Australian Energy Market Commission

RULE CHANGE

RULE DETERMINATION

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

15 May 2018

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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.

Summary

On 9 and 30 August 2017, the Prime Minister met with and announced agreement from the seven largest Australian energy 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 were addressed by the Australian Energy Regulator's (AER) recently revised Retail Pricing Information Guidelines (RPIG). The RPIG provides guidance on how retailers should present pricing information, which could include percentage discounting. For other matters it was concluded changes to the National Energy Retail Rules (NERR) 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). The rule change request states that:

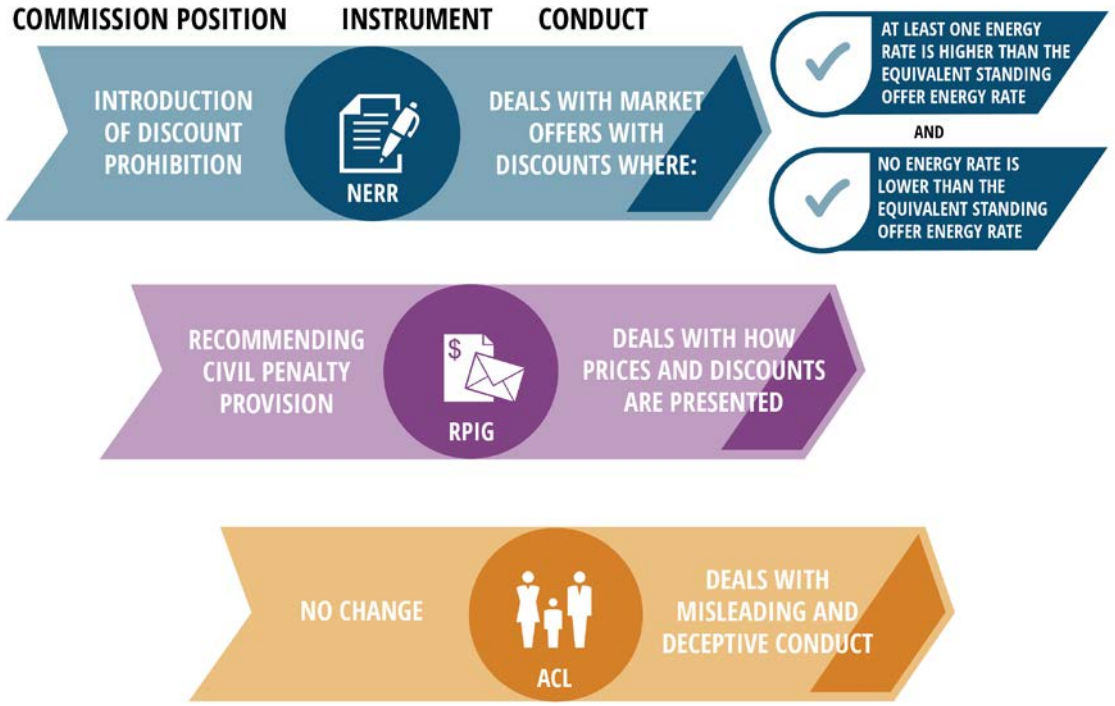
> "The rule is aimed at preventing a behaviour that is considered to be inherently confusing for the average consumer – the practice of applying discounts to rates that significantly exceed the base rate as represented by the retailer's standing offer. Because the base rate against which the discount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

The rule change request proposes to prohibit such behaviour by restricting retailers from applying discounts to market retail contracts if any of the rates in the contract are higher than the retailer's equivalent standing offer rates.

Commission's more preferable final rule and civil penalty provision

The Commission supports the intent of the rule change request and the final determination achieves this intent through a targeted and integrated approach. It strengthens the existing regulatory framework by changes to the NERR and the addition of a civil penalty provision to the AER's RPIG. These changes will work in tandem with the existing Australian Consumer Law (ACL), as displayed in Figure 1.

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



As displayed in Figure 1, the two changes are:

1. Introducing a rule in the NERR (not applicable in Victoria) restricting retailers from including discounts in market retail contracts where customers would definitely be worse off under the undiscounted market offer than under the standing offer.
2. A joint Commission-AER recommendation to the COAG Energy Council to make retailers' non-compliance with the RPIG's provisions on the presentation of market and standing offer prices subject to a civil penalty under the NERL. 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) per breach.

Commission's analysis

A competitive retail energy market is generally better at producing energy offers that meet consumers' preferences at prices consumers are willing to pay than regulatory measures which restrict the offers that retailers are able to make to consumers. 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.

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

prices. In this context it is important that the RPIG is enforceable and to achieve this the Commission recommends a civil penalty provision for the RPIG.

The addition of civil penalties for the RPIG would provide the AER greater enforcement options. The AER will be able to use these options to fit the circumstances when faced with a contravention of the RPIG. The Commission considers civil 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.

In addition, 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 is appropriate.

This is the case where retailers provide discounts in a market retail contract where at least one rate is above the equivalent rate in a standing offer and no rates in the market offer are below an equivalent rate in a 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 final rule prohibits this practice under the NERR.

The rule change sought to prevent market offers with discounts where any rate is above the equivalent rate in a standing offer, even if the other rates in the market offer are below the standing offer rates. The final rule does not restrict such offers because that would capture market offers that are beneficial to consumers. For example, high energy consumption households may be better off on market offers with higher daily supply charges but lower energy usage charges. The Commission also considers that the proposed rule would be more likely to inadvertently cause increases in standing offers. This would materially harm a significant number of consumers.

This new prohibition in the NERR will supplement the ACL. It does not narrow the application of the ACL. If there are discounting practices that would constitute misleading or deceptive conduct, or a false or misleading representation then these practices can and should still be prosecuted by the ACCC under the ACL.

Broader issues relating to discounting

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

The Commission noted in the 2017 Retail Energy Competition Review that energy retailers currently 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. While discounts can be of benefit to consumers, the current presentation of discounts by retailers contributes to consumer confusion. There is not a general recognition by consumers that 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 recent revision of the RPIG has addressed this issue in part, and the ACCC's ongoing Retail Electricity Pricing Inquiry is also 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.

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1 The rule change request

1.1 Introduction and outline

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 aimed to address confusing retailer discounting practices. The rule change request proposed 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.

The proponent also requested that the rule change request be considered a non-controversial rule change request and, as a result, be progressed under an expedited rule change process. This final rule determination:

- summarises the key elements of the rule change request
- sets out the background to the rule change request
- describes the rule change process
- describes the Commission's more preferable final rule and how it meets the national energy retail objective (NERO)
- provides the Commission's approach in relation to its positions on the final rule for this rule change request and civil penalties for the Retail Pricing Information Guidelines (RPIG)
- summarises the issues the Commission considered in its position on civil penalties for the RPIG, including stakeholder views, the Commission's analysis and its final position
- summarises the issues the Commission considered in assessing this rule change request, including stakeholder views, the Commission's analysis and its final determination.

1.2 Rationale for the rule change request

1.2.1 Issues raised in the rule change request

The request raised a number of issues but sought to address one core issue. This core issue is stated 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."[1]

The issue raised in the rule change request is therefore a very specific framing of a problem with discounting. The issue raised does not extend to broader problems associated with discounting practices. These could include the presentation of discounts generally or general consumer confusion created by other types of retailer discounting practices, such as discounts off standing offers which are set in inconsistent ways by energy retailers.

The rule change request further links its statement of the problem to be addressed to two concepts: consumer detriment and the 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.[2]

1.2.2 Arguments in the 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 Australian Energy Regulator's (AER) RPIG and the Australian Consumer Law (ACL):[3]

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 describing discounts in advertising and marketing. It does not extend to what is permissible in the terms and conditions of contracts.[4]
   - **A rule sends a strong signal to energy retailers as to what their obligations are.** A provision in the National Energy Retail Rules (NERR) prohibiting discounting where charges in market offers are higher than in

1 Rule change request, p. 2.

2 Rule change request, p. 6.

3 These are discussed in section 1.4.1.

4 Rule change request, p. 3.

the equivalent standing offer would send a strong signal to energy retailers as to their obligations.[5]

- **Simpler 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.[6]
- **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.[7]

2. **May capture behaviour that is not covered by the ACL.** The rule change request quotes the Australian Competition and Consumer Commission (ACCC) Retail Electricity Pricing Inquiry's preliminary report as support for 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."[8]

1.3 Solution proposed in the rule change request

The proponent sought to resolve the issues discussed in section 1.2 by proposing a rule (the proposed rule) that prohibits retailers from applying 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.

The rule change request states, however, that 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."[9]

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5 Ibid, p. 6.

6 Ibid, p. 6.

7 Ibid, pp. 3–4.

8 Ibid, p. 6.

9 NERL section 2.

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.[10]

The proposed rule would apply only if there is a standing offer with a 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 (to which a discount applies) with standing offer rates 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.[11]

The rule change request also suggested 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.[12] 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 national electricity market as distribution network pricing covers groups of customers in the same geographical area.[13]

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.[14]

The rule change request suggested a civil penalty 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.[15]

To illustrate how the proposed rule would apply, if it were made, the Commission has developed examples of its likely operation. These examples are set out in Box 1.1 and Box 1.2 below.

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10 The term "generally available" has a meaning in the RPIG.
AER, *AER Retail Pricing Information Guidelines: Version 4.0*, Melbourne, 2015, p. 17. Version 5.0 of the RPIG was released on 23 April 2018 but does not take effect until 31 August 2018; see p. 22 for its definition of "generally available plan".

11 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.

12 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.

13 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.

14 Rule change request, p. 4.

15 Rule change request, pp. 3–4.

Box 1.1 First example of how the proposed rule would operate

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

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

Box 1.2 Second example of how the proposed rule would operate

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

	Standing offer	**Market offer**
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.

1.4 Relevant 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.[16]

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.

1.4.1 Current arrangements

There are two existing regulatory frameworks 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 ACL under the Competition and Consumer Act 2010 (enforced by the Australian Competition and Consumer Commission (ACCC)), and the AER's RPIG.

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 or misleading representations about goods or services (section 29).

The ACCC has previously taken action against energy 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.[17] This was in respect of Origin's DailySaver electricity, gas and dual fuel plans.[18]

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, Origin admitted that some consumers would have understood that its discounts in the DailySaver plans would be applied to energy usage rates available generally to consumers like themselves (i.e. the standing offer).

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16 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.

17 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-%2013%20November%202017.pdf.

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

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.[19] 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.[20]

The Retail Pricing Information Guidelines

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

The RPIG has been recently revised and the revised RPIG will come into effect in August this year.[21] This revised RPIG had its genesis in a 2017 review conducted by the AER. The Customer Price Information review, published in September 2017, focused on the detailed implementation of the outcomes from the Prime Minister's August 2017 roundtable meetings with energy retailers.[22]

The issues paper for the review 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.[23] The Customer Price Information review informed a range of the AER's work in relation to its RPIG, including discounts.

Following the review and consultation on revisions to the RPIG, the AER published a final revised RPIG on 23 April 2018 (version 5.0). It will take effect on 31 August 2018. The final revised RPIG requirements on retailers regarding discounts have not changed substantially from version 4.0. The most important change relevant to discounts is that retailers will now be required to present a new Basic Product Information Document (BPID; prepared by the AER) for all of their energy offers.

RPIG version 5.0 requires retailers to have two documents for each energy offer available: the BPID and the Detailed Plan Information Document (DPID).[24] Importantly, the BPID includes two bill estimates for each of the following household usage profiles:

- a one person household
- a two to three person household
- a four to five or more person household.

19 Ibid, paragraphs 25–27.

20 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.

21 AER, *AER Retail Pricing Information Guidelines: Version 5.0*, AER, Melbourne, 2018.

22 AER, *Customer price information: issues paper*, AER, Melbourne, 2017, pp. 6–7.

23 Ibid, p. 3.

24 AER, *AER Retail Pricing Information Guidelines: Version 5.0*, AER, Melbourne, 2018, p. 5.

The two bill estimates for each of these usage profiles relate to when all available discounts in the energy offer are obtained, and when conditional discounts are not obtained under the energy offer.[25]

Notably, the comparison pricing table will not be displayed on the BPID for:

- small business customer energy offers
- residential customer energy offers with demand charges
- plans where customer usage data is required to price the plan.[26]

In relation to discounts, the RPIG version 5.0 requires retailers to provide the following information on Energy Made Easy (EME) for the purposes of the BPID and the DPID:

- the amount and/or percentage of the discount
- for percentage discounts, what component of the customer's bill the discount applies to (for example, whether the discount is off usage, the supply charge or the whole bill) and if the discount is off the GST inclusive or exclusive charges
- the base level tariff and what the discount is off
- where information on the base level can be found (including the specific page where it can be found on the retailer's website)
- for dual fuel offers, which fuel(s) the discount applies to
- for solar plans, how any discounts are to be applied. For example, is the discount off total usage, or the net bill amount after solar credits.[27]

This information must also be included in retailers' marketing or advertising about a specific discount rate. There are some additional specific requirements for retailers in describing discounts in their advertising and marketing.[28]

1.4.2 Concurrent work on related issues: ACCC Retail Electricity Pricing Inquiry

External to the Commission, the ACCC's Retail Electricity Pricing Inquiry relates to issues raised by this rule change request. This ACCC inquiry has the mandate and scope to address broader issues to do with discounting.

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 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 transactions costs, a lack of transparent information, or other factors."[29]

25 Ibid, p. 21.

26 Ibid, p. 21.

27 Ibid, pp. 9–10. These information requirements are similar to those in the RPIG version 4.0.

28 Ibid, p. 20.

29 S Morrison (Treasurer), *Inquiry into Retail Electricity Supply*, Parliament House, Canberra, 27 March 2017.

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."[30]

The ACCC is still developing its final report for its Retail Electricity Pricing Inquiry, to be provided to the Australian Government by 30 June 2018.

1.5 The Commission's rule making and consultation process

On 20 March 2018, the Commission published a notice advising of its commencement of the rule making process and consultation in respect of the rule change request.[31] A consultation paper identifying specific issues for consultation was also published. Submissions closed on 17 April 2018.

The Commission considered that the rule change request was a request for a non-controversial rule as defined in section 252 in the NERL. Accordingly, the Commission commenced an expedited rule change process, subject to any written requests not to do so. The closing date for receipt of written requests was 3 April 2018.

No objections to the Commission carrying out an expedited rule change process were received. Accordingly, the rule change request was considered under an expedited process.[32]

The Commission received 17 submissions. Issues that are not discussed in the body of this document have been summarised and responded to in Appendix A.

The Commission also held stakeholder forums on 15 February 2018 and 5 April 2018 to discuss the rule change request and the Commission's initial and revised positions on the issues raised in the rule change request. These were attended by a range of stakeholders including representatives from energy retailers, ombudsmen, government, market bodies and consumer representatives.

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30 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.

31 This notice was published under section 251 of the NERL.

32 Section 252 of the NERL.

2 Final rule determination

This chapter outlines:[33]

- the Commission's final rule determination
- the rule making test for changes to the NERR
- the assessment framework for considering the rule change request
- a summary of the Commission's consideration of the more preferable final rule against the NERO.

2.1 The Commission's final rule

The Commission's final rule determination is to make a more preferable final rule. The more preferable final rule's key features are summarised in Table 2.1 below.

At a high level, a retailer would be in breach of the final rule if all the following conditions are satisfied:

(1) The retailer formed a market retail contract including provisions for discounts to any energy rates

(2) The retailer has a standing offer that is equivalent to the market retail contract (an "equivalent standing offer" — the conditions for equivalency are referred to as the "equivalency test" in section 5.5)

(3) The retailer's market retail contract both has:

  (a) at least one energy rate that exceeds the equivalent energy rate component under the equivalent standing offer (before the application of the discount)

  (b) no energy rate that is lower than the equivalent energy rate component under the equivalent standing offer (together with (3)(a) above, referred to as the "energy rates test" in section 5.2).

(4) The retailer's market retail contract has every single energy payment to a consumer (for example, a feed-in tariff) equal to or lower than the equivalent payments in the equivalent standing offer (referred to as the "energy payments test" in section 5.3).

Table 2.1 Key features of the final rule

Key feature of the rule	Operation of the feature
Prohibition on discounting in certain circumstances	A retailer must not include a discount to an energy rate in a market retail contract with a small customer if the conditions outlined below are met.

