

7 February 2019

Essential Services Commission
Level 37, 2 Lonsdale Street
Melbourne VIC 3000

By email: compliance.reporting@esc.vic.gov.au

Dear Compliance and Enforcement,

Re: Draft decision – Compliance and enforcement policy

Thank you for the opportunity to comment on the Essential Services Commission's (ESC) *Draft decision – Compliance and enforcement policy (Draft Decision)*.

The Energy and Water Ombudsman (Victoria) (EWOV) is an industry-based external dispute resolution scheme that helps Victorian energy and water customers by receiving, investigating and resolving complaints about their company. Under EWOV's Charter, we resolve complaints on a 'fair and reasonable' basis and aim to reduce the occurrence of complaints¹. We are guided by the principles in the Commonwealth Government's Benchmarks for Industry-based Customer Dispute Resolution². It is in this context that our comments are made.

The Draft Decision is timely as the ESC enters a new phase of enforcement with the imminent appointment of a new Commissioner specifically to have a compliance and enforcement focus. EWOV is strongly supportive of this forthcoming new appointment and the increased organisational focus on compliance and enforcement that it represents for the ESC.

In a similar vein, we are also supportive of the new direction outlined in the Draft Decision. As the ESC has identified, the detailed compliance and enforcement pathways outlined in the current policy are not conducive to timely decision making – which in turn is not conducive to effective compliance and enforcement activity, and is frustrating for both consumers and industry. We note that the ESC's current approach may have contributed to more customer complaints to EWOV than we would anticipate with the new direction.

The Draft Decision states that the ESC will instead adopt an approach similar to the Australian Energy Regulator (AER), eschewing prescribed, detailed compliance and enforcement pathways and instead

¹ See Clause 5.1 of EWOV's Charter: <https://www.ewov.com.au/files/ewov-charter.pdf>

² See EWOV's website: <https://www.ewov.com.au/about/who-we-are/our-principles>

proposing a “...broad approach to compliance and enforcement, including identifying the tools we may use to promote self-compliance with our energy regulatory framework”.³

As the Draft Decision also highlights, the new policy will be amended to reflect the risk-based, intelligence led, outcome focus that ESC intends to apply to their compliance and enforcement work program.

The “outcome focus” identified in the Draft Decision is particularly significant. We are encouraged by - and support - the move away from ‘tick-the-box’ regulation that the ESC has embarked upon, noting in particular the statements by ESC Chairperson Dr Ron Ben-David in his introduction to the ESC’s Draft Decision, *Building trust through new customer entitlements in the retail energy market*, published on 7 September 2018.

We reproduce Dr Ben-David’s statement in part below to clarify our understanding of the broad policy direction the ESC are taking in relation to compliance:

In that introduction Dr Ron Ben-David stated:

Poor customer outcomes are not always the result of poor retailer compliance. Conversely, compliance does not always lead to satisfactory outcomes.

That’s why we are taking a different approach to implementing the recommendations from the Independent Review. We’re seeking to put responsibility for building trust in the retail energy market back where it belongs — with the energy retailers. After all, it is the energy companies who have the direct relationship with customers.

In this draft decision we’re proposing a new form of regulation. While we’re creating the obligations recommended by the Independent Review, we are also proposing to codify the consumer outcomes these obligations are intended to deliver. Doing so means retailers won’t be able to adopt a simple tick-the-box approach to complying with these new obligations. Instead, they will need to turn their minds to how they achieve these outcomes while meeting their compliance obligations. Trust and community confidence cannot be restored by more tick-the-box regulation.⁴

³ Essential Services Commission, *Compliance and enforcement policy – Draft Decision*, January 2019, p. 4.

⁴ Dr Ron Ben-David, Essential Services Commission, *Building trust through new customer entitlements in the retail energy market- Draft Decision*, 7 September 2018, pp. iv – v. (Available at: <https://www.esc.vic.gov.au/electricity-and-gas/electricity-and-gas-inquiries-studies-and-reviews/electricity-and-gas-retail/electricity-and-gas-retail-markets-review-implementation-2018-bills-and-marketing#tabs-container2>)

Notably, the Final Decision for *Building trust through new customer entitlements in the retail energy market* implemented this regulatory philosophy by creating the new “clear advice entitlement”, which will come into effect in the Energy Retail Code (ERC) from 1 July 2019.

As we noted in [our submission](#) to the consultation on that change, we anticipate that customer complaints will reduce because of this shift.

As the ESC is acutely aware, EWOV recently acquired jurisdiction of embedded networks through amendments to the General Exemption Order (GEO); and the new Payment Difficulty Framework (PDF) also recently came into effect (on 1 January 2019). Both developments have created significant new regulatory obligations for embedded network operators and energy retailers respectively. This has generated a particularly pressing need for vigilant compliance and enforcement activity by the ESC, as market participants grapple to adjust to new obligations and higher standards of conduct. Our regular publications highlight the impact this adjustment has on customers.

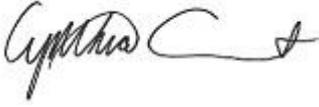
Further, EWOV notes the small but growing number of out of jurisdiction enquiries that we receive – the majority of which involve solar energy. With strong support from the State Government, the residential solar market will continue to grow for at least the next decade. EWOV anticipates that without legislative reform, this growth along with growth in other out of jurisdiction energy technology markets (such as home batteries and peer to peer trading) will leave an increasing proportion of Victorian energy consumers without access to our services for external dispute resolution. Currently, we refer the majority of those enquiries to Consumer Affairs Victoria (CAV). The Victorian Civil and Administrative Tribunal (VCAT) remains the forum in which such disputes are heard, despite VCAT being largely unsuitable to hear technical energy matters. This is clearly a concern, and one which the sector will need to address in the medium to long term.

Similarly, unless the ESC brings its attention to those growing markets, those consumers may remain largely unprotected by the ERC – which clearly has the potential to create a significant regulatory failure, leaving significant cohorts of energy consumers with lesser consumer protections than others.

EWOV is strongly supportive of the new energy and focus that the ESC is bringing to its compliance and enforcement work. The flexible, broad approach that the Draft Decision outlines should indeed foster timely outcomes, and assist EWOV in its purpose to resolve complaints and reduce their occurrence. We would simply add that the ESC must remain mindful, as the energy system changes, that the obligations being enforced are sufficient to protect all energy consumers – and the ESC must remain prepared to develop further protections with newer markets in mind, if they are not.

We trust these comments are useful. Should you like any further information or have any queries, please contact [REDACTED]

Yours sincerely



Cynthia Gebert
Energy and Water Ombudsman (Victoria)