

Australian Government Rule Change Proposal to the Australian Energy Market Commission

**Ensuring customer awareness of changes in retail market contracts  
Customer notification at the end of benefit periods**

## 1. Name and address of the rule change proponent

**Name of Proponent:** The Honourable Minister Josh Frydenberg MP, Minister for the Environment and Energy on behalf of the Australian Government.

**Address of Proponent:** Parliament House, Canberra, ACT.

## 2. Description of the proposed rule

In accordance with section 243 of the *National Energy Retail Law* (the NERL), we request the Australian Energy Market Commission (AEMC) make changes to the National Energy Retail Rules (the NERR) through the creation of a new 'Rule 48A' requiring authorised energy retailers to contact retail market contract customers, in writing (either by letter or email separate to the bill), of the end of a fixed benefit period.

The NERR set out requirements retailers must meet in relation to small customer billing. NERR requirements include the basis for calculating bills, the frequency and content of bills, under- and overcharging, and billing disputes and errors. Under the NERR, retailers are also required to notify customers before a fixed term contract ends and provide options for a new contract. The Australian Energy Regulator (AER) also provides guidance on the structure and content of energy price fact sheets and the presentation of offer information to customers through the Retail Pricing Information Guidelines, last issued in August 2015.

However retailers are not required under the NERR to notify customers before a fixed benefit period ends within a retail market contract. The NERR otherwise allows significant flexibility to retailers in the design of retail market contracts, which includes allowing retailers to offer contracts that:

- Can vary price during the course of a contract or set a price for the life of the contract;
- Can include an end date or be an ongoing contract;
- May include termination fees; and
- Can include a range of terms and conditions including discounts – discounts can appear as both conditional and unconditional (i.e. pay on time discounts).

Innovation is an important characteristic of effective retail competition. The increased diversification of retail offers and their terms and conditions, particularly in the nascent stages of the market, can however make consumer choice more complex. The recent review of the Australian Consumer Law found that clear information is important when building consumer engagement and confidence in complex markets and contracts. Information provision around contract discounting practices by retailers was raised as an issue in the 2015 review of Retail Pricing Information Guidelines undertaken by the AER.<sup>1</sup>

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<sup>1</sup> In the 2015 Retail Pricing Information Guidelines, the AER set guidelines on the presentation and information concerning discounts on a customer's bill and other retailer marketing material removing all references to fixed contracts or fixed benefit periods:

With this in mind, the Australian Government (the Government) proposes a new rule to ensure customers are aware of changes that take place over the course of their retail market contract, specifically changes to benefits offered for fixed periods within the overall term of the contract.

Rule 48 of the NERR requires retailers to notify customers on fixed term market retail contracts that their contract is coming to an end between 40 and 20 business days before the end date of the contract. The Government is seeking a new rule that requires retail businesses to similarly be required to inform customers between 40 and 20 business days before the end of a fixed benefit period under a market retail contract. This notification would be limited to financial benefits only, and not include non-financial benefits like gifts (such as movie or magazine subscriptions).

The Government considers there is a case for establishing a new rule that ensures consumers get appropriate notice of changes to their market retail contracts that significantly alter the cost of electricity supply. At present there is no requirement on retailers to provide consumers notice on changes that take place when financial benefit periods end.

The Government proposes new rule 48A:

**48A Retailer notice of end of fixed benefit period**

- 1) *If a market retail contract for the sale of electricity between a retailer and a small customer includes a fixed benefit period that expires before the end of the contract, the retailer must in accordance with this rule, provide notice to the small customer that the fixed benefit period is due to end.*
- 2) *Subrule (1) does not apply:*
  - a) *in relation to a non-financial benefit available to a customer during the fixed benefit period; and*
  - b) *if, on the expiry of the fixed benefit period, the customer would be financially no worse-off than had the period not expired.<sup>2</sup>*
    - i) *For the purposes of paragraph b), the relative position of the customer is to be determined having regard to the benefit available immediately before the expiry of the fixed benefit period.<sup>3</sup>*

