

## Energy retail licence review – commission response to licensee feedback

On 31 January 2022 we wrote to all energy retail licensees with a proposal to vary their licences. We requested feedback by 15 March 2022. We appreciate the engagement by many retailers in this process. This document summarises the feedback received and how that feedback has been responded to in the revised variation proposal.<sup>1</sup>

No	Relevant clause (adopting revised numbering unless otherwise specified)	Feedback	Commission response to feedback
1	<b>Additional technical capacity requirement:</b> Requirement for licensee to have such additional	Red and Lumo submitted that this clause is redundant and should be removed. Retailers will trial and adopt technologies that they believe will maximise their ability to	In the revised SELC and SGLC this clause has been removed. It is noted that there is a licence condition requiring a licensee to maintain such technical capacity

<sup>1</sup> **Key:**

SELC – Proposed Standard Electricity Licence Conditions

SGLC – Proposed Standard Gas Licence Conditions

technical capacity as is reasonably required to enable it to meet and utilise technological advances in the electricity industry.

Clause 3.1(ii) of proposed Standard Electricity Licence Conditions (SELC)); clause 3.1(ii) of proposed Standard Gas Licence Conditions (SGLC))

offer a compelling combination of price and service standards in a competitive market. Red and Lumo were concerned with the scope of this clause.

as is required to undertake the activities authorised by this licence.

2 **Training requirement:** Requirement for licensee to ensure that all relevant staff are provided with appropriate training in all Victorian specific obligations including the conditions of its licence and the Energy Retail Code of Practice (if applicable to the activities authorised by this licence)

AGL and Alinta raised concerns with this condition, considering it was unnecessary. Alinta states: *“It is cognisant on retailers to ensure relevant staff are appropriately trained in their obligations, and requirements for operating across the markets in which they are active. As a result, Alinta Energy believe this new clause is an unnecessary inclusion and suggest it can be removed.”*

AGL states: *“It is implicit to operation of an energy retailer that its staff are appropriately trained in processes, obligations, and requirements of the markets in which the*

This condition has been standard in licences since 2014.

The Victorian energy retail framework has differences to other energy markets. The commission considers it necessary that retailers provide staff with training in relation to these Victorian specific obligations, including the Energy Retail Code of Practice.

However, in response to the feedback this licence condition will be removed. Consideration may be given, at an appropriate time, to the need for additional

(Clause 3.3 of previous version of SELC dated 31 January 2022; clause 3.3 of previous version of SGLC dated 31 January 2022)

*retailer operates, including obligations under the Energy Retail Code of Practice, Electricity Industry and Gas Industry Acts.”*

obligations in the Energy Retail Code of Practice to ensure there are appropriate safeguards in place to ensure services are being delivered by staff with an appropriate awareness of the specific aspects of the Victorian regulatory framework. There are existing training obligations in the Energy Retail Code of Practice pertaining to marketing (clause 53) and family violence (clause 149).

3 **Information to customers that are not small customers:**

Requirement for licensee to include in a bill issued to a customer that is not a small customer “any information required by the Act, the ESC Act or any Code of Practice or guideline issued by the commission”.

Shell requests that paragraph (iv) be amended to read (proposed additional text underlined):

*“any information required by the Act, the ESC Act, or any Code of Practice or guideline issued by the commission to be included in a bill issued to a Customer that is not a Small Customer.”*

Shell notes that the purpose of their proposed additional text is to clarify that this requirement only applies to information that is expressly required to be provided to Customers that are not Small Customers under the Act,

The commission acknowledges this proposed amendment is clarifying in nature and this amendment has been adopted in the revised proposal.

