

21 January 2020

Ms Kate Symons
Chairperson,
Essential Services Commission of Victoria
Level 37, 2 Lonsdale Street
Melbourne VIC 3000

Submission – Ensuring Energy Contracts are Clear and Fair

Thank you for the opportunity to provide a submission in response to the Draft Decision on Ensuring Energy Contracts are Clear and Fair (**Draft Decision**).

Momentum Energy is a 100% Australian-owned and operated energy retailer. We pride ourselves on competitive pricing, innovation and outstanding customer service. We retail electricity in Victoria, New South Wales, South Australia, Queensland, the ACT, and on the Bass Strait Islands. We offer competitive rates to both residential and business customers along with a range of innovative energy products and services. We also retail natural gas to Victorian customers.

Momentum Energy is owned by Hydro Tasmania, Australia's largest producer of renewable energy.

Momentum genuinely supports the efforts to reform the energy industry, making consumer outcomes more fair and ensuring contract terms are clear and easily understood. We appreciate that the ESC has been tasked with implementing the recommendations from the Thwaites Review however, we consider the current market environment does not reflect the same environment that existed at the time of the Thwaites Review.

Momentum has always advocated for a staged approach to the implementation of the Thwaites recommendations to ensure that positive competitive outcomes are not curtailed by the imposition of unnecessary regulation. It was the view of Momentum (and many other industry participants) that the very real issues could be addressed through relatively light-handed regulation while allowing the benefits of competitive markets to work. The approach taken to date has not been consistent with this and we are concerned that a failure to pause and assess where the market is following each tranche of reforms risks seriously diminishing good consumer outcomes. The introduction of intrusive regulatory intervention in the form of the VDO, has obviated a need for a number of other reforms.

The Thwaites Review concluded that competition has failed Victorian consumers. Momentum does not agree with this statement however, we acknowledge that this has become the basis for government policy which the ESC is obliged to implement. We are concerned that the Thwaites review does not acknowledge that competition has delivered some benefits to consumers and that dramatic reforms which do not fully consider the market as a whole, risk leading to a worse market than that which was found to be in need of urgent reform by Thwaites and his panel. The fact that the ESC is contemplating reforms which reduce consumer choice and by its own reckoning lead to higher prices,¹ suggests that it may be time to reconsider whether this is the best approach to meeting the needs of Victorian consumers.

¹ Essential Services Commission 2019, Ensuring energy contracts are clear and fair: Draft decision, 10 December p35

The Draft Decision contends that a number of the concerns which Thwaites was looking to address, remain in today's market. Retailers have not however been presented with evidence that this is the case. This view also ignores the practicalities of market operation and development and fails to recognise the magnitude of the reforms introduced to date. Fundamental reforms such as those introduced on 1 July 2019 led not only to an immediate change in practices, but also led retailers to consider how they would compete in a new market where customer rights and retailer obligations had changed significantly.

In basing its observation of the market on data from September 2019 and concluding that there is still work to be done, the ESC has not recognised the fact that retailers were scrambling to achieve a compliant state by 1 July and have not yet had the opportunity to develop new offerings or approaches to sales, service and marketing which would allow them to best compete in the new market. Similar analysis conducted at a subsequent point in time would likely indicate a further shift in the market as retailers adjust to a new approach to conducting their businesses and show that further drastic reform is not necessary.

Momentum is concerned that with a final decision expected in March 2020 for 1 July implementation, reforms will be more costly than necessary and there will be a real risk of non-compliance as a result of such a rushed implementation timeline.

Furthermore, we note that the ESC received their Terms of Reference to undertake this review in December 2018 and that the compressed timeframe at this end of the consultation was avoidable. We believe that it would be reasonable and pragmatic for the ESC to take additional time to undertake a more thorough assessment of the market to gather and present evidence of genuine consumer detriment on which to base their decision with a later implementation date.

3A Require retailers to market their offers in dollar terms, rather than as percentages or unanchored discounts.

Momentum considers requirements for retailers to market their offers in dollar terms is a positive move mirroring the approach that we have taken for some time. The use of the VDO as a reference price and requirement to ensure that offers are presented in a clear and easily understood manner are without question, in the best interests of Victorian consumers. We further support the extent to which this arrangement is harmonised with national provisions and urge the ESC to harmonise in all instances unless the particular needs of Victorian consumers are such that this is not possible.

We caution however, that the ESC be mindful of the amount of information that retailers are required to provide to consumers at each interaction, as we believe that overwhelming consumers with detail, risks alienating them as much as misleading them by omission. While Momentum will not be directly impacted to the same extent as other retailers due to our policy of not discounting, we can commit to ensuring that we continue to be clear and transparent with consumers under the new arrangements.

