

Guideline 4 (2022): Explicit informed consent

18 May 2022

The requirement that retailers obtain explicit informed consent is fundamental to ensuring Victorian consumers have trust and confidence in the energy market. The commission provides the following guidance on the requirements of explicit informed consent under the Energy Retail Code of Practice (the code).

Purpose and application

The purpose of the explicit informed consent obligations is to ensure that consumers understand the information about the transaction they are entering into and clearly provide their consent to the transaction.

This guideline sets out the general requirements that apply to obtaining explicit informed consent, as well as the requirements that apply to the specific types of transactions where explicit informed consent is mandatory under the code. This includes obtaining explicit informed consent:

- at the time of entry into a new contract
- prior to submitting a request for transfer of a customer
- to permit certain billing methods
- to provide information via electronic communications
- for an expedited deregistration of a life support customer.

Retailers and exempt persons

The obligations within this guideline apply to retailers and, in many cases, exempt persons undertaking activities in particular categories. Specifically, exempt persons are required to obtain explicit informed consent in relation to:

- giving electronic notices to a small customer (clause 10(1)(a)(iii))
- bills that are not based on metering data (clause 57(1)(a)(iii) and 57(1)(b)(iv))
- bill smoothing arrangements (clause 61(2))
- bills that differ from the exempt person's regular recurrent period (clause 62(2))
- expediting life support deregistration of customers (clause 171(6)(b)).

Part A: Overarching obligations

Clause 7 of the code identifies what constitutes explicit informed consent. It relevantly provides:

7 Explicit informed consent

- (1) Explicit informed consent to a transaction is consent given by a small customer¹ to a retailer where:
 - (a) the retailer, or a person acting on behalf of the retailer, has clearly, fully and adequately disclosed in plain English all matters relevant to the consent of the small customer, including each specific purpose or use of the consent; and
 - (b) the small customer gives the consent to the transaction in accordance with subclause (2); and
 - (c) the small customer is competent to do so; and
 - (d) any requirements prescribed by this code of practice for the purposes of this subclause have been complied with.
- (2) Explicit informed consent requires the consent to be given by the small customer:
 - (a) in writing signed by the small customer; or
 - (b) verbally, so long as the verbal consent is evidenced in such a way that it can be verified and made the subject of a record under clause 8; or
 - (c) by electronic communication generated by the small customer.

Transactions which require explicit informed consent

Clause 7 applies to 'transactions' to which a customer may consent. The transactions to which explicit informed consent applies are identified throughout the code:

- to provide information using electronic communication (clauses 10(1)(a)(iii) and 139(2))
- at the time of entry into a new contract (clause 26(4)) and when transferring a customer to

¹ *Small customer* means a domestic or small business customer under section 3 of the Electricity Industry Act or section 3 of the Gas Industry act. Refer to the code for the full definition of small customer.

- another plan with the same retailer (clauses 120(1)(c)(ii) and 146(5))
- to permit certain billing methods (clauses 57(1)(a)(iii), 57(1)(b)(iv), 59(1)(a), 61(2), 62(2))
- to permit certain payment arrangements (clause 72(3)(b))
- prior to the customer transferring their energy supply to a new retailer (clause 113(1)(a))
- for an expedited deregistration of a life support customer (clauses 166(7)(b) and 171(6)(b)).

The clauses that address these types of transactions also set out further requirements for the purposes of clause 7(1)(d).

Further details on what obtaining explicit informed consent means in respect of these transactions are addressed in Part B of this guideline.

Providing information clearly, fully and adequately and in plain English

Clause 7(1) provides an obligation to ensure a retailer or person acting on behalf of a retailer has 'clearly, fully and adequately disclosed in plain English' all matters relevant to the consent of the small customer.

These obligations require consideration of the manner in which information is disclosed. What constitutes full and adequate disclosure depends on the transaction in issue. Specific guidance about these factors is provided in Part B of this guideline.

The obligation to provide information clearly and in plain English has a number of elements:

- Complex legal language and jargon must be avoided.
- Where information is provided in writing, the information must be clearly laid out in an orderly format and legible font.

The following specific issues should also be noted.

Delivery of spoken and recorded information

Where information is provided during a phone call, conversation pace and tone must be considered. Call centre staff must ensure that they do not rush through the information or speak in a manner that is difficult for the customer to understand.

It is common for call centre staff to read out specific information about available plans at a very fast pace. This may make it difficult for a customer to understand the details of what is being conveyed.

