

Compliance Check

National Energy Retail Law: Explicit informed consent

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Energy retailers are required to report breaches, or possible breaches of their legislative requirements to the Australian Energy Regulator. This is set out in our Compliance Procedures and Guidelines. Recent reports by energy retailers show a concerning increase in the number of breaches of the requirement to obtain the explicit informed consent (EIC) of customers prior to them entering into market retail contracts with the retailer.

We have issued this Compliance Check to remind retailers of their obligations under the National Energy Retail Law (Retail Law) and National Energy Retail Rules (Retail Rules). The AER take breaches of the EIC provisions seriously and we expect retailers to fully comply with their obligations. Failure to meet EIC requirements is a breach of the Retail Law.

Retailer requirements

Retailers must obtain a customer's consent before transferring them from another retailer or entering a customer into a market retail contract. When obtaining a customer's consent, the Retail Law requires the consent to be both explicit and informed.

Sections 38 to 42 of the Retail Law detail the requirements for EIC, and can be summarised as follows:

- EIC is consent given by a small customer to a retailer where the retailer or their agent has clearly, fully and adequately disclosed all matters relevant to the consent of the customer to a transaction, including each specific purpose or use of the consent.
- A customer's consent must be given either in writing, verbally or electronically.
- A retailer must maintain a record of each EIC provided by the customer, which includes information that will enable the AER to verify the retailer's compliance with its EIC obligations.
- A retailer must produce a satisfactory record of the informed consent if a customer asserts that EIC was not obtained.

Responsibility for compliance

Section 273 of the Retail Law requires a regulated entity (even where functions are outsourced to a third party) to establish policies, systems and procedures to enable it to efficiently and effectively monitor its compliance with the requirements of the Retail Law, the National Regulations and the Retail Rules.

Retailers and distributors must comply with the requirements set out in the Retail Law in relation to obtaining a customer's EIC. This includes:

- ensuring appropriate systems and processes are in place to support consumers and ensure they are not transferred or entered into contracts without their EIC;
- having systems to detect in a timely manner instances where EIC has been falsified or not obtained; and
- having oversight and controls on the conduct of any outsourced service providers to satisfy relevant EIC provisions.

Penalties for non-compliance

Failure to meet EIC requirements is a breach of the Retail Law and is a civil penalty provision under section 38 of the Retail Law. This means that a court may order a penalty up to \$100 000 for a corporation and \$20 000 for individuals per contravention. The AER may also issue an infringement notice(s) where it has reason to believe that a person has breached section 38 of the Retail Law. The penalty payable for corporations in response to an infringement notice is \$20 000.

AER approach to compliance

We assess instances of potential non-compliance with the Retail Law and Retail Rules in accordance with our Statement of Approach (available on the AER website). We will consider a range of factors in deciding on an appropriate response to particular conduct, and will take steps with the regulated entity involved.

What is informed consent?

Informed decision-making is a two way communication process between the customer and the business. It reflects the principle that a customer has a right to accept or decline an offer, the right to change their mind, and to make their decision after considering all relevant information.

Obtaining consent – general principles

Consent is informed

- The customer understands the energy offer. There is two-way discussion, between the business and a customer, in a way that is balanced and transparent.
- When making an offer to a customer the information is current and relevant and presented in plain simple English, without jargon.

Consent is voluntary

- The customer is provided with a genuine opportunity to provide or withhold their consent to taking up any energy offer.
- When making an offer to a customer, it is free from pressure, undue influence or duress.

Capacity to provide consent

- The customer has the ability to provide consent, that is, they must be able to understand and use the information to make a decision.
- When making an offer to a customer, be aware that age, physical (for example hearing or visual impairments) or intellectual disability may affect a person's capacity to provide consent.