

30 March 2020

Submitted via Engage Victoria

Kate Symons
Chairperson
Essential Services Commission

Dear Kate,

ESC Assessing the competitiveness and efficiency of the Victorian energy retail market - Framework and approach paper

Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the Essential Services Commission's (ESC) *Assessing the competitiveness and efficiency of the Victorian energy retail market - Framework and approach paper (the Paper)*.

Because energy is an essential service that all households need for their health, wellbeing and social participation, it is important that the ESC effectively monitors energy retailers to ensure fair outcomes for all households. Consumer Action supports the perspectives of the Independent Review of The Electricity & Gas Retail Markets in Victoria (**Thwaites review**)¹ and approach paper which have both stated that "competition is a means to an end rather than an end in itself." Above all else, the regulation of our essential energy services must be focused on identifying and addressing where businesses fail to provide fair access and service for all households.

The ESC has indicated that it will first prioritise the assessment of 'trust' and 'innovation' when assessing competitiveness in the energy market. However, we suggest that outcomes for households that disengage from the energy market and potential gaps or inconsistencies in consumer protections for gas when compared to electricity regulation should be among the ESC's priorities. The ESC should use its information gathering powers to identify what people are paying and recommend action where there are any households in Victoria who are not protected with regulated fair pricing when they are disengaged.

With the onset of the COVID-19 pandemic, this review takes on a different dimension. Regulators are, rightly, acutely focused on delivering good outcomes for customers. We also note that many industries are seeking to engage in coordinated conduct to deliver outcomes, for example, through seeking authorisation for otherwise anti-competitive conduct from the Australian Competition & Consumer Commission.² We support such action where it seeks to ensure services remain connected (no disconnections), that prices and bills remain affordable, and that businesses treat their customers fairly. Issues to do with retailers' viability will come to the fore, and will be perhaps more acute for resellers through embedded networks. However, we consider that there must be independent oversight of such coordinated action, including the involvement of consumer and civil society. This is essential to retain trust—we should not be divulging important social decisions to corporate interests alone at this time.

¹ Faulkner, Mulder and Thwaites, 2017. *Independent Review of The Electricity and Gas Markets in Victoria*.

² See: <https://www.accc.gov.au/media-release/accc-response-to-covid-19-pandemic>

Our comments are discussed in more detail below and a summary of recommendations is available at **Appendix A**.

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About Consumer Action

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

General comments

The roles of businesses and regulators

First and foremost, energy retailers' primary purpose should be to provide affordable energy to people on fair terms. Because they supply an essential service, energy retailers have a social responsibility to conduct themselves in the interests of all households. Households experiencing vulnerability need to be able to rely on these businesses to act fairly so they can keep the lights on. Ongoing access to sufficient energy is a 'must have' for all households. Without such access, it is impossible to overcome or manage a wide range of vulnerabilities.

Any conduct from a retailer that results in households being put at risk of or losing access to their essential energy services should be treated by the ESC as a failure from that business or the regulation that holds that business to account. With a focus on fairness, the ESC must identify whether reform, consumer redress, enforcement or all of the above are needed where these failures are identified.

Unfortunately, energy markets in general have failed many households in Victoria and caused significant harm. Unfair pricing where businesses earn excessive margins or operate inefficiently at the expense of households is unacceptable. Marketing or conduct that encourages households to sign up to energy offers which are not in their interest are unacceptable. A failure to identify and offer assistance for payment difficulty when it first emerges is unacceptable. As examples these can result in:

- The rationing of power at the risk of harming a person's health or quality of life;
- Households deciding to access finance from a predatory lender who compounds debt issues because of the pressure placed on them by energy retailer's costs or conduct, such as threatening disconnection; or
- Significant risks to a person's mental health and general safety.

Victorian households should not experience this harm from retailers' failure to provide accessible essential energy services. The ESC as a regulator should use its powers to gather information about consumer outcomes to make sure issues are identified and addressed.

RECOMMENDATION 1. The ESC focus on identifying failures by business that have harmed households and taking action to address these failures so that all households get fair outcomes when accessing essential energy services.

