

# Making an Energy Retail Code of Practice

Final Decision

20 December 2021

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## Executive summary

As part of its Energy Fairness Plan commitments, the Victorian Government is reforming the enforcement framework under which the commission operates. To align with this new framework, our existing energy codes will transition to 'codes of practice'.

The new enforcement framework is being implemented via the Essential Services Commission (Compliance and Enforcement Powers) Amendment Act 2021 (Compliance and Enforcement Act)). The Compliance and Enforcement Act commenced on 1 December 2021. The commencement of this act resulted in our existing energy codes being deemed as 'codes of practice'. However, for the provisions of those instruments to be fully enforced through the new enforcement framework, we are undertaking a further step of reviewing each code.

We started by reviewing the Energy Retail Code. We consulted on the proposed Energy Retail Code of Practice in September 2021. This was to assist stakeholders to understand what the transitional process of making an existing code into a code of practice would look like, and how the new enforcement framework would be operationalised.

We are now making a final decision on the new Energy Retail Code of Practice. As noted in our previous consultation, the process of remaking the Energy Retail Code as a code of practice is primarily an administrative one. We are not altering in any substantive way the obligations that licensees and exempt persons are currently required to follow.

This decision is final, save that the draft Energy Retail Code of Practice at Annex A is subject to correction of drafting matters that may be raised through further consultation on the exposure draft at Annex A.

We received helpful feedback on our consultation from stakeholders, with submissions noting some areas where our proposed drafting might have unintentionally represented a change in policy intent. We have reviewed these areas and made some minor changes to the final Energy Retail Code of Practice to ensure that existing obligations are not substantively altered. We have also made some changes to correct minor typographical errors. Besides these changes, the final Energy Retail Code of Practice is largely the same as the draft code we consulted on.

With this final decision we are also confirming that we will make consequential amendments to other energy codes and guidelines that currently reference the Energy Retail Code, to reflect new clause numbering. These are largely unchanged from the amendments we consulted on, other than some changes to the guideline setting out greenhouse gas disclosure requirements. Those changes clarify that requirements for residential customers will not change from current requirements.

## Commencement

Several stakeholders expressed a preference for a further round of review, and for the Energy Retail Code of Practice to commence on 1 July 2022. However, we note that the new code of practice must be in effect in time for the commencement of the Energy Legislation Amendment (Energy Fairness) Act 2021 (Energy Fairness Act). We anticipate, on the advice from the Department of Environment Land, Water and Planning, this legislation commencing in part on 31 December 2021, namely those provisions prohibiting save and win-back offers and door-to-door sales and cold-calling. With the remainder of the legislation, including provisions relating to disconnections and life-support, anticipated to commence on 1 March 2022. We are therefore proceeding to a final decision now. The new Energy Retail Code of Practice will take effect on 1 March 2022.

However, in acknowledgement of the stakeholder feedback, we are providing a further opportunity to review the new Energy Retail Code of Practice before it commences. This is an opportunity for stakeholders to raise any drafting errors or concerns that they identify in this period. We will not be considering any feedback for significant policy or other changes at this time. As will be apparent from the timing of this review, and our intention to publish the final version of the Energy Retail Code of Practice by the end of January, the scope of this review is targeted at ensuring the drafting is accurate.

If you wish to provide comments to this effect, based on the exposure draft Energy Retail Code of Practice included at Annex A of this decision, you can do so until **17 January 2022**, by emailing any feedback to [energyreform@esc.vic.gov.au](mailto:energyreform@esc.vic.gov.au). We will publish a final version of the Energy Retail Code of Practice by the end of January, ahead of commencement on 1 March 2022.

The commission also consulted in September on changes to reporting obligations contained in the Compliance and Performance Reporting Guideline. A final decision will be made on this reporting guideline in February, before the Energy Retail Code of Practice takes effect. As foreshadowed in the draft decision, there are planned to be transitional reporting requirements in place ahead of the new reporting guideline commencing on 1 July 2021.

## Consultation on our decision

In developing this final decision, we consulted with stakeholders through a consultation, released on 13 September 2021. We received ten written submissions to our consultation – eight from energy retailers, one from an industry body and one confidential submission.

During the consultation period we held a stakeholder information session to explain how we will approach the proposed changes to our energy enforcement function. We would like to thank stakeholders for their involvement and contributions to the process.

# 1. Introduction

## **The government is strengthening the commission's enforcement powers**

In November 2018, the Victorian Government announced its Energy Fairness Plan, aimed at reducing energy costs for families and increasing transparency and competition in the market. As part of the Energy Fairness Plan, the government also committed to strengthening the commission's enforcement powers. This included giving the commission clearer investigatory powers, and overhauling fines and penalties that could be faced by energy companies.<sup>1</sup>

Government commitments in the Energy Fairness Plan are being implemented through:

- the Energy Fairness Act (passed through parliament on 3 August 2021), which prohibits certain marketing practices and creates offences relating to wrongful disconnections and providing false or misleading information to the commission
- the Compliance and Enforcement Act (which commenced on 1 December 2021), which reforms the enforcement framework under which the commission operates.

