

21 January 2020

Submission to 'ensuring energy contracts are clear and fair' consultation
Essential Services Commission
Level 37, 2 Lonsdale Street
Melbourne VIC 3000

Via engage.vic.gov.au

Re: Ensuring energy contracts are clear and fair: Draft decision

Simply Energy welcomes the opportunity to provide feedback on the Essential Services Commission's draft decision on *Ensuring energy contracts are clear and fair*. Simply Energy is a leading energy retailer with over 720,000 customer accounts across Victoria, New South Wales, South Australia, Queensland and Western Australia. As a leading retailer focused on continual growth and development, Simply Energy supports the development of effective tools to facilitate competition and positive consumer outcomes in the market.

Simply Energy appreciates that the Commission is engaging with industry on the implementation of these recommendations in response to the *Independent review into the electricity and gas retail markets in Victoria* (the "Thwaites review"). Broadly Simply Energy agrees with the intent behind the recommendations 3 and 4 to increase consumer confidence¹.

Simply Energy urges the Commission to address the key questions the Australian Energy Council posed in their initial submission to the Commission's issues paper on the Thwaites review recommendations 3A and 4A to 4E. It is unclear how implementing these recommendations in the manner envisaged will result in an overall consumer benefit without negatively impacting the competitive market in Victoria. We would continue to urge the Commission to consider the questions below to guide the final decision;

1. Does the change encourage energy consumers to actively participate in the market and to benefit from that engagement?
2. Without the change, are energy consumers unfairly disadvantaged for failing to engage?

Source: Australian Energy Council's submission to *Ensuring energy contracts are clear and fair* issues paper, 2 July 2019, pg. 2

Simply Energy considers that the introduction of the Victorian Default Offer (VDO) and the *Building trust through new customer entitlements in retail energy* retail reforms have given effect to many of the Thwaites recommendations considered by this draft decision. Retailers changing existing market contract prices when the VDO changes is one decision that looks to remedy an issue that we consider has already been resolved through the introduction of the deemed best offer and the clear advice entitlement in the Energy Retail Code (The "Code").

¹ Professor John Thwaites et.al, *Independent review into the electricity and gas retail markets in Victoria*, August 2017, pg. 56

Simply Energy understands that the Commission intends to give effect to the Thwaites review recommendations 3A and 4A to 4E through further regulatory reform and as such, request that the Commission understands and accommodates implementation issues faced by industry, acknowledging that many of the draft decisions, including the proposed timeframes pose unnecessary challenges and would likely lead to increased costs for retailers and consumers alike.

Draft Decision 1

New objective for marketing energy offers

Simply Energy does not consider that the mirroring of Australian Consumer Law (ACL) provisions in the Energy Retail Code has been well considered and the impacts understood. The justification is not evident in the draft decision. Retailers must already understand and comply with Australian Consumer Law. These obligations are neither new, nor poorly understood within the industry.

Furthermore, The ACCC is especially well-equipped to deal with breaches of the ACL and is active in the enforcement of provisions related to misleading and deceptive conduct. Simply Energy does not agree that the duplication of powers in this instance would result in a net benefit to consumers or to the competitive energy market in Victoria.

Simply Energy considers that the Commission have not provided evidence that justifies the duplicative provisions, nor that energy retailers are unaware of their strict obligations under the ACL. If the Commission suspected contraventions of ACL, Simply Energy would encourage the Commission to engage with the ACCC, rather than implement code changes that give the Commission the power to enforce the same obligations.

Draft Decision 2

Retailers must market electricity offers with reference to the VDO

Simply Energy agrees with the Commission on the draft decision to implement a reference price in line with the “Competition and Consumer (Industry Code—Electricity Retail) Regulations 2019” and the associated ACCC guidance material. Simply Energy acknowledges that there is still work to be done to ensure that the reference price requirements in the Electricity Retail Code are fit for purpose and are delivering for consumers.

Simply Energy urges the Commission to ensure that the requirements are mirrored on an ongoing basis. Differing reference price requirements for national retailers would likely lead to complex system builds, increased costs for retailers and confusion among agents and customers alike. Jurisdictional differences are challenging to justify in this case, especially given the relative success the reference price has enjoyed and the reduction in costs a harmonised approach entails.

Draft Decision 4

Retailers must not advertise headline conditional discounts

Simply Energy agree that this obligation be mirrored in Victoria, to minimise jurisdictional differences. Simply Energy is keen for the Commission to clarify the requirements around advertising conditional discounts for gas.

Simply Energy suspects that consumer confusion may increase where there will be relatively minimal consistency across the market for advertising gas offers. The current draft decision highlights that conditional discounts must not be the most prominent feature in gas or electricity advertisements, marketing or promotions.

Given the Commission has not provided clear direction on a reference price for gas, it is unclear to Simply Energy what the Commission sees as being the most prominent feature in gas advertisements, marketing or promotions.

Simply Energy's recommendation is to exclude gas from this particular provision. The requirement to reference an energy fact sheet in advertising provides customers with a trusted, consistent format to understand both electricity and gas offers.