**Example:** *the notice is not required if the benefit is rolled-over on the same terms and conditions.*

- 3) *The notice must be given—*
  - a) *in writing;<sup>4</sup>*

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<https://www.aer.gov.au/system/files/Notice%20of%20Final%20Instrument%20-%20AER%20Retail%20Pricing%20Information%20Guidelines%20-%20August%202015.PDF>

<sup>2</sup> The government requests the AEMC to consider alternatives to this proposed exemption. The purpose of this subrule is to dispense with disclosure requirements if the customer will suffer no practical detriment as a result of the fixed benefit period ending. Such a scenario might arise if, following the end of the fixed benefit period, the terms of the contract are varied to 'roll-over' the existing benefit – that is, the customer continues to receive the same discount applied against the same base rate.

<sup>3</sup> The purpose of this paragraph is to clarify that the financial position of the customer is to be determined by reference to the change resulting from the expiry of the benefit. It is not intended the retailer be required to engage in a general evaluation of the consumer's financial position.

<sup>4</sup> For the sake of consistency, it would be appropriate if the requirements of s319 of the NERL applied in relation to the written notice.

- b) *no earlier than 40 business days before the expiry of the fixed benefit period; and*
  - c) *no later than 20 business days before the expiry of the fixed benefit period.*
- 4) *The notice must clearly state—*
- a) *that the fixed benefit period is due to expire;*
  - b) *the date on which the fixed benefit period is due to expire;*
  - c) *the nature of the benefit that is available during the fixed benefit period;*
  - d) *that the customer may view all the generally available offers in their area through the AER's energy retail price comparison website (including the name and current web address of that website); and*
  - e) *any early termination charge the customer would be required to pay if the customer terminated the market retail contract as at the date of the notice.*
- 5) *In addition to providing the information specified in subrule (4), the notice must clearly state and compare—*
- a) *the amount in dollars that was payable by the customer under the contract;*
  - b) *the amount in dollars that would have been payable by the customer under the contract but for receiving the financial benefit during the fixed benefit period; and*
  - c) *the retailer's reasonable estimate of the amount that will be payable under the contract as a result of the expiry of the fixed benefit period.<sup>5</sup>*
- 6) *For the purposes of subrule (5), the amounts must be:*
- a) *calculated by reference to the date on which the customer was last invoiced;*
  - b) *based on the average energy usage of the customer over:*
    - i) *the 12 months preceding the date on which the customer was last invoiced; or*
    - ii) *such lesser period the customer has been a customer of the retailer; and*
  - c) *expressed as annualised amounts.<sup>6</sup>*

The government further proposes that, consistent with rule 48, the notice requirements in proposed rule 48A(1) be subject to a civil penalty if a retailer fails to comply.

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<sup>5</sup> In respect of this requirement, it is recognised that the estimate may not reflect the actual. The purpose is, however, to require a comparison against a static benchmark, (see the subrule (6) requirements), so that consumers can best understand the financial impact of the expiry of the benefit. It is fully expected that retailers will express appropriate disclaimers in respect of this disclosure requirement to avoid misleading customers.

<sup>6</sup> For example, if at the time of the notice the consumer had paid \$90 for energy over 1 month (inclusive of a \$10 per month discount), the annualised amount would be \$1080 (with discount) and \$1200 (without discount).

## Timing of implementation

The Government considers this rule to be an important step in empowering consumers. To that end, Government proposes the rule be made under the expedited process set out in s252 of the NERL.

The Government would like the rule to start from 1 January 2018, but recognises that a reasonable period of transition is needed to allow retailers to update their systems and procedures. The government requests the AEMC consider an appropriate commencement date having regard to the impact of different commencement dates on the costs to retailers of complying with the rule.