While supportive of any moves to harmonise with national arrangements, we are concerned with the ESC's decision to replicate provisions of the *Competition and Consumer Act 2010* in the Energy Retail Code. Energy retailers are already subject to significant financial penalties for engaging in misleading or deceptive conduct. The Victorian Guide to Regulation² outlines the approach whereby duplicating provisions of the Australian Consumer Law should be avoided. We do not believe that there is reason for the ESC to deviate from this approach. Having the same provision enforceable by

² Government of Victoria, 2011, *Victorian Guide to Regulation*, Department of Treasury and Finance, Melbourne. Attachment 1.

two different regulators increases the risk that differing standards will be applied leading to a scenario where neither retailers nor consumers understand what is permissible.

Recommendation 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. Retailers may request an exemption from the ESC to address unforeseen changes in network costs.

Momentum acknowledges that customers do not like it when their prices increase. Price increases drive additional calls, complaints and churn and a prudent, ethical retailer will seek to minimise them. Momentum's policy of informing customers well in advance of any change to their prices long pre-dates the requirement to do so under the Energy Retail Code and we applaud the ESC's decision to implement this provision in 2019. We agree that advance notification requirement provides consumers with greater transparency and in doing so, increases the incentive for retailers to pass through price changes only when completely necessary. As such, we are not convinced that Recommendation 4A as proposed will benefit consumers.

While all regulation should be made from a solid evidence base, one such as this which will disadvantage a large number of consumers through reduced choice and higher prices arguably requires an even higher standard of proof. Like the ESC, we consider the practice of baiting and switching abhorrent, however we have no real visibility of how prevalent this practice is. We also contend, based on many years' experience in the retail market, that even if price increases are limited by law to once per year, many consumers will still feel as if they have been victims of baiting and switching if they consider that the period between them signing up and receiving a price change is not sufficient.

Momentum currently offer two main products, one which effectively limits our ability to pass through price increases and one where the terms and conditions allow us more flexibility regarding our ability to pass through increases to our cost base. Our more flexible product is overwhelmingly our most popular simply because it is cheaper as we are not faced with the risk that we will be unable to recover significant movements in wholesale prices (or other inputs) should they occur.

Implementing 4A is a drastic step which would require us to withdraw, or drastically change our most popular product. We believe that it is beyond the remit of a regulator in a notionally competitive market to make a decision on behalf of a large number of customers that the product choice they have made does not in fact suit their needs. Doing this in the knowledge that it will cause retail prices to increase by \$22 to \$100³ appears to be at odds with what the Victorian Government has been working to achieve.

If the ESC intends to stamp out bait and switch behaviour (to the extent that it is a real issue in today's market), we are fully supportive and consider that Recommendation 4B, along with the Clear Advice Entitlement (and heavy penalties for transgressors) should be sufficient. If on the other hand, the ESC believes that all customers value certainty around the timing of price changes to the same degree, we categorically disagree with this assessment.

We consider it more appropriate that customers who value price certainty over the lowest possible price should have access to products which offer this and we note that the market already caters for this. As an alternative to the proposed approach to 4A, the ESC could require retailers to offer a

³ Essential Services Commission 2019, Ensuring energy contracts are clear and fair: Draft decision, 10 December p35

market contract where prices are fixed (either from the contract date or for a calendar year) in addition to any other products, and ensure that customers are provided with appropriate information regarding these products. We note that in their response to the Thwaites Review, Consumer Action notes with regard to fixed price contracts “It does not appear that these contracts have been heavily marketed and are not popular”⁴ and consequently we do not consider that they should be imposed on customers.

We also note that the VDO is a ‘fair’ price for electricity which offers exactly the certainty that recommendation 4A is seeking to deliver. The market’s ability to cater for customers who place different values on different things is one of the benefits that competition has unquestionably brought, and we consider that the ESC’s Draft Decision on recommendation 4A will diminish this.

Recommendation 4B

Require retailers to clearly disclose to customers the length of time any offered prices will be available without change.

The existence of recommendation 4B suggests that the Thwaites Review did not anticipate that 4A would be applied to all contracts. It seems redundant to clearly disclose the length of time any offered prices will be available without change if this is not subject to any discretion on the part of the retailer.

Momentum considers that recommendation 4B (in conjunction with the existing Clear Advice Entitlement) would more appropriately complement a less prescriptive interpretation of 4A.

4B becomes much more useful to consumers in an environment where there is the potential for variability in price changes. Momentum believes that customers would be better off if the current choice which exists in the market (between fixed and variable price contracts) was preserved, with an additional protection for customers who are concerned that they may face unfair price increases.⁵

Recommendation 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.

Recommendation 4D

Any conditional discount or other benefit offered for paying on-time or on-line billing should be evergreen. Customers should not lose the discount or other benefit when the contract ends.

This submission addresses the above recommendations together in light of the ESC’s decision that Recommendation 4D will give effect to the intent of 4C.

The concept of a benefit term was created to address the issue which existed whereby a retailer was required to obtain a customer’s explicit informed consent at the end of a contract. By introducing the construct of a benefit term within an evergreen contract, the retailer could place the customer on a new plan without the customer needing to engage. This approach was initially highly beneficial for consumers as it prevented customers being reverted to Standing Offer Contracts. Unfortunately,

⁴ Consumer Action Submission to the review of electricity and gas retail markets in Victoria, March 2017

⁵ Noting that the existence of the Federal Government’s Big Stick legislation will give retailers further reason to carefully consider whether any price increases are justified.

over time, the benefit term concept became a mechanism by which retailers imposed the 'loyalty tax' on customers by ceasing benefits such as discounts with little or no warning.

