



Australian Energy Market Commission

RULE DETERMINATION

National Energy Retail Amendment (Retailer price variations in market retail contracts) Rule 2014

Rule Proponents

Consumer Action Law Centre
Consumer Utilities Advocacy Centre

23 October 2014

**RULE
CHANGE**

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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.

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Summary of final rule determination

Overview

The Australian Energy Market Commission has made a more preferable final rule to improve the information given to consumers when entering energy contracts. This will help consumers to better understand how prices may change under these types of contracts. Enabling consumers to make more informed decisions is likely to promote consumer confidence and engagement and enhance competition in retail energy markets.

As has always been the case, retailers are required to comply with the terms and conditions of their contracts. Under the final rule, retailers will now be required to better inform consumers about any terms and conditions relating to price changes on contract entry.

This rule has been made in response to a rule change request submitted by two Victorian consumer groups, the Consumer Action Law Centre and the Consumer Utilities Advocacy Centre. The rule change request sought to prohibit retailers that operate in jurisdictions that have adopted the National Energy Customer Framework from varying prices during contracts that cover a defined period of time and contracts that offer a benefit, such as a discount off the standard contract rates, for a defined period.¹

A key issue raised by the rule change request is that some consumers may be entering contracts unaware that under the terms of their contracts prices may vary. After careful consideration of this and other issues raised by the rule change request, extensive stakeholder engagement, and consumer research, the Commission considers it preferable to provide greater transparency in relation to how prices may vary when consumers sign up to a new contract. This is reflected in the more preferable final rule. The Commission is satisfied that this rule will better achieve the National Energy Retail Objective by assisting consumers to choose an energy contract that better meets their needs.

Context and reasoning for the Commission's decision

There are two different types of energy contracts, *standard retail contracts* and *market retail contracts*. The terms and conditions of *standard retail contracts* are largely

¹ The National Energy Customer Framework (NECF) applies in Tasmania, the Australian Capital Territory, South Australia and New South Wales. It is a framework of laws that includes the National Energy Retail Rules and National Energy Retail Law. It will apply in Queensland from 1 July 2015, following the passing of the *National Energy Retail Law (Queensland) Bill 2014* by the Queensland Parliament on 10 September 2014. Further details can be found here: <http://statements.qld.gov.au/Statement/2014/9/10/families-to-benefit-from-electricity-reforms>. The Victorian Government has announced that it will implement the NECF by the end of 2015. See: <http://www.energyandresources.vic.gov.au/about-us/publications/victorias-energy-statement>. The Essential Services Commission of Victoria has recently released Version 11 of its Energy Retail Code that includes many of the provisions from the NECF and will apply in Victoria from 13 October 2014.

prescribed in detail in the National Energy Retail Rules. For *market retail contracts* however, these rules instead set out some basic minimum standards.

These minimum standards currently do not restrict retailers in relation to how often they change their prices or by how much prices can change. However, retailers are required to notify consumers of any price changes as soon as practical to do so or at the latest in the consumer's next bill. There are also a number of obligations on retailers to disclose key information to consumers at the point of entry into a *market retail contract*. For example, retailers are required to inform consumers about whether there are any applicable exit fees as part of product disclosure information provided on their entry into a *market retail contract*.

Market retail contracts with a defined period of time, such as a two year contract, are known as "fixed term" contracts. *Market retail contracts* can also have a benefit that is offered for a defined period, such as a ten per cent discount off the retailer's standard contract rates over a two year period. These contracts are known as "fixed benefit period" contracts.

Retailers manage a range of costs and risks on behalf of consumers and package these into a retail energy bill for consumers. The costs they manage include:

- competitive market costs: which include the costs of purchasing electricity or gas in wholesale markets and the retailer's own operating costs;
- regulated network costs: which are the costs of connecting energy users to energy suppliers; and
- government policy costs: which include costs resulting from the policies of Commonwealth and/or State and Territory governments.

Some of these costs, such as regulated network costs and some government policy costs, impact retailers equally and are determined by processes that are independent of individual retailers. These costs represent over 60 per cent of a retail energy bill and are passed directly through to retailers. Depending on the extent of competition, retailers can pass on changes in the costs of providing energy services to consumers where contracts include price variation clauses.

The Consumer Action Law Centre and the Consumer Utilities Advocacy Centre considered that a retailer's ability to change a consumer's price shifts the risk of cost increases from retailers to consumers. They considered that this negatively affects confident consumer participation and engagement in retail energy markets. Their proposed rule to prohibit price changes would not allow retailers to pass on any cost increases during *market retail contracts* with a fixed term or a fixed benefit period.

The Commission considers that if retailers are unable to change their prices to pass on unmanageable changes in costs, prices for consumers are likely to increase. This is because retailers would need to set a price at the start of the contract to recover what their costs might be for the duration of the contract. Retailers are likely to be conservative in their estimates of how costs may change, as a significant proportion of

the costs that make up a retail energy bill are determined independently of retailers. They are likely to charge a significant risk premium because they have few tools to manage these costs. This means that consumers would be paying for the risk that costs may increase during the contract, even if costs go down or do not in fact increase.

The Commission also considers that if retailers are unable to change their prices, they may reduce the length of contracts or stop offering contracts with a fixed term or fixed benefit period. The Commission has concerns that this could reduce the choice of contracts available to consumers. This could affect their ability to find a contract that meets their needs. The reduction in the length of retail energy contracts could have corresponding impacts on the length of wholesale market contracts and consequently increase barriers to entry in retail energy markets and the effectiveness of competition in those markets.

Most currently available *market retail contracts* allow retailers to change their price during the fixed term or fixed benefit period. However, some retailers also offer contracts where the price does not change. These fixed price contracts are generally more expensive, but allow consumers that prefer price certainty to choose a contract that meets that preference. The Commission considers that it is important to allow consumers to choose an energy contract that they consider best meets their needs, so long as they have enough information to make an informed decision. This also places competitive pressure on retailers to develop contracts that meet consumers' preferences.

The Commission's more preferable final rule

The Commission considers that there is the potential for consumer disengagement from retail energy markets where there is a significant gap between consumer expectations and retailers' contracts. The Commission has made a more preferable final rule to address this potential disengagement, which could arise from a lack of consumer awareness about whether prices may vary during *market retail contracts*. This more preferable final rule will require retailers to better inform consumers about how prices may change when they enter *market retail contracts*. More informed and engaged consumers are likely to make better choices in retail energy markets. They are also likely to enhance retail competition, resulting in more efficient prices and contracts that better reflect consumers' preferences.

The Commission's rule builds on existing protections available to consumers under the National Energy Retail Law and the National Energy Retail Rules. Under these protections retailers are required to inform consumers on contract entry of key aspects of their contract and how they may vary over the duration of the contract.

The Commission notes that consumers' current ability to select a contract that meets their needs will be preserved under its rule. The requirements under the rule are not likely to affect the level of risk faced by retailers and are also likely to have limited direct implementation costs for retailers. This should limit the impact of the rule on prices.

The rule amends the National Energy Retail Rules to specifically require retailers to:

- disclose terms or conditions that provide for the variation of tariffs, charges or benefits (that is, prices) as part of the existing requirement to obtain the explicit informed consent of consumers to the entry into a *market retail contract*; and
- provide information about when they will notify consumers of variations to prices, charges and benefits (to the extent both are not otherwise part of prices) during *market retail contracts* as part of existing product disclosure information provided on contract entry. Consumers will have a ten business day cooling off period to withdraw from the contract after receiving this information.

These requirements will enhance the current disclosure requirements relating to explicit informed consent in the National Energy Retail Law and product disclosure requirements in the National Energy Retail Rules. Retailers may still provide additional services or information that goes beyond the requirements in the more preferable final rule, where they consider that consumers are likely to place a high value on these services.

The Commission considers that competitive retail energy markets provide the most effective mechanism for retailers to discover what consumers want and for consumers to discover the service and price combinations that retailers are offering. Competition is an iterative process that drives retailers to attract and retain customers and for customers to seek out the deal that they consider best meets their needs. For example, some retailers offer a variety of *market retail contracts* that go beyond the minimum requirements set out in the retail rules, including offering fixed price contracts, contracts with no exit fees, and contracts which provide consumers with advance notice of price changes.

The Commission's final rule is largely unchanged from the draft rule set out in the Commission's draft determination. The Commission has made this rule after carefully considering the issues raised by stakeholders during consultation on its draft determination. The rule will apply to all electricity and gas *market retail contracts* in South Australia, New South Wales, the Australian Capital Territory, and Tasmania. These are the jurisdictions where the National Energy Retail Rules currently apply.

The Commission has decided to apply this rule to all *market retail contracts* as the risk that consumers may be entering contracts unaware that prices may vary is relevant to all types of *market retail contracts*, rather than only those with a fixed term or fixed benefit period. Having regard to this and the other issues raised in the rule change request, the Commission is satisfied that improving information requirements for all *market retail contracts*, rather than limiting it to some types of *market retail contracts*, is preferable as it better serves the long-term interests of consumers, consistent with the National Energy Retail Objective.

This rule will commence on 1 May 2015 and will apply to all new electricity and gas *market retail contracts* that are entered into from this date. This will provide retailers with six months to implement changes to their processes to comply with the new requirements. Existing contracts that have been entered into before 1 May 2015 will not

be affected by the final rule as the rule only relates to disclosure requirements as part of the entry into a *market retail contract* after this time.

Further observations in relation to the marketing of market retail contracts

It can be difficult for consumers to make an informed choice when selecting an energy contract. However, there are a number of consumer protections and tools available under the National Energy Retail Law and the National Energy Retail Rules to help consumers make informed decisions.

The Australian Energy Regulator has responsibility for overseeing retailer compliance with the National Energy Retail Law and the National Energy Retail Rules and also specific responsibility for regulating retailers' marketing of energy offers to consumers. As part of this responsibility the Australian Energy Regulator requires that retailers produce energy price fact sheets for each of their contracts and operates the Energy Made Easy website to assist consumers to compare contracts. The Energy Made Easy website also provides information to assist consumers to understand whether prices may vary in their energy contracts.²

The Commission's consumer research indicates that consumers would like better information about their energy contract options and for it to be easier for them to compare different offers. This research also indicates that there are low levels of awareness of independent price comparator websites, such as Energy Made Easy.

The Commission notes that improvements to the Energy Made Easy website and energy price fact sheets could be made to improve consumer understanding of the options available to them. The Commission welcomes and supports the Australian Energy Regulator's proposed review of the requirements for the Energy Made Easy website and energy price fact sheets.³ The Commission notes that a range of stakeholders have also provided support for this review.⁴

The Commission also notes that there is a potential role for governments to play in increasing the confidence of consumers to shop around for a better deal and has set out the actions governments could take in its recent 2014 Retail Competition Review.⁵ For example, we note the New South Wales Government's "Power's in Your Hands" campaign website seeks to assist consumers to find a better energy deal, and includes links to the Energy Made Easy website.⁶

² See: <http://www.energymadeeasy.gov.au/price-changes-and-your-energy-contract>.

³ See the submissions of the Australian Energy Regulator at page 5.

⁴ See the submissions of the Australian Energy Regulator at pages 3 to 5, the South Australian Department for State Development at page 2, CALC and CUAC at page 6, the Ethnic Communities Council of NSW at page 3, AGL at page 1, the Energy Retailers Association of Australia at page 2 and the Combined Pensioners and Superannuants Association of NSW at page 4.

⁵ Further details on the AEMC's 2014 Retail Competition Review can be found on the AEMC website at www.aemc.gov.au

⁶ See: <http://www.yourenergy.nsw.gov.au/>.

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1 CALC and CUAC's rule change request

1.1 The rule change request

On 23 October 2013 the Consumer Utilities Advocacy Centre (CUAC) and the Consumer Action Law Centre (CALC) submitted a rule change request to the Australian Energy Market Commission (AEMC or Commission).⁷ The rule change request sought to make amendments to the National Energy Retail Rules to prohibit retailers from including terms in their contracts that allow them to change their prices during the fixed term or fixed benefit period of *market retail contracts*.

This was the first request that the AEMC received to amend the National Energy Retail Rules (retail rules) following their commencement on 1 July 2012.⁸

1.2 Relevant background and current arrangements

1.2.1 The National Energy Customer Framework

The retail rules are part of a broader set of obligations, including the National Energy Retail Law (Retail Law), that together comprise the National Energy Customer Framework (NECF).⁹ This framework operates in participating jurisdictions that currently include Tasmania, the Australian Capital Territory, South Australia and New South Wales.¹⁰ The NECF establishes consumer protections and obligations regarding the sale and supply of electricity and natural gas to consumers, with a particular focus on residential and small business customers.

⁷ See the CALC/CUAC rule change request, October 2013.

⁸ The National Energy Retail Rules commenced in the Australian Capital Territory and Tasmania on 1 July 2012, followed later by South Australia on 1 February 2013 and New South Wales on 1 July 2013. The National Energy Retail Rules are yet to apply in Queensland or Victoria.

⁹ The NECF is made up of the Retail Law, the National Energy Retail Regulations and the retail rules and amendments to the National Electricity Law, the National Gas Law, National Electricity Rules, and National Gas Rules necessary to implement the Retail Law and the retail rules. The Retail Law and the Regulations are legislative instruments implemented in each participating jurisdiction that set out the core framework of the NECF, including the provisions that provide the AEMC with the power to make changes to the retail rules. The retail rules provide more detailed provisions that regulate the rights and obligations of retailers and consumers in retail energy markets.

¹⁰ The NECF will apply in Queensland from 1 July 2015, following the passing of *National Energy Retail Law (Queensland) Bill 2014* by the Queensland Parliament on 10 September 2014. Further details can be found here: <http://statements.qld.gov.au/Statement/2014/9/10/families-to-benefit-from-electricity-reforms>. The Victorian Government has announced that it will implement the NECF by the end of 2015. See: <http://www.energyandresources.vic.gov.au/about-us/publications/victorias-energy-statement>. The Essential Services Commission of Victoria has recently released Version 11 of its Energy Retail Code that includes many of the provisions from the NECF and will apply in Victoria from 13 October 2014.

The consumer protections under the NECF are intended to complement and operate alongside consumer protections in other relevant laws. These protections include the national consumer protections under the Australian Consumer Law and also state and territory consumer protection laws.

1.2.2 Regulation of retail energy contracts

There are two different kinds of retail contracts that are regulated under the retail rules. These are *standard retail contracts* and *market retail contracts*.¹¹ They are regulated in different ways as shown in Figure 1.1 below. Retailers may go beyond the minimum requirements set out in the retail rules for *market retail contracts*, where they consider consumers are likely to value additional services or information .

