



# ENERGY COMPLIANCE AND ENFORCEMENT POLICY

Final Decision

July 2016

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# 1 INTRODUCTION

## 1.1 PURPOSE OF THIS FINAL DECISION

The purpose of this final decision is to set out for regulated energy businesses (**regulated entities**) and other stakeholders our final decision to our *Energy Compliance and Enforcement Policy (Policy)*. This final decision outlines our responses to the key issues raised by stakeholders in submissions to our draft decision and draft Policy released in April 2016.

The final Policy accompanies this paper, and will apply from the date of its publication on our website. The Policy replaces the *Interim Approach to Energy Compliance and Enforcement (December 2015) (Interim Approach)* that modified our *Compliance Policy Statement for Victorian Energy Businesses (January 2012) (Compliance Policy Statement)*.

The 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 BACKGROUND

On 1 January 2016, the *Energy Legislation Amendment (Consumer Protection) Act 2015* amended our enabling legislation, the ESCA, and the Victorian energy industry legislation we administer – the *Electricity Industry Act 2000 and Gas Industry Act 2001*.

The amendments assist us to promote the outcomes that customers are entitled to expect in light of the overall regulatory framework.

The amendments established a new objective for the Commission to promote protections for customers, including in relation to assisting customers who are facing payment difficulties.<sup>1</sup>

The amendments also provided us with a new compliance monitoring and reporting function.

Our enforcement powers were also amended to enable the Commission to:

- (a) issue a Wrongful Disconnection Penalty Notice of \$5,000;
- (b) issue an Energy Industry Penalty Notice of up to \$20,000 for particular breaches of licence conditions as specified by regulation;
- (c) accept a written undertaking that is enforceable in court; and
- (d) vary an energy licence or condition of licence in the case of non-compliance.

The maximum penalty amount we may impose using our existing Civil Penalty Notice power also increased.

To facilitate the smooth implementation of the legislative reforms, and to provide industry with certainty as to when we may use our new and updated enforcement powers, we released an Interim Approach that modified our current Compliance Policy Statement by replacing Chapter 4.

The Interim Approach commenced on 1 January 2016. At the time of publication, we indicated that the Compliance Policy Statement, as modified by the Interim Approach, would apply until they are replaced by the final Policy.

On 1 June 2016, the Essential Services Commission (Energy Industry Penalty Regime) Regulations 2016 (**Regulations**) commenced. The Regulations prescribe the particular breaches of licence conditions for which we may issue an Energy Industry Penalty Notice and when a penalty amount below \$20,000 applies.

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<sup>1</sup> Electricity Industry Act 2000, section 10; Gas Industry Act 2001, section 18.

## **1.3 OUR CONSULTATION**

On 27 April 2016, we commenced a consultation on the draft Policy and invited written submissions from stakeholders by 25 May 2016.

As part of the consultation, we held a stakeholder workshop on 20 May 2016 with representatives from energy retailers, energy distributors, consumer organisations and the Energy and Water Ombudsman, Victoria (**EWOV**), so stakeholders could informally discuss and provide initial comment on the draft Policy.

We received 10 written submissions in response to our consultation – from AGL, Australian Gas Networks, CitiPower/Powercor, Consumer Action Law Centre (Consumer Action), EnergyAustralia, Jemena, Momentum Energy, Powershop, Simply Energy and Red Energy/Lumo Energy.



## 2 SUMMARY OF KEY CHANGES IN THE FINAL POLICY

### 2.1 KEY CHANGES

The final Policy makes a number of key changes to the draft Policy in response to the issues raised by submissions from stakeholders.

We have provided greater clarity in section 3.2 about how a matter will progress through the *Compliance – Enforcement Pathway*, including how and when we will decide whether a breach has occurred. In particular, we have inserted a new preliminary assessment stage to the *Compliance – Enforcement Pathway*.

We have also provided further information in the final Policy to better explain how we will promote and secure compliance along the *Compliance – Enforcement Pathway*.

The changes include clarifying:

- (a) that the factors in section 3.2.1 (previously section 3.2.4 of the draft Policy) (**Compliance and Enforcement Factors**) will apply to all stages of the *Compliance – Enforcement Pathway*;
- (b) that we will communicate the outcome of a preliminary assessment to the regulated entity;
- (c) that a matter can be concluded at each stage of the *Compliance – Enforcement Pathway*;
- (d) the standard of proof that will apply to our decisions regarding enforcement actions.

