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By email: retailenergyreview@esc.vic.gov.au

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Dear Sugi and Aaron

Submission in response to ensuring energy contracts are clear and fair issues paper

Consumer Action Law Centre (**Consumer Action**) and COTA Victoria welcome the opportunity to comment on the Essential Services Commission's (**ESC**) *Ensuring energy contracts are clear and fair*, Issues paper (**Issues paper**). The deregulated energy retail market in Victoria has not delivered fair outcomes for all Victorian households accessing their essential energy services. From 1 July 2019 interventions like the Victorian Default Offer (**VDO**) to re-regulate electricity pricing will ensure that those who never engaged with the deregulated electricity market receive a fair price. Victorian households who use gas services still have no equivalent protection.

We strongly support the interventions proposed in the recommendations from the *Independent review into the electricity and gas retail markets in Victoria* (**the Independent Review**) that are addressed in the Issues paper. If implemented effectively these interventions will complement the VDO to ensure effective protections are in place for more Victorian households. There are many reasons that Victorians do not regularly engage in the electricity market and they should not be ripped off simply because they don't have the capacity or ability to regularly look for the best energy price. The recommended reforms should remove the need for households to be constantly vigilant for changes in their underlying pricing or discount. It will also ensure that there are rules which guarantee that contracts default to a fair price arrangement, as opposed to default pricing being at the discretion of retailers. Leaving it to the discretion of the retailers does not benefit consumers particularly because many people do not have either the capacity of ability to read the fine print.

However, through initial discussions surrounding this consultation, we have become aware that the ESC only plans to apply these changes to contracts that households enter into from the implementation date for these reforms. This is concerning, as it means people who are not engaged with the energy market will miss out. To help overcome this, it will be critical that reforms are retrospectively applied to protect all who do not engage with the electricity market following the implementation of the VDO, as well as protecting everyone engaging in the gas market who do not have equivalent protections but are impacted by the outcomes these interventions aim to deter. Ultimately, getting a fair outcome in Victoria's essential energy retail services markets must not require active engagement.

Our comments are discussed in greater detail below.

About Consumer Action

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just market place for all Australians.

About COTA Victoria

COTA Victoria is the leading not-for-profit organisation representing the interests and rights of people aged over 50 in Victoria. For 70 years in Victoria, we have led government, corporate and community thinking about the positive aspects of ageing. Today our focus is on promoting opportunities for and protecting the rights of people 50+. We see an ageing population as a time of opportunities for personal growth, contribution and self- expression. We believe there are obvious National, State, community, family and individual benefits from this approach. COTA Victoria is a not-for-profit member-based organisation run by, for and with Victorians 50+. We work with all levels of government, peak advocacy organisations and a broad range of community and service organisations.

Pricing and contract issues still outstanding after VDO for electricity's implementation

Four overarching issues remain that could be resolved by these reforms. But the Issues paper currently only aims to address the first two. For all Victorians to be protected, all must be addressed. The issues are:

1. Victorian households signing up to gas or electricity offers in the future may end up with an unfair pricing outcome that they did not expect. This is due to the retailer's ability to apply unfair penalties for not meeting conditions for 'discounts' or because retailers have the ability to vary pricing and discounting.
2. If Victorian households sign up to an energy market offer following implementation of these reforms, but do not engage regularly in the future, they may end up being defaulted to an unfair price.
3. Victorian households signing up to gas or electricity offers in the past may have ended up with, or will end up with, an unfair pricing outcome that they did not expect. This is due to the retailer's ability to apply unfair penalties for not meeting conditions for 'discounts' or because retailers have the ability to vary pricing and discounting.

4. If Victorian households sign up to an energy market offer before the implementation of these reforms, but do not regularly review available energy prices in the future, they may end up defaulted to an unfair price.

These reforms must also make sure that those who are disengaged but on 'legacy' market offers, from prior to the implementation of the reforms, also benefit from fair price and discounting protections. For 10 years, the full deregulation of energy pricing in Victoria has seen almost all households switch away from standing offer arrangements at least once.[1] As retailers during this time have had the ability to vary prices at any time it is hard to determine what households are actually paying if they have not regularly engaged in accurately switching to the best offer for their needs.

