AUSTRALIAN ENERGY COUNCIL

Essential Services Commission
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Building trust through new customer entitlements in the retail energy market: Draft Decision

The Australian Energy Council (the Energy Council) welcomes the opportunity to make a submission on the Essential Services Commission (ESC) draft decision that seeks to implement recommendation 3F to 3H of the Thwaites Review. The Energy Council supports measures that improve customer understanding of their energy offers and further encourages engagement with the market.

The AEC is the industry body representing 21 electricity and downstream natural gas businesses operating in the competitive wholesale and retail energy markets. These businesses collectively generate the overwhelming majority of electricity in Australia and sell gas and electricity to over 10 million homes and businesses.

Part 2A overall

The Energy Council is broadly supportive of the intention of the changes proposed and recognise the benefits that this can deliver consumers. We support measures that provide consumers with greater transparency in products on offer. However, it is critical that changes are implemented in a manner that limits unintended consequences.

Of significant concern is the high level objective of Part 2A and how this may flow through to the actions of retailers. 70G appears to place a responsibility on the retailer that is higher than an obligation to provide information to the customer. The words 'assist' and 'select' connote that the retailer has a role to play in what would normally be the customer's choice. Our view is that retailers should be responsible for giving accurate, clear, objective information to the customer, and the customer will then use that impartial information to make an informed choice that suits their needs. The objective of 70G to *assist* the customer and make a *selection* infers the customer will make a particular choice based on the advice of their retailer. We consider this to be too high a standard.

We understand the ESC broadly considers this division to be about retailers identifying and providing customers with the right information. Our view is that this boundary is unclear from the drafting, and should be clarified in the final decision. In the absence of any guidance notes, interpretation is reliant exclusively on the words in the retail code, with particular focus on the objective of the division.

It is not yet clear how the market will evolve from this and other interventions currently in train. While a change to the status quo is necessary, we cannot create a scenario in which retailers appear to hold a higher responsibility over customers making good choices than they should. A customer's agency should not be impinged. We would strongly encourage the ESC to include wording in this objective to unequivocally state that it is the customer's responsibility to choose an offer that meets their needs, with the retailer's role to ensure that they base that decision on accurate and easy to understand information.

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Best offer alerts

Methodology

Most retailers consider the best offer methodology chosen by the ESC to be the simplest at a high level. However, we consider that some minor amendments must be made to ensure the best offer presented to customers is meaningful.

At the workshop on 27 September, restricted generally available offers (GAO) were discussed. This was raised in light of the ESC's decision to amend the definition of GAO to match the Australian Energy Regulator's new definition. The new definition includes offers previously considered not to be a GAO, such as offers for new customers only, and offers that were only applicable to specific groups of customers, namely those who were members of affiliated clubs and associations.

Our preference is that offers with eligibility criteria are excluded from the best offer alert requirements. These offers will often result in the cheapest deals for customers, but might either require a customer to pay a fee to join a club to be eligible, or it may be impossible for them to become eligible.

Certain fees for joining clubs can be large, potentially outweighing the savings the new offer might allow. The result of this methodology will cause disengagement, and will not deliver improved customer experiences or increase trust in the market.

Frequency of notification

We support the proposal that customers be notified of the retailer's best offer at least twice per year, and once in every 6 month period.

We understand there are three options being considered. The option presented in the draft decision that would require retailers to notify customers in the first bill post 1 July and the first bill post 1 January (the July/January option), twice per year on the customer's 6 monthly anniversary (the anniversary option), and at any time during each 6 month period (the flexible option).

Our strong preference is for the flexible option, with some caveats to ensure the intended outcome is delivered. For example, we would be comfortable with an expectation that the alerts be at least 4 months apart to prohibit a potential scenario where a retailer issued the best offer notification in both June and July to avoid sending it again for a year.

At least 6 monthly notifications guarantee that customers are notified in a meaningful manner, without the risks of desensitisation and confusion. An additional benefit (which would significantly reduce operational costs for retailers) is that retailers will be able to spread the load of the notification across the year. We expect the notification will drive significant action from customers, and the load on call centres from issuing every July bill with the alert cannot be understated. Of further concern is that July is already one of the busiest months for call centres as customers get in touch to discuss high winter energy consumption.

Further, we consider there may be benefit in exploring uncoupling the best offer alert from the bill and the bill change notice. The draft decision requires retailers to issue the best offer alert three times per year, at specific times[1]. This is prescriptive, and not reflective of an outcomes based regulatory framework. The objective of the division in 70G, and the part in 70O sets out a need for customers to be informed in a clear

[1] The customer would be notified three times if a single bill change event occurs. If no bill change, the customer would be notified twice.

