
COMPLIANCE ISSUE – DECISION REPORT

DATE: 30 June 2016
RULE: Clauses (b), (e) and (f) of Appendix 6
MEMBER: Wesfarmers Kleenheat Pty Ltd (“Kleenheat”)
RESPONSIBILITY: Chairman of the Board

RULES IMPACTED

The Retail Market Rules (the “Rules”) contain several provisions that place obligations on Users to obtain Explicit Informed Consent (“EIC”) from customers in various instances. Rule 349 requires Users to comply with Appendix 6 of the Rules, and Appendix 6 of the Rules specifies the requirements for EIC, including:

- An EIC must be given:
 - (a) expressly;
 - (b) in writing (for large customers), or in writing or verbally (for small use customers);
 - (c) after the User has disclosed all necessary information to the customer; and
 - (d) by a competent person.
- Users must:
 - (e) create a record of all EICs received;
 - (f) keep records of their EICs for 2 years; and
 - (g) provide a copy of the Record to REMCo if REMCo requests it.
- A record must:
 - (h) be in a form capable of examination by REMCo; and
 - (i) include information to allow REMCo or auditors to verify compliance with the EIC Rules.

SUMMARY OF THE ISSUES

Kleenheat Gas Pty Ltd (“Kleenheat”) had some issues with compliance with Appendix 6 of the Rules in 2015 for small use customers and for large customers, as follows:

Regarding Small Use Customers:

Rule 350 requires users to have an annual audit completed of their compliance with the EIC requirements in the Rules. Kleenheat’s audit for 2015 found 507 failures by Kleenheat to record EIC for small use customers. This represents less than 1% of Kleenheat’s small use customer transfers in 2015; and is a breach of clauses (e) and (f) from Appendix 6 of the Rules, as Kleenheat does not have a record of the relevant EICs for these customers.

Kleenheat’s Rule 350 audit for 2014 identified similar issues, and Kleenheat implemented a number of controls part way into 2015 to address these problems. Kleenheat’s breaches of clauses (e) and (f) of Appendix 6 occurred before these controls were implemented.

Regarding Large Customers:

Kleenheat had two instances of obtaining verbal rather than written EIC for large customers, and one instance where Kleenheat responded to a Request for Proposal (“RFP”) and considered that EIC was implicit in the RFP.

These three issues represent breaches of clause (b) from Appendix 6 of the Rules, as Kleenheat does not have a written EIC for the three large customers. Kleenheat has subsequently obtained the necessary EICs from the impacted large customers.

To address the issue with obtaining written EIC for large customers in the future, Kleenheat has:

- changed its process for RFPs to ensure the EIC to obtain historical data is obtained separately and in line with the Rule requirements; and
- provided further and ongoing training to its customer service staff and sales executives, and has revised its training documents.

In addition, the Rule Change Committee (“RCC”) is considering an amendment to Appendix 6 of the Rules to allow verbal EIC from large customers, not just from small use customers. If these Rule changes are implemented, then Kleenheat’s behaviour for all large customers in 2015 would be compliant with the Rules in 2016.

SUMMARY OF THE COMPLIANCE PROCESS

REMCo published a Notice of Apparent Rule Breach to the market on 18/04/16, seeking submissions from market participants (Users and Network Operators) regarding:

- the effect that this apparent breach has on their operations (if any), and
- their view with regard to the determination, if any, REMCo should make under Rule 329 in respect of the apparent Rule breaches.

The submission period closed on 05/06/15, and REMCo received no submissions.

Under Rule 329, the REMCo Board is responsible for making decisions on compliance matters. Rule 329(1) indicates that:

- (1) After considering an alleged rule breach or rule interpretation REMCo may:
 - (a) if the matter relates to an alleged Rule breach by a participant or REMCo:
 - (i) if REMCo determines that the matter was not material, resolve not to take any further action in relation to the matter; or
 - (ii) if REMCo determines that the matter was material, refer the matter to the Compliance Panel; or...

This matter was referred to the Board for consideration at its meeting on 26/06/16.

DETERMINATION

The REMCo Board’s determination regarding small use customers is as follows:

- Kleenheat has implemented appropriate controls to prevent recurrence of the problem, which was first recognised in 2014;
- the breaches of clauses (e) and (f) of Appendix 6 of the Rules in 2015 occurred before Kleenheat’s implemented the controls; and
- Kleenheat’s breach of clauses (e) and (f) of Appendix 6 of the Rules is not material for the same reasons as in 2014 – a copy of the 2014 compliance notice (dated 25 June 2015) is attached.

The REMCo Board’s determination regarding large customers is as follows:

- Kleenheat has acknowledged the Rule breaches and taken steps to ensure that the breaches do not recur;

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- Kleenheat has subsequently obtained EIC from the impacted large customers;
 - the RCC is considering changes to the Rules to allow verbal EIC for large customers; and
 - Kleenheat's breach of clauses (b) of Appendix 6 of the Rules is therefore not material.

REMCo has determined to exercise its discretion under Rule 329 to take no further action in relation to these matters.