Figure 1.1 Overview of the main differences between standard and market retail contracts

Standard retail contracts	Market retail contracts
Must be offered by some retailers	Not required to be offered by retailers
Prices regulated in some jurisdictions for some retailers	Prices are not regulated
Contracts must be based on "model terms" set out in the retail rules, subject to limited variations	Contract terms subject to limited minimum requirements (not model terms)
Prices cannot vary more than once every six months	No restriction on the number or size of price variations
Notification of price variation published 10 days in advance and in the customer's next energy bill	Notification of price variation as soon as practicable and no later than the next energy bill
Retailers cannot charge exit fees	Retailers can only charge exit fees during the fixed period and the exit fee cannot be more than a reasonable estimate of the costs to the retailer resulting from the early termination

Retailers are also required to comply with a number of product disclosure requirements when consumers enter *market retail contracts* that they are not required to comply with for *standard retail contracts*. These include a requirement to inform consumers of all matters relevant to their entry into a *market retail contract* in obtaining their "explicit informed consent" to the transaction,¹² and to disclose information on prices and how prices may change before or soon after the formation of a *market retail contract*.¹³

11 See subsections 20(1) and (2) of the Retail Law.

12 See sections 38 and 39 of the Retail Law.

13 See rules 62 to 64 of the retail rules.

The rule change request relates to the regulation of the terms and conditions of *market retail contracts* in the retail rules.¹⁴ *Market retail contracts* are all retail electricity or gas contracts that are not *standard retail contracts*. Under the retail rules retailers have greater flexibility in the terms they can include in *market retail contracts* compared to *standard retail contracts*. For example, *market retail contracts* can include a discount or other benefit, such as a magazine subscription. The flexibility extends to the terms retailers can use in relation to how they vary prices under *market retail contracts*. *Market retail contracts* can be:

- *Fixed term retail contracts* – which are contracts that contain a term that specifies the date on which the contract will end or a method for calculating that date. For example, a two year contract where the contract ends at the end of the two years;
- Contracts with a *fixed benefit period* – which are contracts that contain terms that specify a benefit that is available for a specific period of the contract. For example, a contract that has a two year period with a ten percent discount from the rate of the standard retail contract, and the same contract continues after the discount ends; and
- Contracts that do not have a fixed term or benefit period, which are known as evergreen contracts.

For convenience and simplicity we will refer to *fixed terms* and *fixed benefit periods* together as “fixed periods”. The rule change request relates to retailers changing their prices during fixed periods in *market retail contracts*.

1.2.3 Current regulatory arrangements for market retail contracts

The retail rules contain a set of "minimum requirements" that *market retail contracts* must comply with which retailers are able to build on to compete for customers.¹⁵ Under these rules, *market retail contracts* can contain terms that allow prices to change during fixed periods. The contract must also require the retailer to inform the customer of any price changes as soon as it is practical to do so, or at the latest in the next bill.¹⁶ There are no restrictions on the amount or number of price changes that a retailer can make during a fixed period in a *market retail contract*.

Retailers can charge their customers if the customer terminates certain retail energy contracts early. Retailers can only charge their customers for terminating a *market retail contract* if it is a contract with a fixed period and the contract is terminated during that fixed period. These “exit fees” cannot be more than a reasonable estimate of the costs to the retailer resulting from the early termination.¹⁷ In New South Wales there is also a cap on the exit fees that can be charged by retailers of \$130 for termination within the

¹⁴ These rules are set out in Division 7 of Part 2 of the retail rules.

¹⁵ See section 34(1)(b) of the Retail Law and rules 14(1) and 15(2) of the retail rules.

¹⁶ See rule 46 of the retail rules

¹⁷ See rule 49A of the retail rules.

first 12 months of the contract and \$45 for termination thereafter.¹⁸ Due to the competitive process in retail energy markets, some retailers may choose not to charge exit fees in some or all of their *market retail contracts*.

1.3 Rationale for rule change request

CALC and CUAC noted that the current retail rules allow retailers to include terms and conditions in *market retail contracts* that allow them to vary their prices during a fixed period. Further, as retailers are also able to charge exit fees under the rules, CALC and CUAC considered that consumers may be discouraged from changing their retailer or contract following a price rise.¹⁹ CALC and CUAC noted that although the size of exit fees is limited under the retail rules to the reasonable costs incurred or to be incurred by the retailer, many fixed period contracts still impose significant exit fees.²⁰

CALC and CUAC provided case studies indicating that some consumers have entered into contracts with retailers with low prices that have then increased during the fixed period, and the consumers have noticed that the retailers are still offering similar lower prices to new customers.²¹ CALC and CUAC considered that the customers are then locked into the higher prices because of exit fees. They also suggested that, as a result, customers are likely to consider that changing retailers would be a waste of time because the new retailer would soon raise their prices.²²

CALC and CUAC considered that by allowing retailers to vary prices in *market retail contracts* the current rules give rise to a number of concerns, such as:

- inefficient allocation of risk in the market, as retailers are able to shift much of the risk of cost changes in the delivery of energy services to consumers by increasing the prices paid by customers;
- inefficient pricing and consumption decisions in the market, as price rises may result in consumers using less energy than is efficient or paying retailers more than would be efficient;
- a lack of consumer confidence and engagement in the market, as consumers are discouraged from participating in retail energy markets. CALC and CUAC suggest this occurs because of the perception that retailers will vary prices after

18 For more information see http://www.ipart.nsw.gov.au/Home/Industries/Electricity/Reviews/Retail_Pricing/Review_of_requirements_for_early_termination_charges/16_Dec_2013_-_Media_Release/Media_Release_-_Final_Report_on_early_termination_fees_for_electricity_contracts_for_small_customers_-_16_December_2013.

19 See the CALC/CUAC rule change request at page 4.

20 See the CALC/CUAC rule change request at page 4.

21 See for example the CALC/CUAC rule change request at pages 19 and 20. We note that the examples provided in the rule change request are from Victoria, a non-NECF jurisdiction. However, such conduct would also not offend the relevant provisions of the retail rules regarding price variations in *market retail contracts*.

22 See the CALC/CUAC rule change request at page 38.

consumers enter a new contract and the transaction costs (such as exit fees and search costs) involved in switching to a new contract; and

- adverse impacts on the application of certain consumer protections, as the current rules may affect the protections available to individuals from unfair contract terms under the Australian Consumer Law.

1.4 Solution proposed in the rule change request

CALC and CUAC's preferred outcome is the inclusion of a new rule 46A in the retail rules that would prohibit retailers from including terms in their contracts that allow them to vary their prices during the fixed periods of *market retail contracts*.²³ CALC and CUAC's proposed rule is set out in Box 1.1 below.

Box 1.1: CALC and CUAC's proposed new rule 46A

46A Fixed period market retail contract

1. This rule applies to market retail contracts with a fixed period.
2. For such market retail contracts, all tariffs and charges payable by the customer are not to change for the duration of the fixed term.
3. For avoidance of doubt, for contracts subject to this rule, the retailer is not able to vary the tariffs and charges that affect the consumer.

We understand that it is intended that the proposed rule would apply in relation to all fixed period contracts. That is, both "fixed terms" in *market retail contracts* and "fixed benefit periods" in *market retail contracts*.

While the proposed new rule 46A is the preferred option for CALC and CUAC, two alternative options were also provided in the rule change request for the AEMC to consider. These are:

- prohibiting all changes to prices during the fixed period of *market retail contracts* except passing on "government charges" (such as costs associated with environmental policies). CALC and CUAC stated that this option would also require appropriate further regulation to communicate the risks of changes in government charges to consumers;²⁴ and
- removing the current rule 46 (which they argue expressly allows retailers to include price variation clauses in their fixed period contracts) so that the Australian Consumer Law (ACL) provisions relating to "unfair" terms in

²³ See the CALC/CUAC rule change request at page 6.

²⁴ See the CALC/CUAC rule change request at pages 6 to 7.

consumer contracts would then apply.²⁵ CALC and CUAC considered that this would allow consumers to exit fixed period contracts following a price variation without paying an exit fee.²⁶

CALC and CUAC noted that the second of these options is their least preferred alternative option.

1.5 The Commission's rule making process to date

On 13 February 2014 the Commission published CALC and CUAC's rule change request and a paper prepared by AEMC staff identifying issues and questions for consultation. On this date the Commission also decided to extend the timeframe for the publication of its draft determination to 14 August 2014. This extension of time was due to:

- the complexity of the issues raised by the rule change request; and
- the need to undertake additional stakeholder consultation, including undertaking meetings with a broad range of stakeholders and holding a public forum.

Submissions on the rule change request closed on 27 March 2014. The Commission received 38 submissions as part of this first round of consultation. They are available on the AEMC website.²⁷ A summary of the issues raised in submissions and the Commission's response to each issue is set out in **Appendix C**.

The Commission held a public forum on 19 May 2014 to provide an opportunity for stakeholders to share their views on the problems identified in the rule change request, the impact of the proposed rule, and any alternative solutions that may better address the identified problems. Fifty one participants attended the public forum. A copy of the presentations given at the public forum can be found on the AEMC website.

The Commission's draft determination and more preferable draft rule was published on 31 July 2014. The Commission's more preferable draft rule sought to improve the information given to consumers when entering *market retail contracts* by requiring retailers to provide information to consumers on whether prices could vary and when they would be notified of any price changes. The draft rule was intended to address the risk that consumers may be entering contracts unaware of how prices may change during their contracts, an issue arising from the rule change request.

Submissions on the draft determination closed on 11 September 2014 and 20 submissions were received. The submissions are available on the AEMC website and a summary of the issues raised and the Commission's response is set out in **Appendix B**.

²⁵ We note that this view is based on CALC and CUAC's view that rule 46 impacts the application of the unfair contract terms provisions of the ACL.

²⁶ See the CALC/CUAC rule change request at page 7 and more generally at Appendix 2.

²⁷ www.aemc.gov.au.

The Commission has also received comments on the rule change request via CALC's campaign website "www.fixit.org.au". 12 emails were received from consumers through the link provided on CALC's campaign website. These emails contained a range of views and concerns relating to the rule change request, including the rising cost of energy, the difficulty of understanding energy contracts and the need for lower income and vulnerable consumers to have certainty in their energy costs. The emails were largely supportive of CALC and CUAC's proposed rule. The Commission has taken the views expressed in these emails into account in making this final determination.

CALC's campaign website also allows consumers to sign a petition supporting the statement "I believe fixed contracts should mean fixed prices!" The Commission has to date received 1,436 petition responses, which were passed onto the Commission by CALC, supporting this statement.

The Commission notes that it has taken these petition responses into account in making its final determination and acknowledges the concerns expressed by the petitioners. Given the statutory framework within which it operates, the matters that the Commission gives weight to when deciding whether to make a rule are matters that are relevant and of value as evidence of whether the proposed rule contributes to the National Energy Retail Objective. The number of petitioners who agreed to the statement was not considered by the Commission to be material to the assessment of this rule change request because it did not provide additional evidence relevant to the assessment of the proposed rule with respect to the National Energy Retail Objective.

2 Final rule determination

The Commission considers that there is the potential for consumer disengagement from retail energy markets, where there is a significant gap between consumer expectations and retailers' contracts. The Commission has made a more preferable final rule to address this potential disengagement, which could arise from a lack of consumer awareness about whether prices may vary during *market retail contracts*. This rule will require retailers to better inform consumers about how prices may change when they enter *market retail contracts*.

This Chapter outlines:

- the Commission's rule making test for changes to the retail rules;
- the Commission's assessment framework for considering the rule change request; and
- a summary of the Commission's final determination, including the reasoning for its decision.

Appendix A sets out further detail regarding the legal requirements for the making of this final rule determination.

2.1 Rule making test

The Commission may only make a change to the retail rules if it is satisfied that the change meets the rule making test set out in the Retail Law. The rule making test requires the Commission to be satisfied of two matters.

Firstly, the Commission's assessment of the rule change request must consider whether the rule will or is likely to promote the National Energy Retail Objective (NERO) (the "NERO test").²⁸ The NERO states:

"The objective of this Law is to promote efficient investment in, and efficient operation and use of, energy services for the long term interests of consumers of energy with respect to price, quality, safety, reliability and security of supply of energy."²⁹

The AEMC 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").³⁰

²⁸ In accordance with section 236(1) of the Retail Law.

²⁹ See section 13 of the Retail Law.

³⁰ See section 236(2)(b) of the Retail Law.

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.³¹ 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.

It should also be noted that, where the Commission is satisfied that a proposed rule would satisfy both parts of the rule making test, it is not automatically required under the Retail Law to make the rule. The Commission retains discretion as to whether or not to make the proposed rule. For example, the Commission may make a more preferable rule.

The Commission can make a more preferable rule that is materially different from the proposed rule if it is satisfied that, having regard to the relevant issues raised in the rule change request, the more preferable rule will or is likely to better contribute to the NERO.³² Further discussion on the Commission's framework for considering the rule change request is set out below.

The Commission is also required to consider any relevant Ministerial Council on Energy (MCE) statements of policy principles in determining whether a change to the retail rules is required.³³ As yet, no relevant MCE statements of policy principles have been made.

2.2 The Commission's assessment framework for considering the rule change request

2.2.1 The NERO test

The long-term interests of consumers lie at the heart of the NERO test. The NERO requires that efficiency in the investment, operation and use of energy services is the principal consideration for determining what is in the long-term interests of consumers.³⁴

³¹ That is, the legal tests outlined in section 236(1) and 236(2)(b) of the Retail Law.

³² See section 244 of the Retail Law.

³³ See section 236(2) of the Retail Law. The MCE is referenced in the AEMC'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.

³⁴ "Efficiency" has three components. *Allocative efficiency*, which requires that goods and services are provided that meet the needs and preferences of consumers and are based on prices that reflect as closely as possible the costs of supplying an additional unit of a good or service. *Productive efficiency*, which requires that the minimum value of resources are used to produce a given set of goods and services (i.e. goods are provided at "least cost"). *Dynamic efficiency*, which requires that

The Commission considers that, where feasible, competitive markets provide the best means of promoting efficiency. Where competition is effective, retailers will have strong incentives to provide products and services that consumers value and set prices that reflect costs. They will also seek out ways to lower costs and invest and innovate to meet changing consumer preferences. Retailers that do not effectively compete in this way risk losing profits and being forced to exit the market. Effective competition also requires the active participation of informed consumers in the retail market.

The rule change request sought to make changes to the rules that affect the operation of retail energy markets. Given the importance of competition in driving efficient outcomes in markets, a key consideration for the AEMC in assessing this rule change request is the degree to which the proposed rule is likely to either promote or hinder competition.

The Commission considered the following matters in assessing whether the proposed rule will, or is likely to, promote the NERO:

- whether the efficient allocation of risks between retailers and consumers is being adversely affected by the current rules that allow price variation clauses in fixed period contracts;
- the impact of the current retail rules regarding price variations in *market retail contracts* on the transparency and information required for consumers to make informed consumption and product decisions;
- the impact of the current rules on consumer participation and decision making where prices have risen during the fixed period of *market retail contracts*;
- whether the competitive market should be relied on to deliver fixed price contracts or whether changes to the retail rules should be made to deliver this outcome; and
- the impact that the proposed rule may have on the future level of competition in retail energy markets.

2.2.2 The consumer protections test

The consumer protections test is relevant to the consideration of this rule change request.