The final Policy also specifies four key ways in which we will provide information to stakeholders about how we will promote compliance and share best practice.

These four ways are by:

- (a) meeting with industry and other stakeholders to identify and clarify uncertainties about common compliance issues, such as through regular forums;
- (b) publishing our compliance and enforcement decisions, and statements of reasons;
- (c) publishing Guidance Notes; and
- (d) making formal determinations in accordance with our general determination-making power.

We have updated some of the Compliance and Enforcement Factors in section 3.2.1 of the final Policy to clarify that we will have regard to the timeliness of the response by a regulated entity.

# 3 KEY ISSUES RAISED IN SUBMISSIONS TO THE DRAFT POLICY

## 3.1 RESPONSE TO OUR DRAFT POLICY

Written submissions generally expressed support for our draft Policy or the development of the Policy.

For example, feedback from industry included:

*Simply Energy agrees with the establishment of the Policy to provide energy retailers with clear principles and guidance on the ESC's approach to its regulatory activities.<sup>2</sup>*

*Jemena supports the draft Policy. It is a principles based approach to compliance and enforcement. In particular, we support an approach of addressing compliance issues that is timely and results in lowest administrative cost resolution.<sup>3</sup>*

*AGL supports the development of the C&E Policy, which seeks to inform energy licensees, holders of energy licence exemptions and Victorian consumers about the ESC's approach to promoting and enforcing compliance with the Victorian energy industry legislation administered by the ESC.<sup>4</sup>*

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<sup>2</sup> Simply Energy 2016, *Submission to the Essential Services Commission consultation on its draft Energy Compliance and Enforcement Policy*, June, p1.

<sup>3</sup> Jemena 2016, *Submission to the Essential Services Commission consultation on its draft Energy Compliance and Enforcement Policy*, June, p1.

<sup>4</sup> AGL 2016, *Submission to the Essential Services Commission consultation on its draft Energy Compliance and Enforcement Policy*, June, p1.

Consumer Action commented that:

*We support the Commission's efforts to ensure that it integrates the revised objective "to promote protections for customers, including in relation to assisting customers who are facing payment difficulties" into its compliance and enforcement approach.<sup>5</sup>*

Feedback from submissions raised five key issues for our consideration and response:

1. Consumer impact;
2. Determining breach and standard of proof;
3. Progress of matters;
4. Request for detail; and
5. Reference to EWOV.

We address each of these issues below.

## 3.2 CONSUMER IMPACT

### ***Stakeholder feedback:***

Submissions generally supported the overarching guiding principles of *responsiveness, proportionality, consistency and accountability*, as representing appropriate guidance for how the Commission will make decisions regarding compliance and enforcement in accordance with its Policy.

EnergyAustralia noted that:

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<sup>5</sup> Consumer Action 2016, *Submission to the Essential Services Commission consultation on its draft Energy Compliance and Enforcement Policy*, June, p1.

*The principles that the Commission has used to guide the development of the draft policy are appropriate. In particular, the principles of responsiveness, proportionality and consistency are essential to provide regulated entities and customers with confidence that... enforcement is applied fairly for the long term benefit of customers.<sup>6</sup>*

A view was expressed by Consumer Action that the Commission should adopt an additional guiding principle, that of *consumer impact*:

*This is recommended so as to aid the Commission's approach to assessment of consumer detriment, so that it considers the level and nature of impact on consumers or a group of consumers as well as the level of detriment overall.<sup>7</sup>*

Further, Consumer Action expressed the view that adopting this proposed guiding principle would ensure that the impact on consumers underpins the Commission's entire approach to compliance and enforcement in the final Policy, rather than only applying at later decision-making points, for example when commencing an investigation or taking enforcement action.

In contrast, several energy retailers expressed the view that it is unnecessary to adopt an additional guiding principle for *consumer impact* because the principle of *proportionality* could apply:

*Red and Lumo believe that the proportionality principle adequately accounts for impacts on consumers.<sup>8</sup>*

AGL noted that:

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<sup>6</sup> EnergyAustralia 2016, *Submission to the Essential Services Commission consultation on its draft Energy Compliance and Enforcement Policy*, June, p1.

