



25 May 2016

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

Submitted by email: submission@esc.voc.gov.au

AGL's submission on the ESC's Draft Energy Compliance and Enforcement Policy

AGL Energy (**AGL**) welcomes the opportunity to comment on the Essential Services Commission's (**ESC**) Draft Energy Compliance and Enforcement Policy dated April 2016 (**C&E Policy**).

AGL is Australia's largest integrated energy company, operating across the supply chain with investments in coal-fired, gas-fired, and renewable electricity generation and is a significant retailer of energy, providing energy solutions to over 3.7 million customers across Australia. AGL is Australia's largest ASX listed owner, operator and developer of renewable generation.

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.

According to the OECD, a "well-formulated enforcement strategy is one that provides correct incentives for regulated subjects as well as appropriate guidelines for enforcement staff, and minimises both the monitoring effort and the costs for the regulated subjects and the public sector".¹ Given this, AGL submits that the ESC:

- needs to balance its new enforcement and reporting powers with the industry costs associated with meeting the more onerous obligations. That is, the ESC does not want to impose such a strict regime whereby customers, especially vulnerable customers, have to pay more than the benefits they (consumers) derive from the new powers. Therefore, in the interest of best practice rule making, AGL recommends that the ESC conduct a full and open cost benefit analysis that clearly contains the consumer benefits and their value against different consumer groups (e.g., residential, vulnerable, business) against the additional costs imposed on the industry in adhering to the new compliance and enforcement powers.
- should encourage compliance with the law without being so stringent that it stifles innovation or prevents regulated businesses from achieving the ESC's objective of promoting "the long term interests of Victorian consumers with regards to the price, quality and reliability of energy". 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.

¹ OECD (2014), *Regulatory Enforcement and Inspections, OECD Best Practice Principles for Regulatory Policy*, OECD Publishing

- should consider rewarding regulated businesses with good compliance records. For example, a retailer that has shown no compliance breaches over a two year period could be rewarded with a lower level of reporting obligations. As stated above by the OECD, a good enforcement regime not only imposes penalties on poor performers but it also rewards business that meet and exceed the regulatory requirements. This would also assist in encouraging a culture of compliance among regulated businesses.



The importance of stakeholder engagement throughout the entire compliance and enforcement process could also be better reflected in the C&E Policy.

AGL has provided more detailed comments on particular sections of the C&E Policy below in **Appendix 1**.

AGL looks forward to engaging further with the ESC as part of this consultation process. Please contact Leilani Kuhn on [redacted] if you wish to discuss any aspect of this submission further.

Yours sincerely,

Rebecca Brigham
Manager, Regulatory & Compliance Services

Appendix 1 – AGL’s detailed comments on C&E Policy

1. Purpose of the C&E Policy

- 1.1. In AGL’s opinion, the current purpose outlined in the C&E Policy is a little vague and could be expanded upon to provide further details on the actual objective of the C&E Policy. For example, AGL considers an appropriate objective of the C&E Policy to be “encourage a culture of compliance among regulated businesses, which leads to good outcomes for Victorian energy consumers”.

2. Section 3.1 – Guiding Principles of C&E Policy

- 2.1. Ideally, regulation should be clear enough for compliance to be apparent. Where there is some uncertainty or a lack of clarity, the ESC should provide advice to regulated businesses to assist them in understanding their compliance obligations. This would give regulated businesses the opportunity to comply with their obligations prior to a breach occurring. It is AGL’s view that a compliance and enforcement approach should be largely focused on preventing breaches of the regulations from occurring rather than how a regulator will deal with breaches if they arise. It is AGL’s opinion that a number of historical compliance breaches have been due to a difference in interpretation of the regulations, which may have been avoided if the ESC took a more proactive approach in engaging in discussions with regulated businesses on how they should meet their regulatory requirements.
- 2.2. AGL considers that section 3.1(b) should specify that when the ESC is considering the proportionality of their response to a non-compliance, they should ensure their response is commensurate to the level of consumer detriment, with the focus being on customer impact. In AGL’s view, if an identified non-compliance seems significant but in fact has resulted no customer impact, it would be unreasonable and unfair to penalise the regulated business significantly. To help address this issue, AGL submits that rather than looking at the “extent of non-compliance”, the ESC should focus on the “customer impact of the non-compliance”, which ties back to the ESC’s objective of “*promoting the long term interests of Victorian consumers with regard to price, quality and reliability of energy*”.
- 2.3. AGL submits that the ESC should change the title of the guiding principle outlined at 3.1(d) from accountability to transparency as this better reflects the intention of that principle.

3. Section 3.2 – Promoting and securing compliance

- 3.1. AGL submits that the ESC should provide more clarity in the C&E Policy around:
 - 3.1.1. the differences between the “Preliminary Assessment” and “Investigation” stages of the Compliance and Enforcement Pathway; and
 - 3.1.2. the factors considered by the ESC when deciding to progress to the “Investigation” or “Enforcement Action” stages.

