

21 January 2020

Essential Services Commission
Level 37, 2 Lonsdale Street
Melbourne VIC 3000

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

Dear Ms Symons,

Re: Ensuring energy contracts are clear and fair – Draft Decision

Thank you for the opportunity to comment on the Essential Services Commission's (ESC) *Ensuring energy contracts are clear and fair – Draft Decision (Draft Decision)*.

The Energy and Water Ombudsman (Victoria) (EWOV) is an industry-based external dispute resolution scheme that helps Victorian energy or water customers by receiving, investigating and resolving complaints about their company. Under EWOV's Charter, we resolve complaints on a 'fair and reasonable' basis and aim to reduce the occurrence of complaints¹. We are guided by the principles in the Commonwealth Government's Benchmarks for Industry-based Customer Dispute Resolution². It is in this context that our comments are made.

The Draft Decision proposes a series of reforms which have their roots in recommendations made by the 2017 *Independent Review Into the Electricity and Gas Retail Markets in Victoria (Independent Review)*. Once introduced, they will dove-tail with retail market reforms introduced on 1 July 2019 – which also stemmed from the Independent Review. Working in concert, these sets of reforms serve the twin policy objectives of the Independent Review – to enable consumers to navigate the energy market more easily and with greater confidence, while also providing minimum protections for those who are unable or unwilling to engage. It is fair to say that the tranche of reforms proposed by this Draft Decision fall more into the latter category (Recommendations 4A, 4C, 4D and 4E) than the former (Recommendations 3A and 4B). As expressed in our submission to the Issues Paper informing this Draft Decision, EWOV supports the policy intent of the Independent Review and resulting reforms as they align strongly with our own objective of reducing the occurrence of disputes.

¹ See Clause 5.1 of EWOV's Charter: <https://www.ewov.com.au/files/ewov-charter.pdf>

² See EWOV's website: <https://www.ewov.com.au/about/who-we-are/our-principles>

Indeed, since significant retail energy reform was introduced on 1 January 2019 in the form of the Payment Difficulty Framework (**PDF**), we have seen a statistically significant drop in the number of complaints. Over the 2018-19 financial year, we received 10% less complaints than the previous year – making it the lowest number of complaints recorded by us over the past five years (31,180). The impact of the PDF was particularly apparent in disconnection complaints over that period, which fell 29%³ to 2,449.⁴ For context, in 2014-15 disconnection complaints received by us numbered 5,747.⁵

The impact of the 1 July 2019 reforms (i.e. the Victorian Default Offer (**VDO**), Best Offer Entitlement, the Bill Change Notice, the Clear Advice Entitlement and the Victorian Energy Fact Sheets), is less easy to gauge – although complaint numbers have certainly been low since they were introduced. In the July-September quarter of 2019, for instance, we received 6,891 complaints – which was 30% less than received in the corresponding quarter of 2018.⁶ In terms of complaints received which specifically concerned the 1 July 2019 reforms, the numbers have been so low they can only be drawn on to provide anecdotal conclusions. Over the period 1 July – 30 September we only received 35 cases under the sub-issue ‘Best Offer’ and 17 under the sub-issue ‘VDO’. Of that total of 52 cases, 31 were Assisted Referrals, 16 were Unassisted Referrals, and 2 were enquiries. Only 3 cases went to Investigation stage (all were related to the sub-issue Best Offer).⁷

Despite these positive trends, we are highly conscious that consumers (and particularly, vulnerable consumers) do continue to experience difficulties with the retail energy market. Our outreach activities have identified that there is significant unmet need, particularly in rural and regional Victoria- and we are aware that not all customers know to use our services, (or have the capability or confidence to do so). For example, over the 2018-19 period, while electricity and gas disconnections were in historical terms very low (we only handled 877⁸ complaints regarding ‘actual’ electricity and gas disconnections)⁹, the ESC still reported 36,729 disconnections drawn from retailer data over the same period.¹⁰ Given that context, it is important to continue with the reform process – particularly with reforms designed to support vulnerable consumers unwilling or unable to engage with the market.

