

INTERIM COMPLIANCE AND PERFORMANCE REPORTING GUIDELINE FOR ENERGY RETAIL LICENCE HOLDERS

Final Decision

June 2016

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1 INTRODUCTION

The Essential Services Commission is the independent regulator of energy businesses in Victoria. The Commission licenses businesses that generate, distribute, supply and sell energy, and establishes codes and guidelines that set standards of conduct for these businesses.

1.1 PURPOSE OF THIS PAPER

The purpose of this paper is to set out for energy licensees and other stakeholders our Final Decision on changes to energy retailer compliance and performance reporting obligations. This Final Decision outlines our response to the key issues raised by stakeholders in submissions to our Draft Decision and Draft Interim Guideline released in May 2016.

The final *Interim Compliance and Performance Reporting Guideline* (the Final Guideline), accompanies this paper and will apply from 1 July 2016. This Guideline replaces the *Compliance Reporting Manual (Energy Retail Businesses)*, October 2014 and the *Energy Retail Performance Indicators*, June 2013. The Final Guideline is an interim measure, pending an update of compliance and performance reporting obligations in 2017-18.

A comprehensive review of retailer reporting obligations will be initiated following the review of the Australian Consumer Law and our review of the Marketing Code of Conduct .. Details of the next steps are in Chapter 5.

1.2 BACKGROUND TO THE CHANGES

We have decided that it is necessary to make changes to energy retailers' compliance and performance reporting obligations for four key reasons;

- to comply with new statutory monitoring and reporting requirements that came into effect on 1 January 2016;
- to consolidate and streamline existing compliance and performance reporting guidelines;
- to assist in the transition to the new framework for assisting customers experiencing payment difficulty due to come into effect on 1 July 2017;
- to enable the Commission to better monitor changes in the Victorian energy retail market.

In accordance with our obligations under the Energy Industry Acts¹ we have issued a new guideline, the *Interim Compliance and Performance Reporting Guideline for Energy Retail Licence Holders* (Final Guideline) which combines elements of two existing instruments for reporting on compliance and performance, removed some redundant and duplicative items, and added new obligations that we consider necessary to enable us to meet our compliance and enforcement reporting functions.

1.3 CONSULTATION

We published a Draft Decision and Draft Guideline for consultation on 6 May 2016. A workshop was held on 31 May 2016 to provide stakeholders with an opportunity to clarify aspects of our Draft Decision and raise issues for discussion.

Submissions to the Draft Decision closed on 3 June 2016. Nine submissions were received. All submissions were published on the ESC website.

¹ *Electricity Industry Act (2000) s23A(4), Gas Industry Act (2001) s 33(4)*

TABLE 1.1 ATTENDEES AT STAKEHOLDER WORKSHOP
31 May 2016

AGL	People Energy
Alinta Energy	Powershop
Blue NRG	Simply Energy
Community Information & Support Victoria	WINenergy
Click Energy	Energy Australia
ERM Power	Momentum Energy
Energy and Water Ombudsman (Victoria)	Online Power and Gas
Lumo Energy /Red Energy	Origin Energy
M2 Energy	Pacific Hydro Retail

TABLE 1.2 SUBMISSIONS MADE TO DRAFT DECISION AND GUIDELINE

Alinta Energy	Lumo Energy /Red Energy
Powershop	Australian Energy Council
Origin Energy	M2 Energy
Energy Australia	Simply Energy
ERM Business Energy	

1.4 STRUCTURE OF PAPER

Chapter 2 sets out the Commission’s responses to the key issues raised by stakeholders in response to the Draft Decision and Draft Guideline.

Chapter 3 lists the details of the amendments made to the compliance reporting obligations between the Draft Guideline and Final Guideline.

Chapter 4 lists the details of the amendments made to the performance reporting obligations between the Draft Guideline and Final Guideline.

Chapter 5 explains the Commission’s next steps in regard to retailer reporting obligations.

This paper should be read in conjunction with the Final Guideline.

2 KEY ISSUES

The Commission received nine submissions to the Draft Guideline (see table 1.2). Six key issues were raised. Our responses to these issues are outlined below.

Administrative and process matters raised by stakeholders are addressed in chapters 3 and 4, which detail all the amendments made to the Draft Guideline.

