

Australian Energy Market Commission

## CONSULTATION PAPER

# National Energy Retail Amendment (Preventing discounts on inflated energy rates) Rule 2018

### Rule Proponent

The Honourable Josh Frydenberg MP, Minister for the Environment and Energy on behalf of the Australian Government

20 March 2018

RULE  
CHANGE

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**Citation**

AEMC, Preventing discounts on inflated energy rates, consultation paper, 20 March 2018, Sydney.

**About the AEMC**

The AEMC reports to the Council of Australian Governments (COAG) through the COAG Energy Council. We have two functions. We make and amend the national electricity, gas and energy retail rules and conduct independent reviews for the COAG Energy Council.

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## **Executive summary**

On 9 and 30 August 2017, the Prime Minister met with and announced agreement from the seven largest retailers on a range of measures to improve outcomes for electricity consumers.

The Prime Minister's meetings focused on the key issue of affordability, with a priority being that consumers have increased transparency about their bills. A particular concern raised was that percentage discounts contribute to consumer confusion and that energy offers with large percentage discounts do not always lead to the lowest bills for consumers.

Some of the agreements are being addressed by the work being done by the Australian Energy Regulator (AER) on a new Retail Pricing Information Guideline (RPIG). The RPIG provides guidance on how retailers should present pricing information, which could include percentage discounting. For other issues it was concluded rule changes were required.

### **The rule change request**

On 18 December 2017, the Honourable Josh Frydenberg MP, Minister for the Environment and Energy on behalf of the Australian Government submitted a rule change request to the Australian Energy Market Commission (Commission) under the National Energy Retail Law (NERL) that aims to address confusing retailer discounting practices.

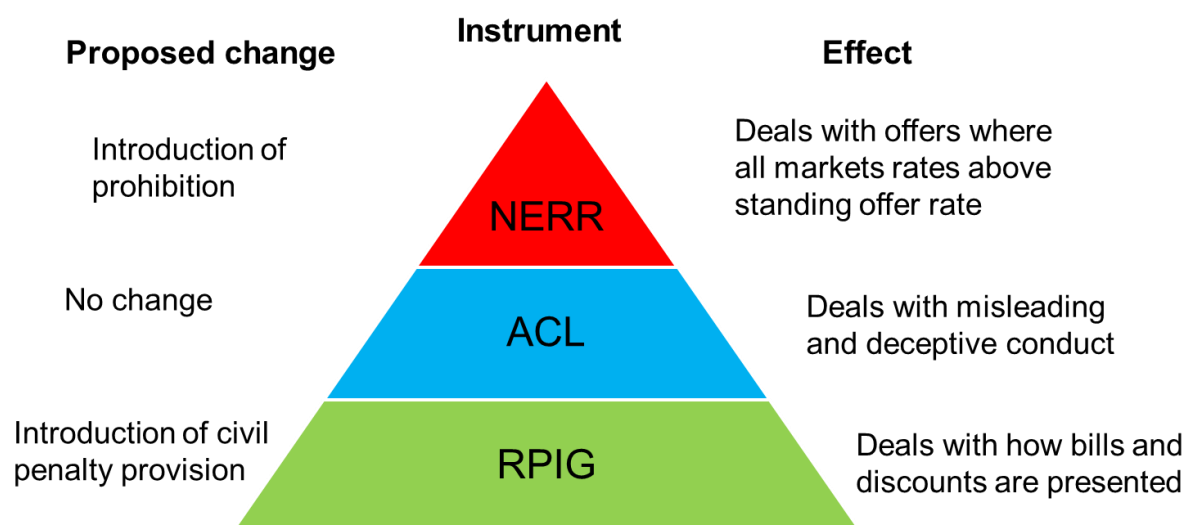
The rule change request proposes to prohibit a retailer applying a discount to a market retail contract if any of the rates in the contract are higher than the retailer's equivalent standing offer rates.

### **Commission's initial position**

The Commission supports the intent of the rule change request in addressing the practice of retailers applying discounts to market offers with rates above equivalent standing offers. To provide an opportunity for detailed stakeholder feedback, this consultation paper provides an initial Commission position which would, if implemented, achieve similar outcomes to the proposed rule, but through a more targeted and integrated approach. This approach, where the rule change is combined with the existing mechanisms of the Australian Consumer Law (ACL) and the RPIG, is displayed in Figure 1.

The ACL enforced by the Australian Competition and Consumer Commission (ACCC) and the AER's RPIG together provide a framework for how retailers present and market offers in the competitive energy retail market. The RPIG contributes to this framework by addressing the presentation of market offer prices and standing offer prices. The ACL contributes to this framework through its provisions against misleading or deceptive conduct and false or misleading representations.

**Figure 1: Proposed package of regulatory arrangements**



The Commission’s initial position builds on the existing regulatory framework through two proposed changes:

1. A joint Commission-AER recommendation to the COAG Energy Council to make retailers’ non-compliance with the RPIG’s provisions on presentation of market and standing offer prices subject to a civil penalty under the NERR. Having these provisions of the RPIG subject to a civil penalty would allow the AER to issue infringement notices with penalties of up to \$20,000 (for a body corporate).
2. Introducing a rule in the NERR (not applicable in Victoria) restricting retailers from including discounts in market retail contracts where all of the energy rates in the contract are above the equivalent rates in a standing offer.

### **Commission’s initial analysis**

A competitive retail energy market is generally better at producing energy offers that meet consumers’ preferences at prices they are willing to pay than regulatory measures which restrict the offers that retailers are able to make to consumers. The Commission therefore considers that the primary means of addressing confusion should be through the existing regulatory instruments governing the presentation and advertising of retail offers, that is, the RPIG and ACL. In this context it is important that these instruments are enforceable and to achieve this the Commission is proposing a civil penalty provision for the RPIG.

The addition of infringement notices would provide the AER greater enforcement options, which it can use to fit the circumstances when faced with a contravention of market and standing offer pricing presentation provisions in the RPIG. The Commission considers infringement notices with penalties are an effective tool for the AER in many of the circumstances where an RPIG provision regarding the presentation of standing or market offer pricing has been breached.

The Commission generally considers that these instruments are appropriate. However, where there are particular retail practices which cannot be in the interest of consumers

and are apparently designed purely to confuse consumers, a specific restriction of such practices within the NERR should be considered.

In its initial analysis, the Commission considers that this is the case where retailers provide discounts in a market retail contract where all of the rates within the contract are above all of the rates of an equivalent standing offer. In this case, no consumer could be better off under the undiscounted market retail contract than under the standing offer. Therefore a key reason the market retail contract may be attractive is through confusing consumers with inflated discounting rates. The Commission’s initial position, on which this consultation paper seeks feedback, is that this practice should be prohibited under the NERR.

The benefits of having a prohibition in the NERR are that it provides a clear and stronger deterrent on such practices and avoids the legal costs associated with having to pursue action under the ACL. If there are discounting practices that would constitute misleading or deceptive conduct or a false or misleading representation then these practices can still be prosecuted through the ACL. The prohibition in the NERR would not be intended to narrow the application of the ACL.

### Process

The Minister proposed, and the Commission considers that the rule change request should be subject to the expedited rule making process. Based on analysis of current energy offers, the Commission considers the request is a request for a non-controversial rule as defined in the NERL.

While the rule change request meets the tests to be expedited, the Commission notes that the issues presented are contentious and complex. Therefore, the Commission has provided, and will continue to provide, opportunities for consultation above the usual consultation within an expedited process. To date, this has included bilateral meetings, a stakeholder workshop and opportunities for informal written feedback. The Commission’s initial position, indicative drafting and questions for consultation contained in this paper reflect this early consultation.

The Commission will continue to provide such opportunities throughout the rule change process, including through another stakeholder workshop. Table 1 summarises the Commission’s proposed process.

**Table 1: Proposed rule change process**

<b>Milestone</b>	<b>Date</b>
Early informal stakeholder workshop	15 February 2018
Publication of consultation paper and commencement of the rule change process	20 March 2018
Objections to Commission decision that the rule change request is for a non-controversial rule (expedition)	3 April 2018
Stakeholder workshop	TBC
Opportunities for individual engagement	Prior to 17 April

Milestone	Date
Submissions on the consultation paper due	17 April 2018
Publication of final determination and final rule (if made)	15 May 2018

### **Broader issues relating to discounting**

While this rule change relates only to the practice of discounting off rates above the standing offer, the Commission is keenly aware of issues with discounting more broadly.

The Commission noted in the 2017 Retail Energy Competition Review that currently energy retailers predominantly compete on price and do this through the use of discounting. This typically involves providing market offers where there is a conditional discount (e.g. a pay-on-time discount) on standing offer rates. This discounting behaviour also appears to be contributing to consumer confusion. In particular, there does not seem to be a general recognition by consumers that the discounts typically reference a standing offer price that is not set consistently across retailers. Each energy retailer can set its own standing offer and change the standing offer price every six months. Other reviews, including the Thwaites review in Victoria have also noted this issue.

The result of this general discounting practice is that the value associated with different retail market offers becomes difficult for consumers to compare. Larger discounts have been shown often not to correlate with lower bills or the best deals for consumers.

The Commission notes the AER's existing revision of the RPIG and the ACCC's Retail Electricity Pricing Inquiry are investigating this issue. The Commission supports this work, is liaising with the AER and the ACCC on these issues and welcomes suggested reforms in this area.

## Contents

<b>1</b>	<b>Introduction .....</b>	<b>1</b>
<b>2</b>	<b>Background .....</b>	<b>2</b>
2.1	Context .....	2
2.2	Current arrangements .....	2
2.3	Concurrent work on related issue by the AER and ACCC .....	4
<b>3</b>	<b>The rule change request.....</b>	<b>6</b>
3.1	The issues raised in the rule change request .....	6
3.2	The proposed rule.....	8
3.3	Assessment framework for this rule change request .....	10
<b>4</b>	<b>Commission initial position and indicative drafting .....</b>	<b>13</b>
4.1	Part one of the initial position: civil penalties for the RPIG .....	13
4.2	Part two of the initial position: addressing a specific discounting practice.....	15
<b>5</b>	<b>Issues for consultation .....</b>	<b>28</b>
5.1	Issues raised in the rule change request .....	28
5.2	Part one of the Commission’s initial position .....	30
5.3	Part two of the Commission’s initial position.....	31
5.4	Contingent and related issues to the rule change request.....	35
5.5	Retail gas .....	37
<b>6</b>	<b>Process for this rule change.....</b>	<b>38</b>
6.1	Treatment as a non-controversial rule change.....	38
6.2	Process and approach to this rule change request.....	39
6.3	Key dates .....	40
6.4	Lodging a submission or request not to make a rule under an expedited process..	40
	<b>Abbreviations and defined terms .....</b>	<b>42</b>
	<b>Appendix A: Data analysis .....</b>	<b>43</b>
A.1	Methodology.....	43
A.2	Analysis of energy offers .....	44

# 1 Introduction

On 18 December 2017, the Honourable Josh Frydenberg MP, Minister for the Environment and Energy on behalf of the Australian Government (proponent) submitted a rule change request (rule change request) to the Australian Energy Market Commission (Commission) under the National Energy Retail Law (NERL) that aims to address confusing retailer discounting practices. The rule change request proposes to prohibit a retailer applying a discount to a rate under a market retail contract if any of the rates in the contract are higher than the retailer's equivalent standing offer rates.

