

08 February 2019

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

Dr Ron Ben-David
Chairperson
Essential Services Commission

Dear Ron

Compliance and enforcement policy draft decision

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the Essential Services Commission (**ESC**) *Compliance and enforcement policy draft decision* (**Draft Decision**). For too long energy businesses' conduct has given Victorian households little reason to trust that industry is acting in their interests. A strong, effective and proactive regulator is needed to ensure the energy market delivers for all Victorian households.

We support the ESC changing its compliance and enforcement policy to reflect a risk-based, intelligence led, outcome focused approach. The ESC must be able to transparently demonstrate that it is effectively intervening to deter misconduct and that compliance and enforcement action is delivering timely results for Victorian households. We consider that the *Energy Compliance and Enforcement Policy Revised Draft* (**Revised Draft**) accompanying the Draft Decision should be strengthened by the ESC implementing public complaints reporting, a super complaint process and a forum where consumers and community organisations are consulted on enforcement strategies and priorities.

Our comments are detailed more fully below.

About Consumer Action

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just market place for all Australians.



Objectives, aims and compliance and enforcement factors

The Draft Decision states that the ESC is proposing to revise the compliance and enforcement policy following suggestions by industry that action often takes too long. As a community organisation regularly assisting households dealing with the consequences of industry misconduct, we also encourage the ESC to undertake more proactive and timely enforcement action to ensure compliance. Our 2013 *Regulator Watch* joint report included set out a series of recommendations for all Australian consumer regulators to consider.¹ These recommendations remain valid today as they did in 2013:

- Increase the quantity of enforcement work;
- Report better on enforcement work;
- Better support vulnerable & disadvantaged consumers as witnesses;
- Make more systemic use of the media;
- Enhance systems of reporting to consumer organisations; and
- Ensure model litigant policies do not interfere with effective use of enforcement powers.

Everyday our caseworkers hear about breaches of energy regulations that have unacceptable consequences for Victorian households who just want fair access to essential energy services for their health, wellbeing and social participation. Effective enforcement activity is essential to incentivise compliance and avoid these negative outcomes for Victorian households.

We support the ESC being more flexible in its approach to enforcement action, and that it prioritises action in accordance with the compliance and enforcement factors set out in the Revised Draft.² However, we suggest other relevant compliance and enforcement factors should include clarifying aspects of the law (particularly for newer provisions), the likely deterrent effect of enforcement action and the level of public interest or concern in the matter.³

We also query the ESC's key objective being 'voluntary compliance'.⁴ Recently a number of consumer regulators, including the Australian Securities and Investments Commission (**ASIC**), have been scrutinised by the Royal Commission into Misconduct in the Banking, Insurance and Financial Services Industry for taking this approach. In response, ASIC has committed to a much stronger starting point for all enforcement matters, which is to ask the question "why not litigate?"⁵ While we acknowledge that litigation is not necessarily appropriate in every circumstance and that a flexible approach is required, we encourage the ESC to adopt a stronger key objective than 'voluntary compliance'.

¹ Consumer Action, Renouf & Balgi, 2013. *Regulator Watch; The Enforcement Performance of Australian Consumer Protection Regulators*, p.131-134.

² Pages 5-6

³ These can be observed in the ACCC's equivalent policy: ACCC, 2019. *Compliance & enforcement policy & priorities*. Retrieved 6 February 2019 from: <https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>

⁴ Page 1

⁵ ASIC, 2019. *Statement from ASIC Chair James Shipton on the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, Retrieved 6 February 2019 from: <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-020mr-statement-from-asic-chair-james-shipton-on-the-final-report-of-the-royal-commission-into-misconduct-in-the-banking-superannuation-and-financial-services-industry/>



In relation to the ESC's aims in regulating compliance,⁶ we recommend making it clear that regulated energy entities must in fact comply with their regulatory obligations. The current Revised Draft simply says that regulated entities must know their obligations, monitor and report breaches, and respond to and rectify breaches, which seems to imply that it is inevitable that entities will contravene their obligations. Further, the Revised Draft suggests that if breaches occur, the ESC expects their timely and effective resolution 'at the lowest possible cost'. It should be clear that full and timely remediation to affected consumers for breaches is expected when breaches occur, not remediation at 'the lowest possible cost'.

