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Ensuring contracts are clear and fair: draft decision

AGL Energy (**AGL**) welcomes the opportunity to comment on the draft decision for implementing Thwaites recommendations relating to contracts and discounting practices (**draft decision**) released by the Essential Services Commission of Victoria (**ESC**) on 10 December 2019.

We believe the package of these draft decisions, in conjunction with existing obligations that took effect from July 2019, will have significant and negative unintended consequences on Victorian energy users and market participants. Importantly, we anticipate that the practical impacts to customers and their experience with a retailer have not fully been considered and are likely to lead consumer disengagement and reduced competition.

In isolation, and at a high policy level, these draft decisions are aimed at providing better outcomes for consumers in line with the ESC's primary objective of ensuring the long-term interests of Victorian consumers. However, there is little consideration given to the impact these draft decisions will have on competitive markets required under the ESC Act 2001. This will ultimately impact consumers' choice, engagement and experience with energy, and is likely to see prices increase as a result.¹

The draft decision introduces new requirements on retailers that have not previously been considered or discussed, for example:

- A new approach to implementing 4A, where prices can only change on the Victorian Default Offer (**VDO**) change day (currently 1 January). This will effectively prevent retailers from offering current fixed-price products such as AGL Essentials.
- Auto-roll of gas customers on to the best-offer (without a clear path to achieve this through amendments to the Gas Industry Act). This approach will effectively curtail retail competition, prevent retailers from offering lower priced products for engaged customers and effectively eliminate price dispersion to the detriment of Victorian customers.

¹ This was noted by the academic report commissioned by the ESC and referenced in the [draft decision for ensuring contracts are clear and fair](#), in relation to premiums potentially being higher with fixed prices, p.36.



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- Retrospective application of the evergreen discount requirement will create confusion for consumers who seek to engage in the market that now offers only capped discounts (an illusion that their higher discount is better) and will increase costs to retailers.
 - Proposed mirroring of Australian Consumer Law (**ACL**) obligations into the Energy Retail Code (**ERC**) and advertising guide (which is not captured as a draft decision in itself). This is contrary to best practice regulation, the Victorian Guide to Regulation as well as the Intergovernmental Agreement signed by Victoria to not duplicate existing obligations.
 - Changes to the back-billing obligations being brought forward from the Energy Fairness Package slated for 2021. These changes will unfairly penalise retailers as the relevant obligations on distributors are not being amended and the additional cost because of this change will ultimately be borne by customers through increased prices.

We believe as a package of reform measures they do not promote competition and market innovation. We encourage the ESC to undertake a more robust cost-benefit analysis that takes into consideration those matters raised in s8A of the ESC Act 2001, to fully identify and mitigate unintended consequences for consumers. The draft decision approach to focus on high-policy level is likely to result in a poorer market and experience for consumers.

AGL would support the ESC seeking an extension to the implementation date so that they have appropriate time to consider stakeholder submissions and make the necessary amendments and enquiries to ensure that any variations of the draft decision will not also have unintended consequences on the market. An extension will ensure sure retailers are afforded the initially proposed 6-month period to make the necessary changes to comply with the new obligations.

Given the sheer scope of industry concerns flagged through submissions, as well as in meetings and public forums, we believe the appropriate option is for the ESC to request an extension to the Terms of Reference (**TOR**) from the Victorian government.

The above matters are discussed in more detail below, in two key sections:

1. Observations of regulatory principles, consumer experience and market impacts which discusses matters at a high-level.
2. Draft decisions for each of the Thwaites recommendations – detailed assessment.

If you have any questions about this submission, please contact Kat Burela on [REDACTED] or at kburela@agl.com.au.

Regards,

Con Hristodoulidis

a/General Manager Energy Markets Regulation



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Summary of positions

Draft Decision	High level comment
DD1 – New objective for marketing energy offers.	No comment
DD2 – Electricity market offers with reference to VDO	See page 23
DD3 – Electricity reference price requirements	Do not support mirroring of ACL obligations – unnecessary regulatory duplication and contrary to the Victorian Regulation Guide and Victoria’s Intergovernmental Agreement. See page 23
DD4 – Do not headline conditional discounts	No comment
DD5 – Price change only on “VDO change” day	Do not support draft decision as currently drafted, unnecessarily restrictive on product innovation and consumer choice. See page 13
DD6 – Product exemptions for DD5	Do not support draft decision. See page 16
DD7 – Disclose time prices will not change	Will not protect customers from honeymoon rate practices any more than is already available in the market. See page 16
DD8 – Evergreen benefits	Do not support draft decision. See page 25
DD9 – Rolling customers at the end of a contract	Do not support draft decision. See page 20
DD10 – Pay on time discounts (POTD) to be capped by ESC	No comment
DD11 – Aligning POTD cap	No comment
DD12 – Methodology for POTD cap	No comment
DD13 – Updating POTD cap	No comment
DD14 – Announcing POTD cap	No comment
DD15 – Honour POTD for TA customers	No comment
DD16 – VDO information on bills	Does not align with existing retailer obligations under the relevant Order in Council. These should be aligned. See page 29
DD17 – Reducing back billing from 9 to 4 months	Do not support inclusion for 1 July 2020 start date. This was not part of the Thwaites recommendations and retailers had been told this would be captured in the 2021 reforms for the Energy Fairness Package. Recommend a September 2020 start date to give enough time to make relevant Victorian Distribution Code changes. See page 27
DD18 – commencement date 1 July 2020	Do not support as retailers will have approximately 4 months to make significant changes to internal processes. Retailers are forced to start implementing on the draft decision which presupposes the outcome of the consultation process. If the ESC remains committed to the Terms of Reference for the Thwaites recommendations, we recommend implementing a minimum viable product for each recommendation – as not enough analysis or assessment of the policy options and cost to regulated industries (under ESC Act S8A(e)(ii)) has occurred. See page 5 and appendix 1

Part 1 – General

This section of the submission focuses on the development of the draft decision at a high-level re and the impacts it will have on the market.

This Part is split into the following sections:

1. The ESC's decision process
2. Changes in the market and ESC assessment
3. Cost benefit analysis
4. Overview of customer and industry impacts under draft decisions.

Overview of decisions

When considered in isolation, each draft decision has the potential to deliver a better outcome for consumers or a subset of consumers – however the scope/extent of this benefit is unclear and, in some instances, may be marginal at significant cost. There is no evidence of a cost-benefit analysis being completed for these proposed regulatory changes. Adding regulatory changes without clear objectives on the current scope of the problem sought to be fixed, and with marginal (or no real tangible) benefit will likely deepen the mistrust with retailers as the market, the terms and conditions, the language and the experience differs each time the customer engages with us.

Further, there appears to be limited consideration of the broader impacts that these draft decisions will have on consumers and industry when considered in connection with one another, and the previous regulatory changes that have occurred over the last 12 months. For example, the ESC's latest market performance report released in November 2019 the ESC Chairperson stated that "energy offers are becoming clearer".² This would suggest prima facie the market is trending in the right direction from the perspective of fairer and clearer contract terms and therefore raises the question as to whether the draft recommendations are a response to market practices that are no longer prevalent.

Cost-benefit analysis is an integral part of developing appropriate regulation and in line with best practice regulatory processes. The draft decision appears to show that the ESC has chosen each option based on its potential for consumer benefit (even if this is marginal/negligible) without the commensurate cost implications. This is not a sustainable approach for regulatory reforms or ensuring effective competitive markets in the future.

ESC's decision process

When the Victorian Government originally provided the ESC with the Terms of Reference to implement Thwaites recommendation 4 the ESC publicly stated they intend to release a final decision for in December 2019. The ESC is now expecting to issue a final decision in late February 2020, which is not ideal from a customer impact perspective for two key reasons:

1. It means the ESC has only a month to consider the submissions and matter raised by stakeholders, make relevant changes, and consult and test with relevant stakeholders for a final decision and have these approved internally by the Commissioners.

² See the [Victorian Energy Market Report 2018-19](#), p.4.

2. It reduces the implementation time that retailers expected to have from 6 months to 4 months. This is particularly concerning where significant market reforms are being proposed, some which have not previously been discussed, and with the proposal of retrospective application. Rushed implementation can impact the customer experience, where solutions have not been adequately tested and potentially lead to perverse or unintended outcomes.

