



CORRECTING CLAUSE 25 OF THE ENERGY RETAIL CODE VERSION 11

October 2014

An appropriate citation for this paper is:

Essential Services Commission 2014, *Correcting Clause 25 of the Energy Retail Code version 11*, October

Our reference: C/14/13428

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1 INTRODUCTION

1.1 PURPOSE

The Commission has become aware of a drafting error in clause 25 of the Energy Retail Code version 11 (**ERC v11**) and this paper reflects how the Commission will address this error in both the short and long term.

1.2 BACKGROUND

The National Energy Customer Framework (**NECF**) is a regulatory regime applying, on adoption by individual State and Territory governments, to the sale and supply of energy to retail customers. The NECF was established to provide a single framework for regulating retailers across Australia. It was anticipated that Victoria would transition to the NECF in July 2012. However, in June 2012 the Victorian Government announced that it would defer Victoria's transition.

In July 2012, the former Minister for Energy and Resources wrote to the Essential Services Commission (**Commission**) requesting that the Commission consider harmonising the regulations contained in its Codes and Guidelines to the extent possible with the NECF.

In response to the former Minister's request, the Commission released the 'Harmonisation of the Energy Retail Code and Guidelines with the National Energy Customer Framework (NECF) – Consultation Paper' (**Harmonisation Initial Consultation Paper**) and a draft ERC v11 for public consultation in December 2012.

The Commission's approach in preparing the draft ERC v11 was to adopt the structure and wording of the National Energy Retail Rules (**NERR**), except to the extent that the NERR provisions were precluded by Victorian legislation, or were inconsistent with the Victorian Government's stated policy intentions.

The Victorian Government's stated policy intentions have been indicated through:

- the *National Energy Retail Law (Victoria) Bill 2012* and associated Explanatory Memoranda; and

- papers published by the Department of State Development, Business and Innovation identifying Victorian-specific consumer protections that are in addition to or different to the NECF.

The Commission invited submissions from interested parties on the extent to which the draft ERC v11 achieved the objectives set out in the Harmonisation Initial Consultation Paper and any changes that would better achieve those objectives.

In July 2013, following the consideration of stakeholder submissions, the Commission released the 'Harmonisation of the Energy Retail Code and Guidelines with the National Energy Customer Framework (NECF) – Draft Decision Consultation Paper' (**Harmonisation Draft Decision Paper**), and an updated draft ERC v11. The Commission again invited stakeholders to provide submissions on the drafting of the ERC v11. The Commission considered the stakeholder submissions it received in relation to its Harmonisation Draft Decision Paper, and released the 'Harmonisation of the Energy Retail Code and Guidelines with the National Energy Customer Framework (NECF) – Final Decision Paper' (**Harmonisation Final Decision Paper**) and a final version of the ERC v11 in July 2014.¹

1.3 REGULATORY POWERS OF THE COMMISSION

The Commission has responsibility for licensing electricity and gas retailers and distributors in Victoria. The Commission's powers are outlined in the *Electricity Industry Act 2000* (**EIA**), the *Gas Industry Act 2001* (**GIA**) and the *Essential Services Commission Act 2001* (**ESCA**).

Section 8 of the ESCA requires the Commission to promote the long term interests of Victorian consumers in performing its functions and exercising its powers, and in doing so have regard to the price, quality and reliability of essential services. In seeking to achieve this objective, the Commission must have regard to the following matters to the extent that they are relevant in any particular case:

- (a) efficiency in the industry and incentives for long term investment;
- (b) the financial viability of the industry;
- (c) the degree of, and scope for, competition within the industry, including countervailing market power and information asymmetries;

¹ For more information on the harmonisation project, and to view the decision papers, please visit www.esc.vic.gov.au/Energy/Harmonisation-of-Energy-Retail-Codes-and-Guideline

- (d) the relevant health, safety, environmental and social legislation applying to the industry;
- (e) the benefits and costs of regulation (including externalities and the gains from competition and efficiency) for—
 - (i) consumers and users of products or services (including low income and vulnerable consumers);
 - (ii) regulated entities;
- (f) consistency in regulation between States and on a national basis;
- (g) any matters specified in the empowering instrument.

The Commission also has specific energy sector objectives under the EIA and GIA. These are:

- to promote a consistent regulatory approach between the electricity industry and the gas industry, to the extent that it is efficient and practicable to do so; and
- to promote the development of full retail competition.

The Commission's approach to consultation and regulatory reviews is set out in our Charter of Consultation and Regulatory Practice which is available on the Commission's website at <http://www.esc.vic.gov.au/getattachment/About-Us/Consultation-Policy/CharterofConsultationforWeb.pdf.aspx>.

1.4 DRAFTING ERROR

Following the release of the Harmonisation Final Decision Paper, the Commission received a stakeholder query regarding the obligations of subclause 25(1)(n) of the ERC v11 and whether there was a potential drafting error, as the additional non-NERR obligations did not appear to be consistent with Victorian Government's stated policy intentions.

Subclause 25(1)(n) currently states:

details of consumption or estimated consumption of energy **for each billing period over the past 12 months or, in the case of customers with a smart meter and to the extent the data is available, consumption for each monthly period over the past 12 months;**

(language in bold is non-NERR language)

The Commission's intention in introducing the non-NERR language into subclause 25(1)(n) of the ERC v11 was to give effect to the Victorian Government's stated policy intention of retaining the retailer obligation to include certain graphical consumption information for smart meter customers in accordance with the requirements of clause 4.4(a) dot point five of the ERC v10a.

