

5 October 2018
Dr Ron Ben-David
Chairman
Essential Services Commission Victoria
Level 37, 2 Lonsdale Street
Melbourne VIC 3000

Submitted by email to retailenergyreview@esc.vic.gov.au

Building Trust Through New Consumer Entitlements in the Retail Energy Market

Thank you for the opportunity to provide a submission in response to the ESC's Draft Decision on Building Trust Through New Consumer Entitlements in the Retail Energy Market.

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.

Introduction

Momentum supports the findings from the Bi-Partisan Review into Retail Energy Prices (Thwaites Review) and has previously indicated support for a number of the recommendations including recommendation 3 which is the basis of this draft decision. With this in mind, we are concerned that the Commission is seeking to impose drastic reforms on an industry which is already showing signs that the calls from customers, regulators and politicians for a fairer and more transparent energy market are being heeded.

We are always supportive of initiatives to help customers to engage in the market on fair and transparent terms. We appreciate the ESC's acknowledgement of our decision to cease offering discounts and rely on a simple price based approach which allows customers to easily understand their energy charges. Thwaites recommendation 3 is largely in line with Momentum's philosophy of transparency and fairness and consequently our comments in this submission are based on ensuring that the requirements deliver the intended outcomes.

We fully support requirements to ensure that consumers understand all relevant information about their energy contract at point of sale; are provided with transparent information when their bill is about to change; and consider it eminently reasonable that

prices are displayed inclusive of GST in line with the vast majority of other consumer goods and services. Our key concerns with the draft decision arise from the fact that the Government has imposed extremely tight deadlines for consultation and implementation which may lead to suboptimal outcomes being realised.

The reforms, although much needed, are being made in a contracted timeframe without the opportunity for the ESC to undertake its usual exploration of costs and benefits. In light of this, we consider that the ESC should either recommend to government that additional time is required to undertake a more thorough review or, to ensure that any reforms are as light touch as possible to minimize the costs associated with them and allow them be reversed if the desired outcomes don't arise. We submit that this approach may involve the recommendation of staggered implementation timeframes to enable retailers to meet their obligations in a more cost reflective manner.

We applaud the ESC's approach to attempting to analyse the outcomes from the reforms by engaging behavioral economists to ensure that the implementation is effective as possible. We believe however that the timeframe under which this has been undertaken has not allowed for a proper analysis and consequently the findings cannot be taken as given, so the ESC should err on the side of caution before requiring changes to be implemented at huge cost to industry.

It is important that the reforms result in a demonstrable net benefit to consumers. The idea of a Deemed Best Offer Message may very well lead to a range of positive consumer responses however the real life experience is unlikely to replicate the results of the discrete choice experiment used. Revealed preferences (or the real life outcomes) often differ from stated preferences arise through behavioral insights experiments and we think this is highly likely to be the case with these reforms.

Our concerns in this regard stems from the fact that the insights testing showed that 27% of customers would respond to the Deemed Best Offer Message by visiting the Victorian Energy Compare website. Thwaites report found that "awareness of the site is not currently high¹" which appears to be inconsistent with the finding from the insights testing. We do not believe that this invalidates the finding that there would be some benefit to consumers, but it certainly means that any benefit which does arise is unlikely to be as high as predicted. This should be considered when the ESC has regard to the costs and overall impacts on consumers.

We urge the ESC to impose the minimum obligations on industry in order to achieve the intended outcome at the lowest possible cost. This may require the ESC to exercise discretion in its interpretation of the recommendations and increase focus on the desired outcomes rather than the exact wording. We believe that the ESC would still be meeting its terms of reference if it adopts this approach.

We have submitted during discussions with the ESC that the changes being proposed will be extremely costly to implement and will result in additional costs being borne by consumers.

