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Review of Draft AER Retail Pricing Information Guidelines (Version 6.0)

The Australian Energy Council (the ‘AEC’) welcomes the opportunity to make a submission regarding the Australian Energy Regulator’s (the ‘AER’) consultation on the draft *AER Retail Pricing Information Guidelines* (the ‘RPIG’).

The AEC is the industry body representing 23 electricity and downstream natural gas businesses operating in the competitive wholesale and retail energy markets. These businesses collectively generate the overwhelming majority of electricity in Australia and sell gas and electricity to over 10 million homes and businesses.

The AEC supports the AER’s intent to ensure the RPIG remains up to date and consistent with changes in the energy market. In this instance, the Default Market Offer and Electricity Code coming into force has created a new set of obligations on retailers when presenting offers to customers. To assist in understanding how these obligations apply, the ACCC has produced a *Guide to the Electricity Retail Code* (the ‘ACCC Guide’). Although the ACCC Guide in itself is non-binding, the AER has elected to update the RPIG so it aligns with the Guide as well as the Electricity Code.

While the AER might describe this as “consequential changes”, necessitated by the introduction of new obligations parallel to the RPIG, the AEC considers it raises a number of serious procedural issues. The ultimate effect of these changes is to turn the non-binding ACCC Guide into a regulatory instrument. This is because retailers must now comply with the Guide in order to comply with the RPIG and, by extension, the National Energy Retail Law (the ‘NERL’). Not only does this set a concerning precedent but it also risks undermining the role of the National Energy Retail Rules (the ‘NERR’), particularly with respect to the regulation of price change notices, covered by rule 46 and clause 8.2. The AEC considers the most appropriate manner to make changes to existing processes is through proposing a rule change to the NERR.

Further, the AEC does not agree that these changes are all necessitated by the introduction of the Code and the Guide. Unless there is a clear inconsistency between the obligations in the Electricity Code and RPIG, it is not necessary to align the two instruments. This simply leads to duplicative rules. Moreover, the attempt to align the two instruments has undermined the fuel agnostic status of the NECF, resulting in separate rules for electricity and gas offers. The cumbersome and convoluted three-part structure of the draft RPIG is sub-optimal.

Notwithstanding these procedural concerns, incorporating these regulations appears to go beyond the intended scope of the RPIG. It is a document designed to regulate retailer responsibilities in the area of advertising and publishing prices. These responsibilities do not extend to existing ‘offers to supply’ as in the Code. The RPIG ultimately exists to standardise price presentation, and regulating data input into Energy Made Easy. The RPIG assists consumers seeking to engage with and navigate the energy market.

We strongly encourage the AER to ensure this version of the RPIG is not inconsistent with the Code, and make other non-essential changes in a future iteration, based on more fulsome consultation and only after undertaking customer testing to ensure any changes deliver the intended value.

Procedural or Technical Issues

Given the current environment of rapid and often parallel streams of regulatory change, the AEC considers it would be worthwhile for the AER to establish a threshold test that could be used when an external change touches on an area related to the RPIG. For example, it might be necessary to make a change if there is an inconsistency between the RPIG and another instrument that makes it impossible for a retailer to comply with both instruments. However, it is unlikely to be necessary to make a change if the RPIG is silent on a particular point, and thus even if not consistent with the other instrument, it is not inconsistent. Changes in the latter category might still be valuable, but should be made as a consequence of appropriate consultation.

Duplicative Regulations

The AEC sees it as good practice for the AER to consider whether recent regulatory changes, in this case the introduction of the Electricity Code, impact on the operation of the RPIG. We strongly agree that it would create confusion and uncertainty for both regulator and retailer if the two regulatory instruments operated in a manner inconsistent with another. However, it is not necessary for the obligations in each instrument to align when no inconsistency exists.

The AEC is concerned then that the stated purpose of these changes is to ‘support consistency between the Guidelines and the Electricity Code’ rather than eliminate inconsistencies.¹ Not only does this lead to duplicative rules, it also has implications for what is the intended purpose of the RPIG.

RPIG Should Not Create New Obligations

Section 61(2) of the NERL makes clear that the RPIG’s purpose is ‘to provide guidance to retailers in the presentation of standing offer prices and market offer prices’. Its scope extends to the publishing and advertising of price. The scope of the Electricity Code is much wider and includes both the RPIG’s advertising and publishing, as well as capturing retailers ‘making an offer to supply’. Despite this intended scope, the AER has used section 61(3)(C) of the NERL, which allows it to specify in the RPIG ‘any additional matters that the AER considers necessary or convenient’ to replicate the scope of the Code. Given how broad this power is, it should be used sparingly and only in appropriate circumstances.

The AEC does not view the proposed changes as an appropriate use of this power. While the Electricity Code is an important regulatory instrument, it does not affect the standing of the RPIG. The two instruments operate under separate jurisdictional legislation, with the Code part of the federal Australian Consumer Law and the RPIG part of the state-based NERL. Importantly, both regulatory instruments can operate side by side without any inconsistency undermining the operation of the other.