Clause 4.4(a) dot point five of the ERC v10a states:

- (a) A retailer must include on a customer's bill a graph showing the customer's consumption:
- in the case of customers with smart meters, the customer's consumption for each monthly period over the past 12 months.

Clause 4.4(a) of the ERC v10a is a clause that is able to be varied by agreement between customers and retailers in the formation of market contracts, and as such is only a mandatory requirement for customers on a retailer's standing offer.²

On 10 September 2014, the Commission wrote to relevant stakeholders advising them of what it considered to be a drafting error in clause 25 of the ERC v11 and inviting them to comment on its proposed changes to clause 25 of the ERC v11 to correct the drafting error.

The Commission proposed to redraft clause 25 as follows:

Subclause 25(1)(n) :
details of consumption or estimated consumption of energy ~~for each billing period over the past 12 months or, in the case of customers with a smart meter and to the extent the data is available, consumption for each monthly period over the past 12 months;~~

Subclause 25(1)(nn):
in the case of customers with a smart meter and to the extent the data is available,
consumption for each monthly period over the past 12 months to be presented in graph
format;

² The ERC v11 adopts the NERR terminology regarding the two energy contracts, which are referred to as either a standard retail contract or a market retail contract.

Subclause 25(4):

Application of this clause to market retail contracts

This clause applies in relation to *market retail contracts*, [except with respect to subclause 25\(1\)\(nn\)](#).

1.5 SUBMISSIONS

The Commission received four stakeholder submissions regarding its proposed changes to clause 25 of the ERC v11 to correct the drafting error.

AGL Energy Limited and ERM Power Limited supported the proposed amendments.

The Consumer Utilities Advocacy Centre (**CUAC**) did not support the corrections to clause 25(1)(n), as it believed the changes would result in a reduction in consumer protections. CUAC supported the introduction of clause 25(1)(nn), although not its limited application to standard retail contracts.

CUAC's submission, and the Commission's response, is discussed in more detail in section 2.1.1 of this paper.

Alinta Energy Retail Sales Pty Ltd (**Alinta**) stated that the Commission should also consider correcting clause 9.2(a) of the model terms and conditions for standard retail contracts contained in Schedule 1 of the ERC v11, which it stated should reference the NERR (noting that the document contains a Victorian box in the preamble that states that the NERR is to refer to the ERC v11 in Victoria).

Alinta's submission, and the Commission's response, is discussed in more detail in section 2.1.2 of this paper.

2 CLAUSE 25 – CONTENTS OF BILLS (SRC AND MRC)

2.1 COMMISSION RESPONSE TO STAKEHOLDER SUBMISSIONS

2.1.1 CUAC SUBMISSION

CUAC stated in its submission that the proposed clause 25(1)(nn), which stated “in the case of customers with a smart meter and to the extent the data is available, consumption for each monthly period over the past 12 months to be presented in graph format” should apply to market retail contracts. The Commission has stated throughout the harmonisation consultation process, in both its decision papers and its workshops with stakeholders, that it would not introduce obligations into the ERC v11 that went beyond current regulatory obligations. Retailers are not currently required to provide this information to market retail customers as clause 4.4 of the ERC v10a, which contains the obligations regarding providing consumption graphs on customers’ bills, can be varied by agreement between a retailer and customer.

CUAC stated that the proposed amendments to clause 25 of the ERC v11 would result in all customers no longer being guaranteed to receive information on their consumption for each billing period over the past 12 months. However, retailers are not currently required to provide graphical information on a customer’s bill of their consumption over the past 12 months because clause 4.4 of the ERC v11 can be varied by a market contract. The Commission acknowledges that the proposed changes to clause 25 would result in retailers no longer being required to provide standing offer customers who still have manual meters with a graph of their consumption over the past 12 months (although retailers would be required to provide details of consumption for that billing period). This obligation is currently contained in clause 4.4(a) dot point three of the ERC v10a, and was incorrectly carried over into the ERC v11 as a Victorian derogation. However, this obligation is not a Victorian derogation, and as such the Commission considers it to be a drafting error that should be corrected.

2.1.2 ALINTA SUBMISSION

The Commission agrees with Alinta that clause 9.2 of the model terms and conditions contained in Schedule 1 of the ERC v11 does incorrectly refer to the ERC v11 instead of the NERR. When

adopting the model terms and conditions, retailers can change this reference without seeking the Commission's approval; it would be considered a permitted alteration as defined in clause 12(4) of the ERC v11. The Commission will seek to correct this error when it amends the ERC v11 to address the drafting error discussed in section 1.4 of this paper.

3 NEXT STEPS

3.1 SHORT TERM RESPONSE

The Commission will not pursue enforcement action against a retailer with regard to any potential breach of clause 25(1)(n) of the ERC v11 as currently drafted conditional upon the retailer being compliant with the proposed redrafting of clause 25 of the ERC v11 as outlined in this paper.

3.2 LONG TERM RESPONSE

The Commission will seek to amend clause 25 of the ERC v11 as follows:

Subclause 25(1)(n) :

details of consumption or estimated consumption of energy ~~for each billing period over the past 12 months or, in the case of customers with a smart meter and to the extent the data is available, consumption for each monthly period over the past 12 months;~~

Subclause 25(1)(nn):

in the case of customers with a smart meter and to the extent the data is available, consumption for each monthly period over the past 12 months to be presented in graph format;

Subclause 25(4):

Application of this clause to market retail contracts

This clause applies in relation to *market retail contracts*, except with respect to subclause 25(1)(nn).

The Commission will update stakeholders when it is in a position to release the revised ERC v11 that incorporates these corrections.