momentum energy

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Erin Dempsey
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Department of State Development, Business and Innovation

By email: erin.dempsey@dsdbi.vic.gov.au

Dear Ms Dempsey

Draft Consultation Paper – Reforms to retail regulation 2014 and planned outages

Momentum Energy welcomes the opportunity to provide comments in response to the Draft Consultation Paper – Reforms to retail regulation 2014 and planned outages (the Draft Consultation Paper).

Momentum Energy is a second tier retailer with current retail electricity licences in Victoria, New South Wales, South Australia, Queensland and the Australian Capital Territory, and current retail gas licences in Victoria and South Australia. Momentum Energy is fully owned by Hydro Tasmania, one of the largest clean energy producers in Australia.

Momentum has reviewed the submissions of the Energy Retailers Association of Australia (ERAA) and the Energy Supply Association of Australia and supports the positions set out in those submissions.

General comments

Momentum is very disappointed in the content and the process of these policy proposals. The proposals have not resulted from a robust policy-making process and the eight day industry consultation period is inadequate given the significance of the proposals.

The outgoing Minister's announcement of these policy proposals and the Draft Consultation Paper placed significant focus on the energy concerns button on the SwitchOn website. Momentum has been unable to ascertain whether any of its customers have used the energy concerns button on SwitchOn because the Department has advised that it is unable to provide that information. Momentum considers this to be unsatisfactory in light of the significant implications these policy proposals have for retailers. We are left with the strong impression that we and most other retailers are being punished for the well-publicised problems of others. Recent annual reports of the Energy and Water Ombudsman of Victoria (EWOV) reinforce that view.[1] An appropriate response to those well publicised problems would consider, firstly, the Essential Services Commission's (ESC's) utilisation of its regulatory powers and, secondly, whether the ESC's powers to deal with any individual market participant's problems need amendment.

[1] http://www.ewov.com.au/__data/assets/pdf_file/0019/9640/1-EWOV-2103-Annual-Report.pdf
http://www.ewov.com.au/__data/assets/pdf_file/0017/6272/2012-Annual-Report-Full.pdf

Momentum is concerned that the approach set in train by the outgoing Minister appears to be to expedite implementation of these policy proposals without subjecting them to a Business Impact Assessment (BIA) (for the proposals that would be implemented by primary legislation) and a Regulatory Impact Statement (RIS) (for the proposals that would be implemented by regulation or amendment to the Energy Retail Code). Such a course of action would be totally inconsistent with the Victorian Guide to Regulation and with the Victorian Government's professed commitment to a 25 per cent reduction in red tape.[2] The costs associated with the retail energy regulatory regime are ultimately borne by all energy consumers. Therefore, it is absolutely imperative that significant changes to the retail energy regulatory regime are subject to proper scrutiny. It should also be noted that implementation of these policy proposals would add to the considerable number of areas of the National Energy Customer Framework (NECF) from which the Victorian Government has already derogated, thus diluting the benefits of the national framework.

If implemented, these policy proposals will impose increased costs on retail energy businesses that will outweigh any associated benefits. In order to avoid an outcome where consumer protection objectives are met in a manner which imposes far greater costs on business (and thus upward pressure on retail prices) than is necessary, these proposals must be subject to a proper policy-making process that follows the Victorian Guide to Regulation. The lack of industry consultation to date makes this especially important.

We suggest that the incoming Victorian Energy Minister has the opportunity to be given time to consider the implications of these issues and to use this process to commence positive engagement with the Victorian energy industry. An option for the incoming Minister to consider is the establishment of an industry roundtable convened by his Department. If there had been greater industry engagement prior to the ongoing Minister's announcement and the Draft Consultation Paper, some of these issues could have been addressed. Robust processes are standard because they subject claims of expected benefit and of expected cost to rigorous analysis, leading to policy proposals with net benefits and minimised costs, and to outcomes that the government anticipates.

Increases to the Wrongful Disconnection Payment

The Wrongful Disconnection Payment (WDP) is a regulated penalty that forms part of energy retailers' cost bases. An increase in the WDP will translate to higher retailer costs and thus higher retail prices for consumers. The impact of the WDP on retailer costs and prices is enlarged by the fact that, under the current WDP regime, EWOV frequently assesses that WDPs are payable in circumstances where the failure by the retailer is trivial.

