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Guide to the Electricity Retail Code: Draft for consultation

AGL Energy (AGL) welcomes the opportunity to provide comment on the Australian Competition and Consumer Commission's (ACCC) draft *Guide to the Electricity Retail Code* (draft Guide), released for consultation on the 20 May 2019.

As AGL has consistently stated, we do not support the re-regulation of retail electricity prices because of the potential long-term impact it could have on retail competition and customers due to the regulatory risk that it introduces into the market. However, we strongly support the use of an effective price comparison that provides greater clarity for customers and minimises the potential for customer confusion.

In our submission¹ to the Department of the Environment and Energy on the *Competition and Consumer (Industry Code— Electricity Retail) Regulations 2019* (Code), AGL expressed concerns that the Code required retailers to present the reference price comparison at the point of advertising, at times of price change and contracting in a manner that could lead to confusing outcomes for some customers. AGL sought amendments to these obligations to minimise the potential of misleading customers.

Although the final Code rectified some issues of interpretation, the limited period of consultation at that time has meant that many issues remain.

Clearly, the ACCC is not able to resolve these issues of legislative drafting, but AGL believes that the ACCC has an opportunity to assist electricity retailers to better understand their obligations, that there is a consistency in the interpretation and implementation of the provisions and that they are enforced in a manner aimed at improving the customer experience.

We recognise the ACCC has not had the time to properly consider complex scenarios in the draft Guide but overarching statements that these obligations must be complied with while also complying with other existing obligations is not helpful in navigating the complexity. In remaining silent on complex scenarios there is a risk of inconsistent application by retailers leading to suboptimal outcomes for customers.

¹ <https://thehub.agl.com.au/articles/2019/03/agls-submission-on-industry-code>



Ideally, AGL would have liked to see the ACCC's draft Guide consider all regulatory obligations on the retailing of energy and provide guidance that results in a clear and transparent customer communication.

Although each retailer will make its own assessments, it would be extremely helpful if the draft Guide addresses industries' concerns on how to effectively implement the Code's requirements without misleading or confusing customers, at a minimum.

This submission therefore focuses on AGL's practical concerns with the Code and draft Guide and highlights where it would be beneficial if the ACCC expanded on its interpretations and guidance within the final version of its *Guide to the Electricity Retail Code*.

Complying with the National Energy Retail Law

AGL has concerns on how these obligations under the Code overlaps with the current regulatory requirements under the Australian Energy Regulator's (AER):

- Retail Pricing Information Guidelines (RPIG); and
- Benefit Change Notice Guidelines.

We note the draft Guide has considered the amendment of the RPIG by the AER. It is our understanding this will not be completed by 1 July 2019.

However, the draft Guide makes it clear that retailers must also comply with the requirements under the National Energy Retail Law (NERL) and the National Energy Retail Rules (NERR) in addition to the Code.

The Benefit Change Notice Guideline details how a retailer must notify a customer when a benefit provided through their market retail contract is expiring or changing. This is greatly impacted by the reference price obligations of the Code, especially given the ACCC's expansive interpretation of the term "offer" that captures changes in a contract despite being inconsistent with other regulatory requirements as we discuss below.

Irrespective of this interpretation, the AER needs to review the Benefit Change Notice Guideline to determine the necessary changes.

In AGL's view, the ACCC must take these obligations into account in making its draft Guide if it is to ensure that this requirement does not create greater confusion with customers. Based on the ACCC's position in the draft Guide, the current notifications require substantial changes to customer communications to make them compatible with the reference price disclosure.

Given the timing of the final information for retailers and the 1 July 2019 implementation date this is unlikely to occur. If retailers rush a solution, there will likely be mistakes which lead to poor customer outcomes and experiences. There are also limitations with third party providers (such as mail houses) that constrain retailers in making substantial changes to customer communications in a short period.

AGL believes the requirement to include the reference price in a recontracting notice should be delayed until this review is completed, noting that by recontracting, AGL is referring to providing a customer with an extended or new benefit period and not a new market contract. This would assist retailers in ensuring there is enough time to communicate changes internally and to third party providers.



Reference Price Calculation

The draft Guide examples for the calculation of the reference price are clear and practical. However, AGL would like further guidance on two elements:

- *Rounding*: the draft Guide rounds the lowest possible cost to the nearest dollar in the marketing examples. Based on the Code, the only rounding allowance is for the percentages off the reference price. Rounding to the nearest dollar makes the most sense from a marketing perspective and we encourage the ACCC to consider explicitly allowing for this in the final Guide; and
- *Representation of standing offer prices*: the draft Guide shows how to display the percentage off or above the reference price in any comparison. For the regulated standing offer, does this require a “0%” off the reference price comparison or can retailers refer to it as equal to the reference price?