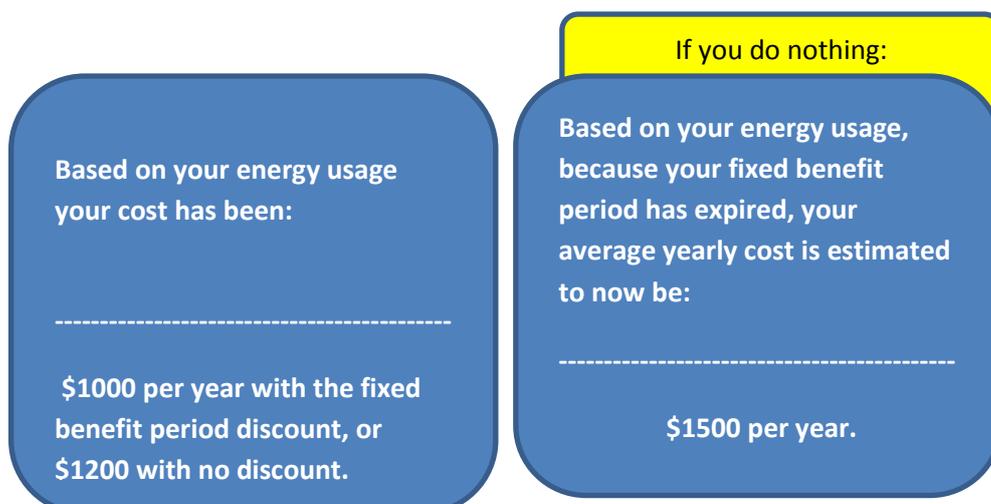
### 3. Explanation of the proposed rule

The proposed rule contains four key components which are aimed at encouraging consumers to actively consider whether to remain on their existing contract after the financial benefit ends within the existing term of the contract.

The key components to achieve this outcome are:

- Timely advice to the consumer that a financial benefit (such as a time-limited discount) is coming to an end before the end of their contract;
- Advice to the consumer of the real financial value of that benefit – comparing the cost of energy with and without the fixed benefit period discount;
- Advice to the consumer on how to compare their existing contract with other available offers in the market; and
- Advice on the potential costs the consumer may bear in switching to a new contract before their existing contract expires.

In relation to the core comparison of the real financial value of the benefit, the government expects that this could be complied with by providing the customer with a notice in the following terms:



In ensuring the consumer is equipped with sufficient knowledge about the true cost of staying on their existing contract versus the potential benefit of moving to a new contract, customer switching rates should improve. In turn, this rule should encourage competition within the market and result in benefits consistent with the National Energy Retail Objective.

#### 4. Statement of issues

##### Nature and Scope of the Issue

Retail energy markets are changing, with more consumers than ever before on retail market contracts, and with customer switching rates steady (Figure 1). Retailers are also increasingly expanding the range of retail market offers available to consumers in recent years. According to the AER’s Retail Market Performance Report 2016, around 50 per cent of customers are on retail market offers in the NEM; however, this varies significantly between jurisdictions (Table 1).