33 Note that the proposal to attach civil penalties to the provisions in the NERL that require retailers to comply with the RPIG in relation to the presentation of prices is discussed in chapter 4 rather than this chapter, as that proposal will be a recommendation to the COAG Energy Council, not a rule change.

Key feature of the rule	Operation of the feature
Preventing confusing discounts that cause consumer detriment: *energy rates test*	The discount prohibition will apply to all market retail contracts where, before any discounts are applied: • at least one energy rate exceeds the equivalent energy rate component under the equivalent standing offer • no energy rate under the market retail contract is lower than the equivalent energy rate component under the equivalent standing offer. This condition is part of three conditions that must be satisfied for the discount prohibition to apply. The other two conditions are the *energy payments test* and *conditions for equivalency*.
Preventing confusing discounts that cause consumer detriment: *energy payments test*	The discount prohibition will apply to all market retail contracts where the level or rate of every energy payment to the customer under the market retail contract (if any), such as feed-in tariffs, is equal to or lower than the level or rate of the equivalent energy payment under the equivalent standing offer. This condition is part of three conditions that must be satisfied for the discount prohibition to apply. The other two conditions are the *energy rates test* and *conditions for equivalency*.
Conditions for equivalency between a market retail contract and standing offer	The discounting prohibition applies only to a market retail contract that has an equivalent standing offer. A standing offer is equivalent to a market retail contract if: • they are provided by the same retailer (or by related bodies corporate) • their tariff structures are not materially different with respect to energy rates and energy payments • the market retail contract does not provide material additional benefits or services to the customer compared to the standing offer • they are both available to the same customer, or would be, if the retailer were the designated retailer for the customer's premises.[34] This condition is part of three conditions that must be satisfied for the discount prohibition to apply. The other two conditions are the *energy rates test* and *energy payments test*.
Materiality with respect to: • tariff structures of energy rates and energy payments • additional benefits and services.	• The references to "material" means trivial differences in tariff structures or benefits and services between the market retail contract and the standing offer will not prevent the discount prohibition from applying to a retailer's market retail contract. • The AER will need to judge what is "material" in enforcing the final rule. Some guiding examples of materiality are provided in Boxes 5.2 to 5.6 in chapter 5.

34 This is included as only the designated retailer for a customer's premises is obliged to offer a standing offer to that customer. NERL Part 2, Division 3.

Key feature of the rule	Operation of the feature
Explicit accounting for fixed price market retail contracts	Market contracts that have all energy rates fixed for 12 months or more will be exempt from the discount prohibition by way of not being considered to have an "equivalent standing offer".[35]
Accounting for unique aspects of dual fuel contracts in the operation of the discount prohibition	• A new definition of a dual fuel market contract has been included in the NERR.[36] This covers: (a) one market retail contract between a small customer and a retailer for the sale of both electricity and gas by the retailer to the small customer (b) two market retail contracts with the same small customer, one for the sale of electricity and the other for the sale of gas to the customer, where the prices or conditions of one or both contracts are contingent on the customer entering into both contracts. • Dual fuel market contracts can have an equivalent standing offer that is either: — a dual fuel standing offer — a combination of an electricity-only standing offer and a gas-only standing offer. • Single fuel market contracts will not match to one fuel in a dual fuel standing offer.
Commencement date	The final rule for the discount prohibition takes effect on 1 July 2018. This date coincides with network pricing changes in all National Energy Customer Framework adoptive jurisdictions.

The Commission's reasons for making this final rule determination are summarised in section 2.4. Further information on the legal requirements for making this final rule determination is set out in Appendix B.

The more preferable final rule made by the Commission is published with this final rule determination.

The Commission has sought to enhance the proposed rule with its more preferable final rule. The discount prohibition in the more preferable final rule targets instances where consumers could enter into contracts where they would be (penalties and fees aside) worse off on the undiscounted market retail contract compared to the standing offer. We have also made sure the comparison of rates between the market retail contract and standing offer is more of a "like for like" comparison. This way we can account for additional benefits and services received by consumers.

A detailed comparison of the more preferable final rule and the proposed rule is contained in Appendix D.

35 Other fixed price market contracts will be assessed by the AER under the conditions for an "equivalent standing offer" in terms of the fixed price aspect being a "material additional benefit or service". This is covered in more detailed in section 5.6.4.

36 This impacts existing rules 48B and 117, as discussed in section 5.11.4 of this final determination.

2.2 Rule making test

2.2.1 Achieving the national energy retail objective

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 NERO.[37] This is the decision making framework that the Commission must apply.

The NERO is:[38]

> "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").[39] 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.[40] If the Commission is satisfied that one test, but not the other, has been met, the rule cannot be made.

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.

2.2.2 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 NERO.

2.3 Assessment framework

In assessing the rule change request against the NERO the Commission has considered the following principles:

- **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 has assessed the extent to which the proposed rule and alternatives are likely to promote information provision that facilitates informed consumer choices.

37 Section 236(1) of the NERL.

38 Section 13 of the NERL.

39 Section 236(2)(b) of the NERL.

40 That is, the legal tests set out in sections 236(1) and (2)(b) of the NERL.

- **Regulatory and administrative burden:** The Commission has assessed the extent to which proposed solutions impose costs on market participants. The Commission has also assessed 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 has assessed the extent to which any rule is likely to restrict tariff and service innovation in the future.

The Commission's assessment against these principles is set out in section 2.5.2.

2.4 Summary of reasons

2.4.1 Contributing to the achievement of the NERO

Having regard to the issues raised in the rule change request and during consultation, the Commission is satisfied that the more preferable final rule will, or is likely to, better contribute to the achievement of the NERO for the reasons set out below.

Transparency of information

The Commission considers that the more preferable final rule is likely to promote greater transparency of information to consumers by restricting a practice that is inherently confusing.

Standing offers generally correspond to the highest terms and conditions and consumer protections afforded to consumers in jurisdictions applying the National Energy Customer Framework (NECF), and thus generally are the most expensive energy offers in the market. Therefore, the practice of discounting off market offers above the standing offer (that will be prohibited by the Commission's final rule) lacks transparency as it obscures the market contract's higher energy rates (relative to the standing offer) through an inflated level of discount. A key reason the market retail contract may be attractive is through confusing consumers with these inflated discounting rates.

This kind of transparency of information is crucial to competition and consumer engagement. This discounting prohibition in the final rule will assist consumers in having the confidence to compare and choose energy products and services they value at prices they are willing to pay.

Regulatory and administrative burden

The Commission's final rule is unlikely to have a significant impact on regulatory burden because the practice being restricted is not common within the industry. For example, the Commission's analysis (as set out in Appendix sections C.1 and C.2) demonstrates that at 17 January 2018 0.9 per cent of all market offers would be restricted under the more preferable final rule. More broadly, since the cases brought by the ACCC under the ACL (described in section 1.4.1) the practice of discounting off market offers above standing offers is rare.

Furthermore, the Commission's final rule has the potential to reduce administrative burden on the retail market's compliance as a whole because it may avoid the legal costs associated with action under the ACL by providing a clear and stronger deterrent on the specific discounting practice.

Part of the burden identified for this rule change was the potential for retailers to increase their standing offers to comply with the rule. The Commission considers there is a low chance of any significant upward pressure on the standing offers across jurisdictions that have adopted the NECF. This is due to the low prevalence of the discounting practice the final rule will prohibit. Furthermore, the more preferable final rule is likely to have less of an upward pressure on standing offer prices compared to the proposed rule because under the proposed rule the discounting prohibition was broader and likely to affect some offers that were in consumers' interests.

Facilitating service and tariff innovation

Under the Commission's more preferable final rule, retailers will be free to develop and offer services and tariffs that consumers value without the risk of their discounting provisions in market retail contracts being prohibited across the board.

The conditions for equivalence between a retailer's market contract and standing offer which are crucial to the operation of the final rule recognise that consumers value more than just energy rates in market contracts for energy. There are often additional benefits and services, and energy payments (such as feed-in tariffs), that motivate consumers to adopt certain energy offers and take them up as market contracts. The operation of the rule provides that retailers offering innovative extra services and innovating in their market retail contract tariff structures beyond their basic standing offer tariff structures will not have the risk of a discounting prohibition applying to these contracts.

Furthermore, the exclusion of fully fixed price contracts of greater than a year within the final rule recognises these contracts do not have an equivalent standing offer and that tariff innovation beyond standing offer tariff structures should not be restricted.

The final rule also accounts for and facilitates the potential for greater locationality of pricing in the future, particularly as distribution network pricing evolves. An equivalent standing offer, which forms the basis of the comparison of energy rates and energy payments crucial to the discount prohibition for a market retail contract, must also be available to the customer taking up the market retail contract (or would be available if the retailer was the designated retailer for the customer's premises). This better facilitates locational pricing compared to the proposed rule, which referred to the market retail contract and standing offer being available in the same region (such as a distribution network supply area). This is because pricing signals at the postcode level, for example, would be accounted for under the final rule, but not the proposed rule.

The Commission's rule would only prohibit discounting provisions if one of the energy rates in the market retail contract is higher than the same energy rate in an equivalent standing offer, while all the other energy rates in the market retail contract are at least equal to or higher than in the equivalent standing offer. This would allow retailers to make offers (with discounts) to consumers where, for example, a daily supply charge is lower but the usage charge is higher than the equivalent standing offer. This type of pricing could be beneficial to lower usage households. In permitting this type of tariff

innovation, the Commission sees its final rule as a more preferable way to meet the NERO while maintaining the intent of the proponent to prevent confusing inflated discounts that cause consumer detriment.

2.4.2 Consumer protections test

The Commission is satisfied that the more preferable final rule passes the consumer protections test as it is compatible with current consumer protections and is likely to be compatible with the future development of consumer protections for small customers. In particular, the final rule was designed to complement, and be compatible with, the consumer protections provided in the RPIG and through the ACL (as discussed in section 1.4.1).

The restricted scope of the discounting prohibition also limits the potential for any future incompatibility with consumer protections as they are developed over time.

3 The Commission's approach

This chapter sets out the Commission's overarching approach in relation to the issues raised in the rule change request and broader discounting issues. It is broken down into:

- the rule change request
- the Commission's initial position
- stakeholder views
- the Commission's final position.

The details of the specific civil penalty recommendation and the NERR restriction are set out in chapters 4 and 5.

3.1 The rule change request

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 were addressed by the AER's recently revised 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.

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 Commission under the NERL. The rule change request states that:

> "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."

The rule change request proposes to prohibit such behaviour by restricting retailers from applying discounts to market retail contracts if any of the rates in the contract are higher than the retailer's equivalent standing offer rates.

3.2 Commission's initial position

3.2.1 Commission's approach in relation to the rule change request

In the consultation paper the Commission considered that 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 considered 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, the Commission considered that it is very important that these instruments are enforceable and to assist with this the Commission proposed a civil penalty provision for the RPIG.

The Commission generally considered that the RPIG and the ACL are the appropriate instruments to deal with confusing retail market offers. 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.

The benefits of having a prohibition in the NERR are that it provides a clear and stronger deterrent to 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 Commission noted that the prohibition in the NERR would not be intended to narrow the application of the ACL.

3.2.2 Broader issues relating to discounting

While this rule change relates specifically to the practice of discounting off rates above the standing offer, the Commission set out in the consultation paper that it is cognisant 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 common 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 noted the AER's revision of the RPIG and the ACCC's Retail Electricity Pricing Inquiry are addressing this issue. The Commission supported this work, is liaising with the AER and the ACCC on these issues and welcomes suggested reforms in this area.

3.3 Stakeholder views

Retailers

Retailers generally supported the Commission's initial overarching approach in relation to both:[41]

- competitive energy retail markets generally being better at producing energy offers that meet consumers' preferences at prices they are willing to pay than regulatory measures and therefore the RPIG and ACL being the main regulatory instruments governing the presentation and advertising of retail offers
- direct restrictions being placed in the NERR on retailers making offers that could never be in the interests of customers and are designed to confuse customers.

For example, Red Energy and Lumo Energy stated that:[42]

> "In general, Red and Lumo do not support the inclusion of rules in the NERR that regulate the type or form of offers retailers can make to customers under Market Retail Contracts. That being said, we agree that the scenario described in the consultation paper cannot be in the interests of consumers. As such, we are comfortable with the Commission making a rule that prohibits retailers from discounting off base prices higher than their own standing offer, however it must be assured that the drafting of the rule will not limit the ability of retailers to offer products that may be in the best interests of customers. We consider the proposed rule highlighted in the consultation paper achieves this outcome."

Retailers generally did not comment on the importance of effective enforcement of the RPIG. Instead, retailers opposed the introduction of a civil penalty provision for the RPIG. This was on the grounds that they considered:

- there is not a demonstrated problem with compliance
- it would not be clear what obligations the civil penalty provision would apply to
- the introduction of a civil penalty provision would not be consistent with the overarching legal architecture.

These issues are discussed in detail in chapter 4.[43]

Few retailers commented on the broader issues relating to discounting and transparency. However, where they did, retailers were supportive of broader reforms to increase the comparability of retail offers. For example, AGL noted that ideally in the future consumers will be able to access understandable and comparable pricing information and there is work underway to achieve this aim, such as through the AER's RPIG review and the refresh of the Energy Comparator Code of Conduct.[44]

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41 AEC submission, p. 1; Origin Energy submission, p. 1; EnergyAustralia submission, p. 1; AGL submission, p. 1; Simply Energy submission, p. 1; Red Energy and Lumo Energy submission, p. 1.

42 Red Energy and Lumo Energy submission, p. 1.

43 AEC submission, p. 1; Origin Energy submission, p. 1; EnergyAustralia submission, p. 1; AGL submission, p. 1; Simply Energy submission, p. 1; Red Energy and Lumo energy submission, p. 1.

44 AGL submission, p. 3.

Consumer groups

Some consumer groups that made submissions to the consultation paper did not agree with the proposition that a competitive energy retail market will be generally better at producing energy offers that meet consumers' preferences at prices they are willing to pay than regulatory measures.[45]

Other consumer groups indicated a more specific concern that the current state of competition in the retail energy market has not been delivering the best outcomes for consumers and some level of targeted intervention is required. This was reflected in the Energy Consumers Australia (ECA) submission which, while noting it understood the Commission's perspective, considered that:[46]

- the way that competition has developed in the retail market since deregulation has resulted in a market based on discounts that causes significant price confusion for consumers
- this confusion results in no incentive for retailers to reduce the noise (confusion) in the market
- given this market dynamic, to promote the long-term interests of consumers, it is appropriate for the Commission as rule maker (market designer) to take action to reduce the noise.