	(Clause 9.1(iv) of the SELC; clause 9.1(iv) of the SGLC)	ESC Act or any Code of Practice or guideline issued by the commission.	
4	<b>Notice of tariff variation to customers other than small customers:</b> Notice of variation to tariff or contract terms and conditions at least five business days prior to the changes taking effect.  (Clause 9.2 of SELC; clause 9.2 of SGLC)	The commission received feedback that these clauses should be removed or amended.  Generally, licensees who provided feedback on this clause expressed concern that, in practice, large customers negotiate bespoke contract terms, which include the provisions that they require, regarding notice of changes. There was particular concern expressed with the lack of flexibility to provide notice of a variation to the tariff or terms of conditions of a contract at least five business days prior to any changes taking effect.	The commission has removed the requirement to notify a customer (that is not a small customer) of variations at least five business days prior to any changes taking effect to “as soon as practicable or as otherwise agreed between the Customer and the Licensee,” and removed the requirement for a notice provided pursuant to clause 9.2 to be issued in the form of a statement.
5	<b>Conditions relating to expiry of a fixed term contract:</b> Requirement to notify customers who are not small customers of the expiry of a fixed term contract and provide certain information no sooner than 40 business days	Red and Lumo and Shell raised concerns with these clauses. In particular, concern was raised that the requirement to provide notice was unnecessary and would potentially cause confusion, in circumstances where a recontracting process (e.g. a tender process) is already underway or complete.	The commission has addressed this feedback by proposing a new clause 9.5 that provides notification of the expiry of a fixed term contract is not required if the customer has already entered into a new contract with the licensee or has otherwise engaged with the licensee about its intentions following the end of the fixed term.

and no later than 20 business days before the expiry of the fixed term).

(Clause 9.4 of SELC; clause 9.4 of SGLC)

6 **Use of System Agreements (electricity) - discrimination**

**clause:** A use of system agreement must not unreasonably discriminate, or have the effect of creating unreasonable discrimination, between retailers or between customers of a retailer.

(Clause 8.3 of the SELC)

Red and Lumo noted that the clause, as drafted, excludes a reference to the commission deciding whether a use of system agreement unreasonably discriminates which is included in its current licence. Red and Lumo requested retention of the ability to have questions of whether a use of system agreement unreasonably discriminates, to the commission.

The commission notes that the proposed varied licences prohibit use of system agreements that unreasonably discriminate, or have the effect of creating unreasonable discrimination between retailers or between customers of any retailer.

This prohibition is also replicated in the electricity distribution licences, and has recently been proposed to be moved to the Electricity Distribution Code of Practice (as part of the review of that instrument that is presently underway). Any failure by a distributor, or a retailer, to comply with this prohibition may be investigated by the commission and enforcement action may be taken.

As such the commission has not revised its proposal in relation to this clause.

<p>7     <b>Use of system agreements (gas)</b></p> <p>(Clause 9 of the previous version of the SGLC dated 31 January 2022)</p>	<p>Lumo and Red observed that the commission removes references to Use of System Agreements in gas licences, because the concept of a Use of System Agreement does not exist for gas (as the retailers and distributors enter into Terms and Conditions).</p>	<p>The commission has removed this clause, noting the access arrangements under Part 8 of the National Gas Rules sufficiently deal with the subject matter of this clause.</p> <p>The commission notes that all its codes will be reviewed as part of the transition to a code of practice. As at this time the Gas Distribution System Code of Practice has not been reviewed, but that review will be undertaken in due course and may necessitate further consequential amendments to the gas retail licence as a result.</p>
<p>8     <b>Retailer of Last Resort</b></p> <p>(Clause 12 of SELC; clause 13 of SGLC)</p>	<p>Sumo submits that such a requirement should be limited as a special condition for Licensees with the financial and operational capacity to take on customers of a failed retailer and should not be a standard condition for all retailers.</p>	<p>The commission does not propose a change to this clause.</p> <p>It is noted that this clause does not, of itself, mandate a retailer to sell electricity/gas to a customer in the event of a “retailer of last resort event”, rather it mandates that, on request, a retailer submit to the commission proposed tariffs, terms and conditions upon which a licensee would sell electricity in the event of a retailer of</p>

last resort event, that must be approved by the commission. ‘

In considering any such submission the commission must have regard to a range of matters including, relevantly, the extent to which the licensee has developed systems to comply with such a requirement (s 49D(2)(b), EI Act; s 51D(2)(b), GI Act).

