

Ensuring energy contracts are clear and fair

Final decision

28 February 2020

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Executive summary

In August 2017, the final report of the Independent Review into the Electricity and Gas Retail Markets in Victoria concluded the market was not working for consumers. The review made a number of recommendations designed to reform the market and address failures identified. The guiding principle for these reforms was that energy is an essential service and the retail energy market should deliver benefits to all consumers, not just to those willing and able to engage.

In the words of the review:

Consumers are entitled to obtain easily understandable energy offers and enter into energy contracts that provide value for money and don't contain negative surprises.

The recommendations made by the review proposed changes to deliver this outcome for all customers. We have already implemented reforms that go some way toward achieving this, by making it easier for customers to navigate the market and make informed choices and giving all customers access to a fair electricity price.

Since 1 July 2019 customers on electricity standing offers have benefited from the introduction of the Victorian Default Offer (VDO), a reasonably priced electricity offer set by the commission. Retailers must also now regularly notify customers if they are on their retailer's best offer, provide clear upfront advice on contract terms when a customer is signing up to a plan, and notify customers in advance of any price or benefit changes.

The clear and fair contract reforms are important to continue building trust in the market by giving customers greater certainty over what to expect throughout their contract.

The reforms in this final decision will address issues raised by the review including:

- retailers being able to change prices at any time during a market contract
- customers needing to engage before the end of a benefit or contract period to avoid potentially losing benefits or being rolled onto a more expensive offer
- customers with increasingly large conditional discounts being disproportionately affected by missing offer conditions like paying on time.

Our new rules will give price certainty to Victorian customers on existing and new contracts, make contract practices clearer and simpler for customers, and add safeguard protections for customers.

This final decision also includes changes relating to the marketing of gas and electricity offers and including information about the VDO on electricity bills. This will further support customers in navigating the market and choosing a contract that meets their needs.

New entitlements for customers

Price certainty

From 1 July 2020, retailers are only allowed to increase prices for customers once a year. For many customers, this will happen on a set date one month after network tariff prices change. Customers on fixed-price contracts will only experience any price increases on the anniversary of their initial fixed-price period expiring. Retailers must clearly communicate the time at which prices may change with their customers.

More frequent price increases are only allowed in certain cases, where retailers can demonstrate the innovative nature of a product, and on conditions that we determine.

Clearer and simpler contract and discounting practices

Retailers will no longer be able to stop offering discounts, credits or rebates part-way through a contract. From 1 July 2020, any customer signing up to an offer with a discount, credit or rebate will receive that benefit for the entire duration of a contract.

This change will remove the confusing practice of benefit periods ending part-way through a contract and simplify the choice of contracts for customers. Retailers can either offer ongoing (evergreen) contracts with no fixed end date, in which case any discounts, credits or rebates will also not have an end date. Or retailers can choose to offer fixed-term contracts of 12 months or more that only offer discounts for that fixed period.

Retailers advertising electricity offers must also reference prices to the VDO. This will ensure customers can compare 'apples with apples' and more easily assess which offers represent best value for money.

Safeguard protections

We are capping the size of pay-on-time discounts retailers can offer on new contracts from 1 July 2020. Customers on these contracts who pay a bill late will no longer be disproportionately penalised for doing so. The cap will be based on retailers' cost of debt.

We are also establishing protections for customers on existing contracts with pay-on-time discounts who have difficulty paying their bills. If a customer is receiving tailored assistance from their retailer and misses a bill payment, their retailer must honour the pay-on-time discount.

If a customer chooses a contract with a fixed end date and does not give explicit informed consent at the end of that contract to move onto another offer, their retailer must roll them onto the VDO (for electricity) or best offer (for gas). The rule changes to give effect to this for gas customers will be made later in the year pending legislative amendments. We will issue a technical consultation on the required code amendments before these rule changes take effect.

Improved information to help customers assess offers

Retailers will also be required to include specified information about the VDO on electricity bills. This will ensure customers are aware of the VDO and may prompt them to discuss the suitability of this option with their retailer.

Commencement

The reforms in this final decision that give effect to recommendations 3A and 4A-4E and including information about the VDO on electricity bills come into effect from 1 July 2020.

We are consulting further on the government's commitment to reduce the allowable back-billing period to make changes to energy distribution and retail codes. Alongside this final decision, we have published a draft decision proposing changes to the Energy Retail Code, Electricity Distribution Code and Gas Distribution Code.¹ We are proposing that these changes take effect from 1 January 2021.

Audit and monitoring

We will monitor and audit the impact of these reforms and how retailers have responded, including through our regular energy market reporting and our new review into the competitiveness and efficiency of the market. This includes monitoring retailer practices relating to gas customer experiences of the market (in the absence of a gas reference price), legacy contracts (to better understand that cohort of customers and inform whether other regulatory interventions are required in the future) and offering products that are exempted from prices increasing once a year.

We will report our findings publicly to ensure the community is well-informed about how retailers have responded to their new responsibilities and take enforcement action where necessary.

Consultation on our decision

Throughout the process of developing these new entitlements, we consulted extensively with stakeholders through workshops, one-on-one meetings and reference group meetings.

We released an issues paper on 5 June 2019, to which we received 16 written submissions – 10 from retailers, three from consumer organisations, and one each from the Energy and Water Ombudsman (Victoria), Australian Energy Council and a consumer.

We released a draft decision on 10 December 2019, to which we received 21 written submissions – 15 from retailers, two from consumer organisations, one from the ombudsman, one from the

¹ Essential Services Commission, [Changing the back-billing rules for retail energy customers: draft decision](#), February 2020.

Australian Energy Council and two from consumers via Engage Victoria. An expert panel, appointed by the Minister for Energy, Environment and Climate Change, met with the commission twice during the draft decision consultation.

We would like to thank stakeholders for their involvement and contributions to the process.

Our final decisions

This section contains our final position on the changes we proposed in our draft decision. Table 1 sets out the changes we have made between draft and final decisions.

Table 1 Summary of changes between draft and final decision

Element	#	Decision	Status	Description
Ensuring customers can easily compare offers	1	New objective for marketing energy offers	Unchanged	
	2	Marketing electricity offers with reference to the VDO	Modified	Clarified requirement for reference comparison to be made during advertising. Excluded demand tariffs
	3	Electricity reference price requirements	Unchanged	
	4	Banning advertising of headline conditional discounts	Unchanged	
	5	Banning misleading and deceptive conduct	Unchanged	Added as a final decision but policy intent unchanged from draft decision
Fixing market contract prices	6	Existing market contract prices can only increase when the VDO price changes	Modified	Amended the price increase date to a month after network tariff prices change. Also allowed retailers to offer 12-month or longer fixed-price contracts
	7	Offering products that are not compatible with limiting price increases to once a year subject to certain conditions	Unchanged	
	8	Disclosing the length of time prices will be available without change	Unchanged	
Protecting customers at the	9	Offering ongoing financial benefits for the duration of a	Modified	Amended scope so rule only applies to new contracts from

end of benefit and contract periods	contract		1 July 2020
	10 Rolling customers onto the VDO (for electricity) or best offer (for gas) at the end of a fixed-term contract	Unchanged	Policy intent unchanged, but changes to give effect to gas will be made at a later date
Regulating conditional discounts	11 Capping pay-on-time discounts	Unchanged	
	12 Aligning the energy pay-on-time discount cap methodology with the commission's existing methodology for water	Unchanged	
	13 Methodology for capping pay-on-time discounts	Modified	Debt risk premium modified
	14 Timing of updating the cap	Modified	Cap will be based on data as of 31 March each year
	15 Process for announcing updated cap	Modified	Retailers will be notified of any change in the level of the pay-on-time discount cap in early May each year
	16 Honouring pay-on-time discounts for customers receiving tailored assistance	Unchanged	
Including information about the VDO on bills	17 Including information about accessing the VDO on electricity bills	Modified	Amended wording to be included on bills
Changing the back-billing rules	18 Reducing the allowable back-billing period	Modified	Policy intent unchanged but we are consulting further on changes to energy distribution and retail codes
Implementation	19 Commencement of code amendments	Modified	Back-billing requirements to commence from 1 Jan 2021

Final decision 1: New objective for marketing energy offers

Retailers must market gas and electricity offers in a clear and easily understood manner.

Final decision 2: Retailers must market electricity offers with reference to the VDO

Retailers must use the VDO as a reference price for all electricity offers.

Retailers must make a reference price comparison whenever they advertise an electricity offer (other than demand tariff) to a customer.

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Final decision 3: Electricity reference price requirements

An electricity reference price comparison must include:

- the difference between the VDO price and unconditional price, as a percentage of the VDO price
- for each conditional discount, rebate or credit mentioned, the difference between the unconditional price and conditional price, as a percentage of the VDO price
- the lowest possible price
- the conditions of any conditional discounts, rebates or credits
- the distribution zone and type of small customer.

Final decision 4: Retailers must not advertise headline conditional discounts

Retailers must not advertise conditional discounts as the most prominent feature in gas or electricity advertisements, marketing or promotions.

Final decision 5: New clause prohibiting misleading and deceptive conduct

Retailers must not engage in misleading or deceptive conduct or make a false or misleading representation. The Energy Retail Code will mirror relevant Australian Consumer Law provisions.

Final decision 6: Retailers can only increase existing market contract prices once a year

Retailers can only increase prices of existing market contracts once a year, either:

- on the day that is one month after network tariff prices change, or
- on the anniversary date of a customer's initial fixed price period expiring (where the initial fixed price period must be no less than 12 months).

Final decision 7: Retailers can offer innovative products that are not compatible with limiting price increases to once a year in certain cases and subject to conditions

Retailers can offer innovative products that are not compatible with limiting price increases to once a year via:

- a standing exemption, under which specific categories of product nominated by the commission are automatically exempt from once-a-year price increases, or
- commission-granted exemption, if a retailer can demonstrate that its product is genuinely innovative.

Retailers offering products under either a standing or commission-granted exemption must:

- make customers signing up to these products aware of additional factors when obtaining explicit informed consent

- report regularly to the commission and
- conduct tariff reviews for customers on these products who become eligible for tailored assistance.

Final decision 8: Retailers must disclose the length of time prices will be available without change

At the point of entering a contract, as part of the existing clear advice entitlement, retailers must clearly disclose when prices will change and, if known, the magnitude of any anticipated changes.

After a customer has signed up to an offer, existing rules require retailers to give advance notice of any price changes and tell the customer about their best offer.

Final decision 9: Retailers must offer any ongoing financial benefits for the duration of a contract

Benefit and contract periods will be aligned, so customers receive any ongoing discounts, credits or rebates for the entire duration of a contract. Retailers must not change these benefits during the contract term. Additionally, fixed-term contract lengths cannot be less than 12 months.

This applies only to new contracts from 1 July 2020.

Final decision 10: At the end of a fixed-term contract retailers must roll customers onto the VDO (electricity) or best offer (gas)

At the end of a fixed-term electricity contract, if a customer does not give explicit informed consent to move to a different offer, their retailer must automatically roll them onto the VDO.

We intend to introduce rules requiring retailers to roll gas customers onto their retailer's best offer at the end of a fixed-term contract, if the customer does not give explicit informed consent to move to another offer. We will make these changes later in the year following legislative amendments.

Final decision 11: Pay-on-time discounts to be capped by the commission

A pay-on-time discount cap will be determined by the commission and apply to new contracts from 1 July 2020.

Final decision 12: Aligning the methodology for capping energy pay-on-time discounts with the commission's existing methodology for water

The methodology used to determine the pay-on-time discount cap for energy retailers will be consistent with the commission's established methodology for capping water interest rates.

Final decision 13: Methodology for capping pay-on-time discounts

The pay-on-time discount cap will be the sum of:

- the 10-year Australian Commonwealth Government Bond Rate

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- a debt risk premium
- an allowance for debt raising costs.

Final decision 14: Updating the pay-on-time discount cap

The pay-on-time discount cap will be updated annually. It will be based on data as at 31 March each year and will take effect on 1 July each year.

Final decision 15: Process for announcing updated pay-on-time discount cap

The commission will update its guideline and communicate any change in the level of the pay-on-time discount cap in writing to energy retailers in early May each year.

Final decision 16: Retailers must honour pay-on-time discounts for customers receiving tailored assistance

Retailers must honour pay-on-time discounts for customers receiving tailored assistance.

Final decision 17: Retailers must include information about accessing the VDO on electricity bills

From 1 July 2020, retailers must include prescribed text on all electricity bills, which explains how a customer can access the VDO.

Final decision 18: Reducing the allowable back-billing period to four months

We have published a separate draft decision to consult on the proposed back-billing changes for both energy retailers and distributors.

Final decision 19: Commencement date of code amendments

The code amendments giving effect to recommendations 3A and 4A-4E and the requirement to include information about the VDO on electricity bills will take effect from 1 July 2020.

We expect the code amendments giving effect to the back-billing rule change will take effect on 1 January 2021.

1. Context for this decision

Independent Review into the Electricity and Gas Retail Markets in Victoria

In November 2016, the Victorian Government appointed an independent panel to conduct a review of electricity and gas retail markets in Victoria. In August 2017, the review released its final report and concluded the market was not working for consumers. In reaching its conclusion, the review found Victorians were paying 'unusually high' electricity prices compared to other jurisdictions.

The review made 29 detailed recommendations, under eleven areas, aimed at improving energy market outcomes for consumers, including changing retailer marketing practices, improving market monitoring, establishing a regulated basic service offer and abolishing standing offer contracts.

The Victorian Government response

In March 2018, the government referred terms of reference to the Essential Services Commission under section 10(g) of the Essential Services Commission Act 2001. These terms of reference were for the commission to review the Energy Retail Code (the code) to give effect to:

- customer outcomes in the energy market, relating to recommendations 3A-3H and 9
- efficient pricing in the energy market, relating to recommendation 8.

In October 2018, the government issued its final response to the review, which supported all recommendations subject to some refinements. In December 2018, the government referred terms of reference for the commission to review the code to give effect to recommendation 4, relating to ensuring contracts are clear and fair.²

New customer entitlements to build trust

We have already given effect to recommendations 3B-3H via two rounds of code amendments, made in October 2018 and March 2019. These code amendments took effect from 1 July 2019.

These rules were intended to restore trust and confidence in the market by requiring retailers to do more to help customers understand, compare and switch energy plans.

² See appendix A for the recommendation 4 terms of reference.

Ensuring contract periods, practices and variations are clear and fair

We are now implementing recommendations 3A and 4A-4E. These recommendations promote clear and fair contract periods, practices (including discounting) and variations.

Table 2 Recommendations made by the review relating to contract and discounting practices

Recommendations from the review	
3A	Require retailers to market their offers in dollar terms, rather than as percentages or unanchored discounts.
4A	Require retailers to commit to fix any prices they are offering for a minimum of 12 months. During this period, the market contract prices cannot change. Retailers may request an exemption from the ESC to address unforeseen changes in network costs.
4B	Require retailers to clearly disclose to customers the length of time any offered prices will be available without change.
4C	Require retailers to roll customers onto the nearest matching, generally available offer at the end of a contract or benefit period, unless the customer opts for another offer.
4D	Any conditional discount or other benefit offered for paying on-time or on-line billing should be evergreen. Customers should not lose the discount or other benefit when the contract ends.
4E	Costs incurred by customers for failing to meet offer conditions are to be capped and not be higher than the reasonable cost to the retailer.

Related developments

Regulating conditional discounts

In February 2019, the Australian Government submitted a rule change request to the Australian Energy Market Commission to change the National Energy Retail Rules to ensure conditional discounts for gas and electricity retail offers are no higher than the reasonable cost savings a retailer expects to make if a customer satisfies the conditions attached to the discount.³ This rule change request is in line with a recommendation made by the Australian Competition and Consumer Commission in its Retail Electricity Pricing Inquiry.⁴ The Australian Energy Market

³ For more information see <https://www.aemc.gov.au/rule-changes/regulating-conditional-discounting>.

⁴ Australian Competition and Consumer Commission, [Retail Electricity Pricing Inquiry – Final Report](#), July 2018. p. xxii.

Commission has now finalised this rule change, which takes effect from 1 July 2020.⁵ As the National Energy Retail Rules do not apply in Victoria, this rule change will only apply in Queensland, New South Wales, South Australia, Tasmania and the Australian Capital Territory.

Additionally since July 2018, an Australian Energy Market Commission rule change that prevents discounts on inflated energy rates has also been in effect in the National Energy Retail Rules.⁶ The intention of this rule change was to prevent the practice of retailers applying discounts to rates that are inflated above their standing offers, so if a customer fails to meet the offer conditions they end up paying substantially more than the equivalent standing offer.

Banning headline conditional discounts

Since 1 July 2019, Australian Government regulations have banned headline conditional discounts for electricity.⁷ This means conditional discounts are no longer allowed to be the price-related matter that is mentioned most conspicuously in any advertisement of an electricity offer. These regulations also require advertisements to clearly and conspicuously state the conditions on any conditional discount.

VDO Order

On 30 May 2019, the Victorian Government issued an Order in Council to implement the VDO (VDO Order).⁸ The VDO Order directs the commission to amend the code so that retailers are required to (a) use the VDO as a reference price for tariffs with discounts, and (b) provide information on electricity bills about how a customer can access the VDO. This final decision includes code amendments that give effect to these requirements.

Energy Fairness Plan

In its Energy Fairness Plan, the government announced its intention to reduce the period available for retailers to back-bill energy consumers. In December 2019, the government referred terms of reference for the commission to review the code to give effect to this commitment.⁹

⁵ Australian Energy Market Commission, [Rule determination: national energy retail amendment \(regulating conditional discounting\) rule](#), February 2020.

⁶ For more information see <https://www.aemc.gov.au/rule-changes/preventing-discounts-on-inflated-energy-rates>.

⁷ Competition and Consumer (Industry Code—Electricity Retail) Regulations 2019.

⁸ Victoria Government Gazette, Order under section 13 of the Electricity Industry Act 2000, May 2019.

⁹ See appendix A for the back-billing terms of reference.

Our approach in reaching this final decision

In developing our final decision, we consulted extensively with a wide range of stakeholders through a series of workshops, meetings with consumer groups, retailers and other stakeholders, reference group meetings and submissions on our issues paper and draft decision.

In June 2019, we released an issues paper and held a workshop with stakeholders to discuss options for implementing recommendations 3A and 4A-4E.

An overarching theme raised by stakeholders was the need to consider the recommendations collectively rather than in isolation, and in the context of the current market.¹⁰

Retailers noted the review recommendations were made two years ago and practices have evolved since then, particularly given new rules that came into effect on 1 July 2019.¹¹ In contrast, consumer organisations and the Energy and Water Ombudsman (Victoria) considered the recommendations were still relevant to provide additional protections for disengaged customers.¹²

Following feedback on our issues paper, we issued a notice to all electricity retailers in Victoria to obtain data on how much customers paid for electricity and contract types. Our analysis found there are still some retailer practices in relation to contracting and discounting that support the need for implementing recommendations 3A and 4A-4E. Full details of the analysis presented in our December 2019 draft decision can be found in appendix F.

Our draft decision was also underpinned by:

- consumer testing to better understand how customers respond to different ways of presenting energy prices, to inform the implementation of recommendation 3A
- engaging academic economists to provide an independent view of implementation options and relevant market design considerations for recommendation 4A
- continuing to engage with stakeholders.

We received 21 submissions on our draft decision. These, along with our ongoing discussions and mid-January workshop with stakeholders, helped inform our final decision.

¹⁰ AGL Energy, Alinta Energy, Australian Energy Council, EnergyAustralia, Energy and Water Ombudsman (Victoria), Origin Energy and Powershop, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' issues paper, July 2019.

¹¹ AGL Energy, Alinta Energy, Australian Energy Council, EnergyAustralia, Momentum Energy, Powershop, Red Energy and Lumo Energy and Simply Energy, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' issues paper, July 2019.

¹² Brotherhood of St Laurence, Consumer Action Law Centre and Council On The Ageing, Energy and Water Ombudsman (Victoria) and Victorian Council of Social Service, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' issues paper, July 2019.

Our final decision, like our draft decision, seeks to strike a proportionate and pragmatic approach to delivering the intent of the recommendations set out in the terms of reference. We are mindful of our statutory objective to promote protections for customers, including those who are facing payment difficulty.¹³ Appendix I summarises the commission’s role and our overarching objective.

We believe our final decision strengthens protections for customers, while maintaining flexibility for retailers to develop innovative product offerings.

Consultation in the development of our final decision

Table 3 summarises key consultation milestones and workshops that have contributed to the development of this final decision.

Table 3 Key stakeholder interactions that have informed this decision

Date	Stakeholder interaction
5 June 2019	Issues paper Presented options for implementing recommendations 3A and 4A-4E and sought early views on operational challenges and opportunities. Submissions closed 2 July 2019.
17 June 2019	Workshop on issues paper Stakeholders gave feedback on the options presented in the issues paper.
27 August 2019	Victorian energy open forum We presented an update for stakeholders on the implementation of recommendations 3A and 4A-4E.
3 October 2019	Workshop on gas reference pricing Stakeholders discussed options for presenting discounts on gas tariffs.
10 December 2019	Draft decision Draft decision on implementing recommendations 3A and 4A-4E, requirements to include information about the VDO on bills and back-billing rule change. A stakeholder briefing was held on 10 December 2019. Submissions closed 21 January 2020.
14 January 2020	Workshop on draft decision Stakeholders gave feedback on the draft decision proposals.

¹³ The Essential Services Commission Act 2001 sets out the commission’s overarching statutory objective to promote the long-term interests of Victorian consumers. The commission is also guided by objectives under the Electricity Industry Act 2000 and Gas Industry Act 2001 to promote the protections for customers, including in relation to customers who are facing payment difficulty. See appendix I for more information on the role of the commission.

In addition to this engagement, we:

- established a reference group consisting of energy retailers, consumer organisations, the Energy and Water Ombudsman (Victoria), industry bodies and academics. This forum has been instrumental in helping us understand the key issues from a variety of perspectives. We met monthly over the course of this project and published meeting minutes on our website¹⁴
- met twice with an expert panel consisting of Catriona Lowe (first meeting only), Claire Thomas (chair), John Bradley (first meeting only), Dr Kris Funston and Patricia Faulkner, in line with the terms of reference for this work
- held one-on-one meetings with stakeholders throughout the course of the project. During the consultation period for our draft decision in December 2019 to January 2020 we engaged bilaterally with over 20 stakeholders to understand views on our proposals.

We received 21 submissions on our draft decision. The parties who made submissions are listed below. Their submissions are available on our website:

- 1st Energy
- AGL
- Alinta Energy
- amaysim
- Australian Energy Council
- Consumer Action Law Centre
- Elysian Energy
- Energy and Water Ombudsman (Victoria)
- EnergyAustralia
- ERM Power
- Globird Energy
- Momentum Energy
- Origin Energy
- Powershop
- Red Energy and Lumo Energy
- Simply Energy
- Submissions via Engage Victoria from two members of the public
- Sumo
- Tango Energy
- Victorian Council of Social Service.

¹⁴ For more details, see <https://www.esc.vic.gov.au/electricity-and-gas/inquiries-studies-and-reviews/electricity-and-gas-retail-markets-review-implementation-2018>.

2. Ensuring customers can easily compare offers

Retailers must market gas and electricity offers clearly, in accordance with the new objective we have introduced in the marketing division of the code.

Retailers must advertise any electricity offer (except demand tariffs) with reference to the VDO, in accordance with rules set out in the code and explained further in the 'advertising energy prices' guideline.

When advertising gas or electricity offers, retailers must not include any conditional discount as the most prominent feature of the advertisement.

These requirements ensure offers are mass-marketed in a standardised way, making it easier for customers to compare offers between retailers, but give retailers flexibility to tailor information when they are having a personalised conversation with a customer under the clear advice entitlement.

These rules give effect to the policy intent of recommendation 3A of the review, and the requirements in the May 2019 VDO Order.

The review found that discounts can be difficult for customers to understand, noting that it is often not clear whether the discount is from the total bill or just one component of the tariff.

Recommendation 3A sought to ensure offers are marketed in dollar terms, rather than as percentages or unanchored discounts. This was intended to ensure offers are marketed in a standard way, making it easier for customers to compare and ultimately select an offer, particularly those with discounts.

Requiring retailers to market energy offers clearly

Draft decision proposal

In our December 2019 draft decision, we proposed to give effect to recommendation 3A by introducing a new objective for the marketing division of the code that requires retailers to market both gas and electricity offers in a clear and easily understood manner.

Our draft decision outlined the role of reference pricing in making it easier for customers to compare energy offers and the transparency that is afforded to customers with a common anchor such as the VDO. We considered that the benefits to customers of developing a gas reference price would likely be similar to those in the electricity market, given that issues around the size and prevalence of conditional discounting are relevant to both markets.

In the absence of a VDO for gas, we canvassed possible methods to establish a reference price for gas retail offers with our stakeholders and found there are a number of limitations in developing one at this time.

We therefore concluded that we would revisit consideration of a gas reference price if the government asks us to set a VDO for gas, or if our ongoing monitoring of the market indicates issues with how gas customers are experiencing the market that could be addressed by the creation of a reference price.

Stakeholder views

Stakeholders generally appreciated the challenges in developing an appropriate reference price for gas offers and understood our proposed decision to not establish a reference price at this time. Some stakeholders raised concerns about the impact of differing rules for gas and electricity offers in this area.¹⁵

Simply Energy questioned how gas offers should be advertised in the absence of a reference price, given that conditional discounts are not allowed to be the most prominent feature in gas advertisements, marketing or promotions.¹⁶ AGL considered that customers may be confused by differences in how retailers market electricity and gas offers.¹⁷

Consumer organisations welcomed the proposed package of rules around marketing electricity offers but were concerned about the lack of equivalent protections for gas offers. The Consumer Action Law Centre and Victorian Council for Social Services supported the development of a VDO for gas, both to give disengaged customers access to a fair price for gas and to enable consistent reference pricing for gas and electricity.¹⁸

The Energy and Water Ombudsman (Victoria) noted that a lack of a gas reference price puts more pressure on the new marketing objective and rule banning headline conditional discounts to achieve the policy intent of recommendation 3A for gas offers. It supported our commitment to

¹⁵ AGL, Consumer Action Law Centre, Energy and Water Ombudsman (Victoria), Simply Energy and Victorian Council of Social Services, submissions to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹⁶ Simply Energy, submission to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹⁷ AGL, submission to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹⁸ Consumer Action Law Centre and Victorian Council of Social Services, submissions to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

actively monitor customer experiences in understanding gas retail prices and noted that a reference price may still be required in the future.¹⁹

Our response and final decision

We acknowledge the comments made around the differing protections for gas and electricity customers and appreciate that without a gas reference price there will, by necessity, be differences in how retailers advertise offers to customers. However as the challenges outlined in our draft decision around developing a methodology and the absence of a government mandate for a gas VDO remain, we will not develop a gas reference price at this time.

We remain committed to monitoring how gas customers are experiencing the market and whether the creation of a reference price could address any outstanding issues.

The reference price requirements in electricity provide some transferable concepts that apply to the marketing of gas offers. For example, focusing on the unconditional price of the offer and clearly articulating any conditional elements of the offer separately. The onus is on retailers to determine the best way of marketing offers, particularly for gas, to ensure that customers are not confused.

Our final decision is therefore to adopt our draft decision in relation to the objective for marketing energy offers.

Final decision 1: New objective for marketing energy offers

Retailers must market gas and electricity offers in a clear and easily understood manner.

Electricity reference price requirements

Draft decision proposal

Our December 2019 draft decision proposed to require retailers use the VDO as a reference price for all electricity offers, and to make a reference price comparison whenever they advertised an electricity offer to a customer. These requirements are consistent with national price disclosure requirements (set out in the Australian Government's Electricity Retail Code²⁰).

¹⁹ Energy and Water Ombudsman (Victoria), submission to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

²⁰ Competition and Consumer (Industry Code—Electricity Retail) Regulations 2019, available on the [Australian Government Federal Register of Legislation](#).

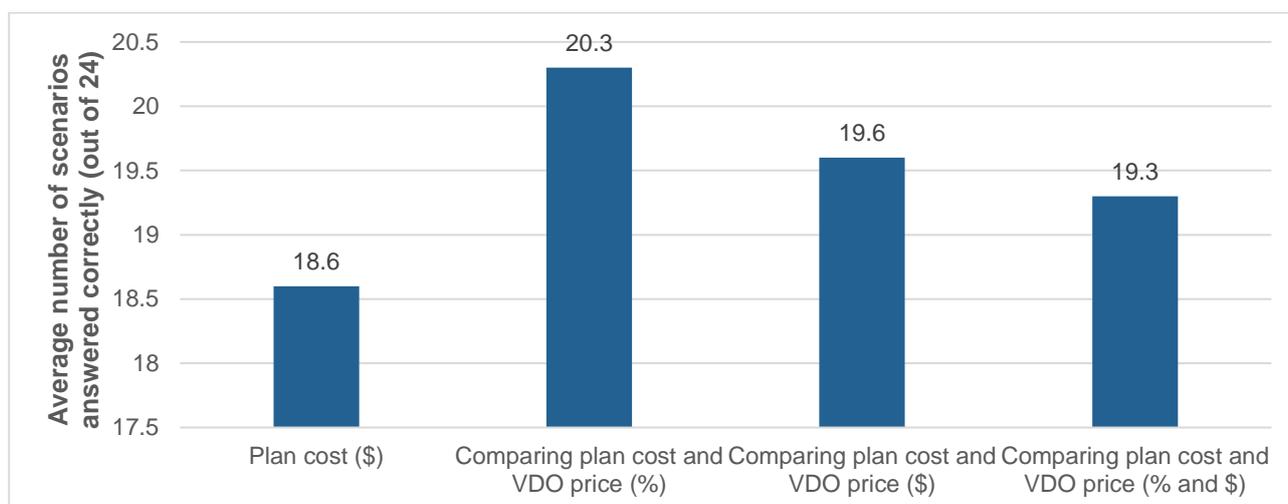
Our draft decision included a draft guideline²¹ that provided more detail on the proposed requirements and mirrored the Australian Competition and Consumer Commission’s guide to the national requirements.²²

We conducted consumer testing to better understand how customers respond to different ways of presenting VDO price comparisons. We presented a representative sample of Victorian customers with pairs of energy plans and asked them to identify the cheapest. Respondents were randomised into one of four groups, who were shown the following headline information about the plans:

- How much the plan would cost per year in dollars.
- How the plan cost compares to the VDO price as a percentage.
- How the plan cost compares to the VDO price in dollars.
- How the plan cost compares to the VDO price both as a percentage and in dollars.