This paper is designed to facilitate consultation on the rule change request. This paper:

- sets out the background to the rule change request
- summarises the key elements of the rule change request
- outlines the Commission's proposed assessment framework for this rule change request
- summarises the Commission's initial position, including reasons and indicative drafting reflecting this position
- identifies a number of questions and issues to facilitate the consultation on this rule change request, particularly around the indicative drafting reflecting the Commission's initial position on the rule change request
- outlines the Commission's proposed rule change process and timeline.

The Commission notes that this paper seeks stakeholder views on an initial Commission position (and indicative drafting to reflect the position) as well as the proponent's proposed rule. The Commission has done this so that within the expedited process stakeholders are able to provide feedback on the initial position and indicative drafting. More detail on this process is set out in section 6.2.



## 2 Background

On 9 and 30 August 2017 the Prime Minister announced agreement from the seven largest retailers on a range of measures to improve outcomes for electricity consumers.<sup>1</sup>

The rule change proposal was developed following the Prime Minister's meetings with energy retailers last year. It was developed specifically through retailer roundtable meetings which followed the Prime Minister's meetings.

The Prime Minister's meetings and the roundtables have looked at the key issue of affordability, with a priority being that consumers have increased transparency about their bills. In particular, there has been a concern that percentage discounts contribute to consumer confusion. Part of the concern is that energy offers with large percentage discounts do not always lead to the lowest bills for consumers.

### 2.1 Context

The 2017 Retail Energy Competition Review noted that retailers predominantly compete on price and do this through the use of discounting. Most of this retailer discounting behaviour is not the practice raised as an issue in this rule change request, as most discounting is from standing offer rates.<sup>2</sup> This typically involves providing market offers where there is a conditional discount (e.g. a pay-on-time discount) on standing offer rates.

This discounting behaviour also appears to be contributing to consumer confusion (in addition to the specific form of confusion identified in the rule change request). In particular, there does not seem to be a general recognition by consumers that the discounts typically reference a standing offer price that is not set consistently across retailers. In our 2017 Retail Energy Competition Review, we noted:

“Discounting off standing offer rates remains the main form of price-based competition in the retail energy market. Market offers based on an effective or conditional discount, such as pay on time discounts off a standing offer contribute to the challenges consumers face in comparing retailer offers as they are not necessarily consistently set by retailers.”<sup>3</sup>

The result is that the value associated with different retail market offers becomes difficult for consumers to compare. Larger discounts off standing offer rates have been shown often not to correlate with lower bills or the best deals for consumers.

### 2.2 Current arrangements

There are two existing regulatory arrangements that deal with discounting behaviour, including the issue of discounting from rates above those in a standing offer which the rule change request seeks to address. These are the Australian Consumer Law (ACL) under the Competition and Consumer Act 2010 (enforced by the Australian

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<sup>1</sup> M Turnbull (Prime Minister), *A better deal for Australian families*, media release, Parliament House, Canberra, 9 August 2017, <https://www.pm.gov.au/media/better-deal-australian-families>.

<sup>2</sup> AEMC, *2017 Retail Energy Competition Review*, final report, 25 July 2017, Sydney, pp. v, 17, 101.

<sup>3</sup> AEMC, *2017 Retail Energy Competition Review*, final report, 25 July 2017, Sydney, p. 28.

Competition and Consumer Commission (ACCC)), and the AER's Retail Pricing Information Guidelines (RPIG).

### 2.2.1 The Australian Consumer Law

Among other things, the ACL protects consumers across Australia from:

- misleading or deceptive conduct, or conduct that is likely to mislead or deceive (section 18)
- false and misleading representations about goods and services (section 29).

The ACCC has previously taken action against electricity retailers for making false or misleading representations about discounts under the ACL. In 2015, Origin was required to pay penalties for making false or misleading representations about the level of discount residential consumers in South Australia would receive.<sup>4</sup> This was in respect of Origin's DailySaver electricity, gas and dual fuel plans.<sup>5</sup>

The energy usage rates (to which the discounts applied) were higher in the DailySaver energy plans than in Origin's standing offer generally available to residential consumers. In the legal proceedings, it was admitted by Origin that some consumers would have understood that its discounts in the DailySaver plans would be applied to energy usage applicable generally to consumers like themselves (i.e. the standing offer).

Origin admitted that as the energy usage rates were not in accord with the reasonable understanding that discounts would have reference to generally applicable rates (standing offer rates), various advertisements of the DailySaver plan made false or misleading representations.<sup>6</sup> Specifically, it admitted that it had contravened sections 29(1)(g) and (i) of the ACL: making false or misleading representations that goods or services have certain characteristics or benefits, and making false or misleading representations with respect to the price of goods or services.<sup>7</sup>

### 2.2.2 The Retail Pricing Information Guidelines

The AER provides guidance on the presentation of pricing information (including discounts) in its RPIG. The NERL requires retailers to comply with the RPIG in their presentation of standing and market offers (NERL sections 24 and 37).

The current RPIG requires retailers to produce an energy price fact sheet which details the relevant price information, incentives, discounts, fees, and other information.<sup>8</sup>

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<sup>4</sup> ACCC, *Retail Electricity Pricing Inquiry: Preliminary report*, ACCC, Canberra, 2017, pp. 128, 167-168, viewed 19 March 2018, <https://www.accc.gov.au/system/files/Retail%20Electricity%20Inquiry%20-%20Indicative%20report%20-%202013%20November%202017.pdf>.

<sup>5</sup> Federal Court of Australia, *Australian Competition and Consumer Commission v Origin Energy Limited* [2015] FCA 55 (9 February 2015), Federal Court of Australia, Adelaide, 2015.

<sup>6</sup> Ibid, paragraphs 25-27.

<sup>7</sup> Relevant misleading or deceptive conduct was also alleged by the ACCC. The judgement indicated that the ACCC did not, however, pursue this allegation. Ibid, paragraph 24.

<sup>8</sup> AER, *AER Retail Pricing Information Guidelines: Version 4.0*, AER, Melbourne, 2015.

In relation to discounts, the current RPIG requires retailers to present on the energy price fact sheet:

- the amount and/or percentage of the discount
- for percentage discounts, what portion of the customer's bill the discount applies to (for example, whether the discount is off usage, the supply charge or the whole bill)
- the base level to which the discount applies
- where information on the base level can be found (for example, on the retailer's website or Energy Made Easy)
- for dual fuel offers, which fuel(s) the discount applies to.<sup>9</sup>

## **2.3 Concurrent work on related issue by the AER and ACCC**

External to the Commission, there are currently two tracks of work related to the issues raised by this rule change request: a revision of the AER's RPIG and the ACCC's Retail Electricity Pricing Inquiry. These are covered in the following two sections.

### **2.3.1 AER revision of the Retail Pricing Information Guidelines**

In 2017, the AER conducted a Customer Price Information review. The review focused on the detailed implementation of the outcomes from the Prime Minister's roundtable meetings with energy retailers.<sup>10</sup>

The issues paper focused on how customers get the information they need to prompt them to investigate the energy market, compare plans and providers, and choose the best deal.<sup>11</sup> The Customer Price Information review informed a range of the AER's work in relation to its RPIG, including discounts.

Following the review and receipt of submissions on the issues paper, the AER published a draft revised RPIG on 30 January 2018.

The draft revised RPIG requirements on retailers regarding discounts have not changed substantially. The most important change relevant to discounts is that retailers will now be required to present a new Basic Product Information sheet (prepared by the AER) for all of their energy offers. This includes two bill estimates for each of the following consumption categories: low, medium and high consumptions. These two bill estimates relate to when all available discounts are obtained in the energy offer, and when no discounts are received under the energy offer.<sup>12</sup>

### **2.3.2 ACCC Retail Electricity Pricing Inquiry**

On 27 March 2017 the Treasurer, the Hon Scott Morrison MP, directed the ACCC to hold an inquiry into the supply of retail electricity and the competitiveness of retail

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<sup>9</sup> Ibid, section 3.3.

<sup>10</sup> AER, *Customer price information review: issues paper*, AER, Melbourne, 2017, pp. 6-7.

<sup>11</sup> Ibid, p. 3.

<sup>12</sup> AER, *DRAFT AER Retail Pricing Information Guidelines: Version 5.0*, AER, Melbourne, 2018, p. 18.

electricity prices. Relevant to discounts, the terms of reference state that the matters to be considered for the inquiry include:

“any impediments to consumer choice, including a transactions costs, a lack of transparent information, or other factors.”<sup>13</sup>

On 16 October 2017 the ACCC published its preliminary report for the inquiry. The preliminary report commented on discounting practices in the retail energy market. It stated:

“Discounts are a common way for retailers in many sectors to advertise or signal to consumers that the price being offered is lower than that which is generally available. The retail electricity sector is no different and, while discounts are attractive to consumers, the practice has been identified as a barrier to consumers engaging with the market successfully. A number of parties also consider that the practice of discounting has eroded trust in the retail electricity market.”<sup>14</sup>

The ACCC is still developing its final report for its Retail Electricity Pricing Inquiry, to be published 30 June 2018.

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<sup>13</sup> S Morrison (Treasurer), *Inquiry into Retail Electricity Supply*, Parliament House, Canberra, 27 March 2017.

<sup>14</sup> ACCC, *Retail Electricity Pricing Inquiry: Preliminary report*, ACCC, Canberra, 2017, p. 128, viewed 19 March 2018, <https://www.accc.gov.au/system/files/Retail%20Electricity%20Inquiry%20-%20Indicative%20report%20-%2013%20November%202017.pdf>.

### 3 The rule change request

This chapter sets out the:

- issues raised in the rule change request, including an overview of the arguments supporting the rule change and the scope of the rule change request
- proposed rule
- Commission’s proposed assessment framework.

Copies of the rule change request, including the proposed rule, may be found on the Commission’s website, [www.aemc.gov.au](http://www.aemc.gov.au).

#### 3.1 The issues raised in the rule change request

The proponent has raised a number of issues in the rule change request. However, there is a core issue to be addressed, upon which all the other issues are contingent. The rule change request states this core issue as follows:

“The rule is aimed at preventing a behaviour that is considered to be inherently confusing for the average consumer – the practice of applying discounts to rates that significantly exceed the base rate as represented by the retailer’s standing offer. Because the base rate against which the discount applied is inflated, it can lead the consumer to believe the discount is of relatively greater value than it is.”<sup>15</sup>

The core issue is the confusion for energy consumers caused by the practice of applying discounts to rates in market offers significantly above the equivalent standing offer rates. The issue raised in the rule change request is thus a very specific framing of a problem with discounting.

The rule change request further links its statement of the problem to be addressed to two concepts: consumer detriment and the National Energy Retail Objective (NERO). The rule change request specifically mentions the complexity and variability of available offers means the discounting practice it seeks to address has the potential to confuse a consumer and can easily result in consumer detriment.<sup>16</sup>

The arguments supporting the core issue are summarised below, followed by a discussion of the scope of the rule change request.

##### 3.1.1 Arguments in rule change request supporting the proposed rule

The rule change request provides two main arguments why a retail rule of the kind proposed in the request would be a useful addition to the provisions already in place in the AER’s RPIG and the ACL:

1. **A more effective deterrent than existing arrangements.**
  - **Goes further than the RPIG.** The RPIG only deals with the presentation of discounting and pricing information, and contains requirements for

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<sup>15</sup> Rule change request, p. 2.