Care must be taken to ensure that information is delivered in a manner that is clear to the customer.

Opportunities to ask questions

Customers must be provided with the opportunity to ask questions or seek clarification about matters before providing their consent. When listening to pre-recorded information, customers may

prefer to provide consent sequentially to different aspects of the transaction rather than at the end of the recording. Supplying the customer with the opportunity to pause the recording and seek clarification before proceeding may also assist the customer in providing explicit informed consent.

Care must be taken to ensure that the customer's consent is both explicit and informed. Any confusion or uncertainty on the customer's behalf should be clarified before it can be demonstrated that the consent obtained was informed and their explicit informed consent recorded.

Referral to an interpreter

Part 2 of the code sets out retailers' general obligations and contains the requirement to refer a residential customer to an interpreter service where it is necessary or appropriate to do so. It applies to some classes of exempt persons. Clause 12 relevantly provides:

12 Referral to interpreter services

- (1) A retailer must refer a residential customer to a relevant interpreter service if a referral is necessary or appropriate to meet the reasonable needs of the residential customer.

The obligation in clause 7 to provide information in plain English does not remove the obligation on a retailer to provide information in languages other than English.

Clause 12 of the code states that if a referral is necessary or appropriate to meet the reasonable needs of the customer, then a retailer must refer a residential customer to an appropriate interpreter service. Therefore, where it is necessary or appropriate to do so, a retailer must refer a customer to a relevant interpreter service in order to obtain explicit informed consent from that customer. This applies:

- where a customer expresses concerns about understanding the proposed contract because English is not their preferred language
- where it is apparent to the retailer during the call that there may be language barriers impeding the customer's understanding of the matters relevant to their consent.

Case study 1: Referral to appropriate interpreter

During a call where a customer was entering into a contract with a new retailer, the customer was asked if they understood the details of the contract. The customer replied no, and asked questions which the retailer's representative did not clearly understand. This was due to the customer having a limited understanding of English language.

In order to meet the obligations under clauses 7 and 12 of the code, the retailer's representative must refer this customer to an appropriate interpreter service. This will ensure that the customer is clearly and adequately informed of all relevant matters prior to giving their consent.

Making written – and where possible, recorded voice - information available in languages other than English or in accessible English will assist customers with low English literacy to provide explicit informed consent.

Disclosing all matters relevant to the customer’s consent

Clause 7 of the code requires that a retailer disclose all matters relevant to the consent of the customer in relation to the transaction. This includes the purpose or use for which the consent is being obtained.

This guideline identifies matters that, at a minimum, will be considered relevant in relation to each type of transaction for which explicit informed consent must be obtained in Part B of this guideline. However, what constitutes a matter relevant to a customer’s consent will also vary according to the circumstances of the customer, as well as the engagement between a retailer and a customer.

A retailer or person acting on behalf of a retailer must always ensure that the customer is provided with clear identification of the retailer to whom they are providing consent. Information on how to contact the retailer must also be provided. This is particularly important where a salesperson may act on behalf of multiple retailers, or in the context of white-label arrangements where it may not be apparent to the customer who the retailer is. Refer to **Guideline 1 (2022): Customers of white-label arrangements are entitled to all protections of the Energy Retail Code of Practice** for further information.

Case study 2: Disclosing all matters relevant to the customer’s consent

A customer wants to take up an energy offer available via their mobile network provider because they have been very happy with the service they received. The customer contacted their mobile network provider and signed up a new service.

When the customer received their welcome pack, they realised that the mobile network provider’s energy offer was a white-label arrangement with another retailer. As the customer was not informed of the identity of the retailer at the time of the transaction, explicit informed consent had not been obtained.

Customers may request or decline to be provided with certain information. Where a customer requests particular details, the information is relevant to the customer’s consent to the transaction.

Conversely, if a customer expressly declines to hear or receive particular information, a retailer may consider that the information is not (or no longer) relevant to the customer’s explicit informed consent. However, caution must be taken with this approach.

Responsibility lies with the retailer to ensure that all matters relevant to the transaction are disclosed prior to obtaining a customer’s explicit informed consent.

Case study 3: Customer request not to listen to the applicable rates

A customer contacted a retailer by telephone to enter into a new contract. The customer service representative offered the customer the opportunity to hear more details about the product. This included information on tariffs and how those tariffs may change over the course of the contract.