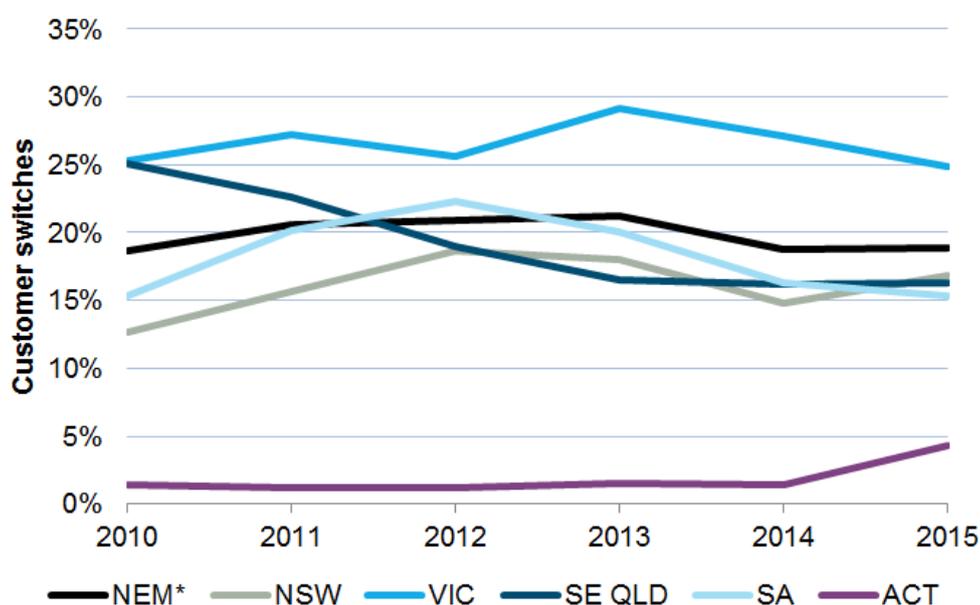


Figure 1 Percentage of electricity customers that switched retailers in Queensland, NSW, Victoria and South Australia

Table 1 Percentage of residential electricity customers on market and standing offers

State	Market Contract	Standard Contract
NSW	77%	23%
QLD	52%	48%
SA	87%	13%
TAS	11%	89%
ACT	23%	77%

Source: Quarter 3 2016-17 retail statistics, AER.

With 28 electricity retailers offering hundreds of different retail offers across the NEM, consumers are confronted with a vast array of options and providers. As retailer offers continue to expand and innovate, the role of clear and helpful information will become increasingly important if consumers are to make the best choices for their energy needs.

Retail market contracts come in a range of forms, from a fixed-price fixed-term contract (which don't typically change over the term of the contract), to a contract that is considered 'ongoing' (i.e. with no end date). Ongoing contracts can vary significantly and may include a range of (financial) benefits that fall away over time. Considering that there is no requirement under the NERR for retailers to notify a customer at the end of a financial benefit period, there is a risk that consumers will:

- not notice or understand the change and complacently remain with the offer even though they are no longer receiving discounts or other benefits;
- not actively seek out potentially better offers in the market;
- become angered by the change in offer and lose confidence in the market as they feel 'hoodwinked' by their provider for changing the price without notice.

The result of such consumer behaviour could lead to a negative effect on the overall competitiveness of the retail electricity and gas markets, as it can result in consumers being more 'sticky' (i.e. not switching), or becoming increasingly distrustful of the market.

### Consumer Experiences

AEMC market research indicates that there are a significant number of customers that are not active in the retail market. Specifically, around half had not switched retailer or plan in the past 5 years.<sup>7</sup>

AEMC consumer research from the 2016 Retail Competition Review found that consumers least likely to proactively shop around are also less likely to be comfortable with technology (including online information searches), face language or literacy barriers, and/or face financial hardship.

Consumer representative organisations, regulators and commentators have also noted the increasing role of discounts in the retail electricity and gas markets, and the impact of the lack of clear or timely information concerning changes to retail market contracts on consumers. Representative comments include:

- From Dr Ron Ben-David, in reference to a customer not being notified of a benefit ending: "one simple inaction has ensured that this customer now pays among the highest rates in the market and in the absence of any further action by the customer, it will continue to do so indefinitely."<sup>8</sup>
- St Vincent de Paul's report *'The National Energy Market – A hazy retail maze'* states that consumers may not be aware that a benefit period is not in line with the contract period or that the benefit may or may not be renewed by the retailer. The report highlights:

"Customers may not be aware of a common market contract feature called 'limited benefit period' and falsely think they are still on a good offer after they last switched, say 18 months prior."

