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Essential Services Commission

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Essential services Commission – Building trust through new customer entitlements in the retail energy market

AGL Energy (AGL) welcomes the opportunity to make a submission in response to the Essential Services Commission Victoria (Commission) draft decision on implementing recommendations 3F, 3G, 3H of the Independent Review of Electricity and Gas Retail Markets (Thwaites review).

We recognise the complexities in developing a regulatory response to the Thwaites recommendations and appreciate the tight timeframes the Commission has had to work in. AGL consider that if these recommendations are appropriately developed they will help offer Victorian consumers additional information to help keep them informed and engaged in the energy market.

Given the limited timeframe AGL believes the following recommendations will ensure consumers obtain a positive experience and therefore become more confident and engaged with the energy sector. Our recommendations through the submission relate to:

- The proposed Clear Advice Entitlement (CAE) and how to make the proposal effective for consumers
- Obtaining clarity on the proposed bill message and the application of Australian Consumer laws.
- The use of further consumer testing to validify positive customer outcomes and ensuring the proposed changes are consistent with wider energy market reforms.

AGL recommended response for achieving Thwaites recommendation

AGL recommend that the Commission require a bill message without a proposed future savings as the simplest and most effective way to meet the intention of the Thwaites recommendations to nudge and engage consumers. Specifically, we recommend that the Commission consider a message that facilitates retailer and consumer trust, similar to the case study we provide in the attachment below.

This could include messaging such as "we want to put you on a better plan to help you save money – contact us to find out more".

AGL have serious concerns about the potential impact the messaging may have on consumers by misrepresenting future savings amounts in breach of the Competition and Consumer Act. AGL consider the ultimate intention of nudging consumers can still be achieved with this

recommendation and will then allow time for the CAE can then be considered by Commission through a separate and more robust regulatory process.

The CAE can then be considered by Commission through a separate and more robust regulatory process.

AGL would welcome the opportunity to discuss the potential for this solution to be implemented earlier than 1 July 2019.

AGL also recommend that the Commission

- Undertake a comprehensive review of the regulatory requirements for information on consumer bills to ensure that the requirements remain relevant and up-to-date with the latest consumer testing and regulatory intent. AGL have undertaken a major project regarding the bill design in National Energy Consumer Framework jurisdictions which we are happy to share with the Commission to inform this review.
- Consider how the Consumer Data Right will interact with these new obligations. The Consumer Data Right will give customers the right to portability of their data to get access to services and products that suit their individual circumstances.

A summary of AGL's view on the draft determination is provided below, with detailed information in the subsequent attachment.

Should you have any questions in relation to this submission, please contact Kathryn Burela on 0498001328, kburela@agl.com.au.

Yours sincerely

Elizabeth Molyneux

[Signed]