The Commission is therefore required to satisfy itself that any rule it makes is compatible with the development and application of consumer protections for small customers, including (but not limited to) protections relating to hardship customers.

The Commission considered the following matters in assessing the proposed rule against the consumer protections test:

allocative and productive efficiency are sustained over time with changing technology and consumer tastes and preferences. Investment and innovation are integral to *dynamic efficiency*.

- the term "compatible" should take its ordinary meaning as it is not defined in the Retail Law;
- the relevant consumer protections to be considered include both current protections and protections that may be developed through legislative developments and other regulatory avenues over time, such as judicial decisions; and
- the scope of relevant consumer protections includes protections in the NECF, in the general law (for example, the ACL), jurisdictional protections under retail energy laws and regulations of participating NECF jurisdictions and those jurisdictions that are not yet participating in the NECF (such as Queensland and Victoria).³⁵

The Commission has focussed on the consumer protections in the categories outlined above that specifically pertain to the issues raised in the rule change request.³⁶ Given that the Commission is required to "satisfy itself" that the test has been met, the Commission has a degree of discretion in how it considers and gives weight to the different matters and issues relevant to its consideration.

During the course of the rule change process a number of jurisdictions have announced new developments to the consumer protections that apply in retail energy markets in their jurisdiction, including in Queensland and Victoria. This includes the Queensland Government's decision to adopt the NECF from 1 July 2015 and its consultation on draft regulations to implement the NECF.³⁷ It also includes the Essential Services Commission of Victoria's amendment of the Victorian Energy Retail Code to harmonise the Code with the NECF.³⁸ The Commission has taken these developments in consumer protections into account in considering this rule change request.

³⁵ Further detail on relevant consumer protections to the rule change request can be found in Appendix A in the Commission's consultation paper for the rule change request.

³⁶ Ibid.

³⁷ Relevant differences in the National Energy Retail Rules that may apply in Queensland that are currently being consulted on include a requirement that retailers provide consumers with at least 10 business days' notice before an increase in tariffs and charges are to apply. For more information see the Consultation Draft of the National Energy Retail Law (Queensland) Regulation 2014.

³⁸ Version 11 of the Victorian Energy Retail Code will apply from 13 October 2014. It will relevantly include a requirement that retailers provide consumers that have smart meters at least 20 business days' notice before a variation to tariffs or charges are to apply. This is consistent with previous version of the Victorian Energy Retail Code, Version 10a. For more information see <http://www.esc.vic.gov.au/Energy/Harmonisation-of-Energy-Retail-Codes-and-Guideline>. The Victorian Government has also recently announced that it will implement the NECF by the end of 2015.

Submissions on the Commission's assessment framework

Most submissions on the consultation paper from stakeholders were supportive of the Commission's assessment framework.³⁹ However, CALC and CUAC's submission on the draft determination raised concerns that the AEMC did not include analysis of the experience of the UK market and how that market has informed the Commission's thinking, particularly in relation to the recent reforms to the range and type of contracts that can be offered by energy retailers in the UK.⁴⁰

The Commission has taken into account consumer protections in a range of jurisdictions, including the UK, in considering this rule change request. In the UK a range of reforms have recently been implemented by Ofgem, the UK energy regulator. These reforms include, among other things, limiting the range and type of contracts that retailers can offer consumers and prohibiting retailers from increasing prices during fixed periods in retail energy contracts.⁴¹

The Commission notes, as highlighted by CALC and CUAC, that the recent changes to the range and type of contracts that can be offered in the UK were only implemented in late 2013. Therefore, the Commission considers that it is premature to assess the long-term impacts of these reforms on outcomes for consumers. The Commission also notes that these reforms are wide ranging in nature and are currently being reviewed by the UK's Competition and Markets Authority.⁴² Stakeholders engaging in the Competition and Markets Authority's review have expressed a range of views on the recent reforms, including some arguing that the short term impact of the reforms has been to the detriment of consumers, with increased prices and reduced choice.⁴³

While international experiences can provide some useful insights into the range of possible policy responses that could be adopted, the Commission considers that any

³⁹ See for example the submissions to the consultation paper from the Australian Energy Regulator at page 2, Alinta Energy at page 1 and Lumo Energy at page 1.

⁴⁰ See the submission of CALC and CUAC at pages 9 and 10. The recent retail market reforms in the UK are wide ranging and include, amongst other reforms, limiting the number of contracts that can be offered by each retailer, restrictions on the structure of contracts and the types of discounts that can be offered, and restrictions on price changes for fixed term contracts. Further information on these reforms can be found here:

<https://www.ofgem.gov.uk/ofgem-publications/85375/simplerclearerfairerfactsheet.pdf>

⁴¹ Some other relevant reforms that have been implemented in the retail market in the UK include restrictions on the structure of contracts and the types of discounts that can be offered. Further information on these reforms can be found here:

<https://www.ofgem.gov.uk/ofgem-publications/85375/simplerclearerfairerfactsheet.pdf>.

⁴² The UK's Competition and Markets Authority is undertaking an investigation of the supply and acquisition of energy in Great Britain, which will include the recent reforms to tariff simplification and outcomes in retail markets. Further details on the UK Competition and Market Authority's review can be found here: <https://www.gov.uk/cma-cases/energy-market-investigation>.

⁴³ To access these submission see: <https://www.gov.uk/cma-cases/energy-market-investigation>. See for example the submission of Stephen Littlechild which argues that the UK reforms have negatively impacted competition:

https://assets.digital.cabinet-office.gov.uk/media/53f1bcf2e5274a48c100011/Stephen_Littlechild_-_Promoting_or_restricting_competition_-_response_to_IS_with_cover_note.pdf.

changes to regulatory requirements must be appropriate for the circumstances that exist in Australian retail energy markets, particularly in relation to the level of competition that exists. Any regulatory changes must also be proportionate to the issues they are seeking to address. As set out below, the Commission has determined that the issues raised by the rule change request do not warrant regulatory reforms of the magnitude that have been implemented in the UK. Therefore, the Commission considers that it is not appropriate to adopt reforms similar to those adopted in the UK.

The Commission also notes that it conducts annual reviews of the state of retail competition in electricity and gas markets in National Electricity Market (NEM) jurisdictions. This allows the Commission to consider any regulatory changes that may be warranted to improve the effectiveness of retail competition should circumstances change from year to year.⁴⁴

2.3 The Commission's final rule determination

The rule change request concerns price changes by retailers during *market retail contracts* with a fixed term or fixed benefit period and its impact on consumers. The rule change request raises a range of issues relevant to or arising from price changes by retailers during *market retail contracts*. This includes the level of consumer understanding of the terms and conditions of *market retail contracts*, particularly with respect to whether prices can vary during contracts and the risk that some consumers are unaware of how price changes can occur. After considering this and the range of issues arising from the rule change request, the Commission is satisfied that a narrower regulatory response is preferable to the proposed rule and better serves the long-term interests of consumers.

The Commission considers that price changes have the potential to contribute to consumer disengagement from retail energy markets, where consumers are unaware that prices may change when selecting their energy contract. To address this issue raised by the rule change request, the Commission considers it preferable that the regulatory response be proportionate and consistent with the promotion of consumer engagement and competitive retail energy markets. The Commission considers that a proportionate approach is to promote transparency and better information for consumers in relation to the ability for prices to vary during *market retail contracts*.

The Commission is therefore satisfied that making the more preferable final rule better meets the NERO than the proposed rule. The Commission is also satisfied that the more preferable final rule meets the consumer protections test. As a result, the Commission has amended the retail rules to:

- include a new rule 46A of the retail rules that specifically requires retailers to disclose to consumers any term or condition that provides for the variation of tariffs, charges or benefits (that is, prices) as part of the existing requirement to

⁴⁴ The Commission recently published its final report on its 2014 Retail Competition Review. The Commission's report can be found here:
<http://www.aemc.gov.au/Markets-Reviews-Advice/2014-Retail-Competition-Review>

obtain explicit informed consent from consumers to the entry into a *market retail contract*; and

- amend rule 64 of the retail rules to put beyond doubt that retailers are required to provide information about when they will notify consumers of variations to prices, charges and benefits (to the extent both are not otherwise part of prices) in *market retail contracts*. This information would be provided to consumers shortly before or following contract entry as part of existing product disclosure requirements. Under the current retail rules, consumers have a ten business day cooling off period to withdraw from the contract after they receive product disclosure information on contract entry.⁴⁵

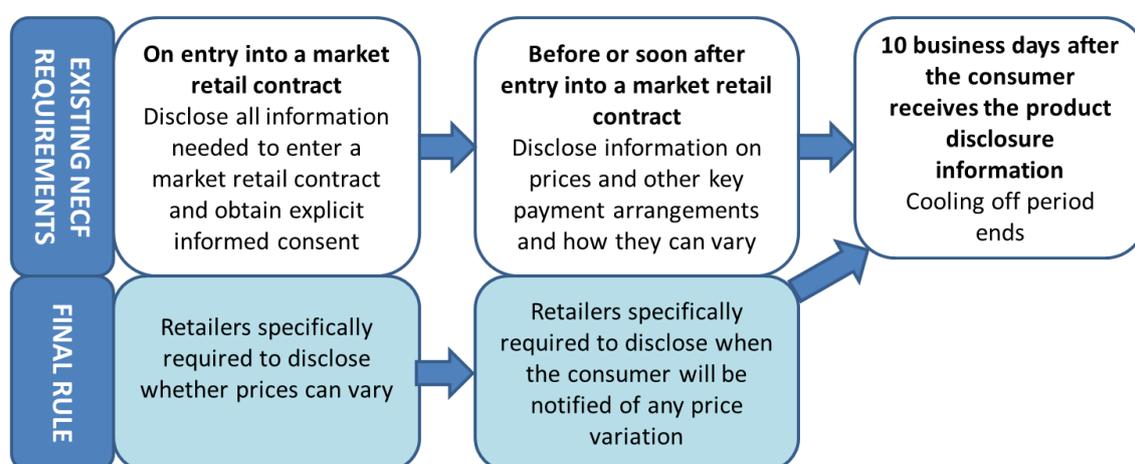
The more preferable final rule includes references to tariffs, charges and benefits as they form components of the price paid by consumers under *market retail contracts*.

The more preferable final rule is largely unchanged from the draft rule set out in the Commission's draft determination. The Commission has made this final rule after carefully considering the issues raised during consultation on its draft determination.

A small drafting change has been made to the draft rule to the requirements relating to explicit informed consent in rule 46A to clarify that retailers are required to disclose any term or condition that relates to changes in tariffs, charges *or* benefits. The draft rule had included drafting which could have been interpreted as only requiring retailers to disclose terms and conditions where these terms and conditions provide for variations to tariffs, charges *and* benefits, where they all occur at the same time. The Commission considers that this drafting change will assist in clarifying retailers' compliance obligations.

Figure 2.1 outlines how the Commission's more preferable final rule will operate.

Figure 2.1 Changes to existing requirements under the Commission's more preferable final rule



⁴⁵ See rule 47 of the retail rules.

This more preferable final rule will commence on 1 May 2015 and will apply to all new electricity and gas *market retail contracts* that are entered into from this date. This will provide retailers with six months to implement changes to their processes to comply with the new requirements. Existing contracts which have been entered into before 1 May 2015 will not be affected by the final rule as the rule only relates to disclosure requirements as part of the entry into a *market retail contract* after that time.

The Commission considers that its more preferable rule will, or is likely to, contribute to the NERO because it is likely to enhance consumer engagement by better informing consumers of key aspects of their *market retail contracts* at the point of contract entry. This will include information on whether prices under these contracts may change. More informed consumers are likely to make choices in retail energy markets that they consider better meet their needs. This improved engagement is also likely to place competitive pressure on retailers to develop energy contracts that meet consumers' preferences with respect to price and how prices may vary over the duration of the contract. This is likely to result in more efficient prices and contracts that better reflect consumers' preferences.

The Commission also notes that its more preferable rule will preserve retailers' current flexibility in the range of energy contracts that they can offer and the ability of consumers to select contracts that they consider meet their preferences. Retailers may still provide additional services or information that goes beyond the requirements in the more preferable final rule, where they consider that consumers are likely to value these services. The new requirements are also likely to have limited implementation costs for retailers, which should limit upward pressure on prices for *market retail contracts*. The Commission notes that some retailers already inform consumers on contract entry about price variation clauses and provide information on when they will inform consumers of price variations during their contract. Further discussion on this is set out in Chapter 8.

The Commission has decided to apply this rule to all *market retail contracts* as the risk that consumers may be entering contracts unaware that prices may vary is relevant to all types of *market retail contracts*, rather than only those with a fixed term or fixed benefit period. Having regard to this and the other issues raised in the rule change request, the Commission is satisfied that improving information requirements for all *market retail contracts*, rather than limiting it to some types of *market retail contracts*, is preferable as it better serves the long-term interests of consumers, consistent with the National Energy Retail Objective.

Further, the Commission considers that limiting the application of the more preferable final rule to *market retail contracts* with a fixed term or fixed benefit period could unnecessarily increase the compliance burden on retailers, as it would create differing disclosure requirements for different types of *market retail contracts*.

The Commission also considers that its more preferable final rule is compatible with the application and development of consumer protections for small customers. This is because its rule will work alongside and enhance the current requirements relating to explicit informed consent in the Retail Law and the product disclosure requirements in

the retail rules. The Commission considers that its more preferable final rule is compatible with recent developments in consumer protections in Queensland and Victoria.

Further information on the Commission's consideration of the rule change request and the reasons for its more preferable rule are set out in Chapters 3 to 8.

2.4 Strategic priority

This rule change request relates to the AEMC's strategic priority of empowering consumers to participate confidently in all parts of the energy supply chain where they desire to do so. In particular, the rule change request relates to how consumers participate in retail energy markets.

3 Issue raised in rule change request: Allocation of costs and risks in market retail contracts

This Chapter:

- provides an overview of the issue raised by CALC and CUAC regarding the allocation of costs and risks in *market retail contracts*;
- outlines the Commission's views on the issue as set out in its draft determination;
- discusses stakeholder submissions on the draft determination on the issue; and
- sets out the Commission's analysis and conclusions on whether a regulatory response to this issue is required.

3.1 CALC and CUAC's views on the allocation of costs and risks in market retail contracts

CALC and CUAC stated in their rule change request that *market retail contracts* that allow retailers to vary their prices during fixed periods result in a range of risks being borne by consumers that should be borne by retailers. This results in the risks of increases in the costs of providing energy services being passed on to consumers as increased prices.⁴⁶ CALC and CUAC argued that it is not efficient for consumers to bear these risks.

In making this point CALC and CUAC argued that retailers are in a better position to manage these risks and, if they were forced to manage them, the costs associated with those risks would be managed more efficiently. This in turn, they stated, would reduce the prices paid by consumers in the fixed periods of *market retail contracts*.⁴⁷ In support of this view CALC and CUAC attached an analysis of contract variation in the energy sector by Dr Smith of the University of Melbourne.⁴⁸ This analysis argued that:

“[i]n relation to an energy contract, for individual consumers, whilst not an insignificant household expense, specific energy costs are simply one of many such costs incurred. On the other hand, the energy retailer faces a variety of risks and has both the incentive and the ability to hedge those risks or otherwise address them. The ability to unilaterally alter the terms of a contract shifts risk from the retailer to the customer. It removes or reduces the incentive for the retailer to assess and properly provide for risk. The contract is likely to be inefficient.”⁴⁹

⁴⁶ See the CALC/CUAC rule change request at page 11.

