards of conduct, with which energy licensees must comply as a condition of the licence.

As part of administering the Victorian energy licence framework, we promote compliance with regulatory obligations through monitoring, reporting and audit activities, and enforcement actions.

Some businesses may be exempt from having to hold an energy licence, but may be subject to obligations set out in their conditions of exemption. We also regulate compliance with the conditions of licence exemptions.

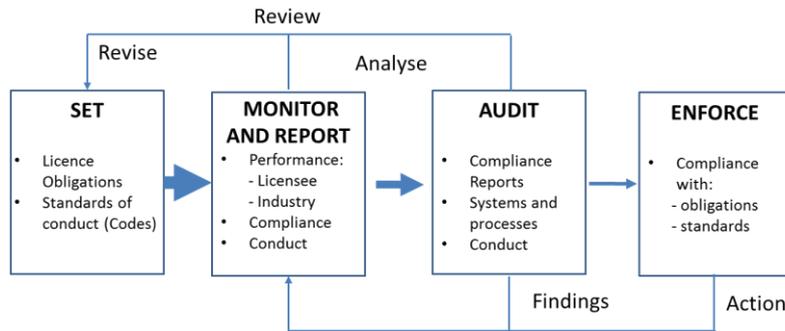
These regulatory activities and how they inter-relate are summarised in Figure 1 below.

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<sup>1</sup> Section 8, *Essential Services Commission Act 2001 (ESCA)*

<sup>2</sup> Section 10, *Electricity Industry Act 2000 (EIA)*, Section 18, *Gas Industry Act 2001 (GIA)*

Figure 1: Our Energy Regulatory Activities



## 2.3 OUR AIMS IN REGULATING COMPLIANCE

Regulated businesses have obligations to:

- (a) 'know' and 'show' that they are compliant with their regulatory obligations, including those that impose a customer protection standard;
- (b) self-monitor and report breaches of licence conditions to us (further information on our expectations regarding licensee monitoring and reporting may be set out in guidance);<sup>3</sup>
- (c) respond to and rectify breaches, including handling customer complaints, and in some cases to compensate customers.

Our aim in monitoring and auditing compliance is to promote active compliance cultures within energy businesses. In particular, we expect early identification of non-compliance and proactive cooperation and collaboration with us to address compliance issues. The outcome of this approach should be the timely and lowest possible cost resolution of non-compliance issues.

Our aim in using our enforcement powers is to secure compliance of both individual regulated businesses and the industry. 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 energy business.

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.

<sup>3</sup> A breach of a licence condition includes obligations to comply with 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 issuing or 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 extent of non-compliance identified;
- (c) **consistency:** we will respond to similar situations with a consistency that provides predictability for regulated businesses as to our approach;
- (d) **accountability:** we will be transparent by making public the outcomes of our compliance and enforcement actions in accordance with our statutory reporting obligations;

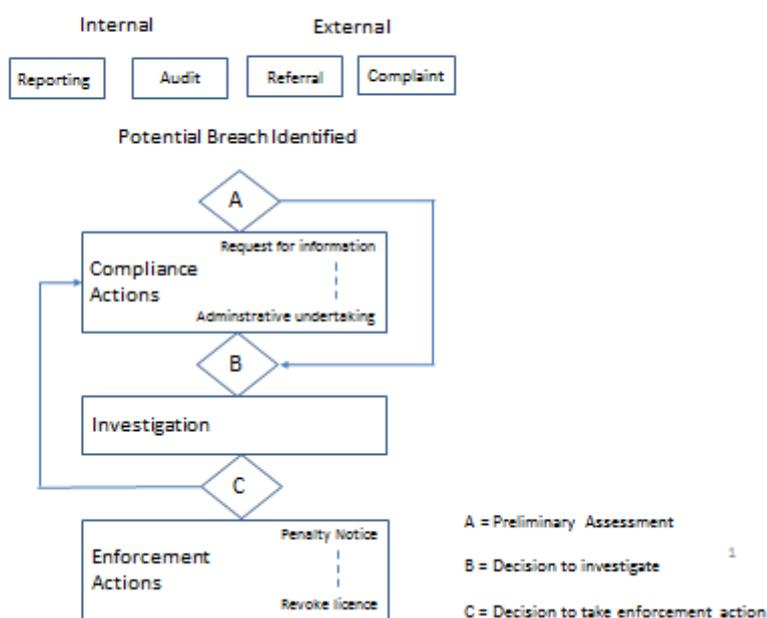
#### 3.2 PROMOTING AND SECURING COMPLIANCE

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 business to address it. However, in certain circumstances we may investigate, and where necessary, take enforcement action to secure compliance.

An overview of our approach to promoting and securing compliance is illustrated below.

Figure 2: Compliance – Enforcement Pathway



Our compliance – enforcement pathway includes three key decision points:

- (a) *preliminary assessment* – to determine whether to take a compliance approach, internally refer for possible investigation, or refer the matter to another regulator (e.g. the Australian Competition and Consumer Commission or Consumer Affairs Victoria);
- (b) *decision to investigate* – to determine whether to conduct an investigation to gather further information (including the possible use of our information gathering powers), with a view to taking enforcement action; and
- (c) *decision to take enforcement action* – to determine what enforcement action is required in the circumstances, and to initiate action.

### **3.2.1 How we identify potential breaches**

We will identify potential breaches through:

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

### **3.2.2 How we deal with potential breaches**

Having identified a potential breach, we will look to determine the most appropriate way to substantiate whether an actual breach has occurred, and to secure compliance. To assist in our decision-making we will:

- (a) gather information from the regulated business to better understand the nature of the breach and any steps underway to rectify and remedy the breach; and
- (b) if necessary, use our powers to obtain information to allow us to form an accurate view as to the extent, circumstances and impact of the breach.

### **3.2.3 Compliance responses to established breaches**

Depending on the particulars of the breach and our desired outcome, we may elect to address an identified breach by:

- (a) agreeing with the regulated business a course of action to bring about compliance;
- (b) issuing a warning letter;
- (c) accepting an administrative undertaking;<sup>4</sup>
- (d) using our powers to clarify the standard of compliance required;
- (e) deciding a wrongful disconnection payment on a matter that has been referred to us from EWOV.

### **3.2.4 Investigation and consideration of further action**

In deciding whether to investigate a particular breach, and whether enforcement action is required to secure individual business and industry compliance, we will assess the nature of the conduct having regard to:

- (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 any customer complaints about the breach were addressed by the regulated business;
- (e) whether the regulated business has taken steps to investigate the root causes of the breach;
- (f) whether the regulated business has taken adequate steps to resolve the breach and prevent its reoccurrence in a timely manner;
- (g) whether the regulated business has taken steps to inform consumers about the breach, and offer an appropriate remedy to affected customers;
- (h) whether the regulated business has put in place effective processes to review and report on the progress of remediation;
- (i) whether the regulated business has responded in full to our inquiries and requests for information or progress updates;
- (j) the compliance history of the regulated business; and
- (k) any other relevant matter.

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<sup>4</sup> An administrative undertaking is a written assurance given by the licensee in relation to the actions it will take to address non-compliance.

### **3.2.5 Enforcement options**

Our decisions about which enforcement option(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 business and regulated businesses generally.

### **3.2.6 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 process for using a particular 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.<sup>5</sup>

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

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

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

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

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<sup>5</sup> 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.