We have provided a timeline in Appendix 1 to demonstrate the restrictive timeframes.

We encourage and support the ESC approaching the Victorian government to request an extension to ensure that the issues raised by stakeholders can be appropriately considered, and that industry have sufficient time to implement the new changes in a way that provides the best customer experience and outcome. This would include enough time for quality assurance and testing.

As we have previously explained to the ESC, retailers require enough lead time to introduce new requirements due to the massive change management project that must be undertaken. These proposed reforms will impact a range of business processes, including customer communications, call centre training and scripting, scoping of system requirements and aligning with scheduled release dates and so forth.

The already short timelines will mean that we are unable to notify customers of their General Terms changes through a bill insert and will have to separately mail / email all Victorian small customers which will add to the cost of the regulatory change process. Retailers need time to develop and schedule system requirements. Additionally, any extension to the implementation date will likely improve the customer experience through providing appropriate time to properly implement the designed changes and communications.

For these reasons we stress the importance of the ESC finalising the decision with at least the initial six months implementation time suggested in the Issues Paper. Four months will not allow for the fulsome quality and assurance testing, it will allow for a minimum viable product to be developed. Had this been a potential raised in the Issues Paper, we would have raised these timeframe concerns at the time of those submissions as well.

Changes in the market and ESC assessment

There has been a demonstrable positive shift in the market since the new reform package hit the energy market on 1 July 2019. However, the ESC's draft decision suggests that this shift has not occurred fast enough, after less than three months analysis³ of transition from a market structure that had been in place for almost a decade. The ESC analysis of offers in the market shows that in just 3 months, the number of conditional discounts offers in the market dropped by half.⁴

Furthermore, figure 4 of the draft decision shows that only 15% of the market did not meet discount conditions, meaning that the majority (i.e. 85%) of Victorian consumers will miss out on the benefits of the competitive market structure.

³ [ESC draft decision](#), p.20 (Figure 2).

⁴ See the [Victorian Energy Market Report 2018-19](#), p.4. – this states that the size of the conditional discount has fallen – see page 4 call out box under energy offers are becoming clearer

What is unclear, and the ESC provides no comment on, is what makes up the remaining 15% of consumers that are not meeting their discount conditions. Is there a commonality in this customer base, is it linked to affordability, disengagement or something else? Once fulsome analysis is done on this section of customers, the ESC can consider an appropriate response that addresses the underlining cause rather than the symptom. This will ultimately provide better outcomes for the minority without having unfair impacts on the majority of customers.

We note that the VDO expert panel report noted that there has been a significant move away from conditional discounting since the introduction of the VDO.⁵

- Previously 16 business offered conditional discounts, this has decreased to 9 businesses.
- The discounts offered on these conditional discounts has also dropped: average POTD now 8% compared to 23% in July 2018 (lower financial penalty for customers that fail to meet POTD conditions).
- Observation from the expert panel that a common price trend between Default Market Offer (**DMO**)/VDO is “an across-the-board shift away from conditional discounting (where customers must take particular actions, such as paying on time, in order to receive discounts)”.⁶
- Narrowing of household annualised bills July 2018 vs October 2019.⁷

The Independent Pricing and Regulatory Tribunal NSW (**IPART**) in their *Review of the performance and competitiveness of the NSW retail electricity Market*, November 2019 also stated that *any change in the regulatory framework needs to be given time to take effect before we [sic] can make definitive findings on its impact*.⁸ This is the same period of time between the 1 July changes (e.g. introduction of the DMO) and the release of the ESC’s draft decision, yet the ESC has determined that regulation is necessary despite the lack of definitive evidence of a regulatory need.

We continue to be of the position that the ESC needs to undertake a review of the current state of the market before making such drastic regulatory changes. We believe that the market today has changed since the time of the Thwaites report and therefore the recommendations no longer remain as pertinent as they did three to four years ago.

Cost benefit analysis

- This section provides feedback on the processes required by the ESC to consider as well as best practice regulatory making. At a high-level we note that: There does not appear to be a consideration of the costs/benefits to retailers for the proposed draft decisions.
- The ESC has obligations under 8A of the ESC Act 2001 to consider several matters, including the degree and scope of competition and the benefits and costs of regulations.
- Best practice regulation principles suggest that a RIS should be undertaken for decisions that create mandatory obligations on businesses. This includes considering a range of policy options (including the status quo/cost to do nothing) and clearly detailing the need for the

⁵ [Victorian Default Offer Expert Panel – November 2019](#) p.12

⁶ Ibid, p.18.

⁷ Ibid, see example p.13.

⁸ [Independent Pricing and Regulatory Tribunal \(IPART\) NSW – November 2019](#) p.57

regulatory response. The principles for RIS development are important for undertaking cost-benefit analysis.

The ESC Act 2001 contains a number of matters the ESC must have regard to in seeking to achieve the objective specified in section 8 regarding the long-term interests of Victorian consumers. The matters prescribed in section 8A are:

- a) efficiency in the industry and incentives for long term investment;
- b) the financial viability of the industry;
- c) the degrees of, and scope for, competition within the industry, including countervailing market power and information asymmetries;
- d) the relevant health, safety, environmental and social legislation applying to the industry;
- e) the benefits and costs of regulation (including externalities and the gains from competition and efficiency) for –
 - (i) consumers and users of products or services (including low income and vulnerable consumers);
 - (ii) regulated industries;
- f) consistency in regulation between States and on a national basis;
- g) any matters specified in the empowering instrument.

We note that the ESC's draft decision highlights only their obligations under section 8 for the long-term interests of Victorian customers. The academics report and consumer testing will only inform 8A(e)(i) of the above ESC Act obligations, but does not help inform 8A(a), (b), (c), (e)(ii), or (f).

This leads to deficiencies in the development of regulatory obligations.

Firstly, it will mean that the ESC will value the position of consumer groups (as representatives of the interests of consumers) over that of other stakeholders, such as industry participants (however, we do stress that industry participants are incentivised through competitive markets to provide consumers a positive outcome). This is precisely the reason that the matters prescribed in section 8A exist, to ensure that such a balance is undertaken in regulatory decisions.

Secondly, in the absence of a cost-benefit analysis pursuant to 8A(e), the ESC appears to be giving preference to draft decisions that are determined at the policy level which are seemingly better for consumers (e.g. that the intended outcome of a draft decision is the 'best' option for a customer). The issue this causes is that the ESC then preferences decisions based on perceived potential benefit, rather than critical analysis, so a favoured draft decision may offer a consumer outcome that is considered marginally or better for some customers but comes at significant cost to retailers and therefore could result in a net loss to Victorians. This type of regulation would not be considered best practice or appropriate regulatory setting.

While we recognise the ESC is not bound by the Federal requirements for a Regulation Impact Statement (**RIS**) for the Office of Best Practice Regulation (OBPR), we direct the ESC's attention to principles that should be applied in undertaking a cost-benefit assessment for regulatory reforms such as this draft decision. We note that this does not align with the Victorian Government's guide to regulation.⁹ RIS help ensure that decision-making is transparent and informed by evidence, and

⁹ See the [Victorian guide to regulation](#) for further information.

that policymakers consult with stakeholders and include consideration of the regulatory burden imposed.¹⁰

We note that these principles regarding effectiveness, proportionality and flexibility are reflected in the review of the ESC's Act final report published in 2016.¹¹ This report also encourages a review of the options, costs and benefits and ensuring regulation complements innovation and market efficiency.¹²

Rather than relying on a review of the market impacts post-implementation through competition and market reviews, the ESC should seek to undertake the appropriate assessment of the costs and benefits prior to implementation. Industry participants are restricted in their ability to provide information to inform the costs elements unless sufficient information is provided through the consultation processes. For example, the VDO change day draft decision for 4A was not included in the Issues Paper for stakeholder consideration.

Recommendations

1. The ESC undertake appropriate cost-benefit analysis as part of obligations under s8A of the ESC Act, and in line with best practice regulation principles.
2. This analysis should be made publicly available for analysis and consultation by stakeholders.

