

Retail licence review 2022

Final decision

12 July 2022

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Retail licence review

Retail licences will be varied to reflect changes in the regulatory framework and to improve consistency, with effect from 12 September 2022.

This paper sets out the commission's decision to vary electricity and gas licences in accordance with section 29 of the *Electricity Industry Act 2000* (Electricity Act) and section 38 of the *Gas Industry Act 2001* (Gas Act), and the reasons for that decision. This decision applies to existing licensees (as set out below) and the approved form of standard licence will inform the form in which future licences are granted.

On 31 January 2022 we wrote to retailers with a proposal to vary retail licences in accordance with section 29 of the Electricity Act and section 38 of the Gas Act.

Broadly, the changes we proposed to licences were for one or more of the following reasons:

- to reflect recent changes to the regulation of energy in Victoria, including the passing of the *Essential Services Commission (Compliance and Enforcement Powers) Amendment Bill 2021*, which require consequential changes to Victorian energy retail licences
- to improve consistency by removing variations that have arisen in licence conditions by reason of there being amendments to standard licence conditions over time that have not been applied to existing licensees
- to remove licence conditions that are no longer required or to promote consistency, where appropriate.

The commission proposed, as part of its review, to remove inconsistencies in standard clauses that had arisen by reason of licences being granted and amended at different times. Where standard licence conditions have been varied, this has sometimes not been applied to existing licences, creating different generations of licences that are substantially similar in most respects, but vary in some manner. To facilitate consistency moving forward, it was proposed, as part of this review to consolidate 'standard conditions' in a document separate to the licence, Standard Electricity Licence Conditions for Electricity Retail (**SEL**C) and Standard Gas Licence Conditions for Gas Retail (**SGL**C), compliance with which would be a condition of the licence.

Following feedback on the initial proposal the commission revised its proposal and ran a further round of consultation. On 27 April 2022, the commission wrote to all retailers and invited submissions on that revised proposal. During this round of consultation, the commission also contacted various consumer groups to advise them of the review and provide them with an opportunity to comment.

The commission has now considered the feedback received from this second round of consultation and has decided to vary licences in accordance with:

- the template Electricity Retail Licence (**Annex A**)
- the SELC (**Annex B**)
- the template Gas Retail Licence (**Annex C**)
- the SGLC (**Annex D**).

The commission notes that each template will be populated to include the details specific to each retailer and some retailers will have unique special conditions that have been advised to the retailer. In most cases these conditions are pre-existing and have not been varied as part of this review, they have simply been retained.

The variations have been made, in many instances, by the consent of the retailer pursuant to section 29(1)(b) of the Electricity Act and section 38(1)(b) of the Gas Act. In instances where retailers did not consent the variation is made by notice pursuant to section 29(1)(c) of the Electricity Act and section 38(1)(c) of the Gas Act, on the basis that the commission is satisfied that the variation is necessary having regard to:

- the objectives of the commission:
 - under the Electricity Act and Gas Act, being:¹
 - to the extent that it is efficient and practicable to do so, to promote a consistent regulatory approach between the electricity industry and the gas industry
 - to promote the development of full retail competition
 - to promote protections for customers, including in relation to assisting customers who are facing payment difficulties.
 - and under the *Essential Services Commission Act 2001* (ESC Act), being, in performing its functions and exercising its powers, to promote the long term interests of Victorian consumers.²
- that licensees have been given an opportunity to make representations on the matter. The commission's response to the feedback is provided below.

The commission appreciates the participation of retailers and community groups in this process.

¹ Electricity Act, section 10; Gas Act, section 18.

² ESC Act, section 8.

Response to feedback on the retail licence review

Overwhelmingly the response to the commission's variation proposal (as revised on 27 April 2022) was positive with the majority of licensees providing express consent to the variation proposal. However, some licensees did raise concerns with particular aspects of the revised variation proposal, the key concerns being addressed below.³

Standard licence conditions

Ongoing financial viability

The proposal included a condition that the licensee must at all times remain financially viable to undertake the activities authorised by the licence (clause 4 of the SELC, clause 4 of the SGLC). This is an existing licence condition for most retailers, though is not included in some licences that are of an older generation.

