



21 January 2020

Ms Kate Symons
Chairperson
Essential Services Commission
Level 37, 2 Lonsdale Street
Melbourne VIC 3000

Email: <https://engage.vic.gov.au>

Dear Ms Symons,

RE: Ensuring energy contracts are clear and fair

Origin Energy appreciates the opportunity to provide a submission in response to the Essential Services Commission (ESC) Draft Decision *Ensuring energy contracts are clear and fair*.

One of the key conclusions of the Independent Bipartisan Review of Electricity and Gas Retail Markets (Thwaites Report) was that the Victorian market was not working and that consumers were paying unusually high prices compared to other jurisdictions.¹ As part of its response, the Government accepted the recommendations of the Thwaites Review noting that the reforms would make energy markets simpler and fairer.²

In its role of implementing the Thwaites Report recommendations, we believe that the ESC must ensure that it develops a stable and objective framework that enables all parties to participate in the market with confidence.

In recent reviews of the economic regulatory framework for water, the ESC and the Victorian Government endorsed the view that regulatory outcomes are best achieved when a regulatory framework is simple and transparent.³ We firmly agree. While we retain our view that price regulation is not the most effective or sustainable response to current market issues; notably customer engagement, where there is intervention regulatory risk must be minimised by providing consistent and predictable regulatory decisions.

Under the proposed arrangements, those customers who have entered into a contract before 1 July 2020 with an expired benefit are effectively a new subset of customers. That is, they are on the retailer's default price. We believe that the best way to restore trust and confidence in the market is for a price no greater than the Victorian Default Offer (VDO) to apply to this subset of customer.

This would provide customers certainty that irrespective of any price changes, their charges would not exceed the VDO. This will provide customers comfort that they will not pay more than a fair price. It also diminishes the incentive and ability of retailers to bait and switch customers where the customer could end up paying more than the VDO. For these reasons, a sensibly set regulated ceiling provides a necessary base level customer protection.

¹ Independent Review of the Electricity & Gas Retail Markets in Victoria, Thwaites, p. ix.

² Victorian Government Final Response to the Independent Review of the Electricity & Gas Retail Markets in Victoria, p. 5.

³ See: *Water for Victoria Water Plan*, Victoria Department of Environment, Land, Water and Planning; and *Water Pricing Framework and Approach*, ESC.

It is also vitally important that the ESC avoid introducing regulatory risk. We believe there is a fundamental legislative and regulatory principle that regulatory rules are generally presumed to operate prospectively. For this reason, the ESC ought to ensure its recommendations do not apply retrospectively to customers who entered into contracts before 1 July 2020 and whose benefits have not expired. We believe that the suite of recommendations provides adequate protections for these customers during the circumstances of a price change and benefit expiry.

Origin's views on the matters raised by the ESC are set out below.

Pricing Certainty

Recommendation 4A

Recommendation 4A requires retailers to commit to fix any prices they are offering for a minimum of 12 months from the date a customer signs a contract; during this period the market contract prices cannot change. The ESC proposes to limit price changes for existing market contracts to once a year and align this with the timing of a VDO price change. Retailers would still be able to make new offers at different prices to customers during the year, but once a customer has signed up to a contract, their price would remain fixed until the next VDO price change occurs. Origin supports the ESC draft decision in relation to recommendation 4A.

However, we note that based on the current drafting there are some scenarios a retailer may not be able to change a price once a year. These are:

- in the event that the ESC extended a VDO price determination. This could result in retailers unable to change prices on existing contracts for up to 18 months;
- if the ESC varied the VDO outside of the regulated dates, the retailer's right to change prices wouldn't arise; and
- in the event that the VDO was repealed, retailers would be prevented from changing prices.

To address the first 2 points, we consider that the "VDO change date" definition should be amended as follows; "means the date on which a VDO price determination made in respect of a regulatory period comes into effect or is varied in accordance with the VDO Order, or any other date the ESC specifies in the absence of a VDO price determination".

The ESC is proposing that the rules restricting retailers to changing market contract prices to when the VDO changes will be located in new clause 46AA. However, we believe the drafting of new Rule 46AA is not sufficiently clear. The ESC states that its intent is to limit price changes for existing market contracts to once a year, and to align this with the VDO change date. We believe that the proposed drafting could be interpreted to mean all offers (including prospective ones), which was not the intent of the decision. For the avoidance of doubt, we suggest that 46AA (2) read that a retailer 'must not increase any of the tariffs payable by a small customer under an existing market retail contract except with effect from a VDO change date'.

