Queensland Competition Authority

Draft Decision

Proposed amendments to customer notification and consent provisions in the Electricity and Gas Industry Codes

March 2014

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We wish to acknowledge the contribution of the following staff to this report:

Jennie Cooper and Adam Liddy

SUBMISSIONS

Closing date for submissions: 17 April 2014

Public involvement is an important element of the decision-making processes of the Queensland Competition Authority (QCA). Submissions are invited from interested parties concerning proposed amendments to customer notification and consent provisions in the Electricity and Gas Industry Codes.

The QCA will take account of all submissions received.

Written submissions should be sent to the address below. While the QCA does not necessarily require submissions in any particular format, it would be appreciated if submissions were provided by email or two printed copies are provided together with an electronic version in Microsoft Word format.

Submissions, comments or inquiries regarding this paper should be directed to:

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Confidentiality

In the interests of transparency and to promote informed discussion, the QCA would prefer submissions to be made publicly available wherever this is reasonable. However, if a person making a submission does not want that submission to be public, that person should claim confidentiality in respect of the document (or any part of the document). Claims for confidentiality should be clearly noted on the front page of the submission and the relevant sections of the submission should be marked as confidential, so that the remainder of the document can be made publicly available. It would also be appreciated if two copies of each version of these submissions (i.e. the complete version and another excising confidential information) could be provided. Where it is unclear why a submission has been marked 'confidential', the status of the submission will be discussed with the person making the submission.

While the QCA will endeavour to identify and protect material claimed as confidential as well as exempt information and information disclosure of which would be contrary to the public interest (within the meaning of the *Right to Information Act 2009* (RTI)), it cannot guarantee that submissions will not be made publicly available.

Public access to submissions

Subject to any confidentiality constraints, submissions will be available for public inspection at the Brisbane office, or on the website at www.qca.org.au. If you experience any difficulty gaining access to documents please contact us on (07) 3222 0555.

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EXECUTIVE SUMMARY

On 17 October 2013, the Minister for Energy and Water Supply submitted a proposal to amend the Electricity Industry Code (the Electricity Code). The Minister proposed amendments that would require retailers to:

- remind customers when their fixed-term benefits are about to expire
- obtain customers' explicit informed consent to apply new benefits, following the expiry of a fixed-term benefit.

After considering support shown in submissions, we have made a draft decision to amend the Electricity Code to require retailers to remind customers when their fixed-term benefits are about to expire. Retailers advised that they either already met this requirement or did not oppose the amendment. Given this, we consider that the amendment will not significantly increase retailers' compliance costs and may provide benefits to customers of those retailers that are not providing advance notice voluntarily. For consistency, we have also made a draft decision to make the same amendment to the Gas Industry Code (the Gas Code).

We have made a draft decision not to accept the Minister's proposal to require retailers to obtain customers' explicit informed consent to apply new benefits. We consider that the amendment may result in higher compliance costs for retailers and higher prices for customers because if they do not respond to retailers' requests for consent, they will not receive any benefit.

We invite submissions from interested stakeholders on our draft decision by 17 April 2014.

1 INTRODUCTION

In south east Queensland, over 70% of electricity customers are supplied under a negotiated retail contract (negotiated contract), where certain terms and conditions are negotiated between the customer and their retailer. Negotiated contracts may be offered for a fixed term (fixed-term contracts) or continue until ended by the retailer or customer (evergreen contracts). Negotiated contracts may also offer benefits, such as discounts, that apply for a fixed period within the contract. These are known as fixed-term benefits.

On 17 October 2013, the Minister for Energy and Water Supply (the Minister) submitted a proposal to amend the Electricity Industry Code (the Electricity Code) to enhance the customer notification and consent provisions relating to fixed-term benefits in negotiated contracts (see Appendix A).

1.1 Minister's proposal

The Minister submitted a proposal to amend the Electricity Code in response to a concern raised by the Energy and Water Ombudsman Queensland (EWOQ). EWOQ advised the Minister that it had received complaints from customers that a particular retailer was not providing advance notice of the imminent expiry of fixed-term benefits. EWOQ expressed concern that customers may only become aware that their benefits have expired when they receive their next bill and suggested that amendments to the Electricity Code may be required to address this issue.

The Minister subsequently proposed amending the Electricity Code to require retailers to:

- remind customers when their fixed-term benefits are about to expire
- obtain customers' explicit informed consent to apply new benefits, following the expiry of a fixed-term benefit.

1.2 Industry code change process

Any person may ask the QCA to amend an industry code in a stated way[1]. If we decide to submit a proposal to amend an industry code for consultation, we must engage in the consultation process prescribed in the *Electricity Regulation 2006* (Electricity Regulation) and *Gas Supply Regulation 2007* (Gas Regulation)[2].