The customer declined to hear this information during the call as they had reviewed the rates online before contacting the retailer. After the contract was formed, the retailer sent the customer a written disclosure statement containing details of the tariffs.

The retailer had not failed to obtain explicit informed consent by not disclosing details of the tariffs by telephone, because the customer declined to be told this information. The details of the tariffs were therefore not relevant to the customer's consent.

However, even if the customer has declined to receive information at a particular point in time, other code obligations may still require a retailer to provide the information. For example, see the discussion about clauses 45 to 47 of the code in Key Contractual Information in Part B.

The customer's competence

Explicit informed consent can only be given where a customer is competent to provide that consent. In any circumstance where a customer is found not to have been competent, the consent will not be valid as per clause 9 of the code (see also 'Transactions without explicit informed consent' below).

Whether explicit informed consent has or has not been obtained will depend on the customer's competence, not the reasonableness of a retailer's efforts to ascertain competence. If the customer is found to be not competent, despite the retailer making reasonable efforts to engage with the customer to verify competence, explicit informed consent will not have been obtained.

Retailers are encouraged to identify signs of limited competence. However, there is no positive obligation to actively question a customer's competence.

Record keeping and compliance

Clause 8 of the code identifies a retailer's and exempt person's obligations in relation to keeping records concerning explicit informed consent. It relevantly provides:

8 Record of explicit informed consent

- (1) A retailer must:
 - (a) create a record of each explicit informed consent required by this code of practice and provided by a small customer; and
 - (b) retain the record for at least two years.

....

Retailers and exempt persons must keep records of the explicit informed consent given by the customer. Where records are kept by a third party, retailers and exempt persons must have arrangements in place to ensure timely compliance with their obligation to produce records.

Clause 8(2) provides the format in which records must be kept:

The record must be in such a format and include such information as will enable:

- (a) the commission to verify the retailer's compliance with the relevant requirements of this code of practice relating to explicit informed consent; and
- (b) the retailer to answer enquiries from a small customer relating to the small customer's explicit informed consent.

Clause 8(3) further provides customers with a right to access the record of consent:

- (3) a retailer must, on request by a small customer and at no charge, provide the small customer with access to a copy of the record of any explicit informed consent given by the small customer and then retained by the retailer.

The importance of these clauses, and the consequences of failure to comply with them, is set out in clause 9 of the code.

Transactions without explicit informed consent are void

Clause 9 of the code details the outcomes of failing to provide a record of explicit informed consent within 12 months after the date of the transaction on request. It relevantly provides:

9 No or defective explicit informed consent

- (1) A transaction specified in this code of practice as requiring explicit informed consent between a retailer and small customer is void if it is established, in accordance with subclause (2) and any applicable provisions of this code of practice, that explicit informed consent as required by this clause was not obtained.
- (2) It is established that the required explicit informed consent was not obtained if:
 - (a) the small customer raises the issue with the retailer either by asserting that the consent was not obtained or by requesting production of a record of the consent; and
 - (b) the issue is so raised within 12 months after the date of the transaction; and
 - (c) the retailer:
 - (i) admits that the consent was not obtained; or
 - (ii) does not produce a satisfactory record of the informed consent as soon as practicable, but within 10 business days, after the issue is so raised.

If there is no record of the consent that meets the requirements of clause 8, then there is no consent at all for the purposes of the code, as provided by clause 9(2). In such circumstances, clause 9(1) of the code provides the transaction will be void.

Case study 4: No record of consent

Following the expiry of a customer's contract, the customer was placed on a new plan after agreeing to an updated plan over the phone. The customer later disputed entering into the new plan and sought a copy of the record of explicit informed consent. Due to a recent IT upgrade to its systems, the retailer was unable to extract a copy of the record.

Although the retailer was certain it had obtained explicit informed consent, its inability to produce the record means that the transaction was void.

Part B: Specific transactions requiring explicit informed consent

This part of the guideline addresses the specific transactions where the code requires that explicit informed consent be obtained.

Electronic communications

Clause 10 of the code states that energy retailers and certain categories of exempt persons must obtain a small customer's explicit informed consent to receive any notice or other document electronically (i.e., data, text or images communicated via electronic means).² It relevantly provides:

10 Giving of notices and other documents under this code of practice

- (1) If this code of practice requires or permits a notice or other document to be served on a person (whether the expression 'deliver', 'give', 'notify' or 'send' or another expression is used), the notice or other document may be served:
 - (a) on a natural person:
 - (i) ...; or
 - (ii) ...; or
 - (iii) by sending it electronically to that person, but, in the case of a small customer, only if the small customer has given explicit informed consent to receiving the notice or other document electronically...