4. Section 3.2.2 – How the ESC will deal with potential breaches

- 4.1. AGL submits that the C&E Policy should provide further detail on:
 - 4.1.1. the circumstances in which the ESC is able to use the information it has obtained under its information gathering powers, including confidential information.
 - 4.1.2. 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*.



5. Section 3.2.3 – Compliance responses to established breaches

- 5.1. It is not clear to AGL from the C&E Policy whether the ESC is able impose a combination of the compliance responses outlined in section 3.2.3 for each incident of non-compliance or if it is limited to only one at a time? AGL's preference would be that the compliance responses available to the ESC are individual responses that can only be applied one at a time.
- 5.2. AGL considers that the response outlined at section 3.2.3(d) is vague. For example, does this 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? AGL suggests that the ESC amend this section to clarify its intention.

6. Section 3.2.4 – Investigation and consideration of further actions

- 6.1. AGL understands that the section 3.2.4 considerations are intended to be used by the ESC in its decision making for the three key decisions points outlined in section 3.2 (i.e. when deciding whether to move from "Preliminary Assessment" to "Investigation").
- 6.2. The considerations outlined in section 3.2.4 are quite broad. Given this, AGL is of the view that the C&E Policy should make it clear that the considerations to be taken into account by the ESC when considering the appropriate action to take under the C&E Policy should be based on the ESC's objectives. This would avoid some of the considerations listed in section 3.2.4 being provided with undue weight in circumstances where it is not warranted.
- 6.3. AGL also submits that:
 - 6.3.1. in section 3.2.4(a), the ESC needs to insert a comma after "the risk of harm" to make it clear that it is "a risk of harm" or "actual harm". AGL also submits that the materiality threshold for this consideration should be better articulated. For example, will the guiding principles be used for this purpose? What weight will be given to a "risk of harm" where there is no customer detriment? In AGL's view, the degree of customer harm should be a critical factor in the ESC assessment of the weight to be given to this consideration in their decision making process.
 - 6.3.2. the ESC needs to provide more detail in the C&E policy on how the impact on consumer confidence in section 3.2.4(b) will be measured.
 - 6.3.3. the ESC should provide further detail for section 3.2.4(g). This should include how an 'appropriate remedy' will be determined by the ESC. AGL submits that the ESC's approach regarding the "appropriate remedy" in other similar instances of non-compliance should be able to be used by regulated businesses as a guide and the ESC should ensure that this information is readily available. This approach is in line with the C&E Policy's guiding principle of consistency.
 - 6.3.4. that the ESC should be more prescriptive in section 3.2.4(j) regarding how far back a regulated business' compliance history is relevant. AGL submits that it should be limited to two years.

7. Section 3.2.5 – Enforcement options

- 7.1. AGL submits that when deciding on the appropriate enforcement option, the ESC should consider what is fair, reasonable and proportionate, and the more punitive options should be clearly linked to customer detriment. Unreasonable penalties deter business improvement and innovation, which is detrimental to energy consumers and the energy industry as a whole. As such, there should be scope for the ESC to not take action for minor compliance breaches (i.e. the equivalent of the AER's letter of no action), where a technical non-compliance has had no detriment to customers and/or does not have an impact on the ESC meeting its objectives.

8. Section 3.2.6 – Due process and procedural fairness



8.1. As a general comment, AGL submits that section 3.2.6 as currently drafted is quite vague and we suggest that the ESC provide more detail about the processes that will be followed by the ESC to ensure that it complies with all of its legal and government policy requirements.

8.2. AGL would also like to see further details included in this section on:

8.2.1. the particular statutory requirements which regulate the ESC's exercise of some of its enforcement powers.

8.2.2. how the process for using a particular enforcement power in a particular situation will take account of the relevant circumstances of the case?

9. Section 4 - Reporting

9.1. AGL submits that the ESC should be required to report its reasoning when making decisions in relation to issues of non-compliance. In some instances a regulated business may have formed a view on what it considered to be compliant actions under the regulations. However, the ESC may have a different view which may result in the business being considered non-compliant despite every effort and intention of the regulated business to comply. In AGL's view, the occurrence of this type of non-compliance could be minimised by the ESC reporting on its compliance decisions and interpretation of the regulations, as this would provide retailers with a better understanding of the ESC's compliance expectations. This knowledge would allow regulated businesses to ensure they are complying with the regulations without the need for any compliance or enforcement action by the ESC.

9.2. This approach would also be in line with the C&E Policy's guiding principle of accountability (or as AGL has submitted above, transparency) as it helps ensure that the ESC's considerations, reasoning and decisions under the C&E Policy are clear and transparent to the energy industry.