On that basis we support the Draft Decision, which in our view succeeds in realising the policy intentions of the relevant recommendations made by the Independent Review. The proposed reforms are sensible

³ EWOV 2019 Annual Report, p. 32. Available at: https://www.ewov.com.au/files/ewov_2019_annual_report.pdf

⁴ EWOV 2019 Annual Report, p. 26. Available at: https://www.ewov.com.au/files/ewov_2019_annual_report.pdf

⁵ EWOV 2015 Annual Report, p. 26. Available at: https://www.ewov.com.au/files/ewov_2015_annual_report.pdf

⁶ EWOV ResOnline 29 – November 2019. Available at: <https://www.ewov.com.au/reports/res-online/201911>

⁷ Please see Appendix A: *Early Impact of the VDO and Best Offer notification* (1 July 2019 – 30 September 2019)

⁸ Across all complaint categories – Enquiries, Unassisted Referrals, Assisted Referrals and Investigations.

⁹ For clarity, EWOV categorises energy disconnection and water restriction complaints as either ‘actual’ or ‘imminent’. ‘Imminent’ disconnection complaints generally significantly outnumber ‘actual’ disconnection complaints – in 2018-19 the figures were 909 ‘imminent’ versus 521 ‘actual’ electricity disconnections, and 591 ‘imminent’ versus 356 ‘actual’ gas disconnections.

¹⁰ Essential Services Commission, *Victorian Energy Market Report 2018 – 19: Appendix – Performance of energy businesses*, p. 32. Available at: https://www.esc.vic.gov.au/sites/default/files/documents/RPT%20-%20VEMR%20%202018-19%20performance%20data%20appendix%20-%2020192811_0.pdf

and practical, realising the spirit of the recommendations without strictly following the originally suggested execution in every case. Variations have been necessary, given that the market has evolved since the recommendations were first made – and the ESC through their own investigations have been able to formulate more appropriate approaches in some cases (the behavioural research in relation to Recommendation 3A is a good example of this). Importantly, the Draft Decision has been drafted with other recent reforms in mind, and is designed to mesh effectively with those reforms to complete the comprehensive set of protections first proposed by the Independent Review.

Our further comments are set out below.

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

Draft Decisions:

- ***A new objective to be inserted into the marketing division of the code requiring retailers to market gas and electricity offers clearly.***
- ***Retailers must not market conditional discounts as the most prominent feature in gas or electricity advertisements, marketing or promotions.***
- ***Retailers must advertise all electricity offers in relation to the VDO, in line with existing requirements in the VDO Order in Council and similar national requirements.***
- ***No gas reference price to be set at this time, but this may be revisited if the Victorian Government asks the ESC to set a gas VDO or if our ongoing monitoring of the market indicates issues with how gas customers are experiencing the market.***

Recommendation 3A was crafted with the intent of remedying customer confusion that had arisen in the retail energy market as a result of unanchored discounts. While the Draft Decision does not fulfil the detail of Recommendation 3A by requiring market offers to be advertised in dollar terms (as opposed to percentages), we are satisfied that through the collective operation of the above reforms, the overarching policy intent will be met.

Since 1 July 2019 the VDO has provided a crucial ‘fixed point’ for retail electricity prices in Victoria, against which the relative value of any offer can be measured. This fixed point is sufficient to negate the problem of unanchored discounts in the electricity market – which is the salient point. To reiterate our position as expressed in our submission to the Issues Paper, we are not overly concerned with whether the advertising is done in dollar terms or percentage terms – but simply that it be struck from a common point so that customers can gauge the true value of the plan being advertised. That being said, we appreciate the consumer testing undertaken by the ESC, which did show a slightly higher degree of comprehension for that information presented in percentage terms, as opposed to dollar terms. We further note that this differential was more pronounced for customers with lower financial literacy skills

and/or those from CALD backgrounds¹¹ – and on that basis we support the Draft Decision proposal that the difference between a plan and the VDO should be expressed in percentage terms.¹²

In terms of retail gas prices, the Draft Decision is less clear cut. While the new objective for marketing clarity will be a welcome addition to the Code and the ‘demotion’ of conditional discounts as the most prominent feature of marketing material may help to provide a degree of market transparency, the lack of a VDO equivalent for gas means that gas customers will continue to navigate the market without the crucial ‘fixed point’ that has been implemented for electricity. This places significant pressure on the new marketing objective and reforms to the marketing of conditional discounts to achieve the policy intent of Recommendation 3A in relation to retail gas prices.