<sup>16</sup> Rule change request, p. 6.

describing discounts in advertising and marketing. It does not extend to what is permissible in the terms and conditions of contracts.<sup>17</sup>

- **A rule sends a strong signal to energy retailers as to what their obligations are.** A provision in the NERR prohibiting discounting where charges in market offers are higher than in the equivalent standing offer would send a strong signal to energy retailers as to their obligations.<sup>18</sup>
- **Simple and cheaper to enforce than the ACL.** A rule preventing discounting on offers above standing rates would operate in addition to the ACL. The rule change request suggests a rule with such a prohibition would prevent the relevant behaviour without the need for the costly and time consuming process of prosecution under the ACL.<sup>19</sup>
- **A retail rule change allows the option to impose a civil penalty.** A financial penalty would be an effective deterrent to this discounting behaviour and is appropriate given non-compliance could result in a retailer receiving a financial benefit.<sup>20</sup>

2. **May capture behaviour that is not covered by the ACL.** The rule change request quotes the ACCC Retail Electricity Pricing Inquiry's preliminary report as support for the rule change request potentially addressing behaviour that causes confusion (and potentially consumer detriment) not being covered by provisions in the ACL:

"Even if a 'discount' does not meet the threshold to be considered misleading or deceptive under the ACL, it could still be very confusing for consumers. This is particularly the case when there is no consistent form of presentation or application of discounts."<sup>21</sup>

### 3.1.2 Scope of the rule change request

The scope of the rule change request determines the possible policy solutions and, in consequence, rules (including those that could be made under the Commission's power to make a more preferable rule, noted in section 3.3.3) that could be made by the Commission in a final rule determination.

The scope of this rule change request is set by the issues raised in the rule change request. The core policy issue for this rule change process is consumer confusion caused by discounts applied to rates in a market offer above the equivalent standing offer rate.

The scope does not extend to problems in the presentation of discounts generally, nor does the rule change request include in its statement of issues that it seeks to address the presentation of prices in any other respect. This includes general consumer confusion created by other types of retailer discounting practices, such as discounts

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17 Rule change request, p. 3.

18 Ibid p. 6.

19 Ibid, p. 6.

20 Ibid, pp. 3-4.

21 Ibid, p. 6.

made off set standing offers which are set in inconsistent ways across retailers in the energy retail market.

### 3.2 The proposed rule

The rule change request proposes that retailers must not apply discounts to any amount in an electricity market retail contract from a rate above a relevant standing offer with respect to:

- daily supply charges
- usage charges
- demand charges.

These charges are not currently defined within the NERR and the proposed rule does not seek to define them. They would therefore need to be defined in the NERR.

A standing offer would be relevant for the operation of the proposed rule if two conditions are met:

- the market retail contract and the standing offer have the same tariff structure
- the standing offer is generally available to small customers in the region in which the customer is to consume electricity under the market retail contract.<sup>22</sup>

The rule change request's proposed solution relies on there being an equivalent standing offer tariff structure mirroring the tariff structure in the market retail contract (with discount provisions) being formed with the small customer. Thus, the comparison of rates in a market retail contract that are being discounted from with standing offer rate needs to resemble a "like for like" comparison. If there is no standing offer with a directly comparable tariff structure the proposed rule would have no effect.<sup>23</sup>

The proposed solution also suggests that comparisons of market offer rates to standing offer rates for a retailer should be done within the region, and the standing offer would be "generally available" to the customer in that region.<sup>24</sup> The Commission has understood "region" to refer to the distribution network supply area in which the consumer's connection point is located. This interpretation makes the most sense in terms of retail pricing in the NEM as distribution network pricing covers groups of customers in the same geographical area.<sup>25</sup>

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<sup>22</sup> The term "generally available" has a meaning in the RPIG.  
AER, *AER Retail Pricing Information Guidelines: Version 4.0*, Melbourne, 2015, p. 17.

<sup>23</sup> To the extent that these comparisons cannot be made with respect to tariff structures, the rule change request suggests the Commission consider a more preferable rule. The rule change request (p. 5) considers the more preferable rule should not discourage tariff innovation or reform.

<sup>24</sup> The rule change request (p. 4) suggests that the Commission could consider a more preferable rule in this instance for an alternative construction such as "nearest region". The intention behind this suggestion is to not limit the application of the proposed rule where there is not an equivalent standing offer tariff structure "generally available" to the consumer.

<sup>25</sup> An alternative interpretation of region could be national electricity market region, along the lines of the transmission pricing regions for the national electricity market.  
See: AEMO, *Fact Sheet: The National Electricity Market*, AEMO, Melbourne, p. 1.

The rule change request also notes that the intention is to prevent discounting on rates that are in excess of the retailer’s standing offer available at the time the market retail contract is entered into. It is not intended that the prohibition apply to a contract that has already been entered into at the time the rule is made.<sup>26</sup>

The rule change request suggested a civil penalty could apply to the proposed rule. The proponent argued a financial penalty would be an effective deterrent to the issue raised in the rule change request given non-compliance could result in a retailer receiving a financial benefit.<sup>27</sup>

The rule change request states it relies on the term “standing offer prices”, which is defined in the NERL as:

“...all of the tariffs and charges that a retailer charges a small customer for or in connection with the sale and supply of energy to a small customer under a standard retail contract.”<sup>28</sup>

Examples of how the proposed rule would operate can be found in Box 3.1 and Box 3.2.

**Box 3.1 First example of how the proposed rule would operate: Ausgrid distribution supply area**

A retailer has a market offer and an generally available standing offer with an equivalent tariff structure in the Ausgrid distribution supply area and the details outlined in the table below:

	<b>Standing offer</b>	<b>Market offer</b>
Distribution network supply area	Ausgrid	Ausgrid
Daily supply charge	122.80 c	132.624 c
Usage charge	35.90 c/kWh	38.77 c/kWh
Discounts (if applicable)	N/A	15 per cent to all charges

The market offer rates are 8 per cent higher than the standing offer rates. The discount provision in a market retail contract based on the above market offer would be a breach of the proposed rule.

<sup>26</sup> Rule change request, p. 4.

<sup>27</sup> Rule change request, pp. 3–4.

<sup>28</sup> NERL s. 2.



**Box 3.2                      Second example of how the proposed rule would operate:  
Energex distribution supply area**

A retailer has a market offer and an “equivalent” standing offer in the Energex distribution supply area with the details outlined in the table below:

	<b>Standing offer</b>	<b>Market offer</b>
Distribution network supply area	Energex	Energex
Daily supply charge	70.68 c	75.96 c
Usage charge	44.56 c/kWh	20 c/kWh
Discounts (if applicable)	N/A	10 per cent to all charges

As the daily supply charge in the market offer on which the discount is being applied exceeds the standing offer, the discount provision in a market retail contract based on the above market offer would be in breach of the proposed rule. This is despite the usage charge for the market offer being well below the standing offer usage charge.

**3.3                      Assessment framework for this rule change request**

The Commission's assessment of this rule change request must consider whether the proposed rule promotes the NERO.

**3.3.1                    Achieving the NERO**

The Commission may only make a rule if it is satisfied that the rule will, or is likely to, contribute to the achievement of the national energy retail objective (NERO).<sup>29</sup> This is the decision making framework that the Commission must apply.

The NERO is:

“to promote efficient investment in, and efficient operation and use of, energy services for the long term interests of consumers of energy with respect to price, quality, safety, reliability and security of supply of energy.”

The Commission must also, where relevant, satisfy itself that the rule is "compatible with the development and application of consumer protections for small customers, including (but not limited to) protections relating to hardship customers" (the "consumer protections test").<sup>30</sup>

Where the consumer protections test is relevant in the making of a rule, the Commission must be satisfied that both the NERO test and the consumer protections test have been met.<sup>31</sup> If the Commission is satisfied that one test, but not the other, has been met, the rule cannot be made.

<sup>29</sup> Section 236(1) of the NERL.

<sup>30</sup> Section 236(2)(b) of the NERL.

<sup>31</sup> That is, the legal tests set out in sections 236(1) and (2)(b) of the NERL.

There may be some overlap in the application of the two tests. For example, a rule that provides a new protection for small customers may also, but will not necessarily, promote the NERO.

### 3.3.2 Commission's assessment criteria

This section sets out the proposed approach to the NERO test. The long-term interests of consumers lie at the heart of the NERO test. The NERO requires that efficiency in the investment, operation and use of energy services is the principal consideration for determining what is in the long-term interests of consumers.<sup>32</sup>

The Commission considers that, where feasible, competitive markets provide the best means of promoting efficiency. Competition can be defined as a process of independent rivalry, where two or more parties (rivals) compete to supply a good or a service to consumers. Where competition is effective, retailers will have strong incentives to provide products and services that consumers value and set prices that reflect efficient costs.

In determining whether the proposed rule would be likely to promote the NERO, the Commission will consider the rule change request against the following criteria:

- **Transparency of information:** Competition is most effective when consumers have the information they need to allow them to compare and choose the products and services that they value at prices they are willing to pay. The Commission will assess the extent to which the proposed rule and alternatives are likely to promote information provision that facilitates informed consumer choices.
- **Regulatory and administrative burden:** The Commission will assess the extent to which proposed solutions impose costs on market participants. The Commission will also assess the extent to which any rule is likely to restrict retail offers and potential side effects of such restrictions (e.g. increases in standing offers).
- **Facilitating service and tariff innovation:** Competition will be most effective where retailers are free to develop and offer services and tariffs that consumers value. The Commission will assess the extent to which any rule is likely to restrict tariff and service innovation in the future.

### 3.3.3 Making a more preferable rule

Under section 244 of the NERL, the Commission may make a rule that is different (including materially different) to a proposed rule (a more preferable rule) if it is satisfied that, having regard to the issue or issues raised in the rule change request, the more preferable rule will or is likely to better contribute to the achievement of the

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<sup>32</sup> Efficiency has three components. Allocative efficiency, which can be seen where goods and services are provided that meet the needs and preferences of consumers and are based on prices that reflect as closely as possible the costs of supplying an additional unit of a good or service. Productive efficiency, which can be seen where the minimum value of resources are used to produce a given set of goods and services (i.e. goods are provided at "least cost"). Dynamic efficiency, which can be seen where allocative and productive efficiency are sustained over time with changing technology and consumer tastes and preferences. Investment and innovation are integral to dynamic efficiency.

NERO. The Commission may make a more preferable rule even in the context of an expedited rule change process.

## 4 Commission initial position and indicative drafting

As a focus for stakeholder consideration of the rule change request, this chapter describes the Commission's initial position and sets out indicative drafting reflecting that position. The Commission notes that neither the initial position, nor the indicative drafting, have the formal status of a decision of the Commission made pursuant to the NERL and NERR. That is, they do not have the status of a draft determination or a draft rule. The initial approach and indicative drafting reflect the Commission's initial analysis and the Commission seeks stakeholder feedback on all aspects of the analysis and the approach. Specific consultation questions are set out in chapter 5.

There are two parts to this initial position:

1. a civil penalty recommendation for non-compliance with market and standing offer pricing presentation provisions under the RPIG
2. dealing with the specific discounting practice raised as an issue in the rule change request detailed in section 3.1.