However, consumer groups (including ECA) generally considered that this broader issue needed to be addressed through a wider package of reforms rather than within this expedited rule change request. Consumer groups supported the broader package of work noted by the Commission in relation to discounting.[47]

Consumer groups considered that it is crucial that the RPIG is enforceable and supported the addition of civil penalty provisions to the RPIG.[48]

Several consumer groups did not agree that the restriction should only apply to offers where customers would definitely be worse off.[49] These stakeholders generally preferred the Minister's proposed solution of restricting offers with any energy rate above the equivalent standing offer rate. However, this was balanced by significant concern from many consumer groups that the more specific and targeted restriction proposed by the Commission could result in retailers increasing their standing offers and that any increase in standing offers would have a material detrimental impact on consumers.[50]

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45 CALC submission, pp. 3–4; National Seniors Australia submission, p. 2; QCOSS submission, pp. 4–5; CHOICE submission, p. 1; QCA submission, p. 2

46 ECA submission, pp. 2–3.

47 ECA submission, p. 1; QCA submission, p. 1; National Seniors Australia submission, p. 5.

48 ECA submission, p 1; QCA submission, p. 1; National Seniors Australia submission, p. 5; CALC submission, p. 2.

49 National Seniors Australia submission, p. 1; Dr Martin Gill submission, p. 1.

50 QCA submission, p. 2; QCOSS submission, pp. 2–4; CHOICE submission, p. 4.

Ombudsmen

The Energy and Water Ombudsmen of South Australia and Queensland (EWOSA and EWOQ):[51]

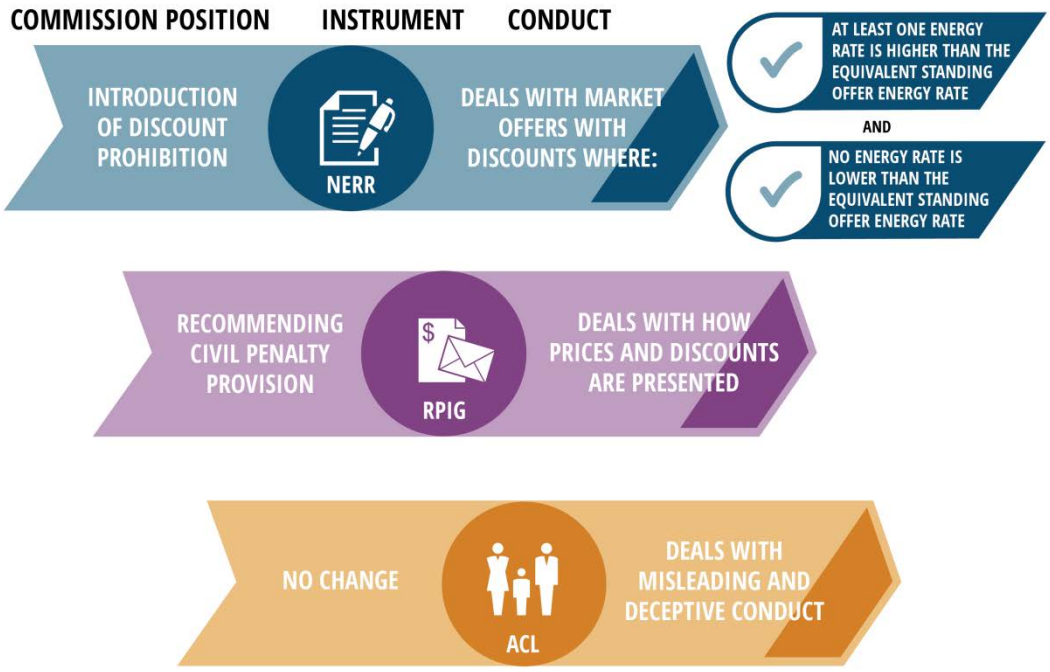
- did not comment on the Commission's overarching approach
- noted the importance of enforceability of the RPIG and supported the addition of civil penalty provisions to the RPIG.

The Energy and Water Ombudsman of New South Wales (EWON) raised similar issues with the NERR restriction as consumer groups. That is, it would prefer that the restriction was broader and captured more offers like the proposed rule, but it considered it crucial that any restriction did not lead to increased standing offers.[52]

3.4 Commission's final position on the rule change

The Commission's final position is to maintain its overarching approach regarding the specific issues raised in the rule change request and issues relating to discounting more broadly. The package of regulatory arrangements and changes to those instruments under the Commission's final determination to implement this overarching approach is displayed in Figure 3.1.

Figure 3.1 Proposed package of regulatory arrangements



In reaching this conclusion the Commission notes the following:

- Due to the scope of the rule change request, it is not possible to deal with broader issues related to discounting in this rule change.

51 EWOSA submission, p, 1; EWOQ submission, p, 2.

52 EWON submission, p, 2.

- The issues raised by consumer groups and EWON regarding restricting a greater number of market offers but at the same time not risking increases to standing offers have been central to the Commission developing its specific restriction. This is set out in chapter 5.
- Issues raised by retailers relating to the need for and appropriateness of civil penalty provisions for the RPIG are addressed in chapter 4.

4 Final position on civil penalties for the RPIG

This chapter sets out the Commission's joint recommendation with the AER that the COAG Energy Council make non-compliance with sections 24 and 37 of the NERL subject to a civil penalty.[53] The civil penalty provision does not form part of the more preferable final rule.

The Commission notes that while the rule change request did not specifically propose the addition of civil penalties to the RPIG it is consistent with the request which suggested the RPIG be strengthened. The rule change request suggested a "bolster" to the RPIG as an alternative option to its proposed rule.[54]

This chapter is broken down into three issues:

- the importance of enforcement tools for the RPIG
- governance issues relating to civil penalties for the RPIG
- ambiguity or lack of clarity in relation to what in the RPIG would be subject to a civil penalty.

4.1 Importance of improving enforcement tools for the RPIG

4.1.1 Commission's initial position

In the consultation paper, the Commission set out that the RPIG is a crucial part of the operation of a well-functioning competitive retail energy market. The Commission therefore considered that it is particularly important that the AER has the appropriate tools to enforce the RPIG.

Currently, the AER's options for enforcement of the RPIG include:

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

The Commission considered the addition of infringement notices would allow 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 therefore proposed 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.[55]

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53 Consultation paper, pp. 13–15.

54 Rule change request, p. 7.

55 Section 24 provides that: "A retailer must— (a) present its standing offer prices (including any variation of those prices) in accordance with the AER Retail Pricing Information Guidelines…". Section 37 provides that: "A retailer must— (a) present its market offer prices (including any variation of those prices) in accordance with the AER Retail Pricing Information Guidelines…".

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. The AER would be able to issue an infringement notice with penalties of up to $20,000 (for a body corporate) for contravention of sections 24 and 37 of the NERL in relation to the presentation of market and standing offer prices. The Commission considered infringement notices with penalties 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.

4.1.2 Stakeholder views

Consumer groups and ombudsmen

Consumer groups and jurisdictional ombudsmen supported the addition of the civil penalty provisions.[56]

EWOSA and EWOQ considered that a civil penalty for the RPIG would provide retailers an additional incentive to comply. Civil penalties (in this case allowing an infringement notice to be issued for noncompliance) would be quicker to apply and avoid costly legal proceedings in relation to noncompliance under the AER's current suite of enforcement tools.[57]

The QCA echoed EWOSA and EWOQ's comments on the importance of the quick application of infringement notices.[58] QCA's submission further stated, supporting the need for the AER to have effective tools to enforce RPIG compliance:

> "The presentation of offers has major impacts on consumer behaviours and choices. Therefore, it is essential that the AER has effective tools that can be applied quickly to enforce compliance with RPIG requirements."[59]

Retailers and the AEC

Retailers generally opposed the addition of civil penalties to the RPIG. Retailer's objections consisted of three main points.

1. The RPIG is not suitable or appropriate for civil penalties

There were several ways in which retailers considered the RPIG unsuitable or not appropriate for civil penalties.

- *Duplicates the ACL, or does not add anything beyond the ACL.*

Origin argued the RPIG has a greater focus on marketing than the presentation of energy offers, meaning civil penalties for the RPIG are inappropriate as they would duplicate the ACL. Given the ACL already covers marketing conduct (relating to misleading and deceptive conduct or false representations) Origin suggested that

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56 QCA submission, p. 1; ECA submission, pp. 3–4; QCOSS submission, p. 4; National Seniors Australia submission, p. 4; CALC submission, pp. 1–2; EWOSA submission, p. 1; EWOQ submission, p. 2.

57 EWOSA submission, p. 1; EWOQ submission, p. 2.

58 QCA submission, p. 1.

59 QCA submission, p. 1.

applying civil penalties to the RPIG is unnecessary.[60] EnergyAustralia echoed similar concerns, suggesting that there is recourse to the ACL for any misleading or deceptive behaviour around retailer energy offer pricing presentation.[61]

- *Sections 24 and 37 of the NERL to which the civil penalty would apply are unclear in their coverage to RPIG provisions.*

The AEC commented that if sections 24 and 37 of the NER are not sufficiently clear in their relation to the RPIG, the appropriateness of sections 24 and 37 of the NERL (providing that energy offer pricing presentation provisions in the RPIG are complied with) being the subject of civil penalties is questionable.[62] Red Energy and Lumo Energy shared this concern, highlighting it was unclear which elements of the RPIG relate to retailer obligations under sections 24 and 37 of the NERL and would therefore be subject to a civil penalty provision.[63]

- *RPIG provisions themselves are ambiguous or unclear or in some other way not laid out in a way that is suitable for a civil penalty.*

AGL commented that civil penalty provisions are generally used for guidelines that have clear requirements. AGL mentioned by way of comparison that the AER's Performance Reporting Procedures and Guidelines provide clear guidance to retailers on how and when they need to provide data to meet their performance reporting obligations.[64] Origin Energy made similar comments comparing the clarity of the Performance Reporting Procedures and Guideline, noting that ambiguity exists in some of the RPIG's provisions, as did Red Energy and Lumo Energy.[65] EnergyAustralia and Simply Energy considered the RPIG a "guidance" document.[66]

Simply Energy also did not consider the RPIG to be appropriate for the purpose of applying civil penalties. Simply Energy stated the RPIG provides guidance on the presentation of energy pricing information and was not written as a "formal legal instrument."[67]

- *The amount of change undergone by the RPIG since its first version make it unsuitable for civil penalties.*

Red Energy and Lumo Energy considered the level of change undergone by the RPIG since its inception should make it inappropriate to have the RPIG subject to civil penalties. The RPIG being now in its fifth version differs greatly from its original. While

60 Origin Energy submission, p. 3.

61 EnergyAustralia submission, p. 3.

62 AEC submission, p.1.

63 Red Energy and Lumo Energy submission, p. 2. Note that these comments appear to indicate that these retailers do not have an understanding of which provisions they must currently comply with in order not to breach the existing provisions of the NERL.

64 AGL submission, p. 2.

65 Origin Energy submission, p. 2; Red Energy and Lumo Energy submission, p. 3.

66 EnergyAustralia submission, p. 3; Simply Energy submission, p. 2.

67 Simply Energy submission, p. 2.

change is appropriate in an evolving retail landscape, that difference alone should make the RPIG incompatible with a civil penalty.[68]

- *Civil penalties for the RPIG are disproportionate*

EnergyAustralia considered civil penalties for the RPIG to be disproportionate. Compliance involves actions that can be impacted by system or human error (such as submitting information to EME). EnergyAustralia suggested most breaches are the result of human error and are not deliberate. Civil penalties for the RPIG will therefore not materially change the level of compliance.[69] Simply Energy supported this in their submission. Simply Energy commented that civil penalties for minor contraventions of the RPIG could lead to higher compliance costs across the industry that will ultimately be borne by consumers, with minimal consumer benefit.[70]

2. The case put forward by the Commission is not clear or sufficient and that application of civil penalties to the RPIG requires evidence of noncompliance or problems with enforcement.

Origin argued that it is not clear why the RPIG should have a civil penalty.[71] Origin further argued civil penalties belong to more concrete consumer protections such as those governing misleading and deceptive conduct or false or misleading representations under the ACL. RPIG provisions such as those that support information provided to EME to enable the comparison of prices are not at the same level of importance.[72] EnergyAustralia made similar comments about civil penalties applying to key consumer protections.[73]

EnergyAustralia, Origin Energy, AGL and the AEC commented that the Commission did not demonstrate in the consultation paper the level of noncompliance with the RPIG, or that there are any enforcement issues for the RPIG.[74] Some retailers (AGL, EnergyAustralia) suggested the Commission should present this evidence.[75] EnergyAustralia did not consider civil penalties for the RPIG would lead to greater enforceability or change the level of compliance to the RPIG.[76]

3. Civil penalties for the RPIG should be consulted on further

EnergyAustralia considered further public comment was necessary given the lack of a strong case warranting civil penalties being attached to the RPIG.[77] Simply Energy also argued civil penalties for the RPIG should be considered separately to this rule change

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68 Red Energy and Lumo Energy submission, p. 3.

69 EnergyAustralia submission, p. 3.

70 Simply Energy submission, p. 1.

71 Ibid, pp. 2–3.

72 Ibid, p. 2.

73 EnergyAustralia submission, p.2.

74 AGL submission, p. 2; EnergyAustralia submission, p. 2; AEC submission, p. 1; Origin Energy submission, p. 2.

75 AGL submission, p.2 ; EnergyAustralia submission, p.2.

76 EnergyAustralia submission, p.2.

77 EnergyAustralia submission, p. 2.

as recommended changes to the enforceability of the RPIG involve matters that cannot be adequately assessed through this expedited rule change process.[78]

4.1.3 Commission final position

The Commission maintains its position to make a joint recommendation with the AER to the COAG Energy Council to make non-compliance with sections 24 and 37 of the NERL subject to a civil penalty. The Commission considers there to be:

- sufficient evidence of non-compliance with the RPIG to warrant adding civil penalties for the RPIG
- an identified gap in the suite of tools currently available to the AER to enforce the RPIG
- no material risk of disproportionate penalties.

The Commission also considers that consultation has been more than adequate for a recommendation to be made. The Commission notes that this has included multiple public workshops, submissions to the consultation paper and bilateral meetings with stakeholders.

Non-compliance with the RPIG

The AER has made apparent that noncompliance with the RPIG has been an issue for some years. It has noted these issues most explicitly in its two previous annual compliance reports.

The AER reported numerous instances of noncompliance with the RPIG in its annual compliance report for 2016–17. The AER stated that during this period it undertook a review of retailers' compliance with the RPIG. The AER engaged with 26 retailers in relation to a number of recurring areas of non-compliance with the RPIG. The most significant issues identified during the review included:

- redundant Energy Price Fact Sheets (EPFS) and difficulty locating EPFS on retailer websites
- the publication of inaccurate, inconsistent or obsolete retail pricing information on EME and retailer websites.[79]

In June 2017, the AER also wrote to all energy retailers to remind them of their obligations to comply with the RPIG.[80]

Furthermore, the AER reported in its 2015–16 annual compliance report that it issued a compliance check in April 2016 to remind retailers of their obligations around the presentation of their energy offers.[81]

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78 Simply Energy submission, p. 2.

79 AER, *Annual Report on Compliance & Performance of the Retail Energy Market: 2016–17*, AER, Melbourne, 2017, p. 90.

80 Ibid.

81 This was prior to its actions noted throughout 2016–17.

Gap in enforcement tools

The Commission maintains its position from the consultation paper that there is a gap in the enforcement tools currently available to the AER in relation to the RPIG. Besides managing noncompliance with the RPIG through administrative measures, the only other option for the AER is to institute civil proceedings in relation to breaches of retailers' obligations to comply with the RPIG under the NERL. The AER's compliance reports indicate that these two options available to the AER thus far have not allowed the AER to effectively bring retailers into compliance with the RPIG. Adding the ability for the AER to issue infringement notices would give the AER a tool to impose appropriate penalties to enforce compliance across the industry.

The Commission considers that civil penalties would be quicker to apply and avoid the need for costly legal proceedings for noncompliance with the RPIG. The Commission considers a civil penalty provision is appropriate for the NERL provisions on compliance with the RPIG.

Proportionality

The Commission does not consider the addition of civil penalty provisions is likely to lead to disproportionate penalties. The Commission highlights, as it did in the consultation paper, that the AER has a published statement of approach to potential breaches under the National Energy Laws (including the NERL).

The AER has a range of administrative and statutory enforcement options to address breaches, and the decision to exercise power is made in relation to the nature and circumstances of the breach. In determining a response, the AER may have regard to:[82]

- the nature and extent of the conduct that forms the breach, including the period over which the conduct extended and the number of related breaches
- the impact of the conduct, including harm or detriment to consumers (particularly disadvantaged or vulnerable consumers) and other parties, and/or an increased risk of serious harm or detriment in future
- whether the conduct was deliberate or avoidable had reasonable compliance practices been followed by the business
- whether the conduct involved, or was directed/overseen by, senior management
- the extent of any realised or potential future financial gain from the conduct (including compliance costs avoided by the business)
- whether action is already being taken to address the issue by another enforcement agency or other organisation
- the business's own actions in relation to the conduct, including whether the conduct was self-reported, the level of cooperation with the AER, and any action taken to rectify the breach and avoid reoccurrence

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See: AER, *Annual Report on Compliance & Performance of the Retail Energy Market: 2015–16*, AER, Melbourne, 2016, p. 5.

82 AER, *Compliance and Enforcement: Statement of Approach*, AER, Melbourne, 2014, p. 10.

- whether the business has a corporate culture conducive to compliance, including the effectiveness of compliance programs, and whether corrective measures have been taken in response to past breaches.

The Commission considers that the AER's statement of approach and its track record of following the statement provide sufficient confidence that the risk of disproportionate penalties is low.

