



# Energy Compliance and Enforcement Policy

Revised Draft

January 2019



**An appropriate citation for this paper is:**

Essential Services Commission 2019, Energy Compliance and Enforcement Policy: Revised Draft  
January 2019

**Copyright notice**

© Essential Services Commission, 2019



This work, Energy Compliance and Enforcement Policy, is licensed under a Creative Commons Attribution 4.0 licence [[creativecommons.org/licenses/by/4.0/](https://creativecommons.org/licenses/by/4.0/)]. You are free to re-use the work under that licence, on the condition that you credit the Essential Services Commission as author, indicate if changes were made and comply with the other licence terms.

The licence does not apply to any brand logo, images or photographs within the publication.

# Contents

<b>Summary</b>	<b>1</b>
Our objectives	1
Our role as energy regulator	1
Our aims in regulating compliance	2
Role of the ombudsman	2
<b>Our approach</b>	<b>4</b>
Our guiding principles	4
Risk-based approach	4
Promoting and securing compliance	4
Compliance and enforcement factors	5
Due process and procedural fairness	6
<b>Information gathering and assessment</b>	<b>7</b>
How we identify potential breaches	7
Compliance action we may take	7
Enforcement action we may take	8
<b>Reporting</b>	<b>9</b>
Working together	9
<b>Appendix</b>	<b>10</b>
Our compliance and enforcement options	10

# Summary

This policy outlines our approach to promoting and enforcing compliance with the Victorian energy industry legislation we administer: the Electricity Industry Act 2000 and the Gas Industry Act 2001.

This policy is made under section 13 of the Essential Services Commission Act 2001 and applies to our energy industry compliance and enforcement functions.<sup>1</sup>

## Our objectives

By regulating the energy industry, we promote the long term interests of Victorian consumers with regard to the price, quality and reliability of energy.<sup>2</sup> We also seek to promote:

- a consistent regulatory approach between the electricity and gas industries
- the development of full retail competition
- customer protections, including helping customers who are facing payment difficulties.<sup>3</sup>

Our primary mechanism for achieving these objectives is to license businesses to operate in energy markets in Victoria. Licence conditions include obligations to comply with a range of codes and guidelines that define customer entitlements, and set out processes that must be followed to protect customers.

Our compliance approach emphasises detection of non-compliant entities and targeted enforcement actions.

Our key objective is voluntary compliance, however we will take appropriate enforcement action when warranted.

## Our role as energy regulator

Victorian energy licence holders (licensees) are authorised to engage in certain regulated activities. Our role as the energy regulator is to:

- ensure compliance with the Electricity Industry Act 2000 and the Gas Industry Act 2001
- issue licences and set licence conditions

---

<sup>1</sup> Section 10AA, Essential Services Commission Act 2001.

<sup>2</sup> Section 8, Essential Services Commission Act 2001.

<sup>3</sup> Section 10, Electricity Industry Act 2000; section 18, Gas Industry Act 2001.

- set standards of conduct through the issue of codes and guidelines
- monitor compliance
- take enforcement action against non-compliance.

Some businesses may be exempt from having to hold an energy licence, but may be subject to obligations set out in their conditions of exemption. We also regulate compliance with the conditions of licence exemptions.

## **Our aims in regulating compliance**

Regulated energy businesses (regulated entities) must:

- know their regulatory obligations, including those that impose a customer protection standard
- self-monitor and report breaches of regulatory obligations<sup>4</sup>
- respond to and rectify breaches, including handling customer complaints, and in some cases to compensate customers.

We expect that regulated entities will:

- interpret obligations in accordance with their purpose and principles
- have a good understanding of the standard of conduct required to achieve compliance
- actively identify non-compliance
- be cooperative in working with us to address non-compliance
- have in place effective compliance systems.

If breaches do occur, we expect their timely and effective resolution, at the lowest possible cost.

Our aim in using our enforcement powers is to secure compliance of individual regulated entities and across the industry as a whole. We have a range of enforcement powers from penalty notices through to enforceable undertakings and enforcement orders, licence variation, and ultimately licence revocation. Details of our enforcement options are outlined in Appendix A.

## **Role of the ombudsman**

The Energy and Water Ombudsman (Victoria) (**EWOV**) is the primary mechanism for external resolution of energy disputes between a customer and a regulated entity.

EWOV also:

---

<sup>4</sup> A breach of a code or guideline is a breach of any licence condition or condition of licence exemption which requires compliance with that code or guideline.

- refers potential wrongful disconnection payment cases to us for decision
- refers potential systemic issues to us for our consideration and possible action.

EWOV is an independent organisation and does not exercise any of our functions or powers.

We work closely with EWOV to ensure a common understanding of the obligations owed by licensees to customers, and the standards of conduct required by codes and guidelines.

## Our approach

We have a range of regulatory options. These include clarifying standards of conduct through communication with the energy industry, issuing and updating guidance, as well as promoting compliance and taking enforcement action.

Our compliance and enforcement actions can include warning letters for minor breaches, administrative undertakings, enforceable undertakings, penalty notices, court orders and injunctions and prosecution.