The proposed framework and initial focus

Consumer Action generally supports the framework and approach developed by the ESC. However, emphasis must be placed on addressing unacceptable outcomes for households above all else. The broad themes of trust and innovation signalled by the ESC for initial investigation, while worthwhile, should be a lesser priority than outcomes for households that disengage from the energy market and potential gaps or inconsistencies in consumer protections for gas. Consumer Action has provided more information about the areas that should be the initial focus of ESC monitoring which we recommend the ESC prioritise in this framework below.

The first area relates to households who 'disengage' and end up with unfair outcomes, which we consider should be prioritised in the ESC's review. Recent and upcoming reforms that implement recommendations from the Thwaites review, such as the defaulting of disengaged household's pricing to the Victorian Default Offer (VDO) regulated fair price for electricity, may not protect some households in Victoria. This is because at implementation, many of the new protections will not apply retrospectively to what will then become "legacy contracts". To analyse and report on outcomes for these households, the ESC should use its information gathering powers to acquire retailer data on what prices Victorians households are paying, whether this is fair and how this correlates with the

amount of time since households switched market offers. Knowing the price outcomes and time people have not engaged may offer greater insight as to the timeliest regulatory intervention for better outcomes. Greater understanding of the impact of new protections will ensure reforms actually achieve their intended objectives such as lowering prices, avoiding disconnections, improving retailer conduct and improving household's trust in industry.

The second area that needs prioritising is the increasing regulatory inconsistencies between electricity and gas. Consumer Action is particularly concerned that there is no price regulation for gas, meaning that many of the poor outcomes identified in relation to electricity continue for gas customers. For example, the recent Tariff Tracking Report published by St Vincent de Paul shows that typical consumption households can save between \$890 and \$1040 per annum if switching from the worst standing offer to the best market offer.³ This spread suggests that disengaged households are likely to be paying way too much. Furthermore, almost all of the 1.99 million⁴ households who have gas supply in Victoria are locked in to using gas as an essential service because it is expensive or impractical for households to disconnect gas supply and replace gas appliances. This is especially the case for households who rent. Also, gas tariffs are less comparable than electricity tariffs and gas prices have increased significantly over time. Questions are also emerging about the future of gas as a fuel source and how the costs of stranded assets should be distributed amongst different cohorts of users. For these reasons the ESC should specifically review and report on gas issues in the first wave of review as too often issues with gas have been an afterthought in reform processes.

Consumer Action welcomes the ESC indicating its intention on page five of the paper to continue engaging with stakeholders ahead of its first report. Where possible, the ESC should include direct engagement with households (particularly low income and vulnerable households) and community workers assisting households who can contextualise the harm caused by retailers failing to provide fair access to essential energy services. We agree with the ESC and experts cited in the Paper who have stated that simply assessing switching and the number of retailers offering services are not sufficient in realising fair outcomes for households. The ESC's use of qualitative interviews in the most recent Victorian Energy Market Report aided understanding of the implications of the data represented and this qualitative approach should continue as a cornerstone of the ESC's ongoing review.

Consumer Action will also be examining the ongoing impact of regulatory reforms in Victoria for the households our caseworkers assist. We will provide information and observations to the ESC wherever possible.

RECOMMENDATION 2. The ESC focus on understanding whether all households who are disengaged with the energy retail market are getting fair outcomes.

RECOMMENDATION 3. The ESC focus on household issues with gas as a priority.

Responses to consultation questions

What other specific sub-markets should we consider in our assessment, particularly those that are different to the traditional model of energy retailing?

We welcome the ESC indicating that embedded networks and new energy technology will be within scope of this review. Consumer Action has seen significant harm to households due to the conduct of businesses in these spaces.⁵

³ St Vincent de Paul Society, 2020. *Victoria Energy Prices January 2020; An update report on the Victorian Tariff-Tracking Project*, p.25

⁴ ESC, 2019. *Victorian Energy Market Report 2018-19*, p.27

⁵ For instance, see: Consumer Action 2019. *Sunny Side Up; Strengthening the consumer protection regime for solar panels in Victoria* Consumer Action, 2019. [Submission to Updating the regulatory arrangements for embedded networks draft report](#)

As such, the ESC's definition of the market should be adjusted to ensure that the ESC does not overlook emerging issues from new technology that delivers or impacts essential energy supply. As the energy system transitions, households might end up accessing energy through multiple business models or increasingly have their energy offers bundled with other services. For example, businesses providing demand response or home energy management might interrupt supply to a home, and the supply of energy technology like solar or batteries that are not fit for purpose may cause households to pay unnecessary amounts for essential energy services over a long period. The community expects the ESC as the regulator of energy in Victoria to future proof its regulation and monitoring and address all issues related to their essential energy use that might arise. Therefore, the definition should go beyond just traditional business models of on selling and recognise that households need fair outcomes from other businesses that deliver energy.