General Manager Energy Markets Regulation

Table of determination and initial AGL comment

Draft decision 1 – Best offer entitlement	Supported
Draft decision 2 – Definition of best offer	Not supported as currently drafted Exclude third party offers in generally available definition
Draft decision 3 – Estimating customer usage	Not supported as currently drafted Potentially misleading and inaccurate without 12-month data. Further information provided in the submission on misleading information.
Draft decision 4 – Presentation of best offer	Not supported as currently drafted Potentially misleading (qualifying information)
Draft decision 5 – Clear Advice Entitlement	AGL recommend the Commission remove the CAE from this round of Code amendments and conduct a fulsome regulatory process to ensure that the extensive changes do not lead to unintended consequences for both consumers and industry. AGL note this is also unlikely to be achievable for digital and third parties as currently drafted and AGL request clarity from the Commission on how this could be possible. AGL have provided further recommendations in the body of this submission.
Draft decision 6 – Scope of best offer obligation	Supported – with some amendments recommended in the body of the submission (i.e. amendments to the definition of bill summaries)
Draft decision 7 – Frequency	Recommend 2 best offers per year (either through bill change notice, or if this is not issued then via the bill). Otherwise, retain proposal in draft decision.
Draft decision 8 – Dollar threshold	Should be evidence based (research supported $50).
Draft decision 9 – Validity period (13 days)	Reconsider if purpose of 'best offer' is to nudge customer engagement in the market.
Draft decision 10 – Must include VEC information	Supported
Draft decision 11 – Bill change notice	Supported if businesses can send in line with AER requirements (i.e. separate notices for the events that include the relevant information as required in Code).
Draft decision 12 – Minimum information for bill change notice	Supported if aligned with AER requirements – note that additional requirements such as inclusion of 'best offer' will impact systems.
Draft decision 13 – Manner and form of bill change notices	Supported if retailers can align with AER requirements
Draft decision 14 – delivery of bill change notice	Supported
Draft decision 15 – Scope of bill change notice	Should apply to exempt sellers as these customers deserve the same level of customer protection and information.
Draft decision 16 – Notice period	AGL support 5 business days' notice in line with AEMC decision.
Draft decision 17 – Exemptions for bill change notices	Final decision should align with AEMC final determination – we note the AEMC have added additional exemptions.
Draft decision 18 – GST inclusive messaging	Operationally complex to implement – AGL would support transitional arrangements while impacts are considered by the Commission.
Draft decision 19 - 1 July 2019 implementation	Not achievable with current draft decision for reasons outlined in the attachment.

ATTACHMENT

Clear advice entitlement

While AGL acknowledges the Commission's rationale for including the Clear Advice Entitlement (CAE) in the draft decision, we strongly recommend the Commission postpone major amendments to Explicit Informed Consent (EIC) requirements through the CAE.

As the CAE has not been subject to a rigorous assessment it is unclear what the customer impacts will be and whether they will overall be in the long-term interest of Victorian consumers. For example, it is unclear how CAE will impact:

1. Sales validity and disputes due to being tied with explicit informed consent.
2. more complex sales channels such as third party and digital.
3. Sales staff conversations with customers on what may be the 'best offer'.

While we welcome the simplicity of the bill message adopted by the Commission, we note the development of the CAE extends well beyond what would be necessary to address any definitional or operational limitations with the 'best offer' approach and surmounts to new and untested regulation through placing substantial new obligations on retailers regarding Explicit Informed Consent.

AGL recommend the Commission undertake the appropriate regulatory rigour in line with their legislative obligations prior to implementing such a significant change to industry to mitigate unintended consequences and to fully understand the cost and impacts of such a change. Unintended consequences were discussed briefly at the Commission's stakeholder forum on 27 September 2018 and the discussion demonstrated some, but not all the impacts to consumers, such as increased handling time, potential privacy risks or breaches, complex and difficult to follow conversations through sales agents) as well as the incomplete thinking on how this could be applied for other sales channels such as digital.

While AGL understands the merit of CAE, we are concerned that without appropriate testing, the CAE may have the opposite impact then intended by the Commission. That is, the CAE may make conversations more complex, and therefore could lead consumers to disengage as they feel overwhelmed with information. This can result in reduced trust from consumers who may feel as though retailers are trying to avoid giving them the best deal (see the section below on misleading information).

Given the scope of these uncertainties, we recommend the Commission remove the CAE from this round of Code amendments. This would allow the Commission to place a greater focus on those elements necessary to the delivery of recommendations 3G and 3F as required by the Victorian Government's Terms of Reference. Further, the Commission can then undertake a separate and

appropriately robust regulatory review process including consumer testing of the concept and application.

As an alternative second-best approach, the Commission should consider the application of the CAE in this round of Code amendments to be limited to customers making direct contact regarding the bill notice and not apply to digital or third-party sales. The Commission can then work with industry and consumer groups to understand how CAE has impacted the customer experience in this scenario and use these learnings on how it can be refined to ensure a better consumer outcome through the digital and third-party sales channels.

Changing contract models

While AGL agree with the Commission's position that the retail energy market's effectiveness relies on a principle of shared responsibility[1], AGL consider that this is a broader concept of the changing model for contracts and the way consumer's want to receive their information, rather than being a matter unique to energy markets.

