



3 June 2016

Hannah Lawrence
Compliance Manager, Energy
Essential Services Commission
Level 37, 2 Lonsdale St
Melbourne VIC 3000

Dear Ms Lawrence

RE: Interim Compliance and Performance Reporting Guideline

ERM Business Energy welcomes the opportunity to respond to the Essential Services Commission of Victoria's (the Commission) draft decision on Interim Compliance and Performance Reporting Guideline for Energy Retail Licence Holders.

About ERM Business Energy

ERM Business Energy Retail Pty Ltd, which trades as ERM Business Energy, is a subsidiary of ERM Business Energy Limited, an Australian energy company that operates generation and electricity sales businesses. Since launching in 2007, ERM Business Energy has grown to become the fourth largest electricity retailer by load in Australia, with operations in every state and the Australian Capital Territory. ERM Business Energy is now the second largest electricity retailer to the large business market by load,¹ with increasing success in the small business market.

General Comments

ERM Business Energy opposes the Commission's interim compliance and performance reporting guidelines. We are concerned that the proposals move Victoria further away from harmonisation with the National Energy Customer Framework (NECF) which results in additional compliance costs on energy retailers.

We also argue against the proposal to reintroduce the Code of Conduct for Marketing Retail Energy in Victoria (the Marketing Code of Conduct) into the compliance component of the guideline on the grounds that is duplicative and will not improve protections or outcomes for customers. In 2014, the Commission recommended it be repealed with the introduction of version 11 of the Energy Retail Code (ERC). There are sufficient protections via other laws that achieve the same requirements as the Marketing Code of Conduct.

ERM Business Energy also contends that the rushed introduction of new performance indicators contains inconsistent requirements and will impose unnecessary costs on energy retailers. We believe that the Commission should adopt a more cautious and considered approach.

¹ Based on ERM Power analysis of latest published financial information.

Reintroduction of the Marketing Code of Conduct into the guideline

The draft decision introduces new Type 1, 2, 3 breaches related to the reintroduction of the Marketing Code of Conduct. The Type 1 breaches relate to misleading customers, receiving explicit informed consent and abiding by the Privacy Act, all three of which are adequately protected by other means. The ACL prohibits misleading and deceptive conduct, failure to comply with the Privacy Act can attract penalties and the ERC requires energy retailers to receive explicit informed consent from customers. Given the protections that exist through other laws, ERM Business Energy sees no clear justification for duplicating these requirements via the reintroduction of the Marketing Code of Conduct.

The Commission has failed to make the case as to why the Marketing Code of Conduct should be reinstated into the compliance component of the guideline given that it previously called for the code to be repealed. In its final decision paper on harmonisation of the ERC and Guidelines with the NECF released in 2014, the Commission argued that:

“The Marketing Code was not amalgamated into the draft [version 11 of the Energy Retail Code], as the Commission intends to repeal this Code. There are now appropriate protections in the Australian Competition and Consumer Commission (ACCC) approved Energy Assured Limited Code (EAL Code) – to which most Victorian energy retailers have become signatories – and the consumer protections enshrined in the Australian Consumer Law.”²

The Commission might argue that the Marketing Code of Conduct is justified as it provides protections which are not included in the ERC or NECF. However, the Commission’s final decision paper on the harmonised energy retail code found that the NECF contained significant protections in relation to marketing “which obviate the need for the Code of Conduct for Marketing”.³ Moreover, the Commission stated that it was clear that other instruments interacted with the ERC and that it was not intended to be an exhaustive list of energy regulations. ERM Business Energy believes the Commission has already clearly made the case against retaining the Marketing Code of Conduct. There is therefore no justification for the renewed focus on it. Ideally, the Commission should repeal the Marketing Code of Conduct as originally intended.

The NECF-harmonised ERC contains many protections that the Commission is seeking to apply. It is therefore unclear why the Commission believes it is necessary to reintroduce the Marketing Code of Conduct into the compliance guideline. Instead, ERM Business Energy considers that the Commission should repeal the Marketing Code of Conduct as was intended with the introduction of version 11 of the Energy Retail Code. The Marketing Code of Conduct was last revised in 2009, is out of date and not fit-for-purpose.

The new draft compliance obligations relating to the Marketing Code of Conduct also result in duplicative requirements. The new type 1 breaches relating to clauses 3.3, 3.5-3.6 of the Marketing Code of Conduct duplicate the proposed newly introduced type 1 breaches relating to clauses 61-64 of the ERC. It is entirely unnecessary to have breaches of both the ERC and Marketing Code of Conduct for the same provision. Similarly, a breach of clause 4.1 of the Marketing Code of Conduct is already an existing type 1 breach covered by clause 57 of the ERC.

With regards to Type 2 breaches, the inclusion of clause 2.3 of the Marketing Code of Conduct relating to no contact lists as a breach is a duplication of Clause 65 of the ERC which is already a Type 2 breach.

² Essential Services Commission (2014), Harmonisation of the Energy Retail Code and Guidelines with the National Energy Customer Framework (NECF) – Final Decision Paper, July. p 3.

³ Ibid. p 109

Finally, clauses 2.4 and 2.5 of the Marketing Code of Conduct relating to visit and telephone records, which are proposed as Type 3 breaches, are already a Type 3 breach as part of clause 68 of the ERC. ERM Business Energy calls on the ESC to remove these duplicative requirements.

In ERM Business Energy's view, there will be no benefits to consumers as a result of reintroducing the Marketing Code of Conduct. It will only act to penalise businesses over and above penalties imposed through other laws rather than encourage improved compliance and performance by retail energy businesses.

New performance indicators

ERM Business Energy is also concerned by the timelines surrounding this draft decision. The Commission is due to make a final decision by 30 June 2016, with a number of the new performance indicators coming into effect the following day. This gives little time for businesses to update systems and procedures to ensure that they are compliant with the new requirements. Furthermore, these are temporary indicators that will be reviewed again in 2017. ERM Business Energy considers 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.

The draft guidelines also introduce several new indicators on which retailers are required to report, including the number of bills, reminder notices and disconnections issued each month. According to the Draft Decision Paper this is to satisfy the Commission's new objective "to promote protections for customers, including in relation to assisting customers who are facing payment difficulties". ERM Business Energy considers that it is unclear how reporting the number of bills, reminder notices and disconnection notices issued each month will meet this objective.

Retailers must already report on the number of customers, so it is unclear what benefit there is from reporting the number of bills issued. There is no justification provided as to how these extra requirements will "promote protections" for consumers. ERM Business Energy considers that the Commission should clearly establish a case for why such information is necessary before imposing these requirements on retailers.

Furthermore there are inconsistencies with the reporting of some metrics relating to payment plans. The draft guidelines introduce requirements to report data on the number of customers on instalment payment plans for residential customers only. The Commission indicates that this is part of the transition to the new hardship customer framework. However, the draft guidelines also impose new requirements (references D023 and D024) to report on the number of customers on payment plans based on duration of these plans and levels of debt without specifying whether this is restricted to residential customers only. As these new performance indicators relate to the new hardship framework, which applies to residential customers only, it would be illogical to require the reporting of sub-categories for all customers. ERM Business Energy recommends that the Commission clarify that reporting for these metrics are for residential customers only.

Please contact me if you would like to discuss this submission further.

Yours sincerely,

[signed]

Ben Pryor
Regulatory Affairs Policy Advisor