The results (summarised in figure 1) showed that customers were able to correctly identify the cheapest plan more often when the headline information in the advertisement showed how the cost of the plan compared to the VDO price as a percentage. This was more pronounced for respondents with lower financial literacy skills and those from culturally and linguistically diverse backgrounds.²³

Figure 1 Key results from consumer testing



Source: Behavioural Insights Team

²¹ Essential Services Commission, [Ensuring energy contracts are clear and fair: draft decision](#), December 2019, appendix C (pp. 79-95).

²² Australian Competition and Consumer Commission, [Guide to the Electricity Retail Code](#), June 2019.

²³ For a more detailed summary of the consumer testing, see appendix G. The full report is available on our [website](#).

Our December 2019 draft decision therefore proposed to require the headline information in an advertisement to be how the cost compared to the VDO price as a percentage. This is consistent with national price disclosure requirements.

We proposed that when retailers make a VDO price comparison, they must show:

- the difference between the VDO price²⁴ and the unconditional price²⁵, as a percentage of the VDO price
- for each conditional discount, rebate or credit mentioned, the difference between the unconditional price and the conditional price,²⁶ as a percentage of the VDO price. This must be articulated separately for each conditional discount, rebate or credit that applies to the offer
- the lowest possible price²⁷
- the conditions of any conditional discounts, rebates or credits
- the distribution zone and type of small customer the prices in the advertisement are based on.

These VDO price requirements include both one-off and ongoing discounts, credits or rebates.

Stakeholder views and our response

Stakeholders supported our draft decision to require the VDO to be used as a reference price for electricity offers.²⁸ Stakeholders were particularly supportive of our decision to align with equivalent national price disclosure requirements. Origin Energy noted the Australian Government is reviewing these national requirements and requested we incorporate any changes in our final decision.^{29,30}

Some stakeholders raised specific comments and questions on certain elements of the proposed requirements. These included:

²⁴ The estimated annual cost of the VDO based on annual reference consumption figures specified in the VDO Order.

²⁵ The total price a customer would pay based on annual reference consumption, including any guaranteed discounts, credits or rebates and excluding any conditional discounts, credits or rebates.

²⁶ The price that would be paid if the conditions for the discount, rebate or credit were met.

²⁷ The total price a customer would pay based on annual reference consumption, including all guaranteed and conditional discounts, credits or rebates.

²⁸ Australian Energy Council, Consumer Action Law Centre, EnergyAustralia, Energy and Water Ombudsman (Victoria), Momentum Energy, Origin Energy, Powershop, Red Energy and Lumo Energy, Simply Energy and Tango Energy, submissions to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

²⁹ Origin Energy, submission to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

³⁰ Australian Government, [Competition and Consumer Legislation Amendment \(Electricity Retail\) Regulations 2019 – consultation](#), October 2019.

- when reference price comparisons should be made in the marketing and contracting process, and how this interacts with the clear advice entitlement
- requests for flexibility in information shown for advertising formats with restricted space
- requests for exemptions from reference price requirements for certain types of tariff
- seeking clarification on aspects of the guideline.

We discuss these comments further in the following sections.

When reference price comparisons should be made

Red Energy and Lumo Energy sought clarity about the relationship between the reference price requirements and the clear advice entitlement.³¹ They considered requiring retailers to provide reference price information, which uses benchmark consumption and is not tailored to the customer, during a clear advice discussion would be unhelpful. They suggested the clear advice entitlement is sufficient to deliver our policy intent once the retailer is having a personalised conversation with a customer, and as such the proposed clause 64G in the code is not necessary.³²

EnergyAustralia also sought changes to proposed clause 64G, to enable retailers to take a customer's expected usage into account when comparing the unconditional price with the reference price. As currently drafted, clause 64G would only allow this for the lowest possible price.³³

AGL considered that a reference price comparison should not be included in material provided to customers when recontracting. This is because customers will be placed on the VDO if they didn't give explicit informed consent to be placed on another offer.³⁴

We have considered when retailers should make reference price comparisons, both in light of stakeholder comments and changes to the national requirements that require retailers to make a reference price comparison whenever they 'communicate' an electricity offer to a customer.

We have decided to amend the code drafting so retailers are only required to make a reference price comparison when they 'advertise' an electricity offer.³⁵ Our intent is that retailers are required

³¹ Red Energy and Lumo Energy, submission to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

³² The clear advice entitlement is in Part 2A, Division 2, Clause 70H of the Energy Retail Code.

Clause 64G enables a retailer to display the lowest possible price of an offer based on a customer's estimated consumption rather than a representative customer.

³³ EnergyAustralia, submission to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

³⁴ AGL, submission to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

to make reference price comparisons when mass marketing an offer, but once they are having a personalised conversation with a customer about an offer, the clear advice entitlement applies. At this point the retailer can use tailored consumption estimates to explain the price a customer might expect to pay.

We consider this will allow customers to make a more informed decision than simply a reference price comparison. We have therefore removed clause 64G to ensure there is no ambiguity about how the clear advice entitlement interacts with reference price requirements.

We note this represents a difference from the national requirements, where retailers are required to show reference price comparisons whenever they communicate an electricity offer to a customer, including on price change notifications. However, we contend that the difference from the national framework is required because the Victorian framework provides opportunities for retailers to present plans with respect to a customer's actual consumption, rather than benchmark comparisons, and this provides Victorian customers with better information and tools to use in the market.³⁶

Flexibility in information shown for certain advertising formats

EnergyAustralia sought flexibility for less mandatory reference price information to be displayed in certain advertising formats where space or characters are limited such as radio, television and social media.³⁷ It suggested the advertisement could instead contain a link to the retailer's webpage where the additional reference price information would be available.

We note stakeholder concerns about the amount of information required to be communicated in a reference price comparison, and the challenges this may raise where advertising space is limited. It is important to note that reference price requirements only apply to price-based advertising. Retailers have flexibility in how they advertise where specific prices are not mentioned.

The electricity reference price requirements are intended to enable a customer to compare offers across the market easily and consistently. We consider that allowing retailers flexibility to include

³⁵ 'Advertise' is defined in the Code for the purposes of this requirement. To summarise, 'advertise' includes any mass-marketing campaign or communication (whether oral or in writing) to publicise a retailer's prices to customers, and does not include any communication directly with a customer regarding a retailer's offered prices, as long as that communication is made in accordance with part 2A of the Code (which includes the clear advice entitlement). See clause 64E in appendix B for the full definition.

³⁶ For example, price change notifications in Victoria contain the best offer message which is based a customer's actual consumption.

³⁷ EnergyAustralia, submission to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

only information they can fit into an advertising space would undermine the ability for consumers to access consistent information, and therefore the intent of this obligation.

We are also concerned that leaving out certain pieces of information risks confusing or potentially even misleading customers. Therefore, we have decided not to make changes for our final decision. We note this is consistent with national requirements.

Exemptions from reference price requirements

Stakeholders suggested several exemptions that we should consider granting from the reference price requirements:

- amaysim and EnergyAustralia noted that products that are not structured in the same way as the VDO, such as subscription products, are not suited to comparison with the VDO and should be exempt.³⁸ amaysim said the reference price requirements would prevent them from advertising the benefits of their products to customers.³⁹
- Tango Energy said offers with a demand component should be excluded from reference price requirements, in line with national requirements, as these tariffs are dependent on load profiles which can vary substantially between customers, rendering a reference price comparison unmeaningful.⁴⁰
- AGL and ERM Power requested that multi-site arrangements be excluded from these requirements, as arrangements tend to be tailored through negotiation and typically a single contract covers electricity usage at multiple locations.⁴¹

We have considered stakeholder concerns that some electricity retail tariffs may be difficult to compare meaningfully with the reference price.

Products structured differently than the VDO

Consistent with our view on allowing flexibility in the information retailers include for reference price comparisons, we consider that allowing carve outs for certain tariffs, such as those not structured in the same way as the VDO, undermines the intent of customers being able to compare all tariffs across the market on a consistent basis.

³⁸ amaysim and EnergyAustralia, submissions to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

³⁹ amaysim, submission to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁴⁰ Tango Energy, submission to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁴¹ AGL and ERM Power, submissions to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

We do not consider that a product being structured differently than the VDO (such as a subscription product with a fixed monthly price) would prevent a retailer from making a reference price comparison. Retailers are free to communicate other benefits of their products in the way that suits them best. We are therefore not exempting products with different structures than the VDO from reference price requirements.

Demand tariffs⁴²

We do agree that demand tariffs warrant separate consideration, as they do not readily lend themselves to being able to be compared to a reference price in a way that is understandable to customers. These types of tariffs are heavily dependent on a customer's individual consumption profile, and so a reference price comparison based on a typical customer's consumption profile is likely to bear little resemblance to the actual cost for a customer.

It would also be up to each retailer to determine an 'average' consumption profile for their demand tariff, as there are no specified usage allocations in the VDO Order for this type of tariff. This means that a customer comparing demand tariffs between retailers would not be comparing 'like with like'. Therefore, we have decided to exempt demand tariffs from reference price requirements. We note this is consistent with national requirements. Our amendments to the code drafting align with the new definition of 'demand tariff' in the national code.

Multi-site customers

We agree that the different way in which retailers contract with multi-site customers means a reference price comparison may have less value for these customers than other small customers, as contracts are generally negotiated in a bespoke way and not at an individual site level. We therefore consider the reference price requirements will not apply to multi-site customers and note that this is consistent with national requirements.

We have now amended the scope of the reference price requirements such that they only apply to retailer advertising at a mass-marketing level. Given that multi-site contracts are generally

⁴² Demand tariffs include a demand charge that reflects the demand a customer puts on the network. Retailers apply demand charges in different ways, for example charging a customer based on their highest demand in a period of time, an average of peak demand over a period of time or different demand rates in different seasons.

We have added a definition of demand tariff into clause 3 of the code:

'demand tariff means a tariff for supplying electricity if working out the amount a customer is charged for the supply of electricity during a period at prices that include that tariff requires identifying, from among particular sub-periods of the period, the sub-period during which the customer's demand for the supply of electricity is the highest'.

Ensuring customers can easily compare offers

negotiated individually, and retailers do not tend to advertise to multi-site customers,⁴³ we consider this change gives effect to our intent relating to multi-site customers.

Clarifications on the 'advertising energy prices' guideline

Stakeholders also sought to clarify aspects of the draft guideline:

- Tango Energy suggested we should make it clear that if a tariff includes a mandatory green component, this should be included in the unconditional price⁴⁴
- AGL raised concerns that our guidance includes one-off sign up credits in the calculation of the unconditional price, which it considers is inconsistent with the Australian Competition and Consumer Commission's guideline⁴⁵
- AGL noted that the definition of 'customer' in our guideline could be misinterpreted as including SMEs and commercial and industrial customers.⁴⁶

We have amended the guideline, as can be seen in appendix C. To summarise, we have:

- clarified any mandatory charges for green energy should be included in the unconditional price, but any optional green charges should not be included
- clarified the unconditional price does not include an amount to represent the value of electricity that is exported from solar panels to the grid (PV/solar feed-in tariffs), consistent with national requirements
- clarified the guideline refers to small customers
- removed the definitions section to avoid duplicating the code.

We have not changed the reference in the guideline to the unconditional price including one-off sign-up credits. We consider these credits should be included, as they are part of the price that the customer is guaranteed to receive under that offer. They should therefore be factored into the decision a customer makes when choosing between different plans. This is not inconsistent with the Australian Competition and Consumer Commission's guideline, which does not explicitly discuss how sign-up credits should be represented.

⁴³ ERM Power, submission to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁴⁴ Tango Energy, submission to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁴⁵ AGL, submission to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁴⁶ AGL, submission to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

Ensuring customers can easily compare offers

Our final decision

We are largely adopting our draft decisions about electricity reference price requirements. We have made some minor changes to the code drafting and 'advertising energy prices' guideline to:

- clarify that reference price requirements only apply when electricity offers are being advertised at the mass marketing stage, and not once clear advice entitlements take effect
- exclude demand tariffs from reference price requirements
- clarify certain areas based on stakeholder comments.

We have considered the changes made to the national Electricity Retail Code by the Australian Government that are due to take effect from 1 July 2020 and aligned with these where we consider it is appropriate to do so.

Final decision 2: Retailers must market electricity offers with reference to the VDO

Retailers must use the VDO as a reference price for all electricity offers.

Retailers must make a reference price comparison whenever they advertise an electricity offer (other than demand tariff) to a customer.

Final decision 3: Electricity reference price requirements

An electricity reference price comparison must include:

- the difference between the VDO price and unconditional price, as a percentage of the VDO price
- for each conditional discount, rebate or credit mentioned, the difference between the unconditional price and conditional price, as a percentage of the VDO price
- the lowest possible price
- the conditions of any conditional discounts, rebates or credits
- the distribution zone and type of small customer.

Banning headline conditional discounts

Our December 2019 draft decision proposed to prevent a conditional discount from being the price-related matter that is mentioned most conspicuously when retailers advertise a gas or electricity offer. This requirement is consistent with the national price disclosure requirements for electricity.

Stakeholder views and our final decision

Alinta Energy, the Consumer Action Law Centre, Powershop and Simply Energy supported this draft decision.⁴⁷

Given stakeholder support for this proposal, we have not made any changes to the final decision.

Final decision 4: Retailers must not advertise headline conditional discounts

Retailers must not advertise conditional discounts as the most prominent feature in gas or electricity advertisements, marketing or promotions.

Prohibiting misleading and deceptive conduct

Draft decision proposal

In our December 2019 draft decision, we proposed to add a requirement that energy retail marketers must not engage in misleading or deceptive conduct or make false or misleading representations.

Stakeholder views

Stakeholders had differing views on our proposal to mirror misleading and deceptive conduct and false or misleading representation provisions in the code. Some retailers questioned why we were duplicating requirements of the Australian Consumer Law.⁴⁸ They considered it may create confusion about how regulatory agencies would interpret the same law. In contrast, the Consumer Action Law Centre strongly supported our proposal, noting that the commission is more focused on Victorian households' access to energy and able to take enforcement action in a more timely manner.⁴⁹

Our final decision

We are retaining the provisions relating to misleading or deceptive conduct and false or misleading representations in the code. Retailers are already obligated to follow Australian Consumer Law, including as a condition of their retail licences. We therefore reject any argument that this change

⁴⁷ Alinta Energy, Consumer Action Law Centre, Powershop and Simply Energy, submissions to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁴⁸ AGL, Australian Energy Council, EnergyAustralia, Momentum Energy, Powershop, Red Energy and Lumo Energy and Simply Energy, submissions to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁴⁹ Consumer Action Law Centre, submission to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

will add to compliance or regulatory burden, as mirroring these provisions does not change the Australian Consumer Law obligations that already apply to retailers.

Some retailers considered that our proposal would be duplicating existing regulations. The Australian Consumer Law is a nationally consistent consumer law contained in a schedule to the *Competition and Consumer Act 2010* of the Commonwealth. It is applied as a law of Victoria by section 8 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic). The Australian Consumer Law's operation is underpinned by an intergovernmental agreement to which Victoria is a party.

The Australian Consumer Law framework overview (2013) notes that the Australian Consumer Law 'is a generic law, designed to apply consistently to conduct across all sectors. The Australian Consumer Law is supported by industry specific consumer laws at the Commonwealth and State and Territory level, where appropriate'. There are many examples in Victoria of consumer protection provisions being included in sector-specific acts.

Holding retailers accountable for misleading or deceptive conduct, along with upholding explicit informed consent, is at the core of rebuilding trust and consumer confidence in the energy market. Customers have a right to expect that their retailer will not mislead or deceive them or make false representations. Including specific provisions in the code is a clear signal to industry that this is a priority area for us.

As part of our enforcement function, it is important we have the ability to act where there is evidence of retailers engaging in misleading or deceptive practices. This is aligned with the government's expectations, set out in its Energy Fairness Plan, of the regulator becoming more active in this space. We will continue our current dialogue and working relationships with other relevant regulators when undertaking any enforcement action. This will also promote consistency in interpretation of the Australian Consumer Law.

Final decision 5: New clause prohibiting misleading and deceptive conduct

Retailers must not engage in misleading or deceptive conduct or make a false or misleading representation. The Energy Retail Code will mirror relevant Australian Consumer Law provisions.

3. Fixing market contract prices

From 1 July 2020, price increases for existing market contracts are limited to only occurring once a year. For many customers, this will happen on a set date one month after network tariff prices change. Customers on fixed-price contracts will only experience any price increases on the anniversary of their initial fixed-price period expiring. Retailers must clearly communicate to customers the time at which prices may increase.

More frequent price increases are only allowed in certain cases, where retailers can demonstrate the innovative nature of a product, and on conditions that we determine.

These rules give effect to recommendations 4A and 4B of the review. They ensure customers have certainty that their price will not increase more than once a year.

At the time of the review, retailers could change market offer prices at any time and did not have to notify customers in advance. While retailers are now required to notify customers at least five business days in advance of any price changes, customers signing up to a contract still do not have certainty over how long their prices will remain unchanged for.

Recommendation 4A sought to fix all market contract prices for at least 12 months from the date a customer signs up to a contract, while recommendation 4B sought to require retailers to disclose to customers the length of time any offered prices will be available without change. Together these recommendations would give customers:

- certainty that their prices would not change for a certain time period
- greater visibility over when a price change might occur.

Providing customers with an entitlement to price certainty

During our consultation process we have considered a range of options to deliver the intent of recommendation 4A. The range of regulatory options we considered are illustrated in figure 2.1 of the issues paper and refined further in figure 11 of the draft decision. In summary, the main options we considered are:

- Doing nothing. This would maintain the status quo, with the VDO available for disengaged customers and a limited number of retailers offering fixed price offers.
- Giving customers the option of price certainty, for example by requiring all retailers to offer at least one fixed-price contract.
- Restricting price increases for all existing contracts to once a year, at the time the VDO price changes.

- Restricting price increases for all existing contracts to once a year, either at the time the VDO price changes or, for fixed-price contracts, on the anniversary of the initial fixed-price period expiring.
- Requiring prices for all contracts to be fixed for 12 months from the date a customer signs up.

We have considered the potential future benefits and costs of these options, taking on board stakeholder feedback received over the course of the consultation process.

Draft decision proposal

Our December 2019 draft decision proposed to give effect to recommendation 4A by limiting price increases for existing market contracts to once a year and linking the timing to when the VDO price changes. Retailers would still be able to make new offers at different prices to customers during the year, but once a customer has signed up to a contract their price would remain fixed until the next VDO price change occurs. At the start of the next 12-month period, when the VDO price changes, retailers would be able to change a customer's price if they wished to. We understand that some retailers already only change the prices of market contracts in force once a year.

Implementing recommendation 4A in this way would ensure all customers, including those who do not engage regularly in the market, would only experience any price increases once a year. For customers who do engage in the market, this approach would establish an annual focal point for engagement. We considered that the need for retailers to build in a risk premium should be lower under our proposed approach, compared to if all market contract prices had to be fixed for 12 months from when a customer signs up, as retailers would have greater certainty over when they would be able to change retail prices.

Potential variations presented at stakeholder workshop

At a stakeholder workshop on 14 January 2020 we discussed the implications of potential variations to our draft decision proposal with stakeholders. The variations discussed were:⁵⁰

- moving from a single price change date to a window for price changes to occur
- allowing retailers to also offer 12-month fixed price contracts starting from the date a customer signs up.

⁵⁰ Essential Services Commission, [Presentation: stakeholder workshop on the draft decision](#), January 2020.

More detailed analysis of existing fixed price contracts

In our December 2019 draft decision, we presented data on the status of the market in terms of the uptake of fixed priced offers and the price levels of fixed priced contracts compared to non-fixed priced contracts.

Our analysis was based on data collected from retailers on the prices customers paid for electricity in 2017-18 and 2018-19. We found that in 2018-19, one in five customers have opted for fixed priced contracts, a slight increase compared to 2017-18 (from 18% to 20% of all customers).

On average in 2018-19, fixed priced contracts were more expensive than non-fixed priced contracts. In terms of simple rates, the difference was \$0.35 per kWh for fixed priced contracts compared to \$0.31 per kWh for non-fixed price contracts. In terms of the average yearly cost of customers on these types of contracts, customers on fixed priced contracts paid \$22 more per year than those on non-fixed priced contracts (based on straight averages).

However, undiscounted fixed priced contracts were cheaper than non-fixed priced contracts in 2018-19. As shown in figure 2, customers were paying \$0.29 per kWh for undiscounted fixed priced contracts compared to \$0.33 for undiscounted non-fixed priced contracts and \$0.30 for discounted non-fixed priced contracts.

Figure 2 Amount electricity customers paid in 2018-19 for fixed and non-fixed priced contracts

	Undiscounted	Discounted (with all conditions met)	Average of all contracts
Fixed price contract	\$0.29 per kWh	\$0.39 per kWh	\$0.35 per kWh
Non-fixed price contract	\$0.33 per kWh	\$0.30 per kWh	\$0.31 per kWh

Source: Data obtained from retailers via an information notice issued under s 37 of the ESC Act 2001

We also found that based on electricity market offers published by all retailers on 31 January 2020, the average difference in fixed price offers compared to those without fixed prices was zero to two per cent depending on distribution zone.⁵¹

⁵¹ Based on ESC analysis on published market offers and calculated as the average difference between fixed price offers and those without fixed prices for market offers without discounts and market offers with discounts (and conditions met).

Stakeholder views on our overarching approach to recommendation 4A

Consumer organisations and the ombudsman supported our draft decision proposal, stating that linking the timing of market contract price increases and VDO price changes is simple and would reduce risks for households and increase consumer trust in the market.⁵² The Consumer Action Law Centre and the Energy and Water Ombudsman (Victoria) supported the simple messaging of a single day for price changes, noting that customers are already familiar with the concept of prices changing once a year from the health insurance market.⁵³ The Victorian Council of Social Service strongly supported the coverage of the annual price increase restriction because all customers in the market would benefit.⁵⁴

Origin Energy and Simply Energy also supported the general intent of linking the timing of market contract price increases and VDO price changes.⁵⁵ However, the majority of retailers did not support our draft decision proposal.⁵⁶ Some retailers considered that recommendation 4A is no longer required following the 1 July 2019 reforms in the market, citing that retailers must now send price change notifications in advance and the VDO is available as an option for customers who value price certainty.⁵⁷

Some retailers considered our proposal would increase prices and reduce consumer choice, and questioned whether the benefits of our proposal will exceed the costs, such as for engaged customers who may not be willing to pay more for price certainty.⁵⁸ They suggested requiring

⁵² Consumer Action Law Centre, Energy and Water Ombudsman (Victoria) and Victorian Council of Social Service, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁵³ Consumer Action Law Centre and Energy and Water Ombudsman (Victoria), submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁵⁴ Victorian Council of Social Service, submission to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁵⁵ Origin Energy and Simply Energy, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁵⁶ 1st Energy, AGL, Alinta Energy, amaysim, Australian Energy Council, EnergyAustralia, ERM Power, Globird Energy, Momentum Energy, Powershop, Red Energy and Lumo Energy, Simply Energy, Sumo and Tango Energy, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁵⁷ 1st Energy, Alinta Energy, amaysim, Australian Energy Council, EnergyAustralia, Globird Energy, Momentum Energy, Red Energy and Lumo Energy and Powershop, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁵⁸ AGL, Alinta Energy, Australian Energy Council, Globird Energy, Momentum Energy and Powershop and Red Energy and Lumo Energy, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

retailers to offer one fixed-price product in addition to their existing products would deliver the intent of recommendation 4A without unintended consequences.⁵⁹

AGL and Red Energy and Lumo Energy questioned the value of our proposal to create an annual focal point for energy, given that best offer messages on bills and price change notifications already prompt consumers to consider their options.⁶⁰ Several stakeholders considered that an annual focal point may incentivise retailers to focus their marketing activities on the months leading up to the price change to encourage customers to switch soon before prices change.⁶¹

The Australian Energy Council and EnergyAustralia stated applying an annual price change restriction to all customers goes beyond the original recommendation to only fix prices for 12 months for new contracts.⁶²

Our response

Our overarching approach to implementing recommendation 4A seeks to build confidence in the energy market by providing all customers with the benefit of price certainty by restricting price increases to once a year, which we believe meets the intent of the review and the terms of reference. We have amended this annual focal point to be the time at which network tariff prices change rather than when the VDO price changes. This more closely aligns with the recommendation's intent that retailers should be able to pass on any network tariff price changes, as these costs are outside a retailer's control from year to year. To be clear, our final decision does not limit retailers from reducing prices at any time.⁶³

We do not consider that maintaining the status quo or requiring retailers to offer just one fixed-price product would deliver the objectives of recommendation 4A. In these scenarios, customers would be required to engage in order to benefit from products offering price certainty. In the current market, even engaged customers can find it difficult to identify which products are fixed price because of the way retailers market and present these offers. Requiring all retailers to offer at least one fixed-price product would add to the number of offers a customer already has to navigate in the market. We do not consider this would lead to improved customer outcomes.

⁵⁹ 1st Energy, Alinta Energy, Globird Energy and Momentum Energy, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁶⁰ AGL and Red Energy and Lumo Energy, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁶¹ AGL, Australian Energy Council, EnergyAustralia and Tango Energy, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁶² Australian Energy Council and EnergyAustralia, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁶³ We note that retailers are still required to provide advance notification of price decreases.

As many retailers only change prices for existing customers once a year, we consider that codifying this will give all customers an entitlement to price certainty without having a material impact on retailer practices. We believe an annual focal point, supported by information campaigns to raise customer awareness, has the potential to encourage customers who may not otherwise be prompted by the best offer message or price change notification to consider engaging in the market.

Retailers raised concerns about the potential price premium that may be factored into providing price certainty for customers. We note it is in a retailer's business interest and responsibility to appropriately manage wholesale price risk for customers, but also provide a level of price certainty for customers. We therefore consider there is already an inherent price risk premium factored into the retail price that customers pay. In addition, some retailers are already providing fixed price products for some or all of their customer base, and do not appear to be charging a substantial premium for these products.

As previously discussed, we found the average difference in fixed price offers compared to those without fixed prices on 31 January 2020 was zero to two per cent depending on distribution zone.⁶⁴ We therefore consider that any additional price premium retailers may incur in providing price certainty for all customers should be modest.

We understand the general practice of retailers is to only pass through price increases once a year to existing customers, and the main reason for price increases is to pass on changes in network charges. Our final decision aligns with this practice by enabling cost pass through of any network tariff price changes. Retailers should continue to manage their wholesale price risk in the most effective and competitive way in the market.

We recognise retailers' concerns that if they are required to honour retail prices for customers throughout the year, they may be exposed in the event of unexpected major events that affect wholesale prices. However, our decision does allow for the cost pass through of major unexpected events. If there is an event that was uncertain or unforeseen by the commission and leads to a VDO price determination being varied during a regulatory period, clause 46AA(7) of the code allows retailers to increase market contract prices one month after the variation.

We are conscious of stakeholder concerns that our rule change may still result in some customers experiencing price increases soon after signing up, if they engage in the market just before an annual price change date. We consider that our decision will complement the clear advice

⁶⁴ Based on the commission's analysis on published market offers and calculated as the average difference between fixed price offers and those without fixed prices for market offers without discounts and market offers with discounts (and conditions met).

entitlement for customers. The closer it is to the annual price change event, the more likely it is that retailers will know the extent of any price increases. We expect retailers to disclose this to customers as part of the clear advice entitlement.

We also note that retailers are not required to increase prices on an annual price change date. Retailers could honour prices for customers who have just signed up to a new offer before prices are due to change. We will continue to monitor retailer behaviour in pricing practices, particularly as part of our compliance program and our review of competitiveness and efficiency in the retail energy market.

Stakeholder views on implementation of draft decision proposal

Stakeholders raised some practical concerns and questions around how our proposal to link the timing of market contract price increases and VDO price changes would work.

Stakeholders noted implementation challenges with all prices changing on a single day. This could put pressure on postal services and call centres, and potentially lead to increased customer call handling times, both for retailers and the Energy and Water Ombudsman (Victoria).

If we continued with the draft decision proposal to align the timing of price changes and the VDO change date, stakeholders broadly supported allowing a window for price changes rather than a single day.⁶⁵ The preferred length of the price change window ranged from one month⁶⁶ to three months.⁶⁷ This window would allow retailers more operational flexibility to develop pricing strategies following release of the new VDO price, as well as to manage the administrative price change process.

The Consumer Action Law Centre and the Energy and Water Ombudsman (Victoria) noted that households may be less likely to engage in the holiday season.⁶⁸ The Consumer Action Law Centre supported the timing of VDO price changes transitioning to the end of the financial year.

⁶⁵ AGL, Australian Energy Council, Consumer Action Law Centre, EnergyAustralia, Energy and Water Ombudsman (Victoria), Red Energy and Lumo Energy, Simply Energy and Victorian Council of Social Service, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁶⁶ AGL, Australian Energy Council, Energy and Water Ombudsman (Victoria), Red Energy and Lumo Energy and Victorian Council of Social Service, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁶⁷ Simply Energy, submission to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁶⁸ Consumer Action Law Centre and Energy and Water Ombudsman (Victoria), submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

EnergyAustralia requested that we clarify the impact of VDO price determinations moving to financial years from 1 July 2021.⁶⁹

Origin Energy suggested changes to the definition of 'VDO change date', to enable retailers to change prices if we extended a VDO price determination or varied the VDO outside the regulated dates, or in the event the VDO was repealed.⁷⁰

1st Energy sought clarity that a VDO price change variation event would be triggered in a scenario such as the Reliability and Emergency Reserve Trader mechanism being used.⁷¹

Our response

We acknowledge stakeholder concerns relating to all existing market contract prices changing on a single day. We understand these concerns are primarily driven by retailers having just over one month to update all existing market contract prices and notify all customers of any price changes in addition to communicating with customers who may be impacted by a change in the VDO.

We have therefore decided to set the date on which existing market contract prices can increase as one month after network tariff prices change. All price changes would take effect from this single day, which retains the simple message for customers of an annual focal point. However retailers would effectively have around three months from when network tariff pricing proposals are approved to manage the administrative price change process for all customers.

We note that while retailers have an obligation to notify customers of a price change at least five business days before the event, this does not prevent a retailer from issuing price change notices earlier. Retailers could therefore stagger the sending of price change notices, and subsequent impact on call centres, across their portfolio of customers during this three-month period.

The new definition of 'network tariff change date' allows retailers to increase market contract prices one month after an electricity distributor's approved pricing proposal takes effect, or a gas distributor's reference tariff variation occurs. As previously mentioned, clause 46AA(7) of the code allows retailers to increase market contract prices one month after a VDO price variation due to an uncertain or unforeseen event. More detail on the circumstances in which we would make such a

⁶⁹ EnergyAustralia, submission to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁷⁰ Origin Energy, submission to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁷¹ 1st Energy, submission to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

variation is included in our current price determination.⁷² The new rules restricting price increases to once a year take effect from 1 July 2020. We note that the timing of network tariff price changes is expected to move to align with financial years in the future. Retailers should determine the best way to manage the transition to these new rules, noting the underlying policy intent of providing price certainty to customers.

