EnergyAustralia
LIGHT THE WAY

15 January 2021

EnergyAustralia Pty Ltd
ABN 99 086 014 968

Level 33
385 Bourke Street
Melbourne Victoria 3000

Phone +61 3 8628 1000
Facsimile +61 3 8628 1050

enq@energyaustralia.com.au
energyaustralia.com.au

Commissioners

Essential Services Commission of Victoria

By email: compliance.reporting@esc.vic.gov.au

Dear Commissioners,

Updating the Compliance and Performance Reporting Guideline

EnergyAustralia welcomes this opportunity to provide the Commission feedback on its proposed updates to its Compliance and Performance Reporting Guideline (CPRG).

EnergyAustralia is one of Australia's largest energy companies with approximately 2.5 million electricity and gas accounts in NSW, Victoria, Queensland, South Australia, and the Australian Capital Territory. We also own and operate a multi-billion-dollar energy generation portfolio across Australia, including coal, gas, and wind assets with control of over 4,500MW of generation in the National Electricity Market (NEM).

EnergyAustralia recognises the importance of breach reporting in allowing the Commission to identify and assist businesses in rectifying non-compliance which causes customer harm. We also recognise that it helps the regulator to identify and assess emerging non-compliance risks in the energy sector.

EnergyAustralia also supports reviewing the CPRG to reflect new regulatory obligations which have come into effect since the last update of the CPRG. This ensures that the breach reporting framework is relevant and up to date. However, we are concerned with some of the Commission's proposed changes. We set out our concerns generally below; and then provide detailed comments for individual obligations which provide examples of our general comments.

General comments

Proposed Type 1 classifications

Our main concern relates to the number of proposed obligations with a Type 1 breach classification. In our view, the Commission has disproportionately "over classified" Type 1 breaches. Type 1 breach classification should only be imposed for breaches which could result in the highest level of customer harm. Type 2 and Type 3 classifications should reflect decreasing levels of customer harm.

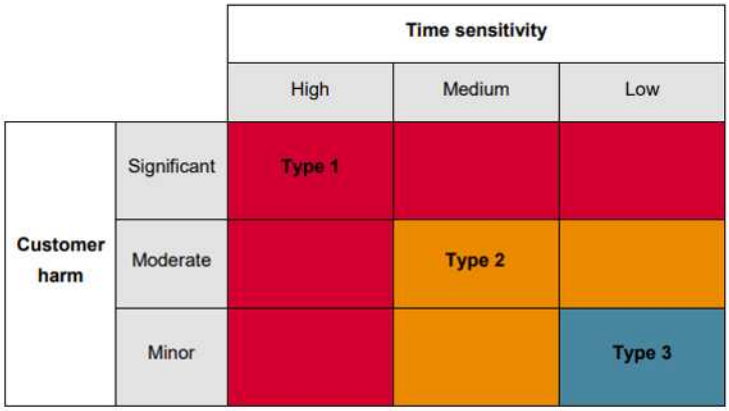
The Commission's definition of Type 1, 2 and 3 breaches in the current CPRG appears to reflect this proportionate approach; along with the additional consideration of "Time Sensitivity":

- The definition of Type 1 obligations refers to 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."

- The definition of Type 2 obligations is the same except it reflects a lower level of customer impact referring to "a moderate impact on customers".
- Type 3 regulatory obligations are all other obligations.

The Commission previously provided more explanation about its assessment of Breach Type classifications in its 2019 review of the CPRG:

> "In order to classify the new obligations we have used a matrix model, set out below, that considers the potential customer impact of a breach and the extent to which an immediate response is required, referred to as Time Sensitivity".[1]



While the above definitions and matrix appear to set out some guidance, we question how the Commission is applying them in practice to provide the large number of Type 1 classifications in its proposed changes to the CPRG. The Commission has also not provided a decision document to explain its reasons for the proposed Breach Type classifications which means its assessment is particularly unclear. In respect of the two criterion, Customer harm and Time sensitivity, we note:

- **Customer harm:** It is difficult to understand the Commission's assessment of what meets the threshold of significant customer harm or significant impact on customers. The Commission proposes to classify 28 out of 30 additional obligations as Type 1 breaches. Many of these proposed Type 1 breach classifications do not appear to have a possible significant impact on customers or customer harm, if significant were given its ordinary meaning of "A significant amount or effect is large enough to be important or affect a situation to a noticeable degree".[2]

  Further, the possible impact of these Type 1 obligations varies significantly and does not reflect a consistent view of significant customer harm. For instance, a breach of an obligation to inform the customer that a price is inclusive of GST (clause 3G(1)(b)) is unlikely to result in significant customer harm, particularly when compared to de-energisation of a customer with a life support requirement (clause 127(1)(c)) which could.

