

4 October 2018

RetailEnergyReview@esc.vic.gov.au

Essential Services Commission
Level 27, 2 Lonsdale Street
Melbourne VIC 3000

Dear Essential Services Commission,

Draft Decision: Building trust through new customer entitlements in the retail energy market

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the Commission's Draft Decision, *Building trust through new customer entitlements in the retail energy market* (**Draft Decision**). Consumer Action appreciates the opportunity to participate in the reference group that has helped inform the Draft Decision. We are confident our views have been genuinely heard throughout that process and have been grateful for the opportunity.

We are also broadly satisfied with the Draft Decision. To the extent that consumer information can mitigate poor consumer outcomes, the Draft Decision will have a positive impact if implemented as proposed—as intended by the relevant recommendations of the *Independent Review into the Electricity and Gas Retail markets in Victoria* (**Independent Review**).

In particular, the 'best offer' requirement is a useful step forward for all of the reasons outlined in the Independent Review. For too long, sweeping assumptions have been made about consumer engagement in energy—without sufficient thought being given to facilitating that engagement, or whether the assumptions being made align with true consumer behaviour. In that vein, Consumer Action particularly values the input of the Behavioural Insights Team (**BIT**) in the development of the Draft Decision, and we encourage the ESC to continue to engage BIT and other behavioural scientists in policy development.

Consumer Action notes and strongly endorses the 'purpose driven philosophy' underpinning the Draft Decision, as expressed by Chairman Dr Ron Ben-David in his introduction:

"Under our proposed approach the code will outline the reason why certain information must be provided to customers. This means retailers' actions won't only be judged against whether they've provided the information, but whether they've done so in a way that enlivens the purpose given for providing that information. This means obligations like the provision of information move beyond traditional principles of transparency and disclosure, and are elevated to higher principles



of responsibility and accountability. Retailers become responsible for enlivening the objective and purposes described in the regulations and they can be held accountable for doing so.”¹

We also acknowledge that while recommendations 3F-H of the Independent Review appear straightforward at first blush, the complexity of the market renders their practical formulation and implementation surprisingly difficult. The Commission has inevitably had to make a series of judgment calls to arrive at a workable series of decisions. The truth is, there is no ‘perfect’ formulation to cover all possible permutations when requiring a retailer to identify a ‘best offer’ and advise a consumer of that offer. Fortunately, the reality of consumer decision making in the energy market is that it is likely to be inexact, made on a gut feel for what sounds like it’s “about right” or “a good deal”. So it is not *about* the detail—it is all about the headline message, and using that headline message (or ‘nudge’) to prompt engagement, and then requiring retailers to honour that engagement with clear advice. On that basis we are confident that the Commission has arrived at a sensible position and we are hopeful that the Draft Decision, if implemented largely as drafted, would have a positive impact on the market.

That being said, Consumer Action does maintain its strong view that prompting engagement will only take the market so far—there is a limit to how many people will engage with the retail energy market, and a limit to the extent they will maintain that engagement over time. The Draft Decision effectively fashions a useful nudge to boost engagement, but in the end we will need bolder solutions (such as a Basic Service Offer) to fully arrest retail energy market dysfunction.

The energy sector does seem to be slowly waking up to the fact that consumers are not nearly as interested in energy as many sector practitioners have traditionally assumed they are. Ironically, there are very *rational* reasons for this. Not least of which is that there is actually *no choice* not to buy the product. The choice around energy consumption is not whether you buy it, but simply who you buy it from—and for a multitude of reasons, some consumers will inevitably be more willing and capable of shopping around than others. From Consumer Action’s perspective, this raises serious alarm bells around low-income and vulnerable consumers. A growing body of academic literature clearly demonstrates that people living in poverty operate under life-stressors which directly impact their capacity to engage with the market. It follows then, that this cohort are likely to be the ‘losers’ in a market where people are rewarded for their capacity to shop around, and penalised if they do not.