We anticipate that the increased bundling of products may undermine recent reforms on the marketing of energy in Victoria if not monitored and addressed. The ESC should also be vigilant around the ways in which excessive margins may be moved around within entities where margins are regulated in one area of the business but not another. For instance, a household may have their electricity, gas and telecommunications with the same provider and where the VDO has restricted the profit margins on their electricity supply, the business may move this margin to their wholesale supply, or to their gas or telecommunications business. This should be monitored for and addressed with relevant decision makers where identified. Where services are bundled, ineffective competition in one market can impact the effectiveness of competition in another.

RECOMMENDATION 4. The ESC expands the definition of the market it will monitor in the review to include all businesses who may interrupt or impact on the price of essential energy services, including new energy technology.

RECOMMENDATION 5. The ESC should be vigilant for ways in which businesses may shift unreasonable profit margins on essential energy supply into other connected services such as gas.

What other factors should we consider when examining the structure of the market, beyond considering the number of participants in the market? Should there be defining and differentiating characteristics between participants in the market?

Switching rates are a deceptive measure of competition, and are not a solid evidence base for good consumer outcomes. The Victorian Energy Policy Centre has found that people often will not necessarily switch to the best deal.⁶ We believe this will still be the case even with clear advice and best offer notification requirements, particularly where people are seeking dual fuel contracts with the same retailer which brings an extra layer of complexity to decision making. Also, the ESC has acknowledged in the past that a significant proportion of switches often relate to moving households as opposed to a deliberate engagement to find an offer that best suits the household's needs. Unsolicited marketing can similarly risk customers signing up to poor offers, and that is why we support the Victorian Government's proposal to ban unsolicited energy marketing.⁷

The ESC should consider the costs of competition when assessing the market. For instance, while in theory having more businesses in the retail energy market should lead to lower prices, instead it might increase the need for businesses to spend on customer acquisition and retention, with these costs ultimately passed on to households. This is particularly unfair to households who are not engaged and gain no value from spending on customer acquisition. This means that the ESC should not consider that more retailers deliver a more competitive market; rather, it should be examining the quality of competition in terms of the outcomes it delivers for consumers.

⁶ Victoria Energy Policy Centre, 2019. *Do Victoria's households leave less money on the table when they switch electricity retailers?*

⁷ See: <https://www.danandrews.com.au/s/CRACKING-DOWN-ON-DODGY-ENERGY-RETAILERS-LABORS-ENERGY-FAIRNESS-PLAN-1.pdf>

The reality is that the energy market remains concentrated, with the larger retailers enjoying advantages over their smaller rivals. Not only do they continue to benefit from incumbency, they have greater economies of scale and are also vertically integrated. While a fourth retailer has gained market share in Victoria, the other retailers are much smaller. We consider this to be a reality of the market, and further 'consumer engagement' strategies are unlikely to promote stronger second and third-tier regulators. Rather, the ESC should consider market activities that cause detriment associated with this structure – for example, 'win back' activities that entrench incumbency, which are also to be banned by the Victorian Government.⁸ The regulatory effort should not be focused on 'activating' consumers, but rather on ensuring the rules and incentives for retailers align with good consumer outcomes.

The ESC should be realistic about 'innovation' and recognise that it does not always benefit customers. Innovation can often be code for chicanery and avoidance. Five years ago, energy retailers promoted 'discounted offers' as innovative. This was pure spin and marketing rather than delivering for customers. Instead of 'innovation' for its sake, the consideration should be whether the service meets the needs of consumers. As noted at the outset, the main concern for consumers is an accessible and affordable supply. While there is potential innovation and efficiency that benefits consumers associated with new renewable energy and distributed energy business models, these need to be examined as to the sharing of risk and benefits for consumers. If the business model is only about putting more risk onto consumers, then trust will be lost, impacting the required effective transition to a low and no carbon energy system.