### Our guiding principles

Our approach to compliance and enforcement will be guided by the following principles:

- **Responsiveness:** We will undertake our work in a timely manner, ensuring we limit uncertainty for affected stakeholders.
- **Proportionality:** We will seek to ensure that our response is commensurate with the nature and extent of non-compliance identified.
- **Consistency:** We will respond to similar situations with a consistency that provides predictability for regulated entities as to our approach.
- **Accountability:** We will be transparent in our compliance and enforcement processes, and make public the outcomes of our compliance and enforcement actions, in accordance with our statutory reporting obligations.

### Risk-based approach

We employ a risk-based approach to our compliance and enforcement work program. While all licence conditions are subject to our monitoring activities, we focus our efforts towards conditions which give rise to (or risk) harm to consumers or the broader energy market. By applying a risk-based approach, we ensure we focus our resources towards areas consistent with our objective to promote the long term interests of Victorian energy consumers.

### Promoting and securing compliance

How a regulated entity meets its obligations is a matter for the individual entity. It is not our role to provide legal advice to regulated entities.

We will not provide regulated entities with individual assurances about whether particular business practices or proposed forms of conduct are or are not compliant.

Nonetheless, in the interest of promoting compliance and sharing best practice, we will:

- meet with industry and other stakeholders to identify and clarify uncertainties about common compliance issues, through for example regular forums
- publish our compliance and enforcement decisions, and statements of reasons
- consider publishing guidance notes,<sup>5</sup> which explain how we will apply this policy to particular regulatory obligations, such as payment difficulty and disconnection for non-payment of a bill.

If we consider that these approaches have not provided sufficient clarity about the standard of conduct that we expect from all regulated entities, we may consider making a formal determination,<sup>6</sup> that will apply to the industry as a whole.

Regulated, licensed entities will be subject to our compliance monitoring and auditing program. Through licence conditions, we require licensees to have effective compliance monitoring and reporting systems in place. Those systems will be routinely audited to determine whether they are achieving early identification and reporting of non-compliance, and the timely resolution of issues.

Once a potential breach is identified, our initial approach may be to seek remediation from a regulated entity to address it. However, in certain circumstances we may continue to investigate, and where necessary, take enforcement action to secure compliance.

## **Compliance and enforcement factors**

In deciding whether and how a matter will be investigated we assess the nature of the conduct and the compliance posture of the regulated entity having regard to the following compliance and enforcement factors, to the extent that they are relevant in the particular case:

- the nature and seriousness of the conduct
- the risk of harm, or actual harm, to energy customers
- the impact on consumer confidence in Victorian energy markets
- whether the breach was self-identified and reported in a timely manner
- how and in what timeframe any customer complaints about the breach were addressed by the regulated entity
- whether the regulated entity has taken timely and effective steps to investigate the root causes of the breach

---

<sup>5</sup> Guidance notes will not set out additional obligations on regulated entities, and are not legally binding. They will not be definitive of all circumstances that may arise. However, where we consider that regulated entities have in good faith relied on any examples of compliant conduct set out in the guidance note, we will not take enforcement action.

<sup>6</sup> A formal determination made under the Act would set out particular forms of conduct that are deemed to be either compliant or non-compliant with a particular obligation on regulated entities.



- whether the regulated entity has taken timely and effective steps to resolve the breach and prevent its reoccurrence
- whether the regulated entity has taken timely and effective steps to inform consumers about the breach, and offer an appropriate remedy to affected customers
- whether the regulated entity has put in place effective processes to review and report on the progress of remediation
- whether the regulated entity has responded in full and in a timely manner to our inquiries and requests for information or progress updates
- the compliance history of the regulated entity
- any other relevant matter.

We may also refer matters to other agencies for consideration of compliance and enforcement action, and we will also accept matters from other agencies for consideration of action.

## **Due process and procedural fairness**

In exercising any power, we will comply with all legal and government policy requirements including model litigant principles.

All investigations and enforcement actions will be undertaken in accordance with the requirements of procedural fairness.

The exercise of some of our enforcement powers is also regulated by particular statutory requirements.

The application of an enforcement power in a particular situation will take account of the relevant circumstances of the case.

Privacy law applies in relation to any information collected about individuals.

# Information gathering and assessment

## How we identify potential breaches

We identify potential breaches through:

- self-reporting by regulated entities
- the findings of compliance audits and the results of investigations
- referrals and systemic issue reports from EWOV
- reports of potential breaches from other external stakeholders (e.g. consumer representatives, other regulatory agencies, whistle blowers, members of the public and the media).

## Compliance action we may take

We may require a regulated entity to provide us with further information about the compliance issue in order to enable us to determine what compliance action is necessary.<sup>7</sup>

We may also require a regulated entity to submit a remediation plan outlining how it has or proposes to investigate, rectify and remedy the compliance issue, and prevent its reoccurrence.