"It is important that customers are aware of how frequently they need to reassess their current contracts and in order to communicate this message effectively to customers, a

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<sup>7</sup> AEMC (2017) Retail Competition Review

<sup>8</sup> Dr Ron Ben-David's (Chair, Essential Services Commission of Victoria) submission to the 2017 Review of Electricity and Gas Retail Markets in Victoria.

clear mutual understanding of what the terms mean and what happens to customers after a ‘benefit period’ and/or ‘contract term’ expires is required.”

- The Grattan Institute’s March 2017 report on the retail electricity market also noted: “The possibility remains that consumers who think that they are getting a good deal find that, after a year, they are on one of the poorest deals in the market. In other words, for consumers to consistently get the best price they need to be consistently engaged in the market.”
- The Consumer Action Law Centre (CALC) submission to the Review of Electricity and Gas Retail Markets in Victoria noted: “... there is no regulatory requirement for a retailer to inform their customer that a benefit period is coming to an end—notification is only required with respect to impending contract expiry. The regulations do require retailers to inform customers of price changes within a contract, however this is arguably not required where a consumer is informed upfront that their benefit period will expire at some point.”

### **How the benefit period rule will address the stated concern**

The Government believes that timely, simple and clear information around changes to benefit periods would help support greater customer engagement and ultimately more competitive market outcomes. AEMC commissioned research<sup>9</sup> indicates that some vulnerable consumers are not seeking out offers due to limited access to, or poor confidence/comfort with online tools. The Australian Government considers a notice of the end of benefit periods for all consumers would also particularly improve vulnerable consumers’ retail energy market outcomes.

The proposed rule is designed to ensure customers are made aware of changes that impact the price of their electricity and gas bills. The rule is in line with best practice regulation principles ensuring transparency in contractual requirements which have significant financial impact – that is, in this case, making customers aware of changes within the term of a contract that could result in them paying more than they may have expected, or may otherwise be required to pay under much better market offers.

The rule also requires the retailer to make the customer aware of any contract termination fees or penalties. This is important because, in the absence of this information, the customer cannot make an informed decision about the financial benefit of switching to an alternative market offer. More simply, if a better contract would save the consumer \$150, but it costs \$160 in termination, administration or meter reading costs (etcetera), then it would make no financial sense for the customer to switch contracts.

The proposed rule also arms the consumer with knowledge about the Energy Made Easy service – the retail offer comparator service that is regulated by the NERL. Building customer awareness of this service will also encourage customer switching and a more competitive market.

### Other options

#### **Queensland derogation**

As a part of the Queensland Application Act of the National Energy Retail Law (2014), the Queensland Government introduced a derogation to the NERR requiring retailers to notify a customer when the

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<sup>9</sup> Newgate Research (2016) Understanding vulnerable customer experiences and needs.

'fixed benefit period' of a market retail contract is due to expire. The rule has the same general policy intention as the proposed rule change however the Queensland derogation does require retailer to provide 'alternative' contract options. This option was assessed, but it was considered that the new NERR rule on benefit periods would be more effective in achieving the objectives as discussed above.

The Queensland NERR derogation states:

*48A Retailer notice of end of fixed benefit period of a market retail contract*

- (1) If a market retail contract includes a fixed benefit period, a retailer must notify a small customer when the fixed benefit period is due to expire.*
- (2) The notice must be given—*
  - (a) no earlier than 40 business days before the fixed benefit period will expire; but*
  - (b) no later than 20 business days before the fixed benefit period will expire.*
- (3) The notice must state—*
  - (a) the date the fixed benefit period will expire; and*
  - (b) information about, and a general description of, the alternative contractual options that may be available to the small customer to purchase customer retail services for their premises; and*
  - (c) information about the ability of the small customer to choose an alternative retailer to purchase customer retail services after the fixed benefit period expires; and*
  - (d) the termination fees and other fees (if any) that will apply if the small customer decides to end the contract; and*
  - (e) details about the prices applicable to the sale of electricity to the premises concerned under the contract when the fixed benefit period expires.*

As the AER does not collect performance data on derogations, the impact of the Queensland rule 48A is unclear due to its recent introduction.