We can only amend an industry code if we are satisfied that the amendment will, or is likely to, contribute to the achievement of the objective of the relevant code.[3] The objective of the Electricity Code is to promote efficient investment in, and efficient use of, electricity services for the long-term interests of Queensland consumers about[4]:

- price, quality, reliability and security of supply of electricity
- the reliability, safety and security of the Queensland electricity system.

[1] *Electricity Regulation 2006* section 222A, *Gas Supply Regulation 2007 s*ection 25
[2] *Electricity Regulation 2006* division 2, *Gas Supply Regulation 2007* division 2
[3] *Electricity Act 1994* section 120G(2), *Gas Supply Act 2003* section 270F(2)
[4] *Electricity Act 1994*, section 120G, section 120PB.

The objective of the Gas Industry Code (Gas Code) is largely the same as the objective of the Electricity Code[5].

If we decide to amend an industry code, we must submit the amended industry code to the Minister for approval. If the Minister approves the amended industry code, we must publish a gazette notice advising that it has been approved and where it may be inspected[6].

1.3 Consultation process

We decided to submit the Minister's proposal for consultation and commenced the process by releasing an Interim Consultation Notice (Consultation Notice) on 22 November 2013.

The Consultation Notice invited submissions from stakeholders on the proposed amendments. Stakeholders were also asked whether similar amendments should be made to the Gas Code. We received five submissions in response to the Consultation Notice.

We are now releasing this draft decision, which incorporates our draft report on the material issues, and the final consultation notice on our proposed amendments. Submissions in response to the draft decision are due no later than **17 April 2014**. In making our final decision, we will consider all submissions received by the due date.

[5] *Gas Supply Act 2003* section 270F
[6] Electricity Act 1994 section 120J, *Gas Supply Act 2003* section 270I

2 ASSESSMENT OF THE PROPOSED AMENDMENTS

As outlined in Chapter 1, the Minister proposed amending the Electricity Code to require retailers to:

- remind customers when their fixed-term benefits are about to expire
- obtain customers' explicit informed consent to apply new or substantially different benefits, following the expiry of a fixed-term benefit.

2.1 Notification of a fixed-term benefit expiring

The Minister proposed that similar notification obligations relating to the expiry of fixed-term contracts should apply to fixed-term benefits. Clause 4.4.4 of the Electricity Code requires retailers to provide advance notice to small customers of the expiry of their fixed-term contract and information about the customers' options following the expiry of that contract.

Submissions

Submissions from the Queensland Council of Social Service (QCOSS) and the Queensland Consumers Association supported the proposed amendments. They considered that the amendments would improve customer confidence, engagement and informed decision making, and promote competition by encouraging customers to shop around for a better deal.

AGL generally supported aligning the notification requirements for the expiry of fixed-term contracts and fixed-term benefits. However, AGL argued that the requirement should only apply where the benefit changes as there has been no change to the customer's contract. AGL noted that explicit informed consent provisions in the Electricity Code require retailers to gain consent for fixed-term benefits when entering into a market contract.

While EnergyAustralia and Origin Energy (Origin) advised that they remind customers when their fixed-term benefits are about to expire, both retailers opposed the proposed amendments. EnergyAustralia preferred the issue to be resolved through competition, not regulation. Origin considered that there would be no consumer benefit as customers were informed of all terms and conditions of their contract, including the details of any fixed-term benefits, when they enter into it. Origin also argued that imposing requirements beyond those that apply under the NECF would impose considerable costs on retailers. Origin highlighted that there was no evidence of similar issues being raised with the customer notification provisions in jurisdictions that have adopted the NECF[7].

QCA position

AGL and Origin are correct to point out that customers are informed about all aspects of their contract, including the benefits they receive and the term for which they apply, when they first sign a market contract. However, as benefits frequently apply for a year or more, the complaints received by EWOQ seem to indicate that some customers forget when their benefits are due to expire.

Reminding customers that their fixed-term benefits are about to expire would ensure they are aware of any future benefits their retailer proposes to provide and may prompt customers to

[7] The NECF is in operation in the Australian Capital Territory, New South Wales, South Australia and Tasmania.

review the current range of market offers available in order to get a better deal, thereby increasing competitive pressure on retailers. On this basis we agree with QCOSS and the Queensland Consumers Association that the proposed amendments would benefit customers, contrary to Origin's view. Further, we consider that these benefits would be realised even where a retailer offers a customer the same benefit after the customer's fixed-term benefit expires. We therefore disagree with AGL that retailers should only be required to remind customers when they propose changing the level of benefit.

The benefits to customers of being reminded when their fixed-term benefits are about to expire must outweigh the associated costs in order for the QCA to amend the Code in accordance with the Code objective.