⁴⁷ See the CALC/CUAC rule change request at page 11 and pages 16 to 17.

⁴⁸ Ibid at pages 29 to 39.

⁴⁹ Ibid at page 39.

3.2 The Commission's views in its draft determination

3.2.1 Does a retailer's ability to vary prices result in less efficient prices for consumers?

The Commission stated in the draft determination that, in general, effective competition in retail energy markets is the best means to provide for the efficient allocation of risks between consumers and retailers.

In a competitive market there should be few incentives for retailers to pass risks on to consumers where retailers are themselves better able to manage these risks. If they did not effectively manage these risks, other retailers would do so and would therefore have lower costs and be able to attract more customers.

The Commission noted in the draft determination that the principal role of the retailer in energy markets is to manage risks on behalf of consumers. Retailers face a range of different risks in providing retail energy services. These risks are associated with:

- Competitive market costs: which include wholesale market costs and retail costs incurred in the sale of energy to consumers;
- Regulated network costs: which are the costs of connecting energy users to energy suppliers through transmission and distribution electricity networks and gas pipelines; and
- Government policy costs: which include costs resulting from policies of the Commonwealth and/or State and Territory governments.⁵⁰

The Commission stated that a retailer's ability to manage risks varies for different costs due to the different tools available to retailers to manage these costs. For regulated network costs few tools exist for retailers to manage risks. In general, for government policy costs, market based policies allow retailers a greater ability to manage risks than non-market based policies due the availability of risk management tools such as hedging contracts.

It is generally more efficient for the party with the greatest ability to manage risks to do so. In this regard, it is important to note that risks are simply another form of cost to any business. Where risks are managed by the party in the best position to do so, this will lower the overall costs of supply. CALC and CUAC argued that, given this, it would be more efficient for retailers to bear all risks associated with the supply of energy by providing a fixed price because they are in a better position relative to consumers to manage risks.

The Commission did not agree with this view in its draft determination. The Commission considered that the principal means of managing some risks associated

⁵⁰ For example, costs resulting from environmental policies such as the Renewable Energy Target and the various state and territory feed-in tariff and energy efficiency schemes.

with the supply of energy to consumers is for retailers to pass on changes in costs to consumers as they incur them. If retailers do not have the ability to pass through changes in costs, retailers are likely to build a "risk premium" into retail energy prices. However, it would be difficult for retailers to accurately calculate risk premiums due to the unpredictability in forecasting changes in network prices and government policy costs. It is therefore likely that retailers would set risk premiums conservatively in order to protect against under-recovery of their costs.

The Commission considered that any risk premium would increase the prices charged to consumers to account for the risk that the relevant costs outside of the retailer's control could rise over the duration of the contract. This would occur even if the retailer is in a better position than the consumer to understand the specific risk and even if the risk did not eventuate.

The Commission noted that, even though retailers are able in most contracts to pass on increased costs in the form of price rises in most *market retail contracts*, retailers still have a competitive incentive to manage risks where it is efficient to do so and only pass on efficient costs. Retailers that pass through inefficient costs would be less competitive and would risk losing customers.

The Commission considered that consumers also have the ability to manage changes in the costs of their energy supply by varying their consumption.

The Commission therefore considered that the ability of retailers to vary prices during fixed periods in *market retail contracts* did not appear to be resulting in retailers passing through an inefficient allocation of risks and costs to consumers.

3.2.2 Do currently available market retail contracts reflect consumer preferences regarding the allocation of risks and costs?

A key indicator of a competitive market is the existence of a range of products and services that meet consumer preferences.⁵¹ The Commission noted in its draft determination that a strong indicator that price variations in *market retail contracts* are negatively affecting competition and the efficient allocation of risk would be if the current allocation of risks and costs in these contracts is significantly different from consumer preferences.

The Commission considered the allocation of risk in the electricity contracts available in Sydney in July 2014. It found that the majority of available contracts with a fixed period did not have a fixed price. In these contracts retailers were able to pass on changes in the costs of supplying energy, to the extent that these changes in cost were not tempered by competition. Two of the available contracts fixed the price of electricity for a defined period of time. In these contracts all risks associated with increases in the cost of supplying energy were borne by retailers. Similar fully fixed

⁵¹ The Commission undertakes a separate process to review the effectiveness of competition in retail energy markets in each NEM jurisdiction each year. More information on the 2014 Retail Competition Review can be found here: <http://www.aemc.gov.au/Markets-Reviews-Advice/2014-Retail-Competition-Review>.

price contracts were available in Victoria, South Australia, and most of New South Wales.

The Commission also noted that a range of retail energy contracts did not include an exit fee, which allowed consumers to switch without penalty if they were unsatisfied with changes in their energy price. The Commission indicated that the absence of exit fees on these contracts places further competitive pressure on retailers to only pass through efficient costs.

The Commission considered that under the available range of *market retail contracts*, retailers generally manage some risks and manage others to a lesser degree or not at all. However, it was also evident that there are a small number of *market retail contracts* that manage most or all risks for consumers for a fixed period.

The Commission noted that, as reflected in the range of *market retail contracts* on offer, consumer preferences also indicated that consumers have varying appetites for risk. Consumer preferences were assessed through surveys and focus groups conducted on behalf of the Commission by Newgate Research.⁵²

Almost half of the surveyed residential and small business consumers (45 per cent and 47 per cent respectively) preferred an energy contract with a variable rate with a lower price, while a third of residential consumers and a quarter of small business consumers preferred a contract with a fixed rate and a higher price.⁵³

Newgate Research noted that participants in focus groups expressed a preference for the option that met the needs of their specific household. The majority of low-income households expressed a preference for a fixed price, however most participants considered that a range of different options with both fixed and variable prices should be available for consumers to choose from.⁵⁴

The Commission therefore considered in the draft determination that, as consumers have access to a range of contract types that reflect their preferences for different levels of risk, there is unlikely to be a significant market failure regarding the allocation of risks in fixed period *market retail contracts*.

The Commission also noted that, given the consumer research showed a significant portion of consumers place a high value on price certainty in their contracts, the competitive market may not currently be delivering the level of fixed price contracts that one would expect to meet those consumers' preferences as only there are only two types of fixed price contracts available in most jurisdictions. The Commission considered that improved information on price variations in *market retail contracts* may prompt retailers to develop more fixed price retail energy contracts where this better meets consumer preferences.

⁵² Consumer Research on Retailer Price Variations in Market Retail Contracts, Newgate Research, June 2014.

⁵³ Ibid See the Newgate consumer research report at pages 18 and 19.

⁵⁴ Ibid at page 3.

3.3 Stakeholder submissions on the draft determination

A number of consumer groups considered that the draft determination reached the wrong conclusions regarding the allocation of risk in *market retail contracts*. They considered generally that retailers are better placed to manage risks associated with all of the costs of supplying energy.⁵⁵ The Combined Pensioners & Superannuants Association of NSW considered that:

“[r]etailers are in a substantially better position to be able to manage and bear the risks associated with increases to energy supply costs than customers, even if disclosure requirements are improved.”⁵⁶

National Seniors Australia expressed confusion at the Commission's conclusion that some input costs of energy retailers are so unpredictable that they have to be able to increase prices at any time to manage risk.⁵⁷ They argued that government policy costs in energy are no less predictable or manageable than in other industries, such as insurance and telecommunications.⁵⁸

CALC and CUAC considered that the Commission did not explain in its draft determination why consumers should bear risks associated with the supply of energy.⁵⁹ They state that a key role of retailers is to manage risks on behalf of their customers and it would make sense that a retailer offering the greatest stability and price guarantees over a given period would attract and retain a solid customer base.⁶⁰ They considered that those retailers that cannot offer such stable and certain prices would exit the market.⁶¹

In response to this issue Origin Energy stated:

“[s]ome customers choose to take the time to shop around while others make relatively quick assessments. Even to the extent that behavioural bias... may be present in customer decision making, it does not necessarily follow that those decisions are not valid choices or representative of the consumer's preferences.”⁶²

No other stakeholders directly commented on the Commission's conclusions on the allocation of risk in *market retail contracts*.

55 See for example the submissions of CALC and CUAC, the Combined Pensioners & Superannuants Association of NSW and National Seniors Australia.

56 See the submission of the Combined Pensioners & Superannuants Association of NSW at page 3.

57 See the submission of National Seniors Australia at page 1.

58 Ibid.

59 See the submission of CALC and CUAC at page 7.

60 Ibid.

61 Ibid.

62 See the submission of Origin Energy at page 1.

3.4 The Commission's analysis and conclusions on whether the issue requires a regulatory response

3.4.1 The Commission's analysis of submissions on the issue

The Commission does not agree with the views put forward by National Seniors Australia, the Combined Pensioners & Superannuants Association of NSW, CALC and CUAC. It reiterates its conclusion in the draft determination that, even though retailers may be in a better position to analyse and understand the risks associated with the supply of energy, it does not follow that it would be most efficient for retailers to bear all risks. This is because they have limited tools to manage some risks, such as risks associated with changes in electricity networks and gas pipeline costs, as well as changes in some government policy costs.

The principal tools available for retailers to manage risks associated with network and pipeline costs as well as unmanageable government policy costs are to:

- vary prices during a fixed period to reflect changes in their costs. This allows retailers to pass changes in costs on to consumers as they occur, depending on the extent of competition; or
- build a risk premium in the prices they charge consumers that reflects the risk that the cost of supplying energy may increase in the future. This requires retailers to bear the risk that costs may increase by more than they anticipate. However, consumers then bear the risk that anticipated changes in costs may not eventuate.

Retailers currently use both of these tools to manage risks in the range of fixed period *market retail contracts* they offer. Retailers generally offer such fixed period contracts for up to three years in length, whereas comparable fixed period contracts are generally for a one year period in the insurance industry and up to two years in the telecommunications industry.

Box 3.1 below provides a breakdown of a number of risks in the energy supply chain and how these translate into the allocation of risks and costs in *market retail contracts*.

Box 3.1: Risks in the energy supply chain and allocation of risk in market retail contracts

A range of different risks exist in the energy supply chain. These risks can be considered in terms of risks faced specifically by individual retailers and risks which are faced equally by all retailers. For example:

Risks faced specifically by individual retailers

- generators and retailers bear price risk in wholesale energy markets. This risk can be significant. For example, prices on the wholesale electricity market can vary between the market price cap of \$13,500 per

megawatt-hour (MWh) and the price floor of -\$1,000/MWh. Average wholesale electricity market prices varied between \$49/MWh in Tasmania and \$74/MWh in South Australia in the 2012/13 financial year.⁶³

Retailers and generators manage wholesale price risk through a range of tools including obtaining "hedging" contracts in financial markets or through vertical integration. Each retailer's wholesale risk will vary depending on a range of factors such as their risk appetite, the generation assets they own, market conditions, their customer base, and the terms and conditions of their hedging contracts;

- retailers bear risks associated with their own costs of operating a retail business, such as labour costs, regulatory costs, and other overheads;

Risks faced equally by all retailers

- consumers bear risks associated with electricity network and gas pipeline costs due to the economic regulation of these costs under the National Electricity Rules, the National Gas Rules, the National Electricity Law and National Gas Law.

Under this regulatory framework, network and pipeline owners are provided with a reasonable opportunity to recover the efficient costs of providing their services and a return that reflects their regulatory and commercial risks.⁶⁴ In particular, network and pipeline businesses bear risks associated with their regulatory obligations to connect and reliably supply all consumers with energy. The Australian Energy Regulator (AER) is responsible for determining the revenue these businesses can recover from consumers to achieve these principles when making revenue determinations.⁶⁵

Where network and pipeline businesses are regulated under a revenue cap the risks associated with changes in the volume of energy sold are effectively transferred to consumers through their retailer. This is because network and pipeline charges are adjusted when the volume of energy sold is different from expectations. The regulated return those network and pipeline businesses receive would reflect that they do not bear this volume risk; and

- all parties in the energy supply chain bear risks associated with changes in government policy because policy changes could impact any part of the

⁶³ AER, State of the Energy Market 2013, at page 35.

⁶⁴ See sections 7A(2) and (5) of the National Electricity Law and sections 24(2) and (5) of the National Gas Law.

⁶⁵ Under section 16(2)(a) of the National Electricity Law and section 28(2)(a) of the National Gas Law, the AER must take into account these principles (the "revenue and pricing principles") when exercising discretion in making certain parts of electricity network and gas pipeline determinations.

supply chain.

Retailers may develop a range of *market retail contracts* that allocate these risks in different ways. Consumers are then able to choose the contract that they consider best suits their needs.

The Commission does not take a view on which risks should be borne by particular parties in retail energy contracts. Rather, the Commission considers that there should be a range of contracts available that reflect the different levels of risk that consumers prefer to bear, and that consumers should be able to make an informed choice regarding the level of risk and price they are willing to bear in their energy contract. Those consumers that place a high value on price certainty should be able to choose a product that they consider suits that need.

However, as noted in the draft determination, given that the consumer research undertaken for the Commission shows a significant portion of consumers place a high value on certainty, the current level of fixed price contracts may not truly reflect consumer preferences. The Commission does not see this as a market failure concerning the allocation of risk in *market retail contracts*. Rather, considering the consumer research set out in Chapter 5 below, the Commission considers that it is likely that this is due to consumers having a limited understanding of their retail energy contracts, particularly regarding whether prices can change.

The Commission also considers that effective competition should drive retailers to manage risks effectively, and therefore only pass on costs where the associated risks have been managed efficiently. The Commission has had regard to the findings of the 2014 Retail Competition Review with respect to the level of competition in retail energy markets in NEM jurisdictions.⁶⁶

CALC and CUAC considered that a retailer that offers a price guarantee over a given period would attract and retain a solid customer base. The Newgate consumer research shows that consumers have a range of different preferences for bearing price risk in their energy contracts, including some consumers that place a high value on price certainty.⁶⁷ A retailer that offers a price guarantee may gain more customers, however the Commission does not consider that this point is relevant to its assessment of this issue. It is not the role of the Commission to determine what types of contracts consumers should prefer and to regulate to achieve that outcome.

The Commission considers that in a competitive market retailers that offer contracts that better meet consumer preferences will be able to attract customers. Competitive

⁶⁶ This review found that the state of competition in energy markets for small customers varies across the NEM reflecting the different pace of market reforms across jurisdictions. It found that competition in electricity retail markets is effective in most jurisdictions, but is yet to emerge in the Australian Capital Territory, Tasmania and regional Queensland. It also found that competition in gas markets has been more tempered as gas is a secondary consideration for most customers and a less attractive value proposition for some retailers. For more information see the Final Report on the 2014 Retail Competition Review, which is available on the AEMC website.