It remains to be seen how retailers will respond to those reforms, and how effective they will be in ameliorating customer confusion around gas prices, and associated customer complaint. EWOV is supportive, therefore, of the ESC’s commitment to actively monitor the customer experience of gas prices – with the clear intent that if the currently proposed measures are not effective then a reference price for gas may still need to be struck at some point in the future. This is consistent with our view as expressed in our submission to the Issues Paper, where we suggested that a gas reference price should be struck.

In terms of our complaints data, High Billing remains our most common complaint sub-issue with 3,985 cases for the 2018-19 financial year, of which 1,770 related to gas and 1,891 to electricity.¹³ This equates to a sub-issue High Billing proportional breakdown of 44% gas cases, compared to 47% electricity – which is markedly more even than the respective proportions across all cases received, where electricity forms 60% of our caseload and gas only 33%.¹⁴ This shows that customers are struggling with gas bills, and underlines that gas prices are an area of concern.

¹¹ Essential Services Commission, *Ensuring Energy Contracts are Clear and Fair – Draft Decision*, p. 30. Available at: <https://www.esc.vic.gov.au/sites/default/files/documents/clear-and-fair-energy-contracts-draft-decision-20191210.pdf>

¹² Essential Services Commission, *Ensuring Energy Contracts are Clear and Fair – Draft Decision*, p. 31. Available at: <https://www.esc.vic.gov.au/sites/default/files/documents/clear-and-fair-energy-contracts-draft-decision-20191210.pdf>

¹³ EWOV 2019 Annual Report, p. 29. Available at: https://www.ewov.com.au/files/ewov_2019_annual_report.pdf

¹⁴ EWOV 2019 Annual Report, p. 3. Available at: https://www.ewov.com.au/files/ewov_2019_annual_report.pdf

2. 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 price will be available without change.*

Draft Decisions:

- ***Retailers can only change the price of existing market contracts at the time that the VDO changes.***
- ***Retailers who wish to offer products that are not compatible with limiting price changes to once a year must comply with certain conditions.***

As stated in our submission in response to the Issues Paper we see Recommendations 4A (and to a lesser extent, 4B), as specific responses to the practice of ‘bait and switch’ advertising which had emerged in the market – and was a prominent cause of complaints to us in late 2018 and early 2019.

The proposed changes should effectively negate this practice, and on that basis we are supportive of the Draft Decision. That being said, we note that relying on the clear advice entitlement to ensure that customers are aware of when their price may change (particularly if they happen to be signing onto a plan late in the year), will require proactive monitoring and enforcement of that relatively new regulatory requirement. We do note that the Bill Change Notice also serves to buttress this reform.

In our submission to the Issues Paper, we were supportive of fixing prices for each customer for twelve months from the point at which they sign onto a contract and it remains our view that would have been the most effective way to ensure customers do not receive a surprise price rise. On the other hand, by stipulating that prices may only change at the same time as the VDO does, the reform may succeed in creating a new level of awareness and engagement in the market. There is an appealing simplicity to this approach, and consumers have already been ‘trained’ by the private health insurance industry to understand that there may be a particular day on which prices go up – and that this creates an opportunity to save money by switching plans. A twelve-month period with a set date on which the price may change also has parallels with residential tenancies, so there are some strong cultural parallels with the proposed reform. From a behavioural point of view, this may help customers adapt to the change quite quickly - and re-contextualise the energy market for those who have yet to realise the benefits possible through active engagement.

One potential downfall of the proposed reform which has been raised through consultation forums, is the administrative difficulty in achieving price changes for every energy customer on 1 January every year. From a purely practical standpoint, this will put enormous strain on postal services and call centres and could result in surges of enquiries and unreasonably long wait times, which would best be avoided.

EWOV would also be likely to experience this - so we are alive to those concerns and would be supportive of measures to avoid this impact.

Workflow issues aside, it is also not a particularly good time of year to be providing customers with important notification of price changes as many people tend to be away or otherwise enjoying their annual holiday. This could mean that some of the intended benefit of higher awareness and engagement with the energy market is lost (the private health insurance industry, for example, changes its premiums on 1 April every year – which seems a more ‘visible’ time to do so).

One proposal that has been made to deal with this issue is the notion of a ‘period’ during which prices can change either side of the 1 January date, rather than requiring all changes to occur specifically on the day itself. This period would need to be relatively contained to ensure the benefit of the reform is not lost - but by spreading the period two weeks either side of 1 January (for example), it may be more manageable from an administrative standpoint, while still being effective as a marker in customer’s minds as the ‘time of year’ when energy prices change - and an effective measure against ‘bait and switch’ advertising.