¹ John Thwaites, Patricia Faulkner and Terry Mulder, 'Independent review into the electricity and gas retail markets in Victoria', Final Report, August 2017. P56

This is an example of the need for the responsibility for outcomes to be shared between retailers, the ESC and policy makers. Noting that the terms of reference prevent the ESC from assessing the independent review's recommendations but instead focusing on timely and cost-effective opportunities to implement them we consider that there is scope to recommend to government ways to reduce costs. These could include proposing alternative solutions to achieve the desired outcomes, or a staggered approach to implementation.

We consider it crucial that the costs associated with the reforms be adequately articulated in the final. As industry is not privy to discussions between the Commission and Government on such matter (and nor should they be in many circumstances) it is necessary to convey in the final decision that a robust examination of the issues has been undertaken to demonstrate how the decision aligns with the ESC's Objective and how the ESC came to such a decision having appropriate regard to all the facts and circumstances required under its governing legislation.

We appreciate that the ESC is not required to undertake a full cost/benefit analysis, however we believe that a balance can be reached which provides "bang for buck" and ensures that consumers are not paying for regulatory reforms from which they will derive no net benefit.

With the aforementioned contextual considerations in mind, we offer the following thoughts on the provisions of the Draft Decision and the proposed Energy Retail Code as drafted.

Legal Considerations

Momentum has formed a view that the requirements expose retailers to possible legal risk on a number of fronts.

Spam Act 2003 and National Privacy Principles

Momentum is concerned that the best offer requirement would have the effect of characterising the bill as a commercial electronic message under Part 6 of the *Spam Act 2003* in instances where customers have opted to receive bills electronically. Part 6 states:

- (1) For the purposes of this Act, a commercial electronic message is an electronic message, where, having regard to:
 - (a) the content of the message; and
 - (b) the way in which the message is presented; and
 - (c) the content that can be located using the links, telephone numbers or contact information (if any) set out in the message;it would be concluded that the purpose, or one of the purposes, of the message is:
 - (d) to offer to supply goods or services; or
 - (e) to advertise or promote goods or services;...

While it is clearly not the intention of the ESC or the retailer to spam customers, we are concerned that this would open retailers up to prosecution as would be unable to offer customers the option to unsubscribe without being in breach of Energy Retail Code (and contractual) requirements to send bills.

We believe that the requirement creates a similar conflict with provisions of the National Privacy Principles where bills are not sent electronically.

We understand that the ESC is cognisant of this issue and has instructed drafters to take particular care to avoid this issue. The broad nature of the Spam Act provisions on this matter will require precise drafting, and we do not believe that the proposed Energy Retail Code provisions contained in the Draft Decision are suitable. Of particular concern is 70S of the Energy Retail Code which has the effect of characterising a negative best offer message as an offer in the contractual sense and would put retailers in contravention of the Spam Act and Privacy Principles provisions surrounding marketing materials.

We are open to working with the ESC to ensure that retailers are not placed in a situation where compliance with the Energy Retail Code exposes them to legal risk under a Commonwealth Act. We seek assurances in the Final Decision that the ESC has robust legal advice on this matter.

Australian Consumer Law

Similarly, we have concerns that the prescribed wording proposed for 70R of Energy Retail Code does not offer retailers sufficient protection from liability under Australian Consumer Law. Momentum, and no doubt other retailers, are conscious of ensuring that representations about the savings which could be achieved on their products could not be construed as misleading.

We are concerned that retailers would need to surround the best offer message with caveats and fineprint to protect themselves from claims of misleading and deceptive conduct. This approach would not engender consumer trust as there is a perception that retailers have benefitted from hiding behind fine print in marketing materials to provide offers which do not live up to customer expectations. Momentum appreciates that the ESC is cognisant of this in drafting the required wording however we consider that a set of wording agreed with all retailers would both lessen the risks faced by retailers and send a more appropriate message to consumers.

