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Essential Services Commission

Level 37, 2 Lonsdale Street

Melbourne VIC 3000

14 October 2019

Essential Services Commission – Compliance and Performance Reporting guideline draft decision

AGL Energy (AGL) welcomes the opportunity to comment on the Essential Services Commission of Victoria's (ESC) draft decision on the Compliance and Performance Reporting requirements (draft guideline).

AGL supports amendments to the retailer reporting obligations as necessary as the sector evolves and new regulatory obligations took effect from July 2019. This ensures that the framework in place for measuring performance and regulatory effectiveness is relevant and up to date. The information gleaned from reporting is then used to inform future regulatory decisions.

The ESC made clear in 2018 that accuracy of reliable data to the regulator is necessary to promote transparency about how the market is operating, and failure to provide accurate and timely data can result in a review of a retailer's licence to sell electricity and gas in Victoria.[1]

Given this importance, we urge the ESC to reconsider the proposed implementation timeframe. The proposed final decision date of 14 November 2019 would allow retailers less than 30 business days to implement major system changes for a 1 January 2020 start date. This is substantially less time than has previously been afforded to retailers to implement these types of changes and poses real risks to the quality and accuracy of data.

Further, the phrase *significant risk of harm* is used for assessing and classifying Type of breaches. We encourage the ESC to consider defining the term more fully and therefore applying it in a consistent manner in determining breach classification.

The remainder of the submission provides detailed views on the proposed new compliance obligations and performance indicator changes.

We would welcome the opportunity to discuss these concerns in more detail with the ESC. Should you have any questions or comments, please contact Kat Burela on 0498 001 328 or kburela@agl.com.au.

Regards,

(Signed for electronic transmission)

Elizabeth Molyneux
General Manager Energy Markets Regulation

[1] https://www.esc.vic.gov.au/media-centre/energy-regulator-issues-warning-agl

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General comments

Timing and implementation

The proposed timeline of release of final Guideline and short period to upgrade systems and processes is not appropriate to facilitate robust and considered implementation by retailers.

We note that in 2018, the ESC released the final Compliance and Performance Reporting Guideline decision in July 2018, for an implementation of 1 January 2019, which provide approximately five months implementation. Those change where significantly less than is being proposed in the current draft decision.

With the proposed final decision being released on 14 November 2019, retailers will have approximately one month for implementation. This is neither practical nor allows adequate time for retailers to make the necessary system and process changes as well as conduct appropriate testing, quality assurance and management.

As the ESC is aware, AGL has invested significant time and resources into renewing our performance reporting systems to ensure the information that we provide is accurate. Based on our experience, the scale of these proposed changes will take at least three months to be able to do effectively. By forcing retailers to rush generates a real risk that errors are made.

Given the type of changes the ESC is proposing also includes amendments to definitions and data that is already being collected, we consider it would be more appropriate to have an implementation date of 1 July 2020, to align with annual reporting periods.

Alignment with the AER

The AER categorise only a small number of priority matters Type 1 (e.g. Life support) that may result in significant harm and also meet other expectations regarding time sensitivity.

We encourage the ESC to facilitate alignment with the AER, not just in relation to reporting dates, but the reporting categories (such as where obligations are rated as Type 1 by the ESC and Type 2 by the AER).

Change review

We wish to highlight the volume of work that will be required to amend the customer definitions as proposed by the ESC. The customer definition (of unique customer or accounts) will flow through a large number of obligations and indicators and represents a substantive system and data change. While this will be achievable over time, we do not think it is appropriate to push such a major change within such a tight implementation timeframe.

Further, as we have raised with the ESC previously (during workshops and consultation on draft decisions for the recent regulatory reforms), several of the obligations created by the ESC are subjective. This is due to the ESC's focus on *retailer responsibility* in obligation management. Such an approach will ultimately mean that the reporting volumes across retailers will vary, depending on the risk appetite of each business. Examples of such obligations include **70H**, **70X**, and **RB0062**, about what terms a customer may need to know, or whether something is in *plain English.*

There also appears to be some potential typographical errors that we encourage the ESC to review prior to the release of a final decision. For example, *customer holder* on page 35 relating to standard

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and tailored assistance definitions.[2] The draft decision also refers to the commencement date of performance indicator requirements as taking effect from 1 January 2019. If this is not an error, we do not believe it is possible or appropriate to retrospectively apply new performance indicators requirements on retailers.

The table below provides specific comments regarding individual classifications.