COMPLIANCE ISSUE – DECISION REPORT

DATE: 25 June 2015
RULE: Clause 6.1.3 of Appendix 6
MEMBER: Wesfarmers Kleenheat Pty Ltd (“Kleenheat”)
RESPONSIBILITY: Chairman of the Board

RULES IMPACTED

The Retail Market Rules (the “Rules”) contain several provisions that place an obligation on Users to obtain Explicit Informed Consent (“EIC”) from customers, including:

- Rule 55A: requires Users to get customers’ EIC before requesting their historic standing meter data;
- Rule 72(1): requires Users to get customers’ EIC before lodging a MIRN discovery request;
- Rule 72(4): requires Users to not use any customers’ information if the customers’ EIC is withdrawn;
- Rule 79(1): requires Users to get customers’ EIC before transferring the customers;
- Rule 166A: requires Users to get customers’ EIC before requesting historic meter data; and
- Rule 349: requires Users to comply with Appendix 6.

Appendix 6 of the Rules specifies the requirements for EIC – some of the key clauses of which are:

- 6.1.1 and 6.1.2: An EIC must be given:
 - expressly;
 - in writing (for large customers), or in writing or verbally (for small use customers);
 - after the User has disclosed all necessary information to the customer; and
 - by a competent person.
- 6.1.3: Requires Users to keep records of their EICs for 2 years.

SUMMARY OF THE ISSUE

Rule 350 requires Users to have an annual audit conducted of their compliance with the Rules relating to EIC. Kleenheat commissioned KPMG to conduct its Rule 350 audit for 2014; and the audit found that Kleenheat complied with all of the audited Rules except for some breaches of clause 6.1.3 of Appendix 6.

KPMG found weaknesses in Kleenheat’s record keeping controls in some instances when Kleenheat was obtaining verbal EIC from small use customers. The audit identified that:

- recordings were being paused in some instances when credit card details were being collected, and were not resumed prior to the collection of EIC; and
- in some instances, the recording system had not been set up correctly at certain workstations.

KPMG conducted its audit by reviewing a sample of Kleenheat's EIC records, and found that, where Kleenheat obtained verbal EIC from small use customers, it failed to keep an appropriate record of EIC in 14.3% of the sample.

SUMMARY OF THE COMPLIANCE PROCESS

REMCo published a Notice of Apparent Rule Breach to the market on 22/05/15, seeking submissions from market participants (Users and Network Operators) regarding:

- the effect that this apparent breach has on their operations (if any), and
- their view with regard to the determination, if any, REMCo should make under Rule 329 in respect of the apparent Rule breaches.

The submission period closed on 05/06/15, and REMCo received one submission from Synergy who advised the incident had no impact on its gas customers.

Under Rule 329, the REMCo Board is responsible for making decisions on compliance matters. Rule 329(1) indicates that:

- (2) After considering an alleged rule breach or rule interpretation REMCo may:
 - (a) if the matter relates to an alleged Rule breach by a participant or REMCo:
 - (i) if REMCo determines that the matter was not material, resolve not to take any further action in relation to the matter; or
 - (ii) if REMCo determines that the matter was material, refer the matter to the Compliance Panel; or...

This matter was referred to the Board for consideration on 18/06/15.

BOARD DETERMINATION

The Board views the EIC requirements in the Rules as a very important customer protection measure, and considers Retailer compliance with the EIC requirements as critical.

Regarding the issue at hand, the Board noted that:

- Kleenheat has acknowledged that it breached clause 6.1.3 of Appendix 6 of the Rules – the requirement to record explicit informed consent (EIC) – in some instances.
- Kleenheat's process requires the verbal collection of EIC which is demonstrated by a check box in the system. Kleenheat also records the communication as a record of EIC.
- In approximately 14% of the sample, there was no voice recording of EIC as a result of the recording mechanism being turned off or not activating.
- In the instances where no voice recording was available, there are notes in Kleenheat's system indicating that EIC was obtained.
- The breach was a result of a problem in Kleenheat's customer contact scripts that led to recording being turned off before EIC was obtained and not turned back on to record the EIC in some instances.

- Kleenheat has taken steps to prevent this issue from recurring by:
 - rearranging the sequence in its process to obtain customer EICs prior to pausing the recording when collecting credit card details; and
 - improving controls around recording system availability when staff move workstations to ensure the recording system is set up correctly.
- Regarding the customers for whom there is no voice recording of EIC:
 - the first contacts were solicited by the customers;
 - the calls were handled by call centre staff that do not receive commission for obtaining customers;
 - none of the customers have made complaints; and
 - the customers have been paying their bills in accordance with their supply contract terms.
- The Rule breach did not have a material impact on:
 - REMCo or on the operation of the market; or
 - market participants (Users or the Network Operator):
 - REMCo received one submission in its consultation process on this matter – from Synergy, who indicated that this Rule breach would not have effected Synergy’s customers, as the effected customers are likely to be residential and under the 180 GJ/a threshold for the Gas Market Moratorium. Therefore Synergy had no comments on any action to be taken

BOARD DETERMINATION

The Board agreed that the EIC requirements in the Rules are a critical customer protection measure, and any breach of the EIC requirements in the Rules is a material concern. However, in this instance, the Board determined that Kleenheat’s breach of clause 6.1.3 of Appendix 6 of the Rules is not material for the reasons indicated above. As a result, REMCo exercises its discretion under Rule 329 to take no further action in relation to this matter.