An Australian Energy Market Commission report in 2017 indicated that around 47 per cent of households at that time had not switched in the last 5 years.[2] Those who switched at this rate may have had an unfair offer in the first place, had fair features of their offer expire, or may have had their rates increased to unfair levels by their retailer at any time. To take up the newly introduced VDO, which will give them ongoing access to an independently set fair price, these households will need to engage to switch. If consumers do not engage they could continue to pay unfair rates for their essential electricity services at their retailer's discretion. For those households who have had the same experience with gas they are still without the fair price protection in general but may access other new energy retail market protections that are being implemented following the Independent Review. But again, this is only if they engage to switch, which they have demonstrated they can no longer or are likely to no longer do. There are many reasons why this may be the case[3] and these households should not be excluded from new protections where they are needed for fair outcomes.

Many problematic practices in retailers' marketing and structuring of energy offers during the fully deregulated pricing period may have led households to select an offer that was unsuitable for their needs. Retailers have also commonly defaulted households to pricing that was unsuitable for their needs at the end of their contract or benefit period. Two examples of problematic practices include: large conditional percentage discounts off inflated base rates; and door to door marketing exploiting the complexity of energy offers combined with the inability for immediate comparison with other rates.

The ESC must explore its ability to apply these reforms retrospectively. This should cover customers on market contracts which have defaulted to higher prices at the end of the benefit period. It should also cover customers that are currently on a market retail offer which allows retailers to vary prices or discounts, and apply penalties for not meeting offer conditions.

[1] ESC, 2019. *Victorian Energy Market Report 2017-18.*
[2] AEMC, 2017. 2017 *AEMC Retail Energy Competition Review*, p.4.
[3] Gardner, J and Nilsson, D, 2017. *Exploring the drivers and barriers of consumer engagement in the Victorian retail energy market.* CSRIO.

Specific responses to Issues paper consultation questions

Recommendation 3A: Require retailers to market their offers in dollar terms, rather than as percentages or unanchored discounts.

Do you agree with how we have expressed the customer outcome [at the start of section 3.1] that recommendation 3A is intended to achieve?

We agree that the recommendation intends to improve how offers are marketed and that this change will make it easier for households to compare offers in some cases. However, there are some variables which mean this recommendation alone will not necessarily lead to better outcomes. Such variables include:

- the differences in household's individual usage profiles;
- the potential for each household's usage profile to significantly change and;
- the differences in energy costs not controlled by energy retailers across multiple supply zones for both electricity and gas in Victoria

Marketing only in dollar terms may lead to more undesirable customer acquisition and retention costs for retailers that are passed on to consumers. It may also lead to consumer harm where the prices people expect to pay are based on energy consumption profiles that differ from their household. This could cause shortfalls in budgeting to pay bills, unnecessary disputes or further confusion and distrust in the market.

Standardising marketing can be achieved in other ways for both gas and electricity with less risks. It must require retailers to declare when they are charging above a reference price, such as the VDO, as well as declaring the true value of a discount relative to the reference price for easy comparison. This will ensure retailers have less ability to distract or leave out information that allows simple and consistent comparison for households who engage in the market.

What options could we consider to implement recommendation 3A for discounts on gas tariffs? What are the benefits and risks of these options?

The ESC should develop a gas reference price that, like the VDO price for electricity, reflects a median of market offers currently available for the fuel. All marketing should be required to be expressed relative to this reference price. If in the future a VDO price for gas is implemented, it should then replace this reference price.

Having electricity offers discounts marketed consistently off the VDO flat tariff rate from 1 July 2019 will enable consistent comparison for households relying on percentage discounts to select the electricity offer that provides them with the best value. This intervention will curb the consumer harm caused by electricity discounting that has been set off inconsistent base rates and has led to households selecting offers that cost more despite looking cheaper on face value. It will also curb the risk of not meeting a 'conditional discount' that can function as an excessive late payment fee wherever discounting is excessive.

The ESC should also go further and require retailers to declare wherever their base rates are above VDO pricing so that households can make fair comparisons about any benefits offered that may not be covered by regulation. An example of such benefits are one-off incentive payments for switching to a new retailer that are currently prevalent on Victoria Energy Compare.