Compliance reporting

Overview

In the draft decision, the ESC has introduced 18 new Type 1 breaches. The possible severity of each of these Type 1's varies significantly and does not seem to be supported with a consistent view on what would constitute a *serious risk of harm.*[3]

The ESC states that it has used the below matrix model that considers the potential customer impact of a breach and the extent to which an immediate response is required (referred to as time sensitivity). The ESC states that this model uses the existing criteria specified in section 2 of the reporting guideline which states:

> *For energy retailers, type 1 regulatory obligations are those where:*
>
> - *non-compliance has or could potentially have a significant impact on customers; and*
> - *the impact of that non-compliance increases over time if it is not rectified quickly* (time sensitivity)

		Time sensitivity		
		High	Medium	Low
Customer harm	Significant	**Type 1**		
	Moderate		**Type 2**	
	Minor			**Type 3**

When reviewing each of the 18 proposed new Type 1 obligations, it is difficult to determine consistency in scale or risk that has been allocated as a significant risk for customers that require an *immediate response* (as stated by the draft decision).

Further, the ESC has inconsistently used the term *serious risk of harm* or *risk of serious harm*, under the justification for an obligation being made a Type 1.

For example, we agree that the family violence obligations (**106G – 106I**) should be listed as Type 1 due to the potential serious risk of psychological harm that could occur from multiple unnecessary

[2] Draft – Compliance and Performance Guideline – 13 September 2019, https://www.esc.vic.gov.au/electricity-and-gas/codes-guidelines-policies-and-manuals/compliance-and-performance-reporting-guideline/compliance-and-performance-reporting-guideline-review-2019

[3] See Compliance & Performance Reporting Guideline, updated to include new entitlements for customers, draft decision 13 September 2019, p17.

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disclosures or the potential serious risk of physical harm, should a perpetrator uncover personal details (e.g. through not following a customers preferred method of communication). However, we do not agree that this same severity of 'significant risk' can be placed on **RB0063** which is about the disclosure of a discount calculation (see *information provision* discussed below), or any of the records management obligations (see *records management* discussed below).

We note that under the Privacy Act, 'serious harm' or 'risk of serious harm' is determined under very specific categories (such as where personal information is disclosed, and such a disclosure is likely to result in serious harm to an individual).[4] Risk assessments are applied to ensure consistency in policy and regulatory decisions and are used regularly by policy-makers, including the Australian Competition and Consumer Commission (**ACCC**) in the assessment of Product Safety hazards, the Office of Australian Information Commissioner (**OAIC**) for Privacy Impact Assessments, and international regulators.[5]

If the ESC intends to use the risk matrix, we would encourage the establishment of appropriate definition of the different significant, moderate and minor harm categories as well as high, medium and low time sensitivity categories. These definitions will ensure a more transparent and consistent classification of Types of breaches.

Finally, AGL believes the minor customer harm / high time sensitivity matrix square should more appropriately classified as Type 2 given the low impact on consumers.

Should the ESC revert to using the criteria specified in Section 2 of the Guidelines[6], we would still encourage the development of appropriate scale and criteria to ensure consistent decisions now, and in the future.

General Type 1 comments

We would like to take this opportunity to comment on existing Type 1 obligations that the ESC should consider while undertaking this review of the Compliance and Performance Reporting Guideline.

Prescribed time period obligations

There are several situations that can arise that may cause a delay to a prescribed time period obligation (for example – a printing delay, an issue with a mail house provider etc). It is possible that customer communications may be delayed for a short time whilst a system error is being corrected, to avoid issuing a customer a communication with incorrect information.

For example, **RB0330** (frequency of bills) is currently a Type 1 obligation by the ESC, but a Type 2 by the AER. As we have previously raised with the ESC, we do not consider it reasonably necessary to report **RB0330** as an immediate Type 1 breach, particularly given the onerous, manual exercise of reviewing, aggregating numbers and reporting daily across a very sizeable customer base.

We also encourage the ESC to consider alignment with the AER on welcome pack obligations (**RB0110**) (which are listed as Type 2 by the AER). As above, there are several reasons that may mean a welcome pack is not sent within the prescribed time period. Taking into consideration that often welcome pack

[5] See for example the Organisation for Economic Co-Operation and Development
[6] Reporting guidelines section 2

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breaches involve a small delay beyond the two-business day timeframe for sending the pack, as opposed to not sending one at all, we are of the view that these breaches should be treated as attracting only a moderate degree of any customer detriment.