2.1 RELEVANCE OF MARKETING CODE OF CONDUCT

Retailers submitted that breaches of the Marketing Code of Conduct (MCC) should not be returned to the compliance reporting framework. Retailers stated that;

- the Commission signalled its intention to repeal the MCC in 2014,
- many of its provisions are duplicated elsewhere in the consumer protection framework, and
- the MCC is out of date.

INTENTION TO REPEAL

The obligations to report breaches of the MCC were removed from the *Compliance Reporting Manual* in October 2014, in anticipation of the imminent transfer of Victorian retail regulation to the National Energy Customer Framework (NECF). The transfer had not occurred when legislation was passed in September 2015, which introduced a new objective for the Commission to promote protections for consumers¹ and added monitoring and reporting on compliance to the ESC's functions.²

¹ *Electricity Industry Act (2000) s10(c), Gas Industry Act (2001) s18(c)*

² *Essential Services Commission Act (2001) s10AA*

The Commission undertook comprehensive regulatory audits in 2015-16. The audit results³ show that monitoring marketing practices remains important to allow us to meet our objectives.

DUPLICATION

The harmonised Energy Retail Code (ERC) which was released in January 2015 includes marketing provisions from the National Electricity Retail Law (NERL). We agree that this duplicates some of the obligations that are contained in the MCC, but also note that there are important consumer protections in the MCC that are not in the ERC. Examples include; rules regarding sales to minors, and training requirements for marketing representatives.

MCC IS OUT OF DATE

The Commission accepts that the MCC requires updating. It was last reviewed in 2009. We also note the current review of the Australian Consumer Law (ACL), the outcomes of which may affect the need for industry specific regulation.

OUR RESPONSE

We consider that the MCC continues to provide important protections to Victorian consumers. We have therefore decided that breaches of the MCC will remain in the Final Guideline.

However, to avoid duplication of obligations, the Final Guideline has been amended to ensure that where the MCC and the ERC overlap, retailers are not required to report the same matter as a breach of both the ERC and the MCC. Details of these amendments are in Chapter 3.

We plan to review the MCC in light of the outcomes of the current review of the ACL. Details of the Commission's next steps are in Chapter 5.

³ Summaries of the audit results are published on the ESC website <http://www.esc.vic.gov.au/energy/compliance/monitoring/reporting/audit-reports/>

2.2 REPORTING ON BREACHES OF OTHER REGULATIONS

Submissions questioned the requirement to report breaches of other regulations that we do not administer. For example Red and Lumo Energy stated in their submission;

“We strongly believe that placing a reportable requirement on an Act unrelated to the functions of the Commission under section 10 of the Essential Services Commission Act (2001) is inappropriate.”

The inclusion of breaches of the MCC that relate to privacy obligations and misleading and deceptive conduct were cited as instances where the ESC does not have jurisdiction to determine whether a breach has occurred, and are therefore inappropriate for inclusion in the compliance reporting framework. Similarly, the obligation to report breaches of ‘all applicable laws’ was considered too broad an obligation.

OUR RESPONSE

We agree that requiring retailers to report on matters unrelated to our functions would not be appropriate.

However, we consider reporting of breaches of other regulations related to the sale and supply of energy is related to our functions, where these regulations affect Victorian consumers directly. We consider it particularly important that Victorian consumers have a complete and coherent picture of the conduct of participants in the energy market.

We also note that there would be limited additional burden for retailers to advise the ESC of breaches of such regulations where they are already obliged to report them to other regulators (such as the Privacy Commissioner and the ACCC).

Our Final Guideline therefore includes the obligation for retailers to supply details of privacy and market conduct breaches to the Commission whenever the relevant regulator finds them to have occurred.

2.3 ALIGNMENT WITH THE AUSTRALIAN ENERGY REGULATOR

Retailers requested that, reporting obligations are aligned with the Australian Energy Regulator (AER) wherever possible.⁴

OUR RESPONSE

We are required under the *Essential Services Commission Act (2001)* (ESC Act) to have regard to consistency in regulation between States.⁵ Where possible we have aligned the reporting requirements in the Final Guideline with the AER's compliance and performance reporting instruments. The Final Guideline therefore contains a number of timing changes to align with AER instruments.

However, there are statutory reporting obligations on retailers in Victoria that are not present in other jurisdictions. We have therefore retained differences in reporting obligations where we consider them necessary to fulfil our statutory functions, including in particular our reporting requirements.

2.4 REPORTING ON PAYMENT DIFFICULTIES

We introduced several new performance indicators in the Draft Guideline to support the transition to a new framework for assisting customers experiencing payment difficulties.