In AGL's view, the contract attributes that the Commission has called out as being covered by the CAE[2] would in fact already be covered by the Marketing Conduct Code in Victoria, Explicit Informed Consent requirements in the Energy Retail Code and the Competition and Consumer Act. Further, requirements regarding Welcome Pack disclosures and the cooling off period provide protection for consumers to fully consider the impacts and scope of their energy plan and allows them the opportunity to withdraw from the offer.

Any concern of a failing of standards to meet these existing requirements should be addressed by the Commission with clear advice to retailers or enforcement action if breaches have been determined. The development of additional CAE obligations should be part of a broader piece of work undertaken by the Commission.

Further, our understanding in talks with the Commission is that section 70H(b) was drafted in such a way to ensure that Standing Offer customers are offered market contract opportunities should the bill message prompt not be suited to their needs. The drafting of this section then should reflect specifically the need to take these additional steps for Standing Offer customers specifically to ensure that the CAE does not extend beyond the Thwaites recommendations.

CAE impractical for all sales models

AGL note that there are severe operational and practical constraints in being able to provide greater context to offers based on what retailers know of customers through digital means without requiring substantial data inputs on the customers behalf. The increase in effort for customers to provide

[1] Draft decision, p43
[2] Draft decision, p45

additional information for the CAE moves this entitlement to an obligation for action on the customer and will likely see drop off in customer interest. [redacted] As a result of the introduction of new CAE obligations customers may become more disengaged (in direct contrast to the objective of the bill message) – finding the process to cumbersome, complicated or time consuming.

The justification for the inclusion of the CAE in the draft decision highlights the limited view the Commission has taken on the application of this across different sales channels.[3] The very nature of the CAE has been based on the traditional direct call sales model rather than being technology agnostic. AGL has seen an upward trend in the utilisation of digital sales and third-party sales as opposed to the traditional AGL call-sales channel and we are happy to share these statistics with the Commission. [4]

The inclusion of the CAE with the intent of applying across all channels without considering the actual application means that this regulatory proposal is not future proof and does not consider the changes in technology or even the development of the Consumer Data Right (CDR) which will be applied across Australia and will alter the way consumers access and port their data. In fact, the proposed ACCC CDR Rules Framework[5] focus on digital solutions only.

We have included additional information in the Appendix regarding the disclosure of fees and different information that would be required to be disclosed by sales agents that will impact call length times and customer experience.

Privacy concerns

There are also complex and interrelating privacy risks and concerns that the Commission must consider further. If retailers are required to provide all their existing customer information (such as usage, payment behaviours) to a third-party provider, there may be serious privacy implications.

Under this arrangement, retailers would need to inform customers that they might provide their information to third parties and why. While this is generally covered in privacy policies, the purpose and intent of this is in relation to the provision of certain services and is therefore limited in the nature and scope of data disclosed. Extension of data provisions beyond those generally expected under privacy policies to ensure compliance against what a retailer knows about a customer, will start to encroach on the data that is currently being considered and captured by the Consumer Data Right – which is prefaced on the principle that consumers should control which accredited third parties can access and utilise their detailed, personal and sensitive data.

There are also restrictions under the Privacy Act, where a business provides personal information to third parties the business must ensure that all Privacy Act and Australian Privacy Principle

[3] Draft decision, p43
[4] Further information available in our FY18 Full-Year Results pack, 9 August 2018, slide 8
[5] ACCC consultation on Rules Framework for Consumer Data Right

obligations are met – particularly where the information is sent offshore. This would require a massive undertaking to understand the commercial operations of third parties to ensure their compliance and ultimately be held liable for any breaches by them of privacy obligations.

Retailers are unable to control the management and information security of third party providers to the extent of ensuring that the data is protected and secure in line with AGL's own obligations. Even if third party retention of a customer's private information is time limited a retailer would be unable to confirm that the data has been destroyed appropriately.

We strongly recommend that the Commission remove the CAE obligation from applying to all sales channel and limiting its scope to a retailer's own calls channel until further scoping can be done. We do not consider the exclusion of other sales channels will result in customer detriment, but rushed implementation without consideration of these types of concerns may result in serious customer detriment, particularly regarding privacy.