But they won’t be the only losers, and they won’t be the only ones who resent being forced to shop around for an essential service. A 2017 paper by the Centre for Competition Policy at the University of East Anglia, *Switching Energy Suppliers: It’s Not All About The Money*, found that when examining consumer behaviour in the energy market:

¹ Essential Services Commission, *Building trust through new customer entitlements in the retail energy market: Draft Decision*, 2018, pp v-vi.

*"...a number of non-monetary factors...seem influential and...help explain apparently weak consumer response to savings opportunities in this context, suggesting that price competition for this seemingly homogenous product may have less power than is often assumed."*²

The study found that:

*"...broad factors which influence the switching decision include uncertainty about various aspects of the offer(s), preferences over non-price characteristics, concerns about the switching process itself and time pressures. Many of the factors identified can be located within a rational decision making framework, suggesting the perceived net benefit from switching may be much less than that suggested by looking solely at the magnitude of potential monetary savings. Consequently, switching rates are likely to be substantially lower than we might initially expect, even in favourable conditions."*³

In his 2018 Consumer Law Conference paper, *Competition, Neo-paternalism and the Nonsumer Uprising*, Dr Ron Ben-David made the observation that:

"Merely telling nonsumers to shop around for 'savings' is unlikely to assuage their growing sense of injustice. It is a sense of injustice driven by having to shop around even though the purchase is involuntary. It is a sense of injustice borne from having to shop around ever more assiduously just to avoid being exploited. It is this growing sense of injustice that is seeing nonsumers increasingly demanding answers.

*And as recent history shows, when nonsumers find their voice, the polity listens."*⁴

The proposed changes in the Draft Decision may well make it easier to get a better deal, but they still amount to telling people to shop around. We have to ask ourselves whether that is enough. It is news to absolutely no-one that consumer inertia in the retail energy market is deeply entrenched. The bigger question is whether it is actually endemic, constituting an unavoidable feature of a 'nonsumer' market.

If it is endemic, then it is incumbent on policy and law-makers to consider policy solutions which do not rely on breathing life into competition. To cite one example—the Victorian state government recently committed close to \$50 million dollars' worth of \$50 payments for consumers to simply visit the state operated price comparator web-site. If we're having to do that to 'encourage' people to shop around, at what point do we accept that perhaps they simply don't want to? At what point do we accept that we have, in policy terms, jumped the shark?

It is clear to us that new policy solutions are needed. It is also clear that such solutions may include a degree of price regulation.

² Deller, David et al. *Switching Energy Suppliers: It's Not All About The Money*, Centre for Competition Policy, University of East Anglia, 2017, p. 1. Available at: <http://competitionpolicy.ac.uk/documents/8158338/17199160/CCP+WP+17-5+complete.pdf/fdaaed88-56e5-44f9-98db-6cf161bfb0d4>

³ Ibid, p 2.

⁴ Dr Ron Ben-David, *Competition, Neo-paternalism and the Nonsumer Uprising*, 2018, p. 32. Available at: <https://www.esc.vic.gov.au/sites/default/files/documents/competition-neo-paternalism-and-the-nonsumer-uprising-paper.pdf>

We note all of this to say that while the Draft Decision is important and useful, it is limited by the paradigm from which it springs. While it will have some positive impact, we do need a much more profound cultural shift to truly address retail energy market dysfunction.

Due to our extensive involvement in the process already, and our broad satisfaction with the document as proposed, we have kept our submission relatively brief.

If the ESC has specific questions of us in relation to any of the comments provided, we are happy to respond to those either through correspondence or in person.

Our comments are detailed more fully below.

About Consumer Action

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just market place for all Australians.

Draft decision 1: Best offer entitlement

This decision gives effect to a major element of recommendation 3F of the Independent Review, and as such is a decision the Commission was required to make following the Government's endorsement of the recommendation.

We hope this requirement will have some impact on the prevailing consumer culture around energy, helping to alert consumers to the benefits of remaining mindful of their energy plans and the potential benefits in switching—even if it only means switching between plans with your current retailer. In those terms, the details of the offer presented are not as important as the headline message, i.e. that you have options to choose from, you don't have to stay where you are. Undoubtedly, this measure will aid retention more than leading to new acquisitions, but if it results in fewer consumers remaining on their retailer's more expensive plans then we are comfortable with that outcome.