Several retailers noted that some of the definitions in the Draft Guideline were inconsistent with draft materials on the new payment difficulties framework circulated for informal consultation. Retailers provided examples in their submissions of how definitions could be amended to provide results that are more meaningful in capturing customers experiencing payment difficulty.

⁴ See for example submissions from Powershop, M2, Red/Lumo Energy, Simply Energy and Origin Energy.

⁵ Essential Services Commission (2001), s. 8A(1)(f)

OUR RESPONSE

We have made amendments to the definitions of the new indicators that relate to payment difficulty, in particular the definition of 'Energy Debt', to ensure that they are consistent with the new payment difficulties framework.

2.5 REPORTING ON NOTICES ISSUED

In the Draft Guideline we introduced new indicators, which would require retailers to report on the number of bills, reminder notices and disconnection notices issued each month. Retailers questioned the relevance of providing this information and the usefulness in reporting it publicly. The Australian Energy Council contends

“that there is no clear rationale as to how reporting the number of bills, reminder notices and disconnection notices issued each month meet [the Commission’s] objective”.

OUR RESPONSE

Reporting by retailers on the number of bills, reminder notices and disconnection notices issued would provide us with data on the actual conduct of the industry in response to its regulatory obligations.

However, in light of the fact that we intend to undertake a comprehensive review of reporting obligations, we have decided to remove these requirements from the Final Guideline at this stage.

2.6 COMMENCEMENT DATE AND SYSTEM CHANGES

Retailers commented that our expectation that retailers commence reporting against the Guideline commencing on 1 July 2016 leaves very little time for implementation and system changes. Energy Australia noted in its submission that;

“it will...be Incredibly difficult for us to be able to build, deploy and test these reports between late June and late October 2016”.

ERM Business Energy stated that

“better results would be achieved by taking time to properly consult on and develop appropriate compliance and performance indicators instead of rushing to develop a temporary solution”.

Origin Energy suggests that the Commission make

“only the minimum change necessary to deliver on its objectives”.

OUR RESPONSE

The Final Guideline includes what we consider the minimum changes necessary to enable us to meet our statutory objectives and obligations.

We understand that there is time, effort and cost related to making changes to reporting systems for an interim measure. We also understand retailers’ systems vary greatly in their capacity to accommodate changes to reporting obligations.

In light of these concerns, we agree that while the Interim Guideline will become effective from 1 July 2016, the obligation to report on some of the new measures, particularly those relating to payment plans, will commence on 1 January 2017.

The Guideline will be updated in 2017 to incorporate the finalised elements of the new payments difficulties framework (including the removal of the requirement to report on hardship programs) before a more comprehensive review of reporting obligations. Details of these next steps are in Chapter 5.

2.7 PENALTY REGULATIONS

On 24 May 2016, the Government prescribed the list of breaches that may be considered for Energy Industry Penalty Notices (EIPNs) under the Commission's new enforcement powers.⁶

On the basis that these matters have been specified as a contravention in regulations, we consider a breach of any of these obligations to be a material breach.

Where these breaches were not already included in the draft guideline as Type 1, the Commission has classified them as such. The comprehensive review of reporting obligations will consider the most appropriate way to align compliance breach reporting with our new enforcement function. Details of the next steps are in Chapter 5.

2.8 OTHER ISSUES

We have also addressed a number of process issues and administrative matters identified in submissions in the Final Guideline. All changes made to the Draft Guideline are set out in the tables in Chapters 3 and 4.

⁶ Essential Services Commission (Energy Industry Penalty Regime) Regulations 2016, S.R. No. 48/2016

3 CHANGES TO COMPLIANCE REPORTING OBLIGATIONS

The following table lists the changes made to the Draft Guideline as a result of the Final Decision. The references in the left most column refer to the issues in Chapter 2. The RB reference codes refer to the obligation in the Final Guideline.

Reference		Final Decision
2.1 Relevance of Marketing Code of Conduct		
RB1201	Record of Explicit Informed Consent	Reporting obligation under MCC replaced with equivalent obligation in ERC.
RB1202	No contact lists	
RB1203	Interpreter services	
RB1204	Explicit informed Consent	
RB0110	Information and conduct	Obligations have been amended to remove duplication with Energy Retail Code.
RB0111	Authorised Person	
RB0112	Privacy	
RB0740	Record keeping	Reporting obligation under MCC replaced with equivalent obligation in ERC.
RB0750	Information provision	
RB0310	Dispute resolution	
2.3 Alignment with the Australian Energy Regulator (AER)		
1.5	Reporting of Type 2 and 3 breaches on a quarterly basis	Type 2 breaches will be reported every 6 months. Type 3 breaches will be reported annually.
	Reporting dates for submissions	Submission dates will be aligned with the AER. The annual/June quarter submission date has been moved from 31 July to 31 August. A quarterly summary of Type 1 breaches has been added to the Final Guideline.