The current supplier of last resort arrangements would currently require AGL, EnergyAustralia or Origin Energy to sell electricity to customers in the event of a last resort event. In the event this arrangement is reviewed, the concerns Sumo raises around a retailer having sufficient operational capacity to take on customers of a failed retailer would be taken into account.

9 **Grant of the licence (electricity)** – Licensee not permitted to sell electricity through the Wholesale Electricity Market except when settling Small Renewable Energy  
Sumo submits that the definition of “Small Renewable Energy Generation Electricity” only includes electricity supplied by a Small Renewable Energy Generation Facility and not a Qualifying Solar Energy Generating Facility. It is not clear to Sumo as to why the settling of electricity exported by Customers with a Qualifying Solar Energy

The commission proposes to amend this clause to authorise the settling of electricity by customers with a Qualifying Solar Energy Generating Facility. It is proposed to amend the definition of “small renewable energy generation electricity” to clarify that it includes

Generation Electricity exports by a Customer through AEMO

(Clause 3.3 of Template Electricity Retail Licence)

Generating Facility is excluded. Sumo proposes that condition 3.3 permits the sale of Qualifying Solar Energy Generating Facility exports through AEMO.

electricity supplied from a qualifying solar energy generation facility, as follows:

*“small renewable energy generation electricity – has the same meaning as in section 40F of the Act, save that it includes electricity supplied from a qualifying solar energy generation facility within the meaning of section 40F of the Act”*

10 **Variation** - variations that are “of an administrative or trivial nature” or “required urgently”

(Clause 4.2 of previous version of Template Electricity Retail Licence dated 31 January 2022 and clause 4.2 of previous version of Template Gas Retail Licence dated 31 January 2022)

Some retailers raised concerns about the commission being able to vary licences without notice, where the variation was ‘administrative or trivial’ or ‘required urgently’. Those concerns were mainly raised by retailers on an older form of licence, noting this clause has been included in more recent licences issued by the commission. One retailer observed that what the commission considers ‘administrative or trivial’ may not be considered as such by a retailer.

The commission notes this feedback was received from licensees on older licences – with more recent licences containing a variation clause the same or similar to what was proposed.

Noting the feedback received, the commission proposes to dispense with this clause and to rely on the legislative process of issuing a notice of variation.

However, this does lead to an administrative process that may not be proportional to minor amendments, say those in the nature of correcting terminology or removal of clauses superseded by regulatory change. For any



AGL proposed that the licence simply note that variation may occur in accordance with section 29 of the EI Act / section 38 of the GI Act.

variation to standard conditions the commission would have to serve a notice of proposed variation on each licensee, provide an opportunity to make submissions and then serve notice of the variation.

So, while the licence has been amended so that this process of providing advanced notice is provided for all variations (no matter how minor), to allow for an efficient process each licensee is asked to specify an email address for service of notices under the licence pursuant to clause 2.1(ii) of the template licence.

11 **Variation – other**

Clause 4 of Template Electricity Retail Licence; clause 4 of Template Gas Retail Licence)

Agora has submitted that clause 4 should contain an obligation to maintain Schedule 1 (noting it is cross-referenced in clause 3.1).

The commission does not propose to make changes in respect of this submission.

The commission interprets Agora’s submission to mean that the template licence should include an express obligation for the commission to maintain the variation schedule.

While the commission intends to maintain the variation schedule, the commission does not propose to include

the express obligation proposed by Agora (noting the licence is intended to impose conditions on a licensee, not the commission).