Recommendation 4B

The draft decision relating to recommendation 4B requires retailers to clearly disclose the length of time any offered prices will be available without change. Origin considers that this recommendation is given effect by the ESC's draft decision on recommendations 4A and 4E respectively, which effectively links the contract term to the benefit period and the Clear Advice Entitlement. This provides the customer certainty that their benefit will not change even if a price change event occurs as per 4A.

Protecting Customers at the End of Benefit and Contract Periods

Recommendation 4C

Recommendation 4C is met by the existing regulations by requiring customers to be rolled onto the VDO (for electricity). For gas, the ESC is proposing that customer are rolled onto retailer's best offer (for gas) at the end of their contract if they do not make an active choice.

Origin supports this approach for electricity contracts, as it is consistent with the recent changes made strengthening customer protections at the end of benefit period and providing customers with 'best offer notifications' on their billing. It is also consistent with the objective of Explicit Informed Consent (EIC) which requires the retailer, or a person acting on behalf of the retailer, to clearly, fully and adequately disclose in plain English all matters relevant to the consent of the customer.⁴

Origin does not support this approach for gas contracts. The ESC chose to make changes requiring a best offer notification for electricity, but not to automatically place the customer on that offer. This was to retain both competitive pricing, and because to do so would be inconsistent with explicit informed consent. Retailers cannot roll customers onto new plans in other circumstances without customer consent.

Origin understands that it is much more difficult to ensure customer pricing protections where there is no regulated price for gas accounts.

The recommendation assumes gas pricing arrangements are similar to electricity, which is not the case. There is no universally available price (the VDO) for gas contracts as there is in the electricity market. Requiring retailers to put all customers on their best offer has the potential to result in a reduction in the spread of prices with prices converging around a retailer's best available offer, thereby reducing the ability of those most engaged customers to make savings on their energy costs.

In addition, the nearest generally available offer might not be clear and easy to compare. Furthermore, unlike the notice requirement which merely informs the customer, a customer might be placed on the offer which does not align with their preferences. The recommendation is asking Origin to determine which offer is more appropriate rather than the customer making this decision.

The draft decision states that changes to the Gas Industry Act would be required to give effect to this rule change, but the ESC does not provide relevant detail on the changes to the Act that are required. We believe that in the event this recommendation is pursued that further consultation is necessary on any changes to the legislation.

Origin urges the ESC not to require retailers to put gas customers on to their best offer at the end of their contract. We consider that a more appropriate response would be for the ESC to provide advice to the Government that further policy decisions are necessary in relation to gas.

Additionally, Origin does not support the proposed inclusion of a new rule that retailers should seek a customer's explicit informed consent in order to reduce the length of any contract that is already in force. We consider that it is in customers interests that retailers are able to do so, as retailers functionally use this ability to terminate a customers' liability for a site where we become aware that the customer should no longer be liable for it – for instance in cases of family and domestic violence where the account holder was coerced into entering into the contract, or more commonly in cases where the customer simply forgets to notify the retailer that they have vacated the property.

Retailers do not routinely utilise the termination clauses for commercially driven reasons, and we do not consider that the inclusion of such a clause enhances the capacity of the draft decision to give effect to the suite of recommendations.

Recommendation 4D

This recommendation is that any conditional discount or other benefit offered for paying on-time or on-line billing should be evergreen meaning that the customer should not lose the discount or other benefit when the contract ends.

⁴ Energy Retail Code v14 p13 Clause 3C.

We support the intent of this rule to prevent customers ending up paying substantially more due to the expiry of a conditional discount they signed up to at the start of a contract.

To address this recommendation, the ESC has proposed to decouple the concepts of benefit periods and contract periods. The new rule will apply to new contracts from 1 July 2020, and to contracts in force where a customer is in an existing benefit period as of 1 July 2020, but not to contracts entered into before 1 July 2020 where the benefit period has expired and customers are now on an evergreen contract.

We agree with the ESC that requiring retailers to reinstate previously expired benefits is likely to be problematic and will not necessarily lead to better consumer outcomes. However, we disagree that recommendation 4D should apply retrospectively to contracts in force where a customer is in an existing benefit period as of 1 July 2020. In these circumstances we strongly believe that the benefit should be permitted to run its duration and then at that point in time we believe the same provisions as the ESC's response to recommendation 4C should apply; that if the customer does not enter into a new arrangement then they revert to the VDO when the benefit period ends.