Stakeholder views on the treatment of 12-month fixed products

Several stakeholders considered our draft decision would not allow retailers to offer products where prices are fixed for the first 12 months from the date a customer signs up.⁷³ They considered retailers should still be able to offer such products, noting that this aligns with the review's terms of reference.

Some retailers suggested that if we continue with our draft decision proposal, we should allow a transitional arrangement for fixed price contracts that exist as at 1 July 2020, so retailers can vary the price when the original fixed price period comes to an end.⁷⁴

Our response

We understand some retailers have started providing customers with price certainty and customers have shown some preference for prices to remain fixed for 12 months from the date they sign up to the plan. Around 20 per cent of customers were on this type of offers as of 30 June 2019.⁷⁵

We consider these products provide customers with price certainty and are consistent with the intent of recommendation 4A. We have therefore decided to allow retailers to continue offering products with fixed-price periods that do not align with the timing of network tariff price changes. These products must have an initial fixed-price period from a customer signing up of no less than 12 months. After this time, retailers can only increase prices on the anniversary of the initial fixed-price period expiring.

Other stakeholder comments

Several retailers suggested that price changes due to network tariff reassignments should be excluded from the definition of a price change, as the reassignments are generally initiated by the

⁷² Essential Services Commission, [Victorian Default Offer price determination 2020: 1 January 2020 – 31 December 2020](#), November 2019.

⁷³ AGL, Australian Energy Council, EnergyAustralia and Tango Energy, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁷⁴ Sumo and Tango Energy, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁷⁵ Essential Services Commission, [Ensuring energy contracts are clear and fair: draft decision](#), December 2019.

distributor or the customer.⁷⁶ ERM Power also sought an exemption for multi-site customers, as contracts often cover both small and large sites and any price changes tend to be to the contract as a whole rather than for specific sites.⁷⁷

Our response

A network tariff reassignment is an event that could change the cost of supplying a customer but is not foreseeable by a retailer when setting prices at the start of the year, as it is triggered at the request of a customer or distributor. We have therefore amended the code to enable retailers to change a customer's tariff as a result of a network tariff reassignment, provided that any increase to the tariff is a direct result of, and does no more than to give effect to, the tariff reassignment.

We recognise the arguments made in relation to multi-site customers and understand that placing restrictions on price changes for all 'small' customers could impact contracts that cover large sites. We have therefore amended the code to exclude multi-site customers from the requirements of recommendation 4A.

Final decision

Our final decision is to provide all customers with price certainty by limiting price increases to once a year, which aligns with our draft decision. However, having taken stakeholder feedback on board, we propose to allow retailers the choice of increasing existing market contract prices either one month after network tariff prices change or on the anniversary date of a customer's initial fixed price period expiring (where the initial fixed price period must be no less than 12 months). These rules apply from 1 July 2020, to all existing and new market retail contracts.

We recognise that this decision may lead to a small price premium, as a result of the risk premium retailers may face in either having to hedge more of their wholesale electricity costs or being restricted in their ability to pass on any unhedged cost increases. However, we expect that any price premium will be modest, as previously discussed. And our decision to give retailers flexibility in how they operationalise this change should further reduce implementation costs.

Taken together we believe the benefits, in the form of enhanced price certainty for all customers which will build confidence in the market, will outweigh costs associated with any price premium. This in turn should give customers greater confidence in the benefits of devoting time to engaging in the market, and so strengthen competition by helping to rebuild trust.

⁷⁶ AGL, ERM Power, Red Energy and Lumo Energy and Tango Energy, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁷⁷ ERM Power, submission to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

Final decision 6: Retailers can only increase existing market contract prices once a year

Retailers can only increase prices of existing market contracts once a year, either:

- on the day that is one month after network tariff prices change, or
- on the anniversary date of a customer's initial fixed price period expiring (where the initial fixed price period must be no less than 12 months).

Innovative pricing structures and retail products

Draft decision proposal

Some retailers currently offer products that are not compatible with limiting price increases to once a year. We do not want to prevent engaged customers who understand the nature of the product they are consuming from continuing to do so. In our December 2019 draft decision, we therefore proposed an exemption mechanism so retailers who wish to offer such products after 1 July 2020 can do so in certain circumstances, and subject to conditions.

We specified certain categories of products that retailers would still be able to offer:

- prices that continually vary in relation to the prevailing spot price of electricity
- where a specific quantity of electricity or gas is pre-purchased by a customer.

We also published a draft guideline that set out how retailers could apply to the commission for specific exemptions for categories of product not listed above.⁷⁸

To offer any products where prices were subject to increase more than once a year, we proposed retailers would have to:

- make customers aware when signing up to the product that the tariff(s) may increase more than once a year, including the basis on which the tariff(s) may change and the estimated frequency of changes. Retailers would also have to explain that other contracts where prices will only increase once a year are available
- notify the commission of the product(s) offered that were subject to these conditions, and report certain additional information to us regularly
- complete a tariff review for customers who are eligible for tailored assistance to establish whether there is another plan more appropriate to that customer's circumstances.

⁷⁸ Essential Services Commission, [Ensuring energy contracts are clear and fair: draft decision](#), December 2019, appendix D (pp. 96-97).

Stakeholder views

Stakeholders were generally in favour of us enabling product innovation, though views differed on our proposed exemption framework.

Consumer organisations and the Energy and Water Ombudsman (Victoria) expressed support for the proposed exemption framework.⁷⁹ The ombudsman and Victorian Council of Social Service suggested the framework would provide adequate opportunities for retailers to market innovative products to informed consumers.⁸⁰ The Consumer Action Law Centre said the framework must include appropriate safeguards to ensure that approved exemptions are working in the interest of households.⁸¹

Retailers generally considered a formal approval process would inhibit innovation.⁸² For example, AGL stated that retailers may introduce innovative offers in other jurisdictions due to the administrative and regulatory burdens in Victoria.⁸³ The Australian Energy Council questioned the rationale of allowing customers to sign up to non-traditional products but banning customers from accessing the currently available variable products in the market.⁸⁴

Retailers sought more detail on the design of the exemption framework and our assessment process, including what criteria we will use to assess applications and our expected timeframes for doing so.⁸⁵ Some retailers also questioned whether an approved exemption would apply to a product category that all retailers would then be able provide or whether each retailer would need to apply for an exemption for the same product individually.⁸⁶

⁷⁹ Consumer Action Law Centre, Energy and Water Ombudsman (Victoria) and Victorian Council of Social Service, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁸⁰ Energy and Water Ombudsman (Victoria) and Victorian Council of Social Service, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁸¹ Consumer Action Law Centre, submission to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁸² AGL, EnergyAustralia, Red Energy and Lumo Energy and Simply Energy, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁸³ AGL, submission to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁸⁴ Australian Energy Council, submission to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁸⁵ AGL, Australian Energy Council, EnergyAustralia, Powershop, Red Energy and Lumo Energy and Simply Energy, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁸⁶ AGL, EnergyAustralia and Powershop, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

Our response and final decision

Given our final decision to proceed with restricting retailers to increasing market contract prices once a year under final decision 6, we still consider there is a role for an exemption process. This will enable retailers to offer certain retail energy contracts that do not provide customers with price certainty but do demonstrate genuine product innovation.

Based on stakeholder feedback, we have clarified how our exemption process will work to support innovative products while providing additional and necessary consumer protections. For clarity, we will allow for two types of exemptions:

- **A standing exemption** that allows an energy product to be automatically exempt from once-a-year price increases. This standing exemption would only apply to specific categories, which can be updated by the commission.
- **A commission-granted exemption**, where a retailer must submit and seek approval from the commission for the exemption of a product. A retailer can apply for such an approval if it can demonstrate product innovation.

We recognise most stakeholders are in favour of us allowing for product innovation, as long as there are necessary controls to ensure customers are protected and the process itself does not unnecessarily inhibit innovation in the market. We support retailers to consider innovation in the market, as highlighted in our recent framework and approach to assessing competitiveness and efficiency in the market.⁸⁷

We consider our final decision strikes this balance, by providing a standing exemption process for innovative products (some of which are currently in the market) and a further process for new innovative products that have not yet been conceived of. In particular there should be few barriers for certain types of innovative products to go to market, as we have clarified that the standing exemption process does not require an up-front application process.

Retailers offering products that are subject to the standing exemption process must notify us before they start offering the product (or before 1 July 2020 if they are already offering the product) and comply with reporting requirements and additional requirements when obtaining explicit informed consent, as set out above and in our updated guideline (appendix D).

In a stakeholder reference group meeting on 4 February 2020, members discussed the features of an exemptions process. Members considered the exemptions process should be made available

⁸⁷ Essential Services Commission, [Assessing the competitiveness and efficiency of the Victorian energy retail market: framework and approach](#), December 2019.

for products such as those that can assist with system support, align with government policy, or provide for 12-month price fixes from the date a customer signs up.

On further review, we consider products that assist with system support (for example incentivising customers to reduce network demand at a certain time) would generally lead to a rebate, credit or tariff reduction for customers and so a specific exemption would not be required for the product to be made available to customers. And given our final decision 6 now allows for 12-month price fixed products, these products also do not require a standing exemption.

We have therefore decided not to introduce any further categories that are eligible for standing exemptions at this time. However, based on feedback from the reference group meeting we have provided additional details in the guideline of the types of product that we may consider granting an exemption for. These include products that better meet specific customer needs, enhance the efficiency of the energy system, or are otherwise part of a Victorian government program or policy.

We will continue to review the categories that may require standing exemptions, particularly as we consider how innovation is taking place in the retail market as part of our review into the competitiveness and efficiency of the Victorian energy retail market.

We have updated the guideline that sets out the process for retailers applying for exemptions for innovative products that are not outlined in the categories for standing exemptions. We have:

- clarified the difference between standing and commission-granted exemptions
- explained how retailers must notify us if they offer products under a standing exemption
- provided more detail on the application process for commission-granted exemptions
- set out reporting requirements for retailers offering products under either a standing or commission-granted exemption.

Given our intent is to provide price certainty for all customers, we expect the majority of customers will be on contracts where prices can only increase once a year. Exempt market retail contracts will only exist for a limited number of innovative products offered by retailers.

Final decision 7: Retailers can offer innovative products that are not compatible with limiting price increases to once a year in certain cases and subject to conditions

Retailers can offer innovative products that are not compatible with limiting price increases to once a year via:

- a standing exemption, under which specific categories of product nominated by the commission are automatically exempt from once-a-year price increases, or
- a commission-granted exemption, if a retailer can demonstrate that its product is genuinely innovative.

Retailers offering products under either a standing or commission-granted exemption must:

- make customers signing up to these products aware of additional factors when obtaining explicit informed consent
- report regularly to the commission and
- conduct tariff reviews for customers on these products who become eligible for tailored assistance.

Disclosing when prices will change to customers

Draft decision proposal

As set out in our December 2019 draft decision, we considered our proposed approach to implementing recommendation 4A, in combination with rules we have already implemented, will give effect to recommendation 4B by ensuring that customers know how long the price they sign up to will remain unchanged for.

Before a customer signs up to an offer, the clear advice entitlement requires the retailer to notify the customer about when prices will change. If the extent of the price change is known then the retailer is also required to disclose this, to help the customer make an informed choice.

For existing customers, retailers are required to provide advance notification of any price changes at least five business days before the change takes effect. This notice includes specific details of the extent of the price change, and the best offer message.

Stakeholder views

Stakeholders who commented on this proposal suggested a commission decision is not needed as existing requirements, including the best offer and clear advice requirements, already require retailers to disclose the length of time prices will be available without change.⁸⁸

Our response and final decision

Our draft decision was to clarify that we consider existing requirements already fulfil the intent of recommendation 4B without the need for additional rules. Our final decision is therefore unchanged.

⁸⁸ Momentum Energy, Origin Energy and Powershop, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

Final decision 8: Retailers must disclose the length of time prices will be available without change

At the point of entering a contract, as part of the existing clear advice entitlement, retailers must clearly disclose when prices will change and, if known, the magnitude of any anticipated changes.

After a customer has signed up to an offer, existing rules require retailers to give advance notice of any price changes and tell the customer about their best offer.

4. Protecting customers at the end of benefit and contract periods

For new contracts from 1 July 2020, retailers must offer any discounts, credits or rebates for the entire duration of a contract. Retailers must not change these benefits during the contract term.

At the end of a fixed-term electricity contract, if a customer does not give explicit informed consent to move to a different offer, their retailer must automatically roll them onto the VDO.

We intend to introduce rules requiring retailers to roll gas customers who do not give explicit informed consent at the end of a fixed-term contract onto their retailer's best offer. As this change requires legislative amendments to the Gas Industry Act, we will undertake a technical consultation later in the year to give effect to this policy intent.

These rules give effect to recommendations 4C and 4D of the review. They ensure that customers no longer have to engage part-way through a contract to avoid losing benefits and establish safeguard protections for customers who do not engage at the end of a fixed-term contract.

The review found that retailer practices and regulations have meant customers need to engage with their retailer before the end of their benefit or contract period or to avoid losing benefits or being rolled onto another contract which could leave them paying a much higher price.

Recommendation 4C sought to protect customers at the end of benefit and contract periods by requiring retailers to roll customers onto the nearest matching, generally available offer at the end of a benefit or contract period, unless the customer opts for another offer. Recommendation 4D sought to make conditional discounts or other benefits offered for paying on-time or online billing evergreen (ongoing), which would prevent customers ending up paying substantially more due to the expiry of a conditional discount they signed up to at the start of a contract.

Aligning benefit and contract periods

Draft decision proposal

Our December 2019 draft decision proposed to give effect to recommendation 4D by aligning benefit and contract periods, so a customer signing up to a discount, rebate or credit at the start of the contract will keep the same benefit(s) until the end of the contract. Retailers could either offer evergreen contracts with ongoing discounts, rebates or credits, or fixed-term contracts (e.g. for a 1- or 2-year duration) with discounts, rebates or credits provided for the same length of time.

Protecting customers at the end of benefit and contract periods

Retailers would not be allowed to decrease any discounts, rebates or credits during the contract term. This includes pay-on-time discounts, which we proposed to cap under recommendation 4E. While the commission will update the cap level each year, retailers will not be allowed to decrease the pay-on-time discount a customer initially signed up for during the contract period.

We noted some retailers already honour discounts after the end of a benefit period, so this would not represent a departure from current practices for these retailers.⁸⁹

Stakeholder views

Consumer organisations and the Energy and Water Ombudsman (Victoria) supported the alignment of benefit and contract periods, as this would prevent customers losing benefits and paying more for energy.⁹⁰ However some retailers did not support the alignment of benefit and contract periods.⁹¹ They suggested existing notification requirements (such as clear advice, best offer and price and benefit change notifications) could address issues around customers not understanding benefit periods. EnergyAustralia said we had expanded the scope of recommendation 4D by covering all discounts, rebates and credits.⁹²

Stakeholders had differing views on whether we should apply recommendation 4D to contracts in existing benefit periods. AGL, the Consumer Action Law Centre and EnergyAustralia noted that there may be transitional issues for customers in an existing benefit period with high conditional discounts.⁹³ For example, these customers mistakenly believe their plan (with high conditional discounts) is better than others available in the market which could lead to disengagement.

The Consumer Action Law Centre considered the protections that would be delivered by implementing recommendation 4D for customers in an existing benefit period would outweigh any

⁸⁹ Our understanding of this practice was confirmed by some retailers in their submissions to our draft decision (Alinta Energy, EnergyAustralia and Red Energy and Lumo Energy).

⁹⁰ Consumer Action Law Centre, Energy and Water Ombudsman (Victoria) and Victorian Council of Social Service, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁹¹ Alinta Energy, EnergyAustralia and Powershop, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁹² EnergyAustralia, submission to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁹³ AGL, Consumer Action Law Centre and EnergyAustralia, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

potential disadvantage during a transition period. It supported us continuing with this proposal, though suggested we should regularly report on the outcomes for these households.⁹⁴

However, several retailers did not support a requirement to honour discounts for customers in existing benefit periods. A number of retailers requested we only implement recommendation 4D for new contracts from 1 July 2020, suggesting that altering existing contracts would impose regulatory risk.⁹⁵ Alinta Energy and Origin Energy suggested that instead of extending benefit periods to the end of a contract, we could instead require existing contracts to terminate at the end of the customer's benefit period.⁹⁶

Origin Energy raised concerns with our proposal that retailers be required to obtain a customer's explicit informed consent to reduce the length of a contract already in force.⁹⁷ It noted there are circumstances where it is in the customer's interest that a retailer can terminate a contract, such as when a customer has been coerced into a contract or has forgotten to notify the retailer they have vacated a property.

Some stakeholders commented on customers on contracts with expired benefits, who would not have been impacted by our draft decision. Origin Energy suggested retailers be required to cap their prices at the level of the VDO price for customers who are on contracts with expired benefits as of 1 July 2020.⁹⁸ The Consumer Action Law Centre and Victorian Council of Social Service supported customers on contracts with expired benefits being rolled onto the VDO.⁹⁹

Two retailers asked for further clarification on the scope of benefits captured by recommendation 4D. Specifically, whether this would include offers with any fixed price features or offers that include a benefit contingent on a third-party agreement.¹⁰⁰

⁹⁴ Consumer Action Law Centre, submission to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁹⁵ Alinta Energy, EnergyAustralia, Origin Energy, Simply Energy and Sumo, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁹⁶ Alinta Energy and Origin Energy, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁹⁷ Origin Energy, submission to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁹⁸ Origin Energy, submission to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

⁹⁹ Consumer Action Law Centre and Victorian Council of Social Service, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹⁰⁰ EnergyAustralia and Simply Energy, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

Our response and final decision

Retailers will honour all discounts, rebates and credits for the length of a contract

We note that some retailers do not support aligning benefit and contract periods, as this would remove their ability to offer fixed benefit periods within a contract. However the policy intent of recommendation 4D is that if a customer signs up expecting ongoing financial benefits on their contract, they should have the right to receive these for the length of the contract. This aligns with the policy intent relating to recommendation 4A, that customers should be entitled to price certainty.

Our final decision is therefore that retailers are required to honour all discounts, rebates and credits for the length of a contract. Retailers will not be allowed to change these benefits during the course of a contract. This will give customers certainty that any discounts, rebates or credits they sign up to will remain unchanged.

In order to preserve customer entitlement to 12 months of price certainty at a time, we have introduced a rule to prevent retailers from offering short fixed-term contracts of less than 12 months. These contracts could have lower prices for the short duration of the contract, but any customers continuing to take supply after this point who did not re-engage would be rolled onto the VDO, likely paying a higher price after only a short period of price certainty. Retailers can still offer fixed-term contracts of 12 months or greater, with financial benefits offered for this duration. We note that customers who require a shorter-term contract to suit their circumstances could choose an evergreen contract which they could leave at any time without incurring exit fees.

Under our new rules, ongoing financial discounts, credits and rebates will be honoured for the duration of a contract. Retailers can choose whether to offer any ongoing financial benefits in dollar or percentage terms, as long as whatever they offer at the start of a contract stays the same over the term of the contract. Retailers could also still offer a one-off discount, credit and rebate in this framework, for example a single sign-up credit or compensation payment.

We note EnergyAustralia's comment that we have expanded the scope of recommendation 4D by covering all discounts, rebates and credits, rather than just pay-on-time or online billing benefits. However we have chosen to implement recommendation 4D in this manner in order to also give effect to the policy intent of recommendation 4C, as it relates to the end of benefit periods. This will ensure that customers no longer have to engage part-way through a contract to avoid losing benefits they initially signed up for.

We have excluded non-financial benefits such as loyalty points, tangible gifts or third-party subscriptions, as it may not always be possible to guarantee these benefits can be provided on an evergreen basis. Where retailers are unable to provide non-financial benefits for the length of a

customer's contract, we expect retailers to disclose the length of the benefit to customers through the clear advice entitlement.

Government energy concessions and feed-in tariff rates are not covered by recommendation 4D. We have amended the code drafting to reflect this.

We have decided to only apply the new rule to new contracts

After considering stakeholder feedback, we have decided the final decision will only apply to new contracts from 1 July 2020. We understand the sector is transitioning away from offers with high conditional discounts, to offers without discounts or with lower, guaranteed discounts. By applying this new rule to existing contracts, there is a risk of locking customers into existing benefit periods with ongoing high conditional discounts.

We would prefer retailers to actively engage with their customers and work to roll these customers off such offers. We consider that applying the new rule to new contracts from 1 July 2020 only is therefore a more pragmatic way of delivering our overarching policy intent, given current practices in the market.

We acknowledge concerns about the coverage of this new rule not extending to customers with expired benefit periods. We note that these customers will benefit from limitations on when prices can increase under recommendation 4A, and they will receive the best offer message on their bills. In relation to Origin Energy's suggestion that these customers should not pay a higher price than the VDO, we note retailers are able to give effect to this if they consider it would benefit their customer base, without waiting for any regulatory intervention. Retailers are able to pass on price decreases at any time of the year, subject to existing advance notification requirements.

We will be conducting ongoing monitoring of existing contracts in effect as of 1 July 2020 that are not affected by our new rules, particularly contracts with expired benefit periods. We will publicly report on our observations, which may include detail on the number of customers with expired benefit periods and the prices these customers are paying due to expired benefits. Through this monitoring we will seek to understand these customers better, to assess whether other regulatory interventions are required in the future.

As we are not applying the new rule to existing contracts, we are no longer proceeding with the proposed code requirement that retailers seek a customer's explicit informed consent in order to reduce the length of any contract that is already in force.

Interaction with other recommendations

Pay-on-time discounts will be capped from 1 July 2020 under our implementation of recommendation 4E. Retailers must ensure that any pay-on-time discount offered does not exceed the cap in force at the time a customer signs up to a contract. While the commission will update the

cap level each year, retailers are not allowed to change the pay-on-time discount a customer initially signed up for during the contract period.

We are decoupling the concepts of benefit periods and fixed-price periods. While it is not explicit, the existing definition of a benefit period could be read as including fixed-price tariffs. Given the interactions between recommendations 4A, 4C and 4D, this may cause unintended consequences if not changed.¹⁰¹ Our intention is that our approach to recommendation 4A regulates tariff changes and our approach to recommendation 4D regulates benefit changes.

Final decision 9: Retailers must offer any ongoing financial benefits for the duration of a contract

Benefit and contract periods will be aligned, so customers receive any ongoing discounts, credits or rebates for the entire duration of a contract. Retailers must not change these benefits during the contract term. Additionally, fixed-term contract lengths cannot be less than 12 months.

This applies only to new contracts from 1 July 2020.

Practices at the end of a fixed-term contract

Draft decision proposal

In our December 2019 draft decision, we proposed that when a customer reaches the end of a fixed-term contract, they are automatically rolled onto the VDO (for electricity) or the best offer (for gas) if they do not give explicit informed consent to move onto a different offer.

The practice of rolling a customer onto the VDO is already required by the Electricity Industry Act, for example if a customer signs up to a contract with an end date (such as in one or two years) and does not re-engage with their retailer prior to their contract expiring. We consider this aligns with the policy intent of the VDO as providing protection for customers who are unable or unwilling to engage.

In our draft decision we indicated that legislative amendments would be required to give effect to our proposed implementation of recommendation 4C for gas customers.

¹⁰¹ If fixed price periods were considered a type of benefit period after 1 July 2020, and retailers were required to align benefit and contract periods, then if a retailer wanted to offer an evergreen contract it would have to keep prices fixed at the same level for as long as a customer remained on that contract. Alternatively the retailer would have to only offer fixed-price, fixed-term contracts which would require customers to engage every 12 months, otherwise they would automatically roll onto another contract under recommendation 4C.

Stakeholder views

Stakeholders generally supported our proposal to roll electricity customers being rolled onto the VDO at the end of a fixed-term contract if they do not make an active choice.¹⁰²

Consumer organisations and the Energy and Water Ombudsman (Victoria) considered it would be preferable for gas customers to roll onto a VDO for gas at the end of a fixed-term contract.¹⁰³ However in the absence of a VDO for gas they supported our proposal to roll gas customers onto the best offer at the end of a fixed-term contract.

Retailers generally did not support our proposal to roll gas customers onto the best offer.¹⁰⁴ Retailers were concerned that the proposal would reduce competition in the market and undermine explicit informed consent, and that a retailer's best offer may have inappropriate features for a customer.¹⁰⁵ Some retailers suggested the current customer notification requirements could address any issues arising from rolling gas customers onto a retailer's standing offer at the end of a contract.¹⁰⁶

Several retailers said it was difficult to comment on our proposal for gas customers fully as it depends on legislative changes that have not been made available for feedback.¹⁰⁷

Our response

Given stakeholders' support for electricity customers continuing to be rolled onto the VDO at the end of a fixed-term contract, our final decision has remained unchanged. Retailers are already required to roll customers onto the VDO at the end of a fixed-term contract if they have not given

¹⁰² AGL, Alinta Energy, Australian Energy Council, Consumer Action Law Centre, EnergyAustralia, Energy and Water Ombudsman (Victoria), Origin Energy, Red Energy and Lumo Energy, Simply Energy and Victorian Council of Social Service, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹⁰³ Consumer Action Law Centre, Energy and Water Ombudsman (Victoria) and Victorian Council of Social Service, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹⁰⁴ AGL, Alinta Energy, Australian Energy Council, Origin Energy, Red Energy and Lumo Energy and Simply Energy, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹⁰⁵ AGL, Alinta Energy, Australian Energy Council, Origin Energy, Powershop and Red Energy and Lumo Energy, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹⁰⁶ AGL and Powershop, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹⁰⁷ AGL, Australian Energy Council, EnergyAustralia, Origin Energy, Red Energy and Lumo Energy and Simply Energy, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

explicit informed consent to move to a different offer by the Electricity Industry Act, so no legislative or code amendments are required to give effect to this decision.

We acknowledge stakeholder comments about rolling gas customers onto the best offer at the end of a fixed-term contract. However, our concerns around rolling these customers onto the gas standing offer set out in our draft decision remain. We consider that while standing offers provide customers with protection in the form of standard terms and conditions, we are concerned that customers would experience price shock if they rolled onto standing offer prices that are significantly more expensive than market offers.

We consider the risk of price shock is much lower if gas customers are instead rolled onto the retailer's best offer at the end of a fixed-term contract. We recognise the best offer may have conditions, but it is a relatively lower-priced offer and is an established concept in the market that customers may recognise from retailer notifications.

On balance, we still consider that this approach best meets the policy intent of recommendation 4C, by protecting customers from being rolled onto a significantly higher price at the end of a contract or benefit period. Our final decision to roll gas customers onto the best offer at the end of a fixed-term contract is also therefore unchanged.

Some retailers argued that our approach will reduce competition in the gas retail market. However, we note that most gas customers are on evergreen contracts and would not be impacted by this regulatory change. Our proposal is a safeguard protection that will only apply at the end of a fixed-term contract where a customer has not given explicit informed consent to move to a different offer.

Customers on fixed-term contracts have previously engaged with their retailer and many will likely engage again, especially once prompted by the retailer's notifications. Overall, we do not consider the practical impact of this change will significantly harm retailers' ability to compete for customers.

The legislative amendments to implement our proposed approach for gas customers will ensure retailers can roll customers onto the best offer at the end of a fixed-term contract without the customer's explicit informed consent. This is consistent with our intent that the gas best offer is a protection for customers who do not engage in this circumstance. While automatically moving customers onto another market contract at the end of the original contract is not our preferred approach, in the absence of a gas VDO we consider that this will best meet the policy intent of avoiding price shock for gas customers at the end of a fixed-term contract.

We remind retailers of their existing obligations under clause 48 of the code to notify a customer before the end of a fixed-term contract. This notification will ensure customers are aware of what will happen if they do not give consent to move to a different offer at the end of the contract.

Final decision

We therefore confirm our draft decision positions regarding practices at the end of a fixed-term contract for both electricity and gas customers.

As highlighted in our draft decision, implementing this decision for gas customers requires legislative amendments to the Gas Industry Act. These legislative amendments are underway but will not be in effect by 1 July 2020. Until the amendments take effect, the existing requirements of the Gas Industry Act will continue to apply. That is, gas customers will automatically roll onto the retailer's standing offer at the end of a fixed-term contract if they have not given explicit informed consent to move to a different offer.

We intend to issue a technical consultation on required code amendments once there is more certainty on the legislative amendments to the Gas Industry Act. We expect this to occur later in the year.

Final decision 10: At the end of a fixed-term contract retailers must roll customers onto the VDO (electricity) or best offer (gas)

At the end of a fixed-term electricity contract, if a customer does not give explicit informed consent to move to a different offer, their retailer must automatically roll them onto the VDO.

We intend to introduce rules requiring retailers to roll gas customers onto their retailer's best offer at the end of a fixed-term contract, if the customer does not give explicit informed consent to move to another offer. We will make these changes later in the year following legislative amendments.

5. Regulating conditional discounts

For new contracts from 1 July 2020, retailers must cap pay-on-time discounts to the level determined by the commission. The cap methodology is based on a retailer's cost of debt. We will publish the level of the first cap in a separate guideline by early May 2020. The cap will be updated annually.

Retailers must also honour pay-on-time discounts for customers receiving tailored assistance who miss a bill pay-by date.

These rules give effect to recommendation 4E of the review, to protect customers from being disproportionately penalised for failing to meet offer conditions.

The review raised concerns that customers on offers with large conditional discounts who fail to meet offer conditions end up paying substantially more, and that this increase is not reflective of the cost incurred by retailers.

Recommendation 4E sought to cap the size of discounts, so they are no higher than the reasonable cost to a retailer of a customer missing an offer condition. This would make conditional discounts cost-reflective and limit penalties faced by customers who fail to meet offer conditions.

Capping pay-on-time discounts

Draft decision proposal

In our December 2019 draft decision, we proposed to give effect to recommendation 4E by capping pay-on-time discounts. We noted that late payment fees have been banned in Victoria since 2005. This was a clear statement of the government's policy intent that customers should not be penalised for missing a pay-by date.