² *Electronic communication* means a communication of information in the form of data, text or images by means of guided or unguided electromagnetic energy, or both

Electronic communications with payment difficulty customers

Clause 139(2) provides that communications required or permitted to be given in connection with the payment difficulty framework in Part 6 of the code must be in writing, unless the residential customer has given explicit informed consent to receiving it in another way.

In obtaining this consent to receiving electronic communications, a retailer must identify all relevant matters, which will include:

- the information that will be communicated electronically, and whether any information will be provided by other methods
- whether further communications will occur via email, an electronic portal, or other electronic arrangements
- how the customer will be able to access that information (for instance, how to set up an online account if required).

A retailer should also consider the customer's ability to engage with electronic communications. Customers experiencing vulnerability may have limited or no capacity to engage with electronic communications.

Where obtaining explicit informed consent from a customer to receive bills electronically, retailers should check that customers understand how to access their bill. If the retailer requires the customer to set up an online account, they should check that the customer can do this.

Case study 5: Receiving electronic communication

A customer was signed up for a new account and was told that they would save more money if they agreed to accept all their bills electronically. The customer told the retailer that they did not have a computer, and were not very good at using their mobile phone to do anything other than make and receive calls and text messages. The retailer assured the customer that this was fine as they would be sent an alert when a bill was due, and could arrange for that to be automatically paid via direct debit.

The customer was subsequently sent a text message alerting them that their bill was now available and could be retrieved in an online portal. The customer was not able to access their bills through this method.

As the customer was not told that they would need to create an online account or access an online portal to access their bill, explicit informed consent to engage in electronic communications had not been obtained. This information was directly relevant to the setting up of the account and the customer being able to give their explicit informed consent.

New contract formation

Part 4, Division 2 of the code details pre-contractual procedures and obligation to supply. Clause 26(4) relevantly provides:

A retailer must obtain the explicit informed consent of a small customer for the entry by a small customer into a market retail contract with the retailer.

In relation to new contract formation, consideration must be given to the following points:

- Information provided prior to forming a contract is directly relevant to the explicit informed consent of the customer to the transaction.
- Where the information is provided after forming a contract, the information cannot be used to demonstrate explicit informed consent to enter the contract.
- The only exception to the obligation to provide the information will be if a customer expressly indicates that they have obtained this information elsewhere or are not interested in the information prior to contract formation (see 'Disclosing all matters relevant to the customer's consent' above).

There are a number of specific instances where the code requires information to be provided at the time of contract formation. This is detailed in the following section.

Key contractual information

The explicit informed consent requirements contained in clauses 7 to 9 should be understood as operating alongside the requirements of clauses 45 to 47 of the code.

Clause 45 relevantly provides for the provision of minimum information to a customer ('required information').

45 Requirement for and timing of disclosure to small customers

- (1) Subject to clause 7, a retail marketer must provide the required information to a small customer in relation to a market retail contract:
 - (a) before the formation of the contract; or
 - (b) as soon as practicable after the formation of the contract.

Although clause 45 permits disclosure of required information after contract formation, it must be provided prior to the relevant transaction for the disclosure to be relevant to the customer's explicit informed consent

Clause 46 sets out the form in which the disclosure of required information must be made.

46 Form of disclosure to small customers

- (1) Required information provided to a small customer before the formation of the market retail contract may be provided electronically, verbally or in writing.
- (2) ...
- (3) If required information was provided to a small customer electronically or verbally before the formation of the market retail contract, the required information in a single

written disclosure statement must also be provided to the small customer after the formation of the contract.

Retailers should consider how to obtain explicit informed consent for the purposes of clause 10 before providing information electronically. For online contract formation, retailers may consider obtaining the customer's explicit informed consent to provide the required information electronically for the purposes of clause 10, before obtaining consent to enter into a new contract under clause 26. This will satisfy the purposes of clause 10 that requires the customer to give explicit informed consent to receive any notice or document electronically.

The content of the required information is set out in clause 47. Retailers and exempt persons must assume that the required information listed in clause 47 is information relevant to the customer's consent to a new contract formation, unless the customer indicates otherwise.