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and timely manner, that enables them to easily identify whether they are on the best offer. The Energy Council considers there is a risk that requiring this messaging to be sent more than once in a short period may confuse customers, particularly if the deemed best offer is different. From a drafting perspective this does not appear to be difficult to achieve. The calculation and presentation of the deemed best offer could be generic, with a simple clause requiring the alert to be provided at least as frequently as the final decision requires. Whether the message is received on the bill or the bill change notice should be irrelevant to the customer.

The obligation to offer

Customers must be able to access energy as an essential service. In both the Victorian and national rules, this right of access is enshrined by requiring designated retailers to offer at least the standing offer to all customers. A designated retailer is either the current financially responsible retailer at the premises, or for a new site, the local area retailer.

Designated retailers are able to elect whether or not they will offer a market offer to a customer, and they must offer their standing offer. Other retailers have no obligation to make any offer to that customer. These rules are in place to carefully balance the rights of consumers to have access to energy, and the ability for retailers in a competitive market to determine the type of business they wish to operate. The rules allow particular offers to be developed and marketed to suit particular customer groups, with no obligation for retailers to offer these products to all. Without these protections, retailer offers that are beneficial to some customers may be removed, with all new offers developed to meet the needs of the lowest common denominator.

We consider that the impact of a number of proposals in the draft decision will change the nature of the 'obligation to offer' principles which are enshrined nationally.

Best offer validity period

The best offer validity period appears to create an expectation that the alert on the bill is in fact a contract offer that the customer is able to accept. This expectation would be enhanced by the presentation of an offer ID. Under the Draft Decision, the retailer is required to inform the customer that the best offer exists, and then must accept a customer request to be put on that offer within 13 business days.

In contract law, the best offer notice on the bill would be considered an invitation to treat, and not an 'offer' to engage in a contract. The actual 'offer' will only occur once the customer engages with the retailer and the retailer agrees to enter into the new contract. We understand that the best offer notice will function as a 'nudge' to get the customer to consider the suitability of their contract, however the best offer notice must still be clearly distinguished from an 'offer' to contract.

Retailers should have an obligation to advise a customer if there may be better offers available to them. The customer then has a right to request that offer, but ultimately it is up to the retailer whether or not it is accepted. In a competitive market, a retailer has three options. Either accept the customer's request to be put on the offer advised in the alert, offer an alternative product that meets the customer's needs, or refuse to make a better offer. The retailer has an incentive to make an offer that encourages the customer to remain with them, otherwise the customer will switch providers.

In any event, these incentives render the 13 day validity period for best offers unnecessary. The Council understands the problem the ESC is attempting to avoid, however consider that the costs in avoiding this problem outweigh the benefits. As noted by many at the ESC workshop held on 27 September 2018, it is operationally cumbersome to maintain offers on a 'rolling' basis. Given this is the first version of these rules,

the simplest method of implementation should be utilised. If the lack of a validity period proves to be a significant detriment to consumers, we would be comfortable with this obligation being reviewed in future iterations of the code.

Requiring a retailer to inform about other suitable offers

Rule 70H(1)b requires retailers to inform customers about other energy offers that the retailer (or their agent) reasonably believes would be suitable for that customer. This appears to create an expectation that all suitable offers will be proffered to the customer. As noted above, retailers only have an obligation to offer the standing offer if they are the designated retailer. There is no requirement to inform a customer about all of a retailer's offers.

We consider the appropriate outcome for these customers is that the retailer should, at a minimum, be obliged to emphasise that the terms and conditions of the offer being discussed might not be suitable in their circumstances. Again, the retailer is incentivised to offer customers other offers or risk losing the customer, but they should not be obliged to.

Practically this obligation as it is currently drafted will have other impacts on the products a retailer offers through different channels. It is quite common for certain sales channels (such as door to door or third party sellers) to only have access to a limited subset of a retailer's product suite. This rule would appear to create an obligation on retailers to make every offer available through every channel, irrespective of whether the product is generally available or not. There is a risk that for a retailer unwilling to offer certain products to particular customer groups, these products will be removed[2].

Customer advice entitlement (CAE)

What the CAE is intended to achieve

Retailers broadly support the notion of an obligation to provide consumers with clear, timely, and reliable information to allow consumers to assess the suitability of the offer they are considering signing up to.

The Draft Decision highlights this as a mechanism that supports customer choices. It notes that it is intended to make a customer more aware of the contract terms that will impact their bills, and allow them to more confidently shop around. Retailers support these objectives.

But the energy market is complex, with different parties able to undertake works that can impact a customer's bill. The CAE cannot be utilised as a mechanism to resolve those broader issues. Often these charges will be agreed prior to the works being undertaken, but in certain circumstances, the agreement may be with the distributor or electrician rather than the retailer directly. For example, a customer may get solar at some point in the future and require changes to the metering at their property. In Victoria the network operator would perform these works, and the customer would be billed by their retailer. Similarly, a customer may receive an estimated bill at some point in the future that impacts their bill. These impacts are features of the market, not of the offer itself.