Following the ban on late payment fees, industry responded by offering pay-on-time discounts, which are essentially the same thing. Over time, we saw these discounts grow in size to become out of proportion to the costs that a retailer would incur from a customer missing an offer condition.¹⁰⁸ The Australian Competition and Consumer Commission's Retail Electricity Pricing Inquiry report also highlighted that customers who miss conditional discounts end up paying some

¹⁰⁸ Essential Services Commission, [Ensuring energy contracts are clear and fair: draft decision, December 2019](#), p22.

of the highest prices in the market, and their data indicated that this disproportionately affects those less able to pay such as hardship customers.¹⁰⁹

While the size and prevalence of pay-on-time discounts has declined since 1 July 2019, around 14 per cent of electricity offers still have pay-on-time discounts of between 11 and 15 per cent and 31 per cent of gas offers have pay-on-time discounts of between 11 and 20 per cent.¹¹⁰ These pay-on-time discounts are likely above the real cost to retailers of offering these benefits. We consider that there is still a clear need for regulation, as the industry's approach to setting pay-on-time discounts is still not delivering good outcomes for customers.

We proposed to cap pay-on-time discounts because they were the most common form of conditional discount, accounting for nearly three quarters of discounts in the market.¹¹¹ We considered that the greatest amount of consumer harm from missing offer conditions would therefore likely relate to this type of discount.

We proposed the pay-on-time discount cap would only apply to new contracts from 1 July 2020. Operationally, if we applied this recommendation to all existing contracts it would likely result in retailers reducing the size of pay-on-time discounts that customers are currently receiving, so customers on existing contracts could end up paying more.

The Australian Energy Market Commission has also been considering a rule change to regulate conditional discounts. This rule change has now been finalised and will take effect from 1 July 2020.¹¹² The Australian Energy Market Commission has taken a principles-based approach, restricting the level of conditional discounts and fees to the 'reasonable costs' likely to be incurred by the retailer when a customer fails to comply with a payment condition. The scope of the rule change extends to any conditional discounts relating to payment timing or method, including fees and discounts, such as discounts for online payment and direct debit dishonour fees.

¹⁰⁹ Australian Competition and Consumer Commission, [Retail Electricity Pricing Inquiry—Final Report](#), June 2018.

¹¹⁰ Based on the commission's analysis of published market offers as on 31 January 2020. This data is presented in Figure 3 of this report.

¹¹¹ Essential Services Commission, [Ensuring energy contracts are clear and fair: draft decision](#), December 2019, p.23.

¹¹² Australian Energy Market Commission, [Rule determination: national energy retail amendment \(regulating conditional discounting\) rule](#), February 2020.

Stakeholder views

Consumer organisations, the Energy and Water Ombudsman (Victoria), EnergyAustralia and Momentum Energy supported capping pay-on-time discounts.¹¹³ They noted that some pay-on-time discounts are still relatively high (at around 30 per cent) which can penalise vulnerable customers. EnergyAustralia also considered that many customers no longer value large discounts and that they can be confusing. The Energy and Water Ombudsman (Victoria) added that capping pay-on-time discounts would give customers more certainty about their energy costs and lead to less complaints.

The Consumer Action Law Centre and the Victorian Council of Social Services appealed for caps to be applied to other types of conditional discounts.¹¹⁴ They considered this would act as a deterrent to other retailers looking to construct other sorts of discounts with large margins and allow intervention and enforcement action if necessary.

A number of retailers did not support us introducing a cap on pay-on-time discounts. Some retailers considered a cap is no longer required, as the requirement for all offers to be referenced to the VDO has reduced incentives for retailers to offer large discounts.¹¹⁵ Globird Energy considered that capping pay-on-time discounts would prevent customers having access to more choice and larger discounts.¹¹⁶

Our response and final decision

In response to concerns that capping pay-on-time discounts limits a retailer's ability to offer larger discounts to customers, we note we remain committed to protecting customers from being disproportionately affected by missing pay-on-time offer conditions.

While we have observed a reduction in offers with conditional discounts in the market, some large conditional discounts do remain in the market. At the end of January 2020, we found that of the conditional pay on time discounted offers available in the market, 60 per cent of gas offers and 58 per cent of electricity offers had conditional percentage discounts of more than five per cent

¹¹³ Consumer Action Law Centre, EnergyAustralia, Energy and Water Ombudsman (Victoria), Momentum Energy and Victorian Council of Social Service, submissions to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹¹⁴ Consumer Action Law Centre and Victorian Council of Social Services, submissions to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

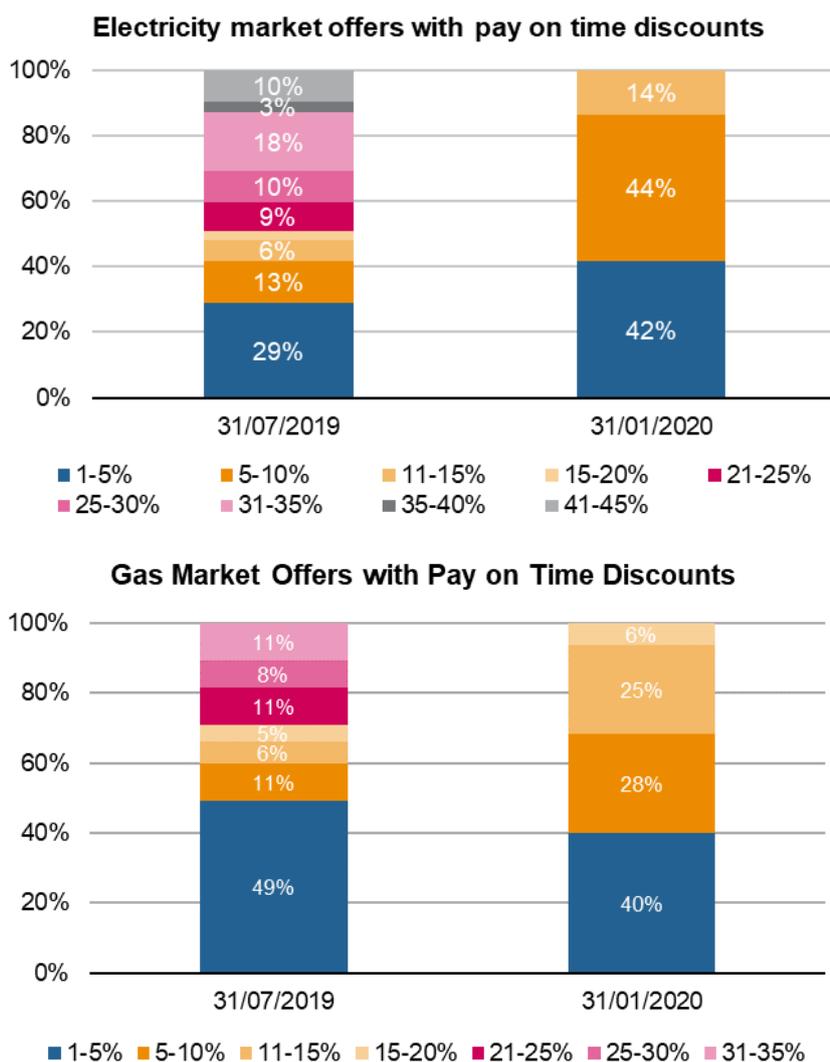
¹¹⁵ 1st Energy, Globird Energy, Momentum Energy and Powershop, submissions to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹¹⁶ Globird Energy, submission to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

(figure 3). On average across the market, the cost of not meeting the conditions of these offers was around 7.5 to 7.7 per cent.¹¹⁷

In the absence of a VDO for gas there are no incentives for retailers to reduce conditional discounts on gas offers to the same extent as has been observed for electricity. We note further that conditional discounting practices have caused considerable harm for customers who miss a bill pay-by date and have been highlighted across a range of reports in the market. We therefore consider there remains a need to cap pay-on-time discounts.

Figure 3 Breakdown of pay-on-time conditional discounted offers by discount percentage



Source: Commission analysis based on published market offers

¹¹⁷ Based on the commission’s analysis, calculated as the difference in a typical annual residential bill for all retailer offers with conditional discounts, with conditions met and not met. Based on an annual average usage of 4,000 kWh for a typical representative residential customer.

We don't propose to extend this cap to other types of discount at this time, as the evidence suggests that the issue is focused on pay-on-time discounts. We understand concerns raised by the Consumer Action Law Centre and the Victorian Council of Social Services that practices could evolve in response to the pay-on-time discount cap. We will consider further protections for customers if our monitoring shows customers are being adversely affected by not meeting the terms relating to other forms of discounts.

We recognise that we have taken a different approach to the Australian Energy Market Commission's rule change. However, given the impact conditional discounts have had, and in our role as a regulator with powers to enforce breaches of the rules, we consider a cap on pay-on-time discounts sends a clear signal in relation to the reasonable costs a retailer can charge. We also consider a cap will reduce the administrative burden on both regulated businesses and the regulator.

We believe our approach presents a balance of being a simple transparent approach, while providing a reasonable cost of debt for a benchmark retailer. Our approach will likely lead to a more consistent approach to conditional discounting across the Victorian energy retail market, will clearly limit these discounts and prevent discounts from inflating to higher levels previously observed.

Our final decision is therefore to cap pay-on-time discounts for contracts from 1 July 2020. The cap represents the maximum discount a retailer could apply to a customer's bill that is conditional on the customer paying that bill on or before the pay-by date.

Final decision 11: Pay-on-time discounts to be capped by the commission

A pay-on-time discount cap will be determined by the commission and apply to new contracts from 1 July 2020.

Calculating and updating the pay-on-time discount cap

Draft decision proposal

We considered a methodology for capping pay-on-time discounts should be simple, transparent, and applicable across the market.

We proposed to base the cap on the cost of debt, as an approximation for the costs that are reasonable for energy retailers to pass onto customers in the event of late payment. This is because it captures the cost to the retailer of borrowing money to cover the shortfall from not receiving a payment from a customer, which we considered is the main direct cost incurred.

The methodology we proposed was aligned with an established methodology the commission uses to limit the maximum interest rate that water businesses can charge on outstanding amounts. We

amended the debt risk premium for the energy pay-on-time discount cap to reflect the costs faced by energy retailers, based on information from the Australian Energy Regulator.¹¹⁸

While retailers are likely to incur administrative costs relating to recovering the payment from the customer, we did not consider that an allowance for these should be included in a cap on pay-on-time discounts. This is because it is a retailer's choice to offer conditional discounts of this kind.

Stakeholder views

The Energy and Water Ombudsman (Victoria) commented that the methodology we proposed to calculate the pay-on-time discount cap was sound and the administrative arrangements to update the cap on 1 July each year were sensible.¹¹⁹

Some retailers considered the indicative cap in our draft decision (3.74 per cent) was too low. Globird Energy considered that a balance was needed to incentive customers to pay their bills on time and at the same time not expose customers to high discounts of around 40 per cent. It suggested a reasonable range would be 10-15 percent.¹²⁰

EnergyAustralia and 1st Energy considered that the indicative value of the pay-on-time discount we quoted in our draft decision was lower than the cost of debt faced by retailers.¹²¹ 1st Energy observed that some smaller retailers may not be able to access funding at the level indicated by our methodology and suggested that bank overdraft rates may give a better approximation of the cost of debt.

EnergyAustralia also noted that based on publicly available information for some retailers, cost of debt appeared to be around six per cent per year. It commented that using a BBB+ credit rating may understate the risk faced by energy retailers and that the Australian Energy Regulator's gearing assumptions might need further consideration in this context.

There were differing views as to how the cap should be presented. Elysian Energy, Red Energy and Lumo Energy suggested the cap should be rounded to the nearest whole number to be clearer for customers.¹²² However, the Consumer Action Law Centre suggested the cap should be calculated

¹¹⁸ Australian Energy Regulator, [Rate of return instrument explanatory statement](#), December 2018, p279.

¹¹⁹ Energy and Water Ombudsman (Victoria), submission to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹²⁰ Globird Energy, submission to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹²¹ 1st Energy and EnergyAustralia, submissions to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹²² Elysian Energy and Red Energy and Lumo Energy, submissions to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

to two decimal places, in line with common practice in the banking sector, as rounding up further could see extra revenue for some retailers.¹²³ Elysian Energy added the cap should not be updated every year as this could confuse customers.¹²⁴

Some retailers called for consistency between our approach and the Australian Energy Market Commission's rule change. While EnergyAustralia supported the pay-on-time discount being set by the regulator as this would have lower administrative costs,¹²⁵ other retailers preferred that we take a principles-based approach instead.¹²⁶

The Australian Energy Council and Simply Energy said retailers need more than two weeks' notice of the new cap level before it takes effect, to enable retailers to develop and market new offers.¹²⁷

Our response and final decision

We have made two minor changes for our final decision in response to stakeholder feedback. These are to:

- incorporate a slightly higher debt risk premium
- allow more time between when the new cap level is notified and when it takes effect.

We continue to consider the cost of debt approach we proposed provides a robust, transparent approach that can be applied across the market. We did consider the alternative methodology suggested by 1st Energy, to base the cap on bank overdraft rates. However, as these rates are generally only available on application and may vary from business to business, it would be difficult to use these rates to create a robust, transparent methodology that applies to the whole market.

Following stakeholder feedback, we have decided to amend the debt risk premium, so that it is based on BBB- rated companies rather than BBB+ rated companies. This is a downgrade in credit rating, which reflects a 'riskier' business.

¹²³ Consumer Action Law Centre, submission to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹²⁴ Elysian Energy, submission to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹²⁵ EnergyAustralia, submission to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹²⁶ Alinta Energy, Australian Energy Council, Elysian Energy, Momentum Energy, Powershop and Red Energy and Lumo Energy, submissions to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹²⁷ Australian Energy Council and Simply Energy, submissions to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

We consider this better reflects the potentially higher risks faced by an energy retailer as opposed to a regulated water business, for reasons such as managing wholesale energy price risks. We consider this also better accounts for the fact that different sized energy retail businesses face different risk profiles and therefore different costs of debt. In practice this increases the debt risk premium component of the cap slightly.

We have not changed any other components of the pay-on-time discount cap. We still intend to set a cap level that is quoted to two decimal places, as the components of the cap are also calculated to two decimal places. Retailers are free to offer a pay-on-time discount to customers that is rounded to a whole number, if it is below the level of the cap in force at the time the customer signs up to the contract.

We also still intend to update the cap annually, to reflect any changes in the cost of debt that retailers face. While retailers can increase the value of a discount during a contract if the pay-on-time discount were to increase, they are not required to do this and can choose to keep the discount unchanged throughout a customer's contract if they wish to. If a retailer does increase the value of a discount, this would trigger a requirement to notify the customer of the benefit change.

The pay-on-time discount cap represents the maximum discount a retailer can apply to a customer's total bill in a given year that is conditional on the customer paying on time. For clarity, we note:

- the definition of pay-on-time discount includes credits or rebates that are conditional on a customer paying a bill on or before the bill pay-by date. If retailers choose to offer pay-on-time credits or rebates on a customer's bill, instead of a percentage discount, these are still subject to the cap. In this case, the value of the credits or rebates in a given year as a proportion of a customer's annual bill must not exceed the cap
- while the cap methodology is based on an equivalent methodology in the water industry, we are not seeking to apply interest charges to debts as may occur in the water industry.

In response to stakeholder feedback, we will provide retailers more time to update offers between the new cap being announced and taking effect. We will therefore base the cap on data as of 31 March each year and notify retailers in early May of the new cap level that will take effect from 1 July each year. This gives retailers approximately two months rather than two weeks to update their offers.

We have updated the draft guideline that will give effect to the pay-on-time discount cap (see appendix E). We will publish the final version of this guideline by early May 2020, with the level of the pay-on-time discount cap that will apply to new contracts from 1 July 2020.

Final decision 12: Aligning the methodology for capping energy pay-on-time discounts with the commission's existing methodology for water

The methodology used to determine the pay-on-time discount cap for energy retailers will be consistent with the commission's established methodology for capping water interest rates.

Final decision 13: Methodology for capping pay-on-time discounts

The pay-on-time discount cap will be the sum of:

- the 10-year Australian Commonwealth Government Bond Rate
- a debt risk premium
- an allowance for debt raising costs.

Final decision 14: Updating the pay-on-time discount cap

The pay-on-time discount cap will be updated annually. It will be based on data as at 31 March each year and will take effect on 1 July each year.

Final decision 15: Process for announcing updated pay-on-time discount cap

The commission will update its guideline and communicate any change in the level of the pay-on-time discount cap in writing to energy retailers in early May each year.

Improving protections for customers in payment difficulty

Draft decision proposal

The pay-on-time discount cap only applies to new contracts from 1 July 2020. We considered that this on its own would leave a gap in protections for customers on existing contracts with conditional discounts, particularly customers experiencing payment difficulty who may be most impacted by missing a pay-on-time discount condition.

A key premise of our payment difficulty framework is to ensure all customers in payment difficulty receive consistent, predictable and equitable assistance. Accordingly, in our December 2019 draft decision we proposed to enshrine industry best practice of honouring conditional discounts for customers who are receiving tailored assistance. This would afford all customers in payment difficulty a consistent and important customer protection.

We proposed retailers would be required to honour pay-on-time discounts for tailored assistance customers. This would start from when the customer first misses a bill and continue until either the customer successfully completes their payment arrangement, or the retailer withdraws assistance. Retailers would not be allowed to recover the pay-on-time discount for the period where the customer was receiving tailored assistance.

Stakeholder views

The Consumer Action Law Centre, the Energy and Water Ombudsman (Victoria), the Victorian Council of Social Sciences and EnergyAustralia strongly supported our draft decision requiring retailers to honour pay on time discounts for customers receiving tailored assistance.¹²⁸

EnergyAustralia reported that it did have any hardship customers on offers with pay-on-time discounts. Further, we understand anecdotally that a number of retailers already honour pay on time discounts for customers experiencing payment difficulty.

Red Energy and Lumo Energy considered that by mandating the form of assistance offered to customers in payment difficulty, retailers would be discouraged from offering other discretionary benefits that the customer might value more highly.¹²⁹

Our response and final decision

Customers experiencing payment difficulty and receiving tailored assistance are likely to be engaging with their retailer and have committed to an on-going payment arrangement for their energy bills. Given this, we consider it an important protection for these customers that retailers honour pay-on-time discounts, to assist them from falling further behind in their repayments. We also note this is not a change in practice for a number of retailers.

We do not consider that our decision limits a retailers' ability to offer further benefits of a different nature to customers in payment difficulty if they choose to. Therefore, our final decision is unchanged from our draft decision.

Final decision 16: Retailers must honour pay-on-time discounts for customers receiving tailored assistance

Retailers must honour pay-on-time discounts for customers receiving tailored assistance.

¹²⁸ Consumer Action Law Centre, EnergyAustralia, Energy and Water Ombudsman (Victoria) and Victorian Council of Social Services, submissions to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹²⁹ Red Energy and Lumo Energy, submission to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

6. Including information about the Victorian Default Offer on bills

On the front page of every electricity bill issued after 1 July 2020, retailers must include the following statement:

“The Victorian Default Offer is a reasonably priced electricity offer set by Victoria’s independent regulator. Contact us on [phone number] to discuss the suitability of this plan for you.”

On 30 May 2019, the Victorian Government issued an Order in Council to implement the VDO. The VDO Order also included a requirement from 1 October 2019 for retailers to include information on electricity bills about how a customer may access the VDO. Clause 16(2)(b) of the VDO Order directed the commission to amend the code to give effect to these obligations.

Draft decision proposal

In our December 2019 draft decision, we proposed to amend the code to include the obligation to have clear, plain and conspicuous information about the VDO on every electricity bill. Specifically, we proposed a retailer must include the following statement on the front page of every electricity bill:

“The Victorian Default Offer is set by Victoria’s independent regulator. For clear advice to help you decide if this is a suitable plan for you, contact us on [phone number] or visit [link to factsheet on retailer’s website].”

Stakeholder views

Consumer organisations and retailers had opposing views on the usefulness of including information about the VDO on electricity bills. Consumer organisations and the Energy and Water Ombudsman (Victoria) supported clear information about the VDO being included on bills.¹³⁰ However, some retailers raised concerns that including additional information on electricity bills

¹³⁰ Consumer Action Law Centre, Energy and Water Ombudsman (Victoria) and Victorian Council of Social Service, submissions to Essential Services Commission ‘ensuring energy contracts are clear and fair’ draft decision, January 2020.

could confuse customers.¹³¹ Two retailers suggested that government or regulator-led awareness campaigns could be a more effective way of raising customer awareness of the VDO.¹³²

Several stakeholders commented on the wording of our proposed statement. EnergyAustralia and Simply Energy suggested we provide retailers with flexibility to decide how information about how to access the VDO is provided to customers.¹³³ Red Energy and Lumo Energy, EnergyAustralia and Elysian Energy asked us to consider a simplified prescribed statement. They considered this would reduce the cost and time of altering bills and be more understandable for customers.¹³⁴

AGL did not consider that our proposed wording was consistent with the requirements of the VDO Order, which requires retailers include information on bills on how a customer may 'access' the VDO.¹³⁵ The Consumer Action Law Centre and the Victorian Council of Social Service suggested our prescribed statement should be written in plain English and more clearly articulate that the VDO is a 'fair price for electricity'.¹³⁶

The Consumer Action Law Centre also suggested the message should include a comparison of what customers are paying relative to the VDO.¹³⁷ The Consumer Action Law Centre and the Energy and Water Ombudsman (Victoria) asked us to monitor the effectiveness of the prescribed text.¹³⁸

AGL suggested we should exempt retailers from having to include the prescribed statement on the bills of customers who are already on the VDO.¹³⁹ AGL also requested an exemption for multi-site

¹³¹ amaysim, EnergyAustralia, Momentum Energy, Powershop and Simply Energy, submissions to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹³² EnergyAustralia and Simply Energy, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹³³ EnergyAustralia and Simply Energy, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹³⁴ Elysian Energy, EnergyAustralia and Red Energy and Lumo Energy, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹³⁵ AGL, submission to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹³⁶ Consumer Action Law Centre and Victorian Council of Social Service, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹³⁷ Consumer Action Law Centre, submission to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹³⁸ Consumer Action Law Centre and Energy and Water Ombudsman (Victoria), submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹³⁹ AGL, submission to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

customers, as if an individual site moves to the VDO they may be removed from the ‘parent’ multi-site contract.

Our response

Consistent with the VDO Order, we do consider there is value in the VDO being mentioned on all electricity bills, particularly in the context of our wider package of reforms. As set out in our June 2019 final decision on consequential amendments related to the VDO, under the clear advice entitlement, retailers only have to inform customers about the VDO if the customer enquires about the VDO or the retailer reasonably believes the VDO may be a better option for the customer.¹⁴⁰

To enquire about the VDO, customers must be aware that the VDO exists. We agree that information campaigns can be a useful tool to help achieve this. We ran a campaign when the VDO was introduced and will continue to raise awareness of the VDO through education and awareness campaigns. However, campaigns tend to focus on targeting specific groups at specific points in time. A requirement to include information about how to access the VDO on electricity bills will help raise awareness of the VDO on an ongoing basis among all customers.

Although the VDO may not be the cheapest offer for a customer, it may appeal to customers that are unwilling or unable to engage in the market on an ongoing basis and are interested in prices set independently by the regulator. If a customer is prompted to enquire about the VDO after seeing the message on their bill, the clear advice entitlement requires the retailer to provide information to help the customer decide if the VDO, or another offer, is suitable for them.

We will therefore require information on the VDO to be included on all electricity bills. In response to stakeholder feedback, we have included additional background to the VDO while maintaining a succinct message. We consider including the words ‘reasonably priced electricity offer’ will indicate the purpose of the VDO to customers and aligns with other public communications of the VDO.¹⁴¹

To give effect to this final decision we have made amendments to the code, as per the government’s direction to the commission under clause 16(2)(b) of the VDO Order. We note that AGL questioned whether the commission’s prescribed text was consistent with retailers’ obligations

¹⁴⁰ Essential Services Commission, [Consequential amendments related to the Victorian Default Offer: Final decision](#), June 2019.

¹⁴¹ For example, see: Minister for Energy, Environment and Climate Change, [Saving Victorians Hundreds Of Dollars Off Their Power Bills: Media release](#), May 2019. Essential Services Commission, [Regulator sets default offer price for 2020: Media release](#), November 2019.

under the VDO Order.¹⁴² For clarity, the new clause 25(1)(za) of the code will replace retailers' obligations under clause 8 of the VDO Order from 1 July 2020.

The requirement to include information about how to access the VDO will apply to all electricity bills, with no exemptions. This approach aligns with our requirements under the VDO Order.

As the prescribed text solely provides an informative message on how customers can access the VDO, we do not anticipate this message will confuse customers. In the two cases raised in submissions (customers on the VDO or in a multi-site contract), we consider any customer enquiries can be addressed through retailers' obligations to provide clear advice to their customers on available retail contracts.

Final decision

We have made some minor changes to the wording of the prescribed statement about the VDO to be included on bills. The statement that retailers must include on the front page of every electricity bill issued from 1 July 2020 is:

The Victorian Default Offer is a reasonably priced electricity offer set by Victoria's independent regulator. Contact us on [phone number] to discuss the suitability of this plan for you.

Final decision 17: Retailers must include information about accessing the VDO on electricity bills

From 1 July 2020, retailers must include prescribed text on all electricity bills, which explains how a customer can access the VDO.

¹⁴² AGL, submission to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

7. Changing the back-billing rules

To implement the government's commitment to reduce the allowable back-billing period, we are seeking to make equivalent obligations for energy distributors and retailers to ensure customers are not back-billed for more than four months when they are not at fault.

We have published a separate draft decision that seeks stakeholder views on our proposed amendments to the Energy Retail Code and energy distribution codes to implement the change to the allowable back-billing period. Our intention is that code amendments will come into effect from 1 January 2021.

In its Energy Fairness Plan, the government announced that the allowable period an energy retailer should be able to recover from a customer is four months. The government considered 'it is unfair to have to pay a bill for nine months' worth of energy when you have been undercharged by the retailer and have done nothing wrong'.¹⁴³

In our December 2019 draft decision, we proposed to amend the Energy Retail Code to reduce the allowable back-billing limit from nine months to four months. The Energy Retail Code sets out the time period for which energy retailers can recover an undercharged amount for energy consumption. Currently, the Energy Retail Code provides that an energy retailer may recover up to a nine-month period from its customer, if the undercharging had occurred for nine months or more and was not the customer's fault (for example, because the customer denied meter access) or caused by an unlawful act or omission of the customer.¹⁴⁴

Stakeholder views

Consumer organisations supported reducing the allowable back-billing limit from nine months to four months, noting this change will incentivise retailers to minimise bill delays and limit the risks of unexpected costs to households.¹⁴⁵ The Energy and Water Ombudsman (Victoria) also supported

¹⁴³ Victorian Labor Party, [Cracking down on dodgy energy retailers – Labor's energy fairness plan](#), November 2018.

¹⁴⁴ Clause 30(2)(a) of the Energy Retail Code.

¹⁴⁵ Consumer Action Law Centre and Victorian Council of Social Service, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

the reform, and considered that it could help to reduce the occurrence of complaints if retailers are prompted to develop and maintain compliant and timely billing systems.¹⁴⁶

Retailers raised concerns that without an equivalent restriction on distribution businesses, retailers may be required to pay distribution businesses for undercharged amounts they cannot then recover from their customers.¹⁴⁷ Several retailers proposed the commission replicate requirements in the National Electricity Rules and National Gas Rules that apply in other jurisdictions.¹⁴⁸

Red Energy and Lumo Energy and the Australian Energy Council considered we should broaden the circumstances when back-billing beyond the prescribed period is allowed, to reflect that undercharging can occur for several reasons outside of retailers' control.¹⁴⁹ These stakeholders provided draft amendments to allow back-billing beyond the prescribed timeframe in circumstances outside of retailers' control.

AGL, EnergyAustralia and Red Energy and Lumo Energy outlined circumstances where undercharging of customers may currently arise, such as issues with site and meter access, accurate meter data and incorrect assignment of meter number or customer details.¹⁵⁰ These stakeholders mentioned legislative requirements that can result in an undercharged amount for customers, such as retrospective transfers of customers under the Australian Energy Market Operator's Retail Market Procedures and the commission's Electricity Customer Transfer Code.

Several retailers requested we delay implementation from 1 July 2020 to allow time for further consultation with stakeholders on the proposed Energy Retail Code amendments and any amendments to the electricity and gas distribution codes.¹⁵¹ Some retailers suggested additional time is required to update existing processes and systems to implement the back-billing change.¹⁵²

¹⁴⁶ Energy and Water Ombudsman (Victoria), submission to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹⁴⁷ 1st Energy, amaysim, Australian Energy Council, Origin Energy, Red Energy and Lumo Energy, Simply Energy, Tango Energy, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹⁴⁸ AGL, amaysim, Australian Energy Council, EnergyAustralia, Origin Energy, Red Energy and Lumo Energy and Simply Energy, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹⁴⁹ Australian Energy Council and Red Energy and Lumo Energy, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹⁵⁰ AGL, EnergyAustralia and Red Energy and Lumo Energy, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹⁵¹ AGL, Australian Energy Council, EnergyAustralia, Momentum Energy and Powershop, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹⁵² AGL, EnergyAustralia, Momentum Energy and Red Energy and Lumo Energy, submissions to the Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

Our response and next steps

We consider that giving effect to the government's commitment more holistically to reduce back-billing to four months would also require changing the obligations of energy distributors in the Electricity Distribution Code and Gas Distribution System Code. This would ensure both retailers and distributors are restricted to recovering up to four months of previously undercharged, or not charged, amounts.

In order to allow for the consultation and implementation of code amendments, we have decided to publish a separate draft decision that sets out our proposed amendments to the Energy Retail Code, Electricity Distribution Code and Gas Distribution System Code.¹⁵³ Our proposed changes to the Energy Retail Code remain unchanged from our December 2019 draft decision.

We are seeking stakeholder feedback on this draft decision by 27 March 2020. At this stage, we intend to publish a final decision prior to 1 July 2020, with the new back-billing rule changes taking effect from 1 January 2021.

Final decision 18: Reducing the allowable back-billing period to four months

We have published a separate draft decision to consult on the proposed back-billing changes for both energy retailers and distributors.

¹⁵³ Essential Services Commission, [Changing the back-billing rules for retail energy customers: draft decision](#), February 2020.

8. Amending the Energy Retail Code

To give effect to this final decision, we have amended the code. The majority of new rules are located in Part 2 of the code, relating to customer retail contracts. We have also made a number of consequential amendments across other parts of the code.

Ensuring customers can easily compare offers

The new rules relating to ensuring customers can easily compare offers are located in Part 2, Division 10 of the code, which covers energy marketing. We have amended Subdivision 1 to include an overarching objective relating to marketing, and created three new subdivisions:

- requirements prohibiting retail marketers engaging in misleading or deceptive conduct are in Subdivision 1A
- requirements relating to conditional discounts (for gas and electricity) are in Subdivision 2A
- electricity reference price requirements are in Subdivision 2B.