Based on the information supplied by the regulated entity, and any other information available to us, compliance actions we may consider including:

- educational activities
- issuing a warning letter
- requesting that affected customers are contacted, alerted to the non-compliance, and offered an appropriate remedy
- public disclosure or advertisement of the non-compliance
- seeking an administrative undertaking
- imposing additional licence conditions
- variation or revocation of licences.

We actively monitor all orders and undertakings to ensure compliance. Our activities may include compliance monitoring inspections, audits and business meetings.

---

<sup>7</sup> see Attachment for compliance and enforcement options

We will also ensure that where customers are found to be entitled to a wrongful disconnection payment the regulated entity will make these payments in a timely manner.

## **Enforcement action we may take**

Our decisions about which enforcement action(s) to take will be informed by the compliance outcomes we aim to secure, including:

- stopping the contravening conduct
- addressing the impact of the contravention on customers
- ensuring future compliance by the regulated entity and regulated entities generally
- raise awareness of the law for both regulated entities and the public
- deter and punish wrongdoers.

All enforcement action(s) we take are governed by the relevant legislation and legal procedure. We may consider:

- enforceable undertakings
- enforcement orders
- penalty notices
- injunctions through civil court actions
- prosecution through the courts.

## Reporting

We are required to publicly report on our energy compliance and enforcement actions.<sup>8</sup>

Public reporting provides transparency of the compliance and enforcement outcomes we seek to achieve and can:

- enhance trust and confidence in the integrity of the Victorian energy regulatory framework
- help regulated entities compare their compliance levels with their industry counterparts and to identify areas for improvement
- help energy customers make informed decisions about their choice of regulated entities.

In accordance with our statutory reporting obligations, we will publish on our website:

- information about the outcome of each enforcement action taken against an energy licensee and the name of that licensee
- an annual comparative performance report (with quarterly updates) for each energy retailer, regarding compliance, enforcement actions, performance and outcomes.

We will also publish all administrative undertakings by regulated entities.

We will publish information on other compliance actions undertaken by a regulated entity, if we consider that it is necessary to promote protections for Victorian energy consumers.

### **Working together**

Where appropriate, we will work with other regulatory agencies and ombudsman schemes to promote compliance in the Victorian energy sector. This includes developing memorandums of understanding with other regulators to support collaboration and information sharing.

---

<sup>8</sup> Subdivision 3, Essential Services Commission Act 2001.

## Appendix

### Our compliance and enforcement options

**Energy Industry Penalty Notices (EIPNs):** A penalty notice may be issued if it is determined that the imposition of a financial penalty is warranted in all the circumstances. If we have reason to believe an energy licensee has contravened a condition of licence, of a type and in circumstances prescribed by Regulations, we may issue a penalty notice for each contravention.

**Wrongful Disconnection Penalty Notices (WDPNs):** If we have reason to believe an energy retailer has contravened an Energy Retail Code obligation that amounts to the wrongful disconnection of a customer from their energy supply, we may issue a penalty notice for each contravention.

**Civil Penalty Notices:** If a determination or condition of licence has been contravened or is being contravened, we may issue a Civil Penalty Notice. The notice may direct that the contravention cease or that rectification occur within the time period specified in the notice. Failure to comply with the notice may attract a monetary penalty of up to 680 penalty units.

**Warning letters:** A warning letter may be issued where there is evidence of a breach of legislation. If we have evidence of a breach of legislation, including non-compliance with a licence condition, we may issue a warning letter.

**Voluntary Undertakings:** We may accept a written voluntary undertaking from an energy licensee if the licensee admits to the non-compliance and agrees to remediate and stop the offending conduct. A voluntary undertaking is not enforceable in court and will only be accepted where we are comfortable that the licensee will comply with the terms of the undertaking.

**Enforceable Undertakings:** An enforceable undertaking is an administrative alternative to court action. We may accept a written undertaking from an energy licensee regarding any matter that relates to our statutory functions or powers. We may enforce compliance in court if the licensee fails to comply with the terms of its written undertaking. The court may make a range of orders, including directing that the licensee: comply, pay compensation or damages, and/or pay an amount equal to any financial benefit attributable to the breach of the undertaking.

**Enforcement Orders:** If a determination or condition of licence has been contravened or is likely to be contravened, we may make an enforcement order that requires compliance or rectification. We can make two types of enforcement orders: *provisional*, that apply for a short duration (7 days, unless we withdraw it earlier); or *final*, that may apply indefinitely, or for the period we specify, whether as a first step or following non-compliance with a provisional order. Failure to comply with

an enforcement order is a criminal offence and may result in substantial monetary penalties that accrue for each day that the contravention continues. We may also apply to the court for an injunction and/or declaration to address non-compliance with the order.

**Licence variation:** If an energy licensee has contravened or is contravening a condition of licence, we may vary the licence or condition of licence without the energy licensee's consent. The manner in which the energy licensee must rectify or prevent any future contravention will be specified in the varied licence or licence condition.

**Licence revocation:** We may revoke an energy licence in accordance with the process set out in the licence. In respect of most energy licences we have issued, we may revoke the licence if an enforcement order has not been complied with.