Ambiguity or lack of clarity

The Commission makes the following broad points in response to submissions regarding ambiguity or a lack of clarity around its position on civil penalties for the RPIG:

- The NERL currently requires retailers to comply with the pricing presentation provisions of the RPIG. Retailers should already be aware of which sections of the RPIG are covered by this obligation, in order to ensure they are not currently breaching the NERL.
- Questions about which provisions of the RPIG are covered under sections 24 and 37 of the NERL are a matter for the AER, and the AER is open to being contacted in relation to all compliance and enforcement matters.
- The Commission considers that it is appropriate to recommend that sections 24 and 37 of the NERL be civil penalty provisions. Having pricing presentation provisions being civil penalty provisions ties the penalty to the most important aspects of the RPIG, as recognised under sections 24 and 37 of the NERL. Furthermore, there appear to be no other suitable avenues under the NERL or the NERR for civil penalties to be attached to breaches of the RPIG. Stakeholders have not been able to provide a better means to have any provisions of the RPIG subject to civil penalties.
- The AER's statement of approach clearly sets out how the AER would use a civil penalty enforcement power, as well as its other enforcement powers.

4.2 Governance issues relating to civil penalties for the RPIG

4.2.1 Commission's initial position

The Commission set out in the consultation paper that the most appropriate manner in which to apply civil penalties to the RPIG was through making sections 24 and 37 of the NERL civil penalty provisions.[83] As noted above, these sections of the NERL specifically provide that retailers' presentation of market and standing offer prices must comply with the RPIG.

4.2.2 Stakeholder views

Only EnergyAustralia and Red Energy and Lumo Energy commented on this issue.

83 This would be done by adding those provisions to the list of civil penalty provisions in the National Regulations made under the NERL.

Red Energy and Lumo Energy stated that an important governance protection in the regulatory framework is that section 4 of the NERL does not allow a guideline to be made into a civil penalty obligation.[84] Red Energy and Lumo Energy stated:

> "Allowing the AER to make changes to the RPIG, and thus make changes to the civil penalty obligations does not appear in line with this governance principle.…This principle is highlighted in the indicative rule drafting in the consultation paper, in which the AEMC only considers it appropriate to propose a specific element of the rule be made a civil penalty. Providing the AER alone the discretion to not only change the civil penalty obligations, but for them to be attached to something as broad as the RPIG, is clearly not in the spirit of the NECF governance arrangements."[85]

EnergyAustralia's raised similar concerns to Red Energy and Lumo Energy. EnergyAustralia argued that the regulatory architecture of the NECF implies that the AER can change guidelines (and hence the RPIG) with less formality than a retail rule. For example, the AER can initiate its own changes under the retail consultation procedure.[86] This would be different to a rule change request, which the Commission cannot initiate and must be initiated by an outside party.[87] This situation would devolve penalty based rulemaking to the same body that enforces the retail rules.[88]

4.2.3 Commission final position

The Commission maintains its position from the consultation paper regarding having sections 24 and 37 of the NERL subject to civil penalties.

Under the NERL, retailers are already obliged to comply with the RPIG. The Commission's recommended civil penalty provision is therefore an additional enforcement tool for the AER, not a new compliance obligation on retailers. Furthermore, given that retailers are already obliged to comply with the RPIG under the NERL they should be aware of and comply with the RPIG's requirements, particularly in relation to the presentation of energy offer prices.

The Commission does not agree with Red Energy and Lumo Energy's proposition that the NERL does not allow a guideline to be made into a civil penalty obligation. Section 4 of the NERL does not prohibit a civil penalty applying in relation to a guideline. Further, NERL section 4(1)(b) clearly allows additional civil penalties — for provisions of the NERL as well as the NERR — to be listed in the National Regulations.[89]

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84 Red Energy and Lumo Energy submission, p. 2.

85 Red Energy and Lumo Energy submission, p. 2.

86 EnergyAustralia submission, p. 3.

87 It should be noted, however, that governments and the COAG Energy Council sometimes do use Commission reviews and recommendations as the basis of a rule change request.

88 EnergyAustralia submission, p. 3.

89 Section 4(1)(b) provides that "A civil penalty provision is … (b) a provision of this Law (other than an offence provision) or the Rules that is prescribed by the National Regulations to be a civil penalty provision." Sections 24 and 37 of the NERL are not offence provisions.

Not only does the NERL allow for civil penalties in relation to AER guidelines, there are multiple examples of civil penalties already being applied (or being recommended to be applied) to NERL or NERR provisions relating to compliance with guidelines:

- NERL section 112(2) is listed as a civil penalty provision in the table under NERL section 4(1), and section 112 relates to compliance with the AER Exempt Selling Guidelines.
- NERL section 282(1) is listed as a civil penalty provision in the table under NERL section 4(1), and section 282 relates to compliance with the AER Performance Reporting Procedures and Guidelines.
- The Commission and the AER recently recommended civil penalties be attached to the rule on Notification of end of fixed benefit period, which included compliance with benefit change notice guidelines to be developed by the AER.[90]

The Commission also considers that governance risk is minimal in providing that sections 24 and 37 of the NERL are civil penalty provisions. The AER must comply with the retail consultation procedure if it wishes to amend the RPIG.[91] Any changes to the RPIG, including to any RPIG provisions which may be subject to civil penalties, will be flagged well ahead of their final application in accordance with the retail consultation procedure.

The Commission reiterates that civil penalties, as with other enforcement tools of the AER, will be used in accordance with the AER's statement of approach as noted in section 4.1.3. This reduces the risk associated with this change for retailers.

90 National Energy Retail Amendment (Notification of end of fixed benefit period) Rule 2017 No. 2 (RRC0010). The recommendation was for a civil penalty to apply to NERR subrule 48A(1).
See: AEMC, *Notification of the end of a fixed benefit period*, final determination, 7 November 2017, Sydney.
The Commission notes the AER published a draft of the benefit notice change guidelines on 19 April 2018.
See: AER, *DRAFT AER Benefit Notice Change Guidelines: Version 1.0*, AER, Melbourne, 2018.

91 NERL section 61(1); NERR rule 173.

5 Final rule determination on the discount prohibition

This chapter sets out how the Commission's final rule — a discount prohibition in the NERR — will operate. It also provides supporting reasons for the operation of the prohibition, and summarises and addresses:

- the proponent's view in the rule change request
- the Commission's initial position as set out in the consultation paper
- issues raised in submissions on the consultation paper
- the Commission's final position.

5.1 Summary of the discounting prohibition

At a high level, a retailer would be in breach of the final rule if all the following conditions are satisfied:

(1) The retailer formed a market retail contract including provisions for discounts to any energy rates

(2) The retailer has a standing offer that is equivalent to the market retail contract (an "equivalent standing offer" — the conditions for equivalency are referred to as the "equivalency test" in section 5.5)

(3) The retailer's market retail contract both has:

  (a) at least one energy rate that exceeds the equivalent energy rate component under the equivalent standing offer

  (b) no energy rate that is lower than the equivalent energy rate component under the equivalent standing offer (together with (3)(a) above, referred to as the "energy rates test" in section 5.2)

(4) The retailer's market retail contract has every single energy payment (e.g. a feed-in tariff) equal to or lower than the equivalent payments in the equivalent standing offer (referred to as the "energy payments test" in section 5.3).

The rule introduces definitions of the terms "dual fuel market contract", "dual fuel standing offer", "energy rate" and "energy payment".[92] These are discussed in sections 5.2, 5.3 and 5.11.

The final rule is published with this final determination. Examples of how the rule would operate in practice can be found in Boxes 5.1 to 5.9.

5.2 Energy rates test

This section discusses the definition of "energy rate" and the operation of the energy rates test in subrules 46B(1)(b) and (c), and 46B(2)(b) and (c).

92 "Dual fuel market contract" is a new global definition; that is, it is included in rule 3 and applies throughout the NERR. The other definitions are local definitions, used only in rule 46B.

5.2.1 Proponent's view

The proposed rule would have restricted a retailer offering discounts in a market retail contract when *any* of its rates are above the rates in an equivalent standing offer.

The discount prohibition would have applied to a market contract if any of the below rates in that contract were above the standing offer with respect to:

- daily supply charges
- usage charges
- demand charges.

The proposed rule would have required the definition of the above charges for market retail contracts and standing offers.

The proponent considered discounting from rates exceeding the base rate in the retailer's standing offer inherently confusing for consumers. This confusing practice could lead to consumer detriment as the resulting inflated discount can lead the consumer to believe the discount is of relatively greater value than it is.

The proponent considered its proposed rule would meet the NERO, stating:

> "In mitigating the possible negatives effects on the market, this proposed rule thereby ensures the efficient operation of the energy services which is inherently in the long term interests of the consumer."

The proposed rule is also covered more broadly in section 1.3 of this paper.

5.2.2 Commission's initial position

Under the Commission's initial position retailers would be prohibited offering discounts under a market retail contract only if all of its energy rates are above the energy rates in an equivalent standing offer. This also worked together with the test for energy payments and the test for an equivalent standing offer described in sections 5.3 and 5.5, respectively.

The Commission's view in the consultation paper was that the proposed rule would likely capture some market offers that would be beneficial to some consumers. For example, high energy consumption households may be better off on market offers with high daily supply charges but low energy usage charges. The Commission's initial position would allow these offers that could be beneficial for consumers to be the basis of a market retail contract with discounts. While it would likely allow some offers not in consumers' interests, the Commission considered the initial position achieved an appropriate balance of only seeking to prohibit retailer discounts in market contracts that are definitely not in the interests of consumers.

Under the Commission's initial position, all energy rates in a market retail contract (before discounts) were required to be above the energy rates in an equivalent standing offer for the prohibition to take effect. This condition was one of three conditions for the prohibition on discounts in a market retail contract to take effect.

Under the Commission's indicative drafting implementing its initial position, the definition of the new term "energy rates" would be added to rule 45A in the NERR.

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 (such as daily supply, usage and demand charges), but in each case excluding charges that are fees or penalties.

The energy rates definition used other terms defined in the NERL, "market offer prices" and "standing offer prices".[93]

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

5.2.3 Stakeholder views

Dr Martin Gill supported the proponent's energy rate test in the proposed rule rather than the Commission's energy rates test in its initial position.[94] National Seniors Australia also supported this kind of energy rates test in its submission.[95]

Both of these submissions also provided alternative proposals to the Commission's initial position and the proposed rule. Dr Martin Gill proposed the use of the comparison pricing table in the RPIG as a basis for validating market offers.[96] National Seniors Australia essentially proposed a hybrid of the proposed rule's energy rates test and the Commission's energy payments test as set out in its consultation paper.[97]

EWOSA and EWON raised concerns regarding the Commission's initial position and noted that offers with one rate above and one rate below would leave some consumers worse off under the undiscounted market offer.[98]

Simply Energy and Origin Energy were supportive of the energy rates test proposal in the initial position where all energy rates in the market retail contract were required to be above the same energy rates in the equivalent standing offer.[99]

Stakeholders were generally supportive of the Commission's energy rates definition put forward under its indicative drafting.[100]

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93 "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).

94 Dr Martin Gill submission, p. 6.

95 National Seniors Australia submission, pp. 5–7.

96 Dr Martin Gill submission, p. 1.

97 National Seniors Australia submission, pp. 5–7.

98 EWON submission, p. 2; EWOSA submission, p. 2.

99 Simply Energy submission, p. 2; Origin Energy submission, p. 3; EnergyAustralia submission, p. 2.

100 Origin Energy submission, p. 4; Powershop submission, p. 3; ECA submission, p. 7.

5.2.4 Commission's final position

Change from initial drafting to reflect policy intent

The Commission's final position is that the discount prohibition will apply to a market retail contract that both has:

- at least one energy rate exceeding the equivalent energy rate component under the equivalent standing offer
- no energy rate under the market retail contract lower than the equivalent energy rate component under the equivalent standing offer.

This final position on the energy rates test results in a slight broadening of the energy rates test presented in the consultation paper. Box 5.1 illustrates the difference between the Commission's initial and final positions on the energy rates test.

Box 5.1 Example 1: energy rates test

A retailer has a market offer and equivalent standing offer (in the same distribution network supply area) as per the below:

	Standing offer	**Market offer**
Daily supply charge	70.68 cents	100 cents
Usage charge	44.56 cents/kWh	44.56 cents/kWh
Discounts (if applicable)	N/A	10 per cent pay-on-time discount to all charges
Energy payments	Feed-in tariff: 8 cents/kWh	Feed-in tariff: 8 cents/kWh
Benefits or services	None	None

The above market offer, if formed into a market retail contract with the discounting provision, would not have been subject to a discount prohibition under the indicative drafting in the consultation paper. It will be subject to the discount prohibition under the final rule. This is due to the change to the energy rates test.

Under the initial position all market retail contract energy rates had to be above the standing offer rates. Under the final rule, all market contract energy rates have to be at least equal to or higher, but with at least one higher than, the equivalent standing offer energy rates.

The Commission is making this change in drafting to better reflect the Commission's overarching intent that contracts providing confusing inflated discounts be restricted if they would definitively leave a customer worse off than under the standing offer (on an undiscounted basis). The Commission considers this is the case if one energy rate in a

The AEC's comments on fees and penalties as related to the energy rates definition are covered in section 5.4.3.

market contract is above the equivalent energy rate in the standing offer and all of the other energy rates in the market contract are equal to their equivalent rates in the standing offer. As demonstrated in Box 5.1 the final rule will prohibit forming contracts on such market offers.

No change in relation to one rate above and one rate below

In relation to the concerns raised by consumer groups and ombudsmen that the Commission's restriction does not capture market contracts with one energy rate above the standing offer and other energy rates below the standing offer, the Commission has maintained its initial position. The Commission continues to consider that restricting such contracts in the NERR will impact on the availability of energy offers that are beneficial to consumers and that this is not appropriate. Furthermore, an analysis of market offers (provided in Appendix section C.3) as at 17 January shows that it is likely the majority of consumers would be better off under the market offers restricted by the proposed rule. Under the Commission's final rule, however, market contracts where a consumer is definitely worse off will be restricted.

Energy rates definition

The Commission's final position has largely maintained the definition of energy rate from the initial position.

5.3 Energy payments test

This section discusses the definition of "energy payments" and the operation of the energy payments test in subrules 46B(1)(d) and 46B(2)(d).

5.3.1 Proponent's view

The proponent did not express specific views on energy payments.

5.3.2 Commission's initial position

Under the Commission's initial position, every energy payment to the customer under the market retail contract (such as a feed-in tariff or demand response payment) would need to be equal to or lower than the equivalent payments in the equivalent standing offer in order for the retailer's market retail contract to be subject to the discounting prohibition. This was intended to work in conjunction with the two other main conditions to the discount prohibition (test for equivalency and the energy rates test).

The Commission considered energy payments an aspect of an energy offer that consumers value. The Commission considered that the level or rate of energy payments should be a consideration in comparing a market retail contract and standing offer. For example, if a market contract had a high feed-in tariff a consumer with a large rooftop solar PV system may be better off on that contract 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.

5.3.3 Stakeholder views

Origin Energy and Powershop agreed with the Commission's approach to energy payments. Several stakeholders supported the Commission's energy payments definition put forward under its indicative drafting.[101]

5.3.4 Commission's final position

The Commission's position on energy payments is unchanged from the initial position.

The Commission continues to consider that energy payments are aspects of an energy offer that a consumer will value, and which may differ from one offer to the next. Therefore a test for energy payments should be included in the rule, with the energy rates test and equivalency test.

5.4 Exclusion of fees and penalties

5.4.1 Proponent view

The rule change request did not address fees and penalties.

5.4.2 Commission initial position

The Commission's initial position and indicative drafting excluded the consideration of fees and penalties in comparing a market retail contract to an "equivalent" standing offer.

The Commission's initial position did include a new defined term relevant to fees and penalties. 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*.

In the consultation paper the Commission invited stakeholders to comment on whether they agreed with the exclusion of fees and penalties from consideration of whether there is an equivalent standing offer.

5.4.3 Stakeholder views

Powershop, Simply Energy, Origin Energy, the AEC, CALC, ECA and National Seniors Australia all commented on whether to include fees and penalties for the operation of the discount prohibition. In general, retailers were supportive of the exclusion of fees and penalties.[102] Consumer groups commenting on the issue of fees and penalties were supportive of their inclusion (excepting ECA).[103]

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101 Origin Energy submission, p. 4; Powershop submission, p. 3; ECA submission, p. 7.