⁶⁷ See the Newgate consumer research report at pages 18 and 19.

retail energy markets and clearer communication will allow consumers to make informed choices regarding the contracts they enter. Competition is a dynamic and iterative process that drives retailers to attract and retain customers and for customers to seek out the deal that they consider best meets their needs.

The Commission does not agree with CALC and CUAC's assertion that in the draft determination the Commission optimistically suggested that only efficient risks are passed on by retailers. The Commission's view, as outlined in the draft determination, is that in a competitive market there should be few incentives for retailers to pass on inefficient costs. If they did so, they would be less competitive and lose customers or profits. In contrast to the views of Dr Smith expressed in the rule change request, the Commission considers that even with the ability to increase prices during a fixed period, retailers still have a competitive incentive to manage risks where it is efficient to do so and only pass on efficient costs. The Commission notes that the incentive for retailers to manage risks and only pass on efficient costs is also influenced by the way other retailers manage costs and risks and the way that consumers respond.

The Commission acknowledges that competition may be tempered by status quo bias in consumer behaviour. However this does not necessarily mean that retailers have an incentive not to manage risks and instead to allow consumers to bear them as price increases. The 2014 Retail Competition Review found that energy consumers change their retailer more often than they change insurance companies, or phone and internet providers.⁶⁸ The Commission considers that this consumer behaviour is consistent with a market in which retailers have strong incentives to meet consumer expectations, including during the term of fixed period contracts. Further, as set out in Chapter 8, the Commission considers that with greater consumer awareness of the range of options available, consumers are more likely to make choices that better reflect their preferences and facilitate improved competition amongst retailers.

3.4.2 The Commission's conclusions on the issue

The Commission does not consider that new or compelling matters have been raised that would merit changing the views it expressed in the draft determination on the allocation of risk in *market retail contracts*. Therefore, the Commission has not changed its view that a regulatory response is not required to address this issue in the rule change request.

The Commission maintains that greater consumer awareness and engagement could promote the provision of *market retail contracts* that better reflect consumer preferences. The Commission considers that its more preferable final rule is likely to improve transparency with respect to the ability of retailers to vary prices and thereby improve the competitive pressure on retailers to only pass through efficient costs.

The Commission's more preferable final rule is set out in detail in Chapters 2 and 8.

⁶⁸ See AEMC, 2014 Retail Competition Review at page 19.

4 Issue raised in rule change request: Inefficient consumption decisions due to price variations

This Chapter:

- provides an overview of the issue raised by CALC and CUAC regarding inefficient consumption decisions due to price variations;
- outlines the Commission's views on the issue as set out in its draft determination;
- discusses stakeholder submissions on the draft determination on the issue; and
- sets out the Commission's analysis and conclusions on whether a regulatory response to this issue is required.

4.1 CALC and CUAC's views on inefficient consumption decisions due to price variations

CALC and CUAC considered that the current retail rules concerning price variations allow retailers to engage in "price baiting" practices. That is, pricing contracts with low introductory rates that do not reflect the cost of supplying energy and then using price variation clauses to raise the price significantly after the customer has entered the fixed period *market retail contract*.

CALC and CUAC provided a case study in their rule change request to support the assertion that price baiting is occurring in retail energy markets. They also included analysis from Dr Smith to support their view.⁶⁹ The key points raised by Dr Smith are as follows:

- the ability for suppliers to vary contracts creates the potential for opportunistic behaviour;⁷⁰
- retail energy markets are an oligopoly and therefore retailers are aware of each other's conduct and will act in the same way with respect to price variations;⁷¹ and
- it is likely that retailers may initially set prices below the competitive level to attract customers, and then increase prices above the competitive level after the customer has signed up.⁷²

Dr Smith's analysis considered the consequences of retailers initially setting prices below the competitive level and then increasing them above the competitive level. For example, Dr Smith suggested the consumer might react by consuming less energy;

⁶⁹ See the CALC/CUAC rule change request at page 29 and 30.

⁷⁰ Ibid at page 20.

⁷¹ Ibid at page 38.

⁷² Ibid at pages 30 and 38.

paying more to consume the same amount of energy; or some degree of both of these responses.⁷³ CALC and CUAC argued that none of these consumption responses is efficient for the market or beneficial for consumers.

4.2 The Commission's views in its draft determination

The Commission noted in its draft determination that inefficient consumption decisions are likely to occur where retailers are engaging in price baiting practices. The Commission noted that this may occur where competition is not effective.

The Commission indicated that it had received limited evidence in submissions and discussions with stakeholders that retailers were engaging in widespread price baiting practices. In reaching this view, the Commission noted that it had consulted widely with consumer groups and Ombudsmen in New South Wales, Victoria, Queensland and South Australia. From these consultations it was not apparent that consumer groups or Ombudsmen were aware of a significant number of cases of price baiting in retail energy markets.

Further, the submissions from the Energy and Water Ombudsman (Victoria) and the South Australian Energy and Water Ombudsman noted that they receive complaints from consumers regarding price rises, and that most of these cases are the result of poor communication or mis-communication between retailers and consumers. However, the Commission considered that these submissions did not provide support for the view that retailers are engaging in price baiting practices.

The Commission also noted the submissions of the Public Interest Advocacy Centre NSW (PIAC) and the South Australian Council of Social Service, which supported the view that price baiting practices are occurring in retail energy markets. However, the Commission noted that these submissions did not provide examples or evidence to support the view that the practices are widespread.

The Commission considered that there was not sufficient evidence to conclude that retailers were engaging in widespread price baiting practices. It also noted provisions in the ACL relating to unfair contract terms, misleading and deceptive conduct and price baiting itself, which already provide protections for consumers from these practices.

The Commission also considered that where consumers may be making inefficient consumption decisions due to a delayed notification of a price change, this was unlikely to be a source of significant or prolonged inefficiency.

4.3 Stakeholder submissions on the draft determination

Few stakeholders commented on this issue in their submissions on the draft determination.

⁷³ See page 11 and see also the detailed discussion of this issue at pages 31 to 37 in Appendix 1 to the CALC/CUAC rule change request.

The Ethnic Communities Council of NSW and CALC and CUAC considered that the draft determination did not provide any substantive analysis or critique of the analysis provided by Dr Smith in the rule change request.⁷⁴ As noted above, a key assumption underlying that analysis is that energy retailers are likely to set prices below a competitive level and then raise them above that competitive level after contract entry.

CALC and CUAC stated in their submission that, to their knowledge, the AEMC did not ask retailers for the history of their price increases and their timing for consumers on *market retail contracts*.⁷⁵ They considered that without this information it is impossible to conclude that there is no evidence of price baiting.⁷⁶

CALC and CUAC also considered that the price baiting and misleading and deceptive conduct provisions of the ACL noted by the Commission are not relevant to this issue. They noted that the price baiting provisions prohibit the advertising of a price for goods or services where there are reasonable grounds to believe that the person will not be able to offer reasonable quantities of the goods or services at that price for a reasonable period. CALC and CUAC considered that this is not relevant to this issue because their concern is "not that the initial contract is unavailable... [but] that the price is changed soon after sign up".⁷⁷

4.4 The Commission's analysis and conclusions on whether the issue requires a regulatory response

4.4.1 The Commission's analysis of submissions on the issue

The Commission acknowledges that in the draft determination it did not refer specifically to the analysis of Dr Smith provided in the rule change request. The Commission agrees that the negative consequences described by Dr Smith arise if the assumptions the analysis are based on are proven to be true. This was noted in the draft determination. It is equally true that if the assumptions are not proven, the negative consequences described by Dr Smith will not necessarily follow.

The key assumption that Dr Smith's analysis is based upon is that due to the oligopolistic nature of energy markets and the ability of retailers to vary prices, retailers are behaving in an anti-competitive manner by setting prices below the competitive level and then later increasing prices above the competitive level. The Commission considers that if this price baiting is not occurring, the resulting consequences described by Dr Smith would not arise and would therefore not need to be further discussed.

⁷⁴ See the submissions of the Ethnic Communities Council of NSW at page 1 and CALC and CUAC at page 3.

⁷⁵ See the submission of CALC and CUAC at page 8.

⁷⁶ Ibid.

⁷⁷ Ibid.

The Commission therefore focussed its analysis on considering whether or not price baiting is occurring in retail energy markets. The Commission did not ask retailers for the full history of their price variations for consumers on *market retail contracts*. The Commission does not have information gathering powers to compel retailers to provide such information. The Commission does not agree that obtaining this information is the only way to consider if price baiting is occurring.

As noted in the draft determination, the Commission consulted with consumer groups and Ombudsmen in a range of jurisdictions. It also met with the Australian Competition and Consumer Commission (ACCC), jurisdictional governments, regulators and retailers. A key focus of these consultations was to determine if any of these stakeholders held concerns that price baiting is occurring in retail energy markets on a widespread scale. Stakeholders generally did not hold such concerns.

The Commission also noted in its draft determination that price baiting is only likely to occur where competition is not effective. In these circumstances retailers will have incentives to raise prices above the costs of supply to consumers because that behaviour would be unlikely to result in a loss in sales to other retailers. This may occur where there are significant costs associated with switching to a more competitive offer or where there are few alternative offers available that better meet consumers' preferences.

However, as the Commission discussed in its draft determination, it found no persuasive evidence to suggest that retail energy markets were not effectively competitive. Following the publication of the draft determination the Commission published the first annual review of retail competition in gas and electricity markets in all NEM jurisdictions.⁷⁸ As discussed in Chapter 3, this review found competition to be effective in most retail energy markets, with consumers switching energy providers more often than they switch insurance companies, or phone and internet providers.⁷⁹ Australian retail energy markets currently have some of the highest switching rates in the world.⁸⁰

As a consequence, the Commission considers that its investigations of price baiting practices for the draft determination were adequate and proportionate to the nature of the issue raised, including the analysis of Dr Smith. Based on this investigation, the Commission considered that there was insufficient evidence provided to the Commission, including by CALC and CUAC and other stakeholders consulted, to conclude that retailers are engaging in widespread price baiting practices.

The Commission does not agree with CALC and CUAC that the ACL provisions relating to misleading and deceptive conduct and price baiting are not relevant to this issue. Whilst these provisions, each taken separately, will not protect consumers from all circumstances in which retailers may set prices below a competitive level and

⁷⁸ See <http://www.aemc.gov.au/Markets-Reviews-Advice/2014-Retail-Competition-Review>.

⁷⁹ See AEMC, 2014 Retail Competition Review at page 19.

⁸⁰ See the most recent VAASA EET 2013 rankings on <http://www.utilitycustomerswitching.eu/424/>.

subsequently raise prices above that level, they are relevant constraints on retailer behaviour.

For example, the misleading and deceptive conduct provisions may protect consumers from some circumstances where a retailer represents that a price or discount will continue at a particular level, but then changes that price or discount. The Commission also considers that the unfair contract terms provisions in the ACL are a relevant constraint on retailer behaviour. Some retailers submitted to the consultation paper that they consider that those provisions apply to price variation clauses in *market retail contracts*. Taken together, these provisions provide consumers with significant protections from price baiting by energy retailers.

In addition to being contrary to the provisions of the ACL, the Commission notes that if price baiting was widespread, retailers that were price baiting would be likely to lose customers over the longer term. Price baiting would not be a sustainable business practice in competitive retail markets.

4.4.2 The Commission's conclusions on the issue

The Commission does not consider that new or compelling matters have been raised that would merit changing the views it expressed in the draft determination on this issue. The Commission therefore continues to hold the view that there is insufficient evidence to conclude that retailers are engaging in widespread price baiting practices.

As a result of this conclusion the Commission considers that it is unlikely that price variations are resulting in consumers making inefficient consumption decisions due to price baiting.

This is the case even though the Commission agrees with Dr Smith that, if price baiting were occurring on a widespread scale, the negative impacts described in her analysis supporting the rule change request would be likely to occur.

An important way for consumers to be protected from price baiting is the promotion of competitive retail energy markets and well informed consumers. The Commission has made a more preferable final rule to promote competition and more informed decision making by consumers.

The Commission's more preferable final rule is set out in detail in Chapters 2 and 8.

5 Issue raised in rule change request: Consumer participation in retail energy markets

This Chapter:

- provides an overview of the issue raised by CALC and CUAC regarding consumer participation in retail energy markets;
- outlines the Commission's views on the issue as set out in its draft determination;
- discusses stakeholder submissions on the draft determination on the issue; and
- sets out the Commission's analysis and conclusions on whether a regulatory response to this issue is required.

5.1 CALC and CUAC's concerns regarding consumer participation in retail energy markets

CALC and CUAC suggested in their rule change request that the ability of retailers to vary prices under the current retail rules negatively impacts the level of consumer confidence and engagement in retail energy markets.

Specifically, CALC and CUAC considered that the ability of retailers to increase prices during the fixed period of *market retail contracts* discourages consumers from switching retailers or contracts, due to:

- the transaction costs involved in switching, including the presence of exit fees and wasted search costs;⁸¹ and
- other factors that affect consumer decision making, such as a bias to remain with their existing retailer and the perception that other retailers will be no better.⁸²

CALC and CUAC noted that the search costs associated with finding the most appropriate retail contract for a consumer can be significant, due to the complexity of the market and the limited comparability of different retail energy contracts. They considered that where consumers have expended significant search costs in finding a retail contract, only for the price to rise later, confidence and participation in the market can be adversely affected. They argued this is because consumers will not spend further time and effort in finding the best retail contract for them. They expect their time and effort will be wasted as the new retailer will raise their prices after they switch to them.⁸³

81 See the CALC/CUAC rule change request at pages 17 to 21.

82 See the CALC/CUAC rule change request at page 11.

83 See the CALC/CUAC rule change request at pages 4 and 38.

5.2 The Commission's views in its draft determination

5.2.1 Are price variations in market retail contracts causing consumer disengagement?

The Commission considered in its draft determination that it had insufficient evidence to conclude that price variations in *market retail contracts* are significantly contributing to consumer disengagement in retail energy markets. A number of key findings from the Newgate consumer research undertaken on behalf of the Commission have contributed to forming this view. Those findings included that:

- consumers are generally satisfied with their current retailer;⁸⁴
- low numbers of consumers (four per cent of residential consumers and five per cent of small business consumers) responded to price variations in their fixed period *market retail contracts* with negative emotions, such as anger or shock;⁸⁵ and
- most consumers see price variations during fixed periods as being less important than issues such as the need for improved information about the offers available to them, improved comparability of offers, and better communication about the availability of independent price comparison websites.⁸⁶

The Commission also noted that the submissions from consumer groups to the consultation paper generally did not focus on the impact of price variations on consumer participation in retail energy markets. Rather, their focus was the difficulty consumers face in engaging in retail energy markets due to the complexity of the energy market and the poor quality of the information available to consumers to assist them to make decisions. The Commission noted that these views were consistent with the findings of its consumer research and were views also raised in submissions from the AER, Ombudsmen, the South Australian Department of State Development,⁸⁷ the Victorian Department of State Development, Business and Innovation, and some retailers.