Finally, we note that the Draft Decision provides an exemption for retailers offering products not compatible with limiting price changes to once a year. This important caveat to the proposed general rule will allow innovative products to continue operating in the market, and leaves the way open for new products to emerge. We are supportive of this decision, and the terms on which it is provided. The associated conditions outlined in Draft Decision 6¹⁵ are sufficient in our view to protect customers from detriment due to innovative offers and if they do experience payment difficulties then, under the proposed reforms, this should be identified and rectified by the retailer.

3. Recommendation 4C: *Require retailers to roll customers onto the nearest matching, generally available offer at the end of the contract or benefit period, unless the customer opts for another offer.*

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

Draft Decisions:

- ***Benefit and contract periods will be aligned, so customers receive any ongoing discounts, credits or rebates for the entire duration of a contract. Retailers must not decrease these benefits during a contract term.***
- ***At the end of a fixed-term contract, if a customer does not give explicit informed consent to move onto a different offer, the retailer must roll them onto either the VDO (electricity) or the retailer’s best offer (gas).***
- ***The changes to the rules for gas contracts are subject to legislative amendments being made.***

¹⁵ Essential Services Commission, *Ensuring Energy Contracts are Clear and Fair – Draft Decision*, pp. 37 - 38. Available at: <https://www.esc.vic.gov.au/sites/default/files/documents/clear-and-fair-energy-contracts-draft-decision-20191210.pdf>

As the Issues Paper noted, Recommendation 4D effectively means the end of benefit periods.¹⁶ In our submission to the Issues Paper we noted our support for that policy intent, as in our view eliminating benefit periods will create a more transparent market, more easily trusted by consumers. This in turn will cause fewer complaints – so we reiterate our support for the reform.

In relation to Recommendation 4C, in our submission to the Issues Paper we did take the view that rolling a customer onto the Best Offer at the conclusion of a fixed term contract would be preferable to the VDO, as it would essentially mimic the behaviour of a textbook ‘rational’ consumer and therefore engender greater ‘discipline’ in the market. That being said, we note the reasons cited by the ESC for opting to roll those customers onto the VDO instead, (primarily that the intent of the VDO is to provide a minimum protection for those customers who do not engage with the market), and we accept that on that basis, the Draft Decision made in relation to Recommendation 4C is appropriate. Certainly, the decision will provide an important consumer protection and has the benefit of being both administratively simple to apply and enforce as well as providing equitable outcomes for customers across the market.

In terms of gas, we agree with the ESC’s decision that rolling customers onto the retailer’s best offer is preferable to a standing offer, which could be very high, cause bill shock, and runs against the intent of the reform. Until such time as a reference price has been established for gas, rolling customers onto their gas retailer’s best offer appears the most practical option to achieve the policy intent of 4C in relation to gas.

3. 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.

Draft Decisions:

- ***Pay-on-time discounts will be capped by the commission. The cap methodology is based on the cost of debt for a retailer and established practices used by the commission for water.***
- ***Retailers must honour pay-on-time discounts for customers in payment difficulty receiving tailored assistance.***

As stated in our submission to the Issues Paper, EWOV supports the capping of pay-on-time discounts on the grounds that it will create more certainty for consumers around their actual energy costs and lead to less complaints.

Also in that submission, we expressed our view that the ESC should develop a cap based on a determination of reasonable costs rather than requiring each retailer to do so independently. Accordingly, we are supportive of the ESC’s Draft Decision in relation to Recommendation 4E. The

¹⁶ Essential Services Commission, *Ensuring Energy Contracts are Clear and Fair – Issues Paper*, 2019, p. 22. Available at: <https://www.esc.vic.gov.au/electricity-and-gas/inquiries-studies-and-reviews/electricity-and-gas-retail-markets-review-implementation-2018/electricity-and-gas-retail-markets-review-implementation-2018-ensuring-contracts-are-clear-and-fair>

proposed methodology strikes us as sound, and the administrative arrangements (with the updated cap taking effect on 1 July each year) are sensible.

