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2 July 2019

Ensuring contracts are clear and fair: Issues Paper

AGL Energy (AGL) welcomes the opportunity to comment on the Issues Paper for implementing Thwaites recommendations relating to contracts and discounting practices (Issues Paper) released by the Essential Services Commission of Victoria (ESC) on 5 June 2019.

We appreciate the ESC releasing an issues paper in advance of a draft decision but are concerned that this has been done prematurely and not within the context of the new Victorian energy market from 1 July 2019.

Our key recommendation to the ESC is to seek an amendment to the Terms of Reference that will allow a review of the state of the market following the substantial regulatory changes occurring on 1 July 2019. The ESC is required to conduct a review following the implementation of the VDO, so it may be more appropriate for work on the remaining Thwaites recommendations to occur until this review takes place, with the review being expanded to the state of the market post 1 July 2019. This would allow the ESC to determine what, if any, additional regulatory changes are necessary to achieve the intended outcomes of the Thwaites recommendations. This is necessary for ensuring effective and meaningful regulation for a number of reasons including:

- The regulatory landscape will be significantly altered from 1 July 2019, and the impacts of these changes are not fully understood or appreciated;
- It is likely that a number of the 1 July 2019 changes will address the initial concerns under the Thwaites review thereby removing the need for further regulatory impost;
- Some of the proposals in the issues paper may be counter to, or duplicate some of the 1 July 2019 changes (discussed further below); and
- separately considering each recommendation in the Issues Paper and determining individual regulatory response options will result in a market that is over regulated and over complicated and could result in unforeseen consumer consequences.

We encourage the ESC to take a holistic approach to implementing the Thwaites recommendations to ensure that regulation is efficient, effective and done based on an assessed need for the specific changes.



By taking pause and assessing the effects on the state of the market post 1 July 2019, the ESC will be able to determine what – if any – specific responses are required to address the remaining Thwaites recommendations. Further, we consider that it should be sufficient under the terms of reference that the amended regulatory framework has achieved the intended outcomes of the recommendations, rather than requiring an individual response to each recommendation.

While we have provided comments on each of the proposed options per recommendation, this has been done only to address the format and structure of the Issues Paper as our key recommendation is outlined above.

If you have any questions, please contact Kat Burela at [REDACTED]

Yours sincerely

Elizabeth Molyneux
General Manager, Energy Markets Regulation



Overview

As we stated in our cover letter, we strongly recommend the ESC work with government and stakeholders to review the impacts on the market from 1 July 2019 to understand if the remaining Thwaites recommendations remain relevant or have been addressed through these other regulatory changes.

The ESC uses the historical lens of the 2016 Thwaites review to drive and examine options it has proposed in the Issues Paper. The 1 July 2019 regulatory changes introduce a new phase of retailer services and supports for consumers to help create a transparent and clear market for all stakeholders. These include:

- **Victorian Default Offer (VDO)** –
 - to provide a safety net price for consumers who choose not to engage in the energy market;
 - the introduction of the regulated VDO includes referencing requirements that will resolve the confusion around discounted energy products and increase the transparency of price information being provided to consumers;
- **Clear Advice Entitlement (CAE)** – that will ensure that all customers will be clearly provided with the key information they need to assess their options prior to signing onto a new plan¹;
- **Advanced notice of changes that impact a customer's bill** – that informs consumers of changes to their energy contract (price and benefits) before they occur which allows them to budget accordingly or switch plans or retailers;²
- **Best offer notification** – will give customers 'best offer' information on electricity and gas bills at least once every three and four months respectively, *so they're always up to date on whether they're on the best plan for their situation*;³
- **GST inclusive** – to provide a consistent price reference to consumers for easy comparison; and
- **New fact sheet obligations** – to provide helpful information about energy plans (on things like terms and conditions) before a customer signs up for a new plan.⁴

The comments we provide below are in direct response to the ESC's options within the issues paper but should not be taken as tacit endorsement of the overall proposed approach or options the ESC has provided. The comments we provide are based on ensuring consumers that have and will continue to engage in the energy market (being around 93 percent of Victorian energy consumers) can continue to benefit from innovative product offerings. For example, AGL offers all Victorian consumers free of charge Energy Insights reports. The report provides customised advice on how energy is likely being used in the household, projections of the likely cost of the next energy bill and tips to improve energy usage. It would likely result in poor consumer outcomes if the Commission solely focuses on price and associated terms and conditions.

¹ Building trust through new customer entitlements in the retail energy market: Final Decision, 30 October 2019 Essential Services Commission, p.3

² See rationale from the Australian Energy Market Commission in the final determination for advanced notice of price changes which was used as the basis of the Essential Services Commission advance notice changes - https://www.aemc.gov.au/sites/default/files/2018-09/Final%20Determination_2.pdf

³ Essential Services Commission's microsite for 1 July changes - <https://www.esc.vic.gov.au/getting-best-energy-plan>

⁴ Ibid.