5.2.2 Could poor information on price variations be contributing to consumer disengagement?

The Commission considered that, even though it did not appear that price variation clauses were causing significant consumer disengagement from retail energy markets, the level of consumer understanding of retail energy contracts with respect to price variations was low. The Commission noted this has the potential to hinder competition in retail energy markets.

84 See the Newgate consumer research report at page 10.

85 Ibid at pages 16 and 17.

86 Ibid at page 22.

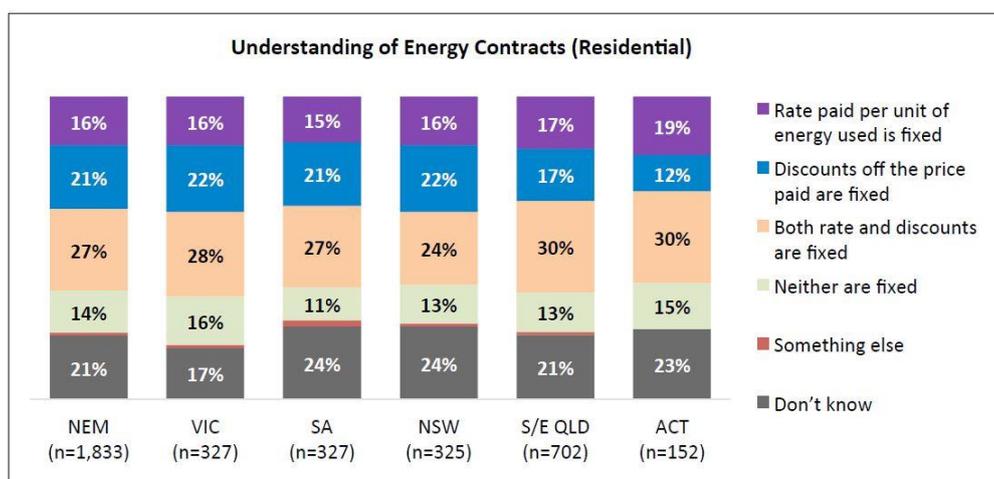
87 Formerly the Department for Manufacturing, Innovation, Trade, Resources and Energy.

The Commission noted that retailers need to be able to understand what consumers' preferences are in order to meet their expectations. Consumers reveal their preferences to retailers through the decisions they make. If consumers do not have all the relevant information or the time to make an informed decision, retailers will not be able to assess what consumers want based on the decisions they make in the market. This could result in retailers developing energy contracts that may not meet the needs and preferences of consumers.

The Commission considered it was clear from the Newgate consumer research that some consumers appeared to have limited information or knowledge concerning *market retail contracts*. In particular, the consumer research indicated that some consumers believed that the prices for their energy contracts would be fixed when in fact they were not.

Both the focus group and survey results suggested there was some confusion about what elements of a *market retail contract* are subject to variation during a fixed period.⁸⁸ The results for residential participants are outlined in Figure 5.1 below.

Figure 5.1 Quantitative consumer research results: What is fixed your residential energy contract?



Base: All Respondents
Q42. While on an energy contract, which of the following do you think applies?

The results for small business consumers were similar to those for residential consumers, although a slightly greater proportion of small business consumers considered that both the rate per unit of energy and the discount would be fixed. Overall, around 20 per cent of residential and 15 per cent of small business consumers were unsure of which elements in their contract were fixed.⁸⁹

Similar questions were asked during focus group discussions. The Commission noted that the focus groups found most participants had not given much thought to which elements of the contract might remain fixed during a fixed period and which might

⁸⁸ See the Newgate consumer research report at pages 12 to 14.

⁸⁹ See the Newgate consumer research report at page 12.

vary.⁹⁰ Many assumed that the terms and conditions, and any discounts they were offered (such as a percentage discount off the overall price) would remain unchanged for its duration and that an exit fee would apply if they wanted to terminate the contract early.⁹¹ However, on further discussion, the majority clarified that actually they had hoped the price would be fixed because it would shield them from rising energy prices, but they assumed that, realistically, the price would probably not be fixed in practice.⁹²

The Commission noted that lower income participants at the focus groups were more likely to believe that the rate they would pay per unit of energy they consumed would be fixed.⁹³ The word 'fixed' was generally seen as having implications for the price of energy under a contract, rather than signing up to a contract for a specified period of time.⁹⁴

The Commission noted that when consumers were asked what they did in response to price variations, only two per cent of the surveyed residential and small business consumers noted that they did nothing because price changes were within the terms of their contract.⁹⁵

Based on the information provided by stakeholders and its own analysis and research, the Commission found that there was insufficient evidence to conclude that price variation clauses in fixed period *market retail contracts* were significantly contributing to consumer disengagement in retail energy markets. However, it also found that there was evidence to conclude that some consumers are not well informed with respect to the terms and conditions of their energy contracts, particularly with respect to whether prices can vary during fixed periods in *market retail contracts*.

5.3 Stakeholder submissions on the draft determination

5.3.1 Consumer group submissions

CALC and CUAC commended the Commission for the extensive research it commissioned on consumer views and preferences.⁹⁶ However, the Ethnic Communities Council of NSW and CALC and CUAC considered that the Commission had arrived at the wrong conclusions in a number of instances because it had

90 Ibid at page 13.

91 Ibid.

92 Ibid.

93 Ibid at page 14

94 Ibid.

95 Ibid at pages 16 and 17.

96 See the submission of CALC and CUAC at page 4.

misinterpreted or been selective in its interpretation of the research results.⁹⁷ CALC and CUAC stated that:

“[t]here is no recognition by the AEMC that the research shows consumers' broad expectations are that prices within contracts remain fixed. To the extent that consumers' expectations are addressed, the AEMC appears to consider it problematic not that the market doesn't follow consumers' expectations, but that consumers' expectations don't follow the market.”⁹⁸

The Ethnic Communities Council of NSW and CALC and CUAC considered that it is not surprising that consumers did not find price variations to be a particularly important problem, as consumers are generally frustrated and distrustful of retailers.⁹⁹ They considered that although price variations may not have ranked highly on the list of matters important to consumers, it was still an issue that consumers were concerned about.¹⁰⁰ CALC and CUAC were also disappointed that the AEMC did not seek to test CUAC's 2012 research which asked consumers about their attitudes to retailers changing their prices in contracts and proposals to change this practice.¹⁰¹

CALC and CUAC and the Ethnic Communities Council of NSW considered that the Commission relied heavily on the finding that almost half of residential and small business consumers say they prefer the contracts with a lower variable price, which is a type of contract that the proposed rule would have stopped retailers from offering.¹⁰² They considered that there were a number of problems with the survey question used as the basis for this finding and the Commission's reliance on it. Their stated problems are:

- the question referred to a "regulated tariff" and in Victoria and a number of NECF jurisdictions there is no longer a regulated tariff. It is therefore "hard to see how a respondent could make sense of the question";¹⁰³
- the Newgate research noted that the focus groups found this question "difficult to absorb" and therefore the AEMC should not have placed too much reliance on the survey responses to this question;¹⁰⁴ and

97 See the submission of the Ethnic Communities Council of NSW at page 2 and CALC and CUAC at pages 4 and 5.

98 See the submission of CALC and CUAC at page 4.

99 See the submissions of CALC and CUAC at page 4 and the Ethnic Communities Council of NSW at page 2.

100 Ibid.

101 See the submission of CALC and CUAC at page 4.

102 See the submission of CALC and CUAC at page 5 and the Ethnic Communities Council of NSW at page 2.

103 See the submission of CALC and CUAC at page 5.

104 See the submission of CALC and CUAC at page 5 and the ECC at page 2.

- around 25 per cent of respondents answered "something else" or "don't know" which indicates that there may have been confusion in answering this question.¹⁰⁵

CALC and CUAC also considered that the Commission relied on a number of other findings from the consumer research that should have been "treated with care".¹⁰⁶ These findings are that:

- consumers are generally satisfied with their retailer;
- low numbers of consumers responded to price variations with negative emotions; and
- most consumers see price variations during fixed periods as being less important than issues such as improved information.

CALC and CUAC and the Ethnic Communities Council of NSW considered that consumer satisfaction is not a good indicator of effective competition and could indicate that consumers think that all retailers are the same.¹⁰⁷ CALC and CUAC considered that each of the above findings could support the view that consumers feel helpless with respect to energy contract terms and conditions.¹⁰⁸ The Ethnic Communities Council of NSW stated that when consumers feel that their attempts to engage are not getting them anywhere "they disengage, stop trying to influence the situation, and become passive".¹⁰⁹ CALC and CUAC stated that this view that consumers have disengaged is supported by a finding in the Newgate consumer research that consumers think that all energy companies offer virtually the same price.¹¹⁰ CALC and CUAC considered a more useful indicator of effective competition is consumer trust and confidence, which they argue is shown to be very low in recent research by CHOICE.¹¹¹

CALC and CUAC also considered that a number of important findings from the Newgate consumer research "appear to have been discounted by the Commission in its draft determination."¹¹² This includes results suggesting that many consumers are not aware of whether they are actually on a contract, and significant confusion about the meaning of the term "fixed".¹¹³ They considered that such a significant lack of basic

¹⁰⁵ See the submission of CALC and CUAC at page 5.

¹⁰⁶ Ibid.

¹⁰⁷ See the submission of CALC and CUAC at page 5 and the Ethnic Communities Council of NSW at page 2.

¹⁰⁸ See the submission of CALC and CUAC at page 5.

¹⁰⁹ See the submission of the Ethnic Communities Council of NSW at page 2.

¹¹⁰ See the submission of CALC and CUAC at page 5.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Ibid.

understanding suggests that consumer views about the details of contracts are unlikely to be robust.¹¹⁴

A number of other consumer groups considered that issues raised by the rule change request concerning information provision and consumer understanding are magnified for particular sectors of the community.¹¹⁵ The Ethnic Communities Council of NSW noted that the AEMC's finding that some consumers may be entering contracts unaware that prices can vary is multiplied for non-English speaking communities.¹¹⁶ National Seniors Australia stated that older Australians continue to report they are confused by the complexity of energy contracts and are often unaware of the ability of retailers to increase the price at any time.¹¹⁷ The Combined Pensioners & Superannuants Association of NSW stated:

“people who lack functional literacy and numeracy, people with cognitive impairment, people who are not proficient in English and those who are not internet users are not adequately catered for in the current energy market.”¹¹⁸

5.3.2 Retailer submissions

A number of retailers acknowledged or supported the AEMC's finding that the key issue arising from the rule change request is that some consumers may be entering *market retail contracts* unaware that prices may vary.¹¹⁹ Retailers differed in their views regarding whether this was a genuine issue raised by the rule change request. AGL considered that it was a genuine issue and that in a competitive market it is important to ensure that consumers have sufficient and appropriate information to enable them to readily understand energy products.¹²⁰

EnergyAustralia however did not consider that CALC and CUAC had provided sufficient evidence to support this issue.¹²¹ They noted that consumers must first seek a resolution to a complaint directly from their retailer before lodging a complaint with an Ombudsman. Given the lack of complaints on this issue, they consider they have strong evidence to support their views that there are no widespread community concerns with price variations, nor is there a lack of consumer understanding that prices can change in their contracts.¹²²

114 Ibid.

115 See the submissions of the Ethnic Communities Council of NSW at page 1, National Seniors Australia at page 1 and the Combined Pensioners & Superannuants Association of NSW at page 4.

116 See the submission of the Ethnic Communities Council of NSW at page 1.

117 See the submission of National Seniors Australia at page 1.

118 See the submission of the Combined Pensioners & Superannuants Association of NSW at page 4.

119 See for example the submissions of EnergyAustralia at page 1, Lumo Energy at page 1 and AGL at page 2.

120 See the submission of AGL at page 2.

121 See the submission of EnergyAustralia at page 1.

122 See the submission of EnergyAustralia at page 2.

EnergyAustralia considered that the AEMC has drawn the wrong conclusions from the Newgate consumer research in finding that some consumers have limited knowledge of their contracts and some think prices are fixed when they are not.¹²³ They considered that the focus group results conflicted with the survey results on this finding and also that some respondents may have had the fully fixed price products on the market in mind when they answered the relevant question.¹²⁴

5.3.3 Other submissions

The AER noted that it agreed with the Commission's discussion of the key issues raised by the rule change request, which includes the finding in the Newgate consumer research that some consumers may be entering retail energy contracts unaware that prices may vary.¹²⁵ The Commission also notes that the AER has recently included information on its Energy Made Easy website to assist consumers to understand whether prices may vary in their energy contracts.¹²⁶

No other stakeholders, other than retailers and consumer groups discussed above, directly commented on this issue.

5.4 The Commission's analysis and conclusions on whether the issue requires a regulatory response

5.4.1 The Commission's analysis of submissions on the issue

The Commission disagrees with the assertion that it misinterpreted or was selective in its analysis of the results of the Newgate consumer research. The Commission carefully considered all of the results of the consumer research and considered the results in light of stakeholder views as well as its own research and investigations.

The Commission agrees that an important consideration in its reasoning was that the proposed rule would have removed from the market the kind of contract that a large number of consumers prefer. That is, *market retail contracts* with a fixed period and a variable price. The Commission however does not agree that it relied solely on one question from the Newgate consumer research to form this view, and it also does not agree that the relevant question in the research was flawed.

The relevant question in both the focus groups and surveys asked if consumers would prefer a fixed price with a one per cent discount off a retailer's current standard rate or a variable price with a nine per cent discount.¹²⁷ The report goes on to note that this

123 Ibid.

124 Ibid.

125 See the submission of the AER at page 2.

126 See: <http://www.energymadeeasy.gov.au/price-changes-and-your-energy-contract>.

127 Note that the relevant question used the term "standard rate" not "regulated tariff" as asserted by CALC and CUAC. See the Newgate consumer research report at pages 20, 24 and 28. The Commission considers that the term "standard rate" could be easily understood by consumers in

question in the focus groups began with a general enquiry into whether participants prefer a fixed or variable price. As this piece of information was difficult to absorb, Newgate then provided "a concrete example... to prompt discussion in the forums".¹²⁸ That example was the "one per cent or nine per cent" example described above.

The Commission considers that the Newgate consumer research report does not support the view that the entire question presented in the focus groups was difficult for consumers to absorb and therefore should not be relied upon. The Commission considers that a more appropriate interpretation is that Newgate provided a clear example of the relative cost of fixed and variable priced contracts so that the question was more easily understood by participants at the focus groups.

Each of the questions used in surveys were tested in cognitive interviews with consumers before being used.¹²⁹ These interviews confirmed that the survey questions were generally appropriate and well understood by participants.¹³⁰ The Commission also notes that there was a relatively high level of participation in the Commission's consumer research, with 162 participants attending the focus groups and 2,213 participants surveyed across Queensland, Victoria, South Australia, New South Wales, and the Australian Capital Territory.

