



12 October 2011

Attn: Mr Phil Waren

Senior Regulatory Manager (Energy)
Essential Services Commission
Level 2, 35 Spring Street
Melbourne VIC 3000

By email: phil.waren@esc.vic.gov.au

Dear Mr Waren

Re: The Essential Services Commission's Proposed Amendments to the Compliance Policy Statement.

Thank you for the opportunity to comment on the Essential Services Commission (ESC)'s proposed amendments to the Compliance Policy Statement (CPS).

The Energy and Water Ombudsman (Victoria) (EWOV) has been required by the ESC to undertake a preliminary review of the circumstances around an actual energy disconnection since the introduction of the Wrongful Disconnection Payment (WDP) in December 2004. This review has occurred for customers who register complaints with EWOV as a result of being disconnected.

EWOV is concerned by the ESC's proposal to remove the WDP information from the CPS. While the ESC will retain the information for internal decision-making purposes with WDP referrals, EWOV finds this information invaluable when making our assessments of WDP applicability with actual disconnection complaints. EWOV is concerned that the removal of this information from the public domain will result in:

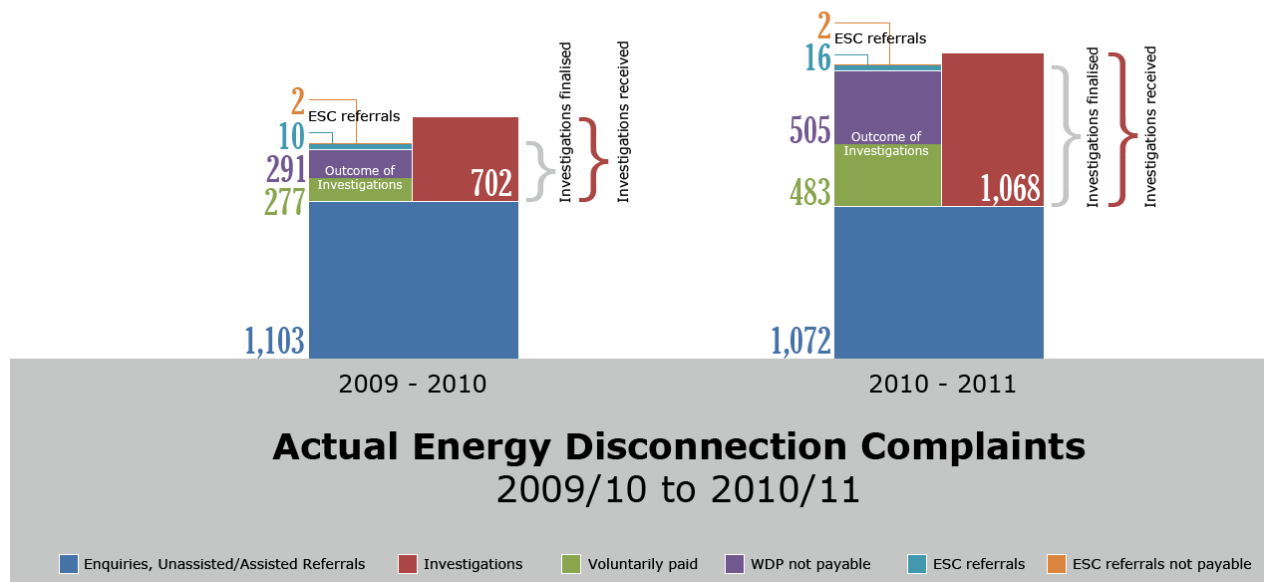
- increased ambiguity in WDP assessments
- increased disputes by energy retailers and/or customers about compliance
- more time and resources required from retailers, EWOV and the ESC in making WDP assessments
- more ESC referrals and decisions.

In making this submission, EWOV's comments are based on our experience in dealing with actual disconnection complaints and WDP assessments that come to us after they have not been resolved between energy customers and their retailer.

EWOV actual energy disconnection investigations

When completing a WDP assessment, EWOV reviews the circumstances surrounding the disconnection of a customer's electricity or gas supply, to determine if the energy retailer has complied with the terms and conditions of the customer's contract¹. If EWOV finds that the energy retailer failed to comply with its obligations, the customer is entitled to the WDP. If the energy retailer contests EWOV's findings, the matter is then referred to the ESC to determine if a WDP applies.

Originally EWOV expected the 2004 WDP legislation to reduce complaints involving actual disconnection cases. While initially this did occur, there has been a significant increase in actual energy disconnection complaints since July 2008. During the 2009/10 and 2010/11 financial years, EWOV investigated in total 1,068 actual disconnection cases. For almost half of these 483 customers, a WDP applied (shown in Graph A). These results reveal that almost one in every two actual energy disconnections subject to an EWOV investigation had breached the terms and conditions of the customer's contract.