The Energy Fairness Act commences on 1 May 2022, unless proclaimed earlier. Parts of the Energy Fairness Act will commence on 1 March 2022, with the Department of Environment, Land, Water and Planning that the Energy Fairness Act advising us that the rest is anticipated to commence by 1 March 2022.

As part of these reforms, our existing energy codes will transition to be made as 'codes of practice' under the Essential Services Commission Act 2001 (ESC Act). This means the codes will become subordinate instruments, rather than being conditions of a licence or conditions of an exemption.

This transition is occurring in two phases:

1. Once the Compliance and Enforcement Act commences, our codes will be deemed to be codes of practice from that date.<sup>2</sup>
2. We will then re-examine each deemed instrument and identify provisions to be specified as civil penalty requirements, to enable enforcement of the obligations through the new framework as

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<sup>1</sup> Victorian Labor Party, [Cracking down on dodgy energy retailers – Labor's energy fairness plan](#), November 2018.

<sup>2</sup> These codes are the Code of Conduct for Marketing Retail Energy, Electricity Customer Metering Code, Electricity Customer Transfer Code, Electricity Distribution Code, Electricity System Code, Energy Retail Code, Gas Distribution System Code and Public Lighting Code.

set out in the Compliance and Enforcement Act. The first code we have examined in this way is the Energy Retail Code.

## **Our approach to remaking energy codes as codes of practice**

We will be remaking our gas and electricity codes as codes of practice over the next few years. We are commencing that process with the remaking of the Energy Retail Code.

As we set out in our September 2021 consultation paper, the process of remaking the Energy Retail Code as a code of practice is primarily an administrative one. We do not intend to revisit any policy intent or otherwise alter in any substantive way the obligations that licensees and exempt persons are currently required to follow. Instead, we are streamlining obligations where there is duplication between instruments, updating any outdated references (such as to bodies or instruments that no longer exist), and otherwise tidying up instruments to make them easier to navigate and understand.

Following the making of the Energy Retail Code of Practice, we will commence the process of reviewing and consulting on remaking other codes, starting with the Electricity Distribution Code. Our intention is for the other reviews to also be primarily administrative processes, but as some of our other codes have not been reviewed for a number of years, a different approach may need to be taken to the remaking of those instruments. In any case, we will engage widely with stakeholders when proposing and making these changes.

After an initial transition period during which we will remake our codes to reflect their status as codes of practice made under the ESC Act,<sup>3</sup> it is proposed these instruments will be subject to the requirements of the Subordinate Legislation Act 1994 for the making and scrutiny of legislative instruments.

## **This final decision**

In reaching this final decision, we have engaged with stakeholders to explain the context for these changes and understand whether there would be any implementation issues or unintended consequences.

On 13 September 2021 we released a consultation paper on the Energy Retail Code of Practice. We published a draft Energy Retail Code of Practice along with this consultation.

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<sup>3</sup> This transition period will end on 31 December 2025.

We held a stakeholder information session on 5 October 2021, attended by over one hundred energy industry and community stakeholders. At this session, our Chairperson and Commissioner Bhojani both explained how we intended to approach the proposed changes to our energy enforcement function more broadly. Staff also discussed our proposed Energy Retail Code of Practice changes in more detail and answered stakeholder questions.

Submissions to the consultation closed on 25 October 2021. We received ten written submissions—eight from energy retailers, one from an industry body and one confidential submission. Their submissions (other than the confidential one) are available on our website.

We would like to thank stakeholders for their involvement and contributions to the process.

### Structure of this document

Chapter 2 of this decision summarises our proposal for the new Energy Retail Code of Practice, what we heard from stakeholders, and how we have taken this on board in making our final decision. Chapters 3 and 4 do the same for our marketing code and implementation proposals. Chapter 5 sets out next steps.

Accompanying this decision are annexes containing the following:

- **Annex A** is the exposure draft Energy Retail Code of Practice.
- **Annex B** is a table identifying how provisions of the final Energy Retail Code of Practice match up against existing provisions of the Energy Retail Code, with a brief summary of the amendments.
- **Annex C** summarises the consequential amendments we are making to other codes and guidelines to update references to the Energy Retail Code. We will publish the full, updated versions of these codes and guidelines on or shortly after the day the Energy Retail Code of Practice takes effect.
- **Annex D** is an updated version of current guideline 13, on greenhouse gas disclosure on electricity customer bills.
- **Annexes E and F** set out consequential amendments we are making to the Electricity Distribution Code of Practice and Gas Distribution System Code of Practice respectively, to reflect Energy Fairness Act changes to life support provisions.