Recommendation 3 G

Momentum is broadly supportive of the ESC's definition of deemed best offer in the draft decision. We have discussed in workshops with the ESC the challenges which will arise from adopting the AER's definition of Generally Available, which would include offers where a membership or affiliation is required to be eligible for an offer, and we do not believe that this would further the objectives of the reforms.

While it may be tempting to require retailers to calculate the benefit net of any additional costs which the customer may incur from an affiliation of membership, we do not believe that this is a realistic option as:

These external costs are outside the control of retailer and may change without their knowledge; and

Some memberships have a scale of fees depending on membership types and therefore cannot be quantified for individual customers.

The simplest option to avoid this issue is to remove offers where the customer is required to make an additional outlay in order to gain eligibility from the scope of this reform, or to retain the ESC's existing definition of generally available offer.

The definition of *annual total cost of current plan* concerns Momentum as we believe that the definition as drafted will prevent the reform from achieving its desired objective. This is due to the fact that the customer's current plan is calculated on the basis that all potential discounts are included even though this may not have been the case for any individual customer.

A number of our competitors offer products with a conditional discount and products with a simple (zero discount) rate. Where the rate, after discounts are applied, is lower than the simple rate the retailer is not obliged to inform the customer of this alternative offer, even if the customer would be able to save money as they do not always pay their bills on time. We do not believe that this outcome aligns with the intent of the Thwaites recommendation and we urge the ESC to consider how this can be addressed.

At face value it appears as though the *annual total cost of current plan* definition should take into account instances where conditional discounts have not been achieved however, we consider this could add significant complexity to the implementation. Given that this issue would not impact Momentum, we are unable to comment on the impacts in terms of costs and timeframes and suggest that the ESC engage directly with potentially impacted retailers before coming to a final decision which meets the objective of the recommendation.

Recommendation 3H.

Momentum agrees that it makes sense for prices to be quoted inclusive of GST, and that energy is in the minority of commodities or services which are not currently represented in this manner. We are concerned however, that the complexities of making this change are not well understood.

Notwithstanding that it will necessitate reviewing almost all marketing materials, customer communications and digital interfaces (websites and online sales channels), it is relatively simple to ensure prices are displayed and quoted inclusive of GST in most instances. Major issues arise however, when this requirement is extended to the bill. A retailer's bill template is not a static document and each field is calculated dependant on other elements. Requiring retailers to show GST inclusive rates is not merely matter of printing a new number, but will fundamentally change the formulas to calculate the bill total, concessions and feed in tariff amounts.

We question whether providing GST inclusive rates on bills will in fact improve the customer experience. The energy industry has not adopted GST exclusive pricing to obfuscate or confuse, but rather to provide greater clarity. Under ATO guidelines, retailers can show the total of the bill inclusive of GST where GST equals exactly 1/11th of the total amount

payable. In instances where the customer has a concession or receives a payment for distributed generation this will not be the case. Rather than providing the customer with a clearer picture of the makeup of their bill, these cases will become more confusing.

This is illustrated below.

Current

Calculation of Electricity Charges (Back page)			
	Units	Rate (Ex. GST)	Total
Usage	575.51	0.176	101.29
Daily	32	0.72	23.04
Total (ex. GST)			124.33
GST Compliant Invoicing (front page)			
Energy Charges		124.33	
Concession		-21.76	
GST		10.26	
Total Payable		112.83	

Proposed

Calculation of Electricity Charges (Back Page)			
	Units	Rate (Inc. GST)	Total
Usage	575.51	0.1936	111.42
Daily	32	0.792	25.34
Total			136.76
GST Compliant Invoicing (front page)			
Energy Charges		124.33	
Concession		-21.76	
GST		10.26	
Total Payable		112.83	

The example on the left shows the current approach to displaying energy charges. This approach enables customers to easily reconcile their energy charges (as calculated on a consumption multiplied by rates basis) with their GST compliant invoice which shows the total amount payable.