### 4.1 Part one of the initial position: civil penalties for the RPIG

The Commission considers that, generally, the energy offers that retailers can make to consumers should not be restricted through the NERR. Their pricing presentation and marketing are, and should continue to be, governed by the ACL and the RPIG.

The ACL aims to protect all consumers, including energy consumers, and ensure fair trading in Australia.<sup>33</sup> It does this through provisions prohibiting misleading and deceptive conduct and false representations, among other things. Breaches of the ACL have led to court action against energy retailers. The ACL's provisions underpin competition in markets across Australia, including in the retail energy market.

The RPIG is an energy specific instrument that governs the pricing presentation and marketing of retail energy offers. Its provisions help consumers have transparency and consistency in the provision of information. This assists them in comparing energy plans and making informed choices. Its provisions are covered in more detail in section 2.2.2.

The ACL and RPIG provide a framework for how retailers operate and what consumers should expect in terms of pricing information quality, consistency and transparency. This is part of the basis of a well-functioning market. That energy offers' pricing presentation and marketing is governed by the ACL and RPIG is consistent with the Commission's views on retail energy competition.

The Commission's view is that, generally, a competitive retail energy market is better at producing energy offers that meet consumers' preferences at prices they are willing to pay than regulatory measures which restrict the offers that retailers are able to make to consumers.

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<sup>33</sup> ACCC, *Retail Electricity Pricing Inquiry: Preliminary report*, ACCC, Canberra, 2017, p. 127, viewed 19 March 2018, <https://www.accc.gov.au/system/files/Retail%20Electricity%20Inquiry%20-%20Indicative%20report%20-%202013%20November%202017.pdf>.

Given the general position that the offers that retailers are able to make to consumers should not be restricted, the Commission considers that it is particularly important that the instruments mentioned above, the ACL and RPIG, are enforceable. Therefore, part one of the Commission's initial position is, subject to the AER's agreement, a joint recommendation from the Commission and the AER to the COAG Energy Council to make non-compliance with sections 24 and 37 of the NERL subject to a civil penalty. These sections of the NERL specifically provide that retailers' presentation of market and standing offer prices must comply with the RPIG.

Early consultation on this part of the Commission's initial position suggested that the AER's enforcement tools for the RPIG could be broader. Currently, the AER's options for enforcement of the RPIG include:<sup>34</sup>

- accepting voluntary or court enforceable undertakings
- instituting civil proceedings in relation to breaches of retailers' obligations to comply with the RPIG under the NERL.

Having the standing and market offer pricing presentation provisions in the RPIG subject to a civil penalty would allow the AER to issue infringement notices with penalties.<sup>35</sup> The AER would be able to issue an infringement notice with penalties of up to \$20,000 (for a body corporate)<sup>36</sup> for contravention of sections 24 and 37 of the NERL in relation to the presentation of market and standing offer prices. The Commission considers infringement notices with penalties are an effective tool for the AER in many of the circumstances where an RPIG provision regarding the presentation of standing or market offer pricing has been breached.<sup>37</sup>

The addition of infringement notices allows the AER greater enforcement options, which it can use to fit the circumstances when faced with a contravention of market and standing offer pricing presentation provisions in the RPIG.

The addition of a civil penalty provision is also consistent with the rule change request, which suggests the RPIG be strengthened. The Commission's initial position would "bolster" the RPIG, which was an alternative option to the proposed rule that was identified in the rule change request.<sup>38</sup>

It is important to note that there are no rule changes associated with this part of the initial position. If a civil penalty recommendation was accepted by the COAG Energy Council, Schedule 1 of the South Australian National Energy Retail Regulations would be amended to include the relevant provisions of the NERL in the list of civil penalty provisions. Therefore, making a civil penalty recommendation would not be considered

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<sup>34</sup> AER, *AER Retail Pricing Information Guidelines: Version 4.0*, AER, Melbourne, 2015, p. 5.  
See also: AER, *Compliance and Enforcement: Statement of Approach*, AER, Melbourne, 2014.

<sup>35</sup> NERL section 308.

<sup>36</sup> AER, *Compliance and Enforcement: Statement of Approach*, AER, Melbourne, 2014, p. 17.

<sup>37</sup> Infringement notices give the recipient of the notice the option of paying a penalty in full or electing to have the matter heard in court. Payment of an infringement notice does not require an admission of an alleged breach or represent acceptance of liability in respect of an alleged breach. Failure to pay the penalty under an infringement notice is likely to result in litigation.  
See: AER, *Compliance and enforcement: Statement of Approach*, AER, Melbourne, 2014, p. 12.

<sup>38</sup> Rule change request p. 7.

part of the test for a non-controversial rule outlined in section 6.1 of this consultation paper. However, the Commission does invite comment on this part of the initial position in chapter 5.

## **4.2 Part two of the initial position: addressing a specific discounting practice**

### **4.2.1 Reasons a specific prohibition in the NERR may be warranted**

As set out in section 4.1 above, the Commission considers that, generally, retailers' energy offers should not be restricted through the NERR and their pricing presentation and marketing should be governed by the ACL and the RPIG. This includes that discounting and the challenges it presents for comparing offers should be addressed primarily through the ACL and the RPIG. However, where there are particular retail practices which cannot be in the interest of consumers and are apparently designed to confuse consumers then a specific restriction of such practices within the NERR should be considered.

In its initial analysis, the Commission considers that this is the case where retailers provide discounts in a market retail contract where all of the rates within the contract are above all of the rates of an equivalent standing offer. In this case, no consumer could be better off under the undiscounted market retail contract than under the standing offer. Therefore a key reason the market retail contract may be attractive is through confusing consumers with inflated discounting rates. The Commission's initial position is that this practice should be prohibited under the NERR.

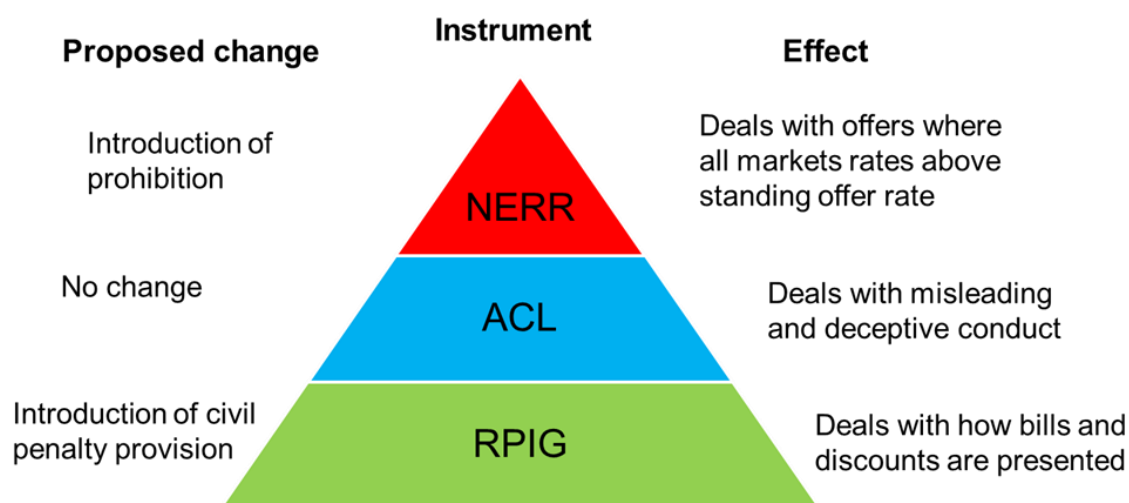
The benefit of having a prohibition in the NERR, in addition to the RPIG, is that it provides a clear and stronger deterrent on such practices and avoids the legal costs associated with having to pursue action under the ACL, as noted in the rule change request. If there are discounting practices that would constitute misleading or deceptive conduct or a false or misleading representation that would not breach a rule based on the initial position, then these practices can still be prosecuted through the ACL.<sup>39</sup> A prohibition in the NERR would not reduce the scope of the ACL.

The combination of the three instruments would then act in tandem depending on the conduct – as displayed in Figure 4.1.

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<sup>39</sup> The Commission notes that it would also be possible for the Australian Government to include additional provisions in the Competition and Consumer Act 2010 (to which the ACL is a schedule), that specifically address retailer discounting behaviour that may be misleading or deceptive, or constitute false or misleading representations. For example, specific provisions for retailers (among others) were added to the Competition and Consumer Act in relation to pass-through of savings from repeal of the Carbon Pollution Reduction Scheme: Competition and Consumer Act Part V, Carbon tax price reduction obligation.

**Figure 4.1 Hierarchy of regulatory arrangements on discounting in retail energy markets**



#### 4.2.2 Application of the prohibition

This section sets out how the Commission’s initial position – a prohibition in the NERR – would operate, and provides supporting reasons for the operation of the prohibition.

##### Summary of the prohibition

At a high level, to contravene a rule implemented with the indicative drafting (see section 4.2.4), a retailer would need to:

- form a market retail contract including provisions for discounts to any energy rates
- have a standing offer that is equivalent to the market retail contract (an equivalent standing offer)
- in the market retail contract have:
  - every single energy rate (before discounts) above the equivalent energy rates in the equivalent standing offer
  - every single energy payment (for example, a feed-in tariff) equal to or lower than the equivalent payments in the equivalent standing offer.

There are several defined terms in the above high level summary: energy rates, equivalent standing offer and energy payments. An explanation of the definitions can be found in the following parts of section 4.2.2 of this paper.

The indicative drafting reflecting the second part of the Commission’s initial position can be found in Box 4.1 in section 4.2.4. Examples of how the application of the prohibition operates in practice can be found in Boxes 4.2 to 4.5.

##### All energy rates above and all energy payments below

Unlike the proposed rule, which would restrict a retailer offering discounts in a market retail contract when any of its rates are above the rates in an equivalent standing offer, the Commission’s initial position would only prohibit retailers offering discounts under a market retail contract if all of its energy rates are above the energy rates in an

equivalent standing offer. In conjunction with this, every energy payment to the customer under the market retail contract (such as a feed-in tariff or demand response payment, covered further in this section) would also need to be equal to or lower than the equivalent payments in the equivalent standing offer, in order for the retailer to be in breach.

The Commission's initial view is that proposed rule is likely to capture some market offers that would be beneficial to consumers. For example, high energy consumption households may be better off on market offers with high daily supply charges but low energy usage charges (such as the scenario presented in Box 3.2). The Commission's initial position would allow these offers to be the basis of a market retail contract with discounts. While the Commission notes that this is likely to allow some offers that are not in consumers' interests, the Commission considers the initial position achieves an appropriate balance in the context of only seeking to outright prohibit retailer offers that are definitely not in the interests of consumers.

### **Tariff components and energy rates**

Under the Commission's initial position, all energy rates in a market retail contract (before discounts) are required to be above the energy rates in an equivalent standing offer for the prohibition to take effect (see Box 4.1, indicative rule 46B(1)(b)). This condition is one of three conditions for the prohibition on discounts in a market retail contract to take effect.

The definition of the new term "energy rates" would be added to rule 45A. Energy rates means any tariff or charge that is a component of the market offer prices under a market retail contract, or of the standing offer prices under a standard retail contract, but in each case excluding charges that are fees or penalties.