While this nudge will help some people, we believe the majority will still fail to engage. On that basis, and for all the reasons outlined above, a policy solution that is less reliant on consumer engagement is still the best way forward.

Draft decision 2: The definition of best offer

We are satisfied that Option 2 is the preferable way to define 'best offer', acknowledging that there is no 'perfect solution' to this problem.

Option 1 would likely lead to a high level of consumer frustration, in a market where consumers already have very little trust or confidence (let alone goodwill) in retailers. Option 3 is too narrow and would fail to expose the degree of price dispersion that the entitlement must expose to really work, and Option 4 would introduce unnecessary and potentially counter-productive complexity.



Studies have found that more options can actually lead to less decision making, and this can be shown even when the options were very limited (i.e. an ability to choose from two different offers, rather than just accepting the one presented):

*"We have also included under uncertainty the negative effect of being shown two offers...rather than one. We interpret the result as a presentation of two offers introducing some uncertainty into the outcome for the recipient: for example, being shown two reasonably similar offers may have prompted some participants to wonder whether there might be other (possibly better) deals in the wider market, either now or in the near future, encouraging postponement of a decision."*⁵

We are strongly opposed to Option 5, which would place too much discretion in the hands of retailers and as the Commission correctly identifies, would present significant enforcement challenges.

Option 2 has the down-side that while the identified 'best offer' may be generally available, it may not be appropriate for the consumer being notified. An obvious example of this is if the offer includes a pay on time discount, and yet the consumer has a history of not being able to pay on time. In our view, this is where the clear advice entitlement should have its intended effect—it effectively requires the retailer to make that analysis on behalf of the consumer and advise them accordingly. For that reason alone, the clear advice entitlement is critical to the Draft Decision having its intended impact.

Throughout the consultation period much has been made of the potentially negative impact of consumers making contact with their retailer only to find that the 'best offer' they've been told about comes with conditions (such as a pay on time discount, or the requirement to be a member of a football club, or the RACV for example) and that this may exacerbate consumer frustration.

We contend that this concern has been over-stated and misses the point that the best offer notice is a nudge designed to encourage a consumer to contact their retailer—rather than provide a definitive offer.

The notice itself will be expressed in approximate terms (i.e. 'you *could* save *around...*' or 'you *may* be paying *up to* x too much') and requires the consumer to make contact with the retailer to learn more—at which point consumers are likely to anticipate potential caveats. Including such offers in the definition of best offer is important to give consumers a true sense of the *range* of prices available to them because this will (we hope) foster a desire to ensure they are getting a good deal.

We would prefer that 'new customer' offers are also included in the definition—as doing so may prompt consumers to explore their options with other retailers, working against the natural tendency for the best offer notice requirement to entrench existing market share by promoting retention. It is more important to us that the best offer notice fosters awareness in consumers of the benefits of 'active' shopping, than the particular 'best offer' identified be available to them without caveat. We also hope over time that the best offer notice will lead to less price dispersion,

⁵ Ibid, p 12.

and this can only happen if retailers are forced to expose the degree of price dispersion that currently exists.

Finally, in relation to pay on time discounts—we note that both the Independent Review and the ACCC electricity pricing inquiry *Restoring electricity affordability & Australia's competitive advantage* (**ACCC Inquiry**) correctly identified them as highly problematic and recommended that they effectively be abolished. We look forward to that outcome.

Draft decision 3: Estimating a customer's usage and the application of discounts and concessions when determining the best offer

This is a sensible approach to achieve the desired purpose.

Draft decision 4: Presentation of the best offer on bills

The BIT testing commissioned by the ESC was valuable in determining the appropriate format for communicating the best offer notice, and we are satisfied that it has arrived at the right balance of information and simplicity to maximise comprehension. This gives the best offer notice the best possible chance of having the desired impact. Along with other stakeholders we were particularly concerned about the potential for confusion, specifically the possibility that consumers may be uncertain as to how much they actually need to pay on their bill, as opposed to how much they could save by switching to the best offer. The BIT testing emphatically dispelled this concern, finding that 96.9% of respondents did not confuse the best offer notice with the amount due. This was very reassuring.