Recommendation	AGL response to ESC options
4A – require retailers to commit to fix any prices they are offering for a minimum of 12 months. During this period, the market contract prices cannot change.	AGL prefers option 2(a), where all retailers must offer at least one fixed price product alongside other market offers, is the only reasonable option.
4B - require retailers to clearly disclose to customers the length of time any offered prices will be available without change.	AGL considers this is been addressed by the Australian Consumer Law and Clear Advice Entitlement. No further action is required.
4C - require retailers to roll customers onto the nearest matching, generally available offer at the end of a contract or benefit period, unless the customer opts for another offer.	AGL recommends a third option – a hybrid option which would have the VDO as a safety net but would allow retailers to roll customers onto another offer if it better for the customer than the VDO.
4D – conditional discount for payment on time or online billing should be evergreen	AGL does not support this recommendation as it is unnecessary given the 1 July 2019 changes.
4E - costs incurred by customers for failing to meet offer conditions are to be capped and not be higher than the reasonable cost to the retailer.	AGL does not consider this is necessary given the 1 July 2019 changes but would prefer the cap based on new entrant costs out of the options presented.
3A – require retailers to market their offers in dollar terms, rather than as percentages or unanchored discounts.	<p>AGL considers this has been addressed for electricity through the Order in Council that requires discounted energy products to be referenced against the VDO.</p> <p>AGL supports the development of an industry reference rate for gas to provide similar transparency for customers.</p>

However, as we note below – not only do we consider that a number of these recommendations have been achieved with the 1 July 2019 changes, but there are also instances where to pursue a regulatory response to these recommendations may cause conflicts with the 1 July changes. These issues reaffirm the need for a comprehensive review of intent of the Thwaites recommendations and if they have been achieved.

Such a review would also give the ESC the opportunity to determine whether aligning with the national framework can deliver positive consumer outcomes. For example, in Victoria, retailers are required to include start and end index reads on customer bills following changes to the Energy Retail Code in July 2012. The Australian Energy Market Commission (AEMC) recently released a draft determination to not



make a rule to require retailers to include start and end meter readings in electricity bills for customers with interval meters.⁵ On the Victorian experience the AEMC stated

With the evidence collected from the Victorian market, the Commission is of the view that including start and end meter readings in bills is unlikely to enhance customer information and decision-making and therefore it is also unlikely to increase transparency or improve customer's trust in the industry. As noted by a number of stakeholders, it may actually increase confusion for customers.⁶

If the ESC were to align with the AEMC approach, and remove the index read obligations in Victoria then there can be a simultaneous effect of simplified regulation as well as simplified bills to improve consumer outcomes and reduce confusion. This is just one example of the opportunities available should the ESC review the current state of the market before introducing more regulation.

The following comments on each specific recommendation within the issues paper is only being provided should the ESC and Government not consider a review of the state of the market post 1 July 2019 as necessary for implementing additional regulatory changes.

Contracting recommendations

Recommendation 4A (requiring retailer to fix prices)

We prefer the option of the 'do-nothing' approach which has been rejected by the ESC in the issues paper. In our opinion, the rejection of this as a viable option was based on the recommendations at that time of the Thwaites review, rather than how the market will be operating post 1 July 2019.

The least damaging option would be Option 2 (a), *retailers to offer at least one fixed period product*.

AGL does not support options 1 and 2(b) as proposed by the ESC as they risk severely impacting consumer choice and offer flexibility in the market. Both options would remove the points of retailer differentiation that provide consumers with innovative products and services and thereby reduce customer choice and flexibility. Furthermore, neither of these options would be appropriate or compatible with new 1 July 2019 obligations, such as the best offer messaging and VDO.

Providing a fixed term product requires a retailer to forecast any future changes in costs. A retailer currently considers future wholesale energy costs at different points in time and this is reflected in the price variation of market offers during the year. However, many input costs are outside of a retailer's control and change on specific dates, such as network costs that change in Victoria on 1 January. Because these costs can only be roughly estimated, a retailer would need to include a substantial risk premium into any fixed price product to ensure it can recover its future costs. This is currently done with some energy products and some customers are willing to pay a premium for a fixed term price. However, requiring all products to be fixed would result in all consumers paying the risk premium, a market wide increase in energy prices.