The energy rates definition uses other defined terms in the NERL, "market offer prices" and "standing offer prices".<sup>40</sup>

Importantly, by not defining the specific tariff structures (e.g. the demand tariffs) that the prohibition applies to, and instead relying on equivalence, the prohibition will apply to any new types of tariffs that are introduced in standing and market offers in the future. For example, if a retailer in the future creates a critical peak price standing offer in the future, the prohibition would apply to critical peak price market offers.

### **Equivalency between the market retail contract and standing offer**

The initial position includes several considerations in determining whether there is an "equivalent" standing offer to trigger the prohibition on discounts in a market retail contract.

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<sup>40</sup> "Market offer prices" means all of the tariffs and charges that a retailer charges a small customer for or in connection with the sale of energy to a small customer under a market retail contract (NERL s. 2).  
"Standing offer prices" means all of the tariffs and charges that a retailer charges a small customer for or in connection with the sale and supply of energy to a small customer under a standard retail contract (NERL s. 2).



A standing offer will be an “equivalent standing offer” for a market retail contract if the following conditions are met:

- *The retailer making the standing offer is the retailer providing the market retail contract (subrule 2(a))*
  - Subrule (2)(a) provides that only the same retailer’s standing offer may be considered an “equivalent standing offer” to any market retail contract provided by that retailer.
- *The standing offer and market retail contract would be available to the same customer, if that retailer was the designated retailer for the customer’s premises.*
  - Subrule (2)(b) would account for the potential for greater locationality of energy offers in the future (even to the level of postcode), as distribution network pricing may become more locational in the future.
- *There are no material differences between the tariff structure of the standing offer and of the market retail contract in relation to energy rates and energy payments.*
  - The tariff structure of both the energy rates and energy payments needs to be the same between the market retail contract and the equivalent standing offer for the prohibition to apply, under subrule (2)(c). This condition would prevent, for example, a time of use tariff in a market offer with time periods for peak and shoulder of 5pm to 7pm and 2pm to 5pm respectively, being equivalent with a time of use standing offer tariff structure which had peak and shoulder times of 8pm to 10pm and 4pm to 7pm, respectively (all other things being equal). In this time of use offer example, the market retail contract and standing offer would not be equivalent and therefore the discounting prohibition would not take effect.
  - The same applies to energy payments, where (in the presence of energy payments) if the structure for the energy payment is different between the two offers, then the prohibition would have no effect.
- *The market retail contract provides no material additional benefit or service to the customer compared to the standing offer.*
  - Benefits and services under subrule (2)(d) can cover benefits associated with a contract such as movie ticket passes, non-financial benefits and offering “green power”. This is intended to capture anything in an offer that a customer might value, other than the supply of electricity or gas.

It is important to note that for market retail contracts where the conditions for equivalency with a standing offer are not met, under the indicative drafting there would be no breach.

## **Energy payments**

In conjunction with both there being an equivalent standing offer and every energy rate being above the standing offer rates, a third condition applies for the discounting prohibition to take effect under the Commission’s initial position. This condition is that every energy payment to the customer under the market retail contract would also need to be equal to or lower than the equivalent payments in the equivalent standing offer.

This condition captures, for example, payments or bills credits given by the retailer to the customer for demand response or feed-in tariffs. The condition is in rule 46B(1)(c) under the indicative drafting.

Energy payments are aspects of an energy offer that a consumer will value. The Commission considers that the level or rate energy payments should be a consideration in comparing a market retail contract and standing offer. For example, if a market offer had high feed-in tariff payments a consumer may be better off on that market offer than under a standing offer with no or low feed-in tariff payments, even if all of the energy rates are higher on the market offer than the standing offer.

### **Discounts prohibition applies to energy rates at the date the contract is formed**

Under the indicative drafting, the prohibition on discounting would apply to any term or condition in a contract that applies a price discount to an energy rate if the conditions described above are met at the date the small customer enters into the contract. If the conditions are not met at the date of entry into the contract, but are met later (e.g. the prices under the market retail contract were initially lower than the standing offer, but are later raised), the prohibition will not apply. This position is consistent with the rule change request.

As the new term “energy rates” is defined in the indicative drafting, the Commission has used this defined term to target the discount prohibition. Thus, anything outside of an energy rate (e.g. a benefit, service, energy payment, fees or penalties) that has a discount applied to it will not be covered by the prohibition.

### **Standing offers**

An implication of the Commission’s initial position is that, ignoring penalties and fees, a retailer’s standing offers should be the highest price offer available to every small customer.

The initial position suggests standing offers should naturally be the most expensive energy offer as they have the highest terms and conditions and constitute an “obligation to offer”. This is not an endorsement of standing offers as a reference price for consumers. However, it does recognise that a segment of the market may still use standing offers as a reference price.

While standing offer rates, which are typically used as base rates to which discounts are applied in market offers, are not consistently set across retailers and consumers are not necessarily aware of what a standing offer entails, there is existing precedent for them being viewed as a reference price or base rate for consumers.<sup>41</sup> Furthermore, standing

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<sup>41</sup> In the *ACCC v Origin Energy* case covered in section 2.2.1, the respondents (two subsidiaries (one for electricity and the other for gas) and the parent company, Origin Energy) admitted “some consumers would have understood, reasonably, that the discounts would be from energy usage charges calculated by reference to rates applicable generally to consumers like themselves.” In this case, “rates applicable generally to consumers like themselves” was a reference to standing offer prices.

See: Federal Court of Australia, *Australian Competition and Consumer Commission v Origin Energy Limited* [2015] FCA 55 (9 February 2015), Federal Court of Australia, Adelaide, 2015, paragraph 15.

offers are also a reference price in embedded networks, under the AER's Retail Exempt Selling Guideline.<sup>42</sup>

## Gas

In the Commission's initial position, the discounting prohibition applies to gas retail offers as well as electricity retail offers in the same way as described in the aforementioned sections. Although the rule change request and the proposed rule referred only to electricity, at this stage the Commission considers the prohibition should apply to both fuels.

### Treatment of dual fuel contracts

The treatment of dual fuel offers under the Commission's initial position depends on whether the dual fuel offer involves two separate contracts, or one contract covering both fuels, as per the below categories:

- Dual fuel offers which have separate market retail contracts for electricity and gas: one or both of the market retail contracts could effectively "match" with an equivalent single-fuel standing offer for either electricity or gas. Indicative subrules 46B(1) and (2) would operate as described above in each of these cases.
- For dual fuel market retail contracts where both fuels are provided for under the same contract, to contravene a rule based on the indicative drafting a retailer would need to:
  - have provisions for discounts to any energy rates
  - in respect of the fuel to which a discount applies, have a tariff structure matching the tariff structure in a single-fuel standing offer for the relevant fuel
  - in respect of the fuel to which a discount applies, have higher energy rates and equal or lower energy payments compared to the equivalent standing offer.

The fact that the market retail contract covered an additional fuel would not, in itself, mean that the single-fuel standing offer was not an equivalent standing offer (i.e. the additional fuel would not constitute an additional service or benefit), provided that the other conditions for equivalence are met.

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<sup>42</sup> AER, *AER (Retail) Exempt Selling Guideline: Version 4*, AER, Melbourne, 2016, p. 35.

The AER has also published a draft revision of the Retail Exempt Selling Guideline, which still contains the relevant provision.

See: AER 2017, *Draft AER (Retail) Exempt Selling Guideline: Version 5*, p. 36.

This was also noted in the AEMC's 2017 Retail Energy Competition Review. In particular, footnote 192 states:

"Condition 7 of the AER's Retail Exemption Guideline identifies that an exempt person must not charge the exempt customer tariffs higher than the standing offer price that would be charged by the relevant local area retailer for new connections, if the local area retailer were to supply that quantity, or estimated quantity, of energy directly to the premises of the exempt customer. This condition, and others in the Guideline are based on the retail customer protections provided under the National Energy Retail Law (Retail Law) and the NERR."

See also: AEMC, *2017 Retail Energy Competition Review*, final report, 25 July 2017, Sydney, p. 172.

In summary, this position would mean that a discounting prohibition would apply to a dual fuel market retail contract if either electricity or gas elements of that contract breach indicative rule 46B, and not both electricity and gas elements.

### 4.2.3 Considerations relating to the proposed rule

The proposed rule has the potential to capture some market offers that could be beneficial to consumers. For example, high energy consumption households may be better off on market offers with high daily supply charges but low energy usage charges (such as the scenario presented in Box 3.2).

Another potential consequence of the proposed rule is that, if it were made, the actions retailers could take to ensure they are not in breach of the rule may have negative outcomes for some consumers. The proposed rule provides a stronger incentive, compared to the indicative drafting, for retailers to inflate the standing offer to avoid the risk of non-compliance. The incentive to inflate standing offers was noted by several stakeholders in early informal consultation on the proposed rule. It is particularly likely to arise for market offers where only one rate is above the same standing offer rate.<sup>43</sup>

The proposed rule also defines a series of terms for its operation that may diminish the effectiveness of the rule over time. These terms include:

- The components (or charges) of a tariff structure in the market retail contract that (if discounts are offered) are not permitted to be above the standing offer. Defining charges may mean the proposed rule will diminish in effectiveness with potential changes in the nature of charges or tariff structures in the future, as there could be fewer charges matching those definitions
- “Region”, which is used for targeting the market retail contract and the standing offer to which it was compared. The Commission’s interpretation of “region” in the proposed rule was to consider it a distribution network supply area. With the evolution of network pricing, especially the greater locationality in pricing, different sub-areas of a distribution network supply area could have different prices, and it would become possible that retailers could provide targeted offers on the basis of areas such as postcodes.

The proposed rule also does not consider any products, benefits or services provided to consumers (or to retailers by consumers) under energy offers that consumers might value other than the supply of electricity itself. Given the variety of benefits and services offered under market retail contracts today, it may be important to take such benefits and services into account when considering “equivalence” between the market retail contract and standing offer. For example, consumers may be better off even with higher charges in a market retail contract if they were compensated through other means such as generous feed-in tariffs, or other products, benefits or services.

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<sup>43</sup> Early informal consultation suggested that the most likely response to the proposed rule would be to increase standing offers to remain in compliance. Another potential response could be to change the tariff structure, level of energy payments, or benefits or services provided under either the market retail contract or standing offer.

#### **4.2.4 Indicative drafting**

The indicative drafting set out in Box 4.1 below reflects the Commission's initial position described in section 4.2.2. Examples of how the indicative drafting operates in practice can be found in Boxes 4.2 to 4.5.

**Box 4.1****Indicative drafting reflecting the Commission's initial position****1. Changes to rule 45A – Definitions**

*Insert the following new definitions in alphabetical order in rule 45A:*

**energy rate** means any tariff or charge that is a component of the market offer prices under a market retail contract, or of the standing offer prices under a standard retail contract, but in each case excluding charges that are fees or penalties.

Note 1: Energy rates relate to the period or amount of energy consumption, such as daily charges and kilowatt hour charges.

Note 2: Examples of fees and penalties for the purposes of this definition are account establishment fees, special meter read fees, new meter fees, credit card payment fees, late fees, and early termination fees.

**energy payment** means any payment or credit by a retailer to a small customer for products or services provided by the small customer to the retailer under a market retail contract or a standard retail contract, for example a feed-in arrangement or demand reduction arrangement.