Draft Decision 5

Retailers can only change existing market contract prices when the VDO price changes

Simply Energy agrees with the intent of the decision, that is, to provide customers with the option of relative certainty if they choose not to engage in the market on a regular basis. To provide context behind Simply Energy's response to this decision, Simply Energy has a number of legacy contracts with terms that provide customers with notice of price changes beyond the minimum regulatory requirements. One particular contract provides at least 90 days-notice of the price changes those customers will experience.

In theory Simply Energy generally changes its market offer prices around 1 January every year. This is in line with the VDO being released and provides relative consistency for Simply Energy customers. However, the flexibility that currently exists in the regulatory framework allows Simply Energy, and presumably other retailers, to manage the risk around call centre volumes, letter volumes and other general issues.

If the price change were limited to 1 day, there would not be sufficient time to notify our legacy contract customers and comply with the prescriptive requirements of the price change notice², including the calculation and provision of a best offer message where key elements of the calculation, including the VDO are not known 90 days before 1 January.

During the Commission's workshop on Tuesday 14 January 2020, a new option was provided to allow further flexibility with this decision. Rather than require a retailer to change existing market contract prices when the VDO price changes, enabling retailers to change prices within a period of the VDO price change.

Given the particular concern that Simply Energy have with legacy contracts, we would recommend a period of 3 months from the date that the VDO price changes. While it is likely that prices will still continue to generally change around 1 January, this option provides the necessary flexibility to engage with this change to reduce broader industry concerns around the issuing of bill change alert letters, along with the impacts to call centres.

Draft Decision 6

Retailers offering products that are not compatible with limiting price changes to once a year must comply with certain conditions

Simply Energy considers that in the retail energy market, innovation often requires agility and flexibility when releasing new offers. To seek the approval of the Commission before an offer is released may act as a barrier to this process. It will particularly affect smaller retailers who likely have the ability to move quickly to react to changes in the market, whether it be a unique offer.

Introducing a process where a retailer must seek formal approval from the Commission for an exempt market retail contract shows a lack of regulatory flexibility. This may have unintended

² Essential Services Commission, Energy Retail Code Section version 14, 1 January 2020, section 70L

consequences, such as a reduction in both competition broadly and the scale and frequency of innovative offers in the market.

Simply Energy recommends that the Commission provide strict timeframes around the processing of applications in relation to this particular exemption process and an outline of how decision will be published or provided to the market without ultimately damaging the competitive market.

Draft Decision 8

Retailer must offer any ongoing financial benefits for the duration of the contract

Simply Energy considers that there may be specific challenges with this approach in the future. If retailers continue to offer ongoing contracts, this particular proposal would not provide for cases outside of a retailer's control.

For example, if a financial benefit relating to a market retail contract was contingent on a third-party agreement and the agreement between the retailer and the third party were to cease for any reason, retailers would be unable to continue providing the financial benefit under their third-party agreement. Simply Energy would urge the Commission to consider these types of arrangements in making a final decision.

Simply Energy is also concerned with the proposal to include a provision in the Energy Retail Code where retailers would be required to obtain a customer's explicit informed consent in order to shorten the duration of a market retail contract. The Code already provides minimum notice periods for customers at the end of a fixed term contract and for customers who will experience a change in benefit. These protections ensure consumers are well-informed of any change to their existing contract.

To require retailers to obtain explicit informed consent to shorten the duration of or end a contract would lead to issues where customers are not able to be contacted or do not respond to retailer communication. Simply Energy cannot see any evidence to support the inclusion of this provision or the consumer harm it is trying to resolve. To remove flexibility around a retailer's ability to end a contract is a concerning encroachment on market retail contracts and limits flexibility which may, in turn, increase costs for retailers. These increasing costs would likely be borne by consumers.

Applying these requirements to existing customer retail contracts was not proposed either in the Thwaites review, nor the terms of reference the Commission received from the Victorian Government titled *Ensuring Contracts are Clear and Fair*.

Draft Decision 9

At the end of a fixed-term contract, retailers must roll customers onto the VDO or best offer (electricity and gas respectively)

Simply Energy agrees with rolling customers onto the VDO at the end of a fixed-term contract. This does not represent a change to the current regulatory framework and the increased protections where previously standing offers were unregulated certainly meets the intent of the Thwaites review recommendations relating to contracts.

However, the proposed requirement to move customers onto the best offer at the end of their gas contract has considerable challenges. While Simply Energy would not support a gas VDO, this proposal will lead to unintended consequences for the competitive retail energy market in Victoria. It is challenging for industry to provide feedback on this proposal as Simply Energy understands that legislative change is required. Without seeing draft legislation, or a proposal for the mechanism around this proposal, Simply Energy cannot comment meaningfully.

Simply Energy also raises the concern that what is the best offer from an annual cost perspective, may not be the best offer from a customer's perspective.

For example, if a customer does not respond to an end of fixed term contract notice and Simply Energy place the customer onto the 'best offer', this could lead to customer confusion and complaints where the customer may have initially been on a more expensive offer, but valued the additional benefits that offer provided.