## 2. The new Energy Retail Code of Practice

### Consultation proposal

We proposed a draft Energy Retail Code of Practice that was largely the same as the existing Energy Retail Code, but with a few key differences:

- We restructured the code to follow the customer journey more closely and included a ‘simplified outline’ at the start of each Part to summarise the contents of that Part for ease of navigation.
- We excluded certain existing provisions relating to life support and disconnections from the draft Energy Retail Code of Practice, to avoid duplicating similar provisions that are being added to the Electricity Industry Act 2000 and Gas Industry Act 2001 by the Energy Fairness Act.<sup>4</sup>
- We specified most provisions in the draft Energy Retail Code of Practice as being ‘civil penalty requirements’ for the purpose of the Essential Services Commission Act 2001. This would mean contraventions of those provisions could be enforced through the new enforcement framework.<sup>5</sup>

We also proposed minor changes to streamline the Energy Retail Code of Practice, including:

- merging existing requirements relating to greenhouse gas disclosure on electricity bills for small and large customers into a single guideline
- transferring existing obligations in the ‘supporting Utility Relief Grant applications’ guideline to the Energy Retail Code of Practice by including them as part of ‘tailored assistance’ obligations
- clarifying that existing obligations for retailers to publish details of their standing offers on their websites are satisfied by publishing energy fact sheets (generated by Victorian Energy Compare) on their websites
- changing some terminology to improve consistency of terms used throughout the instrument.

We also proposed two technical amendments to the model terms and conditions for standard retail contracts, and to remove references to the National Energy Retail Law and the Rules in the model terms and conditions for standard retail contracts.

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<sup>4</sup> Once the Energy Fairness Act commences, provisions that deal with steps a retailer must take when advised of a person needing life support equipment, and provisions relating to the basis on which a customer may be disconnected, will be contained in 5 Division 5C, Part 2 of the Electricity Industry Act 2000 and Division 4AA, Part 3 of the Gas Industry Act 2001.

<sup>5</sup> The new enforcement framework being implemented via the Compliance and Enforcement Act establishes the same toolkit that is commonly available to most modern regulators. It includes the potential for infringement notices, enforceable undertakings and civil litigation. Remedies available as part of civil litigation will include monetary penalties, as well as compliance orders, injunctions, enforceable undertakings, and adverse costs orders.

## Stakeholder feedback

### Overarching comments

Stakeholders made some general comments about our proposed approach to remaking the Energy Retail Code as a code of practice.

The Australian Energy Council, EnergyAustralia, Origin Energy, Powershop and Simply Energy generally supported our proposal to limit the review to administrative changes at this time, with the intent of streamlining existing obligations and removing duplication.<sup>6</sup> The Australian Energy Council noted that care should be taken to avoid any unintended consequences, as these could occur even from the minor changes being proposed.<sup>7</sup>

However, one retailer (AGL) did not support the review being limited to administrative changes.<sup>8</sup> AGL considered it would be appropriate for the commission to undertake a more comprehensive review, to modernise the Energy Retail Code (for example, to ensure that clauses allow for information to be provided digitally, in alignment with how consumers interact with their retailer) before it is made into a code of practice, so that the commission's new enforcement powers apply to a modernised code of practice.

Simply Energy and Tango Energy both considered that the current rules in the Energy Retail Code should be reviewed in more detail to ensure they are fit-for-purpose, given that higher penalties are being assigned to these obligations.<sup>9</sup>

Simply Energy noted that this could not occur for the initial Energy Retail Code of Practice but suggested that this review should occur before the end of the transition period.<sup>10</sup> It said that ideally the review should happen before the Department of Environment, Land, Water and Planning prescribes penalty units to obligations that differ from the default amounts. Tango Energy considered that a Regulatory Impact Statement should be conducted to examine whether the existing rules remain appropriate when moved to a code of practice.<sup>11</sup>

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<sup>6</sup> Australian Energy Council, EnergyAustralia, Origin Energy, Powershop and Simply Energy, Submissions to 'Making an Energy Retail Code of Practice' consultation, October 2021.

<sup>7</sup> Australian Energy Council, Submission to 'Making an Energy Retail Code of Practice' consultation, October 2021.

<sup>8</sup> AGL, Submission to 'Making an Energy Retail Code of Practice' consultation, October 2021.

<sup>9</sup> Simply Energy and Tango Energy, Submissions to 'Making an Energy Retail Code of Practice' consultation, October 2021.

<sup>10</sup> Simply Energy, Submission to 'Making an Energy Retail Code of Practice' consultation, October 2021.

<sup>11</sup> Tango Energy, Submission to 'Making an Energy Retail Code of Practice' consultation, October 2021.

## Specific suggestions

We also received specific suggestions relating to discrete policy areas, discussed in the following sections.

### Greenhouse gas disclosure requirements

AGL, the Australian Energy Council, Origin Energy, Powershop and Tango Energy all commented on our proposal to streamline greenhouse gas disclosure requirements.<sup>12</sup> We proposed to extend guideline 13 (that currently applies to ‘customers that are not small customers’) to all customers and remove equivalent requirements that applied to small customers in clause 25A of the Energy Retail Code.