Advertising prices and discounts

Disclosures and misleading statements

The draft Guide states that it is not a substitute for legal advice or to comprehensively encapsulate responsibilities under the Code, the Australian Consumer Law (ACL), the NERL and NERR.²

The ACCC has previously provided clear advice on the nature of false and misleading impressions, stating that businesses cannot rely on small print and disclaimers as an excuse for a misleading overall message.³ This has been supported through the Australian courts where cases have determined that a statement intended to induce a consumer to deal with a business can still be misleading, even where it is subsequently corrected through a sales process or website.⁴

The current view of Australian Courts is that it is not a defence that a potentially misleading statement is only intended to prompt a customer to engage further with the business. The ACCC is also clear in other guidance that qualifications or disclaimers may not protect that business from breaching the ACL.⁵

Based on the above points we recommend the ACCC consider providing clear guidance on how retailers make the necessary reference price disclosures in a clear and consistent way for consumers.

As an example, AGL has concerns that as the dominant message is required to be the percentage comparison off the reference price in all situations, this may cause customer confusion as to their relationship with the average customer and the plan that they are in fact signing up to. For example, if the headline message must always be a percentage discount, a customer who is signing up to a 24-month fixed rate energy plan may be led into error that they are signing up to a discount product structured as a percentage off the reference price as it changes over time.

In AGL’s view it would be preferable if the Guide made clear that a retailer has the discretion to determine what the dominant features of the product are in each instance and what the headline should be, with the proviso that the reference price comparisons must still appear prominently, such as in a call out box. If the

² ACCC Guide to the Electricity Retail Code – draft for consultation, 20 May 2019, p.1

³ ACCC False or Misleading statements (website last accessed 28/5/2019)

⁴ See for example, ACCC v Singtel Optus Pty Ltd [2010] FCA 1177

⁵ Medical Benefits Fund of Australia Ltd v Cassidy (2003) 205 ALR 402 at 417 [43]: Whether a representation is misleading or deceptive (or likely to be so) depends on the circumstances in which it is made and not on what might happen in the future

ACCC v AGL South Australia Pty Ltd [2014] FCA 1369, [148]-[172] (White J): However, this does not mean that all matters communicated by a representor are to be taken to have the same weight or effect, or that later qualifying words will neutralise the effect of an earlier misrepresentation

⁵ ACCC Advertising and Selling Guide published April 2014



ACCC still requires retailers to provide the percentage discount off the reference price as the headline in all situations, AGL requests that the ACCC provide more extensive examples as to:

- how various product constructs and attributes should be incorporated into the advertising to avoid customer confusion; and
- provide more extensive guidance as to disclaimers that will be appropriate in the ACCC's view to ensure that customers are not led into error that they are an 'average customer', particularly for advertisements that will be distributed broadly.

Marketing in dollar terms

AGL supports marketing in dollar terms to ensure consistency and improve consumer engagement with their energy plans but believes the draft Guide interpretation of how to display the Code's requirements for:

- the percentage difference between an unconditional price and the reference price; and
- the lowest possible price of the offer;

are practical.

However, we are concerned that as it is currently structured, the current draft Guide may lead to consumers being misled about the cost of their energy.

The examples provided in the draft Guide represent one particular customer profile (e.g. a particular distribution area with a certain tariff type). The draft Guide suggests that the obligation is to market as *it relates to the customer*. AGL's concern is that this has the potential to mislead customers and result in inconsistent approaches taken by retailers. Some questions that the ACCC need to be consider in the draft Guide include:

- How does a retailer pick the profile that will be used in advertising; and
- How will this profile be picked for mass marketing or social media that may reach a range of different customers across different distribution zones?

Most advertisements are agnostic about which region within a State the customer is in or whether the customer has controlled load or not (i.e. publishing an advertisement saying that it only applies to customers without controlled load is unlikely). Are retailers required to provide multiple types of comparison if an advertisement or medium such as TV or radio is used which crosses multiple distribution areas and includes all residential customers?

In the absence of clear guidance, retailers may pick different profiles for the same advertising medium which would not help achieve the ACCC and AER objective of clear comparisons for consumers across energy offers and retailers.

Types of advertising covered under the Code

Similarly, the draft Guide provides clear examples of compliant and non-compliant advertising for a simple, single advertisement such as a billboard advertisement. In this case, the disclosure requirements are practical.

However, the disclosure requirements are significantly more complicated when referring to web-based or online product marketing or the use of geographically diverse advertisements across multiple distribution patches.



AGL encourages the ACCC to highlight more complex examples covering a wider range of marketing in its draft Guide. This would confirm whether far greater disclosure is required in these situations or whether the pragmatism the ACCC has shown in its current draft Guide examples is sufficient.

In some instances, such as the display of several similar energy products on a website that apply to the same type of customer, the Code requirements would suggest the need for separate disclosure statements for each product. This raises significant challenges online when trying to fit all required information about energy plans into small space on a screen, particularly for mobile devices.