This notwithstanding, aligning the RPIG with the Electricity Code means the RPIG now creates obligations on retailers under the NERL, when they otherwise would have been obligations under the Commonwealth’s *Competition and Consumer Act 2010* (‘CCA’). A clear example of this is in the area of price change notices in Part B, section 6 of the draft RPIG. Price change notices have always been a feature of this market and could have previously been included in the RPIG, but were only included in

¹ Australian Energy Regulator, Notice of Draft Instrument: AER Retail Pricing Information Guideline, Version 6, June 2019, p20.

this version due to a change in the CCA. Practically, this duplication also shifts the nature of the non-binding ACCC Guide into a compliance instrument under the NERL.

The appropriate avenue for creating new obligations about price changes notices, and other broader notification requirements, is through proposing a rule change to the NERL. The NERL is responsible for regulating how retailers publish and advertise their standing and/or market offers.

The change in section 6 of the draft RPIG is analogous to the recent rule change regarding end of benefit notices. Even though the notices do technically impact price and offers, it was still considered necessary to make a new rule rather than merely changing the RPIG to highlight how the information should be presented.

The rule change process ensures stakeholders can assess whether the proposed changes meet the National Energy Retail Objective, one of three objectives that guide the NECF framework. Following this process will maintain confidence in the NECF framework and avoid muddying the demarcated roles of the AEMC as rule maker and AER as rule enforcer.

RPIG Should be Fuel Agnostic

Aligning the RPIG with the Electricity Code goes against the fuel agnostic approach the NERL has pursued since its inception. The NERL's preamble makes clear its purpose is to 'establish a national energy customer framework for the regulation of the retail supply of energy to customers'. There is no distinction between the different types of energy.

The proposed changes will result in separate regulations being in place for electricity and gas. There is no easy solution to this and the AEC acknowledges the AER's efforts in attempting to make it as simple as possible for retailers to comply with varied obligations for each fuel. Nonetheless, the RPIG's "choose your own adventure" internal structure is not necessary. The AEC would prefer a single set of obligations, with specific derogations where necessary to highlight obligations that are inconsistent with the Code.

It also has impacts for the customer, which are discussed later.

GST Pricing

The AEC asks the AER to clarify how retailers are to present GST on standard offers. As it stands, there appear to be some inconsistencies between the different legislative instruments. For example:

- RPIG: GST is required when presenting financial incentives, fees or charges but it does not mention prices
- NERL: clause 8.6 permits retailers to quote their standing offer price as either inclusive or exclusive of GST
- ACCC Guide: retailers must use inclusive GST pricing (the AER Final Determination on DMO Prices also states this).

A consistent approach is needed to minimise both the administrative burden on regulators and retailers.

Implementation Timeframe

The AER has signalled an intent to publish the final RPIG either late August or early September to achieve an implementation date of 1 October 2019. This will mean the AER has about five weeks to read the submissions from stakeholders and make any appropriate changes. The AER has given itself a strict timeframe because there was various policy consultation previously.

Given the procedural concerns outlined above could not be flagged in previous consultation, a longer consultation period might be appropriate to fully engage with these issues.

Customer Impacts

Customer Friendly Language

The RPIG sets out its language requirements in section 4.7 of Part B. Clause 162 states that ‘retailers must use language that is clear, simple and widely understood’. The RPIG then provides a list of required terms that meet this definition. Among these terms is the requirement that retailers use ‘unconditional percentage’ to describe a discount that is a percentage of the reference price. The term ‘guaranteed discount’ is to be used when not referring to the reference price.

It is incumbent on the AER to ensure that changes impacting customer experience are based on sound evidence. Changes to terminology should not be arbitrary, as this may stifle customer engagement. From the AEC’s perspective, the term ‘unconditional percentage’ appears to be arbitrary because it is not simple or widely understood. Whilst we accept this term was developed by the ACCC in its Guide, we encourage the AER to consider practical customer friendly approaches in the RPIG. As noted above, provided the obligations are not inconsistent, there is no need to replicate the Guide. In this instance, requiring retailers to use this terminology is unnecessary.

The potential for customer confusion is magnified given there is now separate terminology for electricity and gas offers. It means any customer who is participating in, or interested in participating in, the electricity and gas market will be forced to understand two sets of unfamiliar terms. For example, a bundled advertisement will reference an ‘unconditional percentage’ for the electricity offer and then a ‘guaranteed discount’ for the gas offer. This is unlikely to encourage customer engagement in the market. It is the AEC’s position that the terminology for electricity and gas customers should be aligned and the words selected based on customer testing. If not critical, the AER should remain silent on language obligations until such time as this evidence base is collected.

Any questions about this submission should be addressed to Rhys Thomas, by email to Rhys.Thomas@energy.council.com.au or by telephone on (03) 9205 3111.

Yours sincerely,



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