The manner in which the 70(H) has been drafted captures *any* contractual term that might impact a customer's bill. We anticipate this will result in a vastly broader capture than the intended objective of helping a customer choose an offer that suits their circumstances. The Draft Decision suggests that a retailer

[2] These might include products only suitable to customers with solar or battery onsite, or other characteristics that influence their consumption patterns.

with a simple offer will not have to do much to comply with the CAE. Under the current drafting, this will not be the case.

The Energy Council suggests the scope of this obligation should be tightened so that it impacts only the factors that *will* impact a customer's bill for the purposes of offer comparison, and are within the retailer's control. For example, a missed pay on time discount, a paper bill, or a payment surcharge, will impact the amount customers would pay under the contract, and are unique to that offer. A customer is reasonably able to utilise the market to avoid these costs if they deem them to be unacceptable.

There is no benefit in advising a customer of costs that cannot be avoided. These unavoidable charges tend to be distribution charges that retailers merely pass through. An alternative drafting option may be to expressly exclude a retailer informing a customer of outcomes arising from something performed by a distributor or other party. We would be very concerned if the CAE required a retailer to spend a significant length of time providing extensive information to a consumer looking to enter into an energy contract. The risk of confusion is high.

Linking the CAE to Explicit Informed Consent (EIC)

We are concerned about linking the CAE to the EIC obligations in s3C of the Code. The outcome of this link is if a retailer fails to adequately perform the CAE, then the EIC previously obtained will be considered defective.

We understand it is difficult for the ESC to change an obligation given the problem only arises if a retailer fails to comply with the new rule. Given this, we do not raise this issue lightly. This problem is a technical one, caused by the impacts of the defective EIC obligations in the code, rather than the standing of any CAE.

Defective EIC in the Energy Retail Code renders a transaction that required EIC void. Rule 3E prohibits retailers who fail to provide a satisfactory record of EIC to recover any amount for energy supplied as a result of a void transaction. If a customer transferred retailers as a result of that void transaction, the customer is liable to pay their previous retailer for energy rather than the new one.

The defective EIC obligations are designed to provide protections to customers who have been switched from a retailer without their consent, generally without their knowledge. A retailer who fails to obtain EIC for a customer to enter into a market retail contract, or to trigger a customer transfer, clearly should be returned to their previous retailer without incurring any liability to the new retailer. The other EIC obligations in the code do not involve transfers, so the critical element of the defective EIC rule[3] will not be triggered.

The CAE, unlike other EIC obligations, cannot be guaranteed by having adequate systems and processes in place. It is, by the ESC's own statement, intended to provide a much higher standard than mere tick box compliance. The customer's circumstances are expected to be understood, and the nature of the information the retailer gives to the customer will be guided by their individual circumstances. Compliance cannot be determined by any method other than investigating the entire interaction leading to the EIC being given for each specific customer. Issues will arise long after the contract was entered into, and only when the customer considers a term or condition relevant to them switching wasn't appropriately disclosed.

[3] Rule 3E(5)

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The technical problem with the draft decision is that rather than the customer receiving appropriate restitution from their new retailer (who they wanted to transfer to) for the failure to properly comply with the CAE, they are in fact required to be transferred back to their previous retailer. This is clearly not a good customer outcome – and will result in the customer paying more than they otherwise would. The below case study highlights the customer impact:

> *John receives a higher than expected bill after paying a bill late. He makes a complaint to Bolt Energy 10 months after he switched from Lightning Energy to Bolt Energy on a cheaper plan. The offer included a pay on time discount which wasn't properly explained when he signed up.*
>
> *An investigation takes place into what occurred. Bolt Energy check the initial transaction to determine whether the CAE was complied with by listening to a recording of the original sales call. Bolt Energy consider that the CAE wasn't complied with, and the EIC is deemed void.*
>
> *Despite John paying his first 9 bills on time, and receiving all the benefits of the cheaper plan, under 3E(5)a John is no longer liable to pay Bolt Energy for any charges incurred under the new contract, and all money paid must be refunded. John is now liable to pay Lightning Energy all charges for the supply of energy on the terms and conditions of their original contract as if the transfer never occurred. Unfortunately, the prices for Lightning Energy are more expensive than Bolt Energy, so John's bill is higher, causing bill shock.*

The Energy Council strongly suggest that if the ESC determines a CAE is necessary, it is not linked to EIC. This shift would have no detrimental customer impact. Any retailer who failed to comply would have an obligation to rectify their error and if they didn't, the customer would be entitled to raise a complaint with EWOV where they would receive adequate recourse.

In the longer term, we would welcome the opportunity to further discuss the broader role of the EIC obligations in the ERC to ensure they are delivering the outcomes customers expect.

