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26 February 2021

### **Implementing the Energy Fairness Plan**

The Australian Energy Council (the '**AEC**') welcomes the opportunity to make a submission to the Department of Environment, Land, Water and Planning ('**DELWP**') on its Implementing the Energy Fairness Plan *Stakeholder Briefing Paper* (the '**Briefing Paper**').

The AEC is the industry body representing 22 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.

While the AEC acknowledges that the Energy Fairness Plan (the '**EFP**') was a commitment made by the Victorian Government in the days before the 2018 election, it does not consider that the case has been made by the Government as to why these reforms will benefit energy consumers in 2021. In 2018, the recommendations from the Thwaites Review had not yet been implemented, prices in Victoria were unregulated, and there was some concern about a number of practices in the industry no longer relevant to the retail market of 2021.

Given the significant reform agenda that has been implemented in the years since these commitments were made, the AEC expects DELWP to seek to implement the EFP in a manner that least detracts the ability of consumers to benefit from the competitive retail energy market. In particular, the AEC encourages DELWP to minimise the reforms to merely enact the stated intent of the Government when the commitment was made, rather than an expanded application to consider circumstances it considers the Government might have implemented had the EFP been better informed.

#### **Banning door-to-door sales and cold-calling by energy retailers**

##### *Practical impacts of this reform*

The AEC expects that this reform will result in fewer customers engaging in the energy market, as fewer customers are proactively made aware of the availability of cheaper energy deals through sales activity. Consumer research conducted by Energy Consumers Australia highlighted that 19% of customers who considered switching energy companies in Victoria did so because they were approached proactively.<sup>1</sup> This represented the fourth largest driver of customer switching. In practice, all else being equal, post implementation of the EFP, it should be anticipated that significantly fewer customers will engage in the market due to the removal of this driver.

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<sup>1</sup> Energy Consumers Australia, 'Energy Consumer Sentiment Survey December 2020', Essential Survey, December 2020, p100.

The natural consequence of lower engagement is that fewer customers will switch to cheaper offers, and more customers will drift towards prices that are closer to the Victorian Default Offer ('VDO'). Given the cheapest market offers are at least \$281 cheaper than the VDO,<sup>2</sup> this represents a significant financial risk to Victorian energy consumers. In the absence of door to door and outbound telephone sales, the Victorian Government will need to consider how it will encourage this affected cohort to continue to engage with the market and seek out cheaper energy deals.

### *Implementing this reform*

Given the above stated negative outcomes for Victorian consumers, the AEC considers that this commitment should only be implemented narrowly – that is, to avoid only the risks stated by the Government in its press release and fact sheet of 20 November 2018. In this release, the Government stated that its intention was to put an end to “door-to-door sales and cold calling telemarketers harassing Victorian families” and stopping customers being “signed up for what turns out to be a more expensive electricity offer.” Given the reforms implemented since the election, the AEC considers the second concern is no longer relevant – retailers now must comply with the Clear Advice Entitlement that ensures customers are made aware if the offer they are seeking to sign up to is not suitable for them, and termination fees are no longer a feature of the market. Effectively, even if a customer is dissatisfied with a sales interaction, they are able to cancel the offer immediately for no cost.

Noting the Government’s concern about customers being ‘harassed’ by energy providers, the AEC considers that the implementation of this commitment should be underpinned by a principle that all unsolicited contact should be prohibited, but all sales activity that results from the customer requesting contact, or opts into being contacted, should be allowed to continue.

The Briefing Paper describes the conduct that will be prohibited in a broad manner. Retailers will be prohibited from calling on the domestic customer at the customer's ordinary place of residence for the purposes of negotiating a contract or another contract of a kind that is prescribed; or telephoning a domestic customer for the purpose of negotiating a contract or another contract of a kind that is prescribed.

The only exception to the prohibition is if a customer expressly invites the retailer itself to make contact.

This outcome would unnecessarily expand the capture of the prohibition, and is likely to disadvantage Victorian consumers. An example of this unintended capture is a customer who opts into using a connection service when they move residence. A customer will typically opt into being contacted by a connection service through their real estate agent. This connection service will commonly be requested to connect water, energy, internet, pay television, and telephone services in advance of the customer moving into their new property. Undoubtedly, this service is designed to make the stressful situation of moving properties easier, and minimise the risk of a connection being overlooked.