Summary of recommendations in this section

AGL recommends the Commission

- Removing the CAE from the current review process so that appropriate consultation and regulatory review of the inclusion of this requirement can be scoped.
  This would allow the Commission to consider other regulatory changes currently occurring, such as the Consumer Data Right that will fundamentally shift how customers manage and port their own data.

Alternatively, the Commission should at a minimum -

- Remove section 70H(2) as it is not necessary for the entitlement – where a customer would be informed of the relevant terms and conditions linked to a contract (i.e. that a sales agent would state that the offer amount is conditional on paying on time and failure to pay on time would result in higher prices – it is therefore irrelevant if the customer has a history of paying on time or not).
  - If this intended to apply across all sales channels then 70H(2) creates significant boundaries to retailers for compliance. Removal of this section would also remove the privacy concerns noted above.
- Consider limiting the scope:
  - of the CAE to its purpose of proving additional information to customers on how they could save more money and look to switch plans tied to the 'best offer'.
  - To retailer call centres only
  - of 70H(b) and 70BG to apply only to standing offer customers to ensure that those customers are provided other alternatives to switch to a market contract.
  - to retailer call centres only – consult further on application to other sales channels

Misleading information to customers

Nudge or contractual offer

The Commission has positioned the 'best offer' communication as 'nudging' a customer to engage. Specifically, it is noted that the 'nudge based' approach attempts to go with the grain of human behaviour and to prompt customers to consider the suitability of their energy plan.[6] By putting the best offer on bills, we are seeking to provide a 'nudge' for customers to consider the suitability of their current energy plan.[7]

There is a clear tension then, between the stated nudge approach to have customers engage, and the drafting of the deemed best offer messaging which becomes more contractual in nature, with tailored savings amounts and potential for unique offer IDs that the Commission expect under 70S would have an offer validity period. It is AGL's view that this would be classified as marketing. The Commission has previously stated that the final drafting will ensure that the Code state that the 'best offer' message is not deemed marketing. As we highlight below, the Courts have determined that this is immaterial in determining if conduct is misleading or not.

AGL believes the Commission can satisfy the Thwaites recommendation on the content of the 'best offer' message on bills through a non-$ based prompt. AGL has recently used such an approach and we obtained high consumer engagement. Such an approach also mitigates against possible CCA breaches.

Competition and Consumer Act

AGL's view of the proposed requirements relating to best offers will place retailers in a position of potentially breaching Competition and Consumer Act requirements, particularly regarding misleading information. The following section is relevant to a number of the draft decisions of the Commission's paper including:

- Calculation of savings amount
- Representation of savings amount
- Disclaimers and qualifications of representations
    - Eligibility requirements for new definition of generally available
- Implications for exclusions such as not allowing for the bundling of gas/electricity
- Value of non-price incentives such as frequent flyer points, rewards programs, discounted tickets or services etc.

The ACCC has provided clear advice on the nature of false and misleading impressions. Specifically, they have stated that businesses cannot rely on small print and disclaimers as an excuse for a misleading overall message.

[6] Draft decision, p23
[7] Draft decision, p27

If a business needs to qualify its advertisements, the ACCC advises to ensure that the qualifying statements are clear and prominent so that consumers know what the real offer is.[8] For the 'best offer' this clear and prominent qualifying information would not occur until the customer has made contact with the retailer and the sales agent qualifies the offer through the CAE. We therefore do not consider this would meet the requirements of clear and prominent.

Further, Australian Courts have indicated in a number of cases 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[9]. This would mean that irrespective of whether the Commission drafted the Code amendments to explicitly state that these requirements are not marketing, that would not absolve the potential conflict and breach.

