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Chairperson Kate Symons
Commissioner Sitesh Bhojani
Commissioner Rebecca Billings
Commissioner Simon Corden
Level 8
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MELBOURNE VIC 3000

Lodged electronically: www.engage.vic.gov.au

Dear Chairperson and Commissioners,

Compliance and Performance Reporting Guideline Draft Decision - Public

EnergyAustralia is one of Australia's largest energy companies with around 2.4 million electricity and gas accounts in NSW, Victoria, Queensland, South Australia, and the Australian Capital Territory. EnergyAustralia owns, contracts, and operates a diversified energy generation portfolio that includes coal, gas, battery storage, demand response, solar, and wind assets. Combined, these assets comprise 4,500MW of generation capacity.

We welcome the opportunity to provide this submission to the ESC's Draft Decision on the update to the Compliance and Performance Reporting Guideline (Draft Guideline). Our comments on the proposed changes are set out below.

1. Compliance Reporting

We welcome the ESC's decision to holistically review the structure of the breach classifications, rather than reviewing them for only minor changes.

We agree with the ESC's approach to redefining Type 1 reportable breaches to reflect breaches of obligations that have a risk of critical harm to consumers and which need an immediate response. **We recommend that the family violence obligation in clause 150(4) of the Energy Retail Code of Practice be added to the Type 1 category**. Clause 150(4) relates to identifying a safe method of communication for affected customers and is fundamental to the effectiveness of the family violence protections as a whole.

Our primary concern is around the proposed classification of a large number of obligations as Type 2 breaches. We consider this points to either issues with the definition itself or the ESC's

interpretation of breaches which are considered to have "potentially significant or moderate impact or harm to consumers". **Specifically, including the terms "or moderate impact or harm to consumers" may lower the threshold for Type 2 breaches in a way that is not intended and is in effect lower than the third "Other" type category.** The third Other type category is defined as breaches other than Type 1 or 2 which may give rise to a "*material adverse* impact on consumers". **The terms used for Type 2, "*moderate impact or harm to consumers*" is arguably a lower threshold than "material adverse impact", according to their ordinary meaning. We therefore suggest they should be removed from the definition of Type 2 breaches. i.e. Type 2 breaches should be defined as "potentially significant impact or harm to consumers" only, and not "moderate impact or harm".**

This change would assist in reducing the category of Type 2 breaches from the proposed 180 obligations for Retailers under the Draft Guideline, and thereby assist the ESC and Retailers in prioritising resources on breaches with greater consumer harm. While we fully recognise and support transparency of breaches for the ESC, the proposed classification does not facilitate prioritisation of resources.

Further, in comparison with the Australian Energy Regulator's compliance reporting, the ESC's proposed Type 2 classifications also appear to be excessive (there are only 13 Quarterly reportable obligations in the AER's jurisdiction, compared to the ESC's 180). **We encourage the ESC to change its definition as above, and ensure that only obligations that objectively meet the definition of potentially significant impact or harm to consumers are included**. Our views still apply even where these obligations are made civil penalty provisions under separate legislative change. Obligations that do not meet this definition should form part of the third Other type category and would be captured in reporting of those obligations where the breach has material adverse impact, so the ESC would still have transparency over those material breaches.

In the table below we set out specific obligations which we do not consider meet the definition of potentially significant impact or harm, nor do they meet the ESC's broader proposed definition. These views equally apply to support our view that these obligations should not be civil penalty provisions.

In addition, our general view is that across all Type 2 breaches, the 30 calendar day reporting period should be extended to 90 calendar days from when the breach is detected, but even 60 business days would be better. A 90 calendar day timeframe would still deliver faster reporting relative to the current reporting requirement (up to 6 months). It would also align with the AER's reporting timeframes. 90 calendar days is also appropriate in view of practical considerations:

- Where there are several Type 2 breaches to report, 30 calendar days is unlikely to be a sufficient period to be able to investigate the facts around the breaches and determine whether there is a breach. [**Confidential**:

