

Compliance Check

National Energy Retail Law: authorised retailers – explicit informed consent in an embedded network

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The AER has observed an increase in the number of complaints related to the failure to obtain explicit informed consent (**EIC**) of customers in an embedded network before entering into market retail contracts directly with the retailer.

The purpose of this Compliance Check is to remind energy retailers who sell electricity to customers in embedded networks of their obligations under the National Energy Retail Law (**Retail Law**) and National Energy Retail Rules (**Retail Rules**). The AER takes breaches of the EIC provisions seriously and we expect all retailers to fully comply with their obligations. Failure to meet EIC requirements is a breach of the Retail Law.

Retailer requirements

Retailers who are authorised to sell electricity to customers in an embedded network are obligated to meet the EIC requirements under the Retail Law.

Retailers must obtain a customer's consent before 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 a person acting on behalf of the retailer 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 create a record of each EIC provided by the customer, including consent given verbally, which includes information that will enable the AER to verify the retailer's compliance with its EIC obligations. The retailer must retain the record for at least two years.
- A retailer must produce a satisfactory record of the informed consent if a customer asserts that EIC was not obtained.
- A retailer must, on request by a small customer and at no charge, provide the customer with access to a copy of the record of any explicit informed consent given by the customer and then retained by the retailer.

Good practice:

- Energy retailers are required to obtain the EIC of customers before entering into a market retail contract.
- This can be achieved by offering customers clear and accurate information disclosing all matters relevant to the consent of the customer.

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 s. 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 s. 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.

Obtaining explicit informed 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 an 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.

Record of consent

- Retailers must create a record of each EIC provided by a small customer and retain the record for at least two years.

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