102 Powershop submission, p. 2; Simply Energy submission, p. 2; Origin Energy submission, p. 2; AEC submission, p. 2.

103 National Seniors Australia submission, p. 8; ECA submission, p. 6; CALC submission, p. 3. CALC, while not commenting on the exclusion, did mention that it considered retailers could avoid breaching the Commission's indicative drafting while still inflating fees and penalties.

The AEC considered the inclusion of the term "penalty" to be problematic. Any contractual clause which would be considered a penalty would be unenforceable as a matter of law. Including the term "penalty" would imply that market offers include penalty clauses.[104]

National Seniors Australia considered that fees and penalties should be included. Fees and penalties make up part of the total consideration of a retail offer. Consumers do not, or at least should not, exclude these from considerations of whether an offer is in their best interests. National Seniors Australia also commented that fees and penalties should not vary between a discounted market offer and its equivalent standing offer, noting particularly that late payment fees should be a reasonable reflection of the cost of providing a service.[105]

5.4.4 Commission final position

In reference to the AEC's concern of the inclusion of the term "penalty", the Commission is of the view that a general reference to penalties in the NERR will have no bearing on whether or not a particular provision in a particular contract will constitute an unenforceable penalty. The Commission further notes that the NERR contain several other references to penalties. However, the Commission has slightly revised the definition of "energy rate" to indicate that the term "fees" includes those fees that constitute penalties, rather than indicating that fees and penalties are separate categories.

Regarding concerns about the exclusion of fees and penalties raised by consumer groups, the Commission does not consider its policy position requires amendment. The Commission notes that the inclusion of fees and penalties in the scope of this rule change would likely add another condition to equivalency between the market contract and standing offer and possibly lead to the discount prohibition capturing fewer offers. It could give retailers the incentive to add further fees and penalties to market contracts that are not present in standing offers to circumvent the discount prohibition by way of equivalency, which would not benefit consumers.

Furthermore, fees and penalties are also already regulated, to some extent, under the NERR and at the jurisdictional level.[106] As standing offer fees and penalties are regulated it is not appropriate to compare fees and penalties between market retail contracts and standing offers.

5.5 Equivalency test

This section discusses issues around the test for equivalency corresponding to part (2) of the rule summary set out in section 5.1. It broadly covers what an "equivalent standing offer" is under the final rule (subrule 46B(3)).

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104 AEC submission, p. 2.

105 National Seniors Australia submission, p. 8.

106 See for example subrule 49A of the NERR and the pricing provisions of the model terms and conditions for standard retail contracts in schedule 1 to the NERR. Some jurisdictions have restrictions on fees such as late payment fees. See for example *National Energy Retail Law (Tasmania) Act 2012* (Tasmania), s. 19; *National Energy Retail Law (South Australia) Act 2011*, s. 24.

Issues around the use of the term "material" in subrules 46B(3)(c) and (d), and the discretion this would give to the AER over the enforcement of the rule, are also considered in this section.

5.5.1 Proponent's view

In the proponent's view, the tariff structure of the retailer's market retail contract and its compared standing offer must be the same.

Under the proposed rule it would be unclear if there was an equivalency test in terms of the tariff structure in relation to energy payments, such as a feed-in tariff.[107]

Market contract rates are compared to the retailer's standing offer prices generally available to the small customer in the "region" in which the customer is to consume electricity under the market contract.[108] In the examples that the Commission provided in its consultation paper it has interpreted region to mean "distribution network supply area".

The rule change request also suggested the Commission consider an alternative construction of the region closest to the region in which the consumer is to consume electricity.[109]

The proponent did not have a reference to materiality in its proposed rule or consider it in the rule change request.

5.5.2 Commission initial position

The Commission's initial position provided that a standing offer would be an "equivalent standing offer" for a market retail contract if the following conditions were met:

- *The retailer making the standing offer is the retailer providing the market retail contract*
    - This provided 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.*
    - This was to account for the potential for greater locationality of energy offers in the future (even to the level of postcodes), 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.*

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107 To the extent that tariff structure comparisons cannot be made, the rule change request suggested the Commission consider a more preferable rule. See: Rule change request, p. 5.

108 "Region" is not defined in the rule change request. Our interpretation of "region" is that of a distribution supply area. Alternative interpretations could include a postcode or greater geographical area, or a NEM region.

109 Rule change request, p. 4.

- 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. This condition would have prevented, 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 applied 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 could cover benefits associated with a contract such as movie ticket passes, non-financial benefits and offering "green power". This 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.

The Commission's initial position required 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 was 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 the rule by simply making very minor changes to a market offer or a standing offer to remove equivalence.

The consultation paper invited stakeholders to comment on whether the concept of materiality for differences between tariff structures and benefits and services in standing offers and market retail contracts was appropriate.

The Commission invited comment from stakeholders regarding how its 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 to take effect.

5.5.3 Stakeholder views

Simply Energy and the AEC expressed support for there to be consideration to equivalency as set out in the Commission's initial position.[110]

110 Simply Energy submission, p. 2; AEC submission, p.2.

Some retailers were not supportive of the use of the term "material". Powershop and Origin Energy cited the uncertainty around the inclusion of this in some of the conditions for equivalency.[111] AGL was the only retailer to express explicit support for it, but requested guiding examples.[112] Origin Energy, Red Energy and Lumo Energy, and Simply Energy also requested further clarification on the operation of materiality.[113]

Red Energy and Lumo Energy specifically commented that Box 4.3 in the Commission's consultation paper appeared to be inconsistent with the general view expressed in that paper around materiality of an additional benefit or service.[114] The example considered a contract based on a market offer in which GreenPower is available at a cost to the customer, but not included. The Commission indicated that this would be sufficiently different to a standing offer in which GreenPower was unavailable. Red Energy and Lumo Energy did not consider the availability of GreenPower a material difference. It requested a clarification from the Commission in the final determination about whether this was a material difference for the purposes of equivalency.[115]

Some comments from consumer groups and Dr Martin Gill suggested equivalency could be a means for retailers to circumvent the rule.[116] ECA, however, expressed support stating that equivalency "targets more accurately the specific conduct of inflated reference prices rather than just different offer structures."[117]

ECA and EWOQ supported the concept of materiality to allow the AER the discretion to enforce a rule in line with its spirit and intent.[118] National Seniors Australia did not support the materiality provision.[119]

Origin and Powershop considered the equivalency condition of 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) appropriate.[120]

5.5.4 Commission final position

The Commission's final position on the equivalency test is to make minor changes to the test. These changes relate to the treatment of dual fuel contracts, discussed in section 5.11, and the treatment of fixed price contracts, discussed in section 5.6.

111 Powershop submission, p. 2; Origin Energy submission, p. 3.

112 AGL submission, p. 2.

113 Origin Energy submission, p.3; Red Energy and Lumo Energy submission, p. 2; Simply Energy submission, p. 3.

114 Box 4.3 can be found in the Commission's consultation paper. See: AEMC, *Preventing discounts on inflated energy rates, consultation paper*, 20 March 2018, Sydney, p. 25.

115 Red Energy and Lumo Energy submission, p. 2.

116 CALC submission, p.3; Dr Martin Gill submission, p. 5.

117 ECA submission, p. 3.

118 ECA submission, p. 6; EWON submission, p. 3.

119 National Seniors Australia submission, pp. 7–8.

120 Origin Energy submission, p. 4; Powershop submission, p. 3.

In addition, the requirement that the retailer making the standing offer is the retailer providing the market retail contract has been revised to include related bodies corporate of the retailer providing the market retail contract (subrule 46B(3)(a)). This is to cover circumstances where a retail brand has more than one authorised retailer — a relatively common situation, as shown by the AER's register of authorised retailers.[121]

The Commission notes the concerns around the materiality of differences in tariff structures or in benefits or services. In particular, it notes the comments on the example provided in Box 4.3 in the consultation paper, relating to the materiality of GreenPower. The Commission wishes to clarify that it now considers that the mere availability of GreenPower, at a cost to the customer, is not a material additional benefit or service in a market retail contract over an otherwise equivalent standing offer. Any assessment of materiality would depend on the specific circumstances.

In light of the requests of stakeholders to provide further guidance in relation to "materiality", the Commission provides the following examples in Boxes 5.2 to 5.6. The Commission notes it has not provided the energy rate charges in all instances — this is to focus the examples simply on the condition of materially different tariff structure in relation energy rates and energy payments and material additional benefits or services. These are part of the test for equivalency.

The Commission notes that the AER will ultimately be required to enforce the final rule, including in relation to "materiality" aspects, and will have to use its judgement in each case.

Box 5.2 Materiality in practice: example 1 — GreenPower

A retailer has the following standing offer and market offer in the same distribution network supply area:

	Standing offer	**Market offer**
Daily supply charge	122.80 cents	132.624 cents
Usage charge	35.90 cents/kWh	38.77 cents/kWh
Discounts (if applicable)	N/A	15 per cent pay-on-time discount to all charges
Energy payments	N/A	N/A
Benefits or services	None	100 per cent GreenPower is provided to the customer at no extra charge

The above market offer, if formed into a market retail contract with the discounting provision, would not breach the rule. Providing 100 per cent

121 AER, *Public register of authorised retailers & authorisation applications*, AER, Melbourne, 2018, viewed 2 May 2018, https://www.aer.gov.au/retail-markets/authorisations/public-register-of-authorised-retailers-authorisation-applications.

GreenPower at no extra charge would be a material additional benefit and so the standing offer would not be equivalent to the market retail contract.

Box 5.3 Materiality in practice: example 2 — consumption based tariffs

A retailer has the following standing offer and market offer in the same distribution network supply area:

	Standing offer	**Market offer**
Daily supply charge	122.80 cents	122.80 cents
Consumption based charge 1	For first 10 kWh usage per day	For first 1 kWh usage per day
Consumption based charge 2	For following 5 kWh usage per day	For following 15 kWh usage per day
Remaining usage per day	Charges above 15 kWh	Charges above 16 kWh usage per day
Discounts (if applicable)	N/A	15 per cent pay-on-time discount to all charges
Energy payments	N/A	N/A
Benefits or services	None	

The above market offer, if formed into a market retail contract with the discounting provision, would not be subject to a discount prohibition under the Commission's final rule.

Under the test for an equivalent standing offer, the standing offer could not be considered equivalent in this case due to the material difference in tariff structure for energy rates between the market contract and standing offer. "Consumption based charge 2" and "Remaining usage per day" energy rates would apply at substantially different levels of daily consumption in the standing offer compared to a market retail contract based on the above market offer.

Box 5.4 Materiality in practice: example 3 — controlled load/separately metered consumption

A retailer has the following standing offer and market offer in the same distribution network supply area:

	Standing offer	**Market offer**
Daily supply charge	122.80 cents	122.80 cents
Usage charge	30.90 cents/kWh	30.90 cents/kWh
Controlled Load 1	13 cents/kWh	13.5 cents/kWh
Controlled Load 2	N/A	15 cents/kWh
Discounts (if applicable)	N/A	15 per cent pay-on-time discount to all charges
Energy payments	N/A	N/A
Benefits or services	None	None

The above market offer, if formed into a market retail contract with the discounting provision, would not be subject to a discount prohibition under the Commission's final rule. Under the test for an equivalent standing offer, the retailer's "closest" standing offer could not be considered equivalent in this case because of the absence of Controlled Load 2 pricing in the standing offer tariff structure compared to a market contract based on the above market offer.

Box 5.5 Materiality in practice: example 4 — time of use

A retailer has the following standing offer and market offer in the same distribution network supply area:

	Standing offer	**Market offer**
Daily supply charge	122.80 cents	122.80 cents
Off peak-usage charge	All other times	All other times
Shoulder usage charge	4pm to 8pm	2pm to 5pm
Peak usage charge	8pm to 10pm	5pm to 7pm
Discounts (if applicable)	N/A	15 per cent pay-on-time discount to all charges
Energy payments	N/A	N/A
Benefits or services	None	None

The above market offer, if formed into a market retail contract with the discounting provision, would not be subject to a discount prohibition under the Commission's final rule. Under the test for an equivalent standing offer, the standing offer could not be considered equivalent in this case because of the material difference in tariff structure.

In this time of use offer example, there is a material difference in tariff structure because the time periods between the tariff structures of these energy offers are significantly different. The market offer has a time of use tariff with time periods for peak and shoulder of 5pm to 7pm and 2pm to 5pm respectively. The closest standing offer of the retailer is a time of use standing offer which has peak and shoulder times of 8pm to 10pm and 4pm to 8pm, respectively.

Therefore, a market retail contract based on the above market offer would not have an equivalent standing offer and the discounting prohibition would not apply.

Box 5.6 Materiality in practice: example 5 — time varying feed-in tariff

A retailer has the following standing offer and market offer in the same distribution network supply area:

	Standing offer	**Market offer**
Daily supply charge	122.80 cents	122.80 cents
Usage charge	30.90 cents/kWh	30.90 cents/kWh
Discounts (if applicable)	N/A	15 per cent pay-on-time discount to all charges
Energy payment 1	Feed-in tariff at a constant rate	Feed-in tariff: All other times
Energy payment 2	N/A	Feed-in tariff: 4pm to 7pm
Benefits or services	None	None

The above market offer, if formed into a market retail contract with the discounting provision, would not be subject to a discount prohibition under the Commission's final rule. Under the test for an equivalent standing offer, the standing offer could not be considered equivalent due to the absence of a time varying feed-in tariff payment that is in the market offer.

5.6 Fixed price market retail contracts

This section covers the consideration of fixed price contracts in the operation of the discount prohibition. By fixed price contract, what is meant is that prices (or energy rates) are fixed over a certain period of time in the contract (e.g. 12 or 24 months of fixed prices).

5.6.1 Proponent view

The proponent did not express specific views on the treatment of fixed price contracts in the rule change request.

5.6.2 Commission initial position

The Commission did not put forward a position on fixed price market retail contracts being considered differently for the operation of its discount prohibition in the consultation paper.

However, the Commission did consult on whether fixed price contracts should be treated differently from variable price contracts. The Commission particularly invited comments on how the rule should treat market retail contracts with prices fixed for periods of time longer than those for which standing offers are required to be fixed (i.e. greater than six months). The consultation paper noted that 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.

The Commission noted in its consultation paper that:

- standing offer prices can be changed by energy retailers every six months[122]
- market retail contract prices can be changed at any time.[123]

5.6.3 Stakeholder views

Simply Energy considered that fixed price contracts should be excluded from a discount prohibition. Simply Energy considered there to be a risk in offering fixed prices over several years and that energy retailers should be able to price this risk exposure to consumers. It compared fixed price offerings to how banks charge higher amounts for fixed interest rate loans than for variable interest rate loans.

Powershop disagreed and considered that fixed price contracts should not be considered differently from contracts with variable prices for a discount prohibition. It noted the unintended consequences that might follow. Powershop suggested that in the circumstances where electricity prices are falling, customers on fixed price contracts may not reap the benefits of falling prices and that these customers need to be protected.

5.6.4 Commission final position

The Commission considers that fixed price contracts are substantially different from variable price contracts, particularly given the potential risk involved for retailers. The Commission considers that fixed price provide an additional benefit to consumers over the usual market contract pricing model where prices are subject to change by notice from the retailer. The benefit is comparable to fixed interest and variable interest rate loans.

Therefore, under the final rule, market contracts with all of their energy rates and energy payments fixed for 12 months or more will be exempt from the discounting prohibition (under subrule 46B(4)(b)). The Commission does not consider these market retail contracts to have an equivalent standing offer given standing offer prices can be changed every six months.

Other fixed price market contracts will be assessed by the AER under the conditions for an "equivalent standing offer" in terms of whether having the fixed price is a "material additional benefit or service". This includes fixed price market contracts that:

- fix all of their energy rates for less than 12 months
- fix only some of their energy rates, but not all energy rates (for any period of time).

122 NERL section 23(5).

123 See NERR rule 46.

5.7 Commencement date of the rule

5.7.1 Proponent view

The rule change request asked that the rule commence on 1 March 2018. It also recognised that a reasonable period of transition is needed to allow retailers to make necessary changes in compliance with the new proposal and requested the Commission consider an appropriate commencement and transitional approach having regard to the potential impact of the new rule.[124]

5.7.2 Commission initial position

The consultation paper did not propose a commencement date for the rule, but did invite comment on a commencement date.