12 **Revocation – general**

(Clause 6 of Template Electricity Retail Licence; clause 6 of Template Gas Retail Licence)

Feedback was received to the effect that the proposed revocation clause would significantly lower the threshold for the revocation of a licence (e.g. a licence can be revoked for a breach of any provision of a Code of Practice). For instance, Momentum raised concerns that “*there is an increased number of events which entitle the commission to issue a notice of revocation*” under new clause 6.2.

Some retailers suggested that a materiality / consumer harm threshold would be appropriate. For instance, Sumo submitted that it would be appropriate to introduce an element of materiality to triggers for this power (to avoid the commission revoking a licence for a breach of a relatively minor provision of a Code of Practice).

The commission has removed clause 6.2 from the licence (being the clause in the previous version of the template retail licences dated 31 January 2022 which set out the bases on which the commission may revoke a licence). In addition, consequential amendments have been made to clauses 6.3 (now clause 6.2) and 7 of the template retail licences (being clauses which cross-reference now deleted clause 6.2).

In considering the feedback received, the commission has revisited the underlying legislative framework for its revocation power. The legislation provides the commission with a power to revoke a licence, that may be exercised in its discretion, having regard to its statutory objectives and the general principles and limits of administrative decision-making. The legislation contemplates the licence may identify the procedures to

be followed in the event of a revocation decision (s 21(r); s 29(3) EI Act; s 20(o) GI Act, s 38 GI Act) , but the legislation does not contemplate that the licence conditions will fetter the commission's discretion. Further, the commission considers there is a risk in attempting to foreshadow all circumstances in which it may be appropriate to revoke a licence and the commission does not consider it should limit its discretion in this way.

Rather, the commission considers it is appropriate for each circumstance to be considered on its merits, after a process that would accord procedural fairness to the licensee. The commission's revised proposal provides for revocation by agreement or revocation in accordance with the Act, which is the exercise of the commission's discretion, having regard to relevant circumstances and its statutory objectives. The commission acknowledges this is a material change, with licences (albeit in a varied manner) presently prescribing a set of circumstances in which the commission may revoke a licence.

The commission welcomes feedback on whether licensees would be assisted by the commission publishing guidance on the circumstances in which this power may be exercised, should this variation be made. Preparation of such guidance may reflect on the feedback received to the initial variation proposal and concern that the commission not exercise a revocation power in circumstances where there has been a non-material breach of a licence condition or Code of Practice obligation. The commission also notes it has recently published its Compliance and Enforcement Policy which identifies, that when considering revocation in the context of enforcement action, it is the most severe instance or repeated instances of non-compliance that would cause the commission to consider this option.

13 **Revocation if the Licensee’s financial viability or technical capacity is such that the commission considers that the** BlueNRG asked that this clause be removed. BlueNRG submits that this clause purports to grant the commission powers that it does not have at law, and is unenforceable. That is, the clause purports to allow the commission to

The commission has removed clause 6.2 from the licence - see comments in preceding row 12.

**Licensee would be unable to satisfactorily meet its obligations under this Licence, a Code of Practice or the Act**

(Clause 6.2(v) of previous version of Template Electricity Retail Licence dated 31 January 2022; clause 6.2(v) of previous version of Template Gas Retail Licence dated 31 January 2022)

revoke a licence for events that have not yet occurred (beyond the scope of section 19(1)-(2) of the EI Act).

BlueNRG considers that the relevant standard under the EI Act is whether the applicant “is financially viable” at the time the licence is granted, not “would be” financially unviable as it is under clause 6.2(v) of the template licence. BlueNRG submits that the proposed standard conditions, together with clause 6.2(vii) of the template licence, appropriately deal with the same subject matter within the commission’s powers, and that no enforcement powers would be lost by the removal of clause 6.2(v).