Records keeping obligations

We do not agree with the ESC's approach on making associated records keeping obligations Type 1. Records keeping obligations (such as **RB1426**, **RB1428**) do not meet the ESC's matrix model or schedule 2 criteria, as they do not have a significant impact on a customer and do not require an immediate response (e.g. are not time sensitive).

We are not aware of any other examples of records keeping obligations being deemed Type 1 obligations and consider these types of retailer-management obligations should be maintained as Type 2 obligations. We note also that the ESC has listed **70Z** as a Type 2.

Information management obligations

In line with our comments above regarding the risk matrix, we do not consider that information management obligations should be deemed critical when assessed against other existing retailer obligations.

For example, it is unclear what the value of reporting **RB1432** as a Type 1 will achieve. It would be difficult to determine what, if any customers had accessed that information through Victorian Energy Compare (**VEC**) and had then reasonably relied on that, and a retailer did not then either a) honour that offer or b) offer a comparable offer to the customer. Further, we do not believe that reporting such an information management error immediately will have any effect on the resolution of such an issue.

The matter of prescribed time period obligations also links to information provision. For example, **RB1431** requires a retailer to place a 'best offer' on a customer bill or bill summary within the prescribed time periods, however AGL has established a contingency where a letter with the 'best offer' information is sent to customers if there is a reason the bill cannot go out. However, as the requirement is that this information is on the bill/bill summary **and** within the prescribed time, this would still be reportable despite the fact the consumer has received the information and therefore no risk of harm has occurred through a lack of information.

We encourage the ESC to consider not just whether the individual obligation has been breached, but what other opportunities the customer has had to receive the relevant information (e.g. through bills, through clear advice, through letters or bill change notices) before determining severity.

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Type 1 obligations

Note: we have only included cells where we provide comments for the ESC's consideration.

Type 1			
Code & clause	**Summary**	**AGL position**	**Recommendation**
RB0062	Bills must include a reference in plain English on how to access the VDO	See above general comment regarding prescribed time period obligations. It is also unclear if this obligation is in reference to the inclusion of how to access VDO on the bill, or that the information must be in plain English. The latter is not appropriate as either a Type 1 or 2 (potential for retailers to apply different tests).	*Clarify obligation* *Recategorise as a Type 2*
RB0063	Must disclose how the discount is calculated against the VDO	See above general comment regarding prescribed time period obligations. Further, it is not clear if this obligation is in reference to the disclosure of the methodology of calculating the VDO or providing the VDO reference comparison.	*Clarify obligation* *Recategorise as a Type 2*
RB1422 106H	**Family Violence -** A retailer must have a process to avoid an affected customer having to repeatedly disclose	As it appears the clause is based on a retailer **having a process** in place to identify an affected customer and avoid repeat disclosure, then AGL believes this is a Type 2 breach as it does not have an immediate and significant customer impact.	*Recategorise as a Type 2*
RB1423 106I	**Family Violence -** Before taking action to recover arrears from an affected customer, a retailer must take into account the potential impact of debt recovery action at that time, and whether other persons are jointly or severally responsible for the energy usage that resulted in the accumulation of arrears	AGL believes the ESC should articulate what it means to "take into account" as it is a subjective term and makes assessment difficult.	*Seek further clarification*
RB1424 106Q	**Family Violence -** A retailer must maintain records that are sufficient to evidence its compliance with its obligations under Part 3A for 2 years or as long as the customer continues to receive assistance.	See general comments above regarding records keeping obligations and their categorisation.	*Recategorise as a Type 2*
RB1425 70H	A retailer must provide a customer with clear advice about any terms pursuant to which the amounts payable by the customer may vary, the retailer's other	As we have previously raised with the ESC 70H represents several challenges for retailers that will result in different retailers taking different levels of risk	*Recategorise as a Type 2*