<sup>7</sup> Consumer Action 2016, *Submission to the Essential Services Commission consultation on its draft Energy Compliance and Enforcement Policy*, June, p1.

<sup>8</sup> Red Energy and Lumo Energy 2016, *Joint submission to the Essential Services Commission consultation on its draft Energy Compliance and Enforcement Policy*, June, p1.

*when... considering the proportionality of their response to a non-compliance, [the Commission]... should ensure their response is commensurate to the level of consumer detriment, with the focus being on customer impact.<sup>9</sup>*

***Our response:***

The overarching principles are intended to guide how we may use our powers as part of our approach to compliance and enforcement. Our compliance and enforcement activities aim to promote the outcomes that customers are entitled to expect in light of the overall regulatory framework.

The guiding principles and the entire Policy apply in the context of the regulatory framework within which we operate. This regulatory framework includes our statutory objectives.

One of our objectives in promoting and enforcing compliance is to promote customer protections, including assisting customers who are facing payment difficulty.<sup>10</sup>

We must also have regard to consumer impact in terms of the benefits and costs of regulation on consumers and users of products or services (including low income and vulnerable consumers).<sup>11</sup>

As outlined in section 3.2.1 of the Policy, the Compliance and Enforcement Factors we will consider when deciding how a matter proceeds through the *Compliance – Enforcement Pathway* include having regard to consumer impact.

We therefore consider it unnecessary to adopt a new guiding principle for consumer impact in the Policy, as the statutory obligations applicable to our decision-making and the factors outlined in the Policy cover the ground.

The final Policy includes commentary under ‘Our Objectives’ in section 2.1 that highlights the obligations on regulated entities to comply with codes and guidelines,

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<sup>9</sup> AGL 2016, *Submission to the Essential Services Commission consultation on its draft Energy Compliance and Enforcement Policy*, June, p3.

<sup>10</sup> Electricity Industry Act 2000, section 10(c); Gas Industry Act 2001, section 18(c).

<sup>11</sup> Essential Services Commission Act 2001, section 8A(1)(e).

including those that set out the standards of conduct required when interacting with energy customers.

We note that in response to the guiding principles, several submissions suggested some additional principles, such as for *fairness*, *risk-based assessment*, and *preventing breaches*, as well as some minor adjustments to broaden the scope of the principles set out in the draft Policy.

In relation to new principles for *fairness* and *risk-based assessment*, we have decided not to make further adjustments to the Policy, as we consider that the existing principles and factors included in the Policy already cover these issues.

With regards to *preventing breaches*, while we have decided that a new principle is unnecessary, we acknowledge the role that regulated entities play in the early identification and prevention of breaches, and have updated the commentary in section 2.3 of the final Policy to reflect this.

We have also amended the explanation of the principle of *accountability* to include the transparency of our compliance and enforcement processes, as well as publishing the outcomes of our compliance and enforcement actions.

### 3.3 DETERMINING BREACH AND STANDARD OF PROOF

#### **Stakeholder feedback:**

Submissions generally supported the *Compliance – Enforcement Pathway*, as illustrated by Figure 2 in the draft Policy.

For example:

*Simply Energy supports the inclusion of Figure 2, which provides a concise view of the Compliance – Enforcement Pathway.<sup>12</sup>*

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<sup>12</sup> Simply Energy 2016, *Submission to the Essential Services Commission consultation on its draft Energy Compliance and Enforcement Policy*, June, p2.

Notwithstanding this, feedback from several industry submissions suggested the draft Policy was unclear about how the Commission may first identify a potential breach, and then move to determine whether there was an actual breach.

For example, with regards to ‘How we deal with potential breaches’ (section 3.2.2, draft Policy):

*Powershop would encourage the ESC to amend the wording in the whole section, specifically replacing ‘potential’ with ‘alleged’... In respect of section 3.2.2(a), Powershop encourages the ESC to re-word this sub-paragraph, as the current wording implies that the ESC has decided a breach has occurred without consultation with the retailer.<sup>13</sup>*

Simply Energy commented that in relation to ‘Compliance responses to established breaches’ (section 3.2.3, draft Policy):

*The ESC should change the section heading from ‘established’ to ‘identified’ for consistency with the Policy.<sup>14</sup>*

Through the consultation stakeholders also sought clarity of the standard of proof required to support our decisions.