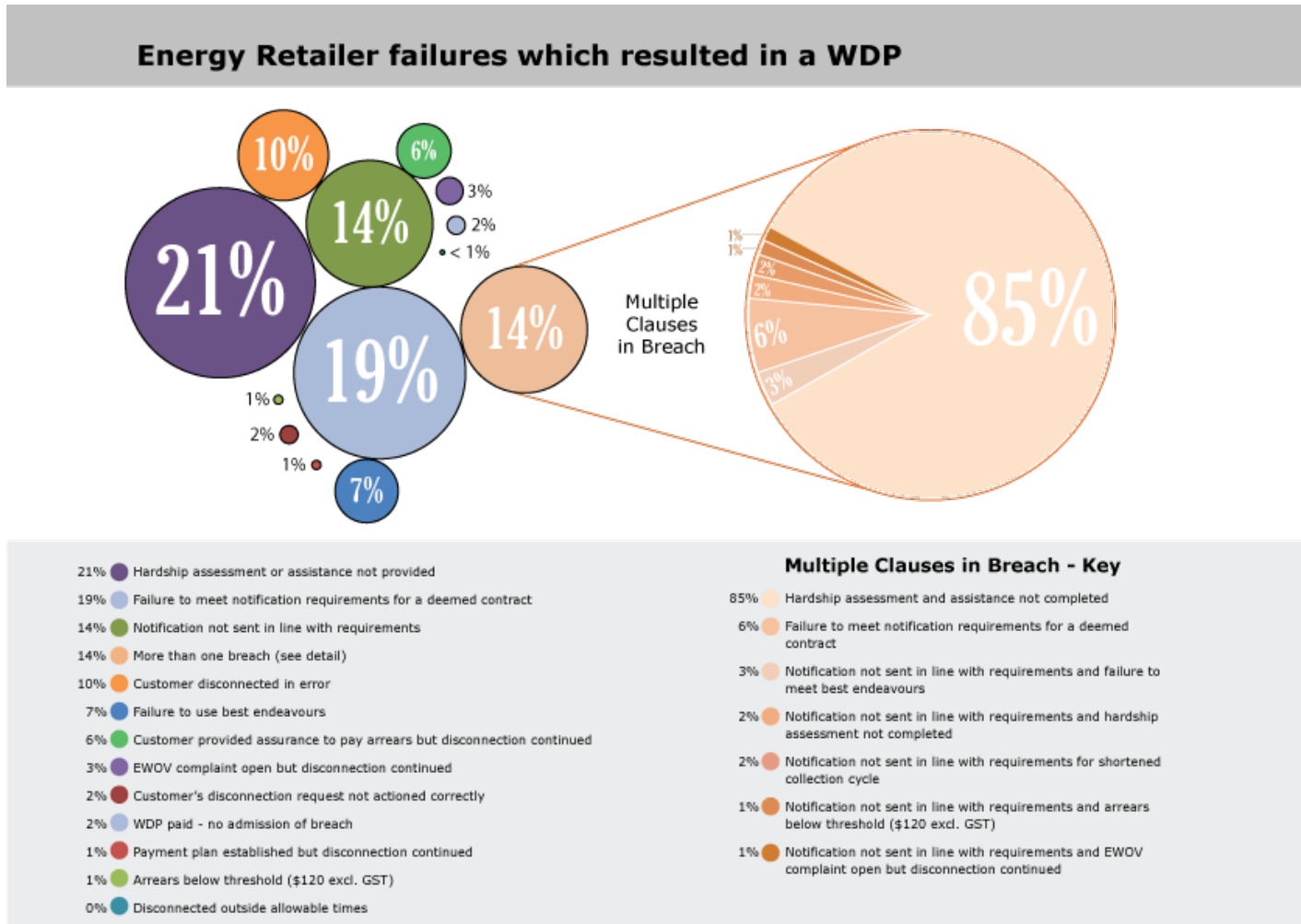


Graph A

¹ EWOV undertakes two separate investigations after receiving an actual energy disconnection complaint. The first reviews whether the disconnection complied with the terms and conditions of the customer's contract; the second investigates any 'non-compliance' aspects of the complaint.

WDP payable outcomes

Of the 483 actual energy disconnection complaints where a WDP applied, the following recurring compliance issues were a concern for the 2010/11 financial year:



Graph B

The Energy Retail Code and the CPS

All contracts between energy retailers and domestic and small business customers must be consistent with the Energy Retail Code (ERC), which sets out the procedures that must be followed by energy retailers prior to disconnecting customers. Sections 4.2.2 and 4.2.3 of the CPS provide EWOV and energy retailers with guidance about the ESC's interpretation of the ERC².