**A new rule requiring retailers to detail the discount on the bill**

In August 2015, the AER considered how discounts should be reflected in the Retail Pricing Information Guideline as prepared by the regulator in accordance with the Retail Law<sup>10</sup>. In adjusting the guidelines, the AER noted that discounts materially impact the price paid by consumers. As such, the AER established a new section in the Guidelines specifically addressing discounts (in all their forms) and how they impact customers' ability to compare offers. The revised Guideline in effect from 1 February 2016 required retailers to detail the following in their retail price fact sheets:

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<sup>10</sup> NERL S 61 refers

1. the amount and/or percentage of the discount
2. for percentage discounts, what portion of the customer's bill the discount applies to (for example, whether the discount is off usage, the supply charge or the whole bill)
3. the base level
4. where information on the base level can be found (for example, on the retailer's website or Energy Made Easy)
5. for dual fuel offers, which fuel(s) the discount applies to.<sup>11</sup>

The AER also recommended that if a retailer makes a representation in its marketing or advertising about a specific discount rate (that is, the amount and/or percentage of the discount), the retailer must also clearly indicate the additional details above (requirements 2-5). Each discount must be named and described using language that is clear, simple and widely understood.

While the Guideline does not extend to the design and content of retail bills, the Australian Consumer Law prohibits retailers from representing discounts in a manner which misleads or deceives consumers.<sup>12</sup> Thus, retailers' communication with customers should be broadly consistent with the guidelines. This is evident in that retailers do detail both the discounted and non-discounted price in their Bills, particularly as it regards conditional discounts.

While the Australian Government considers the AER Guideline in combination with the Australian Consumer Law are appropriate tools in providing transparency to consumers, the government considers the proposed rule will significantly enhance the existing protections and improve consumer and market outcomes.

### **Prohibiting benefit periods changing or expiring during a retail contract**

On 23 October 2013, the Consumer Utilities Advocacy Centre (CUAC) and the Consumer Action Law Centre (CALC) submitted a rule change request to the AEMC. The rule change request sought to make amendments to the NERR to prohibit retailers from including terms in their contracts that allow them to change their prices during the fixed term or fixed benefit period of market retail contracts.

The 2014 rule change process explored the issues associated with changes to price during a contract period including the loss of benefits like financial discounts. The objective of the initial rule was to address customer confusion around how fixed term contracts may change over time as not all fixed term contracts were also fixed price.

In October 2014, the AEMC made a more preferable rule that imposed upfront information provision requirements around retail market contracts.<sup>13</sup>

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<sup>12</sup> *Competition and Consumer Act 2010* (Cth) Sch 2 Australian Consumer Law ss 18, 29(1)(g), 29(1)(i).

<sup>13</sup> AEMC Final Determination Retailer price variations in market retail contracts

<http://www.aemc.gov.au/getattachment/9069a670-ca34-4372-84b3-67883623e19a/Final-determination.aspx>

The Government considers that given the issues raised by limiting the ability of retailers to vary prices, this should be addressed through a separate process, if required. It is thought the rule as proposed in the request will strike an appropriate balance.

## 5. Contribution to the National Energy Retail Objective

The National Energy Retail Objective, as stated in the National Energy Retail Law, is:

“...to promote efficient investment in, and efficient operation and use of, energy services for the long term interests of consumers of energy with respect to price, quality, safety, reliability and security of supply of energy.”

As discussed above, the proposed rule is expected to enhance the competitiveness of retail electricity and gas markets by encouraging greater consumer engagement with the market therefore promoting greater competition and more efficient pricing.

The new requirements improve the retailer relationship with customers and build customer awareness of the market. The inclusion of a requirement to promote Energy Made Easy will also create an opportunity to build customer awareness of the service at the very time customers are looking for a simple way to compare their options from a trusted source. Retailers may still provide additional services or information that goes beyond the requirements in the rule, if they consider that consumers are likely to place a high value on these services.