EnergyAustralia and Origin indicated that competition has already compelled them to remind customers before fixed-term benefits expire and AGL (which we understand also reminds customers) did not oppose the proposed amendment. This would indicate that, in addition to the benefits to customers, the benefits to retailers, in terms of customer goodwill and retention, outweigh the costs of providing reminders to customers. Given these circumstances, we consider that the amendment would not significantly raise retailers' compliance costs, as suggested by Origin.

We do not consider the inconsistency this creates with the NECF is a primary concern because of uncertainty around the final form of regulation in Queensland under the NECF. Specifically, all states that operate under the NECF have adopted state-specific derogations from it and we understand the Minister is considering legislating Queensland-specific derogations for customer protection. There is also potential for the NECF to be amended prior to its introduction in Queensland, with the AEMC considering a rule change.

For the reasons discussed, the QCA's draft decision is to make the proposed amendment because we are satisfied it is likely to contribute to the achievement of the Electricity Code objective.

2.2 Explicit informed consent

The Minister also proposed the inclusion of a requirement for retailers to obtain customers' explicit informed consent to apply new benefits, following the expiry of a fixed-term benefit. The Minister did not suggest what arrangements would apply to customers that did not provide explicit informed consent.

Submissions

The Queensland Consumers Association supported the Minister's proposal.

EnergyAustralia considered that requiring retailers to obtain explicit informed consent before applying new benefits would increase its costs and lead to customers paying higher prices because most customers would not respond to requests for explicit informed consent, which would result in them defaulting to standard tariffs.

QCA position

It does not seem unreasonable that customers should have to consent to the details of new benefits to apply after the expiry of a fixed-term benefit. However, we are concerned that some, possibly many, customers would not respond to requests from retailers for explicit informed consent. This is because customers in the electricity market may expect a "deemed acceptance" approach like that used for the renewal of fixed-term contracts, whereby retailers inform customers of the details of the new contract and customers are deemed to have accepted this if they don't contact the retailer to the contrary. Customers who are disengaged from the market are also unlikely to respond to explicit informed consent requests.

In these circumstances, retailers would not be able to provide customers with any new benefit to replace their expired fixed-term benefit because they would not have explicit informed consent to do so. As a result, we consider that the proposed amendment would likely result in a significant number of customers paying higher prices than they otherwise would have, as suggested by EnergyAustralia. Further, we consider that the proposed amendment would increase retailers' costs, which would lead to higher prices for customers.

For these reasons we are not satisfied that the proposed amendment would contribute to the achievement of the Electricity Code objective and therefore do not support it.

2.3 Application to the Gas Code

Reticulated natural gas customers are supplied under similar terms and conditions to electricity customers and would likely receive similar benefits from an amendment to the Gas Code. Given this, we asked stakeholders in the Consultation Paper if the Minister’s proposed amendments to the Electricity Code should also be made to the Gas Code.

Stakeholders, including natural gas retailers AGL and Origin Energy, considered that there should be consistent treatment of these matters between the Codes. While AGL provided qualified support for the notification amendment, as noted above, Origin did not support any amendments.

We consider that the interests of gas customers would be best served by treating them the same as electricity customers (to the extent possible). The two gas retailers that provided submissions did not indicate whether they currently notify natural gas customers of the imminent expiry of a fixed term benefit. If notification requirements are consistent, we see no reason why notification costs would be significantly different for gas customers compared to electricity customers. Gas retailers are encouraged to comment on the matter in their submissions.

We consider the benefits of the proposed amendments to reticulated natural gas customers outweigh the costs for gas retailers, and that the amendments are likely to contribute to the achievement of the Gas Code objective.

For these reasons, our draft decision is that amendments made to the Electricity Code should also be made to the Gas Code.

2.4 Other issues

Submissions from QCOSS and the Queensland Consumers Association raised additional suggestions for amendments to the Electricity and Gas Codes beyond those proposed by the Minister. The Queensland Consumers Association also called for a comprehensive public review of the Codes.

Under the Electricity Regulation and Gas Regulation, any person may ask the QCA to amend an industry code in a stated way[8]. If stakeholders consider that further amendments are required, they should submit a proposal that outlines the suggested amendment and justifies how it meets the relevant Code objective.

[8] *Electricity Regulation 2006,* section 222A and *Gas Supply Regulation 2007*, section 25.

However, as the Electricity and Gas Codes will be superseded by the NECF, any amendment contained in the Codes would require the government to institute a Queensland-specific derogation for the amendment to have effect when the NECF is introduced. For this reason, stakeholders should consider whether it may better serve the long-term interests of Queensland customers to pursue amendments to the National Electricity Retail Rules, which underpin the NECF.

3 DRAFT DECISION

Our draft decision is to amend the Electricity and Gas Codes to add the following clauses and associated new definitions.