It appears from the Briefing Paper that this connection service would be unable to connect energy services in Victoria. As the customer has not expressly invited the retailer to make contact (they have instead requested an agent of the retailer make contact regarding a number of services, including energy), the connection service will be prohibited from calling the customer and setting up an energy account on their behalf. This is clearly undesirable and must be rectified.

An additional scenario that fails to deliver on the Government’s intended capture of this commitment appears more explicitly in the Briefing Paper. DELWP note that customers who opt into being contacted by the partners of organisations whom they are members of, will not be able to receive calls about energy offers.

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<sup>2</sup> Essential Services Commission, ‘2020 Victorian Energy Market Report’, p105.

Clearly customers who have opted into being contacted should be able to be contacted about energy sales. If a customer does not wish to engage, they are able to opt out (or indeed, never initially opt in).

The AEC is comfortable with the suggestions in the Briefing Paper that retailers should not be able to contact customers from lead generation activities who have not opted into being contacted. This is consistent with the intent of the election commitment.

### *Timeframes*

The AEC expects that there will be significant job losses as a result of banning sales activity. Front line sales agents, support team members, quality assurance and compliance staff, and human resources staff will all be directly impacted by this decision.

Given the current economic conditions caused by the pandemic, the AEC considers that it is absolutely critical that these jobs are not lost as Victoria continues its COVID-recovery. Our members will provide further insights into their individual circumstances and the number of jobs likely to be lost.

At a minimum, the AEC considers that this prohibition should be made at least 12 months after the law passes Parliament. This will allow retailers the maximum opportunity to restructure their sales operations – hopefully avoiding many of these job losses – and mitigate the wider impacts on the Victorian economy. There are no benefits to be gained from implementing this reform quickly, particularly given the above stated evidence that in fact, customers are benefiting from sales activity through cheaper energy deals.

### **Banning win-back and save offers**

Given the broad ban on telephone sales, win-backs and saves are unlikely to be practicable, so even without specific regulation, the Government's stated intent is likely to be met. As such, the AEC will focus its response on any unintended consequences that might come from unnecessary over-regulation.

The AEC agrees with DELWP that the AEMO switching changes will make saves obsolete. No regulation is required to implement this ban.

In practice, the Briefing Paper suggests an old retailer will be able to telephone a lost customer for a number of purposes, including administrative issues and seeking payment for outstanding bills and charges. However, the retailer is not allowed to raise the prospect of the customer switching back to the previous retailer unless the suggestion is offered by the customer first. Without this invitation, and unless the transfer was in error, the old retailer will be prohibited from initiating a return transfer for a 6-month period.

The AEC questions the practicality of this approach. The intent of the commitment was to prohibit retailers calling a lost customer and enticing their return in return for a cheaper offer. This practice has been said to have been impeding the ability of new retailers, in particular smaller challenger brands, from gaining a foothold in the market. In a future market where calling a customer by telephone with the intent of making a sale is prohibited, the Government's intent has already been met.

The Government press release also raised concerns with customers being offered short term discounts by the old retailer that often left them worse off. As noted above, given the implementation of the Clear Advice Entitlement, reforms around discounts and benefit periods, and the best offer notice on bills, these concerns have largely been resolved.

If no further regulation was implemented, retailers would be able to contact customers by other means to encourage them to return to them, but not by so called 'high-pressure' means. For example, an old retailer would be able to send an SMS or email asking the customer to call them for a counter-offer, but would not

be able to make that same offer at the customer's door or via the telephone. Given the customer would not be prohibited from choosing to switch back to the old retailer, the AEC considers the customer impact of regulating and not regulating to be largely the same.

#### *Practical implementation issues*

If the Government chooses to proceed with regulating this ban, the AEC considers that consideration will need to be given to whether or not a connection service or comparator would be impacted. For example, if a customer is in contact with an independent comparator, and the comparator proactively offered the customer's old retailer as the cheapest deal, would the old retailer be in breach of this prohibition if they proceeded with the transfer?