14 **Revocation for failure to comply with a decision, direction, determination or arrangement (including any arrangement including load shedding) (as the case may be) with the Commission, AEMO or the Minister**

AGL requested the commission remove this clause on the basis that it duplicates other industry practices. Specifically, AGL stated that “*market operations and system security of the National Energy Market are the functions of the Australian Energy Market Operator (AEMO), rather than a jurisdictional economic regulator such as the Commission. The purpose of the Retail Licence is to provide for the responsible sale of gas and electricity and strengthen*

The commission has removed clause 6.2 from the licence – see comments in row 12.

(Clause 6.2(vi) of previous version of the Template Electricity Retail Licence dated 31 January 2022; clause 6.2(vi) of previous version of Template Gas Retail Licence dated 31 January 2022)

*consumer protections, not to determine market and system security, therefore it would be inappropriate for the Commission to duplicate this arrangement by introducing licence revocation powers as proposed under clause 6.2(vi)."*

15 **Revocation of a licence in circumstances including appointment of an administrator**

(Clause 6.2 of previous version of Template Electricity Retail Licence; clause 6.2 of previous version of Template Gas Retail Licence)

Agora submitted that clause 6.2(vii) is a subset of clause 6.2(v) and may be deleted.

The commission has removed clause 6.2 - see comments in row 12.

16 **Withdrawal of a notice to revoke a licence**

(Clause 6.4 of previous version of Template Electricity Retail Licence; clause 6.4 of previous version of Template Gas Retail Licence)

Delta and Momentum raised concerns that their right to avoid revocation by implementing remediation of any issues would be removed, now being solely reliant upon a discretionary power granted to the commission. That is, this clause may reduce their ability to have a “notice to revoke” withdrawn by rectifying the breach as the ESC has removed specific reference to this response in clause 6.4 (such that there is no provision entitling a retailer to avoid revocation if it subsequently remedies the breach of non-compliance).

To address this, Delta suggests the original text from clause 22.4 could be retained in clause 6.4 or the ESC could add an explanatory note to clause 6.4 providing context of when the commission would consider it appropriate to withdraw a notice to revoke a licence, for example, when a breach in licence is rectified.

Delta also made a minor drafting suggestion – the readability would be clearer if “otherwise” and “to withdraw the notice” are removed.

The commission has removed this clause.

The commission considers that there may be some misapprehension as to the implications of this change as previously proposed and takes this opportunity to clarify.

Originally there was a clause in some licences to this effect:

*“The Commission may, at its discretion and by written notice to the Licensee, withdraw a notice issued under clause 22.3 at any time prior to the revocation date specified in the notice if the commission is satisfied that the Licensee has complied with the relevant final enforcement order or undertaking, rectified the breach or complied with the relevant decision, direction, determination or arrangement (as the case may be) or if the Commission considers that it is otherwise appropriate to withdraw the notice.”*

The clause was simplified to state:

*“The commission may, at its discretion, and by written notice to the Licensee, withdraw a notice issued under*

*clause 6.3 at any time prior to the revocation date specified in the notice if the Commission considers that it is otherwise appropriate to withdraw the notice”*

The revised wording gave the commission absolute discretion to withdraw the notice, but that was the case in any event. The original clause simply stated examples of matters the commission may have regard to.

This clause has been removed as a consequence of other changes to clause 6 (as set out above).

17 **Special conditions**

(Clause 9 of the Template Electricity Licence; clause 9 of the Template Gas Licence)

Tango Energy submitted it was neither necessary or desirable for the commission to specify a standard schedule of licence conditions, noting that a retail licence provides individual entities an authorisation to provide retail services, subject to relevant legislative and regulatory requirements (ie there should not be any need to provide for prescriptive standardised conditions).

For example, it was submitted, obligations in respect of the provision of information to large customers is a broader policy consideration that should be specified in a legislative

The commission acknowledges that there are matters addressed in the licences that could potentially be addressed in legislation (should the government be so minded) or in a Code of Practice.