**2. New rule 46B**

*After rule 46A, insert:*

**46B Energy rates – discounting practices**

(1) A retailer must not include any term or condition in a market retail contract with a small customer that applies a price discount to an energy rate under the contract (subject to subrule (4)) if, on the date the small customer enters into the contract:

- (a) there is an equivalent standing offer, as defined in subrule (2);
- (b) before any price discounts are applied, every energy rate under the market retail contract exceeds the equivalent component of the energy rate under the equivalent standing offer, subject to subrule (4); and
- (c) the level or rate of every energy payment under the market retail contract (if any) is equal to or lower than the level or rate of the equivalent energy payment under the equivalent standing offer.

[Recommendation: This subrule (1) is a civil penalty provision]

(2) For the purposes of subrule (1), a standing offer is an equivalent standing

offer with respect to a market retail contract if the following conditions are satisfied:

- (a) the retailer making the standing offer is the retailer providing the market retail contract;
- (b) the standing offer and the market retail contract would be available to the same small customer, if the retailer was the designated retailer for the small customer's premises;
- (c) in relation to energy rates and energy payments, there are no material differences between the tariff structure of the standing offer and the tariff structure of the market retail contract, subject to subrule (4); and
- (d) the market retail contract provides no material additional benefit or service to the customer compared to the standing offer, subject to subrule (4).

(3) Where a market retail contract is a dual fuel contract of the type described in paragraph (a) of the definition of dual fuel contract in rule 117(1), a standing offer for a single fuel may be an equivalent standing offer with respect to the market retail contract, and subrule (4) applies.

(4) In the circumstances set out in subrule (3), subrules (1) and (2) apply with the following variations:

- (a) the prohibition on applying a price discount to an energy rate in a market retail contract under the first paragraph of subrule (1) applies to a price discount to an energy rate relating to the fuel supplied under the standing offer only;
- (b) subrule (1)(b) applies to energy rates relating to the fuel supplied under the standing offer only;
- (c) subrule (2)(c) applies to the tariff structures relating to the fuel supplied under the standing offer only; and
- (d) the additional fuel supplied under the market retail contract does not constitute a material additional benefit or service to the customer for the purposes of subrule (2)(d).

**Box 4.2 Example 1: non-compliance with indicative drafting**

A retailer has an electricity market offer and standing offer in the Ausgrid distribution supply area with the below details.

	<b>Standing offer</b>	<b>Market offer</b>
Distribution network supply area	Ausgrid	Ausgrid
Daily supply charge	122.80 c	132.624 c
Usage charge	35.90 c/kWh	38.77 c/kWh
Discounts (if applicable)	N/A	15 per cent pay-on-time discount to all charges
Energy payments	None	None
Benefits or services	None	None

A contract based on the above market offer would be non-compliant with the indicative drafting. This is because all energy rates in the market offer are above all energy rates in the standing offer, and the standing offer would meet the criteria for an “equivalent standing offer”.

**Box 4.3 Example 2: non-equivalent standing offer on the basis of a benefit or service**

A retailer has an electricity market offer and standing offer in the Energex distribution supply area with the below details.

	<b>Standing offer</b>	<b>Market offer</b>
Distribution network supply area	Energex	Energex
Daily supply charge	100.80 c	132.624 c
Usage charge	35.90 c/kWh	38.77 c/kWh
Discounts (if applicable)	N/A	15 per cent pay-on-time discount to all charges
Energy payments	None	None
Benefits or services	None	GreenPower is available

A market retail contract formed on the basis of the market offer above would not be in breach of the indicative drafting. This is because the product or service of “GreenPower” is available to the customer under the market offer but not under the standing offer. Therefore, the standing offer is not an equivalent standing offer.



**Box 4.4 Example 3: energy payments**

A retailer has an electricity market offer and standing offer in the SA Power Networks distribution supply area with the below details.

	<b>Standing offer</b>	<b>Market offer</b>
Distribution network supply area	SA Power Networks	SA Power Networks
Daily supply charge	100 c	100 c
Usage charge	32.50 c/kWh	32.50 c/kWh
Discounts (if applicable)	N/A	15 per cent pay-on-time discount to all charges
Energy payments	Feed-in tariff: 4 c/kWh	Feed-in tariff: 8 c/kWh
Benefits or services	None	None

A market retail contract formed on the above market offer would not be in breach of the indicative drafting. This is due to the feed-in tariff, an energy payment, being higher in the market offer than in the standing offer. Energy payments under the indicative drafting are required in the market retail contract to be equal or less than in the equivalent standing offer. In addition, the energy rates in the market offer are the same as those in the standing offer; the indicative drafting requires the market offer rates to be higher in order for the prohibition to apply.

**Box 4.5 Example 4: not all energy rates are higher in the market offer**

A retailer has a gas market offer and standing offer in the Jemena Coastal Gas distribution supply area distribution supply area with the below details.

	<b>Standing offer</b>	<b>Market offer</b>
Distribution network supply area	Jemena Coastal Gas distribution supply area	Jemena Coastal Gas distribution supply area
Daily supply charge	70.68 c	75.906
Usage charge	44.56 c/kWh	20 c/kWh
Discounts (if applicable)	N/A	10 per cent pay-on-time discount to all charges
Energy payments	None	None
Benefits or services	None	None

A market retail contract formed on the basis of the market offer above would not be in breach of the indicative drafting. This is because not all the energy rates in the equivalent standing offer are below the energy rates in the market offer.

## 5 Issues for consultation

Taking into consideration the assessment framework, and that this consultation paper includes the Commission's initial position and indicative drafting reflecting that position, a number of questions have been identified for initial consultation. Stakeholders are encouraged to comment on these issues as well as any other aspect of the rule change request or this consultation paper, including the assessment framework.

The Commission has undertaken early consultation prior to the publication of this consultation paper. Therefore, the questions and issues raised in this chapter for consultation reflect that some consultation has been undertaken. This early consultation is covered in more detail in section 6.2.

### 5.1 Issues raised in the rule change request

#### 5.1.1 Prevalence of the issue raised in the rule change request

Commission analysis of the prevalence of the issue is set out in Appendix A. In summary, there is a low prevalence of the issue the rule change request seeks to address across the electricity, gas and dual fuel offers. The data analysis, based on offers available on the AER's comparison website EnergyMadeEasy on 17 January 2018, found there were 77 energy offers that would breach the proposed rule. This represents two per cent of total energy offers across electricity and gas offer types for small business and residential consumers.<sup>44</sup> These offers would be in breach of the proposed rule if they were used as the basis for a market retail contract and the proposed rule were in effect. These offers were made by eight retailers operating in the NEM.

The analysis also shows that 20 energy offers available on EnergyMadeEasy on 17 January 2018 (representing 0.5 per cent of all energy offers across electricity and gas offer types for small business and residential consumers) would be in breach of a rule implementing the indicative drafting of the Commission's initial position. Furthermore, these offers were all made by one retailer: Click Energy.<sup>45</sup> The Commission's analysis on prevalence is consistent with feedback provided by retailers in early consultation. Retailers generally commented that after the judgements made under the ACL around discounting practices<sup>46</sup>, the standard practice for their business has been to discount from standing offer rates.

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<sup>44</sup> Note, we have not undertaken an analysis of dual fuel offers at this time. Therefore, the numbers cited in this section do not reflect how dual fuel offers are affected.

<sup>45</sup> As at 15 March 2018, it did not appear that these offers remained available. Click Energy offers that were available on 15 March 2018 did not appear to breach the indicative drafting.

<sup>46</sup> In addition to the ACCC v Origin Energy case covered in section 2.2.1 of this paper, there was another related case on discounts (but not related to the issue raised in the rule change request). In this case, AGL was found to have made false or misleading representations and engaged in misleading or deceptive conduct concerning the level of discount residential consumers would receive under AGL SA's energy plans. Although they initially received the discount, in mid-2012 AGL increased the rates under its energy plans and sent a letter to these consumers advising them of their new rates which stated they would continue to receive their discount. Following the rate increase, however, these customer's rates were higher than those AGL SA applied to consumers who subsequently commenced an energy plan or supply under its standing offer.

There are suggestions that the issue the rule change has raised is becoming an issue for Victoria, which has not adopted the NECF. Analysis completed by St Vincent de Paul Society for the year to January 2018 found there were a number of retailers who have market offers with an annual bill higher than the standing offer (this includes with the guaranteed or pay-on-time discount). Higher market offer compared to standing offer annual bills are more common in electricity than gas, and this has become more common throughout 2017 compared to 2016.<sup>47</sup>

The analysis undertaken by St Vincent de Paul Society uses an annual bill basis for comparison between a retailer's market offer and standing offer for households. There are a number of assumptions about the consumption level of households depending on whether they are single, dual fuel or solar consumers.<sup>48</sup> The St Vincent de Paul Society analysis does not confirm whether there are market offers in Victoria that have all their energy rates (as defined in the indicative drafting) above the equivalent standing offer.

The Commission has not undertaken its own analysis on Victoria's energy offers to identify whether there would be market offers that could not form the basis of a market retail contract under the Commission's initial position.

While any rule will not apply in Victoria, because many of these retailers are also operating in other jurisdictions that have adopted the NECF this might suggest that the practice could become more prevalent in the future.

#### **Question 1      Prevalence of the issue raised in the rule change request**

How prevalent is this practice of discounting in market offers where any (or all) of the demand, usage or daily supply rates are above these rates in the equivalent standing offer in the same distribution supply area? How prevalent has this practice been historically?

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See: Federal Court of Australia, *Australian Competition and Consumer Commission v AGL South Australia Pty Ltd* [2014] FCA 1369 (15 December 2014), Federal Court of Australia, Adelaide, 2014.  
See also: ACCC, *Federal Court finds AGL SA made false or misleading representations about discounts under energy plans*, media release, Canberra, 16 December 2014,  
<https://www.accc.gov.au/media-release/federal-court-finds-agl-sa-made-false-or-misleading-representations-about-discounts-under-energy-plans>.

<sup>47</sup> St Vincent de Paul Society and Alvis Consulting Pty Ltd, *Victorian Energy Prices: January 2018*, report prepared by G Dufty and M Johnston, Melbourne, 2018.

See also: St Vincent de Paul Society and Alvis Consulting Pty Ltd, *Victorian Energy Prices: January 2017*, report prepared by G Dufty and M Johnston, Melbourne, 2017.

<sup>48</sup> The consumption level is assumed to be an average level of 4,800 kWh for single rate offers, which are generally households with gas. Furthermore, electricity only households, predominantly in rural areas, have an assumed average consumption level of 7,000 kWh. These households are on controlled load offers with 70 per cent of consumption allocated to the peak period and 30 per cent of consumption to the off-peak period.

See: St Vincent de Paul Society and Alvis Consulting Pty Ltd, *Victorian Energy Prices: January 2018*, report prepared by G Dufty and M Johnston, Melbourne, 2018, p. 6.

The bill analysis done for solar customers also has a very specific set of assumptions behind it.

See: St Vincent de Paul Society and Alvis Consulting Pty Ltd, *Victorian Energy Prices: January 2018*, report prepared by G Dufty and M Johnston, Melbourne, 2018, p. 54

### 5.1.2 Standing offers and consumer confusion

As set out in section 3.1, the rule change request is premised on the basis that retailers making market offers with discounts where pre-discounted rates are above their equivalent standing offers is inherently confusing for consumers.

#### **Question 2 Standing offers**

Do stakeholders agree that retailers applying discounts in market offers to rates above that retailer's standing offer rates is inherently confusing?