5.7.3 Stakeholder views

EWOSA considered a rule should commence immediately. However, it conceded that if delay is necessary, it suggested 1 July 2018 as an alternative commencement date. This would coincide with the date that changes are likely to be made to a significant number of retailers' standing offers.[125]

Origin Energy and Red Energy and Lumo Energy considered 1 July 2018 to be an appropriate commencement date. Both Origin Energy and Red Energy and Lumo Energy considered this was appropriate both in terms of allowing time for implementation of a rule and because of the timing for when retail and network prices are due to change.[126]

Simply Energy supported a prompt implementation of the rule change in its submission, but considers at least one month should be given after the final rule is published to allow retailers time to make any required pricing adjustments.[127]

Powershop suggested commencement of 1 January 2019 in its submission. Powershop considered there are many changes associated with this rule change, including:

- adjusting standing offer rates (may be impossible given standing offer prices can only be changed by retailers every six months)
- adjusting an entire years' pricing strategy
- adjusting market offers.[128]

5.7.4 Commission final position

The final rule provides a commencement date of 1 July 2018. This is approximately one and a half months after the final rule and determination are published (15 May 2018).

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124 Rule change request, p. 4.

125 EWOSA submission, p. 2.

126 Origin Energy submission, p. 5; Red Energy and Lumo Energy submission, p. 3.

127 Simply Energy submission, p. 3.

128 Powershop submission, p. 4.

The Commission considers 1 July 2018 an appropriate balance of prompt implementation and time for retailers to adjust systems to comply with the final rule. The commencement date will align with retailers' price changes based on network price changes and would likely reduce regulatory burden for implementation of the final rule as the burden of compliance is associated with other business as usual costs.

The Commission does not agree with Powershop's arguments for an extended delay of commencement. It was commented in submissions that retailers are already expecting to make changes to offers at 1 July 2018, so any adjustments of standing or market offers will be minimised.[129] Furthermore, any changes are likely to be minimal. The Commission considers this to be the case given the likely limited number of recent market offers the discount prohibition would apply to if turned into contracts (0.9 per cent of all market offers as at 17 January 2018, based on the Commission's data analysis in Appendix section C.2) and the comments from stakeholders that setting market offers (with discounts) above standing offers is a rare practice in the retail energy market.

5.8 Standing offers under this rule change

5.8.1 Proponent view

The rule change request implicitly held the view that standing offer rates are an appropriate "base rate" for the purpose of discounting, and should be given this status in the market. It considered discounts applied to rates higher than standing offer rates are inherently confusing.

5.8.2 Commission initial position

An implication of the Commission's initial position was that, ignoring penalties and fees, a retailer's standing offers should be the highest price offer available to every small customer. The Commission did not endorse standing offer prices as reference prices, but did 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.[130] Furthermore, the

129 Origin Energy submission, p. 5; Red Energy and Lumo Energy submission, p. 3.

130 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.

Commission noted standing offers are also a reference price in embedded networks, under the AER's Retail Exempt Selling Guideline.[131]

The Commission expressed a view on the proposed rule put forward by the proponent in relation to the impact it could have on standing offers. The Commission considered that the proposed rule, if made, could lead retailers to take actions to ensure they are not in breach of the rule. The Commission particularly considered the proposed rule provided a stronger incentive, compared to its indicative drafting, for retailers to inflate the standing offer to avoid the risk of non-compliance. The incentive to inflate standing offers was also noted by several stakeholders in early informal consultation on the proposed rule. The Commission considered this circumstance particularly likely to arise for market offers where only one rate is above the same standing offer rate.[132]

5.8.3 Stakeholder views

The Commission notes a number of consumer groups at both of its stakeholder workshops expressed concern that under the proposed rule standing offer prices would increase (not all of these consumer groups made formal submissions to the consultation paper).[133] However, one consumer group also commented that the Commission's approach (as set out at both of these workshops and largely consistent with the initial position) would greatly reduce this risk of increased standing offer prices.

Most stakeholders commenting on discounts applied to energy rates above standing offer energy rates to be confusing for some consumers, or at least considered the standing offer to be an appropriate "base rate" for discounts.[134] QCA disagreed, contending that consumers know very little about standing offers.[135]

Most consumer groups and some ombudsmen expressed concern about standing offer price increases.[136] QCA and QCOSS in particular expressed a concern about the impact on customers in regional Queensland, where a substantial number of consumers on

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131 AER, *AER (Retail) Exempt Selling Guideline: Version 5*, AER, Melbourne, 2018, p. 37.
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.

132 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.

133 The Commission held two stakeholder workshops for this rule change process. The first was an informal workshop on 15 February 2018 and the second workshop was held on 5 April 2018.

134 Simply Energy submission, pp. 1–2; ECA submission, p. 5; Powershop submission, p. 1; Origin Energy submission, p. 2; EWOSA submission, p. 1; AEC submission, p. 1; EWOQ submission, p. 2; National Seniors Australia submission, p. 4.

135 QCA submission, p. 2.

136 QCOSS submission, pp. 2–4; CALC submission, p. 3; EWON submission, pp. 1; QCA submission, p. 2; CHOICE submission, p. 4.

standing offers are located. Upward pressure on standing offer prices in south east Queensland, due to the Uniform Tariff Policy of the Queensland Government, will have negative impacts on regulated standing offer prices in regional Queensland. Powershop also noted in their submission that Queensland had the highest number of customers on standing offers.

EWON noted a similar consequence (which the Commission also noted in the consultation paper) for embedded network customers who are subject to standing offer prices of local area retailers as reference prices under the AER's (Retail) Exempt Selling Guideline. EWON notes higher local area retailer standing offer prices could be passed through to these consumers who might have difficulty accessing other offers. EWON also notes that the AER can set an alternative reference price from standing offer prices of local area retailers in the Exempt Selling Guideline if warranted.[137]

5.8.4 Commission final position

The Commission maintains its position as expressed in the initial position in relation to the status of standing offers under its final rule.

The Commission considers the risk of the final rule increasing standing offers to be low. The standard practice across the industry is to discount from standing offer rates. Further, the Commission has identified, based on energy offers in EME, that under the final rule there is a very low prevalence of offers where discounts are applied to market offer rates above the standing offer (0.9 per cent of all market offers as at 17 January 2018; see Appendix section C.2).

The Commission considers this mitigates the concern that the discount prohibition creates an incentive for retailers to increase standing offer rates to avoid any risk of being in breach of a rule, and any subsequent actions that might be taken (e.g. the changing of embedded network reference prices). Under the final rule this incentive is likely to be low. Not only are discounts typically applied from standing offer rates, but under the final rule, it appears there are very few market offers that would be in breach if turned into market contracts (with the discounting provision).

The Commission notes that if a broader restriction (such as the proposed rule) had been implemented this would potentially have led to a greater risk of increases in standing offer rates.

5.9 The rule's coverage of gas contracts

5.9.1 Proponent view

The rule change request and the proposed rule referred only to electricity and did not consider gas. However, the rule change request did not suggest that gas should be excluded or treated differently.

137 EWON submission, pp. 1–2.

5.9.2 Commission initial position

In the Commission's initial position and indicative drafting, the discounting prohibition applied to gas retail offers as well as electricity retail offers. Although the rule change request and the proposed rule referred only to electricity, the Commission considered the prohibition should apply to both fuels because the issue of inflated discounts is relevant for gas and electricity.

The Commission invited comments on whether gas should be excluded from a rule or whether it should be treated differently under the discount prohibition.

5.9.3 Stakeholder views

Simply Energy, Powershop, Origin Energy and EWOSA all supported the rule change request applying to gas. No stakeholders considered that there was any reason to exclude gas or treat gas differently from electricity.[138]

5.9.4 Commission final position

In the Commission's final rule, the discounting prohibition applies to gas retail offers in the same way it applies to electricity retail offers. The Commission considers this appropriate as the rule forms part of the NERR, which are intended to cover the retail supply of both electricity and gas, and no reason for treating gas differently in this rule has been identified.

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

5.10.1 Proponent view

The rule change request noted its intention 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 did not intend that the prohibition apply to a contract that has already been entered into at the time the rule is made.[139]

5.10.2 Commission initial position

The Commission's initial position was that the prohibition on discounting would apply if the relevant conditions 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 would not apply. This position was consistent with the rule change request.

138 Simply Energy submission, p. 3; Powershop submission, p. 5; Origin Energy submission, p. 6; EWOSA submission, p.2.

139 Rule change request, p. 4.

5.10.3 Stakeholder views

CHOICE was concerned that price increases instituted by a customer's retailer exceeding the retailer's standing offer prices following entry into contract would not have the discount prohibition attached.[140]

CALC commented that retailers could avoid breaching the discount prohibition while still providing services that are not in the long-term interests of consumers. This could be done by implementing price rises above the initial contracted market offer rates that would be beyond the standing offer prices.[141]

5.10.4 Commission final position

The Commission final position remains unchanged from the initial position. The discount prohibition will apply at the date the customer has entered into a market contract. This is consistent with solving the problem identified. That is, confusing discounting applied to market offers at inflated rates compared to the standing offer that lead the consumer to believe the discount is of relatively greater value than it is.

The rule will not apply to market retail contracts that either:

- were entered into before the rule takes effect (1 July 2018)
- meet the conditions described above (e.g. the energy rates test) *after* the date on which the contract was entered into, but did not meet them *on* that date.

5.11 Treatment of dual fuel contracts

5.11.1 Proponent view

The proponent did not express specific views on the treatment of dual fuel market contracts.

5.11.2 Commission initial position

The treatment of dual fuel offers under the Commission's initial position depended on whether the dual fuel offer involved two separate contracts, or one contract covering both fuels (issued under a single bill),[142] 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.
- For dual fuel market retail contracts where both fuels are provided under the same contract, the conditions that must be met before the discounting prohibitions applied were as follows:
  - the discount in the market retail contract is applied to an energy rate relating to the fuel supplied under the standing offer

140 CHOICE submission, p. 4.

141 CALC submission, p. 3.

142 This position adopted the definition of "dual fuel contract" in NERR subrule 117(1) (note that the final rule removes this definition, as discussed below).

- the tariff structures of the market retail contract and the standing offer need to be the same only in relation to the fuel supplied under the standing offer
- the energy rate rates test applies only in respect of the fuel supplied under the 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.

In summary, under the Commission's initial position the discounting prohibition would apply to a dual fuel market retail contract if *either* the electricity or gas elements of that contract had an equivalent standing offer with lower energy rates — there was no requirement for both electricity and gas elements to meet those conditions.

5.11.3 Staff level workshop position

In the public workshop that the Commission held on 5 April 2018 Commission staff presented a revised position on dual fuel contracts. The position is similar to the Commission's final position covered in section 5.11.5.

The workshop position on dual fuel contracts differs from the initial position (as described above).

The workshop position held that matching just one fuel in a dual fuel market retail contract or standing offer to a single fuel standing offer or market contract would *not* constitute a "like for like" comparison. This is particularly true when comparing the electricity elements in dual fuel to an electricity-only offer or contract.

Pricing of electricity in single fuel offers could be different to pricing of electricity in a dual fuel offer due to the effect that gas consumption would have on electricity consumption.

Commission staff considered that dual fuel standing offers appear to link separate standard retail contracts for two fuels through an eligibility condition.[143] The eligibility condition would provide that eligibility to enter into one standard retail contract in the pair is contingent upon its counterpart being adopted.

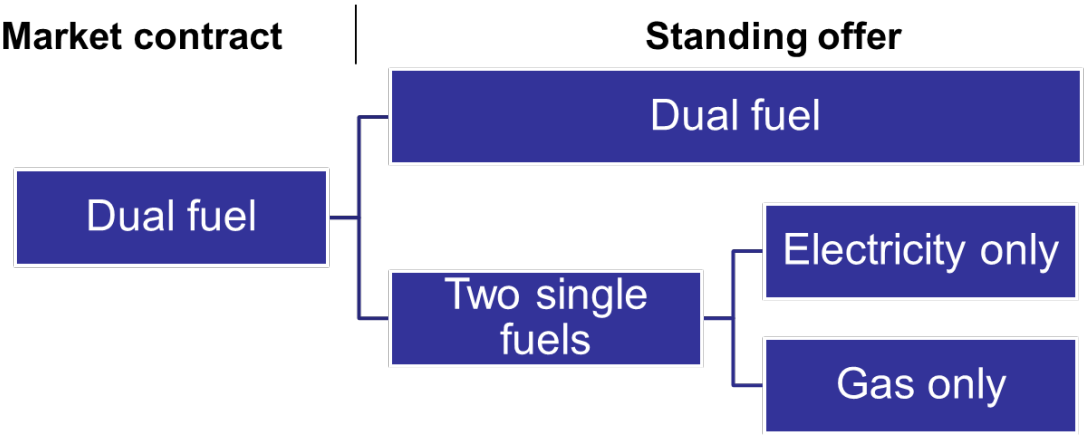
Unlike in the indicative drafting, under the workshop position single fuel and dual fuel will not match (meet the equivalency test) except for one specific case. This case is where two (separate) single fuel standing offers can match to both fuels in a dual fuel market retail contract (or contracts). This is presented diagrammatically in Figure 5.1 below.

Dual fuel market contracts, whether in the form of one market retail contract or two market retail contracts, need to have at all energy rates across all fuels (i.e. electricity and gas) above all the same energy rates in an equivalent dual fuel standing offer or equivalent electricity and gas standing offers (this was the energy rates test as set out in

143 Clause 3.3 of the model terms and conditions for standard retail contracts (NERR schedule 1) provides that "If we are your retailer for both electricity and gas, you have a separate contract with us for each of them."

the consultation paper's initial position). Dual fuel contracts and offers would have to be treated as a whole under this position. This "equivalency" for dual fuel is presented diagrammatically in Figure 5.1 below.

Figure 5.1 Treatment of dual fuel under the Commission's final position



Furthermore, Commission staff presented at the workshop its position that is considered that a dual fuel standing offer cannot be equivalent to a single fuel market retail contract.

5.11.4 Stakeholder views

Red Energy and Lumo Energy supported the Commission's changed policy presented at the 5 April 2018 workshop.[144] The AEC also expressed support for the Commission's revised approach presented at that stakeholder workshop, noting it is more consistent with the rest of the Commission's position and better compares dual fuel market contracts on a "like for like" basis.[145]

5.11.5 Commission's final position

The Commission's final position on dual fuel contracts differs only in some aspects from the workshop position (described in 5.11.3). These differences are covered in this section.

The final rule reflects an understanding that a like for like comparison should be made and is largely consistent with the workshop position. However, the Commission notes that the energy rates test position has changed from the time of the workshop and considers dual fuel needs to be subject to this test in the same way as single fuel.

Therefore, a dual fuel market contract needs to satisfy both the energy rates test and energy payments test in relation to an equivalent dual fuel standing offer, or a

144 Red Energy and Lumo Energy submission, p. 1.

145 AEC submission, p. 2.
See also: AEMC, *Preventing discounts on inflated energy rates, Stakeholder workshop*, AEMC, Sydney, 2018, pp. 31–37, viewed 2 May 2018, https://www.aemc.gov.au/sites/default/files/2018-04/Stakeholder%20workshop%20slide%20pack.PDF.

combination of equivalent electricity-only and gas-only standing offers, for each of the dual fuel contract's fuels.

Dual fuel market contracts, whether in the form of one market retail contract or two market retail contracts, need to have at least one energy rate across all fuels (i.e. electricity and gas) above the same energy rate in an equivalent dual fuel standing offer or equivalent electricity and gas standing offers. Dual fuel contracts and offers will now have to be treated as a whole under the Commission's final rule. This "equivalency" for dual fuel is presented diagrammatically in Figure 5.1 above.

The Commission has also made clear in its final rule that a dual fuel standing offer cannot be equivalent to a single fuel market retail contract, consistent with the workshop position (subrule 46B(4)(a)).

Examples demonstrating the operation of the discount prohibition with respect to dual fuel market contracts are found in Boxes 5.7 to 5.9.