Red Energy Pty Ltd and Lumo Energy Australia Pty Ltd (Red and Lumo) queried the need for a clause requiring ongoing financial viability in circumstances where retailers have existing obligations under the *Corporations Act 2001* (Cth) and financial viability obligations under the National Electricity Rules and National Gas Rules. Red and Lumo further queried the commission's ability to manage this obligation as the commission are 'not financial auditors'.

The commission considers this clause to be necessary. Financial viability is a requirement for market entry,⁴ and it is appropriate that licences maintain financial viability while operating in the industry. This is a further protection to customers, in addition to the retailer of last resort framework which operates in the event a retailer is no longer authorised to operated in the wholesale market. While the commission does not undertake ongoing financial assessment of a retailer's financial position at this time, the condition enables the commission to potentially take necessary action should there be concerns about a licensee's financial viability. Further, the commission considers it appropriate to make this change to ensure consistency for all licensees, noting the majority of licences already include this condition.

³ For further details of the specific concerns raised by stakeholders, please refer to the submissions published to our website: <https://www.esc.vic.gov.au/electricity-and-gas/inquiries-studies-and-reviews/energy-retail-licence-review#tabs-container2>

⁴ Section 19(2)(a), Electricity Industry Act. While there is no commensurate provision in the Gas Industry Act, consistent with its statutory objectives, the commission considers the financial viability of a gas retail licence applicant.

Ongoing technical capacity

The commission proposed removal of the condition requiring such additional technical capacity as is required to enable a retailer to meet and utilise technological advances in the electricity industry after the first round of consultation. This was reflected in its response to feedback, however it was inadvertently retained in the SELC. This will be removed for the reasons previously identified.

Compliance with regulatory instruments

The proposal included a condition that the retailer must comply with any procedure or guideline issued by the commission from time to time that is expressed as being one with which the retailer must comply, to the extent it is applicable to activities undertaken by the licensee pursuant to its licence (clause 6.1 of the SELC, clause 7.1 of the SGLC).

Red and Lumo supported the drafting of the clause, but only if the commission had ‘a positive obligation to inform retailers that a guideline or Code of Practice falls under this condition’. Red and Lumo also submitted that the obligation should have a minimum timeframe assigned to it.

This condition derives from an existing licence condition in most licences, though its wording has been varied to reflect changes in the enforcement framework. One of those changes, as explained in the consultation documents provided to retailers was that it no longer refers to ‘codes’. This is because the commission’s codes are now enforceable as standalone instruments, being ‘codes of practice’ made under the ESC Act, and no longer enforced as licence conditions. This answers part of Red and Lumo’s feedback.

This clause requires compliance with commission procedures or guidelines that may be issued by the commission from time to time. This is a pre-existing licence condition for all retailers and the onus is on a licensee to ensure they are aware of their obligations. Whenever the commission issues a new guideline (or procedure) that places new obligations on a licensee it will consult on that guideline or procedure in accordance with its [stakeholder engagement framework](#). Save that, when a guideline does not create obligations, but merely provides guidance on the commission’s interpretation of particular matters, that may not be a matter appropriate for consultation. It is also noted that the commission is progressing a review of its instruments, in due course some existing guidelines may be amended or revoked as a consequence of this work.

The commission considers this condition to be necessary to ensure compliance with instruments, such as guidelines may be enforced. Moreover, the commission notes that this is an existing licence condition. It has simply been amended, from that version of the clause included in the most recent iteration of retail licences, to reflect the transition of codes to codes of practice.

Change of control

The proposal included a condition requiring a retailer to give the commission notice of any event, decision or any other circumstance that will effect a change of control (clause 5 of the SELC,

clause 6 of the SGLC). The proposal was that this notice be given no later than three business days after the retailer becomes aware of the event or circumstances that will effect a change of control.

Tas Gas Retail Pty Ltd submitted that three business days was not consistent with Gas Networks Victoria Pty Ltd's licence (which allows 10 business days) and its obligations in other jurisdictions (where it is also 10 business days).

The commission considers it necessary to amend the licences to require reporting of a change of control within three business days. The commission notes this concern was only raised by one retailer and in circumstances where all other retailers consented or did not object, considers it appropriate to make this a standard condition of all licensees. The commission is not aware of any circumstances of a particular retailer that would warrant non-standardisation of this requirement.