The BIT testing also clearly demonstrated the wisdom of the adage 'less is more', confirming that more information does not necessarily lead to the best (or at least, better) consumer outcomes. Having the *right* information at the right time—prompting the right action—is as effective as providing exhaustive disclosure.

It was also interesting to see that theory of loss aversion borne out in the testing, with people being clearly more motivated by the thought that they are paying too much than they are by the prospect of making a saving (despite the net dollar outcome being the same).

That being said, we note that even the highest testing option (i.e. the statement '*we could offer you a cheaper plan*' combined with '*you are paying up to \$485 a year more than you need to*') still only achieved a 64.2% comprehension rate in terms of respondents who understood that they were not on the best deal; and a 68% comprehension rate for those who understood they could contact their retailer for a better deal. Put another way, this means that 35.8% of respondents failed to grasp the key message, and 32% did not seem to understand that their retailer could assist them. In terms of stated intentions, the combination of statement + payment was again the most successful. Only a small proportion of respondents to that combination stated they would simply pay the bill and do nothing, although interestingly the proportion who stated they would contact their retailer to explore the best offer identified was not overwhelming. Just as many stated they would go online and do their own research, and only slightly fewer stated they would go to Victoria Energy Compare to explore their options.

Consumer Action is cognisant that these results may not be reflected in a live environment. If anything, there is likely to be a higher degree of inertia. It should also be noted that the respondents were both prompted and reacting to a potential saving of almost \$500 a year. Identified savings will



vary considerably, and it is to be expected that the lower the differential between the identified best offer and the consumers current plan, the less impetus there will be to take action and switch plans. Many unprompted consumers with busy lives, where lower savings levels are identified will simply whack the bill up on the fridge and pay it when they're able—if they're able—and if (or when) they remember to do so.

Taking comprehension figures into account, and then considering the degree of inertia in the market, (and the potential for inertia to increase as identified savings decrease), only the most optimistic adherents of competition theory could make a case for anything approaching a 50% likely 'success' rate for best offer notices—that is, in terms of consumers actually following through and achieving a better outcome. The reality is, the success rate is likely to be far lower. If even 20% of consumers were to take action on the basis of best offer notices to achieve identified savings (or savings close to it), then this would be an outstanding result. Unfortunately, it would still leave 80% who have not.

All of this only serves to underline the limitations of retail competition in the energy market—and highlight the quixotic task of stoking consumer engagement to produce the competitive tension it so desperately needs.

Draft decision 5: Clear advice entitlement

The clear advice entitlement is critical to the success of the Draft Decision, and we're not surprised it's contentious with the retailers. It is perhaps the clearest example of the Commission's outcomes-based, purpose driven regulatory philosophy. The clear advice entitlement does require retailers to adopt a new mind-set in how they interact with their customers, and it is only to be expected that they find the prospect challenging.

We strongly support the Commission in the direction they're taking and accept that it will take time to shift energy retailer culture, just as it will take time to shift energy consumer culture. It's a truism that there is a tension between achieving a truly competitive market, and the natural desire of each individual retailer to maximise profitability. To date, retailers have been able to exploit consumer inertia and the 'stickiness' of the market to overcharge consumers and over time they have become used to profit margins bolstered by those dynamics. It is therefore a significant but necessary cultural shift to require retailers to make genuine efforts to clearly advise consumers of the best plan available to them, and to work to ensure that plan is appropriate. The factors identified in the Draft Decision as being necessary to communicate to the consumer are entirely appropriate, and retailers are well-placed to take those factors into account when providing their advice.

Of course, this cultural shift would be helped by increased awareness of the benefits of switching, of the Victorian Energy Compare (**VEC**) web-site, and the prospect that if retailers don't work to keep consumers then they will lose market share. While this sounds good in theory, we know that such competitive tensions are yet to truly emerge in Victoria's energy market. In a sense, the clear advice entitlement is about trying to instill a mode of behaviour in retailers that should by rights already exist due to competitive market forces.