Information needs to be kept simple so that customers are not confused but this becomes impossible when including the reference price obligations, all the information needed for disclosure under the Code, and other important information about the plan details, contract terms etc.

The requirement for several identical disclosure statements seems non-sensical and it would be valuable if the draft Guideline could address situations such as these.

Customer communications

Finally, the Code reference price requirements also apply to many customer communications that constitute an energy offer. Currently, the examples in the draft Guide only refer to advertising but AGL is also seeking any additional guidance around design and wording that would be compliant and non-compliant for commonly used customer communications.

Conditional Discounts

AGL would also highlight that the application of the Code to energy offers that contain conditional discounts is likely to cause customer confusion.

It will require retailers to present the conditional and unconditional discounts percentages separately in any advertising or presentation of offers. However, because of the way these percentages are derived and disaggregated, they are unlikely to reflect the discount that would apply and be shown on the customer's bill.

Alignment of Expected Language

AGL encourage national consistency with the language used in energy regulation and obligations. For example, the draft Guide reintroduces the term *unconditional discounts* where the Retail Pricing Information RPIG uses the term *guaranteed discounts*.

Through the 2018 review of the RPIG, the AER determined that the term *unconditional discount* was inappropriate for use by retailers. The AER noted that the language requirements were aimed to *address a persistent theme in our consumer testing and through stakeholder feedback – that the variety of terminology and jargon used to describe energy plans contributes to customers confusion and disengagement with the retail energy market*⁶

The revised RPIG did not require retailers to use particular language on customer bills or websites, the AER did encourage retailers to consider the potential for customer confusion and make changes to language to ensure consistency. However, AGL took the initiative and followed the AER recommendation and have invested time and resources into aligning our language across all relevant NECF materials.

⁶ AER Notice of Final Instrument for Retail Pricing Information Guideline, April 2018, p.26



This is also currently being done for Victoria, as the Victorian Essential Services Commission (ESC) recently released a final decision for Victorian Energy Fact Sheets requirements that aligns with language requirements with RPIG.

To readjust the language to *unconditional discount* across all our marketing, communications and online information is a substantial piece of work and would take some time to implement as well as then leading to inconsistency across Victoria and NECF states.

This will also require a change to call centre scripting and the training of 1,400 customer facing employees who need to have conversations with customers and use the new conventions. These service consultants have already started their training for the new DMO obligations.

We also note there are other language deviations from the Code that need to be reconsidered by the ACCC. These include *reference bill* and *reference price* and use of the term *average customer* instead of *representative customer*. While 'average' customer may be easier for consumers to understand, it may not be accurate for the purposes of the calculation as the AER's model usage does not necessarily align with an average user.

Notifying customers of change to market offers

In Section 5.9 of the draft Guide, the ACCC has stated that the variation of market contracts constitutes an offer and would need to comply with the advertising obligations.

AGL doesn't agree with this general interpretation and believes that whether a contract variation is a considered an offer of an electricity price will vary on a case by case basis. According to the NERR, the amendment of prices within a contract is not considered a new offer as section 46 of the NERR enables retailers to vary prices within an existing energy contract, provided advance notice is given to the customer, and the customers' explicit informed consent was provided.

However, given the introduction of the Default Market Offer (DMO) from 1 July 2019 and the intent of the Code is to institute a reference price that will make comparisons clearer for customers, AGL will endeavour to ensure that it complies with the Code's reference price obligations in cases where a customer is being notified of price change.

However, there are many instances where a customers' non-price terms may be varied, such as the extension of a benefit period, and customer communications does not require price notification. AGL does not believe reference price disclosure would be required in these situations where there is just a variation of non-price terms and is not able to implement this change by 1 July 2019.

Implementation and Enforcement

AGL notes that the ACCC has recognised in the draft Guide that retailers are facing time constraints to implement many of the Code requirements, especially when the interpretations of the obligations differ from previous expectations.

The ACCC has highlighted it will consider non-compliances in accord with "*the transition period after the Code has taken effect*" but AGL believes it would be beneficial for the ACCC to formalise transitional arrangements or a transitional period for retailers in meeting these new requirements within the draft Guide.

AGL would highlight that the ESC made has made a similar once-off transitional period for the introduction of the best offer bill message provision in Victoria. Although this requirement begins from 1 July 2019, the



ESC recognised the challenges faced by retailers and until 30 September 2019, retailers can provide the message by alternative forms of written communication⁷.

There is a distinct lack of time for retailers to implement all aspects of these reforms and AGL encourages the ACCC to work with industry to get outcomes in a timely and efficient way.

Should you have any questions please contact me on 03 8633 6207 or Patrick Whish-Wilson on 02 9921 2207.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Elizabeth Molyneux'.

Elizabeth Molyneux
GM of Energy Markets Regulation

⁷ ESC, Building trust through new customer entitlements in the retail energy market Final Decision, 30 October 2018