47 Required information

- (1) For the purposes of this Subdivision, the required information that a retail marketer is to provide to a small customer is information in relation to the following:
 - (a) all applicable prices, charges, early termination payments and penalties, security deposits, service levels, concessions or rebates, billing and payment arrangements and how any of these matters may be changed;
 - (b) the commencement date and duration of the contract, the availability of extensions, and the termination of the contract if the small customer moves out during the term of the contract;
 - (c) if any requirement is to be or may be complied with by an electronic transaction—how the transaction is to operate and, as appropriate, an indication that the small customer will be bound by the electronic transaction or will be recognised as having received the information contained in the electronic transaction;
 - (d) the rights that a small customer has to withdraw from the contract during the cooling off period, including how to exercise those rights;
 - (e) the small customer's right to complain to the retailer in respect of any energy marketing activity of the retail marketer conducted on behalf of the retailer and, if the complaint is not satisfactorily resolved by the retailer, of the small customer's right to complain to the energy ombudsman; and
 - (f) whether an associate of a retailer will receive any commission or fee paid by a retailer by reason of the small customer entering into the customer retail contract.
- (2) The required information, when given in a written disclosure statement, must include or be accompanied by a copy of the market retail contract.

Clause 45, discussed previously in the section Key Contractual Information, allows this information to be provided before or after contract formation. However, these disclosures must ordinarily be made to obtain explicit informed consent prior to entry into a new contract, unless the customer has indicated they do not need the information prior to entering into the contract. In that case, it must be provided to the customer as soon as practicable after contract formation.

Clear advice obligations

Clause 38 of the code sets out additional mandatory minimum information that must be provided prior to obtaining a customer's explicit informed consent to enter into a contract. This includes information on how certain terms and amounts payable under the contract may vary and how the Victorian Default Offer may be accessed.

Clause 38 relevantly provides:

38 Minimum standards – customers entitled to clear advice

- (1) Prior to obtaining a small customer's explicit informed consent to enter a customer retail contract, a retailer must communicate to the small customer in a readily understandable manner information about:
 - (a) any terms pursuant to which the amounts payable by the small customer may vary depending on the actions of the small customer (for example, any conditional discounts);
 - (b) any terms pursuant to which the amounts payable by the small customer may vary depending on the actions of the retailer (for example, any terms pursuant to which the retailer may make price changes, or any specific price changes that will apply to that customer retail contract);
 - (c) any terms pursuant to which a benefit change may occur;
 - (d) the retailer's other generally available plans or a Victorian default offer or standing offer available to the small customer, which the retailer reasonably believes may be more suitable for the small customer having regard to any information the retailer has regarding the small customer wherever it is practicable to do so; and
 - (e) if switching to the customer retail contract involves moving the small customer to a new tariff structure, the cost impact that the new tariff structure may have for the small customer.
- (2) If requested by the small customer, the retailer must provide the small customer with information about the availability of the Victorian default offer or standing offer and how the small customer may access the Victorian default offer or standing offer.

- (3) Prior to entering a feed-in tariff agreement, a retailer must communicate to the small customer in a readily understandable manner information about any terms pursuant to which the credit payable to the small customer may vary.

These disclosure requirements in clause 38 are in addition to the 'required information' provisions in clauses 45 to 47 of the code. If the information in clause 38 has not been provided to consumers, any consent obtained from the customer may be void.

Billing methods

The code further provides that certain transactions relating to billing methods require the explicit informed consent of the customer. These are:

- bills that are not based on metering data
- bills that are based on an estimation of a small customer's consumption of energy
- bill smoothing arrangements
- billing cycles that differ from the retailer's usual recurrent period
- establishing a direct debit arrangement for a small customer to pay their bills.

Bills that are not based on metering data

A retailer must ordinarily base a bill for the customer's consumption on metering data or meter reading. Alternative billing methods may include estimated bills or other methods agreed to by the customer.

Estimated billing and other methods may only be used if the retailer has obtained the customer's explicit informed consent to do so under clauses 57(1)(a)(iii), 57(1)(b)(iv) and 59(1)(a). These clauses relevantly provide:

57 Basis for bills

- (1) A retailer must base a small customer's bill for the small customer's consumption of:
 - (a) electricity:
 - ...
 - (iii) on any other method agreed by the retailer and the small customer, if the retailer has obtained the explicit informed consent of the small customer;
 - (b) gas:
 - ...
 - (iv) on any other method agreed by the retailer and the small customer, if the retailer has obtained the explicit informed consent of the small customer.