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- Where there are several Type 2 breaches to report, a reporting period of 30 calendar days could mean there is insufficient time to provide comprehensive information on a breach and in particular information on any remediation performed (sometimes remediation within 30 calendar days is not possible where the customer is not contactable). This information assists the ESC in determining priority and enforcement action. For example, where remediation negates any potential customer harm the ESC is less likely to take further action on the breach. Therefore it is more efficient for the ESC to receive more complete and comprehensive information including information on remediation, and to receive this information later, compared to the ESC receiving incomplete information within 30 calendar days and following up with information requests which are resource intensive for both the

ESC and Retailers. For these reasons, we strongly suggest the reporting time be increased so that Retailers have sufficient time to provide enough information initially.

- The ESC might consider that one possible effect from shorter reporting timeframes might be that Retailers will likely prioritise remediation and it will therefore result in faster remediation of a reportable breach. Where this is the case for Retailers, we caution that where there is 180 reportable Type 2 breaches, it would make it difficult to determine which remediation should be prioritised. This is another reason as to why the ESC should change its definition and closely re-examine the obligations in its proposed Type 2 category.

We emphasise that the above concerns cannot be necessarily addressed by hiring additional resources. [**Confidential:**

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1.1 Detailed comments on specific obligations

In the table below, we detail why the clause should not have a Type 2 classification and should fall in the Other Type category.

Energy Retail Code of Practice reference	**Description**	**Reason it should not have a Type 2 classification or Civil Penalty Classification**
Payment difficulty or family violence protections	Content of financial hardship policies Requirements for content of a financial hardship policy of a Retailer.	Unclear how a breach of this obligation has a significant or material impact on customers. We note that any hardship policy would need to be approved by the ESC and that the obligation to comply with the hardship policy is arguably more important for the efficacy of the hardship framework.
Clause 146(2) Clause 146(3) Clause 146(4) Clause 146(8) Clause 146(5) Clause 146(6) Clause 146(7)	These obligations relate to offering a plan that has Centrepay as a payment option, allowing a customer access to Centrepay on a plan, or not charging for Centrepay i.e. charging to switch to a plan that offers Centreypay.	We see Centrepay as a payment option, so it is unclear why obligations relating to offering Centrepay and not other payment options are a Type 2 classification. The ESC may have linked access to Centrepay to indicating payment difficulty. In our experience, a customer using Centrepay has no bearing on whether they are in payment difficulty. Nor does it necessarily assist in relieving a customer of payment difficulty. On the basis that Centrepay is another payment method that does not warrant special treatment, we suggest these obligations should not be classified as Type 1 or 2.

Clause 40(10) Clause 40(11) Clause 40(12) Clause 40(3) Clause 40(4) Clause 40(5) Clause 40(6) Clause 40(7) Clause 40(8) Clause 40(9)	These obligations relate to producing and providing fact sheets to customers about their energy plans either directly or through links in marketing or Retailer websites.	We disagree with the classification of these obligations as Type 1 breaches as we do not consider a failure to meet these obligations would result in significant or material harm to the customer. These obligations relate to providing information to a customer about an energy plan via the required fact sheet. It is unclear what detriment would result to the customer due to a failure to provide this information, particularly when key plan information would have been provided via Required Information (clause 45 of the Energy Retail Code) either before the customer enters into the contract or as soon as practicably after (via a welcome pack), and through informed consent obligations.
Clause 80(1)	Guaranteed service level payments Retailer obligation where a distributor makes a payment required to be made by clause 6 of the Electricity Distribution Code via the Retailer.	We disagree with the classification of this GSL obligation as a Type 2. Retailers are required to apply the GSL within 10 business days, but depending on when the customer's next bill is scheduled, this means the payment will make their next bill or will be applied to the subsequent bill. The amount of the GSL payments are low (around $10) and do not increase over time when not paid, so any temporary financial impact to the customer is minimal and would not be a potential significant or moderate impact to the customer. This obligation should be classified as an Other Type of breach – where breaches with material adverse impact would still be reportable, should there be the unusual instance of a very high number of GSLs paid to one customer.
Clause 68(1) and (2)	These obligations relate to providing historical billing or metering data within 10 business days of the customer's request, and only charging for historical billing data in some circumstances.	It is unclear how a breach of this obligation by way of a customer not receiving their metering data or billing data, or being charged for billing data would raise significant or moderate harm. This is particularly where usage information is presented on the customer's bill and where Retailers already have obligations to investigate billing complaints.
Clause 50(1) and 50(2)	These obligations relate to a Retailer marketer providing the customer with information (e.g. name, ID number and Retailer, and in some instances the purpose of call)	The failure to provide a call agent's name or ID number would be unlikely to have a significant or moderate impact on the customer, as it is unlikely to affect a decision as to whether they enter into an energy plan. These details are likely to be inconsequential. The Retailer's name would already be covered in the explicit informed consent requirements would require providing key information about the energy plan, including the Retailer the customer is switching to. We note that explicit informed consent requirements already have a Type 2 classification.