Because of this contribution to all consumers' bills, a regulated penalty on energy retailers should only be increased if there is a well justified case that all of the following conditions are satisfied:

1. There is a policy problem;
2. The penalty increase would make a contribution to solving that policy problem; and
3. The benefits of that contribution to solving the policy problem would outweigh the costs of the penalty increase and the penalty increase would have greater net benefit than other policy options.

[2] http://www.premier.vic.gov.au/media-centre/media-releases/8853-red-tape-reduced-victorian-coalition-government-announces-36-red-tape-reforms.html

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In Momentum's view, the Draft Consultation Paper does not satisfy any of the three conditions above, let alone all of them.

Is there a policy problem?

It is not established in the Draft Consultation Paper that the WDP regime is not meeting its twin objectives of incentivising retailer compliance and appropriately compensating wrongfully disconnected consumers.

Disconnections and WDPs fluctuate year by year. Total residential disconnections in Victoria went down in 2012-13.[3] Any suggestion that a raw increase between any two chosen years necessarily reflects increasing failure by retailers to comply with the disconnection requirements is not credible. Disconnections vary a lot due to changes in the approaches of particular retailers, in particular some retailers suspend disconnections when systems change. The impact of this on an industry decrease followed by an industry increase is significant when the retailer in question is large.

WDPs might have risen overall in the years cited in in the Draft Consultation Paper (155 in 2008-09 to 233 in 2011-12) but WDPs as a percentage of total disconnections have not trended up over that period.

Momentum would agree with the proposition that a reduction in the proportion of energy consumers who are struggling to pay their bills and being disconnected as a consequence would be a good thing. However, a rise in absolute numbers does not of itself justify a conclusion that the WDP scheme is failing to meet its objectives. Significant energy prices rises in recent years are clearly a large factor. It is worth noting that the AEMC's 2013 Residential Electricity Price Trends report projects that Victorian electricity prices will fall in real terms over the period to 2015-16.

In addition, consideration should be given to the circumstances in which WDPs are awarded. In most cases, it is due to legal interpretation rather than retailer negligence. In many cases, if the customer had engaged with their retailer and discussed the difficulties they were having in paying their bill, it is likely the disconnection and the WDP could have been avoided altogether.

If there is a policy problem, would a penalty increase make a contribution to solving it?

Even if it is assumed that the Draft Consultation Paper has shown that the WDP regime is not meeting its twin objectives of incentivising retailer compliance and appropriately compensating wrongfully disconnected consumers, it has not shown that an increased WDP would constitute a good solution.

A proper consideration of this proposal would include analysis of whether and to what extent the proposed policy would deal with the professed concern. Such analysis is undertaken in relation to penalties that are paid by individual wrong-doers (eg driver fines). All of Victoria's energy users pay for regulatory costs through their bills so proper analysis ought to be an even higher priority in this case. Momentum's view is that analysis would show that increasing the WDP would not be as decisive an influence on retailer behaviour as presumed. Any increase beyond retailers' existing incentive to avoid WDPs would be marginal compared to the cost.

[3] Essential Services Commission 2014, *Energy retailers comparative performance report — customer service* 2012-13, Melbourne, Revised January 2014.

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In 2010, the Final Report from the ESC's Review of Wrongful Disconnection Payment found that the previous scheme was, "too blunt in its application" and had "led to outcomes that the Commission believes are unintended and perhaps disproportionate."[4] The current WDP resulted from that review.

A proper analysis would also explore the fact that increasing the WDP would lead to perverse incentives for gaming and the question of whether, by increasing the WDP to $500 per day, and capping it at $5000, this policy proposal would reintroduce the blunt, unintended and disproportionate application of the previous WDP process.

Would the benefits of the contribution to solving the policy problem outweigh the costs of the penalty increase and would the penalty increase have greater net benefit than other policy options?

The Draft Consultation Paper does not evidence any consideration of these questions. There is no evidence of an understanding that an increase in retailers' regulatory costs feeds into the retail prices paid by all consumers.

Retailers (and consumers paying their energy bills) are entitled to ask where is the evidence that increasing the penalty will provide incentive rather than just increase the regulatory cost base that all consumers pay for?