However, stakeholders observed that this would be a change in policy intent, as clause 25A of the Energy Retail Code offers retailers the choice to include bill benchmarking information on electricity bills for small customers, instead of greenhouse gas disclosure information.<sup>13</sup> Stakeholders commented that this would be further than an administrative change and sought clarification as to the rationale for this change and further consultation on the costs and benefits.

### Life support obligations

EnergyAustralia, Red Energy and Lumo Energy, and Simply Energy raised concerns about the proposed amendment to the definition of ‘life support customer details’ in the Energy Retail Code of Practice.<sup>14</sup>

Current obligations<sup>15</sup> require retailers and exempt persons to register that a person residing or intending to reside at a supply address requires life support equipment, and the date from which the equipment is required.

The Energy Fairness Act introduced a definition of ‘life support customer details’ into the Electricity Industry Act and Gas Industry Act that included ‘personal details of each life support resident’. EnergyAustralia, Red Energy and Lumo Energy, and Simply Energy noted that retailers had previously raised concerns with the Department of Environment, Land, Water and Planning, that

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<sup>12</sup> AGL, Australian Energy Council, Origin Energy, Powershop and Tango Energy, Submissions to ‘Making an Energy Retail Code of Practice’ consultation, October 2021.

<sup>13</sup> Ibid.

<sup>14</sup> EnergyAustralia, Red Energy and Lumo Energy, and Simply Energy, Submissions to ‘Making an Energy Retail Code of Practice’ consultation, October 2021.

<sup>15</sup> Set out in clauses 125(1) and 132(1) of the Energy Retail Code, for retailers and exempt persons respectively.

this definition would require retailers to register additional personal details for life support customers than currently required.

EnergyAustralia, Red Energy and Lumo Energy, and Simply Energy noted that the Department of Environment, Land, Water and Planning has previously confirmed that the new definition was not intended to alter existing obligations. However, they were concerned that our proposal to align the Energy Retail Code of Practice definition of ‘life support customer details’ with the new definition in the Acts will cause future confusion about the information retailers are expected to include on the life support register. They requested the commission to consider how to clarify this issue, and provided suggestions for how this could be achieved.

Shell Energy also commented on proposed life support provisions in the Energy Retail Code of Practice.<sup>16</sup> It considered that the requirements for exempt sellers to provide information to parent retailers about life support customers goes beyond the information that is truly necessary. It suggested that while parent retailers do need to be informed of the presence of life support customers at a site, there is no reason for parent retailers to need additional sensitive information such as medical confirmation forms, when the parent retailer has no direct relationship with the life support customer.

#### **Application of the code of practice to multi-site customers**

Shell Energy acknowledged that the review is intended to be administrative only but considered this would be a good opportunity to clarify obligations on multi-site customers.<sup>17</sup> It noted that multi-site customers are not mass-market customers, and so it may not be appropriate for all Energy Retail Code of Practice obligations – many of which are aimed at mass-market customers – to apply to multi-site customers. It proposed that we add a clause to expressly exclude Parts 2 to 6 of the code of practice from applying to aggregated business customers.

#### **‘Intention to disconnect’ notices**

EnergyAustralia noted that the proposed new requirements for an ‘intention to disconnect’ notice exceed current Energy Retail Code requirements.<sup>18</sup> The proposed code of practice drafting includes a requirement for the notice to state the date on which the intention to disconnect period ends. EnergyAustralia suggested that this is not an existing requirement and would involve

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<sup>16</sup> Shell Energy, Submission to ‘Making an Energy Retail Code of Practice’ consultation, October 2021.

<sup>17</sup> Ibid.

<sup>18</sup> EnergyAustralia, Submission to ‘Making an Energy Retail Code of Practice’ consultation, October 2021.

changes to customer communications and internal processes, therefore representing more than an administrative change.

### Other drafting suggestions

Red Energy and Lumo Energy commented on several drafting aspects of the Energy Retail Code of Practice.<sup>19</sup> They recommended we:

- review the use of ‘customer’ and ‘small customer’ throughout the code of practice, to ensure the terms are used correctly in each instance and existing policy intent is not changed
- ensure there are no unintended consequences to other regulatory instruments by removing the terms ‘de-energise’ and ‘re-energise’ and just using ‘disconnect’ and ‘reconnect’. They noted these terms are not interchangeable in practice, and are used in instruments administered by other organisations
- clarify that the ‘simplified outlines’ at the start of each Part are not part of the Energy Retail Code of Practice, and do not affect its interpretation.

EnergyAustralia, Red Energy and Lumo Energy, and Simply Energy raised some other minor drafting comments and suggestions.<sup>20</sup> These were generally to correct typographical errors and cross-references and ensure consistency throughout the Energy Retail Code of Practice.

### Our final decision

The draft exposure Energy Retail Code of Practice (available at Annex A) is largely the same as the draft version we consulted on. We have made some minor changes to address stakeholder feedback and correct typographical errors, as discussed below.