The ESC should also consider whether energy market participants are able to deliver good outcomes for all customers, including the most vulnerable. The ACCC Retail Electricity Pricing Inquiry revealed that some energy retailers developed strategies to "move on" customers experiencing vulnerability.⁹ Consumer Action has also heard many anecdotes of retailers encouraging households entitled to assistance when in payment difficulty to instead switch to another retailer. Such conduct is not always in the household's interests and ignores the obligation on retailers to assist customers experiencing payment difficulty to maintain essential energy supply. The ESC should make similar inquiries as the ACCC to determine if the conduct is still occurring in Victoria. If businesses are unable to provide appropriate assistance for people in payment difficulty or do not see this as their role then they should not be licensed to provide an essential service.

RECOMMENDATION 6. The ESC investigate the costs of competition and whether competition is motivating businesses to treat people experiencing vulnerability unfairly.

RECOMMENDATION 7. The ESC recognise the reality of the market structure, and rather than seeking to change it, focus on ensuring the rules and incentives for retailers align with good customer outcomes

RECOMMENDATION 8. The ESC examine 'innovative' business models to ensure that they deliver consumer benefit

When examining the range of prices being offered by retailers, what other factors should we consider when assessing the competitiveness and efficiency of the Victorian energy market?

Price dispersion should not be considered as an indicator of competition – it merely indicates that some consumers are not obtaining the price benefits of competition. Also, as discussed above, the ESC should consider factors like bundling and the length of time a household has not engaged relative to the fairness of the price they are paying. The ESC should also monitor the pricing available to households in areas with only one gas retailer, and the outcomes for households in embedded networks where they have no effective choice of retailer either.

⁸ Ibid.

⁹ ACCC, 2018. *Retail Electricity Pricing Inquiry*, p.308

The ESC has indicated that it will seek to understand what people are actually paying as well as what is on offer. We welcome public reporting on this as we have seen households presenting to financial counselling services with excessive pricing even after the VDO was implemented. This gouging needs to be identified and addressed.

As noted above, innovation in terms of new products being offered may not always offer consumer benefit. As such, we welcome ESC's close examination of such offers to consider whether these arrangements reduce costs for customers over the long-run. Furthermore, observations about innovation that will reduce retailer's operating costs that are identified during the review should be factored into the ESC's methodology for the VDO. Households should be able to expect that their retailer is acting as efficiently as is known to be possible and passing the savings from efficiencies onto households.

RECOMMENDATION 9. The ESC should gather information on what households are actually paying, including households in areas with on gas retailer or households in embedded networks.

RECOMMENDATION 10. Observations about reductions in operating costs through innovation should be incorporated into the Victorian Default Offer methodology.

What factors should we consider in understanding how customers interact with the market? What level of engagement should be expected of customers in the retail energy market?

Households have no choice but to purchase energy because it is an essential service. Households should not have to engage at all to get a fair outcome. As discussed above, the ESC should prioritise understanding the outcomes that disengaged households face in accessing essential energy services. This is particularly important in gas where there is no regulated fair price for households to default to when disengaged.

The ESC should also recognise that households do not always behave in ways expected by economists and competition policy analysts. It may be expected that a consumer will choose a cheaper offer that is available, but instead the household may decide it is too risky to change retailer because of a negative experience in the past. It is good that the ESC plans to adopt insights from behavioural studies to inform the way consumers respond to the energy retail market.

Many consumer cohorts are taking action relating to their energy service by addressing energy efficiency and installing distributed energy resources in their home. It should not be expected that all consumers have the capacity to do this, many people lack the capacity or capital to make these choices. We also consider that the ESC should take a system-wide view so the benefits of some consumers that do take this action are shared across the community or, at the very least, other households that cannot make these choices are not disadvantaged.

RECOMMENDATION 11. The ESC recognises that not engaging is a reasonable household behaviour in a market for essential services, and that this market must deliver fair consumer outcomes regardless of engagement.

RECOMMENDATION 12. Taking a system-wide view, the ESC should consider household engagement with essential energy supply beyond engagement with traditional energy retailers.