However, in circumstances where the licences are currently of different generations and there is some variability, the commission considers that setting ‘standard’ conditions of general application is an appropriate step at this time. In due course, further consideration may be given to whether these matters



		instrument rather than forming part of a licence. The licence should only mandate the fundamental requirements necessary for an entity to provide retail energy services in Victoria.	are better addressed in the Energy Retail Code of Practice.
18	<b>Transitional period</b>	Alinta requested a transitional period for the introduction of the new standard electricity and gas licence conditions, noting any variation to existing licence conditions will need to flow through to retailers own licence monitoring processes.	The commission responds to Alinta’s feedback by proposing that any variation commence no earlier than 30 days following the decision to vary the licences.
19	<b>Publication of Ministerial licence conditions (and other orders)</b>	Red and Lumo asked the commission to consider publishing details of all Ministerial licence conditions on its website to provide a consolidated point of reference for retailers, and to maintain a public register of all Orders in Council which contain any prohibitions, as outlined in clause 3.4 of the proposed template electricity licence and clause 3.3 of the proposed template gas licence.	The commission notes the request, but considers it falls outside the scope of this review. It would be a matter requiring engagement with the Department of Environment Land Water and Planning.
20	<b>Review by AAT</b>	Agora makes a general observation that given the extent to which administrative determinations are made by the Commission in the proposed licence structure that those	The commission notes that what is appropriately reviewed by VCAT is a matter for the Victorian parliament, not the commission. The matters that are

		determinations should be generally subject to review by the Administrative Appeals Tribunal.	currently subject to VCAT review are identified in section 55 of the Essential Services Commission Act 2001.
21	<b>Customers in embedded networks</b>	MTA Energy and Winconnect queried the effect of the proposed removal of a condition of some licensees that prohibited sale to customers within embedded networks in particular circumstances.	No change is proposed, but the commission clarifies that removal of this clause (unless special conditions apply) may authorise sale to customers into embedded networks. As identified in the table of explanatory changes in the first round of review this change is to provide for improved consistency among retail licensees.
22	<b>Definition of customer by reference to consumption at a supply point.</b>	MTA queried the approach of linking customer size with consumption at a particular 'supply point'. MTA submitted that this leads to 'certain inefficiencies and cost increases' for customers that take supply across sites, if they are captured by the definition of small customer at a particular site	No change is proposed. The commission received feedback on this same point during its recent consultation on the Energy Retail Code of Practice. As set out in its final decision of 20 December 2021, the commission considered it would be preferable to address the matter of relevant protections for multi-site customers in a holistic way, by engaging with the Department of Environment Land, Water and Planning on whether consideration should be given to reviewing definitions of customer in orders in counsel made under

			the industry legislation, these definitions being the basis for customer definitions in the code and the licences. The commission has engaged with DELWP on this matter and continues to do so, but addressing this point is outside the scope of the current review.
23	<b>No definition of “tariff”</b>	Agora queried the meaning of “tariff” in the context of the proposed licence template, noting the term is undefined and potentially open to more than one interpretation.	No change is proposed at this time. Further consideration will be given to whether guidance on the meaning of this term, which appears across instruments, may be appropriate to address this feedback.
24	<b>Explanation of purpose of Schedule 1</b>	Agora queried the purpose of having a “Schedule 1” to the standard licence conditions, in circumstances where there is already a Schedule 1 in the template licence.	No change is proposed. Schedule 1 functions as a change record. Given the standard licence conditions are contained in a separate document to the template licence, it is necessary to maintain a separate change record for each document. We consider that there is sufficient clarity on the scope of the Schedules from the respective titles of Schedule 1 to the standard licence conditions (titled “Schedule 1 – Variations to the Standard Electricity Licence Conditions for Electricity/Gas Retail”) and

Schedule 1 to the template licences (titled “Schedule 1 – Variations to the Licence”).

Essential Services Commission **Response to feedback on Energy Retail Licence Review**

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SGLC – Proposed Standard Gas Licence Conditions