We have continued to limit the scope of any changes to an administrative review. We consider this level of review is most appropriate to ensure the new code of practice can take effect in a timely way. This is important given that the new enforcement framework and Energy Fairness Act will both come into effect on 1 May 2022 latest, and both require the Energy Retail Code of Practice to be in effect at this time.<sup>21</sup>

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<sup>19</sup> Red Energy and Lumo Energy, Submission to ‘Making an Energy Retail Code of Practice’ consultation, October 2021.

<sup>20</sup> EnergyAustralia, Red Energy and Lumo Energy, and Simply Energy, Submissions to ‘Making an Energy Retail Code of Practice’ consultation, October 2021.

<sup>21</sup> For the new enforcement framework to take effect, provisions of the Energy Retail Code of Practice must be specified as civil penalty requirements. The Energy Fairness Act specifies that certain matters relating to life support and disconnections will be addressed in an ‘applicable code’, which is the Energy Retail Code of Practice.

We acknowledge that the Energy Retail Code of Practice will need to respond to changes in the energy landscape. We will review it from time to time as needed, to respond to any emerging issues.

Below we discuss how we have responded to specific stakeholder suggestions.

### **Greenhouse gas disclosure requirements**

We have reviewed the changes we proposed to guideline 13 in the light of stakeholder feedback received. We did not intend to alter existing retailer obligations and acknowledge that the edits proposed to guideline 13 did not clearly convey this intent. We have therefore made further changes to this guideline (see Annex D) to clarify that a retailer can just provide bill benchmarking information on a residential customer's bill, but if it chooses to include information about greenhouse gas emissions on a residential customer's bill, it must comply with the guideline.

### **Life support obligations**

As most of the life support framework is now set out in legislation, the Energy Retail Code of Practice does not mandate what information must be kept in the life support register. The role of the code of practice in relation to life support is primarily to supplement the framework in the legislation, by specifying applicable standards and requirements that retailers and exempt electricity sellers must observe.

However, we acknowledge industry's call for clarification on the information that must be kept on the register. We will consider publishing guidance on the information that must be kept in the register of life support customers and residents.

On Shell Energy's point about reducing the information requirements for exempt sellers to provide parent retailers, we reiterate that this is an administrative review only. We are not changing the underlying policy intent, including amending the substantive obligations of the life support framework.

### **Application of the code of practice to multi-site customers**

The Energy Retail Code of Practice interacts with the Electricity Industry Act 2000 and the Gas Industry Act 2001. The customers to which an obligation in the Energy Retail Code of Practice extends depends on the definition of 'small customer' or 'relevant customer', these terms are defined by reference to orders made under the legislation or in the legislation itself.

We consider it would be preferable to address the matter of relevant protections for multi-site customers in a holistic way. We will engage with the Department of Environment Land, Water and Planning on whether it would be appropriate to revise Orders in Council that currently apply

legislative protections to multi-site small business customers. We could consider any consequential amendments required to the Energy Retail Code of Practice as part of a coordinated approach.

### **‘Intention to disconnect’ notices**

We do not agree with EnergyAustralia’s assessment that the requirement for ‘intention to disconnect’ notices to state the date on which the intention to disconnect period ends is a new obligation on retailers. While the terminology is new, the Energy Retail Code already requires this information to be provided to customers.

The current Energy Retail Code defines a ‘reminder notice’, that a retailer would send to remind a customer that payment of a bill is required. It doesn’t explicitly define what is now being called an ‘intention to disconnect notice’, but the requirement to provide one is implicit in provisions relating to disconnecting customers for:

- not paying a security deposit or refusing to provide acceptable identification (clause 112 of the Energy Retail Code)
- denying access to a meter (clause 113)
- non-notification by move-in or carry-over customers (clause 115).

Each of the aforementioned clauses require a retailer to provide a disconnection warning notice ‘after the expiry of the period referred to in the notice of its intention’.<sup>22</sup> The ‘notice of its intention’ is what is now being referred to as an ‘intention to disconnect notice’, and the ‘period referred to in the notice’ is what is now being referred to as the ‘intention to disconnect period’.

Given this is an existing obligation, and we have only made terminology changes to align with the Energy Fairness Act, we have not made any changes to our proposed code of practice drafting.

### **Licensed retailers who sell to customers in embedded networks**

In response to feedback from Red Energy and Lumo Energy to review the use of ‘customer’ throughout the code, we have made some changes to ensure that customers in embedded networks who are sold electricity by licensees receive comparable protections to other customers. This includes amending the definition of ‘small customer’ so that it encompasses a person within an embedded network who is sold electricity by a licensee or exempt seller.

We have inserted new clause 26A to clarify that the price at which a licensee selling to a customer within an embedded network must not exceed the maximum price formulated and published by the

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<sup>22</sup> These requirements can be found at clauses 112(1)(b), 112(2)(b), 113(1)(e) and 115(2)(b).

commission under clause 10(1) of the General Exemption Order 2017 (relevantly, for present purposes, the maximum price is set at the Victorian Default Offer).