***Our response:***

**Determining breach**

In order to respond to stakeholder feedback about how we will work constructively to establish whether a breach may have occurred, we have introduced a new stage to the *Compliance – Enforcement Pathway* – referred to as a *preliminary assessment*.

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<sup>13</sup> Powershop 2016, *Submission to the Essential Services Commission consultation on its draft Energy Compliance and Enforcement Policy*, June, pp1-2.

<sup>14</sup> Simply Energy 2016, *Submission to the Essential Services Commission consultation on its draft Energy Compliance and Enforcement Policy*, June, p2.

Four possible outcomes from a preliminary assessment are set out in the Policy. One of these is a *preliminary finding*. A preliminary finding about whether there has been a breach is not binding, and regulated entities are able to either:

- a) Accept the preliminary finding; or
- b) Seek a formal decision.

We note that two industry stakeholders suggested the Policy could better distinguish between self-reporting of breaches by regulated entities, as distinct from reports of potential breaches provided by other external stakeholders. In response, section 3.2.2 of the final Policy clarifies that external stakeholders may also ‘report’ potential breaches of regulatory obligations to us.

#### Standard of proof

We obtain the information necessary to enable us to progress through each stage of the *Compliance – Enforcement Pathway*. The standard of proof that may apply will depend on the particular nature of the legislative obligation applicable to us.

For example, to be able to issue a penalty notice, with respect to an energy industry contravention, or a contravention involving a wrongful disconnection, we must be satisfied that we have sufficient information to form a reason to believe there was a breach.

When seeking to exercise many of our other enforcement powers, we will generally need to satisfy ourselves that on the balance of probabilities a breach has occurred, and for some enforcement powers, that the breach was more than trivial.

## 3.4 PROGRESS OF MATTERS

### ***Stakeholder feedback:***

Stakeholders sought greater clarity on how a matter would progress through the *Compliance – Enforcement Pathway*, and how and when we would advise the regulated entity of the progress of a matter involving them.

With regards to how a matter progresses through the *Compliance – Enforcement Pathway*, AGL requested that the Policy should provide greater clarity regarding:

*[T]he differences between the “Preliminary Assessment” and “Investigation” stages...; and the factors considered by the ESC when deciding to progress to the “Investigation” and Enforcement Action” stages.<sup>15</sup>*

With respect to the Commission formally advising a regulated entity of the stage at which a matter is at on the *Compliance – Enforcement Pathway*, industry stakeholders commented that this was desirable to enhance transparency and remove confusion.

CitiPower and Powercor commented that:

*In line with the transparency guiding principle, the Businesses [CitiPower and Powercor] request the Commission clearly states, in all interactions and communications with the Businesses, which stage of the compliance and enforcement pathway any breach-related matter is at.<sup>16</sup>*

Momentum Energy commented that:

*In considering the enforcement pathway, Momentum believes that the ESCV should clearly communicate in writing to the licensee(s) at each stage of the process so there is no confusion about what stage the enforcement action is up to.<sup>17</sup>*

Industry stakeholders also sought clarity about where in the *Compliance – Enforcement Pathway* a matter could be resolved.

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<sup>15</sup> AGL 2016, *Submission to the Essential Services Commission consultation on its draft Energy Compliance and Enforcement Policy*, June, p3.

<sup>16</sup> CitiPower and Powercor 2016, *Joint submission to the Essential Services Commission consultation on its draft Energy Compliance and Enforcement Policy*, June, p1.

<sup>17</sup> Momentum Energy 2016, *Submission to the Essential Services Commission consultation on its draft Energy Compliance and Enforcement Policy*, June, p2.

### ***Our response:***

The Policy anticipates that the majority of matters will be dealt with cooperatively with a regulated entity, although some matters may progress to investigation and enforcement action.

We confirm that the Compliance and Enforcement Factors set out in section 3.2.4 of the draft Policy (now section 3.2.1 of the final Policy), which we will consider to inform whether a matter progresses to investigation and/or enforcement action, will also apply at the preliminary assessment stage. That is, these factors will inform whether a matter progresses from the preliminary assessment stage to promoting compliance or another stage.

The *Compliance – Enforcement Pathway*, as illustrated by Figure 2 and accompanying commentary in section 3.2, has also been updated to show that a matter can be concluded at each stage of the Pathway. We have provided more information in the final Policy about each stage of the Pathway to provide greater clarity to stakeholders.

