

Undertaking to the Essential Services Commission given for the purposes of section 54ZD of the *Essential Services Commission Act 2001* (Vic)

by

Red Energy Pty. Limited (ACN 107 479 372)

The commission's concerns

1. The commission considers that Red Energy did not comply with clause 16(4) of the Energy Retail Code¹ on several occasions. Specifically, the commission considers that Red Energy failed to disclose all matters relevant to the contract (most notably the rates), and therefore failed to obtain explicit informed consent (EIC) in respect of 2,986 electricity and 2,886 gas small customers² entering into a market retail contract for a new connection (new connections customers), between 24 August 2018 and 13 December 2019 (alleged conduct).
2. The commission is concerned about the potential for further non-compliance with clause 26(4) of the Energy Retail Code of Practice arising from process, training or other deficiencies that may have contributed to the alleged conduct.

Admissions and resolution

3. In order to resolve the commission's concerns, Red Energy:
 - a. has taken steps to remediate the situation of new connections customers affected by the alleged conduct, including:
 - contacting or attempting to contact affected new connections customers by phone and in writing to advise them of Red Energy's previous error;
 - for affected new connections customers where Red's contact attempts were successful, disclosing all matters relevant to entering a contract with Red Energy and obtaining the customer's explicit informed consent;
 - offering affected new connections customers the option to terminate the market retail contract;
 - placing affected new connections customers who were non-responsive to Red Energy's contact attempts onto standard retail contracts with the relevant Victorian default officer (for electricity) or standing offer (for gas) rates.
 - b. admits that the alleged conduct outlined in paragraph 1 above may have contravened clause 16(4) of the Energy Retail Code; and

¹ When the Energy Retail Code of Practice was remade with effect from 1 March 2022, this obligation was renumbered, clause 26(4).

² As defined in the Energy Retail Code of Practice (version 1).

- c. offers this Enforceable Undertaking to the commission.

Commencement of this Undertaking

4. This undertaking comes into effect when:
 - a. The Undertaking is executed by Red Energy; and
 - b. The Undertaking so executed is accepted by the commission
(the Commencement Date).
5. From the Commencement Date and for a period of 18 months (the Term), Red Energy undertakes to assume the obligations set out in paragraphs 5 to 9 for the purposes of Section 54ZD of the Essential Services Commission Act 2001.³
6. Red must notify the commission in writing within 5 Business Days of any failure to comply with this Undertaking.

Compliance Improvement Action Plan

7. Red Energy undertakes that it will implement a Compliance Improvement Action Plan (containing the actions set out in Annexure A).

Publication of Undertaking

8. Red Energy acknowledges that:
 - a. the commission may, after notifying Red Energy of its acceptance of this Undertaking make this Undertaking publicly available by publishing it on its website;
 - b. the commission may, from time to time, make public reference to this Undertaking including in news media statements and in commission publications; and
 - c. this Undertaking in no way limits the rights and remedies available to any other person arising from the alleged conduct.

Costs

9. Red Energy must pay all of its own costs in relation to this Undertaking (including but not limited to development and implementation of the Compliance Improvement Action Plan).

³ The Essential Services Commission Act 2001, as it was in force immediately before 1 December 2021, continues to apply in relation to any contravention prior to that date.

Signed for Red Energy Pty. Limited ACN 107 479 372 by its authorised representative:

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Signature of authorised representative

Iain Graham

Name

Chief Executive Officer

Position

ACCEPTED BY THE ESSENTIAL SERVICES COMMISSION PURSUANT TO SECTION 54ZD OF THE *ESSENTIAL SERVICES COMMISSION ACT 2001 (VIC)*.