Where a retailer and customer agree upon another method as the basis for billing, the obligation is on the retailer to ensure that all requirements in clause 7 are met as set out in Part A of this guideline.

59 Estimation as basis for bills (SRC, MRC and EPA)

- (1) A retailer must only base a small customer's bill on an estimation of the small customer's consumption of energy where:
 - (a) the small customer gives their explicit informed consent to the use of estimation by the retailer...

For the purposes of explicit informed consent, retailers and certain categories of exempt persons must provide the customer with information about how consumption will be estimated, and the subsequent steps available to customers to rectify inaccurate estimates before obtaining explicit informed consent.

Retailers and exempt persons are required to ensure that all relevant matters are disclosed to the customer before establishing alternative billing arrangements. As alternative billing arrangements may take a variety of forms, this guidance cannot be specific about the information to be provided. However, information about the basis and frequency of the billing arrangement is required in most circumstances.

Bill smoothing arrangements

Retailers and certain categories of exempt persons may provide estimated bills in accordance with a 12-month bill smoothing arrangement under clause 61 of the code.

61 Bill smoothing

- (1) Despite clauses (b) and (f), a retailer may, in respect of any 12 month period, provide a small customer with bills based on an estimation under a bill smoothing arrangement ...

A bill smoothing arrangement may only be used if the amount payable under each bill is initially the same, based on the customer's previous energy consumption over a 12-month period. The estimate is made by referencing the customer's historical billing data, and is reassessed after seven months.

Under clause 61(2), the customer's explicit informed consent is required to apply a bill smoothing arrangement:

- (2) The explicit informed consent of the small customer is required for the retailer's billing on the basis referred to in subclause (1).

For the purposes of clause 7, the information required to be disclosed to obtain the customer's explicit informed consent for a bill smoothing arrangement includes:

- the historical billing data used for the estimated usage
- the estimated usage
- the amount payable under each bill
- the revised assessment after seven months.

The customer's explicit informed consent must be obtained each time the retailer or exempt person and customer enters a new bill smoothing arrangement.

Alternative billing cycles

An ordinary billing cycle requires a retailer and certain categories of exempt persons to issue a bill at least every three months. For a standard retail contract or an exempt person arrangement, clause 62(2) relevantly provides:

A retailer and a small customer may agree to a billing cycle with a regular recurrent period that differs from the retailer's usual recurrent period where the retailer obtains the explicit informed consent of the small customer. [...]

For the purposes of clause 7, the information required to be disclosed to obtain the customer's explicit informed consent when gaining agreement to an alternative billing cycle includes:

- the relevant billing periods of the new alternative billing cycle
- any additional retail charges proposed to be imposed by the retailer.

The customer's explicit informed consent must be obtained each time a new alternative billing cycle is agreed to, unless the standard cycle of issuing a bill every three months is resumed.

Direct debit arrangements

Clause 72 of the code requires a retailer to make various payment methods available, including direct debit arrangements. Clause 72(3) relevantly provides:

Where a direct debit arrangement is to be entered into between a retailer and a small customer:

- (a) the retailer and the small customer must agree the amount, initial date and frequency of the direct debits; and
- (b) the explicit informed consent of the small customer is required for entering into the arrangement.

Accordingly, under clause 72(3)(a), the information required to be disclosed to obtain the customer's explicit informed consent to form a direct debit arrangement includes:

- the amount of the direct debit
- the initial date of the direct debit
- the frequency of the direct debits.

When a customer enters into a direct debit agreement, the retailer should also advise how the customer can terminate the arrangement as part of all relevant matters requiring disclosure.

Any change to the direct debit amount or frequency will require that the retailer again obtain the explicit informed consent of the customer and create adequate records.

Small customer transfers

The explicit informed consent requirements in relation to customer transfers largely overlap with the requirements associated with new contract formation.

Clause 113(1) provides:

A retailer must not submit a request for a transfer under the relevant Retail Market Procedures unless:

- (a) the retailer has obtained explicit informed consent from the small customer to enter into the relevant customer retail contract; and
- (b) the retailer has a customer retail contract in place to enable the sale of energy to the small customer at their premises.

Given the focus is on the customer's explicit informed consent to the relevant contract, the information that must be disclosed is similar to that which must be provided in relation to contract formation.