At the time of the Thwaites report, recommendation 4A may have appeared functional, although as highlighted, not a great result for consumers. The introduction of the VDO and best offer messaging make this more unlikely. The issue is that the VDO is reset on the 1 January every year in line with network costs. It is not a fixed term product. A customer accessing the VDO in November will see a price change in one

⁵ See Australian Energy Market Commission, [Draft Determination for Bill contents – customers with interval meters](#), 18 April 2019

⁶ Ibid p25



months' time. Under option 1, all other energy products would be fixed and therefore not comparable with the VDO. The best offer messaging on customers' bills will be misleading as what product is better for the customer will be greatly dependent on the time of year as the market product will have a fixed price for 12 months but the VDO will be changing its price on 1 January.

Exemptions

Providing exemptions does not resolve the issue. The exemptions would need to cover annual network price changes as well as unforeseen network costs and tariff reassignments. There are also other costs such as environmental schemes and the reliability and emergency reserve trader (RERT) that need to be considered as all these costs are outside the control of the retailer and impact the cost a customer pays for energy.

If these are included, then the customer is not receiving a "real" fixed price and would be subject to price changes on 1 January in line with current practice. This is not an ideal customer experience.

Recommendation 4B (requiring disclosure of period without change)

In our opinion, the CAE addresses the objective of this recommendation in ensuring customers are provided clear advice about the energy offer they are interested in. The CAE reform also reinforces and complements Australian Consumer Law misleading and deceiving obligations.

As identified in the issues paper, the approach taken for this recommendation will depend on what the ESC decides to do regarding Recommendation 4A. Once this has been decided, stakeholders will need further information from the ESC on the type of disclosure required (assuming any additional disclosure is required), such as what the disclosure term would be, the extent of possible exemptions etc.

Recommendation 4C (rolling customers on to the nearest offer)

We believe that the intention of recommendation 4C on transparency of information to customers at the end of benefit and contract periods has already been met by the recent rule change on advanced notice of changes. As noted above, the intention of the rule change on advanced notice was to ensure that customers were provided with key information affecting their energy contract before any changes occurred. This notification will help consumers determine if they should shop around. This is then reinforced with the best offer messages on bills.

However, based on the options provided by the ESC in the Issues Paper, AGL believe a hybrid option should be considered. This hybrid option would allow a retailer to place the customer on a better offer than the VDO (not based on the best offer calculation for the bill) but have the VDO as the safety net or minimum obligation on retailers. This would provide consumer benefits in retailer flexibility to potentially offer a better offer than the VDO to the consumer but ensures a minimum protection in the VDO as sought by the ESC.

For the reasons outlined by the ESC in the Issues Paper, the 'best offer' calculation is not always the best for every consumer in their circumstances and is the reason the CAE was introduced. To require retailers to roll customers on to a best offer calculated in the way required under the Energy Retail Code will result in some consumers, particularly vulnerable consumers, to potentially be worse off. An approach such as the hybrid model we propose above would enable a degree of retailer flexibility in customising offers for their customers, as well as consumer protections with the VDO base protection.



Discounting recommendations

Recommendation 3A (marketing in dollar terms)

Electricity

The VDO and Order-in-Council should be considered as already giving effect to this recommendation. However, we note that the ESC will be amending the ERC more comprehensively to better instruct on the reference price requirements.

Once the ESC has amended the ERC, the development of Guide similar to the Australian Competition and Consumer Commission (ACCC) Guide⁷ to the Electricity Retail Code would be beneficial.

Gas

AGL believes the development of an industry reference rate for gas retail pricing would improve the transparency for gas consumers.

The reference rate could be based on the average of standing gas offers across the largest gas retailers to allow customers to have a base price for comparison and rectify any issue regarding unanchored discounts.

Recommendation 4D (evergreen benefits)

At the time of the Thwaites review in 2016, large conditional discounts were commonplace in the market. This is becoming less relevant as retailers offer different types of products, such as AGL's Essentials (fixed term product). As we note below, we do not believe this recommendation requires a separate regulatory response. The VDO and CAE the large conditional pay on time discounts will be difficult (particularly if combined with 4E) for retailers to develop and sell conditional discounts in the way that was assessed at the time of the Thwaites review.

Recommendation 4E (caps on conditional discounts)

We do not believe that this recommendation requires a separate regulatory response, as the interaction of the VDO, CAE and best-offer messaging should address concerns of conditional discounting. Should a retailer price a market offer above the VDO, they would be required to inform the customer that a more suitable option is available under the clear advice entitlement, and the customer would receive best-offer messaging on their bill.

However, if the ESC wishes to pursue a regulatory option then we would support the ESC developing a cap based on new entrant costs rather than requiring retailers to document and report on the cost-reflective nature of their discounts.

⁷ See ACCC Guide to Electricity Retail Code: <https://www.accc.gov.au/publications/guide-to-the-electricity-retail-code>