A business may be found to have engaged in misleading conduct at the point at which they have 'enticed' the consumer to enter into negotiations based on an erroneous belief. The ACCC has also indicated that they will look at how the behaviour of a business affects the consumer's impression of a good or service and whether the overall impression created by the conduct is false or inaccurate. The ACCC recommends that additional information should be disclosed where it is likely that the conduct has created a misleading impression, or where it is reasonable to expect that this information will be disclosed.[10] For the purposes of the draft decision, this would include the basis on which the calculation for customer savings has been developed, as well as the terms and conditions associated to that (i.e. club membership eligibility, conditions).

The ACCC further state that the business must clearly direct the consumer's attention to the most significant terms and conditions so that they can make an informed judgment about whether to make a purchase.[11] In this case, the Commission has determined that the most significant terms and conditions relating to that product are only relevant at the time of the sale, rather than at the time of the bill message – as the message is only intended to nudge the customer. AGL considers 'the nudge' is a representation to the customer of something they are eligible for and that the dollar amount will be taken as an accurate representation of the customer's savings when this may not be the case. As noted above, the current view of Australian Courts is that it is not a defence that a potentially misleading statement is only intended to 'nudge' a customer, or prompt them to engage further with the business. This becomes increasingly problematic as retailers need to estimate a customer's 12-month usage without knowing the relevant information to do such a calculation.

For example, if a customer signs up in May and receives their first 'best offer' bill in July, the retailer will have around 6-8 weeks of consumption data for that customer. This data extrapolated out is highly unlikely to provide an accurate reflection of the customers usage for the year. Retailers do not know if there was a unique event (i.e. the customer had been on holiday for the first 3 weeks of that

[8] ACCC False or Misleading Statements guidance
[9] *ACCC v Singtel Optus Pty Ltd* [2010] FCA 1177
[10] ACCC Advertising and Selling Guide
[11] ACCC Advertising and Selling Guide

period), weather implications that may have seen an increase use of heaters or air-conditioners etc. As such, retailers will be required to set the expectation of consumers that they can save hundreds of dollars on a new plan that may not be accurate. While benchmarks may assist this matter in some way, it would still not address the underlying concerns regarding the potential misleading nature of future representations of savings and may result in customers receiving larger savings calculations then is likely due to the nature of the benchmark calculations.

The ACCC is clear that qualifications or disclaimers may not protect that business from breaching the ACL.[12] We have provided further case law on this matter. As it is currently drafted, AGL would need to include an extensive disclaimer on the bill which is already limited in terms of real-estate and runs the risk of being ignored. We have also included an example of the disclaimer we are using for our AER benefit change notice to customers both are in the Appendix. The Commission can note here that there is no call-out box regarding potential savings (i.e. nothing that the consumer will immediately rely on), and the text around the 'do nothing' amount qualifies this statement further. There is also then eight lines of disclaimer – far more than can be required through a bill message box.

The Commission has stated that the purpose of the 'best offer' messaging is to 'nudge' customers in to action and words such as 'could' or 'can' are not intended to mislead the customer. AGL consider the inclusion of the figure heightens the likelihood that the message will be considered misleading under the CCA and would not facilitate a positive transaction between retailers and customers which will only further exacerbate any trust concerns between these parties. AGL consider the following case study is relevant to the Commission's work and demonstrates the effectiveness of positive messaging.

[12] ACCC Advertising and Selling Guide

AGL consider these results are relevant as the Commission has stated that their own consumer testing included prompting to customers for what actions they will take. AGL consider if the Commission undertook the necessary testing without consumer prompting their results would likely match our above experience.

Summary of recommendations in this section

- Reconsider the original intent of the Thwaites recommendations, as well as the practical implications of delivering a nudge message to consumers.
- Remove specifics relating to the savings amount and/or the product name to avoid potential misleading information for the customer and problems relating to calculations and future representations. For example
    - *We may have a better plan for you to help you save money – contact us for more information.*
- Maintain friendly – conversational language for the customer to prompt engagement and help build trust.

Other matters

Generally available definition

AGL supports increased harmonisation with the Australian Energy Regulator (AER) requirements wherever possible but note that alignment with the definition for the purposes of achieving 3G will create substantial confusion and difficulty in determining the best offer.