As discussed in section 3.2.2 above, the survey results showed a mix of preferences, with almost half of residential and business consumers preferring a variable price and a third preferring a fixed price. The focus groups showed a similar mix of preferences. The Commission did not rely solely on these results in concluding that the proposed rule would have removed from the market the kind of contract that a large number of consumers prefer. It also relied on submissions of retailers indicating that such contracts are the most popular and its own investigations that showed almost half of the retail electricity offers available to consumers in Sydney in June 2014 were fixed period contracts with flexible prices.

The Commission does not agree that the results of the Newgate consumer research confirm that consumers are generally disengaged from retail energy markets. The finding from the broader research that many consumers think that retailers offer virtually the same price does not provide sufficient evidence to support the view that a large proportion of consumers are disengaged or are experiencing "learned helplessness". The Commission also notes that the issues raised by the rule change request specifically relate to whether price variations are contributing to consumer disengagement, rather than whether consumers are disengaged from the market more broadly.

A number of findings from the broader research support the view that consumer disengagement is not pervasive in retail energy markets, and to the extent it is present,

jurisdictions that have a regulated tariff and also in jurisdictions that have removed price regulation.

128 Ibid at page 18.

129 See the Newgate consumer research report at page 6.

130 Ibid.

price variations do not appear to contribute significantly to this disengagement. These include the findings noted in the draft determination that most consumers do not see price variations as an important issue, few consumers expressed negative responses to price variations and consumers are generally satisfied with their retailers. The consumer research also relevantly finds:

- the majority of consumers had changed their electricity retailer or plan at least once in the last five years in most jurisdictions;¹³¹
- very few consumers that investigated options for changing their energy retailer or plan did not end up switching;¹³² and
- most consumers who had switched their electricity or gas retailer or plan were satisfied with the switching process and price variations did not appear to contribute to dissatisfaction.¹³³

As noted in Chapter 4, the 2014 Retail Competition Review also found competition to be effective in most retail energy markets.¹³⁴

The Commission does not refute that some level of consumer disengagement is present in retail energy markets. The Commission also agrees that the Newgate consumer research shows that there is a level distrust of energy retailers. However, there is limited evidence to support the view that price variations significantly contribute to consumer disengagement, to the extent that it is present.

The Commission also disagrees with the view of EnergyAustralia that the focus group results conflicted significantly with the survey results. The focus group results clearly show a level of confusion from participants regarding which parts of their energy price they would expect to be fixed in a contract for a specific period of time. These results are also consistent with the survey results.

5.4.2 The Commission's conclusions on the issue

The Commission does not consider that new or compelling matters have been raised that would merit changing its views on this issue. There is insufficient evidence to conclude that price variation clauses in fixed period *market retail contracts* are significantly contributing to consumer disengagement in retail energy markets.

The Commission considers however that some consumers are not well informed with respect to the terms and conditions of their energy contracts, particularly with respect to whether prices can vary under *market retail contracts*. The Commission considers that this could lead to some consumers entering *market retail contracts* expecting prices to be fixed when in fact they are not.

131 Ibid at page 10.

132 Ibid.

133 Ibid.

134 See AEMC, 2014 Retail Competition Review at page 19.

As discussed in the draft determination, if consumers are not well informed about the terms and conditions of their contracts, retailers may develop contracts that do not meet consumer needs. The Commission considers that poor information could contribute to a gap between the expectations of some consumers and the terms and conditions of *market retail contracts* regarding price variations. This could potentially lead to consumer disengagement from retail energy markets. This conclusion is consistent with the Newgate consumer research discussed above, consultations with a broad range of stakeholders, and the Commission's investigations of retailers' disclosure practices discussed in Chapter 8.

The Commission considers that it would be inappropriate to regulate to require all *market retail contracts* with a fixed period to fit the expectations of some consumers who expect prices to be fixed. Nor should the Commission regulate in this way because some consumers prefer contracts with a fixed price. Rather, the Commission considers that an appropriate response is to provide consumers with clearer information to allow them to make decisions that they consider better meet their needs. The Commission notes that for some consumers who have a preference for price certainty this decision may involve a contract with a fixed price, while other consumers who have a preference for lower prices may be willing to bear the risk of price changes. The Commission considers that clearer information regarding price variations in *market retail contracts* is likely to reduce any gaps between consumer expectations and the terms and conditions of their contracts.

Chapter 8 provides further detail on the Commission's more preferable final rule to address this issue.

6 Issue raised in rule change request: Uncertainty in the application of the Australian Consumer Law

This Chapter:

- provides an overview of the issue raised by CALC and CUAC regarding uncertainty in the application of the ACL in relation to price variation clauses in *market retail contracts*;
- outlines the Commission's views on the issue as set out in its draft determination
- discusses stakeholder submissions on the draft determination on the issue; and
- sets out the Commission's conclusion on whether a regulatory response to this issue is required.

6.1 CALC and CUAC's views on the impact of the current rules regarding price variations and the Australian Consumer Law

The consumer protections set out in the NECF are intended to operate alongside and complement existing consumer protections, including in the ACL and the general law. The ACL includes provisions that provide consumers with protections from "unfair" terms in "consumer contracts".

These protections however do not apply if a Commonwealth, state or territory law requires or "expressly permits" these contract terms. This would mean, for example, that if a Commonwealth law expressly permits price variation clauses in *market retail contracts*, the protections in the ACL from "unfair" contract terms would not apply.

CALC and CUAC considered in their rule change request that rule 46 of the retail rules, which provides minimum requirements for the notification of price variations, expressly permits retailers to include terms that allow for price variations during fixed periods in *market retail contracts*.¹³⁵ As a result, they argued that the protections from unfair contract terms under the ACL do not apply.¹³⁶

CALC and CUAC considered that, if the relevant provisions of the ACL were to apply, it is likely that terms in *market retail contracts* that allow retailers to change their prices would breach these provisions in the ACL.¹³⁷ However, CALC and CUAC also noted that if consumers were given a right to terminate their contract at no cost following a price change, contract terms that allow price variations may not be considered as "unfair" under the ACL.

¹³⁵ See page 44 of the CALC/CUAC rule change request.

¹³⁶ See page 44 and more generally Appendix 2 to the CALC/CUAC rule change request.

¹³⁷ See Appendix 2 to the CALC/CUAC rule change request.

6.2 The Commission's views in its draft determination

The Commission considered in its draft determination that there is a degree of uncertainty in the application of the unfair contract terms provisions in the ACL. As discussed above, if a term in a consumer contract is required or "expressly permitted" by a law of the Commonwealth, a State or a Territory, the protections for consumers from unfair contract terms in the ACL do not apply.¹³⁸

The Commission considered that rule 46 of the retail rules appears to "imply" rather than "expressly permit" retailers to include terms that allow for price variations in *market retail contracts*. This means that rule 46 would not expressly permit price variation clauses in *market retail contracts*, and the unfair contract terms provisions of the ACL could apply to those clauses.

The Commission noted however that price variation clauses in *market retail contracts* may also be expressly permitted by other provisions in the NECF, such as section 34(3) of the Retail Law which gives retailers a broad power to include contract terms in *market retail contracts* on "other matters", other than terms and conditions prohibited by the retail rules. If this were the case, the Commission noted it does not have power to amend the Retail Law to remove this potential source of uncertainty.

The Commission also noted that the unfair contract terms provisions in the ACL apply only to individuals and not to businesses, whereas the consumer protections in the NECF apply to both individuals and small businesses. However, the Commission also noted that the Commonwealth Treasury is currently considering a proposal to extend the unfair contract terms provisions to protect small businesses.¹³⁹

The Commission considered that, although there is uncertainty in the application of the unfair contract terms provisions of the ACL, a regulatory response is not required to address that uncertainty. The key reasons for this were:

- CALC and CUAC asserted that the unfair contract terms provisions would help address an unfair allocation of risk to consumers as a result of price variations. As indicated in Chapters 3 and 4, the Commission does not consider there is sufficient evidence to conclude that there is an inefficient allocation of risk between retailers and consumers, nor is there sufficient evidence to conclude that price baiting is occurring in retail energy markets on a widespread scale;
- the Commission does not have the power to amend the Retail Law, which is the source of some of the uncertainty in the application of the unfair contract terms provisions;
- the implications of application of the unfair contract terms provisions are yet to be tested in the courts. Amending the retail rules before the courts have tested

¹³⁸ See section 26(1)(c) of the ACL.

¹³⁹ For more information see the consultation paper here:
<http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2014/Small-Business-and-Unfair-Contract-Terms>

the implications of the unfair contract terms provisions could lead to perverse outcomes; and

- clarifying the application of the ACL may not improve protections for all small customers under the NECF.

6.3 Stakeholder submissions on the draft determination

CALC and CUAC were the only stakeholders to comment on this issue. They stated that the Commission did not acknowledge that the uncertainty in the application of the unfair contract terms provisions of the ACL creates additional costs, particularly for consumers who bear risks associated with price variations.¹⁴⁰

CALC and CUAC considered that the intention of the unfair contract terms provisions was that they be self-enforcing, and would not rely on courts for their enforcement.¹⁴¹

CALC and CUAC stated that:

“[t]he Commission had the opportunity to reduce uncertainty and... costs by making the proposed rule and effectively clarifying that unilateral price variation clauses are unfair... [T]he commission could have expressed a view about the application of the unfair contract term laws... jointly with the ACCC.”¹⁴²

6.4 The Commission's analysis and conclusions on whether the issue requires a regulatory response

6.4.1 The Commission's analysis of submissions on the issue

The Commission has acknowledged that there is some uncertainty in the application of the unfair contract terms provisions in the ACL. The Commission however does not agree that the uncertainty gives rise to significant additional costs for consumers. In order for that to occur the uncertainty in the application of the unfair contract terms provisions would need to result in retailers passing through inefficient costs to consumers. The Commission considers that there is little evidence to support that view because:

- the Commission has found there is insufficient evidence to support the view that retailers are passing through an inefficient allocation of costs to consumers or engaging in price baiting practices on a widespread scale; and

¹⁴⁰ See the submission of CALC and CUAC at page 10.

¹⁴¹ Ibid.

¹⁴² Ibid.

- retailer submissions on the consultation paper indicated that they generally consider that the unfair contract terms provisions in the ACL apply to *market retail contracts*, and act accordingly.¹⁴³

The Commission did not suggest in its draft determination that the unfair contract terms provisions should not be "self-enforcing". Rather, the Commission considered that it is not its role to determine whether or not price variation clauses in *market retail contracts* are "unfair" under the ACL. Only the courts are able to determine this. That is not to say that retailers cannot and do not take a view regarding whether or not price variation clauses are "unfair" under the ACL. Indeed, given that retailers generally consider that the unfair contract terms provisions apply and they include price variation terms in their *market retail contracts*, it follows that retailers generally consider that price variation clauses are not unfair.

The Commission also notes that it is beyond its role to issue regulatory guidance on the interpretation of the ACL. However, it may be appropriate for the ACCC to issue guidance regarding its approach to regulating compliance with the ACL.

6.4.2 The Commission's conclusions on the issue

The Commission acknowledges that there is some uncertainty in the application of the unfair contract terms provisions. However, no new or compelling matters have been raised that would merit changing the Commission's view that it is not appropriate to clarify this uncertainty to address the issues raised by CALC and CUAC.

The Commission considers that, even if the retail rules were amended to clarify the application of the unfair contract terms provisions, some uncertainty could still remain. This is because part of the uncertainty in their application arises due to a section in the Retail Law, which the Commission does not have the power to amend. It is also unclear whether a court would find price variation clauses in *market retail contracts* to be unfair. Further, amending the retail rules to clarify the uncertainty in the application of the unfair contract term provisions may lead to a difference in the protections available to different types of small customers, as small business customers are not currently protected under the unfair contract term provisions.

For the reasons outlined above the Commission has not changed its view that a regulatory response is not required to address the uncertainty in the application of the unfair contract terms provisions in the ACL.

¹⁴³ See the submissions to the consultation paper of EnergyAustralia at pages 13 and 14, the Energy Retailers Association of Australia at pages 2 and 3 and Origin Energy at page 8.

7 The Commission's assessment of the proposed rule and alternative rules

This Chapter:

- provides a summary of CALC and CUAC's proposed rule and proposed alternative rules;
- outlines the Commission's views as set out in its draft determination;
- discusses stakeholder submissions on the draft determination; and
- sets out the Commission's analysis and conclusions on the proposed rule and alternative rules.

7.1 Summary of the proposed rule and proposed alternative rules

As discussed in Chapter 1, CALC and CUAC have proposed the inclusion of a new rule 46A in the retail rules that would prohibit retailers from including terms in their contracts that allow them to vary their prices during the fixed periods of *market retail contracts*.¹⁴⁴

CALC and CUAC also proposed two alternative options for the AEMC to consider. These are:

- prohibiting all changes to prices during the fixed period of *market retail contracts* except passing on "government charges";¹⁴⁵ and
- removing the current rule 46 so that the ACL provisions relating to "unfair" terms in consumer contracts would then apply.¹⁴⁶ CALC and CUAC noted that this is their least preferred option.¹⁴⁷

7.2 The Commission's views in its draft determination

In its draft determination, the Commission considered that it was not appropriate to make the rule as proposed or the alternative proposed rules in the rule change request because they were not a proportionate response to the issues identified in the request. The Commission noted that, given its analysis of the issues raised in the rule change request, the key issue that required a regulatory response was that some consumers could be better informed about the terms and conditions of *market retail contracts*, particularly in relation to whether prices can vary.

¹⁴⁴ See the CALC/CUAC rule change request at page 6.

¹⁴⁵ Ibid at pages 6 to 7.

¹⁴⁶ We note that this view is based on CALC and CUAC's view that rule 46 impacts the application of the unfair contract terms provisions of the ACL as set out in Chapter 6.

¹⁴⁷ See the CALC/CUAC rule change request at page 7.

7.2.1 Impact of the proposed rule on consumer choice

The Commission considered that the proposed rule was likely to restrict consumer choice and inhibit retailers' ability to innovate in how they structure energy contracts. These impacts could have adversely affected competition in retail energy markets and resulted in poorer outcomes for consumers.

The proposed rule would have prohibited retailers from offering retail energy contracts that have a fixed term or benefit period in which the price can vary. Most fixed period offers currently allow for price variations during the fixed period. A small number of fixed price retail energy contracts are offered by retailers, however a number of stakeholders commented that consumer awareness and take-up of such offers has to date been small.¹⁴⁸

The Commission also noted the Newgate consumer research which found that consumers have different preferences for risk in relation to retail energy contracts and value having a choice of different contracts.¹⁴⁹

While retailers would still have been able to offer evergreen contracts with a variable price under the proposed rule, these contracts are generally less popular than fixed period contracts due to the smaller discounts offered by retailers. The Commission noted that the proposed rule would have limited the ability of retailers to develop a range of fixed period contracts that currently meet consumers' different preferences regarding price variability. The Commission was also concerned that retailers may reduce the length of fixed period contracts as a means of reducing the risks that their costs may change unexpectedly over the duration of the contract, or not provide fixed period contracts at all.