The proposed rule would prevent market retail contracts that have discounts applied to rates above the "equivalent" standing offer rates. This effectively "caps" the rates for energy market offers (containing discounts) to each retailer's standing offer rates. The Commission is seeking comment on whether this is appropriate. The Commission notes that:

- The standing offer typically has the greatest levels of consumer protections in its terms and conditions, and therefore usually has the highest charges.
- As outlined earlier in this paper, standing offer rates are used as reference prices for embedded network customers and potentially by customers generally, as discussed in the ACCC v Origin Energy Limited case in 2015.

#### **Question 3 Standing offers as a "base rate"**

Should standing offer rates be considered base rates, or effectively a "cap", for the purpose of applying discounts to market offers?

### 5.2 Part one of the Commission's initial position

As detailed in section 4.1, the Commission considers that, generally, the NERR should not restrict how retailers make or advertise retail market offers to customers. The Commission considers that the ACL and RPIG form the appropriate regulatory mechanisms.

#### **Question 4 Appropriateness of ACL and RPIG**

Are the ACL and the RPIG generally the appropriate mechanisms to govern retailers making and advertising market offers to consumers?

With the RPIG and ACL as the primary mechanisms governing retailers making and advertising market offers, the Commission considers it is important that the AER has the enforcement tools necessary to enforce compliance with the RPIG. Therefore the Commission's initial position includes making a recommendation to add a civil penalty to the market and standing offer pricing presentation provisions in the RPIG, under the NERL.

### **Question 5 Civil penalty recommendation**

Should a civil penalty provision be added to sections 25 and 37 of the NERL, in respect of the requirement to present standing and market offers in accordance with the RPIG? What would be the benefits of doing so? What would be the costs?

## **5.3 Part two of the Commission's initial position**

### **5.3.1 Direct prohibition of certain offers**

The Commission's initial position is that the RPIG and ACL are generally the appropriate regulatory mechanisms governing the pricing presentation and advertising of retail market offers. However, the Commission considers, based on its initial analysis, that discounting prohibitions should be applied to some specific offers that have the potential to cause customer confusion and will never be in the long term interests of consumers. These market offers should therefore be expressly prohibited as the basis for a market retail contract in the NERR. The Commission's reasons for its initial position on this discounting prohibition are detailed in section 4.2.1.

### **Question 6 Direct prohibition within the NERR**

Should some specific types of market retail contracts be expressly prohibited under the NERR?

The Commission set out in section 4.2.2 how its proposed discounting prohibition operates and the discounting in market retail contracts it considers should be directly prohibited, and the conditions for this prohibition.

In summary, retailers would not be able to discount energy rates in a market retail contract where:

- an equivalent standing offer to that market retail contract exists
- every single energy rate (before discounts) is above the equivalent energy rates in an equivalent standing offer
- every single energy payment is equal to or lower than the equivalent payments in the equivalent standing offer.

### **Question 7 Market retail contracts to be directly prohibited**

Do you agree with the Commission's initial discount prohibition as applied to the market retail contracts as set out in section 4.2.2?

### **5.3.2 Specific questions regarding the Commission's initial position as expressed in the indicative drafting**

The Commission invites comments from stakeholders on all aspects of the Commission's initial position as expressed in the indicative drafting. A series of specific

questions are set out below that stakeholders could respond to regarding the operation of the Commission's initial position.

### **Fees and penalties**

The Commission's initial position and indicative drafting exclude the consideration of fees and penalties in comparing a market retail contract to an "equivalent" standing offer: energy rates and energy payments are included, but fees and penalties are not.

#### **Question 8      Exclusion of fees and penalties**

Do you agree with the exclusion of fees and penalties from consideration of whether there is an equivalent standing offer in the Commission's initial position?

### **"Materiality" and discretion for the AER**

The Commission's initial position requires the *materiality* of differences between the market retail contract and the standing offer to be considered in two respects: tariff structures (in relation to energy payments and energy rates) and benefits and services.

This is intended to give the AER some discretion on what is an "equivalent" standing offer for every market retail contract. This will potentially reduce the ability for retailers to circumvent a rule reflecting the indicative drafting by simply making very minor changes to a market offer or a standing offer to remove equivalence.

Early consultation on the Commission's initial position raised concerns with the AER's discretion in regards to materiality. It was stated that the use of materiality in a rule implementing the indicative drafting may not provide certainty to the market as to how such a rule would be enforced.

#### **Question 9      Materiality and discretion for the AER**

Do you think the concept of materiality for differences between tariff structures and benefits and services in standing offers and market retail contracts is appropriate?

### **Issues around the equivalency of energy payments**

Differences in the nature of energy payments in a standing offer and market retail contract could lead to some market retail contracts not being captured under the initial position (due to there being no "equivalent standing offer") that, potentially, should be captured.

**Question 10      Equivalency on energy payments**

The basis on which energy payments are made may differ between market retail contracts and standing offers. Is it appropriate for differences of this kind to prevent the standing offer being an equivalent standing offer (assuming the other conditions for equivalence are met)? If not, what approach would be preferable?

**Market retail contract and standing offer availability to the same customer**

The Commission’s initial position relies upon the market retail contract and standing offer being available to the same small customer (if the retailer were the designated retailer for that premises) as a condition for the standing offer being equivalent with the market retail contract. This is intended to cover the concept of “generally available to the small customer in the region in which the customer is to consume electricity under the market retail contract” in the proposed rule.

**Question 11      Market retail contract and standing offer availability to the same customer**

The Commission’s initial position relies upon the market retail contract and standing offer being available to the same small customer (if the retailer were the designated retailer for the customer’s premises) for matching the market retail contract to the standing offer for the discounting prohibition on energy rates to take effect. Is this appropriate?

**Energy rates and energy payment definitions**

The Commission’s initial position relies on two new definitions for its operation: energy rates and energy payments. The indicative drafting of these potential definitions can be found in Box 4.1 in section 4.2.4.

**Question 12      Energy rates and energy payments**

Do you consider that the definitions of energy rates and energy payments in the indicative drafting are clear and workable? Please note any potential ambiguities or items that you consider should be specifically included in or excluded from these concepts.

**Dual fuel under the Commission’s initial position and indicative drafting**

Under the indicative drafting, dual fuel contracts are catered for in different ways. The Commission invites comments on the types of dual fuel market retail contracts identified and how each are treated under the indicative drafting. The types of dual fuel market retail contracts and their treatment under the indicative drafting are covered in more detail in section 4.2.4.



**Question 13 Approach to dual fuel contracts**

Is the Commission's approach to dual fuel contracts in the indicative drafting appropriate? Are there any issues in the treatment of the types of contracting for dual fuel services, particularly in matching the relevant energy rates, energy payments, tariff structure, and benefits and services to an "equivalent" standing offer, that have not been addressed in the Commission's initial position?

**Changes to prices throughout contracts**

Standing offer prices can be changed by energy retailers every six months.<sup>49</sup> Market retail contract prices can be changed at any time.<sup>50</sup> However, some market retail contracts have fixed price terms (where the energy charges remain constant) of up to two years. This may be considered a reason for having market offer prices higher than the current standing offer prices.

The Commission wishes to invite comments on whether market retail contracts with fixed price terms should be considered differently for a rule implementing its indicative drafting, particularly where the terms for fixed prices exceed those for which standing offers are required to be fixed (i.e. greater than six months). For example, having a long fixed price period could be explicitly treated as a "benefit or service" under the market retail contract, meaning that there would be no equivalent standing offer and the discount prohibition would therefore not apply.

**Question 14 Prices changes throughout a contract**

Should market retail contracts with fixed prices for a period (or throughout the life of) the contract be considered differently from contracts with variable prices for the Commission's initial position?

**5.3.4 Impact of a rule under the initial position**

For retailers to maintain compliance with a rule implementing the indicative drafting and reflecting the Commission's initial position, a few responses are possible. One could be to increase standing offers. Another could be to provide that the tariff structures of market offers do not match the tariff structures of standing offers so there would be fewer (or no) equivalent standing offers for every market retail contract formed. Other potential responses would be to cease offering discount provisions in contracts or to decrease the market offer prices to the level of the standing offer prices or below. While some stakeholder views have been sought on this matter through early consultation noted in section 6.2, the Commission invites further responses.

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<sup>49</sup> NERL section 23(5).

<sup>50</sup> See NERR rule 46.

**Question 15 Likely response to a rule reflecting the indicative drafting**

What would be the expected response of retailers to a rule implementing the indicative drafting?

The Commission is interested in stakeholder views regarding the potential regulatory burden placed on market participants, namely energy retailers, for a rule reflecting the indicative drafting.

**Question 16 Regulatory burden of a rule reflecting the indicative drafting**

Would a rule implementing the indicative drafting be burdensome to maintain compliance with?

**5.3.5 Civil penalties for part one of the initial position**

The rule change request suggested civil penalties for its proposed rule. If a rule implementing the Commission's initial position were to be made, the Commission may (jointly with the AER) make a civil penalty recommendation for that rule.

**Question 17 Civil penalties for part one of the initial position**

Is a civil penalty recommendation for a rule reflecting the Commission's initial position in this consultation paper appropriate?

**5.4 Contingent and related issues to the rule change request**

The below issues and questions would apply to a response to the rule change request more generally, given the scope outlined in section 3.1. Thus, it encompasses issues and questions in common between the issues raised in the rule change request (section 3.1), the proposed rule (section 3.2), and part two of the Commission's initial position (section 4.2).

**5.4.1 Operation of the rule in jurisdictions which regulate standing offers**

The potential operation of a rule in response to the rule change request could be an issue for jurisdictions in the NEM where standing offer prices are regulated. In the Commission's early informal consultation, some stakeholders did raise concerns about how a rule under this rule change request might operate and what impact it would in areas where standing offer prices are regulated.

Standing offers are currently regulated in these areas:

- regional Queensland (which does not currently have market offers)
- Tasmania (only small business customers have access to market offers; residential customers all access regulated standing offers)
- the Australian Capital Territory, where small customers also have access to market offers.

**Question 18 Regulation of standing offers**

Would a rule in response to this rule change request need to consider jurisdictions or parts of the NEM where the standing offer is regulated?

**5.4.2 Commencement date of a rule**

The rule change request asked that the rule change commence on 1 March 2018. It also requests the Commission consider an appropriate commencement date and transitional approaches bearing in mind the impact of the rule change (specifically, the proposed rule).

**Question 19 Commencement dates**

Should a rule, if made, commence immediately upon being made (on 15 May 2018 according to the Commission's proposed timeline) or should its commencement be delayed to provide time for retailers to implement compliance systems? If it should be delayed for this reason, what period of time will retailers require?

**5.4.3 Effectiveness of current arrangements and value of a rule change**

The rule change request suggests its proposed rule may capture behaviour that is not covered by the ACL, and may reduce the need for time consuming and complex legal deliberations under the ACL in relation to the specified discounting behaviour. The rule change could complement existing provisions to prevent the most egregious discounting practices which can cause confusion leading to consumer detriment (covered in more detail in section 4.2).

**Question 20 Complementarity of the rule change to current arrangements**

Given the current regulatory arrangements does the rule change complement these arrangements and address discounting practices which can cause confusion and consumer detriment?

