

Australian Energy Market Commission
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RRC0036 – Bill Contents and Billing Requirements

The Australian Energy Council welcomes the opportunity to make a submission to the Australian Energy Market Commission's ('AEMC') *Bill Contents and Billing Requirements* draft rule determination ('Draft Determination').

The Australian Energy Council ('AEC') is the industry body representing 22 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 remains concerned that the development of an Australian Energy Regulator ('AER') guideline is inconsistent with the separation of powers principle that underpins the energy market's governance structure, and not in the long-term interests of consumers. It is the responsibility of the AEMC to make rules that are compatible with the National Energy Retail Objective ('NERO'); the guideline as described in the Draft Determination delegates this function to the AER. As a general principle, the AEC strongly considers that guideline powers delegated to the AER should be limited to matters of interpretation – enabling the regulator to identify and provide guidance to retailers on the steps necessary to comply with their obligations in the National Energy Retail Rules ('NERR') and Law ('NERL').

The Draft Determination does not meet the separation of powers principles intended in the NERL. The bill is the focal point of the energy regulatory framework, with the information presented within that bill dictating multiple other interactions between a customer and their retailer. The AEMC's Draft Determination appears to diminish the importance of this interaction, enabling the regulator to determine without bounds what information, and in what form, should be provided to customers.

If the AEMC intends to implement the Draft Determination, there must be strict regulations around what the guideline can and cannot do to recognise its exceptional status outside the ordinary governance structure. These limitations should be strict – enabling the AER to implement the regulatory intention of the AEMC, rather than to make decisions on policy.

Governance Structure of the Energy Market

In a recent independent review of the Energy Security Board, the authors stated that a key feature of Australia's energy governance framework is the institutional separation of powers:

Responsibilities for rule making, market operation and market regulation functions are divided between three energy market bodies – the AEMC, the AEMO and the AER... Each body is constituted and funded differently, and subject to different legislative arrangements. The structure of the market bodies is designed to provide for institutional separation of powers and responsibilities.¹

¹ Rhys Edwards RDME Consulting, 'Review of Energy Security Board', Department of Industry, Science, Energy and Resources, Commonwealth of Australia, June 2020, p13.

This observation is not new. The AEMC itself has emphasised at various stages the ‘many benefits’ that arise from this separation, not least the avoidance of temptation for rules to be drafted in a manner that ‘makes life easy for the enforcer’.² Keeping these functions separate is important so there is a system of checks and balances against each body. Given the intended design of the governance structure, the AEC believes any market body delegating responsibility to another market body should only occur in the most exceptional circumstances. It is not apparent here that there are exceptional circumstances, and if there is, they have not been properly explained in the Draft Determination.

Experience with previous AER guidelines

The primary reason given in the Draft Determination for the AEMC delegating rule-making functions to the AER seems to be so a ‘flexible, fit for purpose regulatory approach’ can be adopted.³ However, this outcome is inconsistent with the experiences of previous AER guidelines, in particularly the Hardship Guideline, which has as its primary purpose to standardise retailer hardship processes to ensure uniform customer outcomes;⁴ and the Retail Pricing Information Guideline (‘RPIG’), which in its most recent iteration removed any flexibility on how retailers present pricing information, in favour of a universal AER developed solution.⁵ The tendency of guidelines to adopt a uniform approach appears to go against what the AEMC said in its 2020 Retail Energy Competition Review, which argued for principles-based regulation so ‘billing methods could respond to more diverse consumer preferences as they emerge’.⁶ The AEC considers the AEMC must provide further evidence in the Final Determination to support the rationale behind their assertion that the AER will be better able to deliver a ‘flexible, fit for purpose regulatory approach’ than the NERR.

The development of these existing guidelines are illustrative of the findings of Tambllyn discussed above, with the AER taking greater ownership of customer outcomes to enable easier and more effective compliance. The AEC is concerned that the proposed billing guideline will ultimately be similarly prescriptive.

Of additional concern to the AEC is the powers in the Draft Determination to enable the AER to ‘take into account any other matters that the AER, in its reasonable opinion, considers relevant to the billing objectives’.⁷ Previous guidelines, such as the RPIG, have provided the AER with broad powers to set (and then enforce) rules on ‘any additional matters that the AER considers necessary or convenient...’.⁸ Clauses to this effect provide the AER with unconstrained rule making power, decreasing industry confidence that the guideline is interpreting the obligations in the Rules and should be removed from the Final Determination. If in future the AER considers it is constrained in what should be included in the billing guideline, it retains the ability to propose a rule change as is the case with any market participant.

The AEC considers there must be tighter principles that the AER must have regard to when developing its guideline. The four principles laid out in the Draft Determination are too high-level and open-ended for industry stakeholders to have confidence in their ability to limit the scope of the guideline.

² John Tambllyn, ‘The State of the Australian Energy Market 2008’, Australian Energy Market Commission, 16 November 2008, <https://www.aemc.gov.au/news-centre/speeches/the-state-of-the-australian-energy-market-2008>.

³ AEMC, ‘National Energy Retail Amendment (Bill Contents and Billing Requirements) Rule’, Draft Rule Determination, page 26.