Clause 26(2)(b)	Pre-contractual duty – designated Retailers Obligation if the Retailer is the Designated Retailer for the premises, to advise the customer of the availability of the Retailer's Victorian default offer and/or standing offer.	Any customer detriment that would arise from the customer not knowing of the Retailer's standing offer would be minimal given that the customer would be financially better off on a Market Retail Contract in the vast majority of cases.
Clause 114(1)	Notice to small customers on transfer Retailer obligation to, within 5 business days of receiving notification that it has become the financially responsible Retailer for a small customer as a result of a customer transfer, give notice to the customer of specific matters.	It is unclear why this is a Type 2 classification. The only possible harm we see is that a customer may be alerted to a transfer in error. Current clause 57 (Retailer must not submit a request for a transfer unless it has obtained explicit informed consent etc) better targets this type of customer harm and is already classified as a Type 2 breach. We consider this should be made an Other type of breach – if a breach were to give rise to material customer harm which would be highly unusual and rare, it would still be reportable.
Clause 115(1)	Notice to small customers where transfer delayed Retailer obligation to, where the Retailer has notified a small customer of the expected date of a transfer and that transfer does not occur, notify the customer of specific matters within 5 days of becoming aware that a transfer has not occurred on the expected date.	Although notice to a customer of delays in their transfer to a new Retailer would be helpful to a customer, failing to receive this notice would not result in potential significant or moderate harm to the customer. Especially as this obligation only relates to notification and is not an obligation to transfer within a certain timeframe.
Clause 82(1)	Customer request for change of tariff Retailer obligation where a Retailer offers alternative tariffs or tariff options and a small customer requests a Retailer to transfer from that customer's current tariff to another tariff, and demonstrates to the Retailer that it satisfies all of the Retailer's conditions relating to that other tariff and any conditions imposed by the customer's distributor.	We do not support this being classified as a Type 2 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 i.e. when they use energy. • Also, 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 leading to delays in transferring tariffs. We consider this should fall into the category of Other breach.

Clause 99(1)	Duration of fixed term retail contracts A fixed term retail contract must provide for a contract length of not less than 12 months.	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.

2. Performance Reporting

2.1 Best offer reporting

We question the ESC's potential use of reporting on the new best offer metrics. These new metrics require reporting of number of Customers in bands of the potential annual savings for customers not on best offer, in dollar and percentage terms.

It is highly important to qualify the use of that data and to recognise the limitations of the data, in view of the following:

- **The potential saving calculation (being the difference between the plan the customer is on and the best offer) is an indication of a theoretical saving only**. It does not reflect what the customer will save (i.e. the customer's actual consumption, pricing or plans may change this substantially)

- **The timing of reporting is highly important and the most valuable data will be the data reported after Retailers typically re-price customers on to their new electricity pricing annually on 1 July for Standing Retail contracts and 1 August for Market Retail contracts**, in line with obligations to increase prices for market offer customers on certain dates and once a year (clause 46AA of current Energy Retail Code). **Accordingly, we would suggest that the ESC focus on data provided for the 1 October – 31 December period.** This will ensure that the customers' plan pricing is updated for the annual change in network and wholesale costs; and would therefore provide the ESC with the most up to date data for that year. Focussing on data provided for the periods prior to 1 October – 31 December period (and August) would risk overstating the customers potential annual saving for the year, particularly if retail electricity prices are trending downwards.