An additional practical challenge arises where the customer has been transferred in error. The Briefing Paper states that the retailer will not be banned from switching a customer who transferred away erroneously back within the prohibited period, however it appears that the practical outcome of this rule is that the retailer would not be able to contact the customer to check if the transfer was indeed intended. This would not be a positive outcome, and there is a risk more customers would be transferred erroneously than would otherwise be the case. The AEC suggests the Government make clear in the legislation that retailers are permitted to contact the customer within the prohibited period to ensure the transfer was indeed requested by the customer.

#### *Timeframe for implementation*

Given the clear links between the two reforms, the AEC recommends aligning the implementation date for this prohibition with the ban on sales activities. This reform will have a number of system impacts for retailers. Retailers will need to amend letters and contact scripts to ensure that all reference to offers, benefits and enticements are removed. Further, retailers will need to train all frontline staff to ensure they comply with the new requirements. Depending on how individual retailers conduct sales, there are likely to be a number of staff who will either lose their jobs or need to be redeployed.

#### **New criminal penalties**

The AEC acknowledges the Government's commitment to the introduction of a statutory deterrent for reckless or systemic wrongful disconnections, but holds genuine concerns about the proposed strict liability offence raised in the Briefing Paper. This proposal is a new development that was not included in the original election commitment made by the Victorian Government in 2018, which focused solely on penalising retailers who systematically and willfully wrongfully disconnected customers.

Given these commitments, the AEC notes that DELWP has been tasked with implementing a \$1 million penalty for retailers who knowingly or recklessly wrongfully disconnect a customer. However, the AEC would like to see some safeguards put in place to ensure that disconnections that occur due to circumstances outside a retailers' control are not subject to the new penalty. As an example, retailers have previously raised concerns with AEMO about the increased risk of customers being disconnected due to the new switching rules limiting the ability of retailers to cancel disconnections currently underway as they no longer receive notifications in advance of an impending switch. The AEC would like to see words in the new regulation that ensure the ESC is not able to progress prosecution in circumstances such as this.

The rationale behind implementing a lesser penalty for circumstances where the retailer does not meet the fault requirement for the more serious offence is not stated in the Briefing Paper. It is critical though that the level of deterrence that a law provides must be proportionate to the wrong it is seeking to prevent. Section 40B of the Electricity Industry Act 2000 (Vic) already provides an effective deterrence to wrongful

disconnections by legislating direct compensation be provided to the customer (\$500 for each day they are disconnected). If the Department believes this is inadequate, then evidence should be provided. The inclusion of the new \$1m penalty will further increase the deterrence for more serious breaches from a retailer.

This strict liability offence removes the requirement to establish fault; in other words, retailers who disconnect a customer due to human error could face a penalty of up to \$100,000. The ESC's current approach to wrongful disconnections is extremely technical, with retailers found to have breached their obligations for seemingly minor breaches of the Energy Retail Code. For example, a retailer could be found to have wrongfully disconnected a customer if their bill failed to provide one extra day in the regulated 13-day payment cycle to allow for a public holiday. This circumstance does not warrant an additional strict liability offence.

With respect to the increased penalties for providing false or misleading information, the AEC seeks clarification as to whether the ESC must establish knowledge with respect to the second dot point: 'omits any matter or thing without which the information is misleading'. In other words, is it only a criminal offence if the licensee knowingly omits something? DELWP should also make clear what factors the regulator will have regard to when determining if a criminal or civil enforcement pathway is appropriate, and in what circumstances the ESC is likely to pursue action against a natural person.

The AEC welcomes the opportunity to provide feedback to DELWP on its regulatory approach to implementing these commitments. However, it is critical that consideration is given to the effect of these legislative changes on Victorian energy consumers. The market has dramatically changed from that which was in place in November 2018, and broad-brush changes without merit will result in significant job losses during a pandemic, and likely result in higher energy bills for the average Victorian consumer. These concerns cannot be dismissed merely due to the presence of a commitment made almost 3 years ago.

Given these concerns, the AEC considers that DELWP should conduct a review of how these changes work in light of the introduction of the Consumer Data Right, the efficacy of these changes, and the effect on consumers. We consider that this should be completed 2 years after commencement of the legislation and once the Consumer Data Right framework is known.

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

Yours sincerely,



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