Market impacts (customer and industry)

This section provides an overview of the potential inconsistencies and impacts the proposed draft decisions will have on consumers and industry when you consider the broader as a broader package more generally in the tables below. Some of the information in these tables are elaborated on further in Part 2 of this submission. If the ESC would like further information on any of these points, we welcome the opportunity to discuss.

¹⁰ See the [Department of Prime Minister and Cabinet on guidance for policy makers](#).

¹¹ [Review of the Essential Services Commission Act, Report to the Minister for Finance](#), December 2016

¹² Ibid p.23.



Customer engagement overview	
<p>DD8 – evergreen benefits DD9– rolling customers on to VDO or best offer</p>	<ul style="list-style-type: none"> • Places the onus on customers to continue to engage to get the benefit of competitive market at the end of a fixed term contract. • Reduces customer engagement by stating that the VDO ensures customers pay less for energy. There are a number of market offers that sit below the VDO. A customer may become complacent or disengage, believing they are on the best price as it is a government set price. • The best offer (gas) and VDO (electricity) differences will create an inconsistent experience for the customer and possibly add to customer confusion. Dual fuel communications will need to be sent separately which can cause customers to disengage from information overload. • Evergreen benefit – retrospective application for existing market offers post July 2020 - If retailers had to retain customers on a high POTD, then this customer would be delinked from the VDO. The market would forever be confusing for these customers without a consistent point of reference on discounts for ‘capped’ discounted products post 1 July 2020, and their evergreened large discount.
Customer experience overview	
<p>DD5 – VDO day price changes DD7 – length of time without price change DD9 - rolling customers on to VDO or best offer</p>	<ul style="list-style-type: none"> • Customers can experience a price change within three months of signing up to a new advertised offer and under clear advice obligations the retailer may not know sufficient information to share with the customer at this stage (see Figure 2 below). <ul style="list-style-type: none"> ○ Customers will essentially be signing up to an unknown market offer and the proposed regulations will encourage the use of honeymoon rates as a possible marketing option (see Figure 1 below). • Regarding certainty - customers can experience a price change within one week of sign-up (with clear advice obligations informing the customer that they will effectively be signing up to a different rate within a week). This is already effectively occurring in the market – the change to the VDO day price change will not improve customer certainty regarding their energy plan. <ul style="list-style-type: none"> ○ Fact sheet obligations means that a customer is unable to view/compare the relevant fact sheet, only be informed at the time of sign up prices will be changing in a week and to what rate(s). • Customers who were unable to re-engage with their retailer at the end of their contract period who are placed on the VDO, may then receive best offer messages on their next bill from the retailer about the amount they could have saved if the customer had been on the ‘best offer’ (which may be the plan they had initially been on). This does not foster trust in the market.



	<ul style="list-style-type: none"> Increases the cost of retailer energy offers which will cause customers to pay more (the ESC expect fixed price products (which increase retailer risk) will increase between \$22 and \$100).¹³ Network tariff reassignments would be delayed (due to the exemptions process). This could be a delay in either an increase or decrease of energy costs for consumers.
Customer choice overview	
<p>DD2 – marketing in reference to the VDO DD4 – cannot headline conditional discount DD5 – VDO day price changes DD6 – applying for exemptions DD9 - rolling customers on to VDO or best offer</p>	<ul style="list-style-type: none"> Ultimately there will be less choice and likely higher prices for customers across retailers. How retailers market electricity and gas will differ, can add to customer confusion about language, comparison points, etc. Customers on the VDO will experience a price change each year. This may be higher than the increase of retailer market offer prices (e.g. this year the ESC increased the VDO by 7.8 %, the average increase across AGL’s existing discounted electricity market contracts was 5%.¹⁴ Lack of clarity and timeframes in the ESC’s product exemption process could mean new innovative products/services for customers are unnecessarily delayed and/or refused. There is no transparency on how the ESC will approve an application in a consistent way, this will ultimately impact customer choice in energy offers.

¹³ We note, for example, that the draft decision regarding fixing prices seems to be counter to the [Final Decision for Building trust through new customer entitlements in the retail energy market](#) where the ESC determined that a threshold of \$22 per annum savings be set for the best offer notification obligations to be triggered. The ESC stated that in setting this threshold, they are compelled by legislation to consider customers at large, including low income and vulnerable customers (p.66). In the public forums, the ESC noted that \$22 per annum would be significant to a small subset of customers and therefore must set the threshold low to protect these customers. However, the ESC has determined in this draft decision that, as fixed prices increase retailer risks, it also increases prices. The ESC stating that data received from retailers showing that customers on fixed-price contracts are paying \$22-100 more a year but that only 20% of customers are on this type of offer. It goes on to note that if retailers were required to offer this to all customers, then the premium could be higher.

¹⁴ See AGL Media Centre; [AGL announced Victorian Electricity Prices for 2020](#), Thursday 12 December 2019.

Business impacts overview

- Changes to terms and conditions, product disclosure statement, customer charter, welcome pack, recontracting pack, any collateral not already displaying reference %, scripting, notices to customers, bills. These types of changes will need to be scoped, planned and implemented within a short period representing significant changes for retailers with only a 4-month implementation period.
- Creation of standalone customer comms to explain the changes to those retrospectively impacted. E.g. where their benefits become evergreen OR where they signed up to a fixed price for X years, but now that price will effectively become variable after that date, and then change at next VDO price change.
- Also compromises our ability to transition the existing base of customers who are on discounts, onto VDO rates.
- Rolling customers on the best market offer for gas at the end of a contract will effectively eliminate price dispersion and curtail retail competition in the gas market.
- Unforeseen (i.e. not mentioned in the Issues Paper) and unprecedented (i.e. retrospective application of new regulations) draft decisions to require current market offers to have evergreen benefit periods will add unexpected increased costs to retailers.
- Fixed period products and pricing such as AGL Essentials become less viable. Current terms for these contracts are that the prices are locked for a 12 / 24-month period. If prices can only vary on the 1 day, this product is no longer viable.
- Call centre costs increase – all customer queries/sales at price change time of year (VDO change day). This will likely lead to average handling time (AHT) increasing for calls (impacting the customer experience). As a result, we expect complaints to increase, which will impact customer trust with retailers, and impact performance reporting. Operationally, we will also struggle to print & post / email price change notices for our entire base in a short window via our print centre. The volume pressure will effectively force us to make price change decisions much earlier, when we may still be in the dark about underlying costs – e.g. network submissions. This will increase risks to retailers through forecasting requirements.
- Increased administrative costs to product innovation through exemptions process
- Impacts marketing behaviour – honey-moon period and price rises ‘annual artificial bump’ every year.
- Multiple regulators for the same obligations (e.g. ACL misleading and deceptive obligations) – increases compliance costs and risks particularly if different evidential thresholds and/or interpretations are applied.

Part 2 – Thwaites recommendations

In this section we analyse each of the Thwaites recommendations and the ESC's draft decisions to realise these recommendations, as well as the VDO message and back-billing provisions.

We encourage ESC to undertake a full cost benefit analysis of the policy options under each of the recommendations, and a fulsome analysis on how the final decisions will impact the market – and therefore the impact on customers regarding price, choice and engagement.

Fixed prices (4A & 4B)

We do not support the proposed approach of the ESC for implementing 4A and recommend the ESC reconsider this approach by stating that:

1. If the market contract prices do not have a term period, then align price change to once a year; or
2. If the market contract has a fixed term, then retailers need to honour the fixed term period.

As we and many other industry participants highlighted to the ESC in submissions for the Issues Paper¹⁵, the market that existed when 4A was recommended by Thwaites no longer exists. The market has moved significantly since 1 July 2019, and the evidence is already showing the market moving in the right direction.

Our concern with the current draft decision is two-fold,

1. It will most likely end fixed-price contracts / products in the market, such as AGL Essentials, and
2. that it does not provide clarity on what the intended outcome is; whether it is certainty on price or certainty of a day for change. The status quo is not considered as a possibility, but there remains uncertainty as to why this is the case.

It would be useful for stakeholders to be provided further information on this point.

At the stakeholder workshop held on 14 January 2020, the ESC provided information on a potential variation for 4A. This was that:

Retailers can only increase market contract prices once a year, either

- (a) on the date the VDO price changes (e.g. 1 January), or
- (b) on the anniversary of a customer signing up to the product.