- **Time Sensitivity:** We also disagree with the view that the Time Sensitivity of many of the proposed Type 1 breaches is high, medium, or even low. Often the impact to the customer over time from the breach would stay the same and would not increase at all. Given the definition of Type 1 and Type 2 breaches includes "the impact of that non-compliance increases over time if

[1] https://www.esc.vic.gov.au/sites/default/files/documents/C%2019%2020991%20%20RPT%20-%20FINAL%20FOR%20RELEASE%20-%20Draft%20decision%20-%20Amendments%20to%20the%20Compliance%20%26%20Performance%20Reporting%20-%2020190909.pdf, p 19

2 https://dictionary.cambridge.org/dictionary/english/significant

it is not rectified quickly", where the impact stays the same the definition of Type 1 or Type 2 breaches has not been met, and the obligation should be classified as Type 3.

Impact of proposed Type 1 breach classifications for businesses

If the Commission were to proceed with its proposed Type 1 breach classifications, there would be 85 Type 1 obligations in total under the next version of the CPRG (compared to the current 57). This number is significantly more compared to the Australian Energy Regulator[3] which has 12 obligations classified as Immediate Reports (equivalent to Type 1 breaches).

A requirement to report this large number of breaches within the 2 business day timeframe will have a material impact on businesses.

Investigating and reporting Type 1 breaches within the 2 business day timeframe places time pressures on internal compliance teams which are responsible for coordinating compliance reporting. It also places time pressures on operational teams including call consultants, which the compliance teams engage and work with to gather information required to investigate possible breaches, potentially at the same time they are pre-occupied with fixing the breach.

Increasing Type 1 breach classifications could require more staffing, which would lead to greater costs of compliance and cost to serve which are ultimately borne by customers. It also may not always be possible to simply increase staffing for operational teams who assist with internal investigations as this work is only ancillary to their core function.

The classification of Type 1 breaches where it is not warranted can therefore lead to inefficient outcomes (see Detailed Comments below as to whether Type 1 classifications are warranted for each proposed obligation). Where this occurs, businesses over allocate resources to investigating, reporting, and remediating breaches when those resources could be better allocated to breaches which cause significant customer harm.

Clearer definitions of Breach Type classifications

In view of the above issues around the unclear and inconsistent classification of Type 1 breaches, we also encourage the Commission to provide more definition of the Breach Type classifications in its next version of the CPRG. This will provide more clarity to industry on the Commission's classifications and promote consistency in how obligations are classified going forward.

Significant and moderate impact on customers/customer harm, could be defined by their ordinary meaning to give a relative idea of severity of a breach. Alternatively, the Commission could provide a definition based on the nature of the impact to the customer. i.e. effect on the customer's safety, continuity of supply, or decision to buy from the retailer. The AER's Type 1 and Type 2 breaches conform to consistent themes around continuity of supply, life support and the key consumer protection of explicit informed consent. Specifically:

- Immediate Reports (equivalent to Type 1) refer to wrongful disconnections (prohibitions on de-energisation in certain circumstances) and life support requirements
- Quarterly Reports (equivalent to Type 2) refer to:
    - Rules regarding disconnections (e.g. de-energisation for not paying a bill, not paying a security deposit etc; timing of de-energisation and rules around requests for de-energisation)
    - Rules around obligations to re-energise premises
    - Certain explicit informed consent transactions

[3] See: https://www.aer.gov.au/system/files/AER%20compliance%20procedures%20and%20guidelines%20-%20Version%206%20-%20Final%20-%20September%202018_1.pdf

Detailed comments

Our specific comments regarding individual obligations in the Energy Retail Code are set out below. We urge the Commission to carefully consider whether a Type 1 breach classification is warranted in each case.