We have also amended clause 28 to clarify the circumstances in which an exempt person cannot refuse to sell electricity to a person and inserted a comparable clause (28A) applying to licensees selling to customers within an embedded network.

### **Other drafting suggestions**

We note the minor typographical and formatting errors picked up by EnergyAustralia, Red Energy and Lumo Energy, and Simply Energy. We have corrected these in the final Energy Retail Code of Practice.

The draft Energy Retail Code of Practice often specified an obligation applied to a 'small customer' in the introductory paragraph, but then subsequently defaulted to 'customer'. We have reviewed these references to ensure clarity. However, we have not replaced all references to relevant customer with small customer, as was suggested by Red Energy and Lumo Energy, as the two terms are not always interchangeable. For instance, the definition of relevant customer for the purpose of section 40SB of the Electricity Industry Act 2001 (as amended by the Energy Fairness Act) differs to the meaning of small customer as defined in an order under section 36(3) of the Electricity Industry Act 2001.

We note Red Energy and Lumo Energy's comments about potential unintended consequences of only using the term 'disconnect' rather than 'de-energise' as well (and likewise for 'reconnect' and 're-energise'). However, while we appreciate that these terms can refer to different actions in practice, they are currently used interchangeably in the Energy Retail Code and both are defined as actions to prevent the flow of energy to the premises. Given this, we continue to consider the move to a using a single consistent term makes the code requirements easier to understand.



## 3. Consolidating marketing code provisions

### Consultation proposal

We mapped out provisions in the Code of Conduct for Marketing Retail Energy (marketing code) against equivalent requirements already in the Energy Retail Code or other instruments such as the Australian Consumer Law.<sup>23</sup> Based on this assessment, we considered most provisions in the marketing code largely replicated obligations found elsewhere (primarily in the Energy Retail Code).

There were a small number of marketing code provisions that we did not think were adequately covered by other instruments. We therefore proposed to insert these existing obligations into the proposed Energy Retail Code of Practice – some in a slightly amended form to reflect the transition to a new instrument – and then repeal the marketing code.

The provisions we proposed to consolidate into the Energy Retail Code of Practice were retailer obligations relating to:

- training persons engaged in energy marketing activity
- providing certain information when undertaking personal and telephone contact in relation to marketing activity
- keeping certain records in relation to personal and telephone contact in relation to energy marketing activity
- providing information to a customer about whether a marketing associate will receive any commission or fee paid by a retailer by reason of the customer entering into the contract
- taking reasonable steps to ensure a retailer enters into a customer retail contract with persons who have the authority to enter into that contract.

### Stakeholder feedback

Only three stakeholders (Powershop, Red Energy and Lumo Energy, and Shell Energy) commented specifically on our marketing code proposals. Powershop and Shell Energy supported our proposal to repeal the marketing code.<sup>24</sup> However, Red Energy and Lumo Energy and Shell

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<sup>23</sup> For the detailed mapping, see annex C from our consultation paper, available on our [website](#).

<sup>24</sup> Powershop and Shell Energy, Submissions to 'Making an Energy Retail Code of Practice' consultation, October 2021.

Energy did not support our proposal to retain certain marketing code clauses in the Energy Retail Code of Practice, specifically provisions relating to training.<sup>25</sup>

Shell Energy was concerned that prescriptive marketing training requirements might capture staff or contractors that do not have a direct role in marketing activity.<sup>26</sup> It considered it would be more productive for the commission to focus on an organisation's compliance performance, rather than specifying training that must be delivered to achieve compliance.

Red Energy and Lumo Energy considered that translating training requirements from the marketing code to the Energy Retail Code of Practice is redundant, as retailers are already required to train staff in all obligations as a condition of their licence.<sup>27</sup> They also considered that proposed clause 31 (covering sales to authorised customers) is already covered by explicit informed consent requirements in the Energy Retail Code of Practice, and so this clause is also duplicative and not required.

## **Our final decision**

We have not made any changes to our marketing code proposals. The final Energy Retail Code of Practice still includes provisions from the marketing code that are not covered in other instruments. We have been clear that our proposals are not intended to represent a change in policy intent or reduce consumer protections in any way. Retailers are already required to comply with the provisions of the marketing code, so there should be no systems, process or training changes required in relation to these changes.

Our final decision is therefore to revoke the marketing code with effect from 1 March 2022, when the Energy Retail Code of Practice takes effect.

Regarding Shell Energy's views on the application of training requirements, we note that the definitions of who these requirements apply to are unchanged. Training should be provided to persons engaged in energy marketing activity – if a person is engaged only in the printing of material, and not the marketing, advertising or promotion of that material, then they would not be engaging in marketing activity and so not would not be captured by the training requirements.

On Red Energy and Lumo Energy's concerns about duplicative requirements, we note that currently most retail licences require a retailer to ensure all staff are provided with appropriate

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<sup>25</sup> Red Energy and Lumo Energy and Shell Energy, Submissions to 'Making an Energy Retail Code of Practice' consultation, October 2021.