We believe that this approach aligns with AGL's previous advice to the ESC and would produce better outcomes than the draft decision, such as allowing for fixed term priced products, and we therefore support the adoption of this approach.

The ESC also proposed a potential window for the price change (e.g. a month or two-month window) for price change, rather than the specific day. For the reasons outlined below, we agree that a

¹⁵ [AGL submission to the ESC's Issues Paper](#) on ensuring contracts are clear and fair, 2 July 2019, p.2-3.

window is more appropriate for retailers to be able to manage customer communications, enquiries, mailing obligations and remediation.

Operational impacts of draft decision

From an operational perspective, this requirement will be difficult for retailers to comply with, if contained only to one day a year, for the following reasons:

- A reprice would need to occur months earlier to account for the time needed to plan and contact all customers. This will require retailers to forecast inputs such as the network costs which creates more risk. The greater risk introduced to a product, the higher the premium customers will likely pay.¹⁶
- The costs to retailers for contracting and using the mail-houses to contact all Victorian customers on this date will be significant. We have provided information on mail-houses to the ESC and AEMC previously (regarding prior notification obligations).¹⁷
- Retailers will experience higher costs for call centre and resolution staff to manage customer enquiries and transfer requests. Average handling times will increase, and customer dissatisfaction will grow. This will not help facilitate trust in the market and will likely result in a higher level of complaints. This is the reason retailers currently stagger mail-outs to customers where possible, to minimise the impact to call centres all at once.

These impacts could be reduced if the ESC allowed for a VDO change period (e.g. one month for price changes) rather than a single day.

Draft decision rationale

- In submissions to the Issues Paper, consumer groups supported an option that would be effective at stopping bait and switch practices that have led to high levels of customer complaints.¹⁸ See Figure 2 below on how this may not be the case.
- The ESC state that the intention of the chosen approach is that customers will not experience price changes soon after they sign up to a new contract.¹⁹
- The academics report states; *implementing 4A in this way would create an annual focal point for customers to engage in the market. Customers comparing offers at this time would know the price of their plain for the 12 months ahead and be able to compare this to a suite of market offers available and the newly updated VDO prices.*

Considerations for the ESC include:

- Any customer that does not engage with the market on the specific VDO change day would not have price certainty for 12 months – as the next VDO change day would be less than 12 months away. See Figure 1 below

¹⁶ This was also referenced at a high level in the ESC's draft decision

¹⁷ See [AGL submission](#) to the AEMC draft determination on advanced notice of price changes, 16 August 2018, p.4.

¹⁸ ESC draft decision, p.33.

¹⁹ ESC draft decision p.32.

- Consumers do not just look to switch and compare energy offers once a year (like they may for health insurance). Their lives and circumstances vary, they may be moving property or looking to change services. As a result, an annual focal point becomes less relevant (particularly those in the months leading up to VDO change day), such as movers and new builds.
- Prior notification requirements introduced last year will also provide customers the information they need prior to a price change, reducing the need for there to be an annual focal point.
- The academic report by Byrne and Leslie²⁰ noted that retailers would offer cheaper prices around the VDO price change event – these academics have confirmed that an approach under the draft decision is likely to validate and lead to bait activity by retailers.
 - The expanded clear advice obligations that the ESC is suggesting will not offer much assistance on this matter. Retailers cannot inform customers of a price change if they do not yet know the extent of it. The customer would simply be informed that prices are likely to change on 1 January.
 - A retailer in these circumstances would inform the customer that prices may change on 1 January – giving customers little/no more certainty than they already have in the market.

This will also likely cause a spike of retailer marketing activity in these months (as stated in the academic report), with offers that include upfront or one-off benefits/credits for customers. Because the best offer obligations are for retailers to display their best offer and information about the VDO (consistent across all retailers), customers may be incentivised to stay with whichever retailer attracts them at the time, and then roll-on to the VDO at the end of the contract. We further note:

- There is no strong evidence that **all** customers are willing to pay more for certainty, and indeed this is counter to the position previously raised by the ESC that \$22 a year is significant to some customers.²¹
- There is insufficient evidence to suggest that the market does or does not need additional regulation post the 1 July 2019 changes.²² The ESC noted that as of 30 June 2019, one in five Victorian electricity customers were on fixed-price contracts.²³
- The ESC customer survey does not appear to have been clear to the participants that the trade-off for certainty of a fixed product was that the price may/would increase.
- A fixed and variable market exists in other competitive environments in Australia, such as for home loans.
- Customers can already gain product certainty if they want it through products such as AGL Essentials.

²⁰ Market design considerations in implementing recommendation 4A from the Independent Review into the Electricity and Gas Retail Markets in Victoria, 4 October 2019

²¹ See ESC's [final decision Building trust through new customer entitlements in the retail energy market](#), p.66

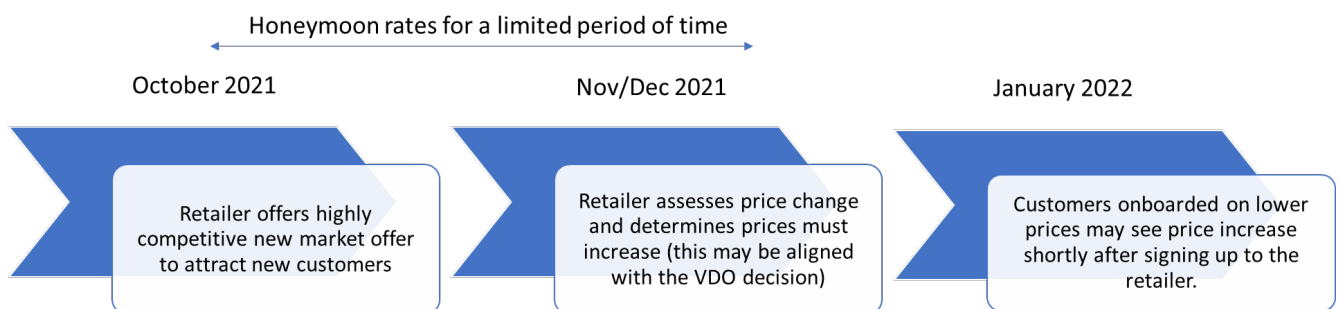
²² We refer to our Issues Paper submission, above comments from IPART and the VDO expert panel, the AEMC review, and other stakeholder submissions to this process to-date.

²³ ESC draft decision, p.18

Figure 1 – customer experiences less price certainty contracting outside of VDO day.



Figure 2 – honeymoon period incentivised by regulations



Product innovation and exemptions

The ESC's proposal for a product exemption process will likely inhibit product innovation, which would appear counter to the ESC's stated intention in the draft decision.²⁴ If a retailer seeks to offer a new product design to customers that are not either

- linked to the spot price, or
- a pre-purchased quantity of electricity or gas,

then the retailer must apply to the ESC for a specific exemption.²⁵ This will mean that for products that not suited or aligned to an annual price variation model will require approval from the ESC.

We recommend instead of an exemptions process; the ESC make clear which product types are captured under the proposed annual price change draft decision. We have demonstrated below a range of reasons for price variations beyond the set date.

Retailer product development phases

To gain this approval, retailers will be required to provide the ESC with an extensive list of information, including demonstrating how the product meets the objectives of the ERC, and details about the product attributes. This will create issues for retailers in the product development phases. To be able to develop the appropriate amount of information and evidence for the ESC, a retailer is likely to have to invest significantly into the development, scoping, testing and other developmental costs that are undertaken for new products. However, it would be in the retailers interest to make an application to the ESC as early as possible (even at the product concept phase), because if a

²⁴ ESC draft decision p.36.

²⁵ Ibid, Appendix D (p.96).

product will not get ESC approval, it is not worth the retailers investment in all of the aforementioned steps.

This may mean that for retailers that operate in both Victoria and other jurisdiction/s, products will likely be developed, piloted and launched in those other jurisdictions due to the administrative and regulatory burdens faced in Victoria. It may mean that go-to market for new products are significantly delayed or not possible for Victorian customers.

Exemptions guideline

There are several issues with the guideline contained in the draft decision. This includes:

- there is no limitation or parameters on the type of information the ESC may request,
- the timeframes that the ESC is required to assess applications in,
- the criteria the ESC will apply to ensure that decisions are made with transparency and consistency. This will also assist with retailers collecting the correct information for the ESC when first making the application,
- the process for providing information about decisions, and
- any appeals mechanism for challenging an ESC decision if a retailer does not agree with the ESC final decision.