Do you consider there are instances where consumer detriment could result from discounting practices described in the rule change request, where there may not be a breach of the ACL or where the ACL may be costly to have recourse to?

As noted in section 2.2, a draft revised RPIG has been published with some changes that may reduce the importance of discounts and thus reduce the customer confusion this rule change seeks to address. Namely, retailers will now be required to link to a new Basic Product Information sheet prepared by the AER for all of their energy offers, including two bill estimates for each of the following consumption categories: low, medium and high consumption. These two bill estimates relate to when all available discounts are obtained in the energy offer, and when no discounts are received under the energy offer.

**Question 21      Complementarity of the rule change to potential future arrangements**

Would a final RPIG including the comparison pricing table requirement in the draft RPIG published 30 January 2018 reduce the need for, or reduce the benefit for, a potential rule on this rule change request? Are there other aspects of the draft RPIG that would reduce the need for, or reduce the benefit of such a rule?

**5.5      Retail gas**

The Commission's initial position covers retail gas, as well as retail electricity. As the NERR applies to both retail gas and electricity, even though the rule change request does not refer to retail gas, there is a strong case that a rule (if made) should apply to retail gas. The only reason why the rule would not apply to gas is if there is a reason to treat retail gas differently, or to omit the consideration of retail gas.

**Question 22      Consideration of retail gas**

Is there a reason why a rule made in response to this rule change request should not cover retail gas offers? Is there a case to exclude gas from a rule, or to treat retail gas differently from retail electricity?

## 6 Process for this rule change

This chapter of the consultation paper details the approach the Commission is taking in this rule change request's assessment process.

It covers:

- the expedition of the rule change request (i.e. treatment as a non-controversial rule change)
- the reasons why the consultation paper includes an initial position and indicative drafting reflecting this initial position
- key dates for this rule change process
- the process for lodging a submission on this consultation paper.

### 6.1 Treatment as a non-controversial rule change

The proponent proposed the rule change request be made under the expedited process set out in section 252 of the NERL.

The Commission considers that the rule change request should be subject to the expedited rule making process under section 252 of the NERL. This is on the grounds that we consider the rule change request to be a request for a non-controversial rule (as that term is defined in the NERL).

Under section 235 of the NERL a 'non-controversial Rule' is defined as 'a Rule that is unlikely to have a significant effect on a market for energy or the regulation of customer connection services'. The Commission considers that the proposed rule change would be unlikely to have a significant impact because, based on analysis of the current electricity and gas retail market offers, it would prohibit discounts in only a small number of market retail contracts for electricity or gas services. It is therefore unlikely to lead to a structural change in the way prices or products are offered in the market or increase costs to market participants.

Rule changes that are considered to be non-controversial may be processed under an expedited (faster) process than the Commission's standard rule change process. Under an expedited process there is only one round of consultation and the Commission must publish its final rule determination within six weeks of commencing the rule change process (subject to extension if warranted).<sup>51</sup>

The Commission has decided to use an expedited process to consider this rule change request provided that it does not receive any valid requests not to use the expedited process by Tuesday 3 April 2018. To be valid, an objection should set out the reasons why the rule change request is a request for a rule that will or is likely to have a significant impact on a market for energy or the regulation of customer connection services.

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<sup>51</sup> The Commission has published a notice under sections 251 and 252 of the National Energy Retail Law to commence and assess this rule change request as a non-controversial rule.

While the rule change is considered appropriate for an expedited process, the Commission considers that the time between the publication of the consultation paper and the final rule determination should be extended from six weeks to eight weeks.<sup>52</sup>

The extension allows more time to consider submissions and other issues related to the rule change request.

## **6.2 Process and approach to this rule change request**

The Commission has conducted a substantial amount of informal targeted consultation on this rule change prior to publishing the consultation paper. This has included:

- Teleconferences with stakeholders across the energy industry, including energy retailers, consumer groups, government and market bodies.
- On 15 February 2018, the Commission held an informal workshop with a range of stakeholders for this rule change request. The workshop allowed stakeholders to be presented an earlier version of what is now the Commission's initial position (a potential approach reflecting a staff level view) to this rule change request, with preliminary drafting reflecting the potential approach.
- An opportunity for stakeholders who attended the workshop to provide feedback on the earlier draft of the Commission's initial position (the potential approach).

From that early consultation we have received substantial feedback and comment on the potential approach to the rule change request, the preliminary drafting and the rule change request itself. The Commission's initial position, indicative drafting and issues for consultation presented in chapter 5 therefore reflect the early consultation and feedback received from stakeholders.

The Commission has also taken a different approach to this consultation paper. The paper includes a Commission initial position on the rule change request and indicative drafting reflecting the initial position. This is designed to provide greater opportunities for stakeholder feedback than the minimum requirements of the expedited process.

Neither the initial position nor the indicative drafting constitutes a statutory approved position of the Commission like that of a draft determination and draft rule. This consultation paper, in publishing a Commission initial position and indicative drafting reflecting that initial position, is more akin to a directions paper.<sup>53</sup>

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<sup>52</sup> This is consistent with the COAG Energy Council's January 2016 response to the Review of Governance Arrangements for Australian Energy Markets, in which the COAG Energy Council, at 3.6, agreed that changes should be made to the national energy laws to allow the expedited rule change process time-frame to be increased from six weeks to eight weeks.

<sup>53</sup> For example, see: AEMC, Five Minute Settlement, directions paper, 11 April 2017, Sydney.

### 6.3 Key dates

The Commission's proposed key dates for the rule change are set out in Table 6.1 below:

**Table 6.1 Key dates for this rule change process**

Milestone	Date
Early informal stakeholder workshop	15 February 2018
Publication of consultation paper and commencement of the rule change process	20 March 2018
Objections to Commission decision that the rule change request is for a non-controversial rule (expedition)	3 April 2018
Extra stakeholder workshop	TBC
Submissions on the consultation paper due	17 April 2018
Publication of final determination and final rule (if made)	15 May 2018

### 6.4 Lodging a submission or request not to make a rule under an expedited process

The Commission invites requests not to make a rule under the expedited process and written submissions on this rule change request.

All enquiries on this project should be addressed to Thomas Redmond or Ben Davis on (02) 8296 7800.

#### 6.4.1 Lodging a request not to make a rule under an expedited process

Written requests not to make a rule under the expedited process in section 252 of the NERL must include reasons for the request, and must be lodged with the Commission by 3 April 2018, either online or by mail, in accordance with the requirements specified below.

The Commission urges all stakeholders considering lodging a request not to make a rule under an expedited process to first contact the project team (either Thomas Redmond or Ben Davis) on (02) 8296 7800.

#### 6.4.2 Lodging a written submission to this rule change request

Written submissions on the rule change request must be lodged with Commission by 17 April 2018, either online or by mail, in accordance with the requirements specified below.

Where practicable, submissions should be prepared in accordance with the Commission's guidelines for making written submissions on rule change requests.<sup>54</sup> The Commission publishes all submissions on its website, subject to a claim of confidentiality.

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<sup>54</sup> This guideline is available on the Commission's website [www.aemc.gov.au](http://www.aemc.gov.au).

#### **6.4.3 Lodging a submission or request not to make a rule under an expedited process electronically**

Electronic submissions, or requests to not make a rule under the expedited process, may be lodged online via the Commission's website, [www.aemc.gov.au](http://www.aemc.gov.au), using the "lodge a submission" function and selecting the project reference code RRC0012.

The request or submission must be on letterhead (if submitted on behalf of an organisation), signed and dated.

#### **6.4.4 Lodging a submission or request not to make a rule under an expedited process by mail**

The submission, or request to not make a rule under the expedited process, must be on letterhead (if submitted on behalf of an organisation), signed and dated. It may be sent by mail to:

Australian Energy Market Commission

PO Box A2449

Sydney South NSW 1235

The envelope must be clearly marked with the project reference code RRC0012.



## Abbreviations and defined terms

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
AER	Australian Energy Regulator
COAG	Council of Australian Governments
Commission	Australian Energy Market Commission
NECF	National Energy Customer Framework
NEM	national electricity market
NERL	National Energy Retail Law
NERO	National Energy Retail Objective
NERR	National Energy Retail Rules
proposed rule	drafting on page 3 of the proponent’s rule change request as a solution to the issues raised in the rule change request
indicative drafting	drafting presented in section 4.2.4 of this consultation paper, consistent with the Commission’s initial position, and providing a potential more preferable solution to the issues raised in the rule change request
RPIG	Retail Pricing Information Guidelines
SA	South Australia

## Appendix A: Data analysis

The data analysis undertaken by Commission staff used data obtained from the AER's EnergyMadeEasy comparison website on 17 January 2018 to examine the existing market offers that would be non-compliant with the proposed rule in this rule change request (described in section 3.2) and the indicative drafting reflecting the Commission's initial position (described in section 4.2.2 and set out in full in section 4.2.4).

### A.1 Methodology

#### A.1.1 Breaches of the proposed rule

To estimate the market offers that would be in breach as market retail contracts under the proposed rule we:

- found market offers which contained discounts
- matched market offers and standing offers in terms of:
  - retailer
  - fuel type (whether electricity, gas or dual fuel)
  - customer type (whether small business or residential)
  - tariff type (for tariff structures)
  - distribution supply area.
- used the tariff fields to determine whether any of the below charges in the market offer exceeded the standing offer:
  - the daily supply charge
  - the usage charge
  - the demand charge.

As the data we are using is from EnergyMadeEasy, each of the standing offers would be considered "generally available" as per the proposed rule.<sup>55</sup> All offers published on EnergyMadeEasy are "generally available".<sup>56</sup>

#### A.1.2 Breaches of the indicative drafting

To estimate the market offers that would be in breach as market retail contracts under the indicative drafting reflecting the Commission's initial position we took a similar approach in most aspects.<sup>57</sup>

We also considered feed-in tariffs in terms of there being an energy payment. This means considering whether the level or rate of every energy payment under the market

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<sup>55</sup> Rule change request, p. 3.

<sup>56</sup> AER, *AER Retail Pricing Information Guidelines: Version 4.0*, AER, Melbourne, 2015, p. 20.

<sup>57</sup> Note that we have not undertaken an analysis of dual fuel offers at this time.

offer is equal to or lower than the level or rate of the equivalent energy payment under the equivalent standing offer.

## A.2 Analysis of energy offers

A summary of the results of the analysis of energy offers in EnergyMadeEasy on 17 January 2018 for market offers that would breach the proposed rule and indicative drafting (if market retail contracts were entered into based on the market offers) can be found in Table A.1 below.

**Table A.1 Summary of the data on offers captured by the proposed rule and indicative drafting offer types, fuels and customer type as at 17 January 2018**

		Type of offer			Breaches	
Fuel type	Customer type	Regulated	Standing	Market	Proposed rule	Indicative drafting
Electricity	Residential	15	585	1145	53	17
	Small business	42	591	967	22	3
Gas	Residential	7	47	207	2	0
	Small business	7	40	118	0	0
Total		71	1263	2437	77	20

The results indicate that two per cent of all energy offers (including regulated, standing and market) available on EnergyMadeEasy on 17 January 2018 would be in breach of the proposed rule. Under a rule based on the indicative drafting, 0.5 per cent of all energy offers would be in breach.<sup>58</sup>

<sup>58</sup> Note that retailers may change or withdraw offers published on EnergyMadeEasy and the results reported above are specific to the date of the analysis.