⁴ AER, ‘AER Customer Hardship Policy Guideline: Version 1’, March 2019.

⁵ AER, ‘Retail Pricing Information Guidelines: Version 5’, August 2018.

⁶ AEMC, ‘2020 Retail Energy Competition Review’, June 2020, p227.

⁷ See draft rule 25A(4)b.

⁸ *National Energy Retail Law (South Australia) Act 2011*, s61(3)(c).

The AEC's practical experience working with guidelines, such as the RPIG, is that flexibility rarely eventuates and guidelines ultimately serve as de-facto prescriptive legal instruments. This is because regulators are resource and time constrained; there is an inevitable progression towards eliminating grey areas, limiting interpretation, and prescribing unequivocal obligations. While this is understandable from an efficiency perspective, it is ultimately what the AEMC cautioned against: a regulatory document that 'makes life easy for the enforcer'.

Compatibility with the NERO

Furthering these concerns is the compatibility of this rule change with the NERO. In the AEC's view, the Draft Determination has not established what benefits the proposed guideline will bring. The argument appears to be that because there are perceived issues with how bills are currently regulated, any change from the status quo represents a preferable outcome.

The AEC agrees the current approach to bill regulation is imperfect and supports evidence-based changes to improve the provision of bills to customers, however a guideline does not reflect that. The AEMC's main theoretical argument in favour of a guideline, its flexibility, is not borne out in practice.⁹ Furthermore, the decision to pursue the AER's customer testing over the customer data that retailers have already provided suggests policy has come before the evidence. Given the expected changes to the retail market in the coming years, it is critical that the AEMC establish some benchmark of success for a guideline so future stakeholders can assess whether it is working as intended.

Making a guideline work

In light of the above concerns, any rule making functions granted to the AER must be tightly constrained. The starting point to this is the exclusion of any clause that gives the AER broad powers to create and enforce rules. An example of what this clause may sound like can be found in the RPIG: 'any additional matters that the AER considers necessary or convenient...'.¹⁰

From there, the four principles the Draft Determination has laid down for the AER to have regard to when developing its guideline should be tightened. At the moment, these principles are so high-level and open-ended that they have minimal practical relevance because they can be interpreted in almost any manner. For example, promoting standardised language and terminology across bills (principle 4) would appear to contradict enabling retailer innovation and customer choice (principle 1).

In the AEC's view, the overarching principle that the AER must have regard to when updating the guideline is cost-benefit analysis. It should be stated upfront that any change to the guideline must be in response to a clearly identified failure in the electricity market and the AER must weigh up whether the costs of making any proposed change outweigh the expected benefits the change will bring, including whether alternative approaches would deliver a more preferable customer outcome. These customer benefits should be informed through behavioural testing, preferably based on real customer interactions, rather than an abstract assessment of what a customer *might* prefer.

The AEMC's Final Determination should provide clarification about how the requirement for 'industry consultation in the development and review of the guidelines' will work in practice. There should be set conditions for the AER to follow when undertaking consultation, including minimum timeframes for response and a requirement for any proposed change to be subject to cost-benefit analysis. Very stringent consultation and engagement will lead to improved consumer outcomes, in that more preferable reforms can be investigated and progressed in a more efficient and strategic manner.

⁹ Another example of this is the AER's Benefit Change Notice Guideline, which prescribes what information must be included in a benefit change notice and how it is presented.

¹⁰ *National Energy Retail Law (South Australia) Act 2011*, s61(3)(c).

Similarly, the AEC considers that further safeguards should be put in place to ensure the billing guideline is not changed so frequently that the costs of compliance are prohibitive. The Draft Determination allows the AER to make changes to the guideline from 'time to time'. This is inadequate. The AER should only be allowed to change the guideline as frequently as is necessary, and in any event, no more frequently than once every 24 months.

Implementation

The Draft Determination has proposed a four-month implementation date for retailers to comply with the guideline. Without a clear understanding of the scope of the guidelines and the system changes retailers will be required to undertake to implement them, the AEC is unable to provide comment on whether or not this timeframe is appropriate, however it raises concerns.

The AEC encourages the AEMC to consider approaches in the rules that would enable the AER to identify and determine an appropriate implementation date based on the scope of the requirements that will be in the guidelines. This approach will ensure that retailers are able to implement the changes proposed, in a timeframe proportionate to their scope. A fixed implementation timeframe may result in an unintended outcome where the AER is limited in developing the guideline to changes that can be implemented within three months. This would not appear to be an efficient outcome.

If the AEMC does not consider it is able to provide the AER with the power to determine the initial starting date (for example, if transitional rules are required to be repealed on a certain date), the AEC considers that at least nine months is necessary for retailers to implement regulatory change to the bill at the least cost to consumers. This timeframe would provide a better balance between a desire to implement the reforms as quickly as possible, while still providing retailers a reasonable period to redesign, implement, and test critical technical infrastructure.

The AEC looks forward to continuing to engage with the AEMC to ensure any guideline is developed in a manner that is in the best interests of customers while maintaining the integrity of existing governance structures.

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Yours sincerely,



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