These sections provide EWOV with important clarification and allow our office to assess, in a consistent manner, under what circumstances WDP applies. EWOV also relies on these sections to decrease ambiguity in WDP assessments, and to decrease disputes with energy retailers about the applicability of WDP. Section 3.3 of the CPS provides a valuable mechanism for the resolution of disputes about the payment of WDP in specific cases. EWOV relies on this information when we complete our WDP assessments and send WDP referrals to the ESC.

Section 4.2.2 of the CPS

This section of the CPS helps EWOV explain an energy retailer's minimum requirements to be deemed compliant, and therefore a WDP not be payable. Two examples of the usefulness of section 4.2.2 of the CPS are outlined below.

Best endeavours

During the 2010/11 financial year, energy retailers did not comply with best endeavours in 10% of the WDP assessments³ where WDP was payable. As the ERC⁴ does not itself provide a definition of the type and frequency of contact that constitutes best endeavours, EWOV relies on the information provided in the CPS. This section outlines how an energy retailer is compliant with 'best endeavours' obligations, particularly when contacting a customer before disconnection. Without this information it is unclear:

- when an energy retailer must contact a domestic customer prior to disconnection
- how frequently the energy retailer must contact a domestic customer prior to disconnection.

² EWOV considers these sections to be guidance and not a set of prescriptive rules. The individual circumstances of a complaint must be taken into account.

³ Illustrated in Graph B.

⁴ Clause 13.2 of the ERC.

Capacity to pay

During the 2010/11 financial year, energy retailers did not comply with their requirement to complete a hardship assessment and/or provide assistance in 35% of the WDP assessments⁵ where WDP was payable. While the ERC states that an energy retailer must complete an assessment of the customer's capacity to pay⁶, EWOV relies on the information provided in the CPS because it clarifies how this hardship assessment should occur⁷. Without this information it is unclear:

- when the energy retailer should be aware that their customer is experiencing payment difficulties (if no self-identification occurs)
- how the energy retailer must carry out an assessment of a customer's capacity to pay.

Section 4.2.3 of the CPS

This section of the CPS outlines the minimum requirements for an energy retailer to substantiate that a written notice was dispatched, and/or phone contact or a personal visit was made. EWOV uses this guidance to assess an actual disconnection complaint for WDP, where the:

- energy retailer claims contact was made
- customer disputes contact was made/notices were received.

This section has been used to explain energy retailer non-compliance in several WDP assessments and in a 2009/10 ESC referral⁸. Without this section it would be unclear what detail is needed in order for an energy retailer to adequately demonstrate compliance with contact and dispatch obligations.

Section 3.3 of the CPS

This section of the CPS sets out the procedure when a WDP assessment cannot be finalised by EWOV due to either energy retailer or customer dissatisfaction with our assessment (sections 3.3.1, 3.3.2 and 3.3.3). EWOV is concerned that if this section is removed, there will be no formal process to refer unresolved WDP assessments to the ESC for a decision, and no formal process to finalise an ESC referral once it has been sent.

⁵ Illustrated in Graph B.

⁶ Clause 11.2 (1) of the ERC.

⁷ Section 4.2.2 (a) states that a specialist credit or hardship department must assess a customer's capacity to pay. It also advises how an energy retailer can be aware that a customer is experiencing payment difficulties, even if the customer does not self-identify as being in hardship. Section 4.2.2 also outlines that the energy retailer can be aware of payment difficulties via a number of indicators including: issuing multiple reminder and disconnection warning notices; failed payment plans; URGS referrals and/or dishonoured cheques.

⁸ One example is EWOV case G/2009/6008, which was referred to the ESC for a formal decision and requested confirmation that the energy retailer had complied with its requirements under section 4.2.3 of the CPS.

EWOV urges that these crucial parts of the CPS remain available to energy retailers and EWOV to assist with assessments of WDP applicability in actual energy disconnection cases. If this information is removed from the CPS, another document dealing with WDP procedures and assessment guidance should be created. Without this information WDP assessments will become more difficult to complete, more disputes will arise and this will ultimately lead to more ESC referrals and decisions being required.

We trust the above comments are helpful. If you require further information or have any queries, please contact Belinda Crivelli, Senior Research and Communications Officer on 03 8672 4460.

Yours sincerely

A handwritten signature in cursive script that reads "Fiona McLeod".

Fiona McLeod
Energy and Water Ombudsman (Victoria)