Momentum would support the ESC being given greater discretion to, when reviewing EWOV WDP assessments, consider the circumstances of disconnections, so that retailers are not penalised for trivial infractions of the WDP regime and so EWOV has greater incentive to avoid anomalous WDP awards. Because the WDP costs levied on retailers are paid for through all customers' bills, WDPs should be awarded only in circumstances where there has been real customer detriment and should be commensurate with the detriment suffered.

Fixed term contracts

The Draft Consultation Paper introduces the proposed prohibition on the use of the word 'fixed' as based on the fact that Victorian consumer groups "have highlighted the confusion sometimes experienced by consumers where a contract has a fixed term but variable price", and notes that the Consumer Utilities Advocacy Centre (CUAC) and the Consumer Action Law Centre (CALC) have together submitted a rule change proposal to the Australian Energy Market Commission (AEMC) to prohibit price increases during contracts that have a fixed term.

In Momentum's view, it would be sensible for Victoria to wait for the outcome of the AEMC's consideration of CUAC/CALC's proposal to change the National Energy Retail Rules (NERR). While Momentum is concerned about that rule change request, it will be dealt with by a conventional, rigorous process that will give all stakeholders ample opportunity for input. If this policy proposal proceeds, it will either not have a conventional, rigorous consultation process or it will duplicate the AEMC process. In fact, this policy proposal gives the impression that the Victorian Government does not really believe in its previously stated commitment to national consistency in the form of the NECF. Energy retailers in Victoria geared up in response to the Government's announcement that it would adopt the NECF, then were told to revert to the

[4] *Final Report – Review of Wrongful Disconnection Payment, Essential Services Commission of Victoria*, January 2010.

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Victorian Energy Retail Code (ERC), then in late 2013 were told to prepare for the imminent commencement of the intermediate solution of a harmonised version of the ERC, and have now been left in limbo for many months, still not knowing which way the Victorian Government will go next (let alone whether that decision will be stuck to). Now the outgoing Minister has come up with policy proposals that add to and expand on derogations from the NECF, and that, in the case of this "fixed" prohibition proposal, pre-empts a NERR rule change process.

Momentum believes that the Australian Consumer Law provides a strong safeguard against misleading and deceptive conduct. Energy retailers are an ongoing focus for the ACCC. If a retailer were to describe an offer as fixed price or not make clear in its marketing materials and sign up documentation that the price paid by the customer was subject to change, and then change the price, the customer would have recourse.

Backbilling

It is obvious that the number of Victorian energy customers facing long billing delays is unacceptable.

It is possible that this current consultation process could turn up a greater understanding of the nature of the problem and alternative, better targeted policy options. Such alternative options could lead to effective and efficient reforms in relation to both any specific retailer experiencing large-scale billing problems and the industry as a whole. That will only happen if the approach to this process is changed, to allow for meaningful stakeholder consultation and to maximise the extent to which the solution is targeted at the cause of the problem (thus avoiding other retailers becoming collateral damage).

While the proposed 'solution' set out in the Draft Consultation Paper is very loosely defined, it is sufficiently defined to be able to assert the following.

1. The policy proposal does not incorporate a strong understanding of how the energy industry works. Momentum endorses the ERAA's description in its submission of the practical impacts of this policy proposal and the ERAA's characterisation of the magnitude of the problems that implementation of this current proposal would cause. It is positive that the Draft Consultation Paper evidences some appreciation of those practical impacts but the fact remains that this is a very significant policy proposal that should be subject to a rigorous end to end policy-making process.
2. It appears that there has been insufficient consideration of the rigorous national process that settled on the nine month backbilling limit. Again, this policy proposal gives the impression that the Victorian Government does not really believe in its previously stated commitment to national consistency in the form of the National Energy Customer Framework and is prepared to dilute the value of national reforms by introducing jurisdictional derogations without proper consideration.

Additional issues/questions that must receive serious consideration include:

- How would a Victorian derogation in relation to restrictions on backbilling interact with 6B.A3.1(a) of the National Electricity Rules (Adjustment of network charges), which stipulates that "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." Clause 508 of the National Gas Rules (Adjustment of distribution service charges) has the same effect.
- A three month limit (or indeed any limit of an odd number of months) is impractical for gas due to the fact that the gas market operates on two month cycles.