As part of the guiding principle of *accountability*, and in order to provide clarity of process, we will inform a regulated entity in writing of how a non-compliance matter will be handled by the Commission following the preliminary assessment. This is reflected in section 3.2.3 of the final Policy.

## **3.5 REQUEST FOR DETAIL**

### ***Stakeholder feedback overall:***

Stakeholders requested more detail, either in the final Policy or in other documents, about how the Commission will apply its Policy.

Requests for more detail focused on four central themes:

- (a) clarifying the standard of compliance required;
- (b) clarifying the meaning and application of certain Compliance and Enforcement Factors;

- (c) clarifying how the Commission intends to use its statutory powers; and
- (d) clarifying due process and procedural fairness.

***Our overall response:***

The Policy intentionally focuses on outcomes, principles and processes.

It is neither practical, nor possible, for the Policy to provide comprehensive detailed guidance on all matters.

There are, however, four key ways in which we will provide more detailed information to stakeholders about how we will promote compliance and share best practice.

These are through:

1. meeting with industry and other stakeholders to identify and clarify uncertainties about common compliance issues, through for example regular forums;
2. publishing our compliance and enforcement decisions, and statements of reasons;
3. publishing Guidance Notes; and
4. making formal determinations in accordance with our general determination-making power.<sup>18</sup>

The final Policy has been updated to specify these communication and regulatory options in section 3.2.

We provide our response below in relation to stakeholder feedback on each of the four central themes referred to above.

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<sup>18</sup> Essential Services Commission Act 2001, sections 34 and 35.

### **3.5.1 CLARIFYING THE STANDARD OF COMPLIANCE REQUIRED**

#### ***Stakeholder feedback:***

Stakeholders sought clarification as to how the Commission would approach taking compliance and enforcement action in circumstances where the standard of compliance required is unclear or not agreed.

AGL sought clarification as to how the Commission would use its powers to clarify the standard of compliance required of regulated entities so they remain compliant with their conditions of licence:

*For example, does th[e ESC's] response include providing guidance/clarification to a retailer on the standard of compliance required under the regulations? Also, what powers will the ESC be relying on to exercise this response?<sup>19</sup>*

Further, AGL expressed the view that we should take a balanced approach to securing compliance when technical breaches are involved:

*AGL considers that there is a balance to be struck in the C&E Policy that would allow regulated businesses to push the regulatory boundaries where their actions will cause no detriment or actually improve customer outcomes, but may be at the expense of a ‘technical’ compliance breach. This is particularly important in the current environment of rapidly changing technology and consumer expectations.<sup>20</sup>*

Simply Energy requested that we provide more detailed guidance in the Policy on:

*[T]he difference between incurring a breach through an interpretation of an obligation and/or Law that is considered to*

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<sup>19</sup> AGL 2016, *Submission to the Essential Services Commission consultation on its draft Energy Compliance and Enforcement Policy*, June, p4.

<sup>20</sup> As above, p1.

*be incorrect, and a deliberate act of non-compliance such as non-reporting or intent to deceive.<sup>21</sup>*

***Our response:***

The introduction of the preliminary assessment and the capacity to make a preliminary finding into the *Compliance – Enforcement Pathway* (as outlined in section 3.3 above), provides a key mechanism by which we can communicate our assessment of whether we consider that a particular form of conduct is, or is not, compliant. A regulated entity is then able to consider whether to accept the finding or seek a formal decision from the Commission.

We acknowledge in section 3.2 of the final Policy that as business practices and technology change, regulated entities may choose to share with us their plans for ensuring they remain compliant.

As outlined above, section 3.2 of the final Policy has been updated to refer to the ways in which we may clarify the standard of compliance required. We expect that together these approaches will enhance understanding of the interpretation of certain conditions of licence.

We note that although intention is irrelevant to whether a condition of licence imposing a customer protection standard is breached, it could be a matter the Commission has regard to under section 3.2.1(k) of the final Policy when determining whether to proceed to enforcement action.

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<sup>21</sup> Simply Energy 2016, *Submission to the Essential Services Commission consultation on its draft Energy Compliance and Enforcement Policy*, June, p2.