Code location	Amendment
Part 1, Division 1, Clause 3 – definitions	<ul style="list-style-type: none">• Added new definitions to give effect to recommendation 3A.
Part 2, Division 10 – energy marketing	<ul style="list-style-type: none">• Renamed the title of Subdivision 1 from ‘preliminary’ to ‘operation of this Division’.• Added new clauses that apply to the whole energy marketing division. This includes:<ul style="list-style-type: none">– a requirement for retailer marketers to perform obligations under the division in a way that promotes the objective of the division and each subdivision (Clause 60A)– an objective to ensure that retail marketers disclose information about energy plans in a clear and easily understood manner that assists customers to assess the suitability of, and compare, a plan (Clause 60B)– a requirement for retailers to ensure that third parties marketing on their behalf comply with this division (Clause 60C)

- Added a new Subdivision 1A on misleading and deceptive conduct.
- Added a new Subdivision 2A on advertising conditional discounts to small customers. This includes:
 - an objective to refer to conditional discounts in a clear and easily understood manner (Clause 64A)
 - specific requirements about advertising conditional discounts (Clause 64B).
- Added a new Subdivision 2B on advertising electricity prices. This includes:
 - an objective to ensure that discounts are referred to consistently in electricity marketing (Clause 64C)
 - a clause to clarify the application of the subdivision (Clause 64D)
 - definitions relating specifically to the subdivision (Clause 64E)
 - reference price requirements (Clause 64F).
- Removed Clause 67 that requires retailers to ensure that third parties marketing on their behalf comply with Subdivision 3 (new Clause 60C replaces this but for the whole of Part 2, Division 10 of the code).

Fixing market contract prices

The new rules relating to fixing market contract prices are located in Part 2, Division 7 of the code. We have created a new Subdivision 1 in this part.

The rules restricting the timing of when retailers can increase market contract prices are located in new Clause 46AA. A new Subdivision 2 sets out the rules around exemptions from once-a-year price increase.

We have also added notes to highlight links between the price change rules and explicit informed consent and tailored assistance provisions in relevant sections of the code.

Code location	Amendment
Part 1, Division 1, Clause 3 – definitions	<ul style="list-style-type: none"> Added new definitions to give effect to recommendation 4A.
Part 2, Division 3, Clause 16 – pre-contractual duty of retailers	<ul style="list-style-type: none"> Added a note to Clause 16(4) (relating to obtaining explicit informed consent before a customer enters a market retail contract) to explain that Clause 52D imposes additional explicit informed requirements for customers entering into exempt market retail contracts.
Part 2, Division 7 – particular requirements for contracts	<ul style="list-style-type: none"> Renamed the title of Division 7 from ‘particular requirements for contracts and exempt person arrangements’ to ‘key requirements for market retail contracts and exempt person arrangements’. Added a new Subdivision 1 to the existing clauses in division 7 (Clauses 45AA to 52). Added new definitions in Clause 45A and changed the definition of ‘fixed term retail contract’ to give effect to recommendation 4A. <div data-bbox="443 1010 1420 1200" style="background-color: #f2f2f2; padding: 5px;"> <ul style="list-style-type: none"> Added a new Clause 46AA that sets out requirements around retailers only being allowed to increase prices on a network tariff change date or annually after the end of a fixed price period. </div> <div data-bbox="443 1200 1420 1346" style="background-color: #f2f2f2; padding: 5px;"> <ul style="list-style-type: none"> Added a new Clause 47AB that requires fixed term retail contracts to be no less than 12 months long. </div> <div data-bbox="443 1346 1420 1951" style="background-color: #f2f2f2; padding: 5px;"> <ul style="list-style-type: none"> Added a new Subdivision 2 that sets out requirements for exempt market retail contracts. This includes: <ul style="list-style-type: none"> a requirement for retailers to perform obligations under this subdivision in a way that promotes the objectives (Clause 52A) objectives of the subdivision (Clause 52B) a definition of an exempt market retail contract (Clause 52C) additional explicit informed consent requirements for exempt market retail contracts (Clause 52D) notice and reporting requirements for retailers offering exempt market retail contracts (Clause 52DA) </div>

- requirements if a customer on an exempt market retail contract becomes entitled to receive tailored assistance (Clause 52E).

Part 3, Division 3, Clause 79 – minimum assistance	Added a note after Clause 79(6) (end of clause that sets out minimum level of tailored assistance a customer can expect) to explain that Clause 52E imposes additional tailored assistance requirements if customers are on exempt market retail contracts.
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Protecting customers at the end of benefit and contract periods

The new rules relating to aligning benefit and contract periods are also located in Part 2, Division 7 of the code.

Code location	Amendment
Part 1, Division 1, Clause 3 – definitions	<ul style="list-style-type: none"> • Amended the current definition of fixed benefit period.
Part 2, Division 7 – particular requirements for contracts	<ul style="list-style-type: none"> • Inserted a new Clause 46B that sets out requirements for retailers to make discounts, rebates and credits available for the whole contract term.
Schedule 3 – transitional provisions	<ul style="list-style-type: none"> • Added that Clause 46B applies to market retail contracts entered into on or after 1 July 2020.

Regulating conditional discounts

The rules around the new pay-on-time discount cap are also located in Part 2, Division 7 of the code.

The rules around honouring pay-on-time discounts are located alongside existing tailored assistance provisions in Part 3 of the code.

Code location	Amendment
Part 1, Division 1, Clause 3 – definitions	<ul style="list-style-type: none"> • Added a new definition for pay-on-time discounts.

Part 2, Division 7 – particular requirements for contracts	<ul style="list-style-type: none"> Inserted a new Clause 46AB that sets out requirements for pay-on-time discounts to not exceed the cap set by the commission.
Part 3, Division 3A – tailored assistance	<ul style="list-style-type: none"> Inserted a new Division 3A on honouring pay-on-time discounts. This includes: <ul style="list-style-type: none"> an objective to require retailers and exempt persons to honour pay-on-time discounts for tailored assistance customers who are in arrears (Clause 83A) a clause to clarify the application of the subdivision (Clause 83B) requirements for retailers and exempt persons to honour pay-on-time discounts for customers who fail to pay a bill by the due date and receive tailored assistance (Clause 83C).
Schedule 3 – transitional provisions	<ul style="list-style-type: none"> Added that Clause 46AB applies to contracts entered into on or after 1 July 2020. Added that Part 3, Division 3A applies to contracts entered into before, on or after 1 July 2020.

Including information about the Victorian Default Offer on bills

Code location	Amendment
Part 2, Division 4, Clause 25 – contents of bills	<ul style="list-style-type: none"> Added a requirement to include specific text on the front page of electricity bills that explains how a customer can access the VDO (Clause 25(1)(za)).

Technical amendment

Code location	Amendment
Part 2, Division 9, Clause 57 – retailer obligations in relation to a customer transfer	<ul style="list-style-type: none"> Removed the reference to a small customer relating to a transfer. This is for clarity and does not affect the original intent of the obligation.

9. Next steps

Commencement of new requirements

Draft decision proposal

We proposed a commencement date of 1 July 2020 for the code amendments giving effect to recommendations 3A and 4A-4E, requirement to include the VDO on electricity bills and back-billing rule change, as set out in the terms of reference for recommendation 4 and back-billing.¹⁵⁴

Stakeholder feedback and our response

While the Consumer Action Law Centre strongly supported this timetable,¹⁵⁵ retailers generally sought more time to implement the new requirements.¹⁵⁶ In particular, some retailers requested that we allow more time to implement the back-billing reforms.¹⁵⁷ They said the 1 July 2020 implementation date for this change was not anticipated, and changes to existing processes and systems would be required.

We acknowledge retailers' concerns about the challenges involved in implementing these changes by 1 July 2020. However, the broad outline and timing of the changes relating to recommendations 4A-4E was established via terms of reference issued in December 2018, 18 months before the commencement of the new rules. We also note that retailers are already required to comply with electricity reference price requirements and include information about the VDO on electricity bills, under requirements in the VDO Order that took effect from 1 July 2019.

We appreciate that system enhancements cannot be finalised until details of the new requirements have been settled. However, we have refined certain proposals between draft and final decision which, based on our engagement with stakeholders, we understand will make it easier to implement the new requirements:

¹⁵⁴ See appendix A for both terms of reference.

¹⁵⁵ Consumer Action Law Centre, submission to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹⁵⁶ AGL, Elysian Energy, Momentum Energy, Powershop and Simply Energy, submissions to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

¹⁵⁷ EnergyAustralia, Momentum Energy and Red Energy and Lumo Energy, submissions to Essential Services Commission 'ensuring energy contracts are clear and fair' draft decision, January 2020.

- In relation to recommendation 4A, we have allowed retailers an additional month after network tariff prices change to prepare for any market retail contract price increases, which should require retailers to make fewer (if any) changes to systems and processes.
- We have modified our approach to recommendation 4A by allowing retailers who currently offer fixed-price products to continue doing so. We expect this will significantly reduce implementation requirements for these retailers. It also offers other retailers an alternative way of implementing recommendation 4A.
- In relation to recommendation 4C, we have confirmed that no changes to current processes are required for electricity customers reaching the end of a fixed-term contract. For gas customers, we have clarified that changes to current processes will only need to be made following legislative amendments later in the year.
- In relation to recommendation 4D, retailers are no longer required to honour discounts for customers on contracts signed up to before 1 July 2020. We understand this will make implementing these changes significantly easier for all retailers.

In relation to back-billing, to allow for the consultation and implementation of code amendments we have decided to publish a separate draft decision that sets out our proposed amendments to the Energy Retail Code, Electricity Distribution Code and Gas Distribution System Code.

Our final decision

The code amendments giving effect to recommendations 3A and 4A-4E and the requirement to include the VDO on electricity bills will take effect from 1 July 2020.

We expect the code amendments giving effect to the back-billing rule change will take effect on 1 January 2021.

Final decision 19: Commencement date of code amendments

The code amendments giving effect to recommendations 3A and 4A-4E and the requirement to include information about the VDO on electricity bills will take effect from 1 July 2020.

We expect the code amendments giving effect to the back-billing rule change will take effect from 1 January 2021.

Monitoring outcomes from the new framework

Our Victorian Energy Market Reports outline retailer performance against a series of measures. These measures indicate at a high level the experiences of customers in the Victorian energy market. We will use this reporting process to monitor the outcomes of these latest reforms.

We also conduct regular audits to see whether retailers and distributors are complying with the energy rules. Over time we will audit retailers in relation to compliance with these new rules.

Next steps

Appendix A: Terms of reference

Ensuring Contracts are Clear and Fair

Terms of Reference to the Essential Services Commission

The Essential Services Commission (ESC) is requested to conduct a review under section 10(g) of the *Essential Services Commission Act 2001* on the appropriate amendments to the Energy Retail Code (the Code) to give effect to recommendations 4A to 4E of the *Independent Review of the Electricity and Gas Retail Markets in Victoria* (the Review).

Background

The Review commissioned by the Victorian Government in November 2016 found that the deregulated energy market was not delivering the anticipated benefits to consumers. It made 29 recommendations designed to place consumers back on a level playing field, including changing retailer marketing practices, introducing a basic service offer and abolishing standing offer contracts.

On 26 October 2018, the government released its final response to the Review. The final response gave full support for all 11 recommendations and in particular:

- supported recommendations 1 and 2 by proposing to require electricity retailers to offer a fairer price for energy, to be called the “Victorian Default Offer” (VDO), and replace standing offers; and
- supported recommendation 4, noting the government will direct the ESC to review the *Energy Retail Code* (the Code) to give effect to the recommendation.

Recommendation 4 is concerned with contract periods, practices and variations being clear and fair, and comprises 5 sub-recommendations:

4A Require retailers to commit to fix any prices they are offering for a minimum of 12 months. During this period, the market contract prices cannot change. Retailers may request an exemption from the ESC to address unforeseen changes in network costs;

4B Require retailers to disclose the length of time any offered prices will be available without change;

4C Require retailers to roll customers onto the nearest matching offer, generally available offer at the end of a contract or benefit period, unless the customer opts for another offer;

4D Any conditional discount or other benefit offered for paying on-time or on-line billing should be evergreen. Customers should not lose the discount or other benefit when the contract ends;

4E Costs incurred by customers for failing to meet offer conditions are to be capped and not be higher than the reasonable cost to the retailer.

Request

The government is now requesting the ESC to review the Code to give effect to Review sub-recommendations 4A to 4E. The ESC is also asked to advise of any implementation issues arising from these Terms of Reference.

The ESC is advised to interpret recommendation 4A, requiring retailers to fix prices for a minimum of 12 months, as applying from the date an individual customer enters into a new contract. This recommendation is not intended to prevent retailers from updating price offers available to other customers in the market.

In conducting its review, the ESC is required to have regard to its objectives under the *Essential Services Commission Act 2001*, *Electricity Industry Act 2000*, and *Gas Industry Act 2001*, findings from the Review, the Government's published response to the Review, advice from relevant experts, and other matters it deems relevant.

While undertaking its review, the ESC may consider early adoption of any measures it considers necessary in the context of its statutory objectives, including those introduced in other Australian jurisdictions.

The ESC should engage in its work with an expert panel including the Secretary of DELWP and members nominated by the Minister for Energy, Environment and Climate Change.

Consultation

In undertaking this review, the ESC is required to publicly consult.

Reporting

Throughout the review, the ESC will advise the Assistant Treasurer and the Minister for Energy, Environment and Climate Change about its progress and final approach.

Completion

The ESC is required to complete and publish its review, so that changes to the relevant instruments can take effect from 1 July 2020.

Energy Fairness Plan

Terms of Reference for the Essential Services Commission

The Essential Services Commission (the ESC) is requested to provide advice under section 10(g) of the *Essential Services Commission Act 2001* (the Act) to support the Government's commitment under its Energy Fairness Plan to reduce the period available for retailers to back-bill energy consumers.

Background

On 20 November 2018, the Government released the 'Energy Fairness Plan' which committed to a range of reforms to the energy retail market aimed at 'cutting the cost of energy for families across the state, increasing transparency and competition in the market and making sure that companies that do the wrong thing face the consequences'.

Request

The ESC is requested to implement the Government's commitment to reduce the period available for retailers to recover undercharged consumption.

Energy retailers are currently able to recover from customers an amount for a period of up to nine months when they have previously undercharged or not charged for consumption. The Victorian Government has committed to reduce this time period so that an energy retailer is only able to recover from customers an undercharged amount for a maximum period of four months from when the customer is notified of the undercharging.

In providing this advice, the ESC is required to have regard to its objectives under the Act and the *Electricity Industry Act 2000*, and other matters it deems relevant.

Reporting

In carrying out this request, the ESC will advise the Assistant Treasurer and the Minister for Energy, Environment and Climate Change about its progress and final approach.

Consultation

In carrying out this request, the ESC is required to consult publicly.

Completion

Unless otherwise determined by Government, the ESC must vary the Energy Retail Code so that the new period for which undercharged consumption may be recovered commences from 1 July 2020.

Appendix B: Final Energy Retail Code amendments

Ensuring customers can easily compare offers (recommendation 3A) and including information about the Victorian Default Offer on bills

AMENDMENTS TO THE ENERGY RETAIL CODE: VICTORIAN DEFAULT OFFER TARIFFS TO BE REFERENCE TARIFFS FOR DISCOUNTS

FEBRUARY 2020

Amendments made by the Essential Services Commission on 28/02/2020

1 Nature and commencement of this instrument

- (1) This instrument amends the *Energy Retail Code*.
- (2) This instrument comes into operation on 1 July 2020.

2 Table of amendments

(1) Insert the following definitions in clause 3 in the appropriate alphabetical positions:

advertisement—see clause 64E;

annual reference consumption—see clause 64E;

conditional discount means a reduction to the price or tariff for the supply of *energy* that applies only if a *customer* satisfies certain requirements or conditions, and:

- (a) subject to paragraph (b), includes a conditional rebate or a conditional credit; and
- (b) does not include a discount, rebate or credit if all the conditions on it relate to the circumstances in which a *customer* enters into a *customer retail contract* (for example, a one-off sign-up credit);

conditional price—see clause 64E;

demand tariff means a tariff for supplying electricity if working out the amount a *customer* is charged for the supply of electricity during a period at prices that include that tariff requires identifying, from among particular sub-periods of the period, the sub-period during which the *customer's* demand for the supply of electricity is the highest;

distribution zone means the area in which a distributor is licensed to distribute and supply electricity under the *Electricity Industry Act*;

lowest possible price—see clause 64E;

offered prices has the meaning given in clause 64F(1);

price — see clause 64E;

proportional conditional discount—see clause 64E;

regulatory period means a period during which a *VDO price determination* applies;

representative customer—see clause 64E;

type—see clause 64E;

unconditional price—see clause 64E;

VDO price—see clause 64E;

(2) Replace the definition of *energy marketing activity* in clause 3 with the following:

energy marketing activity means an activity that is carried on to market, advertise or promote:

- (a) *customer connection services*; or
- (b) *customer retail services*; or
- (c) a supplier or prospective supplier of *customer connection services* or *customer retail services*,

to a *customer*;

(3) After clause 25(1)(z) insert:

- (za) for electricity bills only, clear and simple information expressed in plain language on how to access the *Victorian default offer* from the *retailer*, displayed in a conspicuous manner on the front page of the bill with the following text: “The Victorian Default Offer is a reasonably priced electricity offer set by Victoria’s independent regulator. Contact us on [phone number] to discuss the suitability of this plan for you”.

(4) In Division 10 Energy Marketing, replace the heading for Subdivision 1 Preliminary with the following:

Subdivision 1 Operation of this Division

(5) After clause 60 insert:

60A Requirement

A *retail marketer* is required to perform its obligations under this Division in a way that promotes the objectives of this Division and each Subdivision.

60B Objective

The objective of this Division is to ensure that *retail marketers* carrying out *energy marketing activities* disclose to *customers* information regarding their plans in a clear and easily understood manner so as to assist *customers* to assess the suitability of, and select, a plan.

60C Duty of retailer to ensure compliance

A *retailer* must ensure that a *retail marketer* who is an *associate* of the *retailer* complies with this Division.

Subdivision 1A Provisions from Australian Consumer Law

60D Misleading or deceptive conduct

A *retail marketer* must not engage in misleading or deceptive conduct (within the meaning of sections 18(1) and 34 of schedule 2 of the *Competition and Consumer Act 2010*, modified by section 4 of the *Competition and Consumer Act 2010*) in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services.

60E False or misleading representations

A *retail marketer* must not make a false or misleading representation (within the meaning of section 29(1) of schedule 2 of the *Competition and Consumer Act 2010*) in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services.

(6) After clause 64 insert:

Subdivision 2A Advertising conditional discounts to small customers

64A Objective

The objective of this Subdivision is to ensure that *retail marketers* carrying out *energy marketing activities* refer to *conditional discounts* in a clear and easily understood manner so as to assist *customers* to assess the suitability of, and select, a plan.

64B Manner of advertising conditional discounts

- (1) Subject to subclause (2), a *retail marketer* must state the conditions of the *conditional discount* clearly and conspicuously in any marketing, advertisement or promotion of prices or tariffs for supplying *energy* to *small customers*.

- (2) The *conditional discount* must not be the price-related matter that is mentioned most prominently in the marketing, advertisement or promotion.

Subdivision 2B Advertising electricity prices

64C Objective

The objective of this Subdivision is to ensure *retail marketers* carrying out *energy marketing activities* in relation to the sale and supply of electricity refer to discounts in a consistent way to assist *customers* to compare plans.

64D Application of Subdivision

This Subdivision applies to *retail marketers* carrying out *energy marketing activities* in relation to the sale and supply of electricity.

64E Definitions

In this Subdivision—

advertisement:

- (a) subject to paragraph (b), means any mass-marketing communication (whether oral or in writing) that is published or transmitted by or on behalf of a *retail marketer* to publicise a *retailer's offered prices* to *customers*;
- (b) does not include any communication by a *retail marketer* directly with an individual *customer* regarding the *retailer's offered prices*, provided that the *retail marketer* makes that communication in accordance with Part 2A of this Code;

annual reference consumption for a *regulatory period*, in relation to supplying electricity in a *distribution zone* to a *customer* of a particular *type*, means the matters determined under clause 15(5) of the *VDO Order* for the *regulatory period* in relation to the supply;

Note:

See the note to clause 64F.

conditional price for a *proportional conditional discount* means the total annual amount a *representative customer* would be charged for the supply of electricity in the *regulatory period* at the *offered prices*, assuming the conditions on the discount were met and disregarding any other *conditional discounts*;

lowest possible price means the total annual amount a *representative customer* would be charged for the supply of electricity in the *regulatory period* at the *offered prices*, assuming the conditions on all *conditional discounts* (if any) mentioned in the *advertisement* were met.

Note:

If the *advertisement* does not mention any *conditional discounts*, the *lowest possible price* is the *unconditional price*.

offered prices has the meaning given in clause 64F(1);

price:

- (a) subject to paragraph (b) and (c), includes a tariff or charge of any description, including a recurring fee (for example, an annual membership fee);
- (b) does not include any of the following:
 - (i) a one-off fee (for example, a connection fee or reconnection fee or an account establishment fee);
 - (ii) a fee for making, or failing to make, a payment in particular circumstances (for example, a credit card transaction fee or a direct debit dishonour fee);
 - (iii) a fee for a service provided on request on an ad-hoc basis (for example, a fee for a meter read requested by a *customer*); and
- (c) does not include a *demand tariff*;

proportional conditional discount means a *conditional discount* that is calculated as a proportion of all or part of the amount a *customer* is charged for the supply of electricity at the *offered prices*;

representative customer, in relation to supplying electricity in a *distribution zone* in a *regulatory period* to a *customer* of a particular *type*, means a *customer* of that *type* who is supplied with electricity in that *distribution zone* in the *regulatory period* in accordance with the *annual reference consumption* for that *regulatory period* in relation to the supply;

type means a type of *customer* in respect of which an *annual reference consumption* is determined under clause 15(5)(b)(i) of the *VDO Order*;

unconditional price means the total annual amount a *representative customer* would be charged for the supply of electricity in the *regulatory period* at the *offered prices*, disregarding any *conditional discounts*;

VDO price for a *regulatory period* in relation to supplying electricity in a *distribution zone* to a *customer* of a particular *type* means the estimated annual cost of the *Victorian default offer* determined under clause 15(4)(a) of the *VDO Order* for the *regulatory period* in relation to the supply.

Note:

See the note to clause 64F.

64F Advertisements etc. must compare retailer's prices with the VDO price

- (1) A *retail marketer* must not advertise *prices* for the supply of electricity (the *offered prices*) unless the *advertisement* meets the requirements of subsections (2), (3) and (4).
- (2) The *retail marketer* must state in an *advertisement* the following matters, making it clear that the matters relate to a *representative customer*:
 - (a) the difference between:

- (i) the *VDO price*; and
- (ii) the *unconditional price*;

expressed as a percentage of the *VDO price*;

- (b) for each *proportional conditional discount* mentioned in the *advertisement*—the difference between:

- (i) the *unconditional price*; and
- (ii) the *conditional price* for the discount;

expressed as a percentage of the *VDO price*;

- (c) the *lowest possible price*.

- (3) The *retail marketer* must also state in an *advertisement*:

- (a) the *distribution zone*; and
- (b) the *type of customer*,

to which the *offered prices* relate.

- (4) The *retail marketer* must state in an *advertisement* the matters required by subclauses (2) and (3) clearly and conspicuously.

Note:

The insertion of this clause does not provide for the matters provided for in subclauses 15(4) and 15(5) of the *VDO Order*. By the proviso to subclause 15(1) of the *VDO Order*, subclauses 15(4) and 15(5) of the *VDO Order* continue to apply.

(7) Delete clause 67, and substitute it with:

67 [Not used]

Fixing market contract prices (recommendation 4A)

AMENDMENTS TO THE ENERGY RETAIL CODE: PRICE CERTAINTY AND EXEMPT MARKET RETAIL CONTRACTS

FEBRUARY 2020

Amendments made by the Essential Services Commission on 28/02/2020

1 Nature and commencement of this instrument

- (1) This instrument amends the *Energy Retail Code*.
- (2) This instrument comes into operation on 1 July 2020.

2 Table of amendments

(1) Insert the following definitions in clause 3 in the appropriate alphabetical positions:

applicable access arrangement has the meaning given in the *NGL*;

network tariff change date means the date one calendar month after:

- (a) in respect of a *market retail contract* for electricity, the date on which the relevant *distributor's* approved pricing proposal takes effect under clause 6.18.8(d) of the *NER*; and
- (b) in respect of a *market retail contract* for gas, the date on which the relevant *distributor's* reference tariff variation occurs under the terms of the *applicable access arrangement* for that *distributor*;

Note:

The Australian Energy Regulator approves annual pricing proposals for electricity distributors and reference tariff variations for gas distributors, and publishes details of those approved proposals and variations on its website.

exempt market retail contract—see clause 52C;

fixed price period—see clause 45A;

fixed price period contract—see clause 45A;

fixed term retail contract—see clause 45A;

VDO Order means the Order in Council made under s 13 of the *Electricity Industry Act* published in Special Gazette No. S 208, on Thursday 30 May 2019 and as amended from time to time;

VDO price determination means a price determination by the *Commission* pursuant to the *VDO Order*;

(2) Replace the definition of *Victorian default offer* in clause 3 with the following:

Victorian default offer means any offer to supply or sell electricity that is subject to a regulated price pursuant to the *VDO Order*;

(3) Below clause 16(4) insert:

Note:

Additional *explicit informed consent* requirements are imposed under clause 52D for the entry by a *small customer* into an *exempt market retail contract*.

(4) Replace the heading for Division 7 after clause 45(5) with the following:

Division 7 Key requirements for market retail contracts and exempt person arrangements

(5) After clause 45AA(3) insert:

Subdivision 1: General

(6) In clause 45A, after the heading *Definitions*, delete the words “In this Division:” and insert:

In this Subdivision:

fixed price period means an initial fixed period during which a *retailer* is prohibited from increasing tariffs under the terms of a *market retail contract*;

fixed price period contract means a *market retail contract* that provides that the *retailer* will not increase tariffs during a *fixed price period* of not less than 12 months;

(7) In clause 45A, after the definition of *fixed term retail contract*, insert:

Note:

Clause 47AB of this Code provides that the length of a *fixed term retail contract* must be not less than 12 months.

(8) After clause 46A insert:

46AA Price certainty: Price increases may only be made on a network tariff change date or annually after a fixed price period

(1) Requirement of this clause

A *retailer* is required to perform its obligations under this clause in a way that promotes the objective of this clause.

(2) Objective of this clause

The objective of this clause is to provide *small customers* with certainty that tariffs payable under a *market retail contract* (other than an *exempt market retail contract*) can be increased by a *retailer* only on a *network tariff change date* or as otherwise permitted by this clause.

(3) Subject to subclauses (4), (6), (7) and (8), a *retailer* must not increase any of the tariffs payable by a *small customer* under a *market retail contract* except with effect from a *network tariff change date*.

(4) Subclause (3) does not permit a *retailer* to increase any tariffs payable by a *small customer* under a *market retail contract* with effect from a *network tariff change date* if:

- (a) the contract is a *fixed price period contract*; or
- (b) the *retailer* is otherwise prohibited from doing so under the terms and conditions of the *market retail contract*.

(5) Subject to subclauses (6), (7) and (8), a *retailer* must not increase any of the tariffs payable by a *small customer* under a *fixed price period contract* except with effect from:

- (a) the date on which the *fixed price period* expires; and
- (b) each anniversary of that date.

(6) Subclauses (3) and (5) do not apply to tariffs payable by a *small customer* under an *exempt market retail contract* provided that, for an *exempt market retail contract* entered into on or after 1 July 2020, the *retailer* has complied with its obligations under clauses 16(4) and 52D of this Code to obtain the *customer's explicit informed consent* to enter into that *exempt market retail contract*.

Note:

Exempt market retail contract is defined in clause 52C of this Code.

(7) In the event that a *VDO price determination* is varied on account of an event that was uncertain or unforeseen by the *Commission*, subclauses (3) and (5) do not prevent a *retailer* from increasing any tariffs charged under a *market retail contract* with effect from the date one month after the date on which the variation to the *VDO price determination* takes effect.

Note:

Clause 13(3)(a) of the VDO Order permits the Commission to vary a VDO price determination if an uncertain or unforeseen event has occurred or will occur.

- (8) Subclauses (3) and (5) do not prevent a *retailer* from increasing any tariffs charged under a *market retail contract* at any time where:
- (a) the increase to the tariff is a direct result of, and does no more than to give effect to, a tariff reassignment by the *distributor*; or
 - (b) the *market retail contract* is in respect of more than one premises and:
 - (i) the *customer* is or would be a *small customer* in relation to at least one of those premises; and
 - (ii) the aggregate of the actual or estimated annual consumption level of the relevant premises is higher than:
 - (A) in the case of electricity—the upper consumption threshold provided for in an Order made under section 35(5) of the *Electricity Industry Act*;
 - (B) in the case of gas—the upper consumption threshold provided for in an Order made under section 42(5) of the *Gas Industry Act*.

Notes:

As to the upper consumption thresholds for *small customers*, see the notes under the definition of “*small customer*” in clause 3.

This clause does not apply in relation to changes to any feed-in tariffs payable to *small customers*.

This clause does not prevent a *retailer* from changing the tariffs of plans that it offers, advertises or markets to *customers* at any time.

(9) After clause 47A insert:

47AB Duration of fixed term retail contracts

- (1) A *fixed term retail contract* must provide for a contract length of not less than 12 months.
- (2) This clause is a minimum requirement that is to apply in relation to *small customers* who purchase *energy* under a *market retail contract*.

(10) After clause 52 insert:

Subdivision 2 Price certainty: Exempt market retail contracts

52A Requirement

A *retailer* is required to perform its obligations under this Subdivision in a way that promotes the objectives of this Subdivision.

52B Objectives

The objectives of this Subdivision are to:

- (a) identify what kinds of *market retail contracts* are *exempt market retail contracts* for the purposes of clause 46AA and this Subdivision;
- (b) allow for retail product innovation through clause 52C; and
- (c) provide for additional consumer protections for *small customers* who are party to *exempt market retail contracts*.

52C Definition of exempt market retail contract

In clause 46AA and this Subdivision, *exempt market retail contract* means a *market retail contract*:

- (a) that includes a tariff that continually varies in relation to the prevailing spot price of *energy*; or
- (b) under which a *small customer* pre-purchases a specified quantity of *energy*; or
- (c) on terms and conditions in respect of which the *Commission* has granted an exemption.

Note:

The Commission has published a guideline regarding applications for and granting of exemptions for the purposes of clause 52C(c).