<sup>26</sup> Shell Energy, Submission to 'Making an Energy Retail Code of Practice' consultation, October 2021.

<sup>27</sup> Red Energy and Lumo Energy, Submission to 'Making an Energy Retail Code of Practice' consultation, October 2021.

training in all Victorian specific obligations, including the conditions of the licence and the Energy Retail Code. This is a different obligation to those within the code pertaining to training, such as clause 53 that requires a retailer to provide training to any person engaged in energy marketing activity. The recipients of training mandated by each requirement are different. For example, clause 53 applies to persons engaged in energy marketing activity to small customers, whereas the licence condition mandates appropriate training for persons who may be involved in activities other than energy marketing to small customers. The content of the training mandated by these two provisions is also different. We have not made changes to our proposal.

On Red Energy and Lumo Energy's concerns about duplication between clause 7 and 31 of the Energy Retail Code, we are also not proposing to make changes. Clause 7 of the code requires a person to be competent to give consent to a transaction, whereas clause 31 requires a retailer to take reasonable steps to ensure the person with whom it enters a contract has the authority to do so for those premises.

## 4. Implementation considerations

### Consultation proposal

#### Consequential amendments

Several of our other instruments include cross-references to the Energy Retail Code or provide guidance on how we expect retailers to comply with provisions in the code. We proposed updates to these instruments to reflect the new clause numbering in the Energy Retail Code of Practice. Details of these updates were included in Annex D to the consultation.

These updates included amendments to the Electricity Distribution Code of Practice and Gas System Distribution Code of Practice, to:

- align the life support frameworks in both codes of practice with the new terminology proposed to be introduced in the Energy Retail Code of Practice
- amend some parts of the distribution codes of practice that are not consistent with their status as legislative instruments, such as removing interpretation clauses
- specify a limited number of civil penalty requirements in these codes of practice.

We sought stakeholder views on whether there are other instruments or references to the Energy Retail Code that we should update at this time.

#### Industry implementation

We also noted our expectation that the main implementation steps required following our proposed changes would be internal system changes for retailers, to reflect the new clause numbering of obligations in the Energy Retail Code of Practice. We noted that compliance breach reporting obligations would be impacted by the transition, and that we were consulting separately on proposed updates to the Compliance and Performance Reporting Guideline.<sup>28</sup>

### Stakeholder feedback

#### Consequential amendments

The only comments we received relating to the proposed consequential amendments focused on the guidance notes we have published relating to interpretation of parts of the Energy Retail Code.

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<sup>28</sup> Available on our webpage: <https://www.esc.vic.gov.au/electricity-and-gas/codes-guidelines-and-policies/compliance-and-performance-reporting-guideline/updates-compliance-performance-reporting-guideline>.

AGL, the Australian Energy Council and Powershop all sought clarification on the status of these guidance notes, and whether they would be reviewed for consistency with the new Energy Retail Code of Practice.<sup>29</sup>

### Industry implementation

Several stakeholders noted that retailers will need to update their compliance and reporting systems to reflect new clause numbering in the Energy Retail Code of Practice and requested sufficient time to be able to do this.<sup>30</sup> To this end, AGL, the Australian Energy Council, Origin, Powershop, Red Energy and Lumo Energy, Simply Energy and Tango Energy suggested that the new Energy Retail Code of Practice should commence on 1 July 2022.<sup>31</sup>

Stakeholders also expressed a preference for a further round of review to minimise the chances of any drafting errors in the final code of practice<sup>32</sup>, and suggested that we should consult on updating our guidance notes to better align with the Energy Fairness Plan changes.<sup>33</sup>

EnergyAustralia suggested that the scale of change and limited implementation timeframe increase the risk of unintended negative consequences.<sup>34</sup> It suggested this could be mitigated by establishing a grace period during which industry could identify and rectify any issues not identified during this consultation process, without risk of enforcement action, followed by a final review of the code of practice after this period.

## Our final decision

### Life support amendments to the distribution codes

The updates to the Electricity Distribution Code of Practice and Gas System Distribution Code of Practice, remain as set out in our draft decision, except that we have:

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<sup>29</sup> AGL, Australian Energy Council and Powershop, Submissions to 'Making an Energy Retail Code of Practice' consultation, October 2021.

<sup>30</sup> AGL, Australian Energy Council, Origin, Powershop, Red Energy and Lumo Energy, Simply Energy and Tango Energy, Submissions to 'Making an Energy Retail Code of Practice' consultation, October 2021.

<sup>31</sup> Ibid.

<sup>32</sup> Australian Energy Council, Origin, Powershop, Red Energy and Lumo Energy, and Tango Energy, Submissions to 'Making an Energy Retail Code of Practice' consultation, October 2021.

<sup>33</sup> Australian Energy Council, Origin, Powershop and Red Energy and Lumo Energy, Submissions to 'Making an Energy Retail Code of Practice' consultation, October 2021.

<sup>34</sup> EnergyAustralia, Submission to 'Making an Energy Retail Code of Practice' consultation, October 2021.