We believe retailers had a legitimate expectation regarding how contracts would operate at the time they entered into those contracts. In many cases discounts were set against a base rate that bears little resemblance to the VDO. The ESC's proposal would retrospectively apply a rule that would lock retailers into discounts indefinitely which were offered by the retailers for a limited period and in a different operating environment. It will capture discounts which are not sustainable against the VDO or for an indefinite period.

We believe there is a fundamental legislative and regulatory principle that regulatory rules are generally presumed to operate prospectively. We also believe that retrospectivity introduces regulatory risk which is an undesirable characteristic of any regulatory framework. Any decision to introduce this must pass a very high cost benefit hurdle.⁵

The ESC's decisions goes well beyond the recommendation made by the Thwaites review, which was limited to conditional discounts. We believe that the ESC recommendations on 4D ought to operate prospectively rather than retrospectively as to do otherwise would alter the future regulatory and commercial consequences of past events.

Under the proposed arrangements, those customers who have entered into a contract before 1 July 2020 and whose benefit has expired are effectively a new subset of customers. That is, they are on the retailer's default price. We believe that to restore confidence in the market, a market price no greater than the VDO price should apply to this subset of customer.

This would provide customers certainty that irrespective of any price changes, their charges would not exceed the VDO. This will provide customers comfort that they will not pay more than a fair price. It also diminishes the incentive and ability of retailers to bait and switch customers where the customer could end up paying more than the VDO. For these reasons, a sensibly set regulated ceiling provides a necessary base level customer protection.

⁵ For example, see *Principles of good legislation: OQPC guide to FLPs*, Office of the Queensland Parliamentary Counsel.

Representing discounts

Recommendation 3A

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

With respect to gas, the ESC notes the challenges relating to developing a gas reference price methodology. As a result, it decided not to develop a reference price for gas at this point in time. For the reasons noted by the ESC we consider that this is a pragmatic decision.

The ESC proposes to require the VDO to be used as a reference price for all electricity offers, not just those with discounts, to deliver the policy intent of recommendation 3A. We agree with this decision.

The ESC has proposed that reference price requirements are consistent with national price disclosure requirements and has drafted a guideline that seeks to mirror the Competition and Consumer Industry Code – Electricity Retail Regulations 2019 (the Industry Code).

Origin supports harmonisation with the national requirements. We also note that The Federal Government is currently reviewing the Industry Code so where practicable and relevant, changes to the Industry Code should be reflected in the ESC's final decision.

Back billing

In their Energy Fairness Plan, the Government promised to limit retailers' capacity to back-bill customers to 4 months. Origin understands that failure to issue bills to customers in a timely manner led to this policy decision. In practice, this is more likely to apply to gas supply than electricity supply because electricity customers in Victoria mostly have digital meters meaning challenges around meter reads is largely reduced.

We consider that the ESC must further consider the definition of 'customer fault'. When a customer obstructs access, or tampers with their meter, the inability for a distributor to read a meter is largely the consequence of a customer's actions. While we support distribution businesses obtaining access to customer sites through best endeavour processes, there is only an annual requirement for the access to be provided by the customer. Where the customer provides this access annually, then the retailer may not be able to recover the undercharged amount, because the customer has met their obligation, but the retailer may only recover four months of this.

Additionally, the inclusion of a clause that excludes Force Majeure events as described in Energy Retail Code clause 20.1 would enable retailers to continue their practice of placing bill suppressions on areas affected by natural disasters, such as bushfires and flooding. Retailers support customers in affected areas by first determining whether the site was impacted or destroyed by the event and providing additional support to customers proactively on this basis. When a disaster is particularly devastating or widespread, it may be many months before any party is able to establish the appropriate next steps. In these cases, retailers should be able to resume billing and provide assistance to customers without the limitation applying.

It would be reasonable for the ESC to replicate the National Gas Rules (Clause 508(1)) with relation to both gas and electricity "if a retailer is not permitted to recover distribution service charges from a shared customer under the NERL or the NERR, then neither is the distributor permitted to recover those charges from the retailer." This would ensure that the incentives for distribution networks to perform the physical readings of meters remains.

Closing

Origin considers that the principle of avoiding introducing regulatory risk is a fundamental legislative and regulatory principle, and that regulatory rules are generally presumed to operate prospectively. For this reason, the ESC ought to ensure its recommendations do not apply retrospectively to the detriment of one set of market participants.

If you have any questions regarding this submission, please contact Courtney Markham in the first instance on [REDACTED] and or [REDACTED]

Yours sincerely

A handwritten signature in black ink, appearing to read 'Sean Greenup', is written over a light grey rectangular background.

Sean Greenup
Group Manager Regulatory Policy
[REDACTED]