For example, under the new AER definition of generally available, retailers are required to publish information on offers that may be substantially limited to the public. The Retail Pricing Information Guideline (RPIG) defines the following as an eligibility criteria for a generally available offer "being a member of a particular club – for example: a motoring club, sporting club, or business or leisure association". This will also add to customer frustration if they only find out about the limitation of accessing these types of offers once on the phone with a sales agent and will question why they are being encouraged to contact the retailer for savings that aren't practicably within their reach. It is also unclear how this could be implemented on digital platforms i.e. requesting a proof of membership or otherwise termination the digital transaction. This would only add to consumer frustration and impact trust.

AGL therefore strongly recommend that the Commission exclude third-party offers as well as offers that require a monetary outlay by the customer (such as joining a club) from the definition.

Implementation period

AGL consider that Draft decisions 10 – 18 would be achievable by July 2019 but there will be insufficient time for retailers to develop and implement the requirements for the other decisions as currently drafted.

Draft decisions 2 – 5 are unlikely to be achievable in their current form and move away from the scope originally discussed through the Thwaites recommendations. While we welcome the Commission's suggestion that retailers can innovate on how to implement the CAE for third party and digital sales, there is insufficient time for such an activity to occur for a 1 July 2019 implementation. This is not a matter of innovation but on whether it is operationally achievable or not, particularly with privacy concerns regarding third party disclosures.

Retailers would have around 7 months to develop regulatory solutions for these channels, to investigate, trial, test and deliver, do website system and layout redesigns for full implementation by 1 July 2019. Given the Commission has been working on these regulatory solutions since April 2018, it is reasonable to assume that 7 months for this type of project is insufficient.

As stated above, AGL strongly recommend the Commission exclude CAE from this round of Code changes. Alternatively, exclude digital and third-party sales from the final decision, and then give retailers sufficient time (i.e. 12 months) to develop the above solutions.

Overall framework objectives

AGL note the dichotomy that exists between seeking an *Objectives* based regulatory framework and continuing to have, and apply, highly prescriptive requirements that sit underneath these objectives.

For example, 70O states the objective of the Division as being to give small customers an entitlement to prominently displayed, helpful information that enables them to easily: 1) identify whether they are on the best offer, 2) understand how to access the best offer and 3) understand how to access other offers through Victoria Energy Compare.

The *objective* of this Division is therefore the specific provision of information to help consumers switch plans. The Commission has then drafted highly prescriptive requirements under 70R(4) on how retailers will meet this objective, effectively making the purpose of the objective redundant.

The wording with 70G also places obligations on retailers that are not within their control, specifically "to assist the small customer to assess the suitability of, and select, a customer retail contract". The Code is therefore requiring retailers to ensure a customer selects the right contract, but this is ultimately a decision for the consumer and is not within retailer control. If, after information has been provided by the retailer, a consumer chooses to stay on their plan which results in them paying more for their energy, this would arguably result in a breach of the objective of the Code.

Summary of recommendations in this section

- Limit the definition of Generally Available to exclude third party offers and those that require additional steps by the customer (whether this is monetary i.e. buying a membership, or associated to signing up to other offers, organisations etc).
- If the Commission do not accept the other recommendations provided by AGL in this submission, amend the implementation date to accommodate for phased implementation. For example
    - Restricting CAE application to call sales only for 1 July 2019.
- Review the Commission's *Objectives* in the Code to align with the new regulatory approach (i.e. the dichotomy between Objectives based regulation with highly prescriptive requirements).
- Revise the *Objectives* to be what is within retailer control.

Other Comments

- *Working with other Thwaites Recommendation* - Further guidance should be given on the Commission's intention to implement recommendation 3A requiring retailers to market in dollar terms. If the Commission takes a strict view on this recommendation and retailers are no longer able to market with discounts attached, then this will likely make the market more confusing for customers who are seeing different figures at different points of engagement.
- *Drafting issues* - Need to fix the bill summary definition because it would currently include "dear customer" letters with attached bills. Bill summary should capture where key summary information has been provided in the body of the communication (billing amount, payment methods, due by date).
- *Setting the threshold* – The Commission has set the threshold at $22 even though the findings set it higher. AGL encourage the Commission to use the results of their research to set the threshold at $50 to develop evidence-based regulation.
- *Bill change notice* – The Commission should amend all requirements that are currently drafted to align with the AEMC draft determination with the changes that have come through in the final determination.
- *Non-price incentives* – discussed below.