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	generally available plans, the Victorian Default Offer and the impact that changing tariff structures may have on the customer.	on what terms they determine may impact a customer and be relevant at the time of sale. When consulting on developing this obligation, the ESC noted that the intention was to capture any retailer-controlled charges, not pass-through distributor charges. This position is mirrored in the Final Decision issued by the ESC, particularly on page 51 which states that capturing distributor charges: *is contrary to our intent, which is to create an obligation that scales in proportion to the level of complexity that retailers themselves introduce, as opposed to complexity that is inherent in the market by virtue of the decisions of other entities, such as distributors. That is, our intent is to establish the entitlement in such a way that retailers have the opportunity to minimise or even eliminate their obligations under the rule by virtue of the way they design their products.* However, the final drafting of 70H(2) has included distribution service charges. These can vary and will dependent on an action a customer may take in the future (e.g. requesting an out-of-hours service). This raises issues regarding the timing of a reportable breach on clear advice (e.g. the particular distributor fee only became relevant 12 months later due to a specific customer action). If this fee does then subsequently arise, would this be a reportable breach? If it is, we do not agree it meets the threshold of Time Sensitivity for a Type 1. We express further concerns about the degree of subjectivity involved in assessing whether clear advice has or has not been provided, or more so, the complexity around demonstrating that a retailer has sufficiently "communicated to the customer any alternate, generally available products/plans which it reasonable believes may be/may have been more suitable for the customer having regard to any information we have	

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		with respect to the customer, wherever it is practicable to do so".	
RB1426 70I	A retailer must maintain records that are sufficient to evidence its compliance with its obligations under Part 2A, Division 2. These records must be retained for at least 2 years, or as long as the customer continues to receive assistance.	See general comments above regarding records keeping obligations and their categorisation.	*Recategorise as a Type 2*
RB1427 70L	If a benefit change or a price change is going to occur the retailer must provide the customer who is party to the contract with a bill change alert. This clause provides what must be included in a bill change alert and that it must be provided in writing at least 5 days prior to the change taking effect.	See general comments above on welcome pack around when timing is missed by a few days due to system errors and these breaches should be treated as attracting only a moderate degree of any customer detriment.	*Recategorise as a Type 2*
RB1428 70M	A retailer must maintain records that are sufficient to evidence its compliance. These records must be retained for at least 2 years, or as long as the customer continues to receive assistance.	See general comments above regarding records keeping obligations and their categorisation.	*Recategorise as a Type 2*
RB1431 70R	A retailer must provide a deemed best offer message on a bill or bill summary to a small customer at least once every 3 months for electricity and at least once every 4 months for gas (or if longer period must be once each billing cycle).	See above general comment regarding prescribed time period obligations.	*Recategorise as a Type 2*
RB1432 70X	A retailer must put, into the Victorian Retailer Portal website, accurate details of each standing offer and the Victorian Default Offer. This must include details in the form required by that internet site. Information uploaded to the Victorian Retailer Portal website must be written in plain English and be designed to be readily understandable by customers.	See above general comment regarding information management.	*Recategorise as a Type 2*

Type 2

Type 2		
Code & clause	**Summary**	**AGL position**
Clause 106K	**A retailer must provide an affected customer with information about the availability of one or more external family violence support services at a time.**	AGL supports this obligation. However, we seek further clarity on the timing of information provision.

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	A failure to provide an affected customer with information about the availability of external family violence support services has a significant impact on affected customers as it means that they are not provided with information about all of the support services that they can access. Accordingly, we propose to include this obligation as a type 2 obligation.	Specifically, often a retailer has to balance contacting a customer impacted by family violence to provide such information against the customer's safety and possible requests for no-contact.
Clause 106P	**Provides that a retailer must review its family violence policy at least once every two years.** A failure to have an up to date and regularly reviewed family violence policy carries with it a significant risk of customer harm as a retailer's family violence policy may not be fit for purpose. Accordingly, we propose to include this obligation as a type 2 obligation.	AGL acknowledges that having a Family Violence policy is an important prerequisite to support impacted customers. However, as the obligation to review the policy is every two years and the fact that a policy exists to protect customers and therefore provides immediate support to the customers regardless to whether a review of the policy has occurred with a two year period, AGL considers that this obligation should be recategorised as a Type 3.
Clause 70Y	**A retailer must ensure that an energy fact sheet for each current plan and the Victorian Default Offer is available to relevant customers within two business days of the plan becoming available. This fact sheet must be readily identifiable by a customer.** It is important for retailers to make energy fact sheets available for each current plan and the Victorian Default Offer. Failing to do so can have a significant risk of customer harm and that risk can get worse the longer the retailer fails to make energy fact sheets available. Accordingly, we propose to include this obligation as a type 2 obligation.	As the ESC considers making this obligation a Type 2, it would be prudent to remove the duplicate Type 1 obligation (**RB0053)** which reads: "Deemed licence condition – Section 64C EIA - Obligation to comply with Orders in Council under Section 46D – AMI Tariffs Order".