Implementation

Retailers are concerned with the implementation date of 1 July 2019. We consider that a staged implementation, similar to that utilised by the AER in implementing the recent changes to the Retail Pricing Information Guideline, might deliver the majority of the benefits to Victorian consumers quickly, while allowing retailers time to implement the more complex elements of the draft decision.

In particular, the Energy Council would encourage the commencement date for the CAE for contact centres to be implemented on 1 July 2019, but delayed until at least 1 January 2020 for other channels (including digital and third parties)[4]. The CAE will be complex to implement for these channels, and would benefit significantly from the learnings from call centre implementation. Staging this implementation would allow retailers time to innovate in a manner that delivers customers the outcomes sought from the CAE. As noted in the September workshop, the CAE is complex to comply with, and will require retailers to change the manner in which they currently do things to comply. We are concerned that forcing retailers to be compliant for all channels at the same time will create unintended outcomes. For example, if retailers are unable to develop innovative systems to comply with the CAE for online channels, these channels will have to be removed from the market until a solution is found. This is not in the interests of customers.

[4] We understand the Commission has suggested staged implementations previously, and retailers have suggested this created additional complexities, over and above a once off implementation. This remains true broadly, particularly where each element will require amendments to the same systems. Process changes outside of billing systems can be beneficial to implement in stages, provided their development is be incremental (rather than continuing redevelopment).

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Depending on the best offer alert frequency chosen, retailers also seek an additional transitional provision for the first alert sent after the commencement date. If either the July/January or the anniversary methods are chosen, retailers would need to be 100% ready to comply from the first of July. Retailers would welcome the first message to be sent at any time between 1 July and 31 December 2019 as a transitional provision to reduce the costs of implementation.

Implications of misleading and deceptive conduct

Energy Council members are concerned that the best offer alert has the potential to constitute misleading and deceptive conduct under the Australian Consumer Law. This is an issue even if the ESC clarifies that the best offer alert does not constitute marketing.

Of particular concern is the assumption that including a 'conditions apply' disclaimer is adequate to avoid what is a potentially misleading statement. The ACCC has been very clear that disclaimers must be clear and prominent enough to enable a customer to know what the real offer is. If a best offer alert highlights savings the customer cannot reasonably achieve, then this would appear to be misleading.

Australian courts have indicated that a misleading representation is not rectified by a subsequent sales process that clarifies the representations that were previously made.[5]

This makes the wording of the best offer alert critical. There needs to be a balance between what will achieve the greatest response from customers, and what has the potential to mislead them.

The second round of testing conducted by BIT for the ESC investigated the response for two different types of message. The payment message, highlighting how the customer is "paying $485 more than they need to" is particularly strong. If this message was chosen, we do not consider any disclaimer can adequately explain to a customer that these savings may not be achievable for them.

We strongly recommend the ESC engage with the ACCC to ensure the drafting of this obligation does not put retailers in a position where complying with the retail code risks breaching the ACL. Even if it might be unlikely for the ACCC to take action in such a circumstance, the risk of customer detriment is high.

GST inclusive amounts on bills

Retailers are bound to comply with the GST Act. The Energy Council is concerned that the 3G requirements as drafted may be inconsistent with the GST Act, and may increase customer confusion.

While elements of the bill are inclusive and exclusive of GST, these elements cannot be simply added up to equate to a GST inclusive bill. A number of elements of the bill - for example solar, concessions, and discounts - are complex from a GST perspective.

A practical example of this issue can be shown on a supermarket receipt. The receipt will give a total bill amount, state the amount of GST included, and then designate particular items as GST exclusive. On an energy bill these GST exclusive elements will change based on the calculation and payment method of the bill. For example, a residential customer with a pay on time discount will be charged GST only on the amount paid, after discounts are determined. If the customer fails to pay the bill on time, the discounts will not be applied, and the GST amount will be higher.

We strongly suggest the ESC investigates the GST obligations further before finalising the draft decision.

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[5] *ACCC v Singtel Optus Pty Ltd* [2010] FCA 1177

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GST and concessions

The concession rules in Victoria require retailers to calculate energy concessions on GST exclusive amounts. This creates a practical issue for retailers in attempting to comply with the new rules in 3G. Under the current drafting, retailers would be required to only show the bill amounts inclusive of GST, with no ability to highlight the calculation methodology. This would result in a concession amount shown on the bill that is irreconcilable to the customer – a poor customer experience. We encourage the ESC to expand on the exemptions in 3G to expressly allow retailers to provide amounts as GST exclusive where any other obligation reasonably requires them to.

The Energy Council looks forward to continuing engagement with the ESC to implement the remaining measures in Recommendation 3 and further increase customer engagement with the retail energy market.

For any questions about our submission please contact me by email at ben.barnes@energycouncil.com.au or on (03) 9205 3115.

Yours sincerely,

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