### **3.5.2 CLARIFYING THE MEANING AND APPLICATION OF CERTAIN COMPLIANCE AND ENFORCEMENT FACTORS**

#### ***Stakeholder feedback:***

More detail was requested by industry stakeholders regarding how we might apply certain Compliance and Enforcement Factors (section 3.2.4 factors of the draft Policy or section 3.2.1 factors of the final Policy) to a given matter.

For example, with respect to:

- factor (a) *the risk of harm, or actual harm, to energy customers*, AGL sought clarification as to how we would balance this consideration and what degree of weighting would apply if there was no customer detriment.
- factor (b) *the impact on consumer confidence in Victorian energy markets*, Simply Energy requested that this factor be removed. Although if retained, both Simply Energy and AGL sought greater clarification as to how consumer confidence would be measured, or the methodology we would apply.
- factor (g) *whether the regulated entity has taken steps to inform consumers about the breach, and offer an appropriate remedy to affected customers*, AGL sought clarification as to how we will determine whether a remedy is appropriate.
- factor (j) *the compliance history of the regulated entity*, AGL sought clarification as to how far back we will look, and recommended that it should be limited to two years.
- factor (k) *any other relevant matter*, which Powershop submitted should be removed, or if this factor remained, sought examples to illustrate the types of considerations this would cover.

#### ***Our response:***

The efficient supply of energy is one of the most important ways in which the long term interests of Victorian consumers are served. Efficient supply of energy will be achieved through effective competition in the energy market. We consider that consumer confidence is essential for effective competition. We have therefore decided to retain

'the impact on consumer confidence in Victorian energy markets' as a Compliance and Enforcement Factor.

We have also decided to retain 'any other relevant matter' as a Compliance and Enforcement Factor. We are satisfied that our capacity to consider the matter in our decision-making is sufficiently qualified by the requirement that a matter is 'relevant'. What is relevant will be particular to the compliance matter.

The way in which we balance and weigh certain Compliance and Enforcement Factors, or measure their extent (for example, in relation to factors (a), (b), (g) and (j)), will also depend on the circumstances.

We expect that how we will apply the Compliance and Enforcement Factors will become clearer as we interact with regulated entities regarding particular matters, and as we make compliance and enforcement decisions.

We have updated some of the Compliance and Enforcement Factors to clarify that we will have regard to the timeliness of the response by a regulated entity.

We note the feedback received from one energy retailer that appeared to fundamentally disagree with the underlying policy settings for the Compliance and Enforcement Factors. This energy retailer recommended that we should only investigate and/or take enforcement action when the regulated entity has acted negligently or deliberately breached the regulatory framework.

We note that almost all of the regulatory obligations with which regulated entities must comply make no reference to any duty of care or intent. Notwithstanding this, there may be certain circumstances when negligence or a deliberate breach may be a relevant other matter, which the Commission may have regard to under section 3.2.1(k) of the final Policy when determining whether to proceed to enforcement action.

### **3.5.3 CLARIFYING HOW THE COMMISSION INTENDS TO USE ITS STATUTORY POWERS**

#### ***Stakeholder feedback:***

Industry stakeholders requested that the Policy include more detail regarding how we will use our information gathering powers, and how we will apply our enforcement powers summarised in Appendix A.

For example, AGL requested that the final Policy include further detail on:

*[T]he circumstances in which the ESC is able to use the information it has obtained under its information gathering powers, including confidential information; and the parameters of the ESC's powers to request information from regulated businesses under the Electricity Industry Act 2000 and the Gas Industry Act 2001.<sup>22</sup>*

Red Energy and Lumo Energy commented that:

*[We]... request some clarification in the Final Decision as to how the Commission expects to apply the enforcement options discussed in Appendix A of the Policy.<sup>23</sup>*

#### ***Our response:***

Following the conclusion of a matter where such powers have been used, we will communicate the outcome and reasons for our decisions at industry and stakeholder forums. These forums also provide opportunities to identify additional matters that industry believes may require clarification.

In response, we may publish Guidance Notes to explain how we will apply the Policy to particular regulatory obligations, such as payment difficulty and disconnection for non-payment of a bill. We may also consider making

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<sup>22</sup> AGL 2016, *Submission to the Essential Services Commission consultation on its draft Energy Compliance and Enforcement Policy*, June, p3.

<sup>23</sup> Red Energy and Lumo Energy 2016, *Joint submission to the Essential Services Commission consultation on its draft Energy Compliance and Enforcement Policy*, June, p2.

an industry-wide determination that would set out particular forms of conduct that are deemed to be either compliant or non-compliant with a regulatory obligation.