However, the commission does consider it necessary to make minor amendments relating to this clause. Namely to include a definition of 'entity' to provide clarity as to the meaning of 'change of control' and to define Ultimate Holding Company by reference to the meaning under section 9 of the *Corporations Act 2001* (Cth).

Information to customers that are not small customers

The proposal included a condition that baseline information be included in a bill issued to a customer that is not a small customer (clause 9 SELC, clause 9 SGLC).

International Power (Retail) Pty Ltd, Simply Energy, and Alinta Energy Retail Sales Pty Ltd and Neighbourhood Energy Pty Ltd (Alinta Energy) were of the view that regulating the provision of information to large customers was unnecessary. Alinta Energy noted that the large customer market is competitive and retailers are already incentivised to ensure that large customers are well serviced. It is noted that all three retailers currently have a condition requiring baseline information to all customers, although the extract drafting of the clause does differ across those licences.

Other retailers including Sunset Power International Pty Ltd trading as Delta Electricity (Delta Electricity) and Shell Energy Retail Pty Ltd (Shell Energy) raised particular objections to clause 9.4. Proposed clause 9.4 required information to be provided to a customer, that is not a small customer, prior to the expiry of the fixed term contract. This is an existing obligation for many licenses (including Delta Electricity), though not all (including Shell Energy). It is noted that, following the first round of consultation, the commission responded to concerns about this clause by relaxing the notice requirement so that it did not apply if the customer had already entered into a new contract or given instructions to the retailer as to what action it intends to take at the end of the contract.

The commission considers it necessary to maintain these conditions (and vary licences to insert these conditions if they were not currently contained in the licence). The commission regulates for the long-term interests of all Victorian consumers (not just small customers) and retaining the

obligation of providing basic information in bills such as the NMI, relevant tariffs, network charges is considered appropriate. Moreover, requiring a retailer to provide notice of particular matters prior to expiry of a contract is a beneficial mechanism to ensure customers make appropriate arrangements to ensure the continued supply of essential services; noting that the deemed contract arrangements under the Electricity Act and Gas Act may not apply.

Insofar as Shell Energy submitted that the prescriptive timing requirements of the notice ‘no sooner than 40 business days before and no later than 20 business days before’ did not provide for sufficient flexibility, it is considered that clause 9.5⁵ provides an answer to that concern. A retailer may reach out to a licensee earlier than 40 business days before the expiry of the contract and, provided the customer responds with instructions as to what it intends to do at the end of the period, the retailer is relieved from the requirement to provide a further notice.

Use of system agreements

The proposal included a condition that if the distributor offers a retailer a new form of default use of system agreement under clause 4.8 of its distribution licence, a retailer must not unreasonably refuse to accept such an offer (clause 8.2 SELC).

Shell Energy raised concerns with the drafting of this clause, namely that it placed an obligation on a retailer not to unreasonably refuse to accept the distributor’s offer of a new form of default use of system agreement even if the retailer and distributor have previously negotiated a different form of use of system agreement.

While not raised by other stakeholders, on review of this clause it was also noted by the commission that references to particular clauses of the distribution licence should be removed on account of the Electricity Distribution Code of Practice and electricity distribution licences currently being the subject of review, and clauses in relation to use of system agreements likely to be varied.

It is proposed to address these matters by varying clause 8.2 so it does not apply where a retailer and a distributor have an existing use of system agreement with different terms and conditions to a default use of system agreement. The commission considers this necessary to preserve the existing entitlement of retailers and distributors to negotiate a use of system agreement with terms and conditions different to those included in a distributor’s default use of system agreement. Also, the definition of default use of system agreement has been amended to reflect that it may be approved by the commission pursuant to a clause in the distributor’s licence (as is currently the

⁵ Clause 9.5 of the SELC and the SGLC provides that “Notification pursuant to clause 9.4 is not required if the Customer has already entered into a new contract with the Licensee or has given instructions to the Licensee as to what actions the Customer intends to take at the end of the contract.”

case) or pursuant to a clause in the Electricity Distribution Code of Practice (which is the current proposal).