Box 5.7 Commission's position on dual fuel in practice: example 1

A retailer has a dual fuel market offer and equivalent dual fuel standing offer (in the same distribution network supply area) as per the below:

	Standing offer	**Dual fuel market offer**
Electricity		
Daily supply charge	100 c	100 c
Usage charge	32.50 c/kWh	33.00 c/kWh
Discounts (if applicable)	N/A	10 per cent pay-on-time discount to all charges
Energy payments	Feed-in tariff: 8 c/kWh	Feed-in tariff: 8 c/kWh
Benefits or services	None	None
Gas		
Daily supply charge	97 c	96 c
Usage charge	30 c/kWh	31 c/kWh
Discounts (if applicable)	N/A	10 per cent pay-on-time discount to usage charges
Energy payments	None	None
Benefits or services	None	None

The dual fuel market offer turns into two separate market retail contracts for electricity and gas.

However, the retailer would not be subject to a discount prohibition in relation to these contracts. The reason is that while some energy rates in the dual fuel market offer are above the same standing offer energy rates, some are also below the equivalent standing offer. Therefore, it fails the energy rates test.

This would be the case if the standing offer was a dual fuel offer or a combination of two single fuel standing offers. The Commission notes in this examples that a single fuel market offer for electricity in this example would have the discount prohibition applied to its corresponding market contract.

Box 5.8 Commission's position on dual fuel in practice: example 2

A retailer has a dual fuel market offer and equivalent dual fuel standing offer (in the same distribution network supply area) as per the below:

	Standing offer	**Dual fuel market offer**
Electricity		
Daily supply charge	100 c	100 c
Usage charge	32.50 c/kWh	32.50 c/kWh
Discounts (if applicable)	N/A	10 per cent pay-on-time discount to all charges
Energy payments	Feed-in tariff: 8 c/kWh	Feed-in tariff: 8 c/kWh
Benefits or services	None	None
Gas		
Daily supply charge	97 c	96 c
Usage charge	30 c/kWh	31 c/kWh
Discounts (if applicable)	N/A	10 per cent pay-on-time discount to usage charges
Energy payments	None	None
Benefits or services	None	None

The dual fuel market offer turns into two separate market retail contracts for electricity and gas.

However, the retailer would not be in breach for either of these contracts.

The reason is that while some energy rates in the dual fuel market offer are above the same standing offer energy rates, some are also below the equivalent standing offer.

This would be the case if the standing offer was a dual fuel offer or a combination of two single fuel standing offers.

Box 5.9 Commission's position on dual fuel in practice: example 3

A retailer has a dual fuel market offer and equivalent single fuel standing offers (in the same distribution network supply area) for electricity and gas as per the below:

	Standing offer	**Dual fuel market offer**
Electricity		
Daily supply charge	110 c	121 c
Usage charge	32.50 c/kWh	32.50 c/kWh
Discounts (if applicable)	N/A	20 per cent pay-on-time discount to usage charges
Energy payments	Feed-in tariff: 12 c/kWh	Feed-in tariff: 12 c/kWh
Benefits or services	None	None
Gas		
Daily supply charge	107 c	107 c
Usage charge	29 c/kWh	29 c/kWh
Discounts (if applicable)	N/A	20 per cent pay-on-time discount to usage charges
Energy payments	None	None
Benefits or services	None	None

The dual fuel market offer turns into one market retail contract for dual fuel. The retailer's discounting provisions in this contract would be prohibited by the Commission's final rule.

The reason for this is that the electricity fuel has one higher energy rate under the dual fuel market offer compared to the electricity standing offer, while the other energy rates are the same. Both contracts for dual fuel are taken together, and it satisfies the energy rates test for the discount prohibition to apply.

The market contract would be subject to a discounting prohibition and the retailer has no dual fuel standing offer. This example demonstrates that retailers without dual fuel standing offers would also be covered under the Commission's final rule.

However, if either the electricity or gas elements of the dual fuel market contract have an equivalent electricity-only or gas-only standing offer, it would not be subject to the discounting prohibition. Dual fuel market contracts are treated as a whole under the final rule.

Dual fuel definitions revised

The Commission has made changes related to the definition of dual fuel market contract not only for its final rule, but made this a global definition in the NERR. This would apply not only to the final rule (46B) but also to rules 48B and 117.[146] This definition considers a dual fuel market contract to be:

(a) one market retail contract between a small customer and a retailer for the sale of both electricity and gas by the retailer to the small customer

(b) two market retail contracts with the same small customer, one for the sale of electricity and the other for the sale of gas to the customer, where the prices or conditions of one or both contracts are contingent on the customer entering into both contracts.

For this rule, a "dual fuel standing offer" means a standing offer for the supply of both electricity and gas.

The Commission's final rule drafting also now recognises that retailers could structure their dual fuel service provision in different ways now and into the future. Therefore, the Commission's final rule takes into account:

- the retailer making the standing offer being a related body corporate of the retailer providing the market retail contract (as defined in the National Electricity Rules) and vice versa (discussed further in section 5.5.4)
- the retailers offering each fuel of the dual fuel market contract being different
- the retailer offering one fuel of the dual fuel market contract being a related body corporate of the retailer offering the other fuel in that contract.

Dual fuel market contract being entered into on the same date

There are scenarios where retailers would make a dual fuel market offer to its existing customers which either have separate single fuel contracts for electricity or gas, or have one of their fuels contracted with a different retailer.

The operation of the Commission's final rule is such that the dual fuel market contract is entered into once the new dual fuel market offer has been taken up by the consumer. Before that, the Commission's final rule operates as though the consumer would have just one single fuel market contract or two separate single fuel market contracts for electricity and gas. The succeeding dual fuel market contract would be entered into by the customer on the same date.

146 The changes can be seen in the final rule published with this final determination.

Abbreviations

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
AEC	Australian Energy Council
AER	Australian Energy Regulator
BPID	Basic Product Information Document
CALC	Consumer Action Law Centre
COAG Energy Council	Council of Australian Governments Energy Council
Commission (or AEMC)	Australian Energy Market Commission
DPID	Detailed Plan Information Document
ECA	Energy Consumers Australia
EME	Energy Made Easy
EWON	Energy and Water Ombudsman of New South Wales
EWOQ	Energy and Water Ombudsman of Queensland
EWOSA	Energy and Water Ombudsman of South Australia
GST	goods and services tax
kWh	kilowatt-hour
MCE	Ministerial Council on Energy
NECF	National Energy Customer Framework
NERL	National Energy Retail Law
NERO	National Energy Retail Objective
NERR	National Energy Retail Rules
RPIG	AER's Retail Pricing Information Guidelines
QCA	Queensland Consumers Association
QCOSS	Queensland Council of Social Service

A Summary of other issues raised in submissions

This appendix sets out the issues raised in consultation on this rule change request and the Commission's response to each issue. If an issue raised in a submission has been discussed in the main body of this document, it has not been included in this table.

Stakeholder	Issue	Commission response
Alternative proposals to the proposed rule and the Commission's initial position		
Dr Martin Gill (throughout the submission, but mostly on page 1)	In the near future all retail tariffs will also provide an estimated annual cost, the so called 'comparison price'. Dr Martin Gill's submission suggests the comparison price provides a solid and simple foundation for "checks of validity". Dr Martin Gill preferred the use of the comparison pricing table in the RPIG as a basis for validating offers against the retailer's "default" standing offer". This involves the use of EME, particularly under new provisions in the RPIG for a comparison pricing table, to attempt to calculate if a consumer would be better off on an undiscounted market offer than the standing offer on a bill basis, also utilising the consumption levels behind the comparison pricing table.	Regarding Dr Martin Gill's alternative proposal the Commission makes the following comments: • This is based on consumption and would be unsuitable as a basis for restricting market offers or contracts. It could restrict offers that would benefit some consumers. • The AER has stated that at this time a comparison price for time of use based offers would not be generated. Thus, this proposal would not have these contracts in scope.[147] • The Commission considers the method of validating market offers through AER's EME burdensome given the low level of prevalence. The Commission's final rule would not preclude the AER using EME as a basis for monitoring and enforcement under the Commission's final rule if the AER wished to do so.

147 AER, *AER Retail Pricing Information Guidelines: Version 5.0*, AER, Melbourne, 2018, p. 21. See clause 116, c.

National Seniors Australia (pp. 5–7)	National Seniors Australia proposed a hybrid of the proposed rule's energy rates test and the Commission's energy payments test as set out in its consultation paper.	The Commission does not consider this proposal preferable to the Commission's final rule. This is for the similar reasons why it considers its final rule more preferable to the proposed rule.
Comments on civil penalties for the RPIG		
National Seniors (p. 4); CALC (p. 2)	The penalty level for civil penalties should be adequate as a sufficient deterrent or be increased.	The Commission does not have control over the level of civil penalties; these are established in the NERL. This is a matter for the COAG Energy Council to consider. This was noted by CALC in its submission in referring to the Review of Enforcement Regimes under National Energy Laws undertaken by a working group under the COAG Energy Council in 2016 containing proposed policy positions for consultation.[148]
Red Energy and Lumo Energy (p. 2)	Neither the Commission nor the AER alone has the power to make a rule subject to a civil penalty.	The Commission agrees. The Commission and the AER make joint civil penalty recommendations to the COAG Energy Council, which makes the final decision.
Comments on the discount prohibition		
ECA (p. 7)	Differences in the way energy payments are made should be a consideration in a standing offer being equivalent to a market retail contract. Being too prescriptive about the equivalency on energy payments has the potential to dramatically reduce the scope of the discount prohibition and its potential for better consumer outcomes.	The Commission agrees that prescription beyond what it has considered in the final rule for energy payments (level or rate) could reduce the scope of the prohibition's application. The Commission considers it has found the right balance of prescription for its final rule. Considering factors beyond the level, rate or tariff structure of energy payments is not necessary for the discount prohibition.

148 COAG Energy Council, *Review of Enforcement Regimes under the National Energy Laws: Proposed policy positions for consultation,* Energy Working Group, Canberra, 2016. See also: CALC submission, p. 2.

Dr Martin Gill (pp. 4–5)	When comparing a tariff element that is absent in the standing offer where it is present in the market offer (for cases such as Separately Metered Usage, or controlled load), the tariff structures should be considered comparable and the standing offer charge for the tariff element is zero.	The Commission does not consider this to be a correct interpretation of the proponent's proposed rule, and the Commission has not adopted Dr Gill's approach in its final rule, as it would not follow the principle of a like-for-like comparison. The tariff structures between the market and standing offers are not equivalent in this case (for separately metered usage) so the discount prohibition would not apply.
Dr Martin Gill (pp. 8–9)	Clause 95 of the draft RPIG should have changed wording to say "retailers must make" reference to the plan ID in all communications with customers rather than "retailers must be able to make" reference to the plan ID in all communications with customers.	This is a matter for the AER to consider for the RPIG.
Dr Martin Gill (p. 2); CHOICE (p. 5); CALC (p. 3)	Pay-on-time discounts are confusing, cause consumer detriment and should be addressed.	This issue is out of scope for this rule change request. These broader issues to do with discounting will be addressed in the ACCC's inquiry. The final report is due June 2018.
Queensland Consumers Association (p. 2)	Timing of this rule change as an expedited rule change process conflicts with the ACCC Retail Electricity Pricing Inquiry.	Expedition does not depend on the timing of ACCC's inquiry. The Commission does not consider the final rule will restrict implementation of the ACCC's findings. Especially because this final rule restricts a very specific kind of conduct. In consultation with the ACCC, the Commission considered it was preferable to have this rule change process finalised in advance of the ACCC's final report for its inquiry, due June 2018.
AGL (p. 3)	AGL does not consider civil penalties to be appropriate for enforcement of this rule. AGL considers that the market reaction to this rule change request is evidence that the threat of regulation is sufficient enforcement. After the AEMC identified twenty market energy offers that would have had discounts prohibited under the indicative drafting of the rule change as at 17 January 2018,	For the reasons covered in Appendix B.4, the Commission finds it appropriate to recommend civil penalties for the discount prohibition. The withdrawal of the market offers referred to does not necessarily mean the prohibited discounting practice will not be a problem in the future.

	these offers had disappeared from the EME website by 15 March 2018. This would suggest the threat of regulation was sufficient to change market behaviour.	
EnergyAustralia (p. 2)	The energy payments test providing a market retail contract having *equal* energy payments (in level or rate) to its equivalent standing offer would prohibit retailers from making "equal offers" to consumers.	The Commission does not agree. The energy payments test works in conjunction with the other conditions (the equivalency test and the energy rates test) that give effect to the discount prohibition. Equality in energy payments (say a feed-in tariff) between a market contract and its equivalent standing offer would only give effect to the discount prohibition if the energy rates test was also satisfied. Therefore, the energy payments test does not prohibit a market contract that is equal to or better than the equivalent standing offer, as the energy rates would still have to leave a consumer worse off. The energy payments test would provide the consumer is at least on the same terms with the equivalent standing offer for energy payments (e.g. that the same feed-in tariff rate applies in the contract as with the equivalent standing offer).
QCOSS p. 4	If the rule change does go through, we request the Commission to monitor, and review within six to 12 months, the impact of the change on: • customer outcomes, including whether it has succeeded in reducing customer confusion • market offers, ensuring that they are an honest discount that will in fact lead to lower bills for consumers • standing offers.	The Commission does undertake some monitoring activities and will monitor this rule change's impact to an extent. However, enforcement and market monitoring is primarily the role of the AER. The Commission notes there is a lot of activity in the retail market space as far as regulatory change is concerned which may address some of the concerns raised here.
ECA (pp. 4, 6, 7)	That the term 'tariff' be restricted to refer to network charges payable by retailers.	This would not be consistent with the current usage of the term "tariff" in the NERL and NERR.
ECA (p. 4)	It is important that retailers monitor the effectiveness of this rule change over time and refine their approaches in line with	This is a matter for retailers in terms of compliance and the

	consumer behavioural insights.	AER in terms of enforcement.
ECA (p. 4)	There is a well-developed authorisation process used in many other industries that could enable retailers to reduce the noise in the retail energy market and discuss price structures.	The Commission agrees with this, and there are many examples. One such example is the Jewellery Industry Code of Conduct which contains guidance on discounting and price advertising for jewellery retailers.[149] However, consideration of broader issues such as an authorisation process is out of scope of this rule change request.
ECA (p. 7)	Definition of energy rates could be revised to be more consistent with the definition of energy payment as "means any charge payable to the retailer by a small customer that is a component of the offer prices under a market or standing retail contract, excluding charges that are fees or penalties."	This would not be consistent with the current usage of the term "tariff" and "charges" in the NERL and NERR. The Commission notes here that the final rule's energy rates definition corresponds closely in the terminology used in the definitions of "market offer prices" and "standing offer prices" in the NERL: "…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 [market retail contract or standard retail contract]." [150]
Other issues		
Dr Martin Gill (p. 1); CHOICE (p. 2)	Discounts cannot be meaningfully compared or are difficult for consumers to compare.	Broader issues relating to discounting are not within scope of this rule change process and will be covered in the ACCC inquiry. Pricing presentation as it relates to discounting is also a matter to be considered in the context of the RPIG.
National Seniors	Consumers struggle to select suitable offers in the retail	This is a broader issue than the scope of this rule change

149 Jewellers Association of Australia, *JAA Jewellery Industry Code of Conduct*, Jewellers Association of Australia, Sydney, 2015, pp. 12–14.

150 NERL s. 2.

Australia (p. 3)	energy market because offers are not comparable.	request allows the Commission to address.
ECA (p. 3)	Genuine price innovation will result in more sophisticated underlying price structures, accompanied by advanced pricing tools (such as comparison services with access to household consumption data) will convert these price structures to straight-forward choices. The AEMC's concern that the rule change could prohibit innovatively structured offers is unfounded.	The Commission does not agree with this in all cases. Pricing innovation may come in many forms, including large rebalancing of existing tariff structures. It may also be the case that after developing an innovative market offer tariff structure, a retailer decides to adopt the new structure for its standing offer.
CALC (p. 4)	The Commission should recommend that the ACCC undertake similar action in relation to the Click Energy offers discussed in the Consultation Paper as it did with Origin's standing offers in 2015. CALC considers this action needs to be taken due to instances of similar conduct by Click Energy or other energy retailers in Victoria.	The Commission notes this suggestion (also noting that Click Energy has since withdrawn the offers in question). The Commission's formal role does not include making prosecution recommendations to the ACCC. However, interested parties may contact the ACCC directly..
CALC (p. 4)	Supports the implementation of a Basic Service Offer, as proposed by the Victorian Review. A similar policy would benefit the rest of the NEM.	This issue is out of scope of the rule change request.
CALC (pp. 3–4)	The Victorian Government recently confirmed that it would implement recommendation 4D and 4E of the Independent Review of The Electricity and Gas Retail Markets in Victoria (the Victorian Review). This means conditional discounts on energy retail offers in Victoria will be evergreen and the costs incurred by consumers when failing to meet a condition will be capped at the reasonable cost to the retailer. This is a preferable way forward for addressing the issues related to conditional discounting on a national scale.	
CALC (p. 4)	There should be a published reference price from which energy retailer discounts must consistently be applied for easy comparison.	