Obligation	Proposed Type classification	EA's comments
Clause 3G (1) - GST inclusive pricing	Type 1 immediate	This obligation requires a retailer to identify prices inclusive of GST and specify the price is inclusive of GST in communications. Where communications are written, automated system controls (i.e. letter templates etc) would ensure businesses are compliant with this obligation. Therefore, the Commission can expect that most breaches of this obligation would be through instant messaging via websites and verbal communications where a consultant may: • quote a GST exclusive price, and/or • fail to state that the correct price is inclusive of GST. For the latter, where the statement that a price is inclusive of GST is omitted, the customer harm would be negligible. For the former, where the customer is provided GST exclusive pricing and their quoted pricing is lower, any customer harm in the customer thinking the price is lower than it is, would be low. This is because the customer will also receive a single written disclosure statement (Rule 63(3)) i.e. Welcome Pack, which would specify the correct price and wording. Further the impact of the breach (customer's understanding of pricing) would remain the same and would not increase over time, and so this obligation does not meet the definition of a Type 1 or Type 2 breach. **This obligation should therefore be categorised as a Type 3 obligation.**
Clause 25(1)(za) - Contents of bills - Information about Victorian Default Offer [electricity only]	Type 1 immediate	A retailer would likely be in breach of this requirement where there is an error in their system which removes the VDO reference from the bill or the retailer hasn't built it in the first place. We question the customer harm that would result from the omission of the VDO reference from the Bill. If the reference is omitted, the customer could be unaware of the VDO as a plan option. However, as the VDO would likely be the most expensive plan available in market for a customer, we question whether the customer not knowing about the VDO would detrimentally impact their choices about their energy plan. **Given the questionable customer harm, this obligation should have a Type 2 breach classification.**

Clause 29(1), (2), (3), (5)(a), (6)(b), (7) - Billing disputes	Type 1 immediate	Subclause 2 requires a review of a customer's bill in accordance with the *retailer*'s standard complaints and dispute resolution procedures, including any time limits under those procedures. We disagree with subclause 2 being a Type 1 obligation given any breaches of it would be procedural and minor in nature. The standard complaints and dispute resolution procedures are also drafted by a retailer and would not be consistent from retailer to retailer. Given the variation of the obligations in the procedures from retailer to retailer, the levels of customer harm would also not be consistent, and the Commission cannot assess them as significant. **For these reasons, we would suggest that this be re-classified as a Type 3 breach.** This also would be in line with the AER's classification of clause 29 as a Half yearly report which is its third category of breach classification (note the AER does not have annual reporting).
Clause 35D - Guaranteed service level (GSL) payments	Type 1 immediate	The late receipt of a GSL payment does not have a significant impact on customers, nor does the amount of the GSL increase the longer the breach continues. **This should be classified as a Type 3 obligation.**
Clause 36(1) - Tariff changes - Obligations on retailers	Type 1 immediate	This was an existing obligation to ensure meter reads occur to support a change in tariff for a customer. We do not support this being classified as a Type 1 breach because: • A change in tariff does not mean that a customer will necessarily receive lower costs for their energy and so a breach of this obligation may not result in customer harm. For example, a customer switching from a flat tariff to a Time of Use tariff may in fact pay more for the same period depending on the shape of their usage. • Even if you were to assume a customer would pay less on their new tariff type (and there is customer harm in delays to their tariff change), it is unclear why this existing obligation is now being classified as a Type 1 breach. This is an existing obligation; the only change appears to be the introduction of the VDO. Under the VDO, the differences in prices paid due to different tariff types would be reduced as all the different tariff types are now regulated by the VDO. It is therefore unclear why this is now being classified as a Type 1 breach when any customer harm is actually reduced in a post VDO context. • Lastly, for basic meters, the timing of meter reads may not be within the retailer's control, and the customer request may be timed in a way that misses the distributor's next scheduled read. **In view of the real questions around customer harm, this should be a Type 3 breach.**

Clause 37 - Tariff changes - Customer request for change of tariff	Type 1 immediate	**For similar reasons to the above row, it is unclear why this is now a Type 1 obligation when the customer may not be worse off (from a delayed change in tariff) and when in a post VDO context any customer harm is actually reduced.**
Clause 46AA(3) and 46AA(5) - Price certainty: Price increases may only be made on a network tariff change date or annually after a fixed price period	Type 1 immediate	The intent of this obligation is to provide price certainty to customers by providing that retailers are only allowed to increase prices for customers once a year. This will happen on a set date one month after the distributor's approved pricing proposal takes effect (the "Network Tariff Price Change" date) (except for fixed-price contracts). Breaches of this obligation could fall within two categories: • Where a retailer increases the price on the Network Tariff Change Date but then increases it again on another date, effectively increasing prices more than once a year. • Where the retailer only increases the price once a year but does it on the wrong date – i.e. later than they should. If the retailer changed the price earlier than they should it arguably falls under the first type of breach. **We do not think that the second type of breach should be classified as Type 1** because: • There is no customer harm that would arise from the delayed increase in prices to a customer, where the retailer increases the price later. Any delay would actually result in the customer paying less for their energy overall. • The second breach may often not be within the retailer's control, as it can depend on the AER providing final network tariffs and receiving sufficient notice of the date the network tariffs will take effect. Where AER decisions are delayed, retailers have less time to meet the one month timeframe as their notice of the new tariffs is reduced. • The regulation applies to increases, but not price decreases. Retailers' prices are heavily influenced by network tariff costs that make up around 30-50% of the retail price. A late decision by the AER about network tariffs can mean the difference between a price increase or decrease for some or all customers. This situation coupled with the regulatory requirements mean that retailers could have to rearrange their planned price change dates at short notice depending on a decision by the AER that is out of their control. Relating to the last point, there have been recent delays in AER network pricing decisions, later corrections to published final tariffs and from July 2021, the AER will be making decisions on Victorian electricity network tariffs concurrently with all other states (for gas and electricity). We foresee that there may be many more issues in receiving timely notice of final network tariffs that will place retailers at risk of breaching this regulation. If EA faces this situation, we would contemplate writing to the Commission to request that no compliance action is taken at those times.