Training in Victorian specific requirements

In response to feedback, the commission proposed removing a clause requiring retailers to ensure 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). AGL and Alinta Energy had raised concerns in the first consultation, querying the necessity of this condition. The commission notes that consideration may be given, at an appropriate time, for the inclusion of additional obligations in the Energy Retail Code of Practice to ensure there are safeguards in place to ensure services are being delivered by staff with an appropriate awareness of the specific aspects of the Victorian regulatory framework.

The Victorian Council of Social Services submitted that, given the concerns that have been raised during the commission's payment difficulty framework implementation review about the inconsistent application of Victorian-specific consumer protections, it would have preferred the commission retain the specific training requirement as a licence condition. The commission notes this feedback and will consider, at a future time, whether additional requirements in the Energy Retail Code of Practice are required.

Customer dispute resolution

In the first round of consultation a clause requiring retailers to join the Energy and Water Ombudsman (Victoria) (EWOV) was removed, on the basis that the requirement was covered by a statutory provision. However, it is clear that section 28 of the Electricity Act and section 36 of the Gas Act contemplate the licence itself containing this requirement so this clause has been reinstated (under new clause 16 of the SELC and new clause 17 of the SGLC).

Template licences

Revocation

Following the first round of consultation, the commission revised its proposal in relation to revocation. In response to feedback, the commission revisited the underlying legislative framework for revocation and noted that while the legislation contemplates the licence setting out procedures for revocation, it does not contemplate a licence fettering the commission's discretion to consider a particular set of circumstances on its merits. The commission proposed a variation that is consistent with this legislative framework while providing procedural fairness to a retailer. The commission removed clauses which purported to fetter its discretion by identifying when the power to revoke a licence could be deployed. Instead the commission proposed a clause that simply provided for revocation in accordance with the Electricity Act or Gas Act.

A number of retailers did not consent to this proposal including EnergyAustralia Pty Ltd (EnergyAustralia), Momentum Energy Pty Ltd, Red and Lumo and Enel Energy Australia Pty Ltd (Enel Energy).

EnergyAustralia noted that for it and other retailers on an older version of licences the proposed clause was a significant change. EnergyAustralia noted that revocation is the most severe enforcement action that a regulator can take against a regulated entity and should be limited to circumstances that involve serious non-compliance. Momentum Energy also submitted that the licence should include a precondition to revocation that there has been material contravention of the licence. Red and Lumo and Enel Energy made similar submissions.

The Consumer Action Law Centre and Victorian Council of Social Services were supportive of the proposed change to the revocation clause.

The commission considers it necessary to make this variation to ensure the licence is consistent with the legislation. The Electricity Act and Gas Act provide 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 (section 21(r); section 29(3) Electricity Act; section 29(o) Gas Act, section 38(3) Gas 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.

The commission's Compliance and Enforcement Policy already identifies that, from an enforcement perspective, removal from the industry, through revocation, is the most serious form of enforcement action available. As such, 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. However, the commission welcomed feedback during the consultation on whether retailers would be assisted by the commission publishing guidance on the circumstances in which revocation may be exercised. There was feedback from several retailers that such guidance would be of assistance so the commission will proceed to develop guidance on this topic.

Notice by email

The proposal included a clause requiring a licensee to accept service by email address. Delta Electricity proposed the option of also giving notices under the licence to the commission by email. The commission has adopted this change in the template electricity and gas licences.

Commencement date

The commission proposed that variations would commence no earlier than 30 days following the commission's decision to vary the licences.

Alinta Energy, Shell Energy, the Origin Energy group and Red and Lumo all requested additional time to comply with the varied licence.

- Alinta Energy suggested that 90 days be allowed before the variations took effect to account for 'complex system, policy and process changes'
- Shell Energy requested it be allowed until 'mid 2023' to implement new notification requirements
- The Origin Energy group were not opposed to the new general licence conditions but requested that amendment with respect to clause 3.2 of WINConnect Pty Ltd's licence be stayed for twelve months, as a result of its acquisition.
- Red and Lumo requested 60 days before the variations took effect to allow for internal processes to reflect the new licence.

While the majority of retailers expressed no concerns with the variations coming into effect no earlier than 30 days, in light of the feedback received, the commission has decided that the variations will commence on 12 September 2022. However, as implementation will differ across retailers given differences in current licence conditions, for some retailers special conditions have been inserted to the effect that particular clauses will commence later, based on information provided by these retailers as to their particular circumstances.