52D Explicit informed consent—exempt market retail contracts

- (1) For the purposes of clause 3C(1)(a), the matters relevant to obtaining a *small customer's explicit informed consent* to enter into an *exempt market retail contract* include, but are not limited to:

- (a) the fact that the tariffs may change more than once per year;
- (b) the basis for the changes to tariffs;
- (c) the estimated frequency of changes to tariffs;
- (d) the fact that the *retailer* offers one or more other contracts (including, in relation to electricity, the *Victorian default offer*) under which tariffs will change only with effect from a *network tariff change date* or as otherwise permitted under clause 46AA of this Code.

Note:

Under clause 3C(1)(a), the matters above must be clearly, fully and adequately disclosed to the customer in plain English.

- (2) The matters specified in subclause (1) must be displayed prominently in any document or electronic communication by which they are disclosed to the *customer*.
- (3) This clause does not affect the application of Part 2A of this Code to an *exempt market retail contract*.

52DA Notice and reporting requirements—exempt market retail contracts

- (1) A *retail marketer* must not:
 - (a) supply or offer to supply energy; or
 - (b) advertise or market the supply of *energy*,under an *exempt market retail contract* unless the *retailer* has complied with its obligations under this clause.
- (2) A *retailer* must notify the *Commission* if, as at 1 July 2020, the *retailer* (or a *retail marketer* on its behalf) is:
 - (a) supplying or offering to supply *energy*; or
 - (b) advertising, marketing or promoting the supply of *energy*,under any retail product that is an *exempt market retail contract*.
- (3) A *retailer* must notify the *Commission* if the *retailer* (or a *retailer marketer* on its behalf) will, on or after 1 July 2020:
 - (a) supply or offer to supply *energy*; or
 - (b) advertise, market or promote the supply of *energy*,under a retail product that would be an *exempt market retail contract*.
- (4) A *retailer* who supplies or offers to supply *energy* under an *exempt market retail contract* must report to the *Commission* regarding that retail product.
- (5) A *retailer* who notifies or reports to the *Commission* under any of subclauses (2), (3) and (4) must do so in the manner and form provided for by any guidelines published by the *Commission* under section 13 of the *Energy Services Commission Act 2001* (Vic).

Note:

The *Commission* has published a guideline regarding the manner and form in which retailers are required to give notice and report to the *Commission* under this clause.
- (6) A *retailer* must ensure that a *retail marketer* who is an *associate* of the *retailer* complies with this clause.

52E Tailored assistance to customers on an exempt market retail contract

- (1) If a *residential customer* who has entered into an *exempt market retail contract* becomes entitled to receive tailored assistance under Part 3, Division 3 of this Code, the *retailer* must:
 - (a) carry out a review to identify whether transferring the *customer* to a different plan would be likely to minimise the *customer's energy costs*, and the review must be based on the *retailer's* knowledge of the *customer's* pattern of *energy use* and payment history;
 - (b) inform the *customer* of the outcome of the review; and
 - (c) if the *retailer* identifies a different plan that would be likely to minimise the *customer's energy costs*, the *retailer* must:
 - (i) inform the *customer* of the plan that is likely to minimise the *customer's energy costs*;
 - (ii) seek the *customer's explicit informed consent* to transfer the *customer* to that other plan; and
 - (iii) provided that the *customer* gives *explicit informed consent*, enter into a *customer retail contract* in respect of that plan.

Note:

In relation to the supply of electricity, the plan to which a *customer* is transferred under subclause (1)(c) may be a contract under a *Victorian default offer*.

- (2) This clause is in addition to, and does not derogate from, the operation of Part 3 of this Code in relation to a *residential customer* who is party to an *exempt market retail contract*.

(11) After clause 79(6) insert:

Note:

Additional tailored assistance obligations are imposed under clause 52E in relation to *residential customers* who are party to *exempt market retail contracts*.

(12) In Schedule 3, after paragraph 4, insert:

5. Price certainty and exempt market retail contracts

- (1) Clause 46AA and Division 7, Subdivision 2 apply to *market retail contracts* entered into before, on or after 1 July 2020.
- (2) Clause 47AB:
 - (a) applies to *market retail contracts* entered into on or after 1 July 2020; and
 - (b) does not apply to *market retail contracts* entered into before 1 July 2020.

Protecting customers at the end of benefit and contract periods (recommendation 4D)

AMENDMENTS TO THE ENERGY RETAIL CODE: FIXED BENEFIT PERIOD UNDER MARKET RETAIL CONTRACTS TO APPLY FOR DURATION OF CONTRACT

FEBRUARY 2020

Amendments made by the Essential Services Commission on 28/02/2020

1 Nature and commencement of this instrument

- (1) This instrument amends the *Energy Retail Code*.
- (2) This instrument comes into operation on 1 July 2020.

2 Table of amendments

(1) Replace the definition of *fixed benefit period* in clause 3 with the following:

fixed benefit period means a period of a *market retail contract* (where the end date of that period is specified or ascertainable at the beginning of that period) during which a discount, rebate or credit (including a *conditional discount*) is available to the *customer*. For the purposes of this definition, the following are not discounts, rebates or credits:

- (a) a concession or rebate provided by government in relation to the supply or use of *energy*;
- (b) a feed-in tariff; or
- (c) a contractual limitation on a *retailer's* ability to vary a tariff or charge payable under a *market retail contract*;

Note:

A one-off rebate or credit (such as a one-off sign-on benefit) does not give rise to a *fixed benefit period*.

(2) After clause 46AB, insert:

46B Fixed benefit period to apply for duration of market retail contract

If a *market retail contract* provides for a discount, rebate or credit (including a *conditional discount*) to be made available to the *customer* for a *fixed benefit period*, the *retailer*:

- (a) must continue to make that discount, rebate or credit available; and
- (b) must not change the amount of that discount, rebate or credit,

throughout the term of that contract.

Note:

By the operation of clause 15(2), this clause requires a *retailer* to continue any *fixed benefit period* for the full duration of the contract.

(3) In Schedule 3, after paragraph 5, insert:

6. Fixed benefit period under market retail contracts

Clause 46B applies to *market retail contracts* entered into on or after 1 July 2020.

Regulating conditional discounts (recommendation 4E)

AMENDMENTS TO THE ENERGY RETAIL CODE: CAPPING PAY-ON-TIME DISCOUNTS, AND HONOURING PAY-ON-TIME DISCOUNTS FOR CUSTOMERS RECEIVING TAILORED ASSISTANCE

FEBRUARY 2020

Amendments made by the Essential Services Commission on 28/02/2020

1 Nature and commencement of this instrument

- (1) This instrument amends the *Energy Retail Code*.
- (2) This instrument comes into operation on 1 July 2020.

2 Table of amendments

- (1) Insert the following definitions in clause 3 in the appropriate alphabetical positions:

pay-on-time discount means a *conditional discount* that is conditional upon the *customer* paying a bill on or before the *pay-by date*;

- (2) After Clause 46AA insert:

46AB Pay-on-time discounts to be capped (MRC)

Any *pay-on-time discount* in a *market retail contract* must not exceed the amount that the *Commission* specifies in a guideline published under section 13 of the *Essential Services Commission Act 2001* that is in effect at the time that the contract or arrangement is entered into.

- (3) After Clause 83 insert:

Division 3A Pay-on-time discounts to be honoured

83A Objective

The objective of this Division is to require *retailers* to honour *pay-on-time discounts* to *residential customers* who are in arrears and who are receiving tailored assistance.

83B Application of this Division

This Division applies to all *residential customers* who are in arrears under *market retail contracts*. Where a clause states it applies to *exempt persons* in one or more *categories* it applies to people who purchase electricity principally for personal, household or domestic use from an *exempt person* in the relevant *category* and who are in arrears under their *exempt person arrangement*.

83C Pay-on-time discounts to be honoured

(1) If a *residential customer* fails to pay a bill by its *pay-by date*, or by any extended *pay-by date* that the *retailer* has offered as standard assistance, and receives tailored assistance under this Division in respect of that bill, and:

- (a) the *residential customer* later clears the arrears in respect of that bill; or
- (b) the *retailer* later becomes entitled to withdraw tailored assistance to the *residential customer* under clause 83(1),

the *retailer* must not subsequently recover the amount of any *pay-on-time discount* in respect of that bill or any other bill whose *pay-by date* occurred while the *customer* was continuing to receive tailored assistance.

Note:

Clause 92(1) prohibits a *retailer* from commencing or continuing with proceedings for the recovery of arrears from a *residential customer* who is receiving standard assistance or tailored assistance under this Part.

(2) Application of this clause to exempt persons

This clause applies to *exempt persons* in the following *categories*:

VD2, VR2, VR3 and VR4.

(4) In Schedule 3, after paragraph 6, insert:

7. Pay-on-time discounts

- (a) Section 46AB:
 - (i) applies to *market retail contracts* entered into on or after 1 July 2020; and
 - (ii) does not apply to *market retail contracts* entered into before 1 July 2020.
- (b) Part 3, Division 3A applies to *market retail contracts* and *exempt person arrangements* entered into before, on or after 1 July 2020.

Technical amendment

AMENDMENTS TO THE ENERGY RETAIL CODE: TECHNICAL AMENDMENT TO RETAILER OBLIGATIONS RELATING TO CUSTOMER TRANSFER

FEBRUARY 2020

Amendments made by the Essential Services Commission on 28/02/2020

1 Nature and commencement of this instrument

- (1) This instrument amends the *Energy Retail Code*.
- (2) This instrument comes into operation on 1 July 2020.

2 Table of amendments

(1) In clause 57, replace subclause (1):

- (1) A *retailer* must not submit a request for a transfer under the relevant *Retail Market Procedures* unless:
 - (a) the *retailer* has obtained *explicit informed consent* from the *customer* to enter into the *relevant customer retail contract*; and
 - (b) the *retailer* has a *customer retail contract* in place to enable the sale of *energy* to the *customer* at their premises.

Appendix C: Guideline: advertising energy prices

1. Purpose of this guideline

- 1.1. The purpose of this guideline is to provide information to energy retailers and other interested parties about how the Essential Services Commission (the commission) expects energy retailers and their marketing associates (collectively known as retail marketers) to market energy plans, including those with conditional discounts.
- 1.2. The rules covered by this guideline are in Part 2, Division 10 of the Energy Retail Code (the Code)¹⁵⁸:
 - Subdivisions 1 and 1A apply to any marketing of gas and electricity offers
 - Subdivision 2A applies to any marketing of a gas or electricity offer with a conditional discount
 - Subdivision 2B applies to the mass-marketing of any electricity offer, other than demand tariffs. Once a retailer is having a personalised conversation with a customer about an offer, the rules in Part 2A of the Code (especially the clear advice entitlement) apply instead of the reference price requirements in Subdivision 2B.¹⁵⁹
- 1.3. These rules were introduced to ensure small customers can easily compare offers, in line with recommendation 3A of the Independent Review of the Electricity and Gas Retail Markets in Victoria.¹⁶⁰
- 1.4. This guideline is made under section 13 of the Essential Services Commission Act 2001 and takes effect from 1 July 2020.
- 1.5. This guideline establishes marketing requirements in Victoria that are consistent with the national requirements set out in the Australian Competition and Consumer Commission's

¹⁵⁸ Energy Retail Code available at: <https://www.esc.vic.gov.au/electricity-and-gas/codes-guidelines-policies-and-manuals/energy-retail-code>.

¹⁵⁹ Certain requirements in the s 208 Order in Council (VDO Order) published on 30 May 2019 also apply in relation to subdivision 2B, specifically details of how to calculate the estimated annual cost of the VDO and retailer offers, and annual reference consumption figures. The VDO Order is available at: <http://www.gazette.vic.gov.au/gazette/Gazettes2019/GG2019S208.pdf> and included in appendix A of this guideline.

¹⁶⁰ Further information about the background to these rules is available on our [website](#).

Guide to the Electricity Retail Code.¹⁶¹ The national requirements require retailers to express advertised prices relative to a reference price.

This document does not substitute a licensee's obligations in the Energy Retail Code or any other state or federal law or regulation, such as the Australian Consumer Law, nor does it constitute legal advice. If a licensee is unsure about its regulatory obligations, it should seek independent advice. Energy retailers also have obligations in the Code of Conduct for Marketing Retail Energy in Victoria.¹⁶²

2. Who the rules apply to

- 2.1. Retail marketers must comply with Part 2, Division 10 of the Code.
- 2.2. The obligations in Part 2, Division 10, Subdivisions 1, 1A and 2A of the Code cover all offers and plans for small customers¹⁶³ in Victoria offered by licensed energy retailers. The requirements in Subdivision 2B only apply to electricity offers.
- 2.3. The marketing provisions in the Code and the obligations in this guideline do not apply to exempt persons.¹⁶⁴
- 2.4. Non-compliance with the Code or this guideline may result in a licensee breaching its licence conditions.

3. Objective of the marketing rules (Part 2, Division 10, Subdivision 1)

These rules apply to all electricity and gas offers.

- 3.1. Subdivision 1 contains overarching rules that apply to Part 2, Division 10 of the Code (the energy marketing division).
- 3.2. Clause 60A of the Code sets out a requirement for retail marketers to perform their obligations under Division 10 of the Code in a way that promotes the objectives of the Division (clause 60B) and each Subdivision (including clauses 64A and 64C).

¹⁶¹ Australian Competition and Consumer Commission, Guide to the Electricity Retail Code, June 2019. Available at: <https://www.accc.gov.au/publications/guide-to-the-electricity-retail-code>

¹⁶² Available at: <https://www.esc.vic.gov.au/electricity-and-gas/codes-guidelines-policies-and-manuals/code-conduct-marketing-retail-energy>.

¹⁶³ Small customers are those who use less than 40 MWh of electricity or 1,000 GJ of gas per annum.

¹⁶⁴ Exempt persons are those who are exempt from the requirement to hold an electricity licence under the General Exemption Order 2017, available at: <https://www.energy.vic.gov.au/legislation/general-exemption-order>.

- 3.3. Clause 60B of the Code sets out the objective of Division 10. This is to ensure that retail marketers disclose information to customers about their electricity and gas plans in a clear and easily understood way to assist customers to assess the suitability of plans and select an offer.
- 3.4. Clause 60C of the Code requires retailers to ensure that associates who are retail marketers comply with Division 10 of the Code.

4. Misleading and deceptive conduct (Part 2, Division 10, Subdivision 1A)

These rules apply to all electricity and gas offers.

- 4.1. Clause 60D of the Code prohibits retail marketers from engaging in misleading or deceptive conduct (within the meaning of sections 18(1) and 34 of schedule 2 of the Competition and Consumer Act 2010 (Cth), modified by section 4 of the Competition and Consumer Act 2010) in connection with energy marketing activities.
- 4.2. Clause 60E of the Code prohibits retail marketers from making a false or misleading representation (within the meaning of section 29(1) of schedule 2 of the Competition and Consumer Act 2010) in connection with energy marketing activities.

5. Advertising conditional discounts (Part 2, Division 10, Subdivision 2A)

These rules apply to all electricity and gas offers with conditional discounts.

- 5.1. Clause 64A of the Code sets out the objective of Subdivision 2A. This is to ensure that retail marketers refer to conditional discounts in a clear and easily understood way to assist customers to assess the suitability of plans and select an offer.
- 5.2. Clause 64B(1) of the Code requires retail marketers to express the conditions of any conditional discount clearly and conspicuously in any marketing, advertisement or promotion of prices or tariffs for electricity and gas plans designed for small customers.
- 5.3. Clause 64B(2) of the Code sets out that the conditional discount must not be the price-related matter that is mentioned most prominently in the marketing, advertisement or promotion.
- 5.4. 'Conditional discount' means a reduction to the price or tariff for the supply of energy, including discounts, rebates or credits, if the customer satisfies certain conditions or requirements. It does **not** include a one-off sign up discount, credit or rebate.

6. Advertising electricity prices (Part 2, Division 10, Subdivision 2B)

These rules apply only to electricity offers.

- 6.1. Clause 64C of the Code sets out the objective of Subdivision 2B. This is to ensure that retail marketers refer to discounts in a consistent way to assist customers to compare plans.
- 6.2. Clause 64D of the Code sets out that the rules in Subdivision 2B apply to all retail marketers.
- 6.3. Clause 64E of the Code sets out definitions relating to Subdivision 2B.

Comparing electricity prices with the VDO price

- 6.4. Clause 64F of the Code requires retail marketers to state in any advertisement:
 - the difference between the Victorian Default Offer (VDO) price (see sections 6.7 and 6.8 of this guideline) and the unconditional price (see sections 6.9 to 6.12 of this guideline), expressed as a percentage of the VDO price
 - for each proportional conditional discount mentioned, the difference between the unconditional price and the conditional price for the discount, expressed as a percentage of the VDO price (see sections 6.13 to 6.18 of this guideline)
 - the lowest possible price (see sections 6.19 to 6.24 of this guideline)
 - the relevant distribution zone and the type of customer that the offered prices relate to.
- 6.5. These requirements ensure that all electricity offers are referenced in relation to the VDO price. This includes plans and offers that cost both more and less than the VDO price for a particular distribution zone, and offers with or without discounts, credits and/or rebates.
- 6.6. Clause 64F(4) of the Code requires retail marketers to ensure that the information summarised in section 6.4 of this guideline is stated clearly and conspicuously in any advertisement and it is clear that it relates to a representative customer.

The VDO price

- 6.7. The VDO price is the estimated annual cost of the VDO as determined under clause 15(4)(a) of the Order under section 13 of the Electricity Industry Act 2000 issued on 30

May 2019 (VDO Order).¹⁶⁵ Appendix A of this guideline contains the relevant section of the VDO Order.

- 6.8. Retail marketers must calculate the estimated annual cost of the VDO using the annual reference consumption figures in the commission's VDO price determination.

The unconditional price

- 6.9. The unconditional price of an electricity offer is the total price a representative customer (based on the annual reference consumption specified in the VDO Order) would be charged during a regulatory period at the retailer's offered prices, without any conditional discounts.
- 6.10. Retail marketers must tell customers how the unconditional price of an electricity offer in a particular distribution zone compares with the VDO price for that zone and type of customer. This difference must be expressed as a percentage of the VDO price. To calculate this figure, retail marketers must:
- a) Calculate the unconditional price of the offer based on the annual reference consumption specified in the VDO Order. Retail marketers must include the following items in calculating the unconditional price:
 - (i) any charges
 - (ii) unconditional discounts (this includes discounts, credits or rebates when a customer enters a contract such as a one-off sign up credit)
 - (iii) annual recurring fees such as membership and contribution fees
 - (iv) recurring metering charges.
 - b) Retail marketers must not include green charges (where these charges are for the optional purchase of green energy by a customer. If the offer includes a mandatory green element, the cost of this should be included in the unconditional price) or PV/solar feed-in tariffs in this calculation if these are present.
 - c) Calculate the difference between the unconditional price and the relevant VDO price set by the commission.
 - d) Express this difference as a percentage of the relevant VDO price. This number may be positive or negative, indicating whether the offer is above or below the VDO price.
- 6.11. If the offer is equal to the price cap set by the commission, this should be expressed as equal to the VDO price.

¹⁶⁵ VDO Order available at: <http://www.gazette.vic.gov.au/gazette/Gazettes2019/GG2019S208.pdf>.

The example below is for illustrative purposes only and does not reflect the commission's actual VDO price determinations.

Example 1 – residential market offer with unconditional discount

Offer	Usage	Rate (including GST)	Total
Supply	365 days	\$1.00/day	\$365
Usage (annual reference consumption)	4,000 kWh	\$0.24/kWh	\$960
Unconditional price			\$1,325
Lowest possible price			\$1,325
VDO price			\$1,500

6.12. Example 1 illustrates how to calculate the difference between the unconditional price and the VDO price:

- a) Given the rates under this residential offer and the annual reference consumption specified in the VDO Order is 4,000 kWh, the unconditional price is \$1,325.
- b) The difference between the unconditional price and the example VDO price is -\$175 (\$1,325 subtract \$1,500).
- c) This amount expressed as a percentage of the VDO price is -11.66 per cent (-\$175 divided by \$1,500 and multiplied by 100). As this figure is negative it should be stated as 11.66 per cent less than the VDO price for advertising or presentation purposes.

Conditional discounts

6.13. Retail marketers must express any proportional conditional discount being advertised as a percentage of the VDO price. If there is more than one conditional discount the retail marketer wishes to refer to, it must do this individually for each discount. Retail marketers must not state conditional discounts as a cumulative discount combined with the unconditional price.

- 6.14. Where we refer to conditional discounts, these include conditional rebates and credits but excludes discounts, rebates and credits that relate to a customer entering into the contract such as a one-off sign up credit.¹⁶⁶
- 6.15. It is important retail marketers understand what percentage figure must be stated in an advertisement when referring to a conditional discount. As demonstrated in the example below, a conditional discount available under an offer (such as a pay on time discount based on usage) is not the percentage figure that must be stated; rather it is the conditional discount expressed as a percentage of the VDO price. To determine the percentage figure presented, retail marketers must:
- a) Calculate the unconditional price of the offer as described in paragraph 6.10.
 - b) Calculate the conditional price of the offer. This is the total amount a customer would pay in a regulatory period based on the annual reference consumption if that customer met the conditions for the conditional discount. This must be calculated using the annual reference consumption specified in the VDO Order and include any annual recurring charges and fees outlined in paragraph 6.10(a).
 - c) Calculate the difference between the unconditional price and the conditional price.
 - d) Express this difference as a percentage of the VDO price. The figure should be read as a percentage above or below the VDO price.

The following example is for illustrative purposes only and does not reflect the commission's actual VDO price determinations.

¹⁶⁶ There is a definition of conditional discounts in the Energy Retail Code and in the definitions section of this guideline.

Example 2 – residential market offer with conditional discount

Offer	Usage	Rate	Total
Supply	365 days	\$1.00/day	\$365
Usage (annual reference consumption)	4,000 kWh	\$0.24/kWh	\$960
Unconditional price			\$1,325
Conditional discount		3%	\$39.75
Conditional price			\$1,285.25
Lowest possible price			\$1,285.25
VDO price			\$1,500

- 6.16. Example 2 has the same supply and usage rates as example one, but includes a conditional discount:
- Given the rates under this residential offer and the annual reference consumption specified in the VDO Order is 4,000 kWh, the unconditional price is \$1,325 (11.66 per cent below the VDO price).
 - The conditional price is \$1,285.25 (\$1,325 minus \$39.75). This is the price a representative customer would pay if they met the conditions of the discount.
 - The difference between the unconditional price and the conditional price is \$39.75 (\$1,325 minus \$1,285.25).
 - This amount expressed as a percentage of the example VDO price is -2.65 per cent (\$39.75 divided by \$1,500 multiplied by 100). This is the additional percentage off the VDO price if a representative customer meets the discount conditions. This figure should be used for advertising purposes, rather than the actual size of the discount (i.e. 3 per cent).
- 6.17. For clarity, the unconditional discount is taken off the VDO price first, followed by any proportional conditional discounts (if applicable).
- 6.18. If there are multiple conditional discounts, then these must each be calculated off the VDO price.

Expressing the lowest possible price

- 6.19. The lowest possible price for an offer is the total amount a representative customer would pay in a year, assuming that all the conditions on all conditional discounts (if any) mentioned in the advertisement were met.
- 6.20. Retail marketers must include the following items in calculating the lowest possible price for an offer:
- a) any charges
 - b) unconditional discounts
 - c) conditional discounts
 - d) annual recurring fees such as membership and contribution fees
 - e) recurring metering charges.
- 6.21. Retail marketers must not include green charges (where these charges are for the optional purchase of green energy by a customer. If the offer includes a mandatory green element, the cost of this should be included in the lowest possible price) or PV/solar feed-in tariffs in this calculation if these are present.
- 6.22. If the advertisement does not mention any conditional discount, the lowest possible price is the unconditional price. If there is only one conditional discount, the lowest possible price is the conditional price. If offers have more than one conditional discount, the lowest possible price would include all the conditional discounts.

Other fees and charges

- 6.23. The definition of 'price' in the code requires retail marketers to include a tariff or charge of any description (including recurring fees such as an annual membership fee) in its price, except for:
- a) a one-off fee (for example, a connection fee or reconnection fee or an account establishment fee);
 - b) a fee for making, or failing to make, a payment in particular circumstances (for example, a credit card transaction fee or a direct debit dishonour fee);
 - c) a fee for a service provided on request on an ad-hoc basis (for example, a fee for a meter read requested by a customer).

Time of use, flexible and controlled load tariffs

- 6.24. This section covers how reference price comparisons should be calculated for time of use, flexible and controlled load tariff offers for small customers.

- 6.25. Time of use tariffs apply different charges to electricity usage at different times of the day or week. Typically, periods are split into peak and off-peak (a two-period time of use). However, there are also three-period and four-period time of use tariff types (also known as flexible pricing). An offer which has one shoulder period rate is considered a three-period time of use offer. An offer with two shoulder period rates is considered a four-period time of use offer.
- 6.26. The VDO Order provides usage allocations per period for each time of use tariff type and relevant distribution region. This is to enable retail marketers to calculate the unconditional price of a time of use offer for comparison with the VDO price using a consistent set of information.
- 6.27. The commission's VDO price determination includes the VDO price for each distribution zone for non-flat tariffs.
- 6.28. Retail marketers must use the commission's VDO price determination for non-flat tariffs for small customers in a relevant distribution zone, using the annual reference consumption, when displaying prices in an advertisement. Retail marketers must do this using the formulas and specifications as detailed in the VDO price determination.
- 6.29. For time of use offers with a controlled load, retail marketers must reference the relevant VDO price in the commission's VDO price determination that is in effect at the time of the advertisement, using the annual reference consumption. This means that a retail marketer must apportion usage to the different time of use elements, and the controlled load, to equal the annual reference consumption for a particular customer type (i.e. residential or small business).
- 6.30. To calculate the unconditional price of a time of use offer, retail marketers must:
- a) determine the time of use type for that offer (two period, three period or four period)
 - b) use the usage allocation set by the VDO Order for each period in the tariff type
 - c) use the relevant small customer annual reference consumption (with or without controlled load)
 - d) calculate the unconditional price based on the above information in subclauses (a)-(c) and use the relevant VDO price for comparison in advertising.
- 6.31. If a retailer offers time of use offer with a conditional discount, the advertisement must show the conditional discount expressed as a percentage of the VDO price in the same way as set out in sections 6.13 to 6.18. The lowest possible price must be calculated as set out in sections 6.19 to 6.22.

The example below is for illustrative purposes only and does not reflect the commission's actual VDO price determinations.

Example 3 – residential three-period time of use tariff without controlled load

Offer	Usage allocation per period	Annual reference consumption	Retailer rate (including GST)	Total (including GST)
Supply charge		365 days	\$1.00/day	\$365
Peak usage	25 per cent	1,000 kWh	\$0.33/kWh	\$330
Off-peak usage	30 per cent	1,200 kWh	\$0.15/kWh	\$180
Shoulder usage	45 per cent	1,800 kWh	\$0.28/kWh	\$504
Annual reference consumption		4,000 kWh		
Unconditional price				\$1,379
Lowest possible price				\$1,379
VDO price determination – maximum annual bill				\$1,500

- 6.32. Example 3 illustrates how the difference between the unconditional price and the VDO price must be calculated. As this offer has one shoulder period rate, it is a three-period time of use offer. This offer is for a residential customer with no controlled load so the residential annual reference consumption with no controlled load of 4,000 kWh is used.
- 6.33. The usage amounts of each of the three periods is calculated based on the usage allocation set out in the commission’s VDO price determination and the annual reference consumption of 4,000 kWh for a residential customer. Given the retailer’s rates under this offer, the unconditional price for this time of use offer is \$1,379. The commission’s relevant maximum annual bill price made in a VDO price determination for a regulatory period is \$1,500 for the particular distribution zone.
- 6.34. Retail marketers must display the difference between the unconditional price and the VDO price, expressed as a percentage of the VDO price. In example 3 this is -8.06 per cent (\$1,379 minus \$1,500 equals -\$121 divided by \$1,500 multiplied by 100). This should be stated as 8.06 per cent less than the VDO price for advertising purposes.

Demand tariffs

- 6.35. The requirements in Part 2, Division 10, Subdivision 2B of the Code, as described in section 6 of this guideline, do not apply to demand tariffs.

Bundled offers

- 6.36. The requirements in Part 2, Division 10, Subdivision 2B of the Code, as described in section 6 of this guideline, only apply to electricity offers. However, the other requirements outlined in this guideline apply to gas offers as well. Retail marketers who offer a bundled electricity and gas plan must therefore ensure they comply with Part 2, Division 10, Subdivisions 1, 1A and 2A of the Code, having regard to the separate obligations applicable to electricity and gas.

7. Communications covered

Section 7 of the guideline applies to both electricity and gas.

- 7.1. This guideline only applies to price-based advertising. It does not apply to general advertising.

Communication mediums

- 7.2. The requirements in Part 2, Division 10, Subdivisions 1 and 2A of the Code apply to any energy marketing activities for electricity and/or gas.
- 7.3. These requirements include written and verbal communication of prices or discounts to include any of the following media, but not limited to:
- a) offers over the phone (whether initiated by the customer or retail marketer)
 - b) face-to-face, such as shopping centre sales
 - c) door-to-door sales
 - d) magazines, newspapers or journals
 - e) radio
 - f) web-based or online, including energy price comparator websites
 - g) television
 - h) social media
 - i) billboards or posters
 - j) direct mail, catalogues and leaflets
 - k) public transport advertising such as on trains, trams, buses, taxis or bicycles.
- 7.4. The requirements in Part 2, Division 10, Subdivision 2B of the Code apply to any electricity advertisements. 'Advertisement' is a defined term in the Code for the purposes

of this subdivision. It includes written and verbal mass-marketing campaigns or communications that is published or transmitted by or on behalf of a retail marketer to publicise a retailer's offered prices to customers or prospective customers. It does not include any communication by a retail marketer directly with an individual customer or prospective customer regarding the retailer's offered prices, where this communication is made in accordance with Part 2A of the Code (which includes, among other requirements, the clear advice entitlement).

- 7.5. Clauses 60B and 64A of the Code also require retail marketers to use clear, simple and easily understood communication to assist small customers with understanding plan attributes, including discounts, rebates, credits and prices.

Visual communications

- 7.6. In visual communication to consumers, retail marketers should consider the use of colour, font size or other visual tools to ensure the information required by the Code is clearly and conspicuously displayed and easily distinguishable from other information. The commission does not consider the information to be conspicuous if other information or elements of the advertisement are given more emphasis. For example, on a retail marketer's website, on any page that refers to specific prices and offers, the information required by the Code should be easy to find without navigating through other content.