Given the second arm of the rule-making test in s236(2)(b) of the NERL, it is also noted that the implementation of this proposed rule is inherently compatible with the development and application of consumer protections for small customers. In its essence, the proposed rule could itself be described as a consumer protection measure as it equips consumers with greater knowledge of key aspects of their retail contract. In turn, it empowers consumers to seek out a better deal.

## 6. Benefits, costs and implications of the proposed rule

### **Benefits**

The Government considers that competitive retail energy markets provide the most effective mechanism for retailers to discover what consumers want and for consumers to discover the service and price combinations that retailers are offering. Competition is an iterative process that drives retailers to attract and retain customers, and for customers to seek out the deal that they consider best meets their needs.

For example, the conditional discounts associated with customers paying on time provides a benefit to customers as it reduces their overall bill, while also reducing the retailers' cost to serve as it reduces the level of credit they must support by prompting more timely payment practices.

It is predicted the beneficial impacts of effective and simple notices (ideally separate to the bill) would prompt positive behavioural responses by consumers. CSIRO found similar likely responses in a similar study it conducted around tariff reform.<sup>14</sup> Key behavioural benefits of the rule are that it will:

- build consumer trust in the market and limit the risk of bad consumer experiences
- reduce consumers fear of making the wrong choice by setting out simple and clear options
- help support consumer choice by framing and normalising features of the retail market contract (like time limited discounts).

### Risks, Implications and Treatment

<b>Risk</b>	<b>Treatment</b>
<i>The rule change would require retailers to prepare additional advice for customers on market contracts to notify them of the end of the benefit period. The cost of doing so may be passed on to consumers.</i>	<p>The rule proposed should not require adding any additional information than is presented in bills for customers under good retailer practice.</p> <p>While all new points of customer contact would imply some transaction cost, such cost is already being absorbed by retailers employing good practice around customer information and engagement.</p>
<i>Customers may not respond to the advice as expected, That is, customers may not change their behaviour or they may respond negatively to unsolicited contact.</i>	<p>Social marketing research indicates that communicating clearly and simply to consumers, highlighting the loss they may incur, (i.e. following the end of the benefit period), prompts consumers to explore their options including opting for a non-decision.</p> <p>Consumers that see value will engage in exploring their options. Noting recent stakeholder views around the potential for consumer confusion around the operation of benefit periods, the risk of a non-decision by some customers outweighs the less likely annoyance from unsolicited contact.<sup>15</sup> It is also expected that normalising this advice over time will steadily increase consumer engagement.</p> <p>Under the NERL, the AER will be required to report on retailer performance around information provision, including this new rule, if adopted.</p>
<i>Reducing the agency of retailers to market to customers as they choose and therefore impact their ability to compete</i>	<p>This rule change proposal avoids stipulating the specific form of the information to be provided to consumers.</p> <p>The rule's focus on factual information around important contractual events, and the promotion of Energy Made Easy, should not adversely impact the retailer as they can use the contact as an opportunity to build customer satisfaction and trust.</p> <p>Noting the low consumer awareness of Energy Made Easy and the benefits to consumer confidence through increased awareness of the service, the overall benefit to all retailers in greater consumer satisfaction is considered greater than the risk of increased costs of retention. These costs should inevitably appear in an effective competitive market anyway as it matures.</p>

<sup>14</sup> Stenner, Karen, Frederiks, Elisha, Hobman Elizabeth V. and Meikle, Sarah CSIRO, Australian Consumers' Likely Response to Cost- Reflective Electricity Pricing July 2015

<sup>15</sup> AER Retail Pricing Guideline 2015

<https://www.aer.gov.au/system/files/AER%20Retail%20Pricing%20Information%20Guidelines%20-%20August%202015.PDF>