Licences varied by this process

Electricity retail licences

1. 1st Energy Pty Ltd
2. Acacia Energy Pty Ltd
3. AGL Sales (Queensland) Pty Ltd
4. AGL Sales Pty Ltd
5. Alinta Energy Retail Sales Pty Ltd
6. Amber Electric Pty Ltd
7. Balance Commodities and Energy Pty Ltd
8. Blue NRG Pty Ltd
9. CleanTech Energy Pty Ltd t/a Delorean Energy Retail
10. Cogent Energy Pty Ltd
11. CovaU Pty Ltd
12. Diamond Energy Pty Ltd
13. Discover Energy Pty Ltd
14. Electricity in a Box Pty Ltd
15. Elysian Energy Pty Ltd
16. Enel Energy Australia Pty Ltd
17. EnergyAustralia Pty Ltd
18. EnergyAustralia Yallourn Pty Ltd
19. Energy Locals Pty Ltd
20. GEE Power & Gas Pty Ltd
21. Globird Energy Pty Ltd
22. Iberdrola Australia Holdings Pty Ltd
23. International Power (Retail) Pty Ltd
24. Lumo Energy Australia Pty Ltd
25. M2 Energy Pty Ltd
26. Maximum Energy Retail Pty Ltd
27. Momentum Energy Pty Ltd
28. MTA Energy Pty Ltd
29. Neighbourhood Energy Pty Ltd
30. Next Business Energy Pty Ltd
31. Online Power and Gas Pty Ltd t/a Future X Power
32. Onsite Energy Solutions Pty Ltd
33. Origin Energy Electricity Limited
34. Ovo Energy Pty Ltd
35. People Energy/Mojo Power East Pty Ltd
36. Power Club Limited
37. Powerdirect Pty Ltd
38. Powershop Australia Pty Ltd
39. Progressive Green Pty Ltd t/a Flow Power
40. QEnergy Ltd
41. Real Utilities Pty Ltd
42. ReAmped Energy Pty Ltd
43. Red Energy Pty Ltd
44. Shell Energy Retail Pty Ltd
45. Simply Energy (ABN 67 269 241 237), A partnership between IPower Pty Ltd (ACN 111 267 228) and IPower 2 Pty Ltd (ACN 070 374 293)

46. SmartestEnergy Australia Pty Ltd
47. Stanwell Corporation Ltd
48. Sumo Power Pty Ltd
49. Sun Retail Pty Ltd
50. Sunset Power International Pty Ltd t/a Delta Electricity
51. Tango Energy Pty Ltd
52. Telstra Energy (Retail) Pty Ltd
53. TotalEnergies Gas and Power Australia Pty Ltd
54. WINconnect Pty Ltd
55. ZEN Energy Retail Pty Ltd
56. Tilt Renewables Retail Pty Ltd
57. Hanwha Energy Retail Australia Pty Ltd

Gas retail licences

1. 1st Energy Pty Ltd
2. AGL Sales (Queensland) Pty Ltd
3. AGL Sales Pty Ltd
4. Agora Retail Pty Limited
5. Alinta Energy Retail Sales Pty Ltd
6. CleanTech Energy Pty Ltd t/a Delorean Energy Retail
7. CovaU Pty Ltd
8. Discover Energy Pty Ltd
9. Energy Locals Pty Ltd
10. EnergyAustralia Pty Ltd
11. GEE Power & Gas Pty Ltd
12. Globird Energy Pty Ltd
13. Lumo Energy Australia Pty Ltd
14. M2 Energy Pty Ltd
15. Momentum Energy Pty Ltd
16. Origin Energy (Vic) Pty Ltd
17. Origin Energy Retail Limited
18. Ovo Energy Pty Ltd
19. Powershop Australia Pty Ltd
20. Real Utilities Pty Ltd
21. ReAmped Energy Pty Ltd
22. Red Energy Pty Ltd
23. Shell Energy Retail Pty Ltd
24. Simply Energy (ABN 67 269 241 237), A partnership between IPower Pty Ltd (ACN 111 267 228) and IPower 2 Pty Ltd (ACN 070 374 293)
25. Sumo Gas Pty Ltd
26. Tango Energy Pty Ltd
27. Tas Gas Retail Pty Ltd
28. Telstra Energy (Retail) Pty Ltd