The fact that the Commission has to leverage regulatory reform to compel retailers to behave this way does raise the question of whether competition theory really *works* in retail energy and whether a bolder solution—such as a BSO—may be necessary to achieve positive consumer outcomes.



Draft decision 6: Scope of the new best offer obligation

This is sensible, we have nothing to add.

Draft decision 7: Frequency at which best offer appears on bills

This issue has been the subject of much discussion throughout the consultation period. Consumer Action supports the proposal that best offer notices should be provided twice a year, as we believe providing them too frequently may dull their impact. If best offer notices appear on every bill, we are concerned they will fade into the visual ‘white noise’ that constitutes much of what is already an over-crowded communication piece. As it is, consumers naturally zero in on one factor—the amount due. For the best offer notice to register with the consumer, we believe it has to have some degree of novelty. We are mindful that consumers will also be receiving this information when they receive bill change notices, so we are mindful of dulling the message through over-use.

In terms of when those six-monthly notices should be sent, we are persuaded by the argument that requiring them at set times as the Commission has proposed (i.e. the first bill after 1 January and 1 July each year) may be problematic. The proposal could create a surge in inquiries at those times (and therefore long call-centre waiting times, which is likely to frustrate consumers). It is also possible that retailers will manipulate their available offers at those times to minimize the impact of the best offer notice. Set against those concerns is the potential of encouraging cultural shift through having set notice periods, during which consumers may be inclined to talk to each other, raising community awareness, and during which we may see retailers work to maintain market share. Without knowing the figures, we imagine that a reasonable proportion of consumers switch private health insurers annually at around the time that premiums are raised. It’s highly visible that insurers compete at those times to attract new customers. It would be interesting to know the rate of switching in those periods, as opposed to other times of the year.

On balance, we do arrive at the view that twice year at the retailer’s discretion, provided there is at least four months between notices, is the preferable outcome. We would also encourage the ESC to think about what public education and information campaign it may like to run to raise awareness of the initiative. This could help lift community awareness and foster dialogue between consumers even without designating set dates for best offer notices.

Draft decision 8: Dollar threshold for determining best offer

This has been another point of great discussion throughout the consultation period. Again, Consumer Action is comfortable with the draft decision reached by the ESC. While few consumers are likely to switch for a saving of \$22, those who will are likely to be the ones who desperately need to do so.

If the threshold is to be raised from that amount we would be strongly opposed to it rising above \$50. The truth is, for low-income consumers living in poverty, no amount of money can be considered to be a small amount of money.

Draft decision 9: How long a best offer must be valid for

This has been another contentious issue throughout the consultation process. Consumer Action does understand the retailer’s dilemma with this issue—if an offer must remain open for 13 days from the issuing date of the bill, and if best offer notices are going out at different times, then it creates the prospect of offers which can never be closed without breaching the Code.



That being said, surely it is within the capacity of retailers to identify the expiry date of their offers when generating 'best offer' notices, and ensure that they only list an offer as a best offer when they know it will still be open 13 days from the bill's issuing date? That way, it would not be a matter of holding an offer open on behalf of a consumer in order to meet the 13-day requirement, but of ensuring that any 'best offer' highlighted is one that they already know will be open at least 13 days from that time. If a better offer exists but is due to expire in a shorter time period, then the retailer would simply not identify that offer – and would instead identify the nearest equivalent offer which they can confirm will remain open. Perhaps this is infeasible for operational reasons, but if not it would seem to be an acceptable solution to the problem.

Consumer Action does, however, question whether 13 days provides consumers with enough time to respond, and whether a 21 or 28 day period may be more appropriate. We note that this is a gut feel which may require behavioural testing.

We also note that we are less concerned with this issue than some other stakeholders. The real value of the best offer requirement is not to ensure that consumers get the exact 'best offer' identified, but to prompt consumers to engage with the market and get a *better* offer than one they're on. As previously discussed, the 'best offer' may not be appropriate for them anyway, due to a whole range of potential reasons.