Reference		Final Decision
2.7	Penalty Regulations	
RB0053 RB0054 RB0055 RB0056 RB0057	Provision of tariff information to the internet site nominated by the Minister	Five new deemed licence conditions relating to the provision of tariff information and terms and conditions to the internet site nominated by the Minister have been added as Type 1 breaches, reflecting their inclusion in the Energy Penalty Regulations.
RB0330 RB0355 RB0331	Undercharging and overcharging Frequency of bills Content of bills (pay-by date)	These breaches were changed from Type 2 to Type 1 reflecting their inclusion in the Energy Penalty Regulations.
2.8	Other Issues	
RB0180	Notice of variation to tariffs	The description has been updated to remove reference to an out-dated requirement to advise smart meter customers of changes to tariffs within 20 days.
RB0360	Pay by Date and payment methods	Description updated to more accurately reflect the underlying obligations.

4 CHANGES TO PERFORMANCE INDICATORS

The following table lists the changes made to the performance indicators in the Draft Guideline as a result of the Final Decision. The references in the left most column refer to the issues in Chapter 2. The second column refers to the obligation in the Final Guideline.

Reference	Draft Guideline	Final Decision
2.3 Alignment with the Australian Energy Regulator (AER)		
3.4	Call Centre Indicators	These indicators will be submitted annually, in line with AER requirements.
2.4 Reporting on Payment Difficulties		
B180	Residential customers falling behind on payment	The Commission has set a materiality threshold of \$120 for this indicator and aligned the definition to more closely reflect the work on the payment difficulties framework.
D021 D022	Instalment plans not covering use Instalment plans covering use	The definition has been refined following the discussion at the workshop and suggestions from submissions. Retailers can calculate "use" based on historical consumption at the time of setting up the plan. The indicator does not specify that the calculation is dynamically updated every month. The indicator will be reported as a percentage of customers. The Commission will not require this data to be reported until the quarter commencing 1 January 2017, to allow retailers time to introduce the required systems.
D023	Duration of instalment plans	The Commission has confirmed in the definition that retailers can report on the duration agreed at the time the payment plan is agreed with the customer. This will be reported as a percentage of customers on payment plans.

D024	Debt on entry to instalment plans	The definition has been refined to align with the work on the payment difficulties framework. "Debt" on entry includes all money past its pay-by date.
2.5	Reporting on notices issued	
	Bills issued Reminder Notices Issued Disconnection Notices Issued	The Commission has removed these indicators from the Guideline
2.8	Other Issues	
B021	Customers with Feed-in Tariff	The Commission has amended the definition to align with the obligation under s40NC of the Electricity Industry Act (2000). Retailers must provide the same data to the ESC.
D020	Instalment payment plans	The distinction between payment plans for convenience and payment plans for arrears has been retained.

5 NEXT STEPS

This Final Decision is the first part of a three stage process to update and revise the compliance and performance reporting obligations for energy licensees. For this reason, we refer to the Final Guideline as an Interim Guideline, understanding that it will be updated within twelve months.

STAGE 2 – UPDATE

After the Commission has completed the implementation of the new framework for customers facing payment difficulties, we plan to update the Interim Guideline to;

- Remove the current hardship program performance indicators
- Include performance indicators that reflect the payment difficulty types and the assistance levels as defined in the new framework
- Remove the interim performance indicators added for transition to the new framework
- Include reporting of compliance with the new obligations to offer assistance according to the framework
- Remove obligations to report compliance with hardship program obligations.

We plan to complete this update to coincide with the introduction of the new framework by 1 July 2017.

STAGE 3 – COMPREHENSIVE REVIEW

The Commission has signalled that it intends to review the Marketing Code of Conduct (MCC) in light of the current review of the Australian Consumer Law (ACL Review). We will commence a significant review of retailers' compliance and reporting obligations, including the role of the MCC, after the implementation of any recommendations from the Final Report of the ACL Review. The Final Report is expected in March 2017.