Need for transparent and concise timeframes for ESC application assessment

The guideline in the draft decision states that the ESC will endeavour to process applications in a timely manner.²⁶ As we understand it, the ESC has no public timeframes for actioning requests such as exemptions and there is no obligation for licensing applications. Such applications can take several months for a response.

It is therefore important that the ESC provide a timeframe for review that is reflective of the pace of competition and innovation that can exist in a competitive market.

Decision process

In the absence of assessment criteria, retailers will be unsure of the ESC's parameters or thresholds for approving an exemption application. This will mean that a rejection of an application will be opaque and potentially have different retailer applications being assessed differently with potentially different factors being considered. If the approved application is made public, this may also cause issues for retailers who do not plan to go directly to market after approval has been received (e.g. where a competitor will be made aware of product strategies).

We recommend the ESC provide further information in the guideline on how the decision process will occur.

Further, if an exemption is granted, will the list of exclusions in the Energy Retail Code be extended so that all retailers are able to offer the same type of product that has been approved, or will each retailer need to provide a similar application for that product type? The second option is far more administratively burdensome and will also create competition issues where retailers are held up

²⁶ Ibid, p.97.

from launching the product while they wait in queue for approval, while competitors are being approved.

Network tariff reassignments

We have previously raised the issue of network tariff reassignment with the ESC and the impact that this can have on customer charges. Network tariff reassignment can occur where a new or existing customer's load, connection or metering characteristics changes and this reassignment can be initiated either by the distributor or the customer/customer representative. For example, customer-initiated changes can occur where a customer approaches the retailer to change from a single rate tariff to a time-of-use tariff.

For distributor led changes of a network tariff, changes often occur before retailers are notified. These reassignments impact the way many retailers set the retail tariff as the charges are often passed directly through to the customer. Retailers generally pass these changes on to the customer as soon as practicable and can be either an increase or decrease to customer charges.

By not allowing for price adjustments under network tariff reassignments (except once a year) the ESC will require retailers to complete exemption requests for each individual customer, if there is a reassignment. This is an incredible and unrealistic administrative burden to place on the retailer and the ESC and is impacted by the lack of transparency on the review timeframes the ESC will consider exemption applications within. Further, this can have a significant customer cost impact and experience.

The ESC has previously allowed for exclusions of network tariff reassignments in other decisions, such as price change prior notification obligations which excluded network tariff reassignments from advance notification obligations.²⁷

Other exemptions

While we do not support the proposed approach under draft decision 5, if the ESC should proceed with it then we encourage further analysis for proposed exemptions.

- **Fixed price products** – while our preferred approach is outlined above, if the ESC does not accept this position then we propose that products that are offered to customers on fixed price terms for at least 12 months should be excluded. This would include products such as AGL Essentials (which we have described above in Part 1). It will provide customer certainty for 12 months (in line with intention of 4A) and allows retailers to tailor the product and pricing to the relevant contract times (e.g. can reduce risk).
 - **Bundle products** – e.g. telecommunication bundles. This would involve the customer purchasing a bundle of potentially energy and telecommunication (or other) products where at the anniversary of the product all associated services may experience a price change. This would be difficult under the draft decision (as per above).

²⁷ ESC final decision, *Building Trust through new customer entitlements*, p.86.

- **Multi-sites** – retailers individually negotiate these contract agreements with multi-site customers. Given the balance of power in these negotiations, we believe multi-sites should be excluded from the fixed-price obligations.
We also note that multisite contracts may be negotiated for a specific number of months / years and may include fixed prices for a period that reflects that customer’s needs. Forcing price changes to only occur on the VDO change day is unlikely to align with these multi-site customers’ needs in all instances.
If a multi-site customer rolls out of the parent agreement, today that may trigger a move onto another price / product, as they are no longer eligible for the parent’s agreed rates. However, the draft decision suggests that the prices cannot change outside of the VDO change date or end of contract.
- **Builders product**– “new home plan” is a product designed and targeted towards customers/builders of new homes. As above, the product arrangements for these customers are tailored to their specific needs and should therefore be exempt. [REDACTED]
[REDACTED] when it would compromise our ability to market such offers, which are designed to suit the usage pattern and nature of the new build market.
- **Other Behind the Meter (BTM) services** – e.g. orchestration of VPP, behavioural demand response. Prices linked to the Frequency Control Ancillary Service (FCAS) market and network support services (for example, AGL’s Virtual Power Plant (VPP), where the ongoing rebates are linked to these three services)²⁸ may operate linked to the spot price or may be triggered by other events.

We also refer the ESC to the recent AER authorisation of OVO Energy.²⁹ OVO has a business model in the United Kingdom that includes a feature called *OVO Interest Reward*³⁰, where customers receive a percentage reward based on how much their account is in credit.

Examples such as these demonstrate product innovation and new proposition design that could benefit customers but be stifled by the exemptions process as it currently stands.

The ESC should also align the setting of the Vic FIT to the VDO change day.

We would encourage the ESC to allow retailers to provide further product categories for exemption prior to the exemptions process coming into effect. The ESC should also consider allowing for an automatic exemption for product pilots under a certain volume of customers. This would allow retailers to efficiently and effectively test new product constructs which may or may not progress to market or a request for an exemption.

Recommendations for 4A

²⁸ See [AGL Media Release August 2019](#)

²⁹ <https://www.ovoenergy.com.au/>

³⁰ <https://www.ovoenergy.com/help/interest-reward>

3. The ESC should pursue the variation proposed at the workshop (above), where fixed-rate products are honoured by retailers, and non-fixed rate products are subject to annual price changes.

Alternatively

4. Allow for a price change month rather than a price change day. This would allow for appropriate customer remediation and lessen impacts to retailer mail-house and call centres.
5. List the product types captured by the VDO change day obligation, rather than products that are exempt (allows for greater flexibility and innovation).

Alternatively;

6. Exempt fixed-price products from VDO change day obligations, as well as the other examples listed above.
7. Allow for an automatic exemption for product pilots under a certain volume of customers.
8. Develop transparent, robust and accountable exemptions process that clearly defines the criteria, assessment periods and resolution processes. The decisions under 4A should not come into effect until this process has been appropriately established.

Rolling customers on to new contracts (4C)

We do not support the ESC's draft decision requiring retailers to place customers on the best offer for gas. Price dispersion is not as much of an issue in gas as it is with electricity, but the proposed *solution* is a significantly stronger regulatory response. It is not clear why the ESC has taken this approach. Customers are already receiving the Best Offer message on relevant communications, and clear advice obligations ensure customers get clear information at the time of contact.

We believe that requiring retailers to automatically place gas customers on the best market offer at the end of a contract will effectively curtail retail competition, prevent retailers from offering lower priced products and effectively eliminate price dispersion in the gas market to the detriment of Victorian customers.

The energy industry has a large proportion of fixed and sunk costs, (e.g. retailers' system costs, gas supply contracts etc). A retailer is therefore in a position to vary its retail prices by reducing its retail margin but also by reducing the amount of fixed costs that is recovered through each specific market offer. This is efficient as long the retail price exceeds marginal cost and enables a retailer to actively seek additional customers from the competitive market when needed.

Price dispersion is therefore a result of retailers providing their most competitive prices to acquire engaged customers while also ensuring that their total costs are recovered across their customer base. That is why price dispersion is most prevalent in highly competitive markets.

Without price dispersion, retailers would be offering all customers a single price that at least satisfies the average cost of the retailer.

The VDO was introduced to reduce the highest prices in the Victorian retail electricity market but it still retains a level of price dispersion and thus competition, albeit at a lower level.

The requirement to put all gas customers on the best offer is likely to prove much more damaging for retail competition.

Under this requirement, a retailer would not be able to offer market offer prices below its average cost. If it did so, these market prices would then become its “best offer” and translate to all customers coming off contract. This means that all customer would eventually be paying this rate (below average cost) and the retailer would not be able to recover its actual costs. This situation is obviously untenable. The likely response to this requirement is therefore the absence of discounted market offers and the best market offer simply approximating the average cost of the industry.