What have you observed as an indicator of innovation in the retail energy market? Provide examples and explain why it is a sign of innovation.

Although we have observed some innovative offers in the retail energy market that benefit customers, these businesses often appear to exclude some people experiencing vulnerability. For instance, businesses that offer reduced rates for purchasing in advance do so by digital platforms and are not accessible to people without access

or literacy in using the necessary technology. So, while this could be viewed as innovation the ESC must consider who is excluded and what impact that has on all household outcomes.

As indicated in the recent report by the Consumer Policy Research Centre, households desire simplicity when engaging with essential energy services.¹⁰ The ESC should encourage businesses to innovate using inclusive design principles which will deliver better outcomes for all in the community.

RECOMMENDATION 13. The ESC consider how innovation may include or exclude households experiencing vulnerability and whether this reflects a fair outcome.

What questions would you ask Victorian customers to understand their levels of trust in the retail energy market? Be as specific as possible and provide reasoning for your suggested questions.

We encourage the ESC to continue to utilise qualitative interviews with households to gain insights as to how essential energy service providers can avoid failing and households' preferred level of engagement. We encourage the ESC to ask households questions like the following:

- Have you ever felt ripped off or let down by an energy company?
- Were you able to respond to this happening and if so, how did you respond and was this effective?
- What should have happened differently to avoid the issue happening in the first place?
- Do you feel like you spend too much, the right amount or not enough time thinking or contacting your energy supplier in relation to your electricity or gas supply?

The ESC can also make use of established quantitative research like the Energy Consumers Australia Consumer Sentiment Survey¹¹ or our *Energy Assistance Report*¹² so that this review adds additional insights from qualitative interviews with questions like the above.

Please contact **Jake Lilley** at **Consumer Action Law Centre** on 03 9670 5088 or at jake@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,

CONSUMER ACTION LAW CENTRE



Gerard Brody | Chief Executive Officer

¹⁰ O'Neill, 2019. *Exploring regulatory approaches to consumer vulnerability; A report for the Australia Energy Regulator.*

¹¹ See: <https://energyconsumersaustralia.com.au/publications/energy-consumer-sentiment-survey-findings-december-2019>

¹² Consumer Action, 2019. *Energy Assistance Report; Tracking how Victoria's changing energy policies are impacting households in the state*

APPENDIX A - SUMMARY OF RECOMMENDATIONS

- RECOMMENDATION 1.** The ESC focus on identifying failures by business that have harmed households and taking action to address these failures so that all households get fair outcomes when accessing essential energy services.
- RECOMMENDATION 2.** The ESC focus on understanding whether all households who are disengaged with the energy retail market are getting fair outcomes.
- RECOMMENDATION 3.** The ESC focus on household issues with gas as a priority.
- RECOMMENDATION 4.** The ESC expands the definition of the market it will monitor in the review to include all businesses who may interrupt or impact on the price of essential energy services, including new energy technology.
- RECOMMENDATION 5.** The ESC should be vigilant for ways in which businesses may shift unreasonable profit margins on essential energy supply into other connected services such as gas.
- RECOMMENDATION 6.** The ESC investigate the costs of competition and whether competition is motivating businesses to treat people experiencing vulnerability unfairly.
- RECOMMENDATION 7.** The ESC recognise the reality of the market structure, and rather than seeking to change it, focus on ensuring the rules and incentives for retailers align with good customer outcomes
- RECOMMENDATION 8.** The ESC examine 'innovative' business models to ensure that they deliver consumer benefit
- RECOMMENDATION 9.** The ESC should gather information on what households are actually paying, including households in areas with on gas retailer or households in embedded networks.
- RECOMMENDATION 10.** Observations about reductions in operating costs through innovation should be incorporated into the Victorian Default Offer methodology.
- RECOMMENDATION 11.** The ESC recognises that not engaging is a reasonable household behaviour in a market for essential services, and that this market must deliver fair consumer outcomes regardless of engagement.
- RECOMMENDATION 12.** Taking a system-wide view, the ESC should consider household engagement with essential energy supply beyond engagement with traditional energy retailers.
- RECOMMENDATION 13.** The ESC consider how innovation may include or exclude households experiencing vulnerability and whether this reflects a fair outcome.