Bulk transfer of customers

The code does not contain provisions specific to the bulk transfer of customers. Retailers must assume that the requirements of clause 26 and 113 of the code apply to any such transfers.

Retailers considering the transfer of a large number of customers in the context of a commercial acquisition of the customer base of another retailer should engage with the commission as early as practicable. This must occur prior to the proposed transfer date.

Early engagement will allow the commission to engage with the retailer about the proposed transfer arrangements and related matters. This may include obtaining customers' explicit informed consent, as well as ensuring arrangements are in place to adequately protect customers.

The commission's preference is that the explicit informed consent of each customer be obtained in relation to any transfer.

Transfers affected by fraudulent conduct

Transfers may be affected by fraudulent conduct where third parties enter customers into new energy contracts without the customer's explicit informed consent. In some circumstances, this can occur where the retailer sub-contracts certain sales duties to other companies who employ their own agents. In other incidents, this may occur where individuals utilise the retailer's online platforms to create contracts using stolen identity details and stolen credit cards.

Case study 6: Fraudulent transfers – initiated by sales agent

A sales agent engaged by a retailer receives a commission based on the number of contracts that are signed with new customers each month. The sales agent falsified documents purportedly on behalf of customers and used these documents to transfer the customer's energy supply. The sales agent then received commission payments for the transfers.

The retailer did not have sufficient processes or controls to detect that the customers did not provide their explicit informed consent.

Retailers must have systems and controls in place to prevent customers from being transferred by sales agents (either employed directly by the retailer, or by a third party to whom the retailer subcontracts these duties) without the customer providing their explicit informed consent.

Case study 7: Fraudulent transfers – initiated by identity theft

A third party used stolen identity documents to enter into an electricity contract with a retailer through their online platform, causing the retailer to transfer the premises to the control of the third party. The third party used stolen credit cards to make overpayments on the electricity account, and then requested that the retailer refund the overpaid amounts into another bank account controlled by the third party.

Later, the card owner contacted the retailer and asked them to cancel the contract. because they are a victim of identity theft and credit card fraud and never consented to a contract with the retailer.

Although the retailer assumed that it had obtained explicit informed consent from the new customer, the retailer did not obtain explicit informed consent from the person with whom it entered into a contract, and thereby contravened its explicit informed consent obligations.

Retailers must have appropriate controls in place to reduce the risk of their platforms being used in identify theft scams.

Transfers of customer between plans

Explicit informed consent is also required when transferring a customer from one plan to another as required in clauses 120(1)(c) and 146(5).

Clause 120 relevantly provides:

120 Tailored assistance to customers on an exempt market retail contract

- (1) If a residential customer who has entered into an exempt market retail contract becomes entitled to receive tailored assistance, the retailer must:

.....

- (c) if the retailer identifies a different plan that would be likely to minimise the residential customer's energy costs, the retailer must:
 - (i) inform the residential customer of the plan that is likely to minimise the residential customer's energy costs;
 - (ii) seek the residential customer's explicit informed consent to transfer the residential customer to that other plan; and
 - (iii) provided that the residential customer gives explicit informed consent, enter into a customer retail contract in respect of that plan.

Clause 146 relevantly provides:

146 Payment by Centrepay (SRC and MRC)

- (5) If, as a result of a review, an alternative customer retail contract is considered to be more appropriate, the retailer must transfer the residential customer to that alternative contract, where the retailer has obtained the customer's explicit informed consent.

In each case, retailers must comply with the content requirements of clause 7 of the code as set out in the Overarching Obligations in Part A. Even where the customer is being transferred to a different plan provided by the same retailer, all matters relevant to the consent of the customer must be disclosed prior to entry into the new contract.

Deregistration of a life support customer

Clauses 166(7)(b) and 171(6)(b) set out requirements for retailers and exempt electricity sellers to deregister customers who have been registered as requiring life support equipment, but no longer require life support equipment at their premises. The retailer or exempt electricity seller may deregister the customer on a date that is less than 15 business days from the date of written notification, providing that the customer provides explicit informed consent.

We provide further guidance concerning deregistration of life support customers in **Guideline 2 (2022): Life support customer details**.

This guideline has been approved for publication by the commission pursuant to section 13 of the Essential Services Commission Act 2001. This guideline does not provide or create legal obligations. Its purpose is to assist compliance by regulated entities. Where relevant, areas of better practice or case studies are detailed in breakout boxes.