Accordingly, even if the particular 'best offer' has expired, it is incumbent upon retailer's through the clear advice entitlement to recommend the *nearest equivalent offer to the best offer* and ensure that the terms of that offer are appropriate (and beneficial) for the consumer. Whether they save the exact amount stated on the notice (which would be incredibly difficult to achieve) is not actually the intent – the intent is that they not be left to flounder with an expensive, inappropriate offer. Beyond that, the broader intent is to encourage consumers to be more mindful of their agency in the retail energy market – that they have the freedom to shop around for a better price (either with their own retailer, or with another).

Draft decision 10: Additional information to appear on bills

This is a very important element of the Draft Decision as without clearly pointing consumers in the direction of VEC, the additional proposed bill information will do much to shore up retention but little to fuel competition through new customer acquisition. It is important though that the notice identifying VEC be prominent on the bill, and that it be clearly identified as a government web-site and service.

Again, a strong public information and/or education campaign accompanying these reforms could be very useful to drive more traffic to VEC.

Draft decision 11: Bill change notices

Consumer Action has little to add to the ESC's Draft Decision regarding this reform, other than to say we regard the bill change notice as a sensible and necessary reform and support it in its entirety.

Historically, it has been a major failing of the retail energy market that retailers have not had to advise consumers of price and benefit changes. Given the 'stickiness' of the market, this has resulted in far too many consumers paying far too much for energy—and has produced what has become known as the 'loyalty tax' whereby consumers who stay with their retailer the longest (i.e. the most loyal) end up paying the highest prices.

It is necessary in any well-functioning market that consumers are advised of price and/or benefit changes so that they may re-appraise their situation and act accordingly.

Draft decision 12: Minimum requirements for information to appear on bill change notices

This is a sensible decision, we have nothing to add. The minimum information identified should give consumers what they need to make an appropriate decision.

Draft decision 13: Manner and form of bill change notices

Consumer Action strongly supports the Commission's decision to require retailers to provide bill change notices *'in a manner and form consistent with the objective of the notice.'* This is an important demonstration of the outcomes-based approach that the Commission highlights in the introduction to the Draft Decision and will be a good test of retailer's capacity to embrace that approach and move away from the 'tick-box' approach to compliance that has come to characterise the industry in recent years.

Draft decision 14: Delivery of bill change notices

This is a sensible decision, we have nothing to add.

Draft decision 15: Scope of bill change notices

We are disappointed that exempt sellers are not included in this reform, although we understand the Commission's reasons for that decision. We do note that the Draft Decision says exempt sellers will not be required to send bill change notices 'at this point in time' and remain hopeful that they will be required to do so in due course. While exempt sellers will admittedly find it challenging to adjust to regulatory requirements, that doesn't change the fact that consumers who purchase their energy through them require (and deserve) the same level of consumer protection that applies to consumer's purchasing energy through more traditional channels.

Other than that, this is a sensible decision and we have nothing further to add.

Draft decision 16: Notice period

This is a largely sensible decision, and we agree that for behavioural reasons a five-day notice period is likely to be more effective than the current 40 to 20-day notice period. That is, to the extent that a bill change notice is likely to prompt a consumer to take any action at all, it is more likely to do so if delivered close to when the change is going to occur as opposed to weeks in advance.

That being said, we are conscious of the risk that with slow mail delivery times a consumer may receive the notice with *too little* time (i.e. a day or two before the change takes effect). We encourage the ESC to clarify that the notice must be received by the consumer at least five business days before the change takes effect to ensure the notification lands in a period that is neither too far in advance of the change, or too close to it.

Draft decision 17: Exemptions from the need to issue a bill change notice

Aligning with AEMC and AER decisions regarding price and benefit change notices makes sense, and on that basis we regard this as a sensible decision—we have nothing further to add.

Draft decision 18: Prices to be expressed in GST inclusive terms only

This is a sensible (and long overdue) decision, we have nothing further to add.

Draft decision 19: Commencement date for the new requirements

We understand that 1 July 2019 is as soon as the reforms can be practically implemented and on that basis we support the ESC's Draft Decision on the commencement date.

Please contact Zac Gillam on 03 9670 5088 or at zac@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,



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