- We note that the percentage of the annual saving (also proposed as a new performance indicator) is also important to show the proportion of saving relative to the customer's total electricity cost.

We understand that the ESC might be interested in additional information on the amount of potential savings that could have been saved by customers not on their best offer (having reported that three quarters of customers are not on their best offer earlier this year). **However it is important to note that a material potential saving may not necessarily indicate that the customer is on a poorly priced offer compared to the rest of the market, rather it may indicate that the**

Retailer's new offers in market (best offer) are particularly competitive – and it is the latter that is driving the gap between the customer's plan and the best offer. The ESC should be cautious to not draw conclusions about the competitiveness of the plan a customer is on (where they are not on the Retailer's best offer) without regard to how competitive that plan is compared with the rest of the market. Another factor to be aware of is changes in customers peak and off peak usage patterns or feed in tariffs driving the observed changes in best offer messages.

From a policy standpoint, the resolution of the issue of customers not being on the best offer, and focus of any possible future reform in this area, should be on promoting and incentivising customer engagement in the market so that customers that can engage are able to realise those savings. Customer engagement will further encourage competition and innovation as Retailers compete for engaged customers. We consider further awareness of the VDO as the Reference Price and comparison benchmark will help to support more customer engagement. The Consumer Data Right (slated to commence 1 October 2022) will further support customer engagement (by empowering third parties with better data to facilitate comparisons for customers that find it difficult to engage and shop around).

2.2 Implementation timeframe

In relation to the Compliance Reporting changes, we ask the ESC to change the commencement date to 1 July 2022 and remove any transitional reporting which would require reporting under the new numbering of the Energy Retail Code of Practice (as proposed by the ESC). This will allow Retailers to update their compliance systems with the new numbering.

[Confidential:

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We ask that the ESC extend the commencement date to 1 July 2022, and allow reporting under the current guideline and current Energy Retail Code numbering up to this date. Under this arrangement, the breach will still be reported (it is only the numbering that will not be updated) and so it still supports transparency over breaches for the ESC.

With respect to Performance Reporting, we ask the ESC to change the commencement date for performance reporting to commence for the regulatory period of 1 October to 31 December 2022 (i.e. due to the ESC by 31 January 2023).

Assuming the ESC publishes its final decision on the Guideline in January 2022, the current date of 1 July would only provide 5 months to implement the reporting change. We require 8 months to update our reporting. We require 3 months in additional time even with an increase to resources because the Reporting team will be working on multiple other regulatory requests concurrently. The key milestones are set out below:

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct
Q1 AER & ESC Perf Reporting			Q2 AER & ESC Perf Reporting			Q3 AER & ESC Perf Reporting			Q3 AER & ESC Perf Reporting
		Green Scheme Reporting & Auditing*							
	ACCC Electricity Market Monitoring Enquiry**								
							Qld Competition Authority		

* Green Scheme Reporting includes Renewable Energy Target, NSW Energy Savings Scheme, Victorian Energy Upgrades Energy Efficiency Improvement Scheme and Green Power reporting.
** ACCC Electricity Market Monitoring Enquiry involves a large request of 18 months worth of billing data

The above chart shows that the capacity of the team is constrained until May 2022. The above table **does not** include additional quarterly reporting which is sent to the:

- ACT, NSW and QLD State Revenue Offices,
- Energy Safe Victoria,
- Department of Environment, Land, Water and Planning,
- Australian Energy Market Operator,
- The AER's and ESC's CO-VID 19 weekly reports which may extend out to 2022, and
- The ESC's separate and extra one-off metric reporting related to Payment difficulty framework indicators which the ESC recently raised with EnergyAustralia in October 2021.

[Confidential:

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In light of the above, we strongly urge the ESC to change the commencement date for the new performance indicators to start reporting for the regulatory period of 1 October to 31 December 2022 (due 31 January 2023).

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

[redacted]
[redacted]