Standardisation across gas and electricity is desirable as it will give households consistency in the way offers are represented and make it easier to engage when they seek the best outcomes for their needs from gas and electricity markets.

How should reference prices be calculated and displayed for dual fuel tariffs?

With a reference price implemented for gas and the VDO operating as a reference price in electricity, marketing that claims financial benefit to the consumer for having both accounts with the same retailer should be required to be consistent with these reference points. This will be critical to achieve the intention of this recommendation.

Are there any operational challenges or opportunities we should be aware of relating to implementing a reference price (for electricity, gas and/or dual fuel tariffs)?

This recommended reform is an opportunity to address the challenges that consumers face when comparing gas offers through a reference price. We are aware that gas tariff structures may vary across the market more so than electricity tariff structures. For instance, while electricity tariffs are more likely to be made up of a supply charge and a consistent charge for each unit of usage, gas tariffs are more likely to vary the equivalent charges at different times of the year, switch between these charges at different dates, and/or have 'blocks' of pricing where the cost per unit changes based on consumption. The regulator implementing a reference price for gas, as well as electricity, and using its expertise to best calculate what is a helpful reference price for households will be hugely beneficial in navigating complex and confusing tariff structures.

Are there any other considerations?

The ESC must require that any marketing claiming a financial reward to the customer, by lowering the amount they pay for energy, is required to only be expressed relative to the applicable reference price. Energy retailers may look for ways to circumvent reforms and continue to create bad outcomes for households if the regulator doesn't ensure definitions are broad. For instance, a retailer may charge a customer and then give them 'cash back' on their bill off electricity rates that are higher than the VDO. Such practices cause confusion about the value of the offer relative to others in the market.

Recommendation 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.

Recommendation 4B: Require retailers to clearly disclose to customers the length of time any offered prices will be available without change.

Do you agree with how we have expressed the customer outcome [at the start of section 2.1] that recommendations 4A and 4B are intended to achieve?

The Independent Review stated that:

> *"The review panel believes the current ability of retailers to change energy prices without notice at any time during a contract must be addressed for fairness and to increase consumer confidence. The panel is aware that network costs may change and are outside the retailer's control, and therefore has recommended retailers may seek exemption from the regulator for unforeseen network price rises."*[4]

The ESC's description of the intention of recommendations 4A and 4B in the Issues Paper does not address fairness as described by the independent review. Energy retailers are engaged by households to manage the risks of variable pricing in the energy system and deliver an agreed price for energy services. It is unfair for energy retailers to undermine the significant effort it requires for most Victorian households to engage and select an offer by then changing the price and not delivering what households expect. It is also unfair for a household to not be told when their prices could next change.

Please provide your views on the options outlined in table 2.1. Are there are any benefits or risks we have not identified, or any operational challenges or opportunities we should be aware of for any of these options?

We strongly support requiring all contracts to be fixed for the first 12 months. The second option identified in the Issues paper, that is to give customers the option of price certainty if they choose it, is likely to increase complexity and confusion for households who engage by creating more offers in the market.

Households should not have to be constantly vigilant about price changes and forced to constantly shop around in order to not be ripped off when paying for their essential energy services. We are aware of industry concerns that fixing prices for a period may result in the prices going up because of retailers having to bear greater risk in managing underlying price changes This argument should be rejected because the retailer is far better placed to manage this risk compared to consumers. Further, for electricity, the VDO has accounted for this concern in its methodology and has come up with a fair price. As noted above, we consider a reference price needs to be developed for gas.

[4] Faulkner, P. Mulder, T. and Thwaites, J. 2017. *Independent review of the electricity & gas retail markets in Victoria.* p.56

It is a retailer's job to manage risk on behalf of households, so the benefit of this reform would be to align retailers' actions with their purpose and deliver customers consistent pricing as they expect.

We know of no information to suggest that retailers commonly pass on savings to market contract customers when underlying prices fall. If they reduce prices, they do so for new customers and not existing customers. Any concern that retailers will retain profits by not passing on savings during a 12-month period should be considered in this light. It could also be possible for the ESC to implement fixed pricing for twelve months that just capped the highest price that the household could pay at the rate initially set and not prevent a reduction in price.