The definition of best offer, to focus only on pricing elements will impact product innovation and consumer benefits. For the very reason the Commission has had difficulty in defining the best offer, consumers value different things, and retailers compete on a variety of levels – not just discounts – to win and retain customers. By not allowing for the consideration of these benefits, the Commission will

effectively be pushing retailers to remain focused on price, at the detriment of other benefits such as frequent flyer points, shopping discounts, membership deals etc.

AGL offers a range of non-price benefits attached to our plans which are valued differently by different customers. We offer an AGL rewards program [redacted] Through this program, customers can access a range of special offers including

- Discounted eGift cards with retailers including Coles, Woolworths, Myer, David Jones, JB Hi-Fi
- Discounted movie tickets
- Discounted travel and accommodation
- Up to 50% off meal offers at selected restaurants.

[redacted]

By focusing on price, the Commission will disincentivise non-price competition and reduce customer benefits. This is another reason that the bill message should not contain a future value reference but instead a statement about there being offers that are potentially better for the customer.

Appendix

Case law

Other relevant case law AGL strongly recommend the Commission considers:

- *Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 205 ALR 402 at 417 [43]: "Nor is it to the point that the misleading or deceptive impression may or will be corrected before or after any contract is made. 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"
- *National Exchange Pty Ltd v Australian Securities and Investments Commission* (2004) 61 IPR 420 [55]: "The principle which applies to those cases is that the qualifying material must be sufficiently prominent or conspicuous to prevent the primary statement from being misleading."
- *ACCC v Hillside (Australia New Media) Pty Ltd trading as Bet365* [2015] FCA 1007 [76]: Even if the effect of relevant advertising is, or is likely to be, dispelled prior to any transaction being effected, it may still be misleading or deceptive.
- *ACCC v TPG Internet Pty Ltd* [2013] HCA 54; (2013) 304 ALR 186 [50]: It has long been recognised that a contravention of s 52 of the TPA may occur, not only when a contract has been concluded under the influence of a misleading advertisement, but also at the point where members of the target audience have been enticed into "the marketing web" by an erroneous belief engendered by an advertiser, even if the consumer may come to appreciate the true position before a transaction is concluded.
- *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."

Appendix

Fees linked to energy contracts

AGL has provided additional material on our Victorian Market Retail Contract schedules, and an example of fees that may apply through distributors (listed as pass through on the AGL schedule) which lists further fees for reconnection, disconnection, specific meter read fees, new connections, truck visits, meter equipment tests and pre-approvals for PV installations. All of these could potentially apply to the customers so requiring disclosure of all fees is clearly impractical and will make the sales experience untenable for consumers.

If the Commission will not separately consult on the CAE to allow for all these matters to be appropriately worked through, we strongly recommend as an alternative that the Commission align the disclosure requirements with the AER's definition of "key fees" in the Retail Pricing Information Guideline (RPIG) below, as they may apply to the customers circumstances:

Key fee is any fee applying to a plan that will be incurred by:

- *all customers or*
- *a significant portion of customers.*

Key fees include but are not limited to:

- *connection/move-in fees*
- *account establishment fees*
- *annual fees/membership fees*
- *exit fees*
- *late payment fees*
- *disconnection fee for non-payment*
- *disconnection fee on moving out of the premises*
- *reconnection fees*
- *payment processing fees. For example, credit card fees, direct debit fees, and fees for*
- *paying in person at the post office*
- *metering fees.*

We further recommend that if the Commission pursue this alternative, that there should be flexibility in its' application to allow retailers to exclude any fees/charges that we believe are unlikely to apply to that customer (for example, it is a poor customer experience to talk about connection fees if the customer is switching across).