Electricity Industry Code

4.4.7 Expiry of fixed-term benefits

No earlier than 40 business days and at least 20 business days prior to the expiry of a *fixed benefit period*, a *retail entity* must advise a *small customer* of the:

(a) date on which the *fixed benefit period* will expire;

(b) existence of the other contractual options that may be available for the purchase of *customer retail services* by that *small customer* at that *premises* and a general description of each;

(c) ability of the *small customer* to choose the *retail entity* from whom it wishes to purchase *customer retail services*; and

(d) termination fees and other fees (if any) that will apply if the customer decides to end the contract.

10.1.1 Definitions

A new definition in clause 10.1.1 as follows:

Fixed benefit period means a period of a *negotiated retail contract* (where the end date of that period is specified or ascertainable at the beginning of that period) during which a benefit to the *customer* (such as a price discount) is available.

Gas Industry Code

3.4.5 Expiry of fixed-term benefits

No earlier than 40 business days and at least 20 business days prior to the expiry of a fixed benefit period, a retailer must advise a small customer of the:

(a) date on which the fixed benefit period will expire;

(b) existence of the other contractual options that may be available for the purchase of customer retail services by that small customer at that premises and a general description of each;

(c) ability of the small customer to choose the retailer from whom it wishes to purchase customer retail services; and

(d) termination fees and other fees (if any) that will apply if the customer decides to end the contract.

6.1.1 Definitions

A new definition in clause 6.1.1 as follows:

Fixed benefit period means a period of a negotiated retail contract (where the end date of that period is specified or ascertainable at the beginning of that period) during which a benefit to the customer (such as a price discount) is available.

GLOSSARY

C	
The Codes	The Electricity Industry Code and Gas Industry Code
E	
Electricity Code	The Electricity Industry Code
EWOQ	The Energy and Water Ombudsman Queensland
G	
Gas Code	The Gas Industry Code
M	
the Minister	The Minister for Energy and Water Supply
N	
NECF	The National Energy Customer Framework
Q	
QCOSS	The Queensland Council of Social Services

APPENDIX A: MINISTER'S PROPOSAL

Queensland Government

Office of the Minister for Energy and Water Supply

Ref: EWS/003892
CTS No. 24924/13

Level 13 Mineral House
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Queensland 4002 Australia
Telephone +61 7 3896 3691
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17 October 2013

Dr Malcolm Roberts
Chairman
Queensland Competition Authority
GPO Box 2257
BRISBANE QLD 4001

Dear Dr Roberts

I am writing to ask the Queensland Competition Authority (QCA) to amend the Electricity Industry Code (the Code) to address an issue brought to my notice by Mr Forbes Smith, the Energy and Water Ombudsman Queensland.

Mr Smith wrote to me on 11 September 2013 regarding a potential gap in consumer protections under the Code. The issue he raised is that retailers are offering 'energy plans' providing a benefit such as a discount for a fixed period to customers who are on negotiated retail contracts with no fixed period. (A copy of Mr Smith's letter, its annexures and legal advice is enclosed).

Because the relevant obligation in the Code (clause 4.4.4) applies only to the expiry of the negotiated retail contract itself rather than of a fixed term benefit under the contract, retailers are not required to advise customers of the imminent expiry their fixed term benefit, prior to the benefit expiring. As a result, customers may not discover their discount has expired until they receive their next bill, which may be some months after expiry.

I am proposing that the Code be amended so that retailers are obliged to advise customers receiving a fixed term benefit of the imminent expiry of that benefit. The existing drafting of clause 4.4.4 of the Code regarding 'Expiry of *fixed term contracts*' would seem to be a useful starting point. In particular the timing of the obligation to provide advice no earlier than 40 business days and at least 20 business days prior to the expiry of a fixed term contract seems appropriate.

A new clause should not, in my opinion, be limited only to negotiated retail contracts that have no fixed period, since the same issue can arise where a negotiated retail contract has an expiry date that differs from the expiry date of a fixed term benefit.

I would also ask the QCA to consider an amendment addressing an associated matter.

The Code currently requires retailers to obtain the explicit informed consent of a small customer as a precondition to, amongst other things, entering into a negotiated retail contract with that customer.

With the increased prevalence of negotiated retail contacts with no set expiry date (evergreen contracts), the situation arises where a retailer might offer a new or substantially different fixed term benefit to a small customer who has been contracted with that retailer for a considerable period of time.

Given fixed term benefits typically include tariff pricing and discounts and may include optional tariff types, requiring retailers to obtain customers' explicit informed consent in that respect seems reasonable from a customer protection perspective and not unduly onerous for retailers.

Your consideration of these matters is greatly appreciated.

Yours sincerely

Mark McArdle MP
Minister for Energy and Water Supply

Enc: Letter from Mr Forbes Smith, annexures and legal advice, dated 11 October 2013

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Note: The Minister's letter refers to an attachment containing legal advice obtained by the Energy and Water Ombudsman Queensland. The Energy and Water Ombudsman Queensland requested we treat the legal advice as confidential.