- inserted notes in the application clauses to clarify the sequence of these codes, namely that they amend those versions of the distribution codes as deemed to be codes of practice pursuant to section 76(1) of the ESC Act
- corrected some cross referencing errors and amended the definitions of ‘deregister’, ‘register of life support customers and residents’, and ‘registered life support customer’ (which incorrectly referred to terminology and clauses applicable to retailers not distributors)
- made some other minor changes, such as removing of transitional provisions that are no longer current.

### Consequential amendments

As set out in Annex D of our consultation, we intend to retain the guidance notes currently published on our website. We will add an update at the start of each guidance note to clearly identify that the guidance notes were originally drafted based on Energy Retail Code obligations and note where these obligations can now be found.

The guidance notes were drafted at a point in time, in response to specific issues identified, and so we do not consider it would be appropriate to completely redraft them. However, the rules that were in place at the time the notes were drafted are not substantively changing with the move to the Energy Retail Code of Practice, and so our expectations that retailers follow the interpretation set out in the guidance notes remain.

### Industry implementation

We acknowledge that retailers will need to update their compliance and reporting systems in the light of these changes. That is why we proposed a transition period for the new Compliance and Performance Reporting Guideline until 1 July 2022, so retailers would only have to provide limited reporting until that date, while they are updating their systems.

However, the new code of practice must be in effect in time for the Energy Fairness Act taking effect. We anticipate the Energy Fairness Act will have commenced, in its entirety, by 1 March 2022. We are therefore confirming our decision that the new Energy Retail Code of Practice will take effect early next year, from **1 March 2022**.

We understand that some stakeholders would like to be able to review the Energy Retail Code of Practice again, to ensure its accuracy before it comes into effect. We are therefore providing the opportunity for stakeholders who would like to, to conduct a further review – limited only to identifying any drafting concerns.

If you wish to provide comments to this effect, based on the exposure draft Energy Retail Code of Practice included at Annex A of this decision, you can do so until **17 January 2022**, by emailing

any feedback to [energyreform@esc.vic.gov.au](mailto:energyreform@esc.vic.gov.au). We will publish a final version of the Energy Retail Code of Practice by the end of January, ahead of commencement on 1 March 2022.

## 5. Next steps

### Further view of exposure draft of the code of practice

You are being given a further opportunity to review the Energy Retail Code of Practice and raise any drafting corrections you consider are required. To be clear the commission will not be undertaking a further review of substantive policy matters at this time – this is an opportunity to raise concerns with respect to drafting corrections only.

If you would like to notify the commission of any drafting corrections you consider are required to following review of the exposure draft Energy Retail Code of Practice included at Annex A of this decision, you can do so until **17 January 2022**, by emailing any feedback to [energyreform@esc.vic.gov.au](mailto:energyreform@esc.vic.gov.au).

We will publish a final version of the Energy Retail Code of Practice by the end of January.

### Commencement of new requirements

The new Energy Retail Code of Practice will take effect on **1 March 2022**. On or shortly after this date, we will publish updated versions of the Electricity Distribution Code of Practice, the Gas Distribution System Code of Practice, and consequential changes to other instruments including guidelines and guidance notes on our website as outlined in Annexes D to G.

We anticipate the provisions of the Energy Fairness Act replacing the disconnection and life support framework in the Energy Retail Code will be proclaimed on or about this date and the coinciding of that step with the commencement of the Energy Retail Code of Practice will help ensure a smooth transition to the new legislative framework.

Our final decision on the update to the Compliance and Performance Reporting Guideline is expected in February 2022. It will provide for transitional reporting requirements in the period between commencement of the Energy Retail Code of Practice and commencement of the updated reporting guideline on 1 July 2022.

With effect from 1 March 2022, the Energy Retail Code (version 21) and the Code of Conduct for Marketing Retail Energy are revoked.

### Remaking other codes as codes of practice

We will be reviewing our remaining energy codes over the next four years, to remake them as codes of practice. These codes are the Electricity Customer Metering Code, Electricity Customer



Transfer Code, Electricity Distribution Code, Electricity System Code, Gas Distribution System Code and Public Lighting Code.

The next code we intend to review will be the Electricity Distribution Code. Given we have recently completed in-depth reviews of the technical and customer service standards in this code, we intend this review to also be primarily administrative. We intend to start consulting in early 2022 and will publish more information on our website in due course.

# Annexes

Accompanying this consultation are several annexes containing our detailed final changes.

Annex	Contents
A	Energy Retail Code of Practice. – Exposure draft
B	Table identifying how provisions of the final Energy Retail Code of Practice match up against existing provisions of the Energy Retail Code, with a brief summary of the amendments.
C	Summary of the consequential amendments we will make to other codes and guidelines to update existing references to the Energy Retail Code.
D	Guideline: Greenhouse gas disclosure on electricity customer bills. (This is an updated version of current guideline 13.)
E	Amendments to the Electricity Distribution Code of Practice.
F	Amendments to the Gas Distribution System Code of Practice.