Oral communications

- 7.7. In oral communication to consumers such as radio advertising or offers over the phone, retail marketers should have regard to speed, volume and other audio tools to ensure information required by the Code is clearly audible and emphasis is placed on this information compared to other statements, dialogue or sounds.

Video communication

- 7.8. In video communication such as television advertisements or online video material, retail marketers should have regard to appropriate visual tools and sound elements when presenting a specific price or discount.

Advertising specific distribution zones

- 7.9. Retail marketers are able to advertise an offer specific to a customer type and distribution zone across a jurisdiction or state, provided it is clear the offer relates only to a specific distribution zone.

Appendix A (Advertising energy prices guideline)

This is clause 15 of the VDO Order¹⁶⁷ made on 30 May 2019.

15. Victorian default offer tariffs to be the reference tariffs for discounts

1. This clause applies until such time as the amendments to the Energy Retail Code required by clause 16(2)(a) come into force.

Provided that, if those amendments do not provide for any matter provided for in this clause, then this clause continues to apply in respect of that matter.

2. A retailer that offers a discount to a domestic customer or a small business customer must:
 - (a) if the discount is in respect of the period from 1 July 2019 to 31 December 2019, disclose how the discount is calculated as against the tariffs in Schedule 1 or Schedule 2 (as the case may be), and what (in percentage or dollar terms) the reduction in tariff is in terms of those tariffs; and
 - (b) if the discount is in respect of a regulatory period, disclose how the discount is calculated as against the flat tariffs determined by the Commission pursuant to the VDO price determination that applies in respect of that period, and what (in percentage or dollar terms) the reduction in tariffs is in terms of those tariffs.
3. For the purposes of subclause (2), the reduction in tariffs is to be expressed as the difference between the estimated annual cost of the Victorian default offer for the customer type and distribution zone, and the estimated annual cost of the offer to which the discount relates after the discount is applied, using the annual reference consumption.
4. For the purposes of subclause (3):
 - (a) the estimated annual cost of the Victorian default offer is:
 - i. during the period from 1 July 2019 to 31 December 2019, determined by applying Schedule 3;
 - ii. during a regulatory period, determined by applying Schedule 3 or any other approach or methodology determined by the Commission; and

¹⁶⁷ VDO Order available at: <http://www.gazette.vic.gov.au/gazette/Gazettes2019/GG2019S208.pdf>.

- (b) the retailer must determine the estimated annual cost of the retailer's offer to which the discount relates:
 - i. if the tariff is a flat tariff or a flexible tariff (in either case, with or without a controlled load), by applying Schedule 3;
 - ii. otherwise, based on a reasonable estimate having regard to any relevant information available to the retailer; and
- 5. The annual reference consumption is:
 - (a) during the period from 1 July 2019 to 31 December 2019:
 - i. for domestic customers without a controlled load – 4,000 kWh general usage per annum;
 - ii. for domestic customers with a controlled load – 4,000 kWh general usage plus 2,000 kWh controlled load usage per annum;
 - iii. for small business customers (with or without a controlled load) – 20,000 kWh general usage per annum.
 - (b) during a regulatory period:
 - i. the consumption amount determined by the Commission (if any); or
 - ii. if no amount is determined by the Commission pursuant to subclause (5)(b)(i), the amount specified in subclause (5)(a).
- 6. For the purposes of subclause (5), the amount of electricity consumed is assumed to be the same on each day of the year.
- 7. Any percentage or dollar amount disclosed pursuant to this clause must be expressed as a whole percentage or dollar, rounded to the nearest percentage or dollar.
- 8. Otherwise, Division 2 of Part 2A (*Customers entitled to clear advice*) of the Energy Retail Code applies to the disclosures required by this clause.

Appendix D: Guideline: exemptions from complying with Energy Retail Code requirements to restrict market retail contract price increases to once a year

1. Purpose of this guideline

- 1.1. The purpose of this guideline is to provide information to energy retailers and other interested parties about how a licensee can apply to the Essential Services Commission (the commission) for an exemption for the purposes of clause 52C(c) of the Energy Retail Code (the Code).
- 1.2. Clause 52C(c) of the Code takes effect from 1 July 2020. It allows the commission to grant exemptions so that licensees can offer exempt market retail contracts. These are contracts which do not comply with provisions in clause 46AA of the Code which limits price increases to once a year.
- 1.3. This guideline is made under section 13 of the Essential Services Commission Act 2001.

2. Nature of exemptions

- 2.1. Clause 46AA of the Code gives customers an entitlement to price certainty, by ensuring that retailers can only increase prices once a year. For many customers this will occur on the date one month after network tariff prices change. For customers on fixed-price contracts, price increases can only occur on the anniversary of the fixed-price period expiring.
- 2.2. This rule was introduced to ensure small customers have certainty that their prices will only increase once a year at most once they have contracted with a retailer, in line with recommendation 4A of the Independent Review of the Electricity and Gas Retail Markets in Victoria.¹⁶⁸
- 2.3. The Code contains provisions for licensees to offer exempt market retail contracts – contracts which are not limited to once a year price increases – in certain cases. The rules relating to these contracts are set out in Subdivision 2 of Division 7 of Part 2 of the Code.

¹⁶⁸ Further information about the background to these rules is available on our [website](#).

- 2.4. The intent of the exempt market retail contract rules is to allow licensees to offer innovative products that are not compatible with limiting price increases to once a year. A licensee wanting to offer such a product must clearly demonstrate an innovative approach that better meets specific customer needs, enhances the efficiency of the energy system, or is otherwise part of a Victorian government program or policy. The exempt market retail contract rules ensure additional protections for customers who enter into contracts where prices can increase more than once a year.
- 2.5. We expect that the majority of customers will be on contracts that are compliant with clause 46AA, and exempt market retail contracts will only exist for a limited number of innovative products offered by licensees.
- 2.6. There are two ways in which licensees can offer exempt market retail contracts, via either:
 - Category 1 – standing exemption
 - Category 2 – commission-granted exemption.

3. Category 1 – Standing exemptions

- 3.1. Standing exemptions allow a licensee to offer a product that is automatically exempt from once a year price increases, without needing to apply for an exemption.
- 3.2. Standing exemptions only apply to specific categories, as set out in clause 52C of the Code. These are market retail contracts:
 - that include a tariff that continually varies in relation to the prevailing spot price of energy, or
 - under which a customer pre-purchases a specified quantity of energy.
- 3.3. The commission may update the categories that are eligible for a standing exemption over time.

Retailer reporting obligations for products under standing exemptions

- 3.4. A licensee offering a product that falls into one of these categories must notify the commission before it starts to offer the product, by emailing exemptionregister@esc.vic.gov.au and providing the following information:
 - the name of the product
 - the standing exemption category under which the product is being offered
 - a brief description of how the product works
 - the Victorian energy fact sheet for that product
 - the terms and conditions for that product.

- 3.5. Any licensee offering a product before 1 July 2020 that would be classified as an exempt market retail contract from 1 July 2020 must also notify the commission in the same manner prior to 1 July 2020 if they intend to continue offering the product under a standing exemption.
- 3.6. Licensees offering products under a standing exemption must comply with the conditions set out in clauses 52D, 52DA and 52E of the Code (set out in section 5 of this guideline).

4. Category 2 – Applying for a commission-granted exemption

When the commission would consider granting an exemption

- 4.1. The commission is able to grant exemptions for products which are not compatible with limiting price increases to once a year and do not fall under a category that is eligible for a standing exemption. Licensees must submit and seek approval from the commission for the exemption of such a product in order to be able to offer it from 1 July 2020.
- 4.2. **A licensee must not make an energy offer to customers that does not comply with clause 46AA of the Code, and is not eligible for a standing exemption, before the commission has made a decision to grant or refuse an exemption to a licensee.** In this case the licensee may be non-compliant with its licence conditions and obligations under the Code.
- 4.3. The commission will exercise its discretion to decide on an exemption to a licensee, for an energy offer that does not comply with clause 46AA, on a case-by-case basis and include conditions where it deems appropriate.

The exemption process

- 4.4. Licensees interested in submitting an application for a commission-granted exemption are invited to engage with us before submitting a formal application. Please email us on exemptionregister@esc.vic.gov.au.
- 4.5. Early engagement helps increase the efficiency of the exemption application process. It allows us to discuss the potential exemption with the licensee. While we encourage early engagement, the onus is on the licensee to demonstrate the merits of their case.
- 4.6. When submitting a formal application, licensees must provide the information outlined in sections 4.10 to 4.13 of this guideline, as well as anything else they consider supports their request for an exemption. We will acknowledge receipt of applications within five business days.
- 4.7. When assessing applications, the commission will consider the extent to which the proposed product meets the objectives of Subdivision 2 of Division 7 of Part 2 of the Code.

The commission will consider each application on a case-by-case basis, taking into account rationale and evidence submitted by the licensee to demonstrate that compliance with clause 46AA of the Code would lead to an outcome that is inconsistent with our policy intent (as outlined in section 2 of this guideline) and would have substantial negative unintended consequences for customers.

- 4.8. Decisions will be guided by the commission's overarching statutory objective to promote the long-term interests of Victorian consumers, as set out in the *Essential Services Commission Act 2001*, and objectives set out in the *Electricity Industry Act 2000* and *Gas Industry Act 2001* to promote protections for customers, including in relation to customers who are facing payment difficulty.
- 4.9. Once the commission has made a decision on an exemption, the licensee will be notified of the commission's decision. If an exemption is granted, the decision will be published on the commission's website when the licensee starts offering the product for which the exemption was granted.

How to apply for an exemption

- 4.10. Applications for exemptions must address the information requirements listed below and must be submitted to the commission in writing either by emailing or writing to:

exemptionregister@esc.vic.gov.au

Energy Division

Essential Services Commission

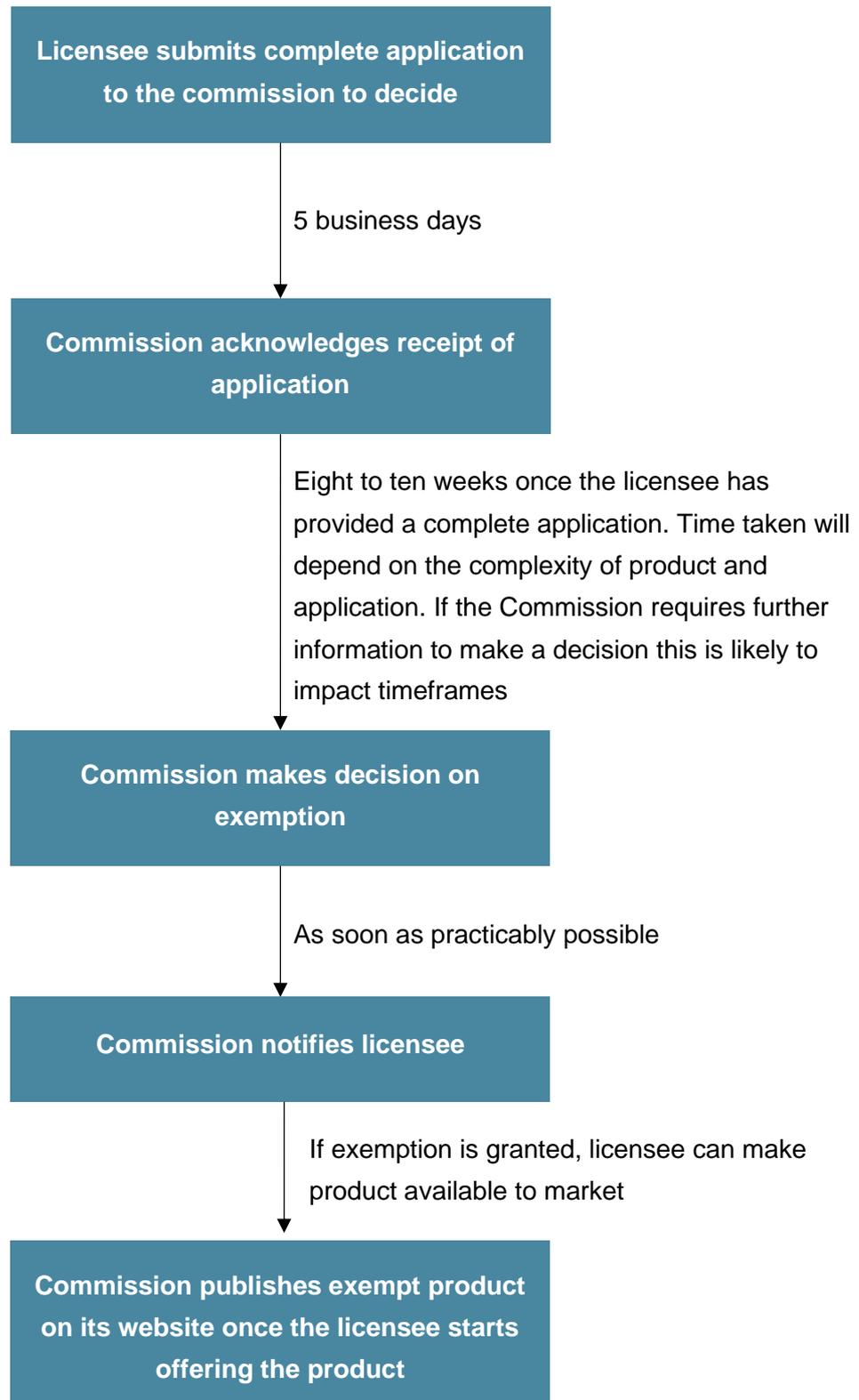
Level 37, 2 Lonsdale Street

Melbourne VIC 3000

- 4.11. The commission requires the following information from licensees:
- The legal name of the applicant.
 - The licence details of the applicant.
 - Details of what the licensee is proposing to do, including comprehensive information about the product attributes, and why the product would not be compatible with clause 46AA of the Code.
 - Details of the proposed timeframes for implementation of the product into the market.
 - The licensee needs to demonstrate to the commission how it meets the objectives of Part 2, Division 7, Subdivision 2 of the Code, and what the benefits are for customers of the product they are proposing.

- 4.12. Applicants should ensure they provide all relevant information and material to the commission to allow sufficient time for the application to be assessed.
- 4.13. The commission will endeavour to process applications in a timely manner, being mindful that we do want to support retailers to consider innovation in the market. As per timeframes associated with licence applications, the time that we will take to process an application is usually from eight to ten weeks once the application is complete.
- 4.14. It is important to note that assessment and decision timeframes can be affected by the details and circumstances of the application and the quality and standard of the material provided. Applications will be assessed on a case-by-case basis having regard to the requirements of the relevant legislation. We may engage external consultants (for example accountants or lawyers) to assist in assessing the information provided to us.
- 4.15. **Important note:** the information requirements set out in this guideline is not intended to be an exhaustive list of the information that may ultimately be required by the commission in determining the application for an exemption. The commission may request further information at any stage prior to making a final decision on the application for an exemption.

Summary of exemptions process



5. Conditions for licensees offering exempt market retail contracts

- 5.1. Licensees who are offering or supplying energy to customers under an exempt market retail contract must comply with the conditions set out in clauses 52D, 52DA and 52E of the Code. These conditions apply to exempt products under both the standing exemptions and commission-granted exemptions.
- 5.2. The conditions are to:
- make customers signing up to the product aware that
 - the tariff(s) for that product may increase more than once a year, including the basis on which tariff(s) may change (i.e. the reasons for or conditions on which retailers would change tariff(s)) and the estimated frequency of changes. Together this information is intended to help a customer understand the nature of the product they are considering signing up to
 - the retailer offers other contracts (including the VDO for electricity) where the prices will only increase when network tariff prices change
 - complete a tariff review for customers who are eligible for tailored assistance to establish whether there is another plan more appropriate to that customer's circumstances. If another contract may minimise costs for the customer, the licensee must inform the customer and seek consent to transfer the customer to that contract
 - report to the commission regarding that product, as set out in sections 5.3 to 5.7 of this guideline.

Reporting requirements

- 5.3. Licensees supplying gas and/or electricity under an exempt market retail contract from 1 July 2020 must report to the commission in the following manner.
- 5.4. Licensees are required to report separately on each product that is subject to a standing exemption or has been granted an exemption by the commission. For each product, licensees must report:
- the number of customers being supplied on that product (reported as the count of NMIs for electricity and MIRNs for gas)
 - the number of these customers that are receiving tailored assistance (reported as the count of residential accounts, separated by gas and electricity and broken down by customers who can pay at least their on-going usage and customers who cannot pay at least their on-going usage).

- 5.5. Definitions of these terms are included in the reporting template and are consistent with the commission's Compliance and Performance Reporting Guideline.
- 5.6. Licensees must report this data to the commission quarterly, at the same time as they report performance indicator data required by the Compliance and Performance Reporting Guideline.
- 5.7. All reports on exempt market retail contracts must be sent by email to compliance.reporting@esc.vic.gov.au. Reporting must be made using the reporting template located on our website, as amended from time to time.

Appendix E: Guideline: maximum cap for pay-on-time discounts

1. Purpose of this guideline

- 1.1. The purpose of this guideline is to provide information to energy retailers and other interested parties on the cap that applies to pay-on-time discounts offered as part of any market retail contract entered into on or after 1 July 2020.
- 1.2. This guideline is made under section 13 of the Essential Services Commission Act 2001.

2. What is the pay-on-time discount cap?

- 2.1. Clause 46AB(1) of the Energy Retail Code provides a new cap on conditional pay-on-time discounts for market retail contracts.
- 2.2. The Essential Services Commission (the commission) will determine the maximum discount that a retailer is permitted to offer to customers as a condition of paying on time.
- 2.3. This rule was introduced to ensure conditional discounts are cost-reflective and limit the penalties faced by small customers who fail to meet offer conditions, in line with recommendation 4E of the Independent Review of the Electricity and Gas Retail Markets in Victoria.¹⁶⁹

3. How the cap is set

- 3.1. The methodology used to calculate the pay-on-time discount cap is the sum of:
 - the 10-year Australian Commonwealth Government Bond Rate using a 40-day trailing average (a proxy for the risk-free rate)
 - a debt risk premium derived based on the difference between the yield on 10-year BBB- corporate bonds and the risk-free rate
 - an allowance for debt raising costs based on information from Treasury Corporation of Victoria.
- 3.2. This figure is the maximum percentage discount a retailer could apply to a customer's bill that would be conditional on the customer paying that bill on or before the pay-by date.

¹⁶⁹ Further information about the background to these rules is available on our [website](#).

4. How the cap is updated

- 4.1. The commission will update the cap annually. The commission will use data as of 31 March to determine the level of the cap that will take effect from 1 July for the financial year.
- 4.2. The commission will update this guideline by early May each year and write to all electricity and gas licensees in Victoria to notify retailers of the new cap level.

5. Current level of the cap

- 5.1. The maximum pay-on-time discount cap effective from 1 July 2020 is [TBC] per cent.

Appendix F: Current market insights (draft decision chapter 2 for reference)

In our issues paper, we presented evidence that issues identified by the review regarding discounting practices and benefit periods were still prevalent.

Since the publication of the issues paper the market has further evolved, particularly in the light of the new rules that came into effect on 1 July 2019. As a result, we analysed the type of electricity and gas offers published by retailers in the market on 30 September 2019, particularly as they relate to discounting and contract terms offered to customers.

We also sought to understand the nature of the existing contracts of Victorian customers, and the actual costs paid for energy. In August 2019, we issued a notice to all licensed electricity retailers operating in Victoria to collect information on the type of retail contracts that Victorian customers are on, and how this may have changed over the last two years. This data has allowed us to examine the retail contracts that customers are currently on and build a more comprehensive picture of the market.

We issued a notice to provide information to retailers using our powers under section 37 of the Essential Services Commission Act 2001.

In this chapter, for data that was obtained from retailers under our section 37 request, the \$ per kilowatt hour (kWh) prices shown are measured by the total amount paid by all customers on a type of offer, divided by the energy consumption of these customers over a 12-month period. Therefore, average prices are shown as a single \$ per kWh figure and will not directly reflect the tariff rates of retailers' offers (as it combines the daily supply charge and variable supply charges into a single figure).

Recommendations 4A and 4B

Recommendations 4A and 4B give customers certainty that their prices will not change for a certain time period.

Prior to 1 July 2019, retailers could change market offer prices at any time and were not required to notify customers before they did so. This meant customers were not always aware of price changes before they happened and could not respond to the change by shopping around for a new offer. The review also highlighted that some customers experience price increases soon after starting a new contract, which could erode confidence in their ability to get a good deal.

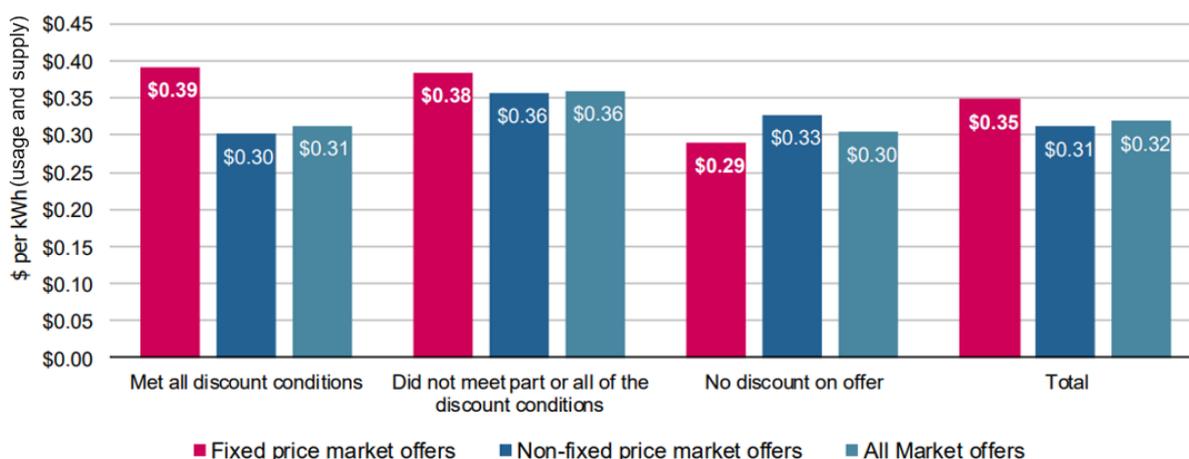
Since 1 July 2019, retailers have been required to provide customers with at least five business days' written notice before changes are made that could affect the customer's bill. This measure helps engaged customers to act and switch to a different plan. However, these changes do not necessarily provide an appropriate level of price certainty for customers when signing up to a new offer (or while on an existing contract).

We recognise that some retailers are providing energy offers with some level of price certainty, usually as fixed-price offers for 12 to 24 months. Based on data we have obtained from retailers, we have found that as of 30 June 2019, one in five Victorian electricity customers were on these fixed-price contracts.

Our analysis also shows that, on average, customers have paid more on these fixed-price contracts. In 2018-19 customers on fixed-price contracts paid an average of \$0.35 per kilowatt hour, whereas customers on non-fixed price contracts paid on average \$0.31 per kilowatt hour. We were mindful of the potential price premium for providing a level of price certainty for customers when considering how to implement recommendation 4A.

It is interesting to note that customers on fixed-price contracts without any discounts paid the lowest on average compared to all other types of contracts. However, we understand that this is largely driven by a small number of retailers that offer low rate plans – 9 per cent of the market are currently on these plans.

Figure 1 Difference in price paid by customers on fixed and non-fixed price offers in 2018-19



Source: Commission analysis of data obtained from retailers

Recommendations 4C and 4D

Recommendations 4C and 4D address the issue of customers needing to engage with their retailers before the end of their benefit or contract period to avoid paying more, by protecting

customers at the end of benefit and contract periods. As of June 2019, fixed benefit periods appeared to feature in the majority of offers available on Victorian Energy Compare. In our issues paper, we noted it was therefore likely that concerns raised by the review persist in the market. We also noted that, given conditional discounts were still widely used in the market¹⁷⁰ and the prevalence of large (30 per cent and greater) discounts had increased since the time of the review,¹⁷¹ the impact on customers of reaching the end of a benefit period was likely to have increased since the review.

We also noted from our discussions with retailers and consumer group representatives that there was no consistent practice among retailers at the expiry of a customer's benefit or contract period.

While we don't have specific data on retailer practices at the end of benefit and contract periods, we have examined the prevalence and size of conditional discounts in the market to understand the extent to which the issues identified by the review are likely to still be relevant. The greater the prevalence of conditional discounts, the more customers are at risk of losing these benefits at the end of a benefit or contract period. The larger the size of conditional discounts customers are receiving, the greater the impact of losing such discounts will be on these customers.

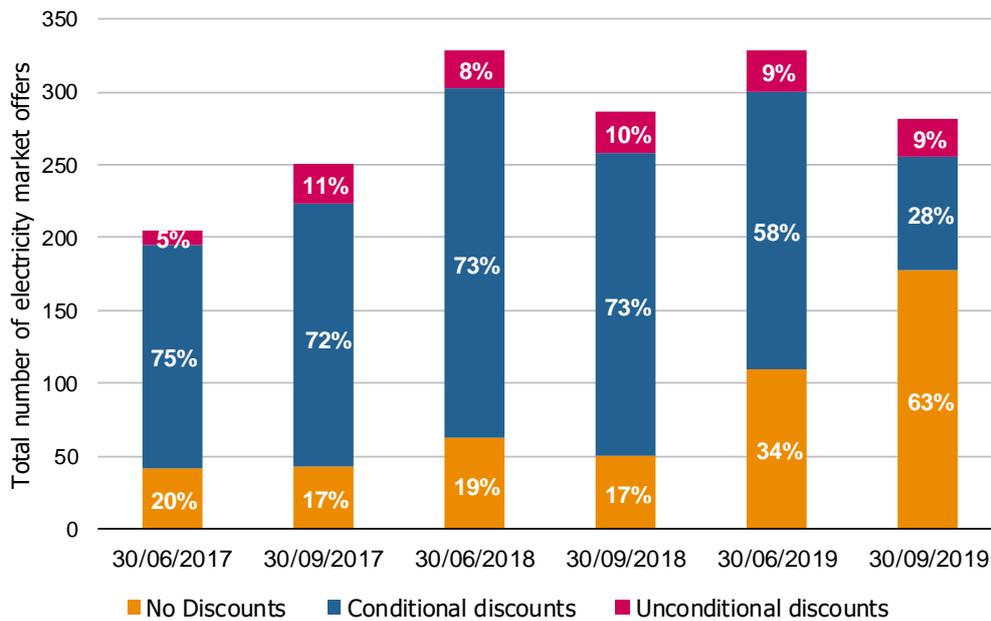
Prevalence of discounting practices

The number of offers with conditional discounts available in the market post 1 July 2019 has reduced. As of 30 September 2019, only 28 per cent of electricity offers and 29 per cent of gas offers had conditional discounts, compared to 58 per cent and 55 per cent respectively just three months earlier. However, the data we have obtained from retailers shows that across the market, 83 per cent of customers were on offers with conditional discounts as of 30 June 2019 (figure 4). The fact that the majority of customers are still on offers with conditional discounts indicates that customers are still likely to be impacted when they reach the end of a benefit period.

¹⁷⁰ Essential Services Commission, [Victorian Energy Market Report 2017-18](#), February 2019.

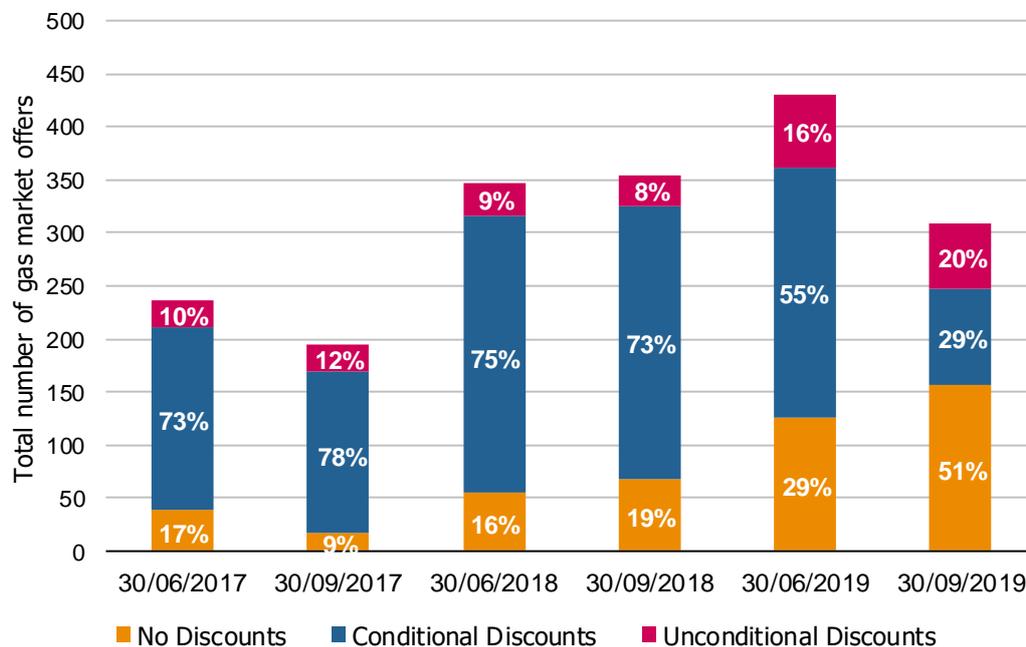
¹⁷¹ ESC analysis of the Victorian Energy Compare website data, April 2019.