### 3.5.4 CLARIFYING DUE PROCESS AND PROCEDURAL FAIRNESS

#### **Stakeholder feedback:**

Stakeholders requested greater clarification regarding how we would provide due process and procedural fairness to support the implementation of the Policy.

AGL commented that section 3.2.6 of the draft Policy should be updated to include detail regarding:

*[T]he particular statutory requirements which regulate the ESC's exercise of some of its enforcement powers; and how the process for using a particular enforcement power in a particular situation will take account of the relevant circumstances of the case.<sup>24</sup>*

Simply Energy submitted that:

*The ESC needs to define more effectively and explain the context of the term "model litigant principles" in relation to energy regulation.<sup>25</sup>*

Other industry stakeholders requested that the Policy should emphasise our commitment to proactively engaging with stakeholders (collectively and/or individually) before taking any compliance or enforcement action.

With regards to how we could improve our processes for receiving reports of potential breaches from consumer groups, Consumer Action commented that:

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<sup>24</sup> AGL 2016, *Submission to the Essential Services Commission consultation on its draft Energy Compliance and Enforcement Policy*, June, p5.

<sup>25</sup> Simply Energy 2016, *Submission to the Essential Services Commission consultation on its draft Energy Compliance and Enforcement Policy*, June, p3.

*We consider that a referral pathway for breaches to be an effective means of the Commission understanding market activity and potential breaches. Consumer Action has established referral pathways with [other Commonwealth consumer protection regulators]..., whereby complaints are logged and referred on a regular basis, with clear feedback loops as to how those complaints have been assessed by the regulator.<sup>26</sup>*

**Our response:**

We do not consider these matters need to be addressed within the Policy. We propose to discuss them at future stakeholder forums. We will also continue to review whether any additional guidance is required.

## 3.6 REFERENCE TO EWOV

**Stakeholder feedback:**

Stakeholders generally did not comment on, or request any changes to, the section of the draft Policy regarding the ‘Role of the Ombudsman’.

However, Simply Energy expressed the view that the commentary on the role of EWOV should be removed entirely because the intent of the Policy is compliance and enforcement, and EWOV is not a body that can perform compliance and enforcement duties:

*EWOV is a complaints mechanism body holding no powers to enforce any regulation or obligations upon a retailer.<sup>27</sup>*

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<sup>26</sup> Consumer Action 2016, *Submission to the Essential Services Commission consultation on its draft Energy Compliance and Enforcement Policy*, June, p2.

<sup>27</sup> Simply Energy 2016, *Submission to the Essential Services Commission consultation on its draft Energy Compliance and Enforcement Policy*, June, pp1-2.

Alternatively, Simply Energy expressed the view that if we did not remove the commentary on EWOV from our Policy, we should update the Policy to make clearer that we will work with all relevant stakeholders, including retailers and distributors, to resolve non-compliance.

***Our response:***

Reference to EWOV in the Policy seeks to confirm the unique role the Ombudsman performs in the Victorian energy regulatory framework, in terms of resolving energy disputes between customers and regulated entities.

We receive formal reports of potential ‘systemic issues’ from EWOV in accordance with recently introduced statutory reporting obligations, and referrals regarding potential wrongful disconnection cases for Commission decision.

We cannot, and do not, duplicate the role of the Ombudsman as the primary dispute resolution mechanism for energy customers. It is important that the respective roles of the Ombudsman and the Commission are clear.

Under the energy industry legislation, the Commission approves a customer dispute resolution scheme.<sup>28</sup> EWOV is currently the only customer dispute resolution scheme approved by the Commission.

We recognise that some issues may be resolved between a regulated entity and the customer without the need for the involvement of EWOV or the Commission.

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

We have decided to retain the reference to EWOV in the final Policy, but make clearer in section 3.2 that we may liaise with industry and other stakeholders to achieve compliance.

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<sup>28</sup> Electricity Industry Act 2000, section 28; Gas Industry Act 2001, section 36.

## 4 FINAL DECISION

Under section 13 of the ESCA, the Commission has decided to make the final Policy which accompanies this paper, with effect from the date of its publication on our website.

The Policy replaces the Interim Approach that modified our Compliance Policy Statement.

We will review the Policy from time to time, as required.