Momentum's current suite of products do not have benefit terms as defined by the Draft Code and as such, our customers will not be directly impacted by this change. The decision will however, undeniably change contract structures within the market, and we believe that the ESC should articulate how it envisages the market will have developed in the 12 or 24 months following this change as well as how this translates to an improvement in customer wellbeing.

Recommendation 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.

Momentum does not currently offer pay on time discounts however, we consider that there may be a place for them in a thriving retail market if there is demand from consumers. With this in mind, we share the view that in some instances, customers have been heavily penalised where they have been unable to meet the conditions required to achieve the discount. We are especially conscious of the fact that many vulnerable consumers have been penalised in this manner.

With the ESC research indicating the 85% of customers pay on time, imposing a restriction on a product feature which is available to those who value it does not seem to be in line with promoting positive customer outcomes.

We support the ESC's action to end any questionable practices relating to conditional discounts however, we question the existence of evidence to suggest that these remain a problem. As at the time of drafting this submission the highest discount in market according to the Vic Energy Compare website was 12% (for the Jemena distribution zone). This is a far cry from the 40+% discounts in market prior to the introduction of the VDO. With this in mind, we see little need to cap pay on time discounts if there is consumer demand.

Momentum will concede that in the absence of a VDO for Gas, the potential for larger discounts exists and contend that if the evidence suggests that action needs to be taken, that the AEMC's proposed approach to limiting pay on time discounts be followed.

Taking this approach rather than imposing an ESC determined cap would also be in line with the ACCC's recommendation to more closely align regulatory frameworks to increase retailer efficiency and improve customer outcomes.

Draft Decision 16 and 17

We support the ESC's decision to fold additional changes which will be required into this decision notwithstanding the fact that this was not called for in the original terms of reference.

Draft Decision 16: Retailers must include information about accessing the VDO on electricity bills.

We appreciate that this effectively enshrines a requirement of the AMI Order in Council into the Energy Retail Code, and as a rule, Momentum prefers regulatory obligations to be captured in the Code due to the certainty and stability it provides. We are not convinced that a requirement to provide information on the VDO in addition to best offer does not cause unnecessary customer confusion.

However, we are relatively unconcerned by this requirement to the extent that it does not require bill redesigns to accommodate the prescribed text.

Draft Decision 17: Reducing the allowable back-billing period to four months.

It is difficult to argue that a customer should be penalised for a retailer error which results in an undercharge. Ultimately, imposing a reduction in the allowable back-billing period will increase the incentive on retailers to fix errors and offer appropriate solutions to customers when issues do occur.

It is vital however, that the Distribution Code is amended to reflect the same time period to ensure that retailers aren't faced with charges that are incurred as a result of distributor error which they are unable to collect from the end user.

We also believe that it is worth considering billing errors often arise as a result of system issues and we have seen these in the market following significant IT investments in the industry.⁶ While it is incumbent on retailers to ensure that systems are tested before changes are launched, it behoves the ESC to ensure that retailers are consulted prior to the determination of implementation timeframes for regulatory reforms and that appropriate lead time is allowed. With this in mind, we consider it more reasonable that this recommendation come into effect from 1 July 2021 and that the ESC be mindful of allowing appropriate implementation timeframes for future reforms.

Conclusion

The changes outlined in the Draft Decision are well intentioned and seek to address a number of issues which existed in the market at the time of the Thwaites Review. It is unclear however, to what extent the issues remain in today's market. We do not believe the ESC's approach aligns regulatory best practice as it fails to adequately identify the existence of a problem or consider a vision of how they would like the market to look in the years following the implementation.

The Draft Decision will lead to a market where customers are faced with reduced choice and higher prices.

Momentum would also like to note that the consultation workshop held by the ESC on 14 January 2020 revealed a number of complex issues which must be worked through and that insufficient time has been allowed to make a final decision which adequately addresses these issues.

It must be noted that the state of the energy market which was described by the Thwaites Review was not only the result of poor retailer behaviour, but also the regulatory framework which existed at that time. The appropriate means to address current issues is not simply more regulation, but effective, targeted regulation, otherwise new issues will arise and consumers will be no better off and may in fact be worse off.

We urge the ESC to delay its final decision in order to undertake further work to determine the extent to which the perceived issues still exist in today's market and to develop and articulate its vision for the market following the implementation of any changes. This would allow the efficacy of any proposed changes to be assessed in order to determine the extent to which they may improve outcomes for Victorian consumers.

⁶Moncrief, Marc (2015) 'Energy Bill complaints down but still too many being disconnected', Sydney Morning Herald, October 13, Accessed online at <https://www.smh.com.au/business/energy-bill-complaints-down-but-still-too-many-being-disconnected-20151013-gk7ilw.html>

If you require any further information with regard to these issues, please contact me via email at

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Yours sincerely

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