Under the proposed requirement to include GST in rates, the figures on the usage calculation will not align with the GST compliant invoice. This is demonstrated in the example on the right and is likely to cause customer confusion. The extent to which this confusion negates any benefit associated with displaying GST inclusive rates is unclear, but this issue, coupled with the considerable cost of system change required should be investigated further before determining the final approach.

We note that the Terms of Reference have provided the ESC until January 2019 to make a decision and we consider that it would be appropriate to delay a decision until this time to investigate whether a more cost effective alternative can be identified.

Clear Advice Entitlement

Momentum fully supports the requirement to ensure that customers are made aware of all pertinent information. We are mindful of the fact however, that too much information will not help customers and that the ESC will need to make a decision on the point at which diminishing returns will commence.

As outlined at the ESC’s workshop on 27 September, the provision as currently drafted will require retailers to disclose details which will not be relevant for the overwhelming majority of consumers. Not only will this result in retailer cost to serve increasing, but it is likely to

discourage customers from participating in the market. The alternative customer response may be to gravitate towards online signup where they may simply click through pertinent information without giving it proper consideration.

The Thwaites review does not expressly state the level of detail which must be provided so we believe that the ESC is unconstrained in its ability to draft a provision which results in position customer outcomes.

Implementation Concerns

Cognisant of the Government's timeframe regarding the implementation of the new requirements, Momentum believes that the ESC must consider the technical and commercial reality of the proposal. As outlined above, Momentum sees considerable value in ensuring that customers are appraised of their opportunities to save money on their energy bills and to this end we tasked our ICT vendor with providing a statement of work to assess the feasibility of a similar initiative prior to the launch of our new customer relationship management system in 2017. This initiative was ultimately abandoned due to the significant cost and build time required.

Unfortunately the required level of resourcing required to implement these reforms by 1 July 2019 may not be a reality due to the number of regulatory change initiatives currently in train. These include the Payment Difficulty Framework (due by the end of this year), implementation of Time of Use Solar (for 1 July 2019), life support reforms (due 1 February 2019) as well as the day to day resourcing effort required to run a business.

We recommend that the ESC investigate how the desired outcomes could be achieved by exercising some discretion in its interpretation of the Thwaites recommendations. For example, we note in the Draft Decision that the ESC considers that providing a bill insert in addition to the changes to the bill would "introduce additional costs to retailers, which could be expected to ultimately be borne by consumer"². While this statement is relatively self evident, a standalone bill insert would be significantly cheaper for retailers to produce as it does not interfere with the bill template which is costly to reconfigure.

Once again noting that the Commission's terms of reference does not allow it to assess the merits of the Government's policy decision, we believe that it is incumbent on the Commission to have regard to the the benefits and costs of regulation, and in line with its terms of reference, suggest mechanisms to achieve the outcomes sought from the recommendations in the most cost effective manner. If the best offer message was to be required on a bill insert rather than on the bill itself, it is likely to reduce costs and achieve similar outcomes and we believe that the ESC should consider this in making its final decision.

In contrast to the relatively limiting Terms of Reference, the Thwaites recommendations are sufficiently broad, in that they lack any real detail as to how they should be operationalised, as to provide the ESC with considerable discretion. In fact, we contend that

² Essential Services Commission 2018, Building trust through new customer entitlements in the retail energy market: Draft Decision, 7 September. P 42.

the ESC should, in accordance with its focus on outcomes based regulation focus more on the desired outcome and less on the specific wording of the recommendation. On this basis we consider that decision to include a best offer message **with**, rather than **on**, bills is consistent with the Terms of Reference.

A similarly flexible approach to the other elements of this suite of reforms is likely to bring a greater net benefit to Victorian consumers and we urge the ESC to consider using any discretion that it believes it has when making its final decision.

Additional information

If you require any further information with regard to these issues, please contact me on (03) 8651 3565 or email joe.kremzer@momentum.com.au

Yours sincerely

Joe Kremzer
Regulatory Manager
Momentum Energy