Responding to compliance risks with a campaign approach

Regulators are generally confronted with the reality that they do not have enough resources to respond to each and every breach of the law. How regulators respond to this reality has a significant impact on effectiveness. One response is a form of paralysis where regulators, in their concern to be fair to all businesses, fail to take action. Alternatively, a regulator may take an approach that seeks to react to problems as they arise—sometimes referred to as the “whack a mole” approach to enforcement. This involves the regulator responding to a range of different issues as they arise, using whatever enforcement tools seems appropriate, without being particularly strategic about how to protect consumers by using enforcement to increase compliance.

Instead, we recommend a more strategic “campaign” approach to enforcement. This approach would involve the regulator identifying an issue in the marketplace that it seeks to address and then, rather than simply continuing to respond to matters brought to its attention, proactively ramp-up compliance activities with a combination of business and consumer educative initiatives and targeted enforcement action. This might involve public statements about the issue of concern, undertaking public investigations and seeking feedback, as well as obtaining enforcement outcomes including court action to contribute to deterrence. We consider that such a strategic campaign approach is likely to have a more positive impact on the market, but not only setting the tone for appropriate market conduct but also ensuring the regulator is feared to incentivise a compliance culture.

Increased transparency

We also suggest that 'transparency' be added to the ESC's guiding principles.⁷ It is critical that the public can see what action the ESC is taking (rather than just the outcomes of action) in response to misconduct and challenge the ESC to take a different approach if the response is ineffective. It would be unacceptable for the ESC to operate a policy of flexibility around the way misconduct is enforced without transparency of what action is or is not being taken. The ESC must incorporate the below mechanisms in the Revised Draft so that Victorian households can trust that their regulator is acting in their interests and without delay.

As stated in our submission to the ESC Charter of Consultation and Regulatory Practice Review:

⁶ Page 2
⁷ Page 4



Implement a 'matters register' for issues or breaches reported to the ESC

A 'matters register' allows consumer groups to raise issues or regulatory breaches to the regulator, and the regulator periodically reporting back information or progress in respect of the issue or breaches. This would strengthen confidence in the ESC's commitment to be transparent and accountable. Other regulators currently undertake this practice; it greatly assists Consumer Action and regulators to easily identify areas of improvement or the need to direct resources to address systemic issues.

Implement a super-complaint process

A super-complaint is a complaint made by a consumer organisation which is fast-tracked to a regulator, requiring a public response within a specific period. For example, CHOICE's "Fare Play?" complaint was made to the ACCC in 2016.⁸ This would be another avenue for reporting and requesting regulatory action when systemic issues are identified and would assist the ESC to undertake regulatory activities consistent with the principles that have been proposed.⁹

There is widespread acceptance that these are legitimate initiatives. Since our submission that is quoted above was made, the Federal Opposition has committed to implementing super complaint function for the Australian Competition and Consumer Commission if elected.¹⁰

We also strongly support public reporting of complaints. NSW Fair Trading has a public complaints register and has recently updated its complaints register guidelines. Consumer Action provided a submission about the most effective way to operate a register, and encouraged other regulators to adopt similar public reporting arrangements.¹¹

The super complaint process would assist the ESC in assessing what enforcement action to prioritise according to risks outlined by community organisations with an ear to the ground.

Regularly consult the community on priorities and approaches to enforcement

The ESC must also ensure there are regular opportunities for community organisations and Victorian households to give feedback on the regulator's approach to enforcement matters and priorities for enforcement action and to challenge the ESC where it is not responding adequately to community expectations. A regular panel or forum would both focus the ESC on the issues that matter to Victorian households and ensure the regulator is held accountable and appropriately amends the approach taken when it is ineffective.

Please contact Jake Lilley on 03 9670 5088 or at jake@consumeraction.org.au if you have any questions about this submission.

⁸ Choice, 2016. *Fare Play? Terms and Conditions in Australia's Airline Industry*. December.

⁹ Consumer Action, 2018. *Submission: ESC Charter of Consultation and Regulatory Practice review*. Available at: <https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2018/01/180129-SUB-ESC-Draft-Charter-of-Consultation-and-Regulatory-Practice.pdf>

¹⁰ See: <https://consumeraction.org.au/super-complaints-to-give-voice-to-consumer-groups/>

¹¹ Consumer Action, 2018. *Submission: NSW Fair Trading Complaints Register Guidelines*. Available at: <https://policy.consumeraction.org.au/2018/12/19/complaints-register-guidelines/>



Yours Sincerely,

CONSUMER ACTION LAW CENTRE



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