How should an exemption process work? Are there any circumstances other than unforeseen changes in network costs that should be covered? Are there processes in other jurisdictions that work well or do not work well that we could learn from?

An exemption process that allows retailers only to adjust prices in line with network costs is reasonable for households. This will ensure retailers do not increase costs disproportionately to claim an additional margin.

What are the operational challenges and opportunities of retailers being required to disclose the length of time the offered price will be available once a customer signs up to a plan?

Disclosing the amount of time that an offered price will be available should not present additional challenges as this should be part of the household's clear advice entitlement. This entitlement requires energy retailers to be upfront with customers about any terms within the contract that could lead to the customer paying more than they expect. This will include any period of time that prices offered are available.

Interventions which inform households of potential actions they may need to take to not be ripped off in the energy market have limits, especially if implemented on their own. Many people experience 'information overload' where the task of engaging becomes overwhelming and it is hard to comprehend or complete switching effectively. However, if it is ever to work, the length of time before a retailer can vary its price without the consumer's consent is a critical piece of information for a household making decisions.

Recommendation 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.

Do you agree with how we have expressed the customer outcome [at the start of section 2.2] that recommendation 4C is intended to achieve?

The issues paper is correct in identifying that this reform should result in fair prices at the end of a contract or benefit. The ESC should also recognise that this reform is also intended to protect households from unfair pricing where they do not regularly engage with the energy retail services market more broadly. Because retailers have had the discretion to define how contracts and benefits end, the ESC must work to define a trigger for defaulting those who do not engage to give consistent effect to that broader intended outcome. For example, the trigger should relate to the substantive price that is charged being increased, not how retailers write particular terms and conditions. Our concern is that retailers may redraft contracts to defeat the reform.

Do you share our understanding of current retailer practices at the end of a contract period and end of a benefit period?

We share the ESC's understanding of current practices. Although, without undertaking the near impossible task of reviewing the fine print of every contract in the market, we and the ESC cannot be sure that we know all the ways in which retailers can default customers onto different pricing and what outcomes result as a consequence of each scenario for households.

The Australian Energy Regulator (**AER**) has recently released reporting about the number of customers who are on a changed contract or a contract with an expired benefit in other National Energy Market jurisdictions.[5] The numbers reported show that only around 3 per cent of market contract electricity and gas residential customers in these jurisdictions fit the definition that the AER has required them to report. We question the accuracy of the reporting of these figures, particularly given that the AEMC reported in 2017 that 47 per cent of households had not switched in the last five years. It would be important to understand how retailers have chosen to define "customers with expired or changed benefits on their contracts" and whether this is reported consistently among retailers. For example, we consider it should be investigated whether other retailers are reporting in the same way as Simply Energy, which reports very high numbers. It is hard to know what happens to household's pricing and contract structures in these situations, but we do know that unless households have read and understood the fine print of contracts then it was largely up to their energy retailer's discretion as to what occurred.

For instance, some bad outcomes could include a retailer setting a contract so that a different benefit kicks in when one expires or for their customer to consent to taking up an offer that doesn't reflect anything generally available which is at an unfair price. These may both happen without that household showing up in the AER reporting.

It is unreasonable to expect every household to understand this 'fine print' aspect of their contract when accepting an offer. Even if consumers do engage in the market most people are likely to already experiencing 'information overload' by the time they make a decision to accept an offer. It is therefore important for the ESC to set a consistent trigger for defaulting customers in order to ensure consistent protections for all households.

[5] Australian Energy Regulator, 2019. *Retail energy market performance update for Quarter 3, 2018-19*, schedule 2.

Please provide your views on the options outlined in table 2.2. Are there are any benefits or risks we have not identified, or any operational challenges or opportunities we should be aware of for any of these options?

The VDO has been designed to protect households from being ripped off when they do not or cannot engage in the market to access their essential electricity services. Defaulting households' electricity contracts onto the VDO wherever lesser prices or discounts expire makes the VDO an effective protection.

We agree with the ESC that options three to five on the table are unworkable. There is also an added risk to having customers default onto the best offer price as opposed to the VDO—that is, the default price could be very inconsistent across retailers.