B Legal requirements under the NERL

This appendix sets out the relevant legal requirements under the NERL for the Commission to make this final rule determination.

B.1 Final rule determination

In accordance with section 259 of the NERL the Commission has made this final rule determination in relation to the rule proposed by the Honourable Minister Josh Frydenberg MP, Minister for the Environment and Energy on behalf of the Australian Government.

The Commission's reasons for making this final rule determination are set out in section 2.4 and discussed in more detail in chapters 3 and 5 of this determination.

A copy of the more preferable final rule is attached to and published with this final rule determination. Its key features are described in section 2.1.

B.2 Power to make the rule

The Commission is satisfied that the more preferable final rule falls within the subject matter about which the Commission may make rules. The more preferable final rule falls within section 237 of the NERL as it relates to:

- regulating the activities of persons (retailers) involved in the sale and supply of energy to customers (section 237(1)(a)(ii))
- imposing obligations on retailers (section 237(3)(e))

B.3 Commission's considerations

In assessing the rule change request, the Commission considered:

- its powers under the NERL to make the rule
- the rule change request
- submissions received during the consultation period and comments made by stakeholders at the stakeholder workshops
- the Commission's analysis as to the ways in which the proposed rule will or is likely to, contribute to the NERO
- the extent to which the proposed rule is compatible with the development and application of consumer protections

There is no relevant Ministerial Council on Energy (MCE) statement of policy principles for this rule change request.[151]

151 Under section 225 of the NERL the Commission must have regard to any relevant MCE statement of policy principles in making a rule. The MCE is referenced in the Commission's governing legislation and is a legally enduring body comprising the Federal, State and Territory Ministers responsible for Energy. On 1 July 2011 the MCE was amalgamated with the Ministerial Council on Mineral and Petroleum Resources. The amalgamated council is now called the COAG Energy Council.

B.4 Civil penalties

The Commission cannot create new civil penalty provisions. However, the Commission and the AER may jointly recommend to the COAG Energy Council that new or existing provisions of the NERR or NERL be classified as civil penalty provisions.

The new provisions that the Commission and the AER will recommend that the COAG Energy Council class as civil penalty provisions are subrules NERR 46B(1) and (2).

This was requested by the proponent in the rule change request:[152]

> "The government further proposes that this new rule be subject to a civil penalty if a retailer fails to comply. Given non-compliance with this proposed rule could result in a retailer improperly receiving a financial benefit, ensuring that breach of this rule can result in a financial penalty would represent an effective deterrent."

The Commission considers that the new provisions should be classified as civil penalty provisions because a civil penalty will be an appropriate deterrent to the discounting practice the provisions in the final rule prohibit. The Commission considers that detriment to consumers (relating to confusion arising from discounts leading consumers entering into less favourable contracts on an undiscounted basis compared to the retailer's equivalent standing offer) could occur if retailers do not comply with these new provisions and that classifying this provision as a civil penalty provision will assist in avoiding this consumer detriment by deterring noncompliance.

In addition, the Commission and the AER will jointly recommend that the COAG Energy Council classes sections 24 and 27 of the NERL as civil penalty provisions, for reasons discussed in chapter 4 of this determination. These sections of the NERL provide that retailers must present their market and standing offer prices (including any variation of those prices) in accordance with the RPIG.

152 Rule change request, pp. 3–4.

C Data analysis

The data analysis undertaken by Commission staff used data obtained from the AER's EME 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 1.3) and the Commission's final rule.

C.1 Methodology

The analysis outlined below excludes dual fuel offers.

C.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 EME, each of the standing offers would be considered "generally available" as per the proposed rule.[153] All offers published on EME "generally available".[154]

The proposed rule does not mention feed-in tariff structures as part of its operation. The Commission therefore needed to make an assumption about whether to include feed-in tariffs in its matching and has chosen not to consider feed-in tariffs in matching market and standing offers for the proposed rule.

We also did not match offers in relation to the following components of a market offer:

- incentive payments
- green power options.

153 Rule change request, p. 3.

154 AER, *AER Retail Pricing Information Guidelines: Version 4.0*, AER, Melbourne, 2015, p. 20.

C.1.2 Breaches of the final rule

To estimate the market offers that would be in breach as market retail contracts under the Commission's final rule we took a similar approach in most aspects.[155] However, as per the final rule, we included the following variables in our matching:

- solar feed- in tariffs (relating to an energy payment, covered in section 5.3)
- incentive payments (relating to an additional benefit or service as a condition of equivalency (covered in section 5.5)
- green power options (relating to an additional benefit or service as a condition of equivalency (covered in section 5.5).

Under the final rule, we used the tariff fields to determine whether any of the below energy rates in the market offer exceeded the same energy rates in the equivalent standing offer:

- the daily supply charge
- the usage charge
- the demand charge
- solar feed in tariff rates
- green power charges.

Notably, the final rule differs from the proposed rule in terms of our data matching through the inclusion of solar feed-in tariff rates and green power charges in the set of charges to be compared between the market offer and standing offer.

The Commission did not consider in its data analysis:

- eligibility criteria
- the frequency of price variation[156] (discussed in section 5.6)
- variation in cooling off periods
- fees or penalties (discussed in section 5.4)
- frequency of billing
- materiality (discussed in section 5.5).

C.2 Analysis of energy offers

A summary of the results of the analysis of energy offers in EME 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 C.1 below.

155 Note that we have not undertaken an analysis of dual fuel offers.

156 The Commission notes that this means that the data analysis is not completely consistent with our final position and final rule regarding fixed price contracts. However, this has not affected the total number of breaches.

Table C.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			Discount prohibition would apply	
Fuel type	**Customer type**	**Regulated**	**Standing**	**Market**	**Proposed rule**	**Final rule**
Electricity	Residential	15	585	1145	54	18
	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	78	21

The results indicate that 3.2 per cent of all market offers (i.e. 78 of 2437 market offers) available on EME on 17 January 2018 would be in breach of the proposed rule if turned into a market retail contract with the discount provision. Under the final rule 0.9 per cent of all market offers (i.e. 21 out of 2437 market offers) would be in breach if turned into a market retail contract with the discount provision.

In the Commission's analysis many of the market offers that breach the proposed rule but not the final rule are time of use offers. As these offers have more pricing elements they are more likely to meet the energy rates test of the proposed rule (where only one rate of the daily supply, usage or demand charge needed to be above in the market contract compared to its equivalent standing offer).

Table C.2 Number of market offers with equivalent standing offers between the proposed and final rule

Number of equivalent standing offer matches	**Number of market offers (proposed rule)**	**Number of market offers (final rule)**
0	556	1579
1	1700	829
2	148	29
4	33	0
Total market offers: 2437		

An offer can be matched multiple times. The correct way to interpret Table C.2 above is to consider the two columns to the right (number of market offers for the proposed rule and final rule) a count of the market offers that have the corresponding number of equivalent standing offer matches in the column on the left hand side. So, for example, the first row tells us that 1579 energy market offers had no equivalent standing offers under the Commission's final rule, compared to the proposed rule having 556.

Table C.2 above shows that there are far fewer "equivalent" standing offers under the final rule compared to the proposed rule. Note that this is before even the energy rates or energy payments test are considered. 858 market offers met the "equivalency test" for the final rule (without reference to materiality and energy payments besides feed-in tariffs) compared to the proposed rule where 2020 market offers had at least one "equivalent standing offer".

C.3 Bill analysis of energy offers

A concern raised throughout the consultation process and in submissions to the consultation paper was that the Commission's initial position did not address confusing discounting practices where only one energy rate in the market contract was above the equivalent standing offer, but high enough above to offset the impact of any lower energy rates. This is discussed in detail in section 5.2 of this paper.

In response to this concern the Commission has undertaken an analysis of bill outcomes. This looks at the prevalence of the market offers that would be in breach of either the proposed or final rule if turned into market retail contracts with their discounting provisions. The analysis of bills was done on an annual basis.

C.3.1 Bill analysis methodology

Consumption levels, where possible, are sourced from Price Trends 2017. We use the small household, representative consumer and large household annual consumption levels in each of the jurisdictional appendices in the report.[157] Otherwise they are estimated by Commission judgment.

Due to the complexity present, we have excluded bill analysis of time of use offers. Nonetheless, the Commission maintains that time of use offers, due to the time variance involved in the charges, depend highly on the consumption and generation profile of the consumer. Thus, comparison of the resulting bill will depend greatly on this profile, particularly in the case where not all energy rates are higher and some are lower in market offer compared to the equivalent standing offer.

It is also worthwhile noting that the only representative consumer with controlled load consumption is in south east Queensland.

157 Tables B.1 (Queensland), C.1 (New South Wales), D.1 (Australian Capital Territory) and F.1 (South Australia).
See: AEMC, *2017 Residential Electricity Price Trends*, 18 December 2017, Sydney, pp. 88, 99, 110, 133.
The Commission notes that none of the consumption profiles used here include solar PV.

C.3.2 Bill analysis results

We note that of the 30 offers that breach the proposed but not the final rule, where bill data was calculated:

- *Before discounts*: 6 market offers were more expensive than their equivalent standing offer at all consumption levels. 1 market offer was more expensive than its equivalent standing offer for half of its consumption levels.[158]
- *After discounts*: 2 market offers were more expensive than their equivalent standing offer at all consumption levels.

This supports the Commission's analysis for its final position which considered the proposed rule was too broad as it caught 23 market offers where consumers had lower bills under all consumption levels, before discounts. That is, these offers that would have been restricted were actually to the benefit of consumers.

The Commission notes in seven of the market offers that were more expensive compared to their equivalent standing offer before discounts (under at least one consumption level) also had a solar feed-in tariff, whereas the standing offer did not have a feed-in tariff. As the Commission did not consider the potential impact of a household generation profile for solar on bills for this analysis, the Commission notes that it is possible a consumer with solar would have been better off on these market offers compared to their equivalent standing offers. Under the Commission's final rule, solar feed-in tariffs would be considered and the energy payments test would apply.

Table C.3 Comparison of annual bill outcomes between market offers subject to the proposed but not final rule and their equivalent standing offers

Bill outcome	Undiscounted bills	Bills after discount
Standing offer leads to a higher bill at all consumption levels	23	28
Standing offer leads to a higher bill at half of consumption levels	1	0
Market offer leads to a higher bill at all consumption levels	6	2

158 This offer has controlled load. It was therefore assessed for a representative consumer with and without controlled load usage. That leads to six consumption levels for this particular offer.

D Differences between proposed rule and more preferable final rule

Table D.1 Detailed comparison of key differences between the proposed rule and the Commission's final rule

Feature of the rule	Treatment under the proposed rule	Treatment under the Commission's more preferable final rule
Preventing confusing discounts that cause consumer detriment: *energy rates test and definition*	The discount prohibition applies to a market contract if any of the below rates in that contract were above the standing offer rates: • daily supply charges • usage charges • demand charges.	The discount prohibition applies to a market contract where: • at least one energy rate exceeds the equivalent energy rate component under the equivalent standing offer • no energy rate under the market retail contract is lower than the equivalent energy rate component under the equivalent standing offer. This part of the rule is discussed further in section 5.2. This condition is part of three conditions that must be satisfied for the discount prohibition to apply. The other two are the *energy payments test* and *conditions for equivalency*.
	The proposed rule would have required the above charges (i.e. daily supply, usage and demand charges) to be defined for market retail contracts and standing offers.	*Energy rate* is defined broadly to encompass daily supply, usage and demand charges as well as account for any currently-unknown charges which might be provided for under future market retail contracts and standing offers. This part of the rule is discussed further in section 5.2.
Preventing confusing discounts that cause consumer detriment: *energy payments test*	The proposed rule did not address energy payments.	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. This part of the rule is discussed further in section 5.3. This condition is part of three conditions that must be satisfied for the discount prohibition to apply. The other two are the *energy rates test* and *conditions for equivalency*.

Feature of the rule	Treatment under the proposed rule	Treatment under the Commission's more preferable final rule
Conditions for equivalency between a market retail contract and standing offer: *tariff structure*	Tariff structure of the market retail contract and standing offer of the retailer must be the same. Under the proposed rule it would be unclear if this would apply to energy payments, such as a feed-in tariff.[159]	• For the rule to take effect a market retail contract with discounting provisions must have an equivalent standing offer. • To be equivalent, the standing offer must have a tariff structure not *materially* different to the market retail contract with respect to: (1) energy rates and (2) energy payments. This part of the rule is considered in section 5.5. The *conditions for equivalency* is part of three conditions that must be satisfied for the discount prohibition to apply. The other two are the *energy rates test* and *energy payments test.*
Conditions for equivalency between a market retail contract and standing offer: *region/availability to the same customer*	Market contract rates are compared to the retailer's standing offer prices generally available to the small customer in the "region" in which the customer is to consume electricity under the market contract.[160] The rule change request also suggested the Commission consider an alternative construction of the region closest to the region in which the consumer is to consume electricity.[161]	• For the rule to take effect a market retail contract with discounting provisions must have an equivalent standing offer. • To be equivalent, the standing offer and the market retail contract must be available to the same small customer, or would be if the retailer was the designated retailer for the small customer's premises. This part of the rule is considered further in section 5.5. The *conditions for equivalency* is part of three conditions that must be satisfied for the discount prohibition to apply. The other two are the *energy rates test* and *energy payments test.*

159 To the extent that tariff structure comparisons cannot be made, the rule change request suggested the Commission consider a more preferable rule. See: Rule change request, p. 5.

160 "Region" is not defined in the rule change request. Our interpretation of "region" is that of a distribution supply area. Alternative interpretations could include a postcode or greater geographical area, or a NEM region.

161 Rule change request, p. 4.

Feature of the rule	Treatment under the proposed rule	Treatment under the Commission's more preferable final rule
Conditions for equivalency between a market retail contract and standing offer: *benefits and services*	The proposed rule did not address benefits or services to a consumer under any market retail contract or standing offer.	• For the rule to take effect a market retail contract with discounting provisions must have an equivalent standing offer. • To be equivalent, the market retail contract must provide no material additional benefit or service to the customer compared to the standing offer. This part of the rule is considered further in section 5.5. The *conditions for equivalency* is part of three conditions that must be satisfied for the discount prohibition to apply. The other two are the *energy rates test* and *energy payments test.*
Conditions for equivalency between a market retail contract and standing offer: *the same retailer providing the market contract*	The proposed rule made reference to the retailer's "standing offer prices" in relation to the market contract in several aspects.	• For the rule to take effect a market retail contract with discounting provisions must have an equivalent standing offer. • To be equivalent, the retailer making the standing offer must be the retailer providing the market retail contract, or be a related body corporate of that retailer. This part of the rule is considered further in section 5.5. The *conditions for equivalency* is part of three conditions that must be satisfied for the discount prohibition to apply. The other two are the *energy rates test* and *energy payments test.*
What the discount prohibition applies to	Any amount a customer is billed under a market contract.	Discounts applied to energy rates. This part of the rule is covered in section 5.2.
Explicit accounting for fixed price market retail contracts	The proposed rule did not address fixed price contracts.	Details of the treatment of fixed price contracts are covered in Table 2.1. This part of the rule is discussed further in section 5.6.
Accounting for unique aspects of dual fuel in the operation of the discount prohibition	The proposed rule did not address dual fuel contracts.	Details of the treatment of dual fuel contracts are covered in Table 2.1. This part of the rule is discussed further in section 5.10.

Feature of the rule	Treatment under the proposed rule	Treatment under the Commission's more preferable final rule
Commencement date	The rule change request suggested the rule commence on 1 March 2018, but recognised that a reasonable period of transition is needed to allow retailers to make necessary changes to comply with a rule.	The rule commences on 1 July 2018. The date of commencement of the final rule is discussed further in section 5.7.