Figure 2 Number and proportion of conditional discount, unconditional discount and no discount electricity market offers



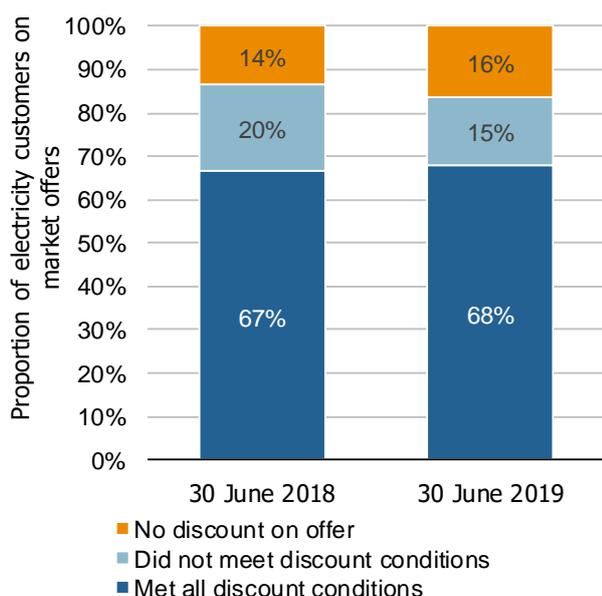
Source: Commission analysis of Victorian Energy Compare data

Figure 3 Number and proportion of conditional discount, unconditional discount and no discount gas market offers



Source: Commission analysis of Victorian Energy Compare data

Figure 4 Breakdown of customers on discounted and undiscounted electricity market contracts



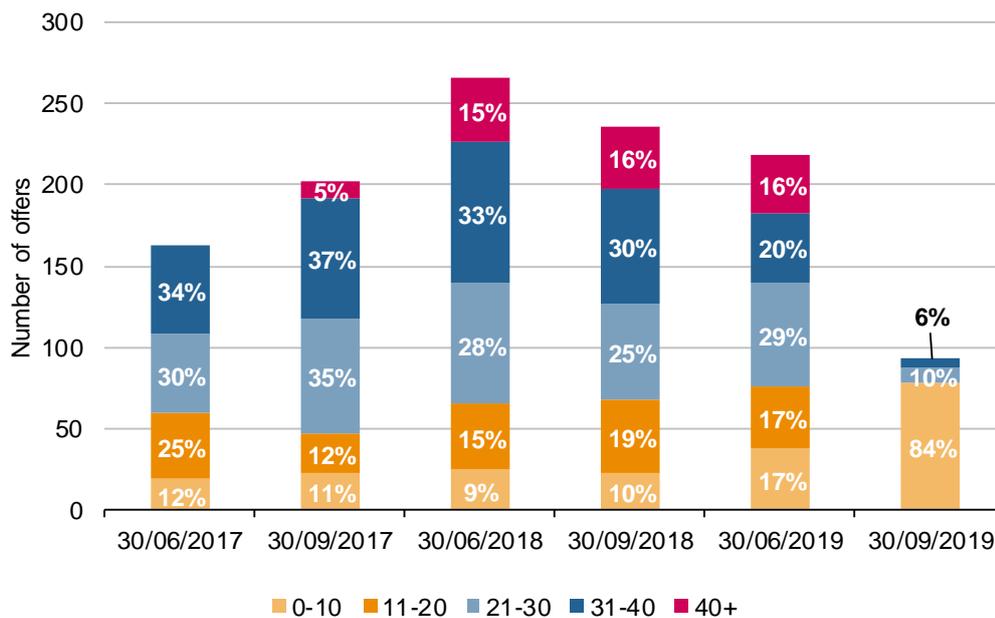
Source: Commission analysis of data obtained from retailers

Size of discounts

We have also observed a reduction in the size of discounts that are available on electricity offers in the market post 1 July 2019, though this has not been mirrored to the same extent for gas discounts. Of offers in the market with discounts, 84 per cent of electricity offers and 53 per cent of gas offers had discounts of less than 10 per cent as of 30 September 2019. However, there are still a small proportion of both electricity and gas offers with very high discounts. As of 30 September 2019, 6 per cent of electricity offers had discounts of 31-40 per cent and 8 per cent of gas offers had discounts of over 40 per cent.

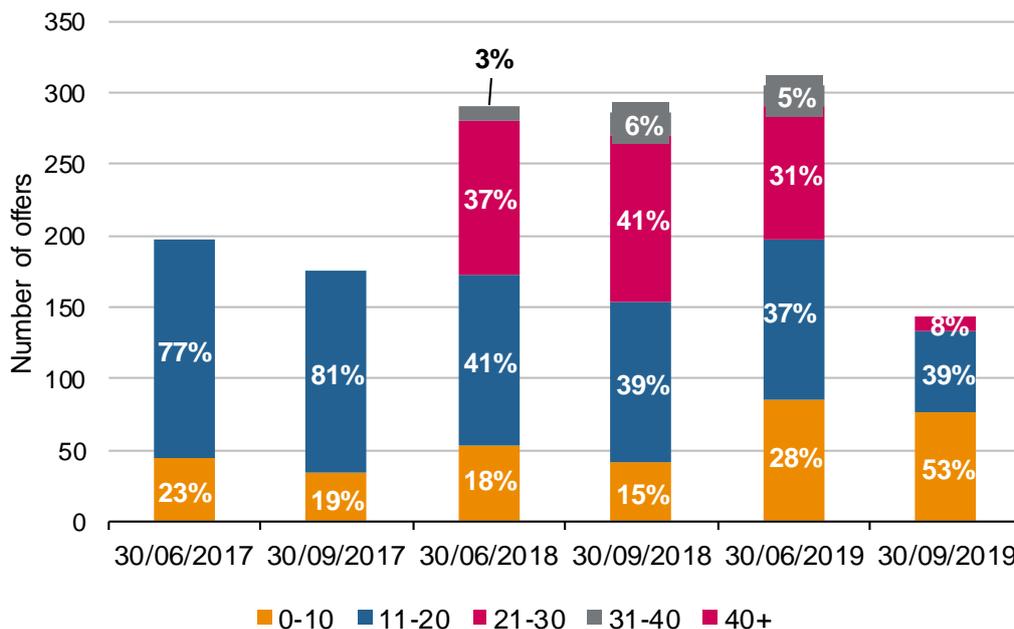
Customers on new electricity contracts are likely to be impacted less when they reach the end of a benefit period, due to reduced discount sizes. However, customers who signed up to electricity and gas contracts before 1 July 2019, and customers signing up to new gas contracts, may still have large conditional discounts and so could still be impacted when they reach the end of a benefit period. This demonstrates that there is still a case for implementing recommendations 4C and 4D.

Figure 5 Number and proportion of electricity market offers by level of discount offered



Source: Commission analysis of Victorian Energy Compare data

Figure 6 Number and proportion of gas market offers by level of discount offered



Source: Commission analysis of Victorian Energy Compare data

Recommendation 4E

Recommendation 4E caps the costs of discounts, so they are no higher than the reasonable cost to a retailer of a customer missing an offer condition. This is intended to make conditional discounts cost-reflective, and limit the penalties faced by customers who fail to meet offer

conditions. To inform our draft decision, we considered both the prevalence of conditional discounts in the market, as well as the actual costs of not meeting discounts for customers on existing contracts.

Prevalence of conditional discounts

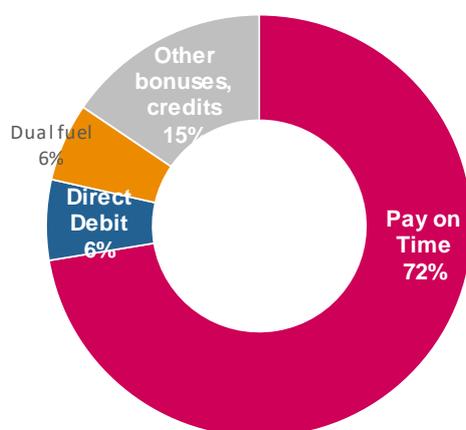
In our issues paper we noted a continued trend of high levels of conditional discounts. More than half of electricity market offers had a discount larger than 30 per cent as of 31 March 2019.¹⁷²

As previously discussed, the size and level of conditional discounts currently available in the market has generally reduced in recent months, particularly for electricity (figures 2 and 5).

However, while conditional discounting practices are less of an issue now for customers signing up to new electricity offers in the market, gas conditional discounts are still of some concern (figures 3 and 6), and there are many customers on existing contracts with conditional discounts (figure 4).

We collected data from retailers on the types of discount that are most common in the market. We found most customers with discounts have pay-on-time discounts (72 per cent). There were no customers receiving discounts for online self-service (reduced fees for using online self-serve system instead of calling customer service).

Figure 7 Proportion of customers on offers with different types of discounts as of 31 August 2019¹⁷³



¹⁷² ESC analysis of the Victorian Energy Compare website data, April 2019

¹⁷³ The main categories of discount were:

- pay-on-time (discount for paying a bill by the due date)
- direct debit (discount for paying a bill through direct debit)
- dual fuel (discount if a customer has both electricity and gas account with the retailer)
- other bonuses or credits (e.g. bonuses or credits for referring a friend, paying zero fees or getting the first month free for signing up to a new account).

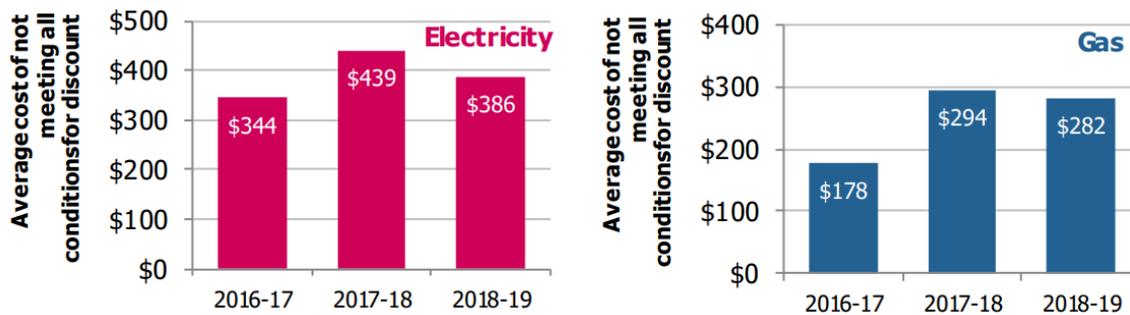
Source: Commission analysis of data obtained from retailers

Missing offer conditions

Figure 4 shows that 15 per cent of all customers with discount conditions did not meet part or all of these in the last financial year. This suggests that whilst most customers are able to meet their discount conditions, the issue of penalties for missing discount conditions is still relevant for a notable proportion of customers.

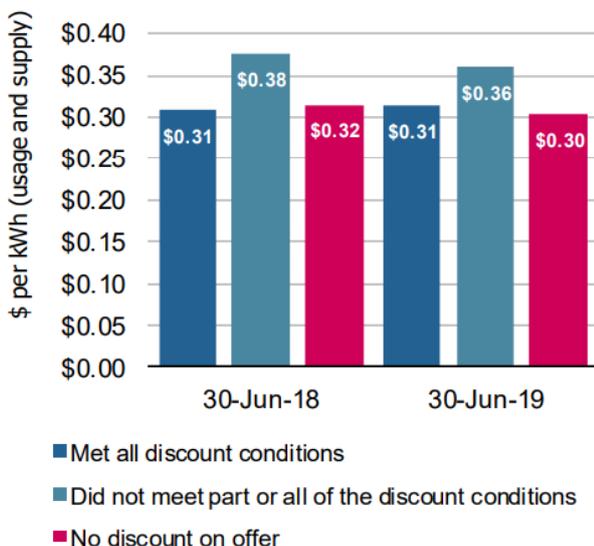
For these customers, the impact of not meeting part or all of their conditions can be significant. On average, the estimated maximum cost to a customer of not meeting all the discount conditions in 2018-19 was up to \$386 for electricity and \$282 for gas (figure 8). Our analysis of retailer data showed that the average actual cost to a customer of not meeting part or all of their electricity discount conditions in 2018-19 was \$188 (\$0.05/kWh, figure 9).

Figure 8 Average estimated annual cost of not meeting all the conditions of a discounted residential energy offer



Source: Commission analysis of Victorian Energy Compare data

Figure 9 Average cost of not meeting discount conditions



Source: Commission analysis of data obtained from retailers

Appendix G: Summary of consumer testing

We commissioned the Behavioural Insights Team (BIT) to conduct consumer testing on our behalf to determine the most effective way of presenting information about energy plans in advertisements to customers. This testing informed the design of our proposed electricity reference price requirements. The full report from BIT is available on our [website](#). Below is a summary of key findings.

Trial design

BIT ran an online experiment involving a representative sample of 2,023 Victorian customers. Respondents were shown pairs of advertisements for energy plans and were asked to pick the cheapest plan as if they were choosing for a relative. Respondents were randomised into one of four groups, each of which saw the advertisements with the information presented in a slightly different way.

The headline information in the advertisements for each of the groups was:

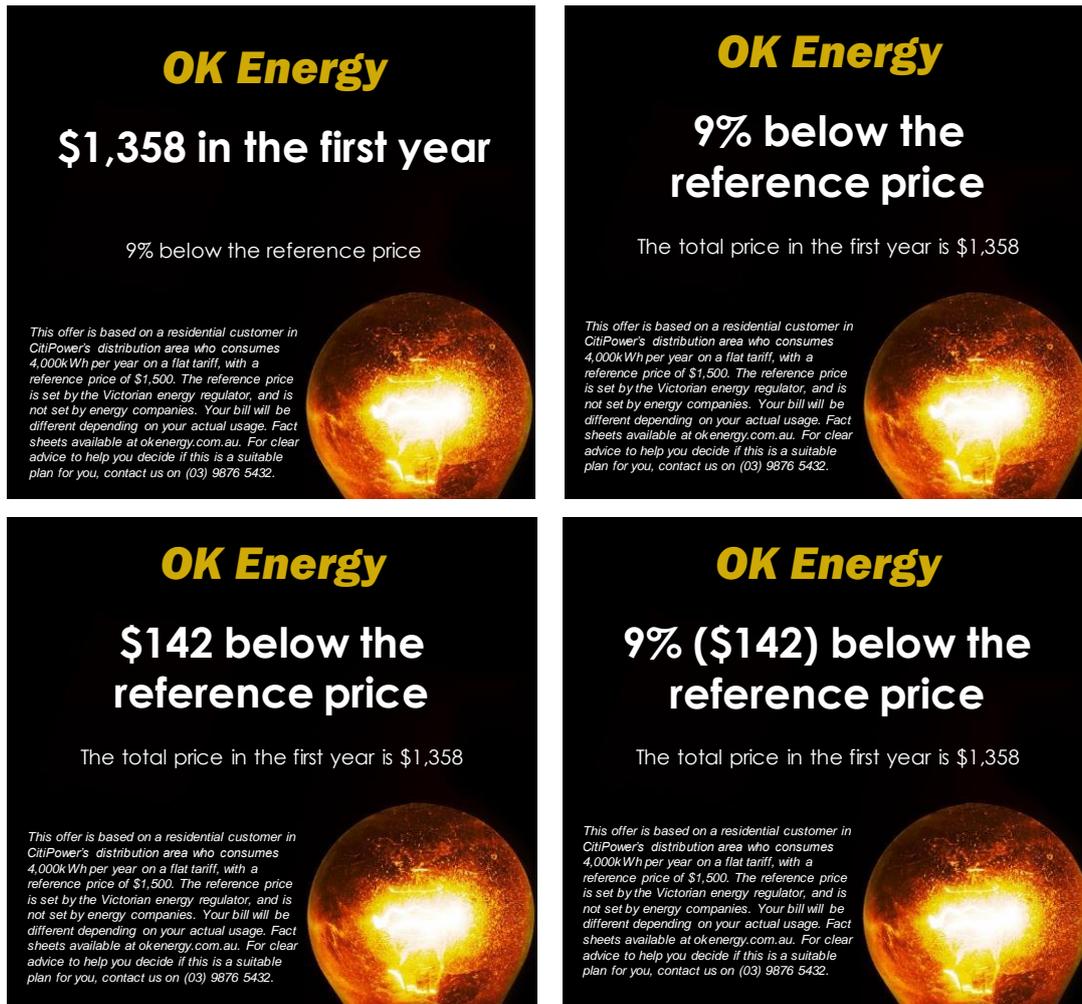
1. How much the plan would cost per year in dollars
2. How the plan cost compares to the VDO price as a percentage
3. How the plan cost compares to the VDO price in dollars
4. How the plan cost compares to the VDO price both as a percentage and in dollars

Figure 13 shows how the information was presented for each of the groups.¹⁷⁴

Respondents saw 24 scenarios (pairs of advertisements) in total, which included offers with a conditional discount, a conditional discount with a one-off credit, an unconditional discount and an unconditional discount with a one-off credit.

¹⁷⁴ The footnote in the advertisement states “This offer is based on a residential customer in CitiPower’s distribution area who consumes 4,000kWh per year on a flat tariff, with a reference price of \$1,500. The reference price is set by the Victorian energy regulator, and is not set by energy companies. Your bill will be different depending on your actual usage. Fact sheets available at [website]. For clear advice to help you decide if this is a suitable plan for you, contact us on [phone number].”

Figure 13 Presentation of information for four groups of respondents

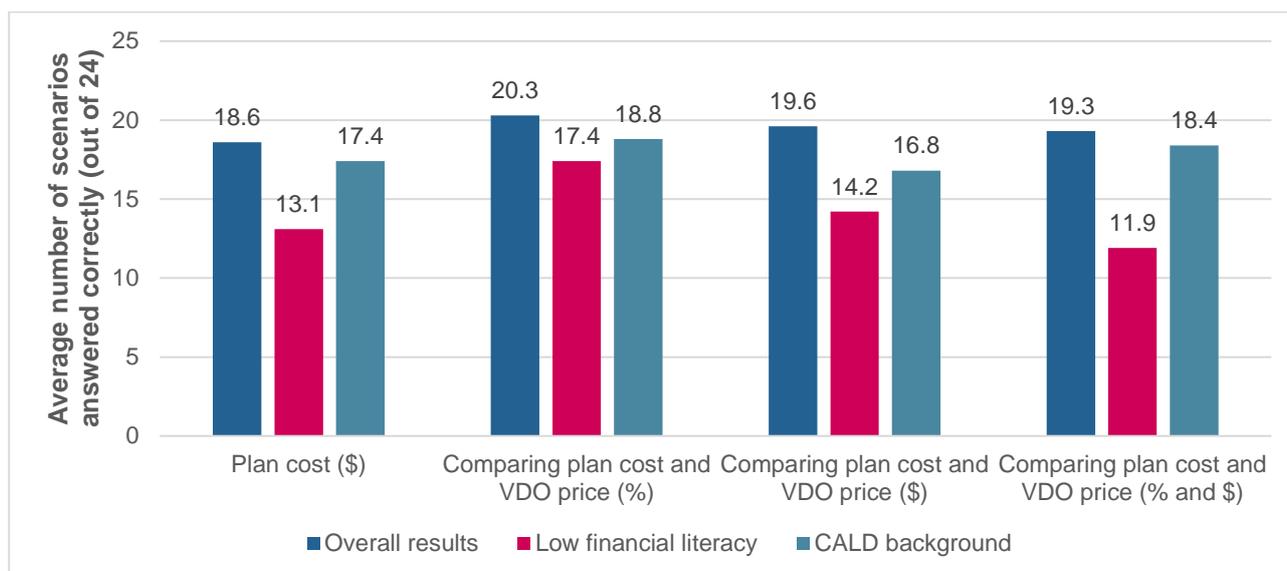


Key results

Respondents were more likely to correctly identify the cheapest plan when the headline information in the advertisement included a comparison to the VDO price in the headline. Groups two, three and four all scored between 0.7 and 1.7 scenarios better than group one which just included the annual cost of the plan.

Respondents correctly identified the cheapest plan most frequently (an average of 20.3 out of 24 scenarios) in group two, where the headline information showed the difference between the plan cost and the VDO price as a percentage. Notably, this result was more pronounced for respondents with low levels of financial literacy and was also observed for respondents from culturally and linguistically diverse backgrounds (see figure 14).

Figure 14 Selected results from consumer testing



Source: Behavioural Insights Team

Other results

We also asked respondents a series of questions about their behaviour and interactions with the energy market. Below we highlight some key insights relating to the use of reference prices.

Understanding of what a reference price is

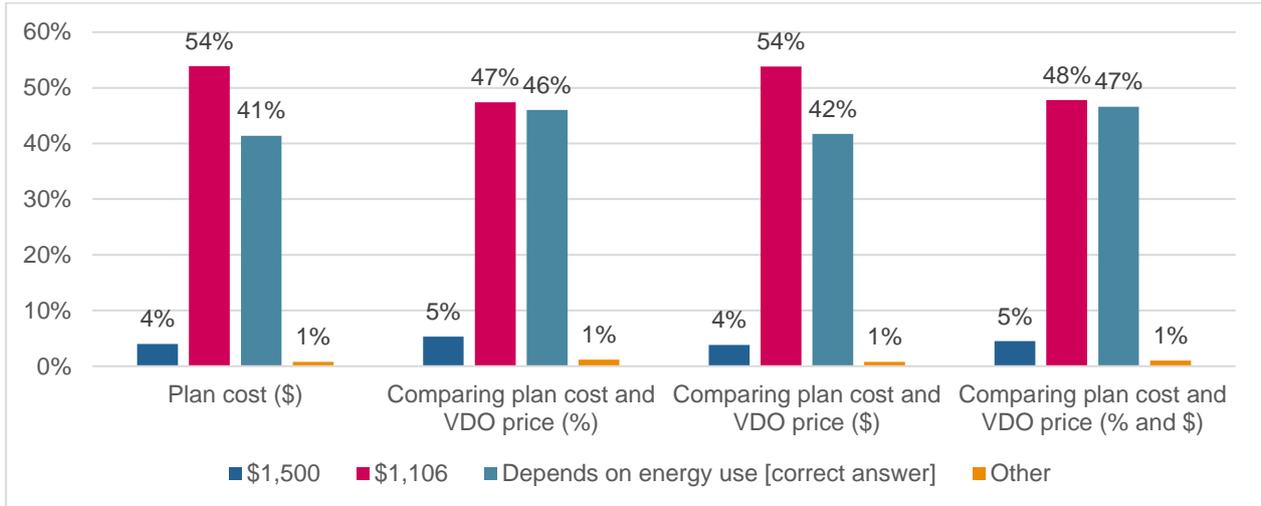
We asked respondents what they thought the reference price referred to in the advertisements they were shown was. Just over half (54 per cent) correctly identified that it is a standard price set by the government that all energy companies have to base their offers on. 31 per cent thought it was a standard price, but one that each energy company calculates differently, and 15 per cent thought it was just energy company marketing.

Understanding of what a customer would pay in practice

We showed respondents a single example advertisement for an offer, presented in the same way as the other advertisements they had seen during the experiment. We asked how much they thought someone who choosing that plan would pay in the first year. In the given example, the total unconditional cost shown for the first year was \$1,106 (based on average annual consumption) and the reference price was \$1,500.

Across each group, most respondents (between 47 and 54 per cent) thought that the plan would cost \$1,106 in practice, which was not the correct answer. The second most popular answer was the correct one, that the price paid would depend on how much energy the customer used.

Figure 15 What customers thought they would pay in practice for a given plan



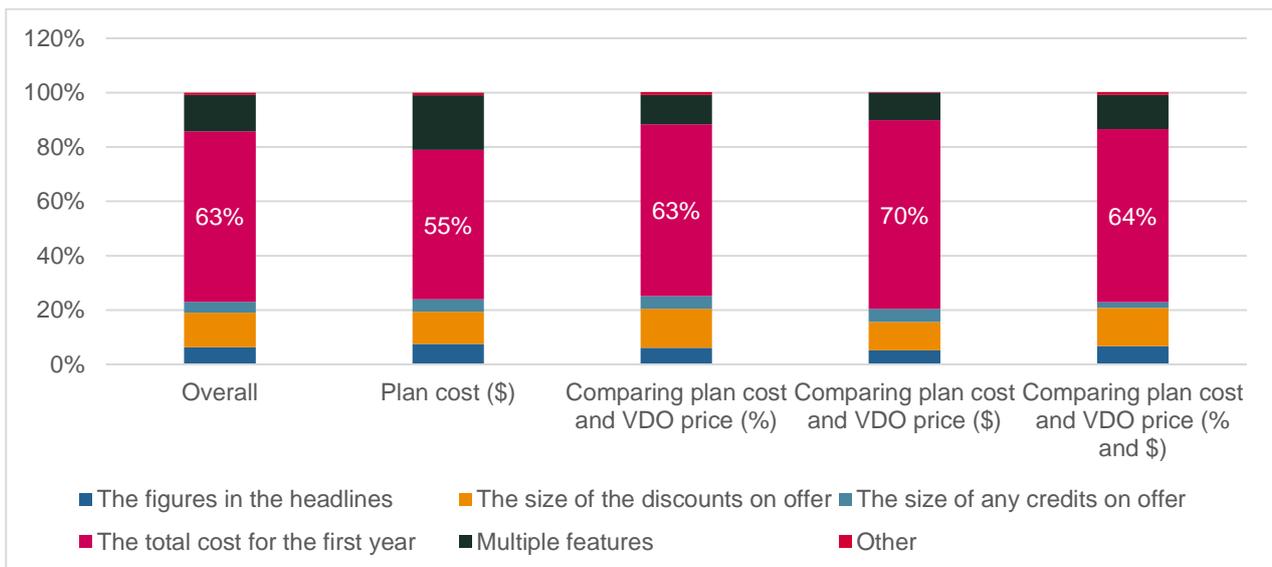
Source: Behavioural Insights Team

On average, more respondents in groups two and four were able to answer this question correctly, with around five per cent more accurate answers than in groups 1 and 3. BIT hypothesise that having a percentage figure in the headline (as in groups two and four) helped customers understand that the amount saved will ‘scale’ depending on the underlying cost.

Factors that customers use to make decisions

We asked respondents what feature helped them decide what the cheapest plan was in the experiment. The majority (63 per cent) focused on the total cost for the first year, though the proportion varied slightly across groups.

Figure 16 The main feature respondents reported using to choose the cheapest plan in the experiment



Source: Behavioural Insights Team

Appendix H: Summary of academic research

We commissioned academics Associate Professor David Byrne and Dr Gordon Leslie to provide an independent view of market design considerations relating to implementation options for recommendation 4A. The full report they produced is available on our [website](#). Below is a summary of key findings.

The five implementation options considered were:

- do nothing
- all retailers must offer one contract where prices are fixed for the first 12 months
- the price of all contracts must be fixed for the first 12 months
- price changes can only occur at set times during the year
- call-to-market for 12-month fixed-price contracts (with a centralised retail exchange option).

Byrne and Leslie assessed the implementation options by considering the impact each would have on consumer search costs, both for engaged and disengaged customers, and whether there could be any unintended consequences such as impacts on competition.

Option 1: Do nothing

Byrne and Leslie noted that this option would maintain the status quo and so would not reduce consumer search costs, though it would maintain the current competitive environment and incentives for innovation. They considered this would not be the best option, as other well-designed options could lead to potential efficiency gains.

Option 2: All retailers must offer one contract where prices are fixed for the first 12 months

Byrne and Leslie considered that this option would have little market impact, as it would just lead to an additional product for customers to consider. Engaged consumers would continue to shop around for better deals and so would likely be unaffected. Disengaged consumers may not be aware that these 12-month fixed contracts are available or put in the effort necessary to find the best contract for them.

Byrne and Leslie suggested that disengaged customers' search costs could be reduced by policy makers publicising a list of available 12-month fixed-price contracts, making clear the rank order of the contracts for a "typical" consumer in the market. However, they noted challenges to the effectiveness of public information campaigns and that public announcements of this nature may lead to tacit price coordination and ultimately higher prices across the market.

Option 3: The price of all contracts must be fixed for the first 12 months

Byrne and Leslie noted that this option would mean that customers would not need to track the price of their deal for the first 12 months but highlighted some major concerns.

This option would limit retailers' ability to compete for engaged consumers, such as by offering introductory discounts or short-run contracts. It would also give firms no flexibility to adjust rates to reflect changing wholesale supply conditions over time.

Even if retailers were allowed to offer contracts to new customers at new prices throughout the year, Byrne and Leslie expected that prices across the market would increase to account for an increased risk premium. They considered that the problems caused by firms not being able to respond to wholesale cost conditions would likely dominate any reduction in consumer search costs.

Option 4: Price changes can only occur at set times during the year

Byrne and Leslie highlighted that this option would provide a focal point in the retail market and the competition calendar when all prices would be reset or rolled over. They noted that customers entering a new contract closer to the price reset date would have certainty of their tariff conditions for a shorter time and may incur search costs again soon after to determine their new best offer.

Byrne and Leslie considered that, all else being equal, contracts entered into closer to the price reset date would be priced lower as the retailer would face less exposure to changing market conditions. This could be affected by whether there is one- or two-sided commitment (whether consumers are able to leave the contract and switch retailers before the reset date or not).

Other factors to consider:

- an information campaign could increase the effective of this option, to raise awareness of price adjustment events and help reduce search costs
- if firms could choose the timing of their price reset date and dominant retailers updated their price levels first, this could result in price leadership and increase overall price levels
- aligning the price reset date with VDO timing could help simplify regulation. Byrne and Leslie also suggested that option 4 could be implemented in a way that creates a class of products which are price-linked to the VDO.

Option 5: Call-to-market for 12-month fixed-price contracts

Byrne and Leslie considered two versions of this option. The simple version would be similar to option 2, with the policy maker publishing information on 12-month fixed-price contracts from retailers, though this would be at specified times during the year when the call-to-market was run. If this was done at consistent times e.g. once a year, over the long run consumers could form habits

in search behaviour. However, besides this cyclical aspect, Byrne and Leslie noted that the option may not add value compared to directing customers to Victorian Energy Compare.

An extended version of this option could involve the policy maker also coordinating the demand side of the market, creating an exchange for energy contracts. As well as collecting 12-month fixed-price contracts from retailers, the policy maker could recruit customers who want to switch based on the outcome of competitive bidding through the exchange. This could give customers the opportunity to opt out of shopping for their own contract, and instead be switched to the cheapest 12-month fixed-price contract every year. Byrne and Leslie consider that this version of option 5 could be much more effective and would be their preferred market design in implementing recommendation 4A.

Appendix I: Role of the commission

Role of the Essential Services Commission

The commission is Victoria's independent economic regulator of essential services. Primary legislation passed by the Victorian Parliament sets out the objectives and expectations for the commission in the regulation of retail energy markets.

The *Essential Services Commission Act 2001* sets out the commission's overarching objective to promote the long-term interests of Victorian consumers.¹⁷⁵ The commission is also guided by objectives under the *Electricity Industry Act 2000* and *Gas Industry Act 2001* to promote the protections for customers, including in relation to customers who are facing payment difficulty.¹⁷⁶

The legislation establishing the regulatory framework for the energy industry in Victoria assigns the commission a range of functions and powers, including the power to grant licences to energy market participants and to create codes and guidelines.

The Energy Retail Code is the principal instrument used to set out retailers' obligations and was first established in 2002.¹⁷⁷ The commission amends the code to reflect new reforms and other changes. Version 15 of the code is currently in force today.

¹⁷⁵ Section 8 Essential Services Commission Act 2001.

¹⁷⁶ Section 10(c) Electricity Industry Act 2000 and section 18(c) Gas Industry Act 2001.

¹⁷⁷ The commission replaced the Office of the Regulator-General (ORG), which was established to oversee regulation of electricity and gas industries during the privatisation of the industry and accompanying establishment of markets in generation, distribution and retail segments of the industry. The legislative objective for the ORG in relation to consumers was expressed as: "to ensure that users and consumers benefit from competition and efficiency" (Office of the Regulator-General Act 1994, s7(1)(e)).