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Proposed compliance reporting obligations to be removed

We agree the ESC's proposed removal of compliance obligations[7] given the changes to energy price fact sheet requirements, however, we note that related obligations under Clause 15D to 15F (RB1370) still appear in the Draft Compliance and Performance Reporting Guideline – Version 5.[8]

Performance indicators

The ESC has proposed an implementation date of 1 January 2020. As we detailed above, it is unclear why the ESC is seeking this date, rather than an alignment with reporting years. Given the significant changes to definitions and customer categorisation, we encourage the ESC to have a 1 July 2020 start date to help ensure that the data collected is meaningful for the entire period.

We support the ESC's approach to amending the total arrears definition and agree that the revised categorisation will assist retailers in managing this indicator in the future.

Proposed changes to existing indicators and new definitions

Customers on the Victorian Default Offer versus Customers on Standard Retail Contracts:

Based on the current Orders in Council and the 1 January 2020 draft Victorian Default Offer decision, the VDO will be extended to all tariff types, including flat and non-flat. We understand that the 1 January 2020 VDO is still in its draft form, however, the likely outcome will be that the concept of "customers or accounts on Standard Retail Contracts" will be superseded or wholly replaced by the indicator "customers or accounts on the VDO." Given the final determination is currently in the making and the ambiguity as to how it will apply to non-flat tariffs, the ESC is best positioned to consider whether pre-emptively removing any performance indicators which refer to customers or accounts on Standard Retail Contracts is prudent at this stage. This is further discussed under "Proposed new indicators" subheading below.

Proposed new definitions

AGL suggests the ESC consider the appropriate use of defined terms throughout the Guideline. For example, the definition of *standard assistance account* refers to a 'residential account', however 'residential account' is not defined, and/or may have been used in error (and instead should have been *residential customer*, which is a defined term).

AGL also suggests the defined words be listed in alphabetical order.

[7] Page 68 draft decision
[8] Essential Services Commission 2019, Compliance and Performance Reporting Guideline - Version 5 (Draft for comment): Version 5, 13 September, p22.

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Proposed new indicators

New Indicators		
Proposed addition	**Proposed definition**	**Comments**
Indicator: Residential Electricity accounts on the Victorian Default Offer	The count of accounts who purchase electricity under the residential Victorian Default Offer, principally for personal, household or domestic use at premises. This should include deemed contracts or occupier accounts and is to be measured as at the last calendar day of each reporting month.	The proposed definition of the Victorian Default Offer is as defined in the Gazette number S208 Offer and introduced by the Victorian Government on 1 July 2019. The ESC is currently consulting on the VDO to apply from 1 January 2020. Based on the current Orders in Council and the VDO draft decision, from 1 January 2020, the VDO will be extended to all tariffs (flat and non-flat), therefore, all standard retail electricity customers will be considered VDO customers. As such, separately reporting "Residential Electricity accounts on the Victorian Default Offer" vs "Residential Electricity accounts on standard retail contracts" may become redundant. Accordingly, AGL does not anticipate that it would be reporting any numbers under the "Residential Electricity accounts on standard retail contracts" as all should be under "Residential Electricity accounts on the Victorian Default Offer". As the 1 January 2020 VDO is still in draft, retailers are still awaiting clarification as to how the VDO will be applied to non-flat tariffs. However, assuming that all electricity tariffs (flat and non-flat) will be captured by the VDO come 1 January 2020, the obligation to separately report on electricity Standing Offer vs Victorian Default Offer customers will be unnecessary. We are also moving forward on the assumption that when new Orders in Council are published, the reference in the definition of the VDO to "as defined in the Gazette number S208" will no longer reflect the most recent OIC, which could be a problem if the

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		definition of Victorian Default Offer changes. Taking into consideration the extremely short timeframes for implementing both the VDO on 1 January 2020 and the new reporting requirements, the ESC should take into consideration the significant analysis, research and development that would be required in retailers' billing and reporting systems to separate the number of "deemed or occupier accounts" versus those accounts that actively elected to sign up for the VDO.
Disconnections for non-payment of residential customers who did not receive assistance	Reported separately for electricity and gas, the number of customers whose supply was disconnected for non-payment during each month within the reporting period who had not received assistance within the previous 6 months.	AGL notes the ESC has removed reference to standard and tailored assistance. AGL considers this reference to be important, to clarify what 'assistance' means under this indicator.

Proposed performance indicators to be removed

AGL supports the removal of performance indicators D010, D030, D040, D090, D100 and D130.