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- Irrespective of whether the Government proceeds with this policy proposal, or how, but especially if the Government ignores the industry in relation to this policy proposal and proceeds to implementation without an appropriately rigorous policy-making process, the Government should constrain the ability of EWOV to stretch the application of clause 6.2 (a) dot point one of the ERC to billing delays and variations to which that clause was never intended to apply. Momentum also believes that easing the restrictions on customers opting in to monthly billing would have to be a prerequisite to any reduction in backbilling timeframes. The ERC currently requires that customers must provide Explicit Informed Consent in writing or by electronic signature to move to monthly billing, which inhibits the ability for retailers to proactively offer this option to customers and to respond to customer requests over the phone.
- While the 'Proposed solution' is expressed as a simple reduction from nine months to three months, the first additional question in the relevant section of the Draft Consultation Paper raises the extremely concerning prospect of extending the proposed three month backbilling restriction beyond billing system issues to all billing delays and undercharging. It is unclear why this extremely significant step would be entertained, although the abovementioned situation where EWOV has a tendency to stretch the application of clause 6.2(a) dot point one of the ERC might provide an explanation. There are numerous factors outside the retailer's control that lead to billing delays and undercharging. This includes non-provision of meter data (and consequently using estimated reads), due to access issues and reads simply not being performed. As well as this, problems associated with meter accuracy and cross metering are complicated and often take a long time to resolve. Deemed contracts and the lack of incentive for deemed customers to engage with their retailer represents the main reason for backbilling customers today. Sometimes Australia Post is unable to deliver mail and in some instances a retailer decides not to bill due to a flood or fire. In many such cases, the problem would be made worse by issuing a bill but the impact of the proposed policy in causing retailers to send bills before the problems are resolved, in order to avoid being blocked from issuing a bill at all, would be very large if the restriction was extended to all billing delays and undercharging. This would have the effect of many more and increasingly complex disputes between customers and their retailers.

If there is a sufficiently serious problem at a particular retailer at any given time, then the ESC is able use the sanctions available to it. If that doesn't produce an outcome that is satisfactory to the Government, it should examine how the existing regulatory regime is being applied and, if necessary, change the sanctions framework that applies to any specific retailer's compliance situation.

Energy efficiency audits

Presuming the Government is not proposing to cover the costs of free energy efficiency audits, requiring energy retailers to offer free energy audits to hardship customers necessarily imposes additional regulatory costs which feed into higher retail prices for all consumers. Again, the Draft Consultation Paper includes a dearth of justification as to how the proposed policy would contribute to achievement of the stated policy objective and whether the benefits would justify the costs. Unless the Government was prepared to fund new appliances and other energy efficiency measures, this policy proposal would not lead to lower energy consumption and thus lower bills except via behavioural change. If a customer can't afford his or her bill, how will he or she be able to afford new appliances and other energy efficiency measures? The split incentives faced by rental customers would remain. No cost energy efficiency has been exhausted by the VEET scheme. Unfortunately, there appears to be a fundamental lack of consideration as to the barriers which exist today to customers taking up energy efficiency audits and changing their behaviour upon receiving the audit recommendations. Therefore, this proposal ought not to have progressed without a study

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of customer response to the current arrangement. Experience suggests that many hardship customers are offered audits but are either reluctant to take them up or reluctant to change their behaviour post-audit

The current arrangement, where a retailer has the option of providing an energy audit where it believes the audit will be beneficial, is appropriate. This approach reduces the likelihood that audits will be requested where they are unlikely to be of benefit.

Momentum believes that interesting opportunities for addressing hardship and energy efficiency will open up as the potential of smart meters is unlocked. We would welcome the opportunity to contribute to robust policy development in this space.

Momentum calls on the Government to work more closely with the energy industry to minimise the cost and thus price impacts of any consumer protection proposals. This would include meaningful industry engagement prior to policy proposals as well as BIA and/or RIS processes as appropriate.

If you would like to discuss this submission or any other matter, please contact Momentum's Regulatory Manager Luke Brown on (03) 8612 6437 or luke.brown@momentum.com.au.

Yours sincerely

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