

24 May 2016

Essential Services Commission
Level 37, 2 Lonsdale Street
Melbourne VIC 3000

By email to: publications@esc.vic.gov.au

Dear Sir/Madam

ESC's Energy Compliance and Enforcement Policy

Momentum Energy welcomes the opportunity to provide the following comments in response to the ESC's Energy Compliance and Enforcement Policy (the Policy).

Momentum Energy is a second tier retailer authorised to sell electricity in Victoria, New South Wales, South Australia, Queensland and the Australian Capital Territory, and gas in Victoria and South Australia. Momentum is fully owned by Hydro Tasmania, the largest clean energy producer in Australia.

Momentum Energy believes good compliance and enforcement are fundamental aspects of any market in that they ensure all participants 'play by the rules'. It is therefore important that in exercising any compliance or enforcement authority the regulatory body has applied due process; any sanctions are proportionate with the detriment which the customer/s have incurred; there is appropriate transparency for the detriment/issue which has transpired to inform other industry participants; any investigation/action is performed in a timely manner and most important of all the approach and outcomes are fair for all participants.

Momentum supports the ESCV having the power to apply various sanctions against industry participants which have deliberately breached the regulatory framework or clearly acted in a negligent manner in order to protect the reputation of the industry and ensure consumers have confidence in the industry which sells them energy.

The key concern Momentum Energy has with the new sanctions is how the ESCV ensures any sanctions are applied in a fair and consistent way and how it distinguishes between participants who deliberately breach or who are negligent and those where controls have failed or been insufficient. Given the complexity of the industry today there is an ever increasing number of issues which are difficult to resolve in a manner which is reasonable to the customer, is consistent with the regulatory framework and is sustainable for the licensees especially where the matters are 'black and white'. In light of these difficulties, Momentum Energy is keen to see more emphasis in the Policy on the ESCV's broad engagement with stakeholders prior to the commencement of compliance actions. To be clear such engagement would be used as the basis for the industry to raise issues proactively and for the ESCV to ascertain the maturity of the licensee's compliance program and therefore should it be required a more commensurate sanction. Such sessions with individual licensee would also help to set expectations about possible enforcement, reinforce ESCV compliance priorities and begin to highlight broader issues.

Investigation and consideration of further action

While the principles for assessing the nature of the conduct are important, they are nonetheless subjective and for any licensee prioritisation will always have to occur. As an energy retail business, this is likely to generally put addressing the detriment to the customer first, often before initiating a full investigation to ascertain the root cause and implement additional or better controls. To this end, Momentum Energy believes the approach of the Australian Energy Regulator whereby any enforcement action only proceeds following the preparation of a risk based impact assessment by the ESCV which clearly articulates the impact of the contravention on businesses, consumers and other stakeholders and the probability of the breach occurring.

Enforcement Pathway

As discussed above, Momentum believes ongoing and proactive consultation with industry to better understand the industry is a fundamental aspect of good enforcement and must be included in the framework. It would be expected that this would occur prior to any enforcement.

In considering the enforcement pathway, Momentum believes that the ESCV should clearly communicate in writing to the licensee(s) at each stage of the process so there is no confusion about what stage the enforcement action is up to.

Alternatives to Enforcement Options

The Policy objective is described as the promotion of the long term interests of Victorian consumers by ensuring a consistent regulatory approach between electricity and gas industries. With this objective at front of mind, the Policy predominantly focuses on Enforcement options as the driver or function to achieve this objective. It is Momentum's view that the Policy should have a prescribed commitment to other remedies that do not focus primarily on Enforcement Options but rather, preventative, corrective and preservative strategies and functions that have a larger regulatory impact on the long term interests of all Victorian customers.

In preparing this submission, Momentum reviewed Enforcement policies from other state and federal Regulators. Despite its title, the Australian Securities & Investment Commission's Enforcement Policy (the ASIC policy) has a theme of 'deterrence' or preventative approach as opposed to reactive Enforcement Options. In particular, the ASIC policy refers to, *'engagements with stakeholders, surveillance, guidance, education and policy advice instead of enforcement action.'* Furthermore the ASIC policy describes the effectiveness of these functions as, *'in many cases we decide it is more effective to deal with our concerns using (aforementioned) other regulatory tools.'*

It is Momentum's view that expressly prescribing a commitment to provide other functions in the Policy such as; Industry wide consultations, Education and policy advice to all retailers derived from breaches would lead to enabling the Commission to holistically achieve its objective of consistent regulatory approach to the larger cross-section of affected customers.

Reporting

Momentum Energy believes the ESCV needs to have a very clear approach to the reporting of enforcement action. While ultimately the use of reporting on the Commission's enforcement action must be exercised in the most serious of cases this needs to be very carefully weighed up against over

reporting of more minor sanctions which ultimately may undermine consumer confidence in the industry. Caution should also be exercised in believing the enforcement of the ESCV will ensure 100% compliance. Due to the complexity of the systems and processes and the coordination of the different industry participants to produce, deliver and procure energy on customers' behalf, this is a misguided belief and unlikely to lead to the best outcomes for customers. An effective compliance program is risk based and prioritises those obligations which will have the most impact on the organisation.

Should you or your staff wish to discuss this matter further please feel free to give me a call on [redacted]

Yours sincerely

Alastair Phillips

Head of Regulation and Compliance