This would curtail retail competition, be economically inefficient and lead to engaged Victorian energy customers that currently access discounted market offers paying more than they do today.

We understand that the ESC does not want gas customers to be placed on higher Standing Offers at the end of contract and AGL does not follow this practice. We believe the raft of other regulatory changes including aligning benefit period and contract length, single price change per annum and the fair entitlement and best offer requirements are enough to fix the concerns raised in 4C and will minimise the circumstances where a retailers would roll customers onto a standing offer instead of a market offer.

Giving effect to this requirement

The draft decision is not clear on how the ‘best offer’ requirement for gas customers will be achieved. The ESC acknowledges that legislative changes are required but have not provided detail on what approach will be taken. Depending on how the ESC decide to implement this, there could be further impacts to the market.

The Gas Industry Act (**GIA**) needs to be updated to give effect to this rule. If this is not complete by 1 July 2020, retailers are in a difficult position from which to form new contract with customers. Regulations will require that retailers need to place gas customers on the best offer at the end of a fixed term contract, whereas the GIA would require that retailers need to place them on a standard retail contract at the end of a fixed term contract. This inconsistency would make it difficult, if not impossible, for retailers to inform consumers what will happen at the end of their contract.

Following any change to the GIA, it is likely that there will need to be significant changes to the ERC. By requiring a retailer to enter customers onto a new market contract (best offer) at the expiry of a fixed term contract would mean changes to the fixed term contract provisions, EIC, and potentially the carry-over customer definition and associated clauses.

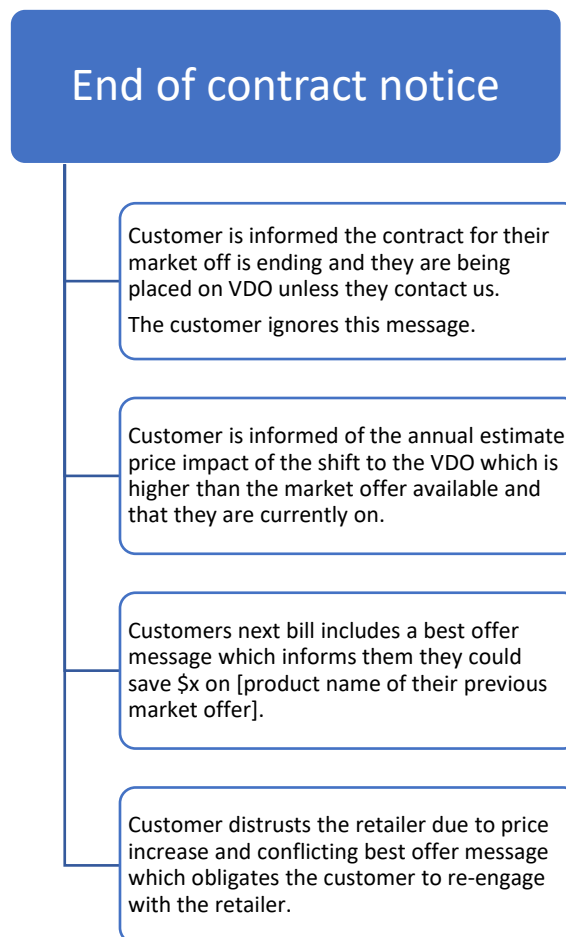
These changes would be significant and if it is to go ahead, any subsequent changes to the ERC should be consulted on to avoid unintended consequences. We do not believe this could be done in an appropriate timeframe for a 1 July 2020 implementation.

When AGL representatives met with ESC staff on 8 January 2020, we enquired how the GIA would be updated to give effect to this requirement. We were informed that this matter is still being considered. Given this, we do not consider it is appropriate for the ESC to make a final decision on this point without an opportunity for stakeholders to be engaged on this point and provide feedback to the ESC on the likely customer and industry impact.

Other comments

- AGL's [REDACTED] If future discounts are to be evergreen, then we would no longer be able to offer such a plan in Victoria. Combined with 4C, this product would not be possible going forward.
- Customer experience example** – the ESC’s proposal to place an electricity customer on the VDO may lead to a poor customer experience and not satisfy the ESC’s overarching objective of building trust. In particular, the need to obtain EIC from a customer to place them on an offer that is better than the VDO at the end of a contract/benefit period will be challenging, and therefore will result in some customers being worse off, or having a poor customer experience. Figure 3 provides an illustration of such an outcome.

Figure 3: Example of customer experience under auto-rolling to VDO process



- Green power** - GreenPower is where customers can elect to have electricity equal to 10%, 20% or 100% sourced from renewable energy sources. This is approved under the National GreenPower Accreditation Program and we have a number of Victorian customers electing to have Green Energy.

Based on the view of DEWLP, VDO should not include GreenPower, but if we are forced to move market contract customers with GreenPower on to the VDO then we would not remove the GreenPower element (as this is something the customer elected). This may be in conflict with what DEWLP intended and how they say the VDO should operate.

Recommendations for 4C

1. For electricity - we recommend the ESC pursue the option where the customer goes on the VDO or a better offer.
2. For gas - do not require auto-roll obligations to best offer.
 - a. This should be left to retailer choice as the ESC's decisions on aligning benefit period and contract length, single price changes per year and best offer message requirements protect customers by providing them price certainty for a period of time, prior notification before a change to that price certainty, and best offer information to ensure the customer is aware of the relevant alternatives provide enough protections for customers to ensure retailers make appropriate offers.
3. Alternatively, the ESC should develop an industry reference price for gas that will improve comparability of offers.
4. Less preferred option: at a minimum, the ESC should provide further information to stakeholders on what legislative changes are intended before finalising the proposal for a 'best offer' in gas. Without any clarity on the approach that will be taken or the words that will be used, this is hugely problematic. This draft decision should not proceed until a clear legislative path is determined.

Advertising energy prices (3A)

The ESC has sought to replicate the *Competition and Consumer (Industry Code – Electricity Retail) Regulations 2019* (the **Electricity Code**) but has created some issues in the adaptation into the ERC and subsequent Appendix C - *advertising energy prices guideline* (**advertising guideline**) on the matter.

We strongly oppose the proposed mirroring of the Australian Consumer Law (**ACL**) obligations through the addition of a new subdivision 1A on misleading and deceptive conduct (60D and 60E).³¹ It is unclear why these are also replicated in the guideline at Appendix C.

This change is significant, and yet has only a single line in the draft decision³² and has not previously been discussed with stakeholders. The Australian Competition and Consumer Commission (**ACCC**) is responsible for ensuring compliance with and enforcing the ACL. Retailers are already required to comply with the ACL and enforcement activity has occurred against energy retailers previously³³, with the ACCC REPI report noting that other such investigations were underway.

³¹ ESC draft decision, p.56.

³² Ibid, p.28.

³³ See for example <https://www.aer.gov.au/news-release/aer-takes-action-against-energyaustralia>

We are concerned about this decision for several reasons including:

- The Victorian Guide to regulation states that duplicative provisions create risks of unnecessary regulation and/ or confusion which states “**duplicative provisions** are those that replicate the equivalent ACL-provision (with no divergence), or which are perhaps framed in a different way, or only concern certain industries but provide identical obligations and/or protections to the ACL. These are not inconsistent per se but can cause confusion among suppliers and consumers. Such laws can also become inconsistent over time if amendments to the ACL or the law in question are passed at different times”.³⁴
- The Victorian Guide to Regulation also includes a section on Intergovernmental Agreements and how the ACL will not be replicated in State Laws unless there is clear justification.³⁵ Specifically this states that “Consistent with the intergovernmental Agreement, Victoria’s approach to maintaining IGA consistency is as follows:
 - For new legislative/regulatory provisions, consideration should be given to whether the issue being addressed are covered by the ACL and, if so, whether additional industry specific provisions are necessary in light of the ACL provisions and;
 - Where existing legislation/regulation is being reviewed or amended, consideration should be given to whether existing provisions are inconsistent with, complementary to, or duplicative of the ACL, and if so, whether those provisions are necessary to provide more effective and/or certain consumer protections.
 - General principles regarding best practice regulation and reduction of red tape would mean that duplicative regulation should not be created. To the above two points we note; if the ESC has concerns about retailer conduct on this matter, they could raise these concerns through a Memorandum of Understanding or other mechanisms of governmental information sharing.
 - If the ESC considers the ACCC is not currently fulfilling its role in enforcing the ACL, we suggest that further information or evidence be provided on this point.
- The ESC draft decision does not contain a rationale for the need for such a change. Further, this has not merited a formal draft decision, merely a line within the paper. When AGL representatives met with ESC staff on 8 January 2020 to discuss the draft decision, we requested advice on the rationale for this inclusion. Staff stated only that it was a Commission decision. At the public stakeholder forum hosted on 14 January, this was raised by industry participants and retailers outlined that they are already aware of their obligations and have compliance programs in place under the ACL.
- Dual regulatory regimes will increase administrative and compliance burdens for retailers, particularly if the ESC chooses to enforce or interpret the obligations differently.
- There is a risk that retailers could be fined twice for the same conduct, we suggest then that a restriction should be placed on any enforcement activity if the retailer has already been fined by the ACCC.