The addition of a rule requiring retailers to honour pay-on-time discounts for customers receiving tailored assistance is important, and will go some way to providing protections around pay-on-time discounts for customers on contracts signed before 1 July 2020. While imperfect, this measure will at least ensure that vulnerable consumers experiencing payment difficulties are not further disadvantaged by legacy pay-on-time discounts, thereby reducing the potential for harm to the most vulnerable.

4. Other Decisions:

- ***VDO Order in Council: Retailers must include information about how a customer can access the VDO on electricity bills.***
- ***Reduce allowable back-billing period: Retailers may only recover any amount undercharged in the four months before they notify the customer, if the undercharging was a result of the customer's fault or unlawful act or omission.***

VDO on bills

The Draft Decision clearly explains that clause 16(2)(b) of the 30 May 2019 Order in Council requires the ESC to amend the Energy Retail Code to require retailers to include information on electricity bills about how a customer may access the VDO.

Our limited data on the VDO indicates that there has been at least some confusion around the reform, so we welcome this requirement to provide further information to customers. That being said, the Best Offer reform has also caused some confusion – despite appearing on bills as a notice with strictly prescribed, consumer tested wording.

On that basis we encourage the ESC to carefully monitor the effectiveness of the stipulated VDO bill notice post-implementation. While we support the ESC's decision to provide prescribed wording, we are conscious that the Draft Decision does not go as far as the Best Offer Notice, which also stipulated the position of that notice relative to the 'Amount Due' statement on the bill. Even with those strict requirements, it has been instructive to see how non-descript and easily overlooked a Best Offer Notice can be. With no other requirement under the Draft Decision than for it to be 'on the front page of the bill', it is very possible that VDO bill notices will be easily overlooked by customers - even if the notices are compliant with the Energy Retail Code.

Back-billing reforms

As the Draft Decision makes clear, the proposed reform to back-billing did not spring from the Independent Review but was instead a commitment made by the Andrews' Government during the November 2018 Victorian State Election campaign. Collectively, energy policy commitments made by the Andrews' Government at that time were dubbed the 'Energy Fairness Plan'.

The Draft Decision cites EWOV data, and it is true that back-billing errors persist as a relatively small and falling, yet still significant number of complaints. In our 2018-19 Annual Report, for example, we reported that we had received 1,067 back-billing error complaints over the year – representing 3.4% of overall complaints.¹⁷ The previous year we reported 1,313 back-billing complaints – representing 3.8% of our overall caseload for that year¹⁸, and the year before that they numbered 1,718 (5.3% of the total 2016-17 caseload).¹⁹

In the Draft Decision, the ESC have stated in relation to the reform that *'energy companies are likely to be incentivised to develop and maintain compliant billing systems due to the reduced recovery period limit'*.²⁰ In our view this would be a very positive outcome, and would assist to reduce the occurrence of complaints. On that basis, we support the reform.

One point that has been raised during consultation is that retailers may find themselves caught between customers and distributors if the period of recovery for distributors from retailers is not also reduced to four months. For clarity, the concern is that distributors would still be able to claim back-billing of up to nine months from retailers, while retailers would only be able to claim back-billing of four months from customers – leaving retailers exposed. We do see this as an unnecessary and unintended consequence of the proposed change, and suggest that the ESC consider appropriate action to avoid this outcome.

We trust these comments are useful. Should you like any further information or have any queries, please contact Zac Gillam, Senior Policy and Stakeholder Engagement Officer, on (03) 8672 4285.

Yours sincerely



Cynthia Gebert
Energy and Water Ombudsman (Victoria)

Attachment(s):

Appendix A - Early Impact of the VDO and Best Offer notification (1 July 2019 – 30 September 2019)

¹⁷ EWOV 2019 Annual Report, p. 29. Available at: https://www.ewov.com.au/files/ewov_2019_annual_report.pdf

¹⁸ EWOV 2018 Annual Report, p. 28. Available at: <https://www.ewov.com.au/files/2018-ewov-annual-report.pdf>

¹⁹ EWOV 2017 Annual Report, p. 26. Available at: <https://www.ewov.com.au/files/2017-ewov-annual-report.pdf>

²⁰ Essential Services Commission, *Ensuring Energy Contracts are Clear and Fair – Draft Decision*, p. 53. Available at: <https://www.esc.vic.gov.au/sites/default/files/documents/clear-and-fair-energy-contracts-draft-decision-20191210.pdf>