		The regulatory regime that applies to retailers and network tariffs and the low potential for customer harm suggests that a breach of this obligation should be classified as Type 3.
Clause 47AB - Duration of fixed term retail contracts	Type 1 immediate	This obligation provides that a *fixed term retail contract* must provide for a contract length of not less than 12 months. This clause can be characterised as a definitional type clause which then links to other associated obligations e.g. obligation to provide notice of end of contracts and early termination charges (clauses 48 and 49A). We do not consider there is any customer harm that arises from this particular clause which prescribes a contract length of 12 months. Depending on other features of a product, shorter or longer contract length may in fact provide more benefit to a customer. **We therefore consider this obligation should be classified as a Type 3 obligation.**
Clause 60D - Misleading or deceptive conduct	Type 1 immediate	**We disagree with these two obligations being reportable.** The question of whether misleading or deceptive conduct has occurred in the context of the Australian Consumer Law is not always objectively clear, which is why courts typically decide whether a person has engaged in misleading or deceptive conduct. In cases where conduct is objectively misleading or deceptive, it can be remedied. There are also substantial penalties in the Australian Consumer Law for misleading or deceptive conduct so retail marketers already have a strong incentive not to act in a manner that is misleading or deceptive or likely to mislead or deceive. **The basis for making these obligations reportable at all, let alone immediately reportable, is, therefore, unclear.**
Clause 60E - False or misleading representations	Type 1 immediate	
Clause 64B - Manner of advertising conditional discounts	Type 1	This obligation requires the conditions of the conditional discount to be set out clearly and conspicuously in any marketing etc, and that the conditional discount not be the most prominent price related matter. While we support giving customers the ability to more easily understand conditional discounting, it is unclear how the detriment to a customer from a breach of this provision could be so serious as to warrant immediate reporting. In the event the conditions associated with a conditional discount are not sufficiently clear or conspicuous in a communication, that communication and any potential harm arising from it, is able to be remedied. For example, if a customer signs up to an energy plan on the basis of a communication that fell short of the obligation, the harm would primarily be signing up to a plan that they would not have otherwise. In this case, the retailer could revert the customer to their existing plan, offer a different plan, offer compensation, etc, to ensure the customer is no worse off than had they not acted on the communication. **For this reason, it should not be considered a Type 1 breach.**

Clause 107 - De-energisation (or disconnection) of premises—small customers	Type 1 immediate	This is an overarching obligation which specifies that a *retailer* must not arrange *de-energisation* of a *customer*'s premises except in accordance with Division 2. Division 2 contains clauses that specify when de-energisation may occur (and what steps must be followed beforehand). It also sets out when de-energisation must not occur. Many of the specific obligations in Division 2 are already Type 1 breaches E.g. clauses 111 – 117 and are reported in the existing monthly Wrongful Disconnections Report. **We do not support the addition of clause 107 to the breach reporting obligations as it would duplicate existing reporting of the same obligations, without a clear purpose or benefit**.
Multiple life support obligations	Type 1 immediate	We agree with the classification of the life support obligations as Type 1. However, we ask that the specific clauses be separated into different RB numbers (rather than have one RB number cover multiple clauses or subclauses). This will facilitate clearer and more efficient reporting by retailers and for the Commission receiving this information by making it clear which obligation a reported issue relates to.

If you have any questions in relation to this submission, please contact me ([redacted]).

Regards,

[redacted]
Regulatory Affairs Lead