Chairperson: Kate Symons

This11th..... day ofAugust..... 2022

ANNEXURE A – Compliance Improvement Action Plan

Training

1. Red Energy must arrange the following:
 - a. the provision of information about explicit informed consent requirements of the Energy Retail Code as part of the induction of employees whose duties relate to the obtaining of explicit informed consent pursuant to clause 26(4) of the Energy Retail Code of Practice in relation to new connections customers, or who have responsibility for managing staff with such duties; and
 - b. regular (at least annual) training about the explicit informed consent requirements of the Energy Retail Code for employees whose duties relate to the obtaining of explicit informed consent pursuant to clause 26(4) of the Energy Retail Code of Practice for new connections customers, or who have responsibility for managing staff with such duties.
2. The training referred to in clause 1(b) must be reviewed and approved annually by either a legal practitioner, or independent compliance professional, with expertise in Victoria's energy laws, which may be delivered via an electronic learning module.
3. In addition to its obligation to maintain records of training as required under clause 54(1)(b) of the Energy Retail Code of Practice, Red Energy will maintain a record of the training provided for at clause 1(b) of: participants, the content of the training, the dates the training was completed and the names and contact details of the relevant legal practitioner or compliance professional who developed and/or reviewed the training.

Quality assurance and compliance monitoring

4. Red Energy must conduct fortnightly quality assurance compliance checks of the obtaining of explicit informed consent in relation to new connections customers over the fortnight since the previous review (or, in the instance of the first review, the fortnight immediately preceding the date of the review) (review period).
5. For the purposes of clause 4, the quality assurance and explicit informed compliance check will be based on a sample:
 - a. comprising at least 6% of the total EIC related sales within the review period;
 - b. comprising a mix of sales via different channels (e.g. calls, emails) that is proportionate to the number of total sales conducted via those channels.

Reports to Board/Senior Management

6. Red Energy must provide a report to the Executives of Snowy Hydro Limited every three months addressing implementation of, and compliance with, the Compliance Improvement Action Plan.

Independent review of compliance with Compliance Improvement Action Plan

7. Within one month of the Commencement Date, Red Energy must propose an independent person, being an independent compliance professional or legal practitioner (Independent Reviewer), for the commission's approval, to complete a review of Red Energy's implementation of the Compliance Improvement Action Plan (Implementation Review). If the commission does not approve the nominated Independent Reviewer, then Red Energy must liaise with the commission to identify a candidate acceptable to the commission within five business days of such non-approval.
8. Within ten business days of receiving notice of the commission's approval of the Independent Reviewer, Red Energy will engage the Independent Reviewer to complete the Implementation Review and prepare a report that identifies:
 - a. whether Red Energy has implemented the Compliance Improvement Action Plan, and the adequacy of that implementation;
 - b. whether the controls and processes implemented by Red Energy have resulted in Red Energy achieving compliance with clause 26(4) of the Energy Retail Code of Practice;
 - c. recommends any further actions, included but not limited to training or quality assurance, to address continued non-compliance with clause 26(4) of the Energy Retail Code of Practice.
9. When assessing compliance for the purpose of clause 8(b), the Independent Reviewer will review a sample of sales that:
 - a. comprises at least 6% of the total EIC related sales involving new connections customers since the Commencement Date;
 - b. consists of a mix of sales via different channels (e.g., calls, emails) that is proportionate to the number of total sales conducted via those channels.
10. Red Energy must use best endeavours to ensure the Independent Reviewer:
 - a. completes the Implementation Review within 60 business days of the engagement, by provision of the report referred to in paragraph 10 above to Red Energy; and
 - b. has full, free and unrestricted access to all, staff, records, documentation and information necessary to conduct the Post Implementation Review.
11. Within two business days of receipt of the Independent Reviewer's report, Red Energy must provide a copy of the report to the commission.
12. Within 20 business days of receipt of the Independent Reviewer's report, Red Energy must provide the commission its response to any recommendations of the Independent Reviewer, including timings for implementation as relevant. This response must be from Red Energy's Chief Executive Officer unless that person is on leave at the required time, in which case it will be from his/her delegate. If Red Energy does not implement any of the Independent Reviewer's recommendations, it will provide the commission with an explanation of its position.

13. Within three months prior to the expiration of the undertaking, Red Energy must provide the commission with a report that outlines:
 - a. its progress in implementing the Independent Reviewer's recommendations (if applicable).and
 - b. its compliance with the Undertaking.

Provision of Compliance Improvement Action Plan documents to the commission

14. Red Energy must maintain a record of and store all documents relating to the implementation of the Compliance Improvement Action Plan for a period not less than 5 years following the Commencement Date.
15. If requested by the commission during the period of 5 years following the Commencement Date, Red Energy must cause to be produced, and provided to the commission, copies of any relevant documents relating to the Compliance Improvement Action Plan.