³⁴ See <https://www.dtf.vic.gov.au/funds-programs-and-policies/victorian-guide-regulation> section 2

³⁵ See <https://www.dtf.vic.gov.au/funds-programs-and-policies/victorian-guide-regulation> section 2

In lieu of providing a clear rationale for the need of this duplication, the ESC decision appears to be contrary to the Intergovernmental Agreement which Victoria is a signatory.

The DMO guideline simple states that retailers must ensure that the information displayed in advertisements does not breach any other part of the ACL.³⁶ We encourage the ESC to simply take the same approach.

Other comments

- ESC also provides guidance around how to calculate the “unconditional price”. It must include “unconditional discounts”, including discounts, credits and rebates when a customer enters a contract such as a one-off sign up credit. This is inconsistent with the ACCC Guidelines and AGL recommends this should be aligned.
- Reference price should not be a requirement on electricity recontracting packs – there is already an overload of information and the customer will be placed on the VDO unless they provide EIC for an alternative offer.
- Ensuring that Victorian Energy Compare (VEC) includes the reference price for consistency and help consumers compare and engage in the market.
- Amending the definition of customer (at page 93 of the draft decision) to reflect the application of the guideline to small customers. Taken in isolation, the definition used in the guideline would cover SME and C&I customers.

We recognise that sections 1 and 2 of the draft guidelines (*purpose of this guideline*, and *who the rules apply to*), limit the guidelines application to obligations under Part 2, division 10 of the ERC – which explicitly applies to small customers. This is also replicated in the draft guideline under section 2.2 which states that it covers offers/plans for small customers in Victoria. This minor amendment will help ensure consistency throughout the ESC regulatory instruments.

- Revocation of the Code of Conduct for Marketing Retail Energy 2009³⁷ (which has not been reviewed in ten years and is increasingly irrelevant due to changes in the market and regulation). This would be in line with ESC commitments to revoke the code back during harmonisation in 2012-13.

Recommendations for 3A

1. The ESC should not mirror ACL obligations but rather state that retailers must comply with all other relevant and applicable laws and regulations.
2. Revoke the Marketing Code of Conduct
3. Amend the definition of customer in the guideline

Evergreen benefit period (4D)

The ESC has proposed that benefit and contract periods should be aligned, and that customers receive any ongoing discounts, credits or rebates for the entire duration of a contract. The ESC is

³⁶ [ACCC Guide to the Electricity Retail Code](#), June 2019, p.2.

³⁷ Available on the ESC [website here](#).

proposing that this apply to both new contracts as of 1 July 2020, and existing contracts where the benefit period is in effect as of 1 July 2020.

We provide feedback on some possible market implications from the proposed changes not captured in the Draft Decision.

Evergreen benefits and annually set conditional discount caps

If a benefit is evergreen, but the ESC is updating the discount cap annually, this will mean that more and more customers will be on legacy products with a mismatch of discounts. By creating evergreen benefits for existing contracts, the ESC will create further complexity in the market for customers and a lack of clarity on the value of discounts as they vary under the ESC set cap and between legacy customers on high POTD.

Retrospective application

We do not support the ESC's proposal to apply to contracts that are in force with an existing benefit period ongoing as of 1 July 2020. We note that the draft rule determination for regulating conditional discounts by the AEMC will apply to new customers, and existing customers where the fixed benefit period or contract term has expired. This approach would allow for a managed transition of the obligation.

Alternatively, the ESC proposal will:

- Lock customers on the condition of their benefit in perpetuity.
 - Customers that have failed to meet their conditions will likely continue to fail to meet their conditions and therefore may remain on a product that is no longer fit for their purpose.
 - As the ESC update the cap each year, different customers will be locked into different levels of conditional discounts.
- It may create the misconception with some customers on pre-July 2020 large conditional discounts that their bigger discount is better than what is available in market (research has demonstrated customers value their discounts, and the ESC set cap will not have comparable discounts against those higher conditional discounts).
 - This can incentivise disengagement. Customer may be less likely to switch when comparing offers on VEC if offer results show 'reasonable cap' conditional discounts (mismatch with 4E).
- Retailers may change the underlying rates of the product to make up for the large discount offered and ensure the overall product costs are aligned to the prevailing market conditions and costs the retailer faces. This is likely to confuse customers and is therefore not meeting the Thwaites objective of clear and simple information to promote customer trust and engagement.

If the ESC does not want to align with the AEMC proposal to only apply the new capped conditional discounts to new products post the implementation date, AGL proposes the ESC allow a 12-month transition period for retailers to work with customers on large conditional discounts and transition them to new products. As the ESC noted in the draft decision and in their latest Market Performance Report, there was been a shift away from large conditional discounts just prior to and

at the commencement of the first set of regulatory changes made to implement the Thwaites recommendations (e.g. VDO, best offer and clear advice). A transition period would provide time for retailers to complete this transition and not breach existing contractual and regulatory arrangements.

Recommendations for 4D

1. Apply this requirement to all new contracts only. Do not apply retrospectively to contracts already entered in to.
2. Alternatively, allow retailers a transition period of up to 12 months before requiring the application to existing contracts.

Back billing

We do not support the ESC's proposal to include the Energy Fairness Plan (**EFP**) back-billing change from 9 months to 4 months for a 1 July 2020 start date.

Up until the release of the draft decision, retailers had been told to expect the back-billing changes from 2021 along with the other EFP commitments. It was not until the ESC released the draft decision that retailers were informed this had changed. As we highlight below, and as was raised by stakeholders during the stakeholder forum hosted on 14 January, there are significant issues that need to be considered and worked through before implementing this change. The ESC should request an amendment to the terms of reference to allow greater time to work through these matters before implementing a change that only addresses one side of the equation of customer back-billing.

There are a range of other market timeframes that need to be considered by the ESC before imposing this obligation on retailers. Given it is not a significant cause of consumer complaints, we recommend the ESC work through these issues and develop a regulatory response that does not cause market and consumer disruption which can also meet the intent of the government announcement. For example, there are a range of non-retailer reasons for re-billing a customer, including:

- **Distributor & Metering Data Provider (MDP)** - meter data error or estimate (for a range of reasons including no-access).³⁸
MDPs are required under market provisions to update the metering data when errors or actual data is collected and send the new data to the market (Network, AEMO and retailer), which is used for wholesale settlements, network billing and customer billing. When this occurs, an adjustment of charges to customers is not the fault of a retailer, but under the proposed ERC changes distributors will be able to charge retailers beyond what a retailer can recover. This will increase the cost to serve for retailers and therefore increase energy costs for Victorian consumers.

³⁸ Some other examples of reasons for data being revised which are the fault of the distributor/MDP include: application of incorrect tariff, meters running slow, where the Current Transform ratio is incorrectly recorded.