That there is no VDO or reference price for gas services currently should also be acknowledged in the ESC's decision making about this reform's implementation. As discussed above, we believe a reference price set by the ESC for gas is needed which could be replaced with a gas VDO protection in the future.

Are there any other options for implementing recommendation 4C that we should consider?

As previously mentioned, the ESC should consider a trigger for consistently defaulting customers who have disengaged from the market so that all are protected against paying an unfair price. The policy mechanism for defaulting could be designed to only default households to the VDO price where they are paying more than that price. This would realise the protection without changing the prices paid by customers who do not require protection.

Recommendation 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.

Do you agree with how we have expressed the customer outcome [at the start of section 3.2] that recommendation 4D is intended to achieve?

We agree with the expression of the outcome for households in the Issues paper, particularly that this reform should ensure that a household not end up paying substantially more because of a discount 'expiring.'

What are your views of the opportunities and challenges of implementing recommendation 4D? Are there any operational challenges we should be aware of?

This reform, like recommendation 4A, is an opportunity to ensure energy retailers deliver what their customers expect which has the potential to restore household's trust in the energy market.

Recommendation 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.

Do you agree with how we have expressed the customer outcome [at the start of section 3.3] that recommendation 4E is intended to achieve?

We agree that this recommendation aims to make conditional discounts reflective of cost so that any penalties a household faces for failing to meet conditions are fair. Escalating conditional discount percentages result in significant harm for those unable to meet conditions like paying on time as they incur excessive penalties. Such excessive penalties result in an unreasonable margin to energy retailers for the services provided. Consumer Action has seen bills where penalties for a person in payment difficulty increased their electricity bill by over $500 dollars in a single quarter for not meeting 'pay on time' conditions. This is an unacceptable outcome in the provision of essential services.

The Victorian Government has previously banned late payment fees but the prevalence and size of penalties for not paying on time has been unacceptable, particularly when the practice was widespread around the time of the Independent review. Many customers may still be on offers with conditional discounts, where the large percentage reflects an increased base rate. Amaysim trading as Click Energy was recently prosecuted by the ACCC for this conduct.[6]. This will change for electricity on 1 July with the introduction of the VDO but the reform proposed in this recommendation is still needed for gas and for households who do not switch electricity offers after this point.

Incentive payments must also be included within the scope of this recommendation where they are conditional. Incentive payments paid over multiple years in increments are currently being advertised throughout the Melbourne CBD and if these are conditional and do not reflect cost may cause the same harm as the excessive penalties of not meeting conditional discounts.

Please provide your views on the options outlined in table 3.2. Are there are any benefits or risks we have not identified, or any operational challenges or benefits we should be aware of for any of these options?

We support a cap on conditional discounts set by the ESC and based on reasonable costs to retailers of the customer not complying with the discount. This protection would be effective and consistent across all retailers. It is also consistent with the approach taken by the ESC to the cap for early termination fees in clause 46(6A) of the Energy Retail Code.

The ESC should also ensure that those in payment difficulty and receiving tailored assistance from their retailer do not have their issue compounded by not meeting conditions. A more appropriate outcome would be to have a discount waived.

The Issues Paper is correct in identifying that the second option where retailers set their penalties where their customers do not meet conditions would result in complexity for compliance and enforcement. It would also result in added complexity for households selecting offers or the risk of disengaged

[6] See: https://www.accc.gov.au/media-release/click-energy-to-pay-900000-for-misleading-claims

households getting unfair outcomes because they are with a particular retailer. Option one should be implemented instead.

What costs should be considered in any assessment of 'reasonable costs' to a retailer of a customer failing to meet offer conditions?

Households should be able to expect that they will not be paying any more than the reasonable cost imposed on the business for them failing to meet a condition. Businesses should not have scope to earn margins off these discounts.

Are there any other considerations we should take into account in implementing recommendation 4E?

The ESC already regulates a cap for late payment fees in water and the effectiveness of that regulation on a similar essential service should be considered when assessing options for implementing this reform.

Please contact Jake Lilley, Policy Officer at Consumer Action on 03 9670 5088 or at jake@consumeraction.org.au to discuss any aspect of this submission.

Yours Sincerely

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