Explicit informed consent is a well understood concept within the energy industry. To disregard explicit informed consent for customers who fail to engage at the end of their gas retail contract, but still require EIC for all electricity market contracts and gas market contracts in other circumstances could lead to consumer mistrust where they likely would not be aware of a change to the regulatory framework that underpins the retailer's actions.

Simply Energy's recommendation is to maintain the current regulatory framework whereby customers would be moved onto the retailer's standing offer at the end of a fixed term contract.

Draft Decision 10

Pay-on-time discounts to be capped by the Commission

While Simply Energy understands the Commission's intent to cap pay-on-time discounts, of more concern is the time-frame provided to retailers for engaging meaningfully with the cap on pay-on-time discounts once the Commission has made a pay-on-time discount determination. This concern is addressed through Simply Energy's response to draft decision 14.

Draft Decision 14

Process for announcing updated pay-on-time discount cap

Simply Energy considers that the proposed timeframe for updating the pay-on-time discount cap is not sufficient. In order to provide the appropriate time needed to make substantial changes to all collateral and marketing where conditional discounts may be referenced, Simply Energy recommends a notice period of 2 months. This extended period would allow these changes to be managed not only by retailers, but by any third parties who retailers may interact with, whether they be comparators or marketing agencies.

Draft Decision 16

Retailers must include information about accessing the VDO on electricity bills

Simply Energy is concerned with both the length and content of the proposed wording for inclusion on small customer electricity bills. The wording as proposed will likely increase confusion for customers where there is already a best offer message required.

Simply Energy supports measures to increase awareness of the VDO, but does not see the bill as the logical home of such an awareness campaign. Simply Energy notes that the Commission undertook a campaign to highlight the 1 July 2019 reforms, the *It's Your Energy Victoria*³ website and associated marketing campaign are an example of where Simply Energy believe this type of awareness could be increased.

³ Essential Services Commission, *It's Your Energy Victoria*, <https://www.esc.vic.gov.au/its-your-energy> (accessed 17/1/2020)

The wording proposed by the Commission is not suited to electricity bills where content requirements already result in a plethora of information. There is little evidence to suggest consumers would respond to such a message.

Simply Energy proposes to maintain the current framework which does not propose strict wording requirements. The Commission could institute a more objectives-based requirement in line with the relevant order in council. Simply Energy currently meet those requirements by including the following message on all Victorian small customer electricity bills;

“To access the Victorian Default Offer, please call Simply Energy on 13 88 08.”

Draft Decision 17

Reducing the allowable back-billing periods to four months

Simply Energy agrees with the intent of the reduction in back-billing, however, cannot support the change where it results in a clear imbalance between distribution businesses and retailers. It is vital that the Commission consider this change in a way that does not unfairly and unreasonably increase costs for retailers. Simply Energy would urge the Commission to mirror the requirements housed in the National Electricity Rules and the National Gas Rules, as below;

“If a retailer is not permitted to recover network charges from a shared customer under the NERL or the NERR, then neither is the Distribution Network Service Provider permitted to recover those charges from the retailer.”⁴

Draft Decision 18

Commencement date of the code amendments

Simply Energy’s view is that these changes need to be more carefully considered. The impacts to competition, whether attempting to regulate for consumers who are disengaged will negatively impact those consumers who are engaged.

Simply Energy understand that the terms of reference the Commission received from the Victorian Government titled “Ensuring Contracts are Clear and Fair’ were issued in December 2018. The release of a draft decision in December 2019 with a final decision not expected until late February 2020 puts undue pressure on industry to implement final Code changes by 1 July 2020.

The Commission cannot expect industry to be able to deal with the significant change that this will require to contracts, systems, processes and training. Simply Energy considers that the previous raft of regulatory reform represented a similar impact to industry. The final decision for the *Building trust through new customer entitlements in retail energy* reforms was issued in October 2018, with an effective date of 1 July 2019, including transitional provisions of an additional 3 months for requirements related to the inclusion of a deemed best offer message on bills.

Simply Energy recommends a delay of at least 3 months, providing similar notice to industry in line with the previous reforms, to allow industry to implement these changes in a meaningful way that will ensure the consumer experience is appropriately considered and accounted for.

⁴ National Electricity Rules Version 132,, 1 January 2020, Division 3, 6B.A3.1

Concluding remarks

Simply Energy agrees with the intent behind *Ensuring energy contracts are clear and fair* and applauds the Commission for seeking harmonisation where possible. However, it is clear in the draft decision that the Commission still needs to evidence that the long-term interests of the Victorian consumer and the competitive market in Victoria are at the core of the upcoming final decision.

It must also be noted that implementation challenges faced by industry could lead to negative impacts to consumers. A rushed implementation without due consideration is, in Simply Energy's view, an unnecessary risk to consumers and retailers alike.

Simply Energy welcomes further discussion in relation to this submission. To arrange a discussion or if you have any questions please contact James Ell, Senior Regulatory Adviser, on, telephone, [REDACTED] at [REDACTED]

Yours sincerely



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