For FY19, the application of this rule would have resulted in approximately [REDACTED] difference for back-billing greater than 4 months. Based on AGL having approximately 22% market share of electricity customers in Victoria³⁹, extrapolating this cost out across the industry would be an additional cost increase of around [REDACTED]

- **Unmetered sites** – Unmetered sites should be exempt from this process as the network/retailer have no control over what load the customer is connecting to the site. It is possible that retailers do not find out about load changes until 12 months or more after this happens (e.g. Telstra may add additional equipment to phone boxes). Once these matters are identified (e.g. through an audit) then the user will be back billed for this.
- **AEMO market settlement charges** - these can go back 30 weeks and so is currently well aligned with the 9-month undercharging clause. A mismatch in this is not the fault of the retailer, and AEMO will send adjustment schedules each week that include up to the full 30 weeks of adjustments.
- **Retrospective transfers** - sometimes a customer may be lost in error, their EIC is void, or a mistake by another retailer. In these circumstances, the original retailer will complete a retrospective transfer which is up to 130 business days for electricity, and up to 118 business days for gas. These business days translate to approximately 6 months. If a customer is lost in error and transfers back to the original retailer at the end of that period, are billing amounts only recoverable for 4 of the 6 months (in line with undercharging obligations), or for the period the customer was lost in error?

There are a number of other reasons that may cause a retailer to back bill a customer that is not necessarily controllable by a retailer, including incorrect network tariffs, incorrect meter configuration, MSATS incorrect across network information more generally, dispute around fault or cause (e.g. complex issues) taking longer lead time, chronic no access issues.⁴⁰

These costs are not the retailer cost to bare and in being forced to fulfil payment to distributors and AEMO, retailing costs, and therefore prices for customers will increase. Until these matters are considered, it is not appropriate to apply an obligation only on retailers that will require retailers to unfairly bare costs that are not by under their control or fault for their correction.

Need to replicate obligations to distributors

By not aligning the retailer and distributor recovery timeframes, the ESC is introducing a significant financial risk for retailers. These costs would ultimately be borne by customers and will impact the underlying price of the retailer offers and is likely to therefore be an added cost consideration to the VDO.

The ESC should replicate **6B.A3.1 of the National Electricity Rules (NER)** into the distribution code as a matter of haste. Section 6B.A3.1 prevents distributor from recovering network charges from a retailer where the retailer is not permitted to recover from the customer.

³⁹ ESC 2018-19 Performance of energy Business Report, page 25

⁴⁰ We encourage the ESC to review our submission to the AEMC consultation paper on estimated meter reads which is [available here](#).

Implementation

We encourage the ESC to remain with the original EFP proposed implementation timeframe for the back-billing obligation changes. Alternatively, the ESC should request a change to the TOR to allow these matters to be considered in full, both across retailer and distributor obligations. This will ensure the ESC undertakes that appropriate consultation and analysis to avoid unintended and negative consequences as well as provide retailers and other market participants enough time to make the appropriate business system and process changes.

At a minimum, retailers should be provided until end Q4 2020 to implement the back-billing obligations.

Order in council (VDO message)

The ESC's draft decision on the new VDO message for bills appears to be inconsistent with the specific wording required under the Order in Council. Due to this inconsistency, retailers undertaking a strict interpretation of the obligations may need to place two messages onto the customer bill regarding the VDO. This is unnecessary and will take up even more limited space on customer bills.

- As part of the Best Offer, AGL have the following message 'If you're looking to access the Victorian Default Offer, call us on 131 245". There are also existing words to direct customers to compare.energy.vic.gov.au.
- The 30 May Order in Council (Order under section 13 of the Electricity Industry Act) specifies that retailers need to include information on an electricity bill on *how a customer may access the VDO* (as our wording above achieves).
- The wording outlined in draft decision 16 does not address how a customer can **access** the VDO but rather on how the VDO is set and how a customer can obtain advice about the VDO suitability.
- The proposed clause 25(1)(za) reads: *...displayed in a conspicuous manner on the front page of the bill with the following text: 'The [VDO] 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 fact sheet on retailer's website.]'*

We recommend the ESC makes the obligations outlined in the 25(1)(za) consistent with retailer obligations under the OIC, or that the ESC request the Department of Environment, Land, Water and Planning repeal the OIC.

Further, it does not seem appropriate to require retailers to place the VDO message encouraging customers to contact retailers regarding the VDO if that customer is already in fact on the VDO. We recommend the ESC include an exception for this type of scenario. We also recommend an exception for multisite customers where an individual site taking up the VDO would have the effect of removing them from the parent contract.

1. Align back-billing obligations implementation with the rest of the Energy Fairness Package as originally proposed, providing retailers and other market participants sufficient time to make the relevant system changes and planning for this change and the ESC time to make appropriate changes to the Victorian Distribution Code.
2. Align or make it clear that the proposed ERC additions on VDO message will supersede the Order in Council VDO message obligations.

Other comments

Multi-site application

A multi-site arrangement is where one contracting entity agrees to contract for many sites, via a multisite agreement. These agreements are negotiated based on the customer's total sites, rather than at an individual site level. These agreements are tailored to meet the specific needs of the customer's business and usage. Examples of multi-site customers are telecommunication businesses (e.g. Optus or Telstra), banks, chain restaurants, and the Victorian government (who have a range of sites including schools, office buildings, etc).

Above, we have highlighted examples of why the proposed fair and clear terms regulatory changes are not appropriate for multi-site arrangements. We recommend that the ESC seek to replicate Division 2, section 4 and 5 of the National Energy Retail Rules (NERR) regarding consumption threshold.⁴¹ This will help ensure that multi-site customers are not unintentionally captured and negatively impacted under these regulatory obligations.

NECF allows businesses that operate across various sites to aggregate their load and therefore obtain a more competitively priced bid due the scale of load they can offer retailers. We note that Victorian business with similar arrangements also seek this opportunity, including the Victorian Government, which in their request for tender on supply of electricity – small sites, 12 July 2018⁴² aggregated the consumption of their sites, including the thousands of public schools across the State. We believe that aggregation through replication of the above NERR requirements is the most appropriate way to carve out these customers and allow them to continue to benefit from more competitively priced energy.

Recommendation

1. The ESC replicate Division 2, section 4 and 5 of the NERR to ensure that retailers can exclude multi-site customers from these requirements.

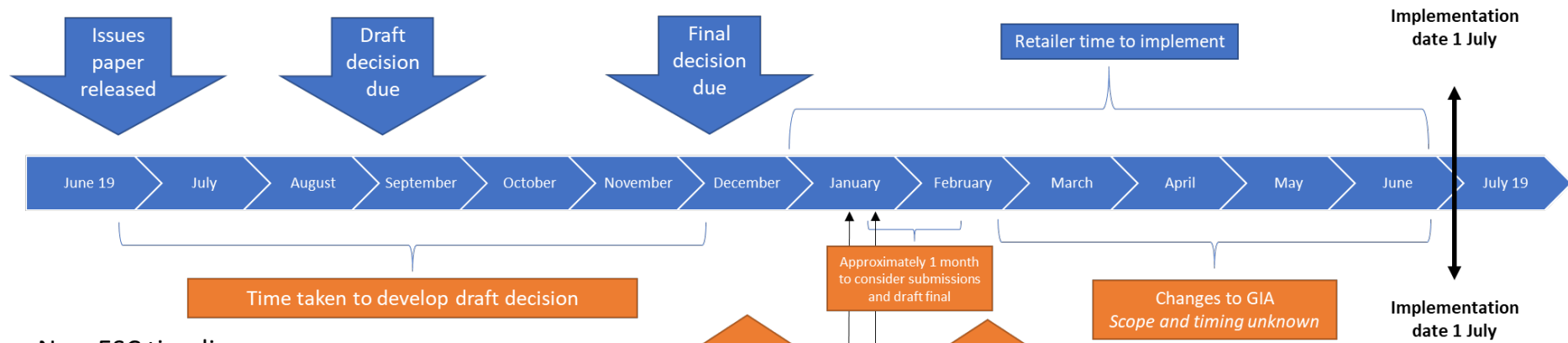
⁴¹ [National Energy Retail Rules](#) version 19, see pages 4-5.

⁴² Reference number SS-04-2018 issued by the Department of Treasury and Finance

Appendix 1 - Timeframe for decisions

The below diagram highlights concern regarding the implementation timeframe for these reforms. We have provided information on the implication of these short timeframes in Part 1 of the submission.

Expected timeline



New ESC timeline

- New concepts introduced including:
- Prices can only change on VDO change day
 - Back-billing changes from 9 to 4 months.
 - Retrospective application of evergreen benefit obligations
 - Mirroring ACL obligations