The Commission considered that the effect of this could be a reduction in the range of contracts offered by retailers. This could have hindered the competitive process of consumer choices informing retailers of what their preferences are and retailers responding by adapting their product offerings to meet these preferences. The Commission also considered there was a risk that consumer engagement in the market could be affected if consumers find that the market is not meeting their preferences.

Further, the Commission considered that the presence of fixed price offers in the market suggests that the market is already meeting, at least to some degree, the preferences of some consumers for price certainty.

7.2.2 Impact of the proposed rule on retail prices

The Commission considered in its draft determination that it was likely that the proposed rule would have resulted in higher prices for fixed period *market retail contracts*.

¹⁴⁸ See the submissions on the consultation paper from the Victorian Department of State Development, Business and Innovation at page 2 and EnergyAustralia at page 5.

¹⁴⁹ See the Newgate Consumer Research report at page 18.

The proposed rule would have required retailers to manage more risks on behalf of consumers. In particular it would have required retailers to manage risks that are determined independently of them which they have a limited ability to predict or manage. This includes risks that network prices and government policy costs may rise over the duration of fixed period contracts. These are significant costs, making up more than 60 per cent of the average retail energy bill.¹⁵⁰ While retailers may have a better ability to manage changes in network prices and government policy costs than consumers, the Commission considered that retailers still have a limited ability to predict or manage these changes in costs.

The Commission noted that network prices are set by the AER and vary within and between five year regulatory periods, as well as within years where a network business has unexpected cost increases. These changes in costs are passed directly through to retailers by the network businesses. In these circumstances, the Commission noted that consumers may be in a better position to manage changes in network costs relative to retailers. This is because retailers have a limited ability to respond in ways that minimise these costs, while consumers can adjust their overall consumption levels or the timing of their consumption.

The proposed rule would have required retailers to make predictions about what their costs would be in the future, and they would have been likely to make conservative predictions of what these costs might be to limit the risk that costs increase by more than they expected. These conservative predictions of what retailers' costs may be in the future would have been passed on to consumers in the prices they pay as a significant risk premium. The Commission considered that as a result consumers would have been paying for the risk that an event outside of a retailer's control could occur, even if the event did not occur.

The Commission investigated the level of price premiums that are priced into existing fixed price *market retail contracts* offered by retailers for electricity. The Commission compared the electricity prices in July 2014 for an average household consumption level for two fixed price offers against the cheapest market offers from the same retailers (assuming all discounts are included), in each distribution area in each state in which those contracts are offered.¹⁵¹ The Commission found that the premium paid for fixed price offers over the cheapest market offers varied significantly between states, varying from around 10 per cent to 20 per cent. The Commission noted that these figures may not in each case accurately reflect the greater risk involved for retailers in fixed price *market retail contracts* due to the low level of competition in the provision of these contracts.

¹⁵⁰ AEMC, 2013, 2013 Residential Electricity Pricing Trends Report, 13 December 2013 at page 12.

¹⁵¹ This analysis was undertaken using data from: the AER's Energy Made Easy website for offers in NSW and South Australia; Origin Energy's website for offers in South Australia; and the Victorian Government's My Power Planner website for offers in Victoria. The following average annual household consumption levels were used: 6,500kWh in NSW; 5,000kWh in South Australia; and 4,645 kWh in Victoria. These consumption levels are the same as those used in the AEMC's annual residential electricity pricing trends reports and are provided by jurisdictional governments.

The Commission acknowledged that the size of the risk premiums that resulted from the proposed rule would have been subject to competition. The Commission considered that it was likely that over time, if required to offer fixed prices in fixed period contracts, retailers would have sought to more efficiently manage the additional risks they would face. For example, retailers may have taken a more active role in network price determinations than they do currently in order to understand and influence how network prices may change. These efficiencies would have then been passed on to consumers over time in the form of smaller risk premiums.

However, the Commission did not consider that the risk premium would be competed away entirely as a degree of underlying uncertainty would have always remained.

The Commission therefore considered that, even though risk premiums would have been subject to competitive pressure if retailers were required to offer fixed prices, those premiums would have still been material and increased prices for consumers. As a result, the Commission considered that the proposed rule would have resulted in less efficient prices for consumers.

The Commission also noted in its draft determination that requiring retailers to offer fixed prices could have resulted in consumers not receiving the benefit of any reductions in retailers' costs. The Commission suggested that while energy prices have risen steeply in recent years, this may not be the case in the future with falling demand and changes in government policy.

The Commission acknowledged that the proposed rule could have resulted in greater transparency of retail energy prices for consumers entering *market retail contracts* with a fixed period, which may have improved consumer engagement. This greater transparency could have occurred as consumers would have been more likely to understand that prices could not vary during the fixed period. However, the Commission considered that the benefits to consumers from this improved transparency were likely to be marginal compared to the negative impacts of the proposed rule on consumer choice, prices and competition in retail energy markets.

7.2.3 Impact of the proposed rule on retail competition

The Commission considered that the proposed rule would have been likely to impact smaller retailers more than larger and more vertically integrated retailers.

Larger and more vertically integrated retailers are likely to have access to a larger range of risk management tools and greater economies of scale in analysing and managing the additional risks that the proposed rule would have required them to manage. Such retailers would have a greater ability to spread risks across more customers and across customers on different kinds of offers. Larger retailers also have greater access to financial markets.

Smaller retailers, and particularly newer entrants in retail energy markets, are not likely to have ready access to all of these risk and cost management tools that would have helped to reduce the costs of complying with the proposed rule. As a result, the

Commission considered that they may therefore only have been able to offer *market retail contracts* with fixed prices that:

- are less competitively priced and build in larger risk premiums than their larger more established competitors; or
- impose a relatively higher risk on the retailer that its costs will rise by an amount that would make the business unprofitable or unviable.

The Commission noted that this may have resulted in smaller retailers not being able to offer fixed period contracts, or only being able to offer fixed period contracts with shorter durations. This in turn could have affected the level of competition in retail energy markets as smaller retailers may have not be able to effectively compete with larger and more established retailers in providing fixed period contracts. The Commission considered that over time, lower levels of competition and a reduced threat of new entrants would have been likely to reduce competitive pressure on existing retailers to offer efficiently priced contracts that reflect consumers' preferences.

7.2.4 Impacts of the alternatives to the proposed rule

The Commission considered that the proposed alternative rule of requiring retailers to fix prices for fixed period contracts, except for the pass-through of changes in government policy costs, would have had the same or similar impacts as the proposed rule. However, the Commission also considered that the alternative proposed rule would have had the following additional negative impacts:

- greater regulatory uncertainty for retailers regarding which costs could and couldn't be passed through to consumers;
- greater administrative burden for retailers in managing the pass-through of costs to consumers;
- greater difficulty in administering and enforcing compliance for the AER in overseeing compliance with the rule; and
- the potential for consumer confusion as to how prices may have varied.

The Commission considered that the greater uncertainties and regulatory burdens placed on retailers and the AER as a result of the alternative proposed rule would have been recovered from consumers in the form of higher prices. The Commission also considered that the proposed alternative rule would not have improved consumers' understanding of the terms and conditions of their *market retail contracts*.

In relation to the second alternative proposed rule to apply the unfair contract terms provisions of the ACL to price variation clauses in *market retail contracts*, the Commission concluded that a regulatory response was not required. The Commission also noted that there would be no appreciable benefit to be gained from clarifying the application of the unfair contract terms provisions in the ACL. Further detail on the Commission's reasoning for this view is set out in Chapter 6.

7.3 Stakeholder submissions on the impact of the proposed rule and alternative rules

7.3.1 Consumer group submissions

Submissions from consumer groups on the draft determination restated their support for the proposed rule.¹⁵²

CALC and CUAC noted that their proposed rule would not inhibit a retailer from offering variable price market contacts without a fixed term.¹⁵³ CALC and CUAC considered that these contracts would allow retailers to pass on risks to consumers and would not limit retailers' contract structure or their ability to innovate.¹⁵⁴ CALC and CUAC also considered that the Commission's stated risk premiums for current fixed priced contracts cannot be relied on as the Commission should have compared the total amount paid by a consumer on a fixed price offer and a consumer on a variable price offer over the term of a contract, rather than the entry prices for fully-fixed price offers and variable price offers.¹⁵⁵

In a supplementary submission CALC and CUAC requested that the AEMC obtain information on the number and magnitude of price rises over the term of fixed period contracts directly from retailers.¹⁵⁶ They noted that, anecdotally, they understand that energy contract prices rise at least twice over the term of a two year contract and data provided by the Victorian price comparator website My Power Planner shows a large number of changes in offer prices over a 10 month period.¹⁵⁷ A total of 3,831 new offers entered the My Power Planner database and 3,875 were removed over October 2013 to July 2014, with the most changes occurring during January 2014.¹⁵⁸

CALC and CUAC also suggested that the Commission did not provide any substantive response to the analysis contained in their rule change request. That analysis indicated that under the proposed rule retailers would be required to take greater steps to manage their risk exposure to cost increases and consumer confidence and competition would improve as a result of the simplification of contracts.¹⁵⁹

¹⁵² See the submissions of PIAC at page 1, CALC and CUAC at page 2, the Ethnic Communities Council of NSW at page 3, National Seniors Australia at page 2 and the Combined Pensioners and Superannuants Association of NSW at page 3.

¹⁵³ See the submission of CALC and CUAC at pages 6 and 11.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid at page 7.

¹⁵⁶ See the supplementary submission of CALC and CUAC at page 1.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid at page 2.

¹⁵⁹ See the submission of CALC and CUAC at pages 3 and 11.

Views on alternative rules

CALC and CUAC considered that the AEMC did not consider a number of other alternative rules that were raised during the consultation process, such as banning exit fees or requiring prices in a fixed period *market retail contract* to be fixed for a defined period. CALC and CUAC noted that requiring prices in a *market retail contract* to be fixed for a defined period, such as 12 or 18 months, was proposed by the Essential Services Commission of Victoria in 2011.¹⁶⁰

As discussed in Chapter 2, CALC and CUAC also considered that the Commission should have included consideration of the recent UK retail energy market reforms.¹⁶¹

Submissions from other consumer groups provided support for alternative rules such as banning exit fees following a price change.¹⁶² The National Seniors Association of Australia considered that this would provide consumers with the ability to manage risks without financial punishment.¹⁶³ The Combined Pensioners & Superannuants Association of NSW noted that exit fees create a barrier to being able to shop around, particularly for low income people.¹⁶⁴

Other consumer groups considered that retailers should be required to provide advanced notification of price changes.¹⁶⁵ PIAC considered that retailers should be required to provide 21 days' notice of any price increases to improve the ability of consumers to respond to price signals and adjust their consumption. PIAC noted that any costs associated with this notification could be reduced through electronic communication.¹⁶⁶

As discussed in Chapter 6, CALC and CUAC also considered that the Commission should have reduced uncertainty in relation to the application of the unfair contract terms provisions in the ACL through a joint statement with the ACCC.¹⁶⁷

7.3.2 Retailer submissions

Simply Energy and AGL considered that the proposed rule would have resulted in negative impacts for consumers through increased prices and a reduced range of

¹⁶⁰ Ibid at pages 7 to 8.

¹⁶¹ Ibid at pages 9 and 10.

¹⁶² See submissions on the draft determination from Combined Pensioners & Superannuants Association of NSW at page 3, the Ethnic Communities Council of NSW at page 3, National Seniors Australia page 2 and Michael Davies (private submission) at page 1.

¹⁶³ See the submission of National Seniors Australia at page 2.

¹⁶⁴ See the submission of the Combined Pensioners & Superannuants Association of NSW at page 3.

¹⁶⁵ See the submissions on the draft determination from PIAC at pages 2 to 3 and the Combined Pensioners & Superannuants Association of NSW at page 3.

¹⁶⁶ See the submission of PIAC at pages 2 to 3.

¹⁶⁷ See the submission of CALC and CUAC at page 10.

contracts in the market.¹⁶⁸ AGL also noted that the proposed rule failed to address the key issue of consumer understanding of energy contracts and could negatively impact competition.¹⁶⁹

Views on alternative rules

Retailers did not comment on the alternative proposed rules in their submissions. Some retailers did provide views on amendments to the Commission's draft rule and the AER's Retail Pricing Information Guidelines - these views are discussed in Chapter 8.

7.3.3 Other submissions

The AER indicated that it did not support CALC and CUAC's proposed rule, as it would be likely to result in reduced choice and higher prices for consumers which would not be in their long term interests.¹⁷⁰

The Hon. Kelvin Thomson MP, writing on behalf of CALC, noted that the Commission is considering allowing energy retailers to continue to increase electricity prices, even if they sell a product that is fixed. He stated that CALC make a fair point that this "is fundamentally unfair on the consumer and makes a mockery of a contractual arrangement where under this system a customer's tariff can be increased mid-contract".¹⁷¹

Views on alternative rules

The AER noted in its submission that advanced notification of price changes reflects good customer practice as it provides customers with the opportunity to switch to another offer or moderate their consumption.¹⁷² The AER noted that it encourages this practice amongst retailers and supports the AEMC's draft rule as a useful starting point in supporting this practice.¹⁷³

168 See submissions of Simply Energy at page 1 and AGL at page 1.

169 See the submission of AGL at page 2.

170 See the submission of the AER at page 1.

171 See the submission of the Hon. Kelvin Thomson MP at page 1.

172 See the submission of the AER at page 5.

173 Ibid.

7.4 The Commission's analysis and conclusions on the proposed rule and alternatives

7.4.1 The Commission's analysis of submissions on the proposed rule

As discussed above, the Commission notes that under the rule proposed by CALC and CUAC, retailers could have continued to offer *market retail contracts* with a variable price where these contracts do not have a fixed term or a fixed benefit period. However, the Commission considers that the issues raised by the rule change request do not warrant prohibiting fixed term and fixed benefit period contracts, particularly as these types of contracts remain the most popular types of contracts with consumers and often provide the cheapest prices. Further, our consumer research indicates that consumers appear to want a choice of contract types.¹⁷⁴ Limiting the types of contracts that retailers can offer may mean consumers may not find contracts in the market that they consider meet their preferences.

The Commission also notes the proposed rule could have resulted in retailers reducing the length of contracts they offer to consumers. This reduction in the length of contracts could have corresponding impacts on the length of wholesale market contracts and consequently increase barriers to entry in retail energy markets and the effectiveness of competition in those markets.

The Commission considers that where possible, effective retail competition, which requires the process of consumers exercising informed choices and retailers having the flexibility to offer a range of offers, provides the best way for retailers to meet consumer preferences and provide for prices that trend to efficient levels. The Commission has sought to improve the ability of consumers to make more informed choices through its more preferable final rule, which is discussed further in Chapter 8. The Commission considers that this is a proportionate approach to the issues raised by the rule change request.

The Commission notes that retailers currently offer different kinds of *market retail contracts*. In some of these, retailers are able to vary prices during fixed periods. In others, retailers are not able to vary prices during fixed periods.

As has always been the case, retailers are required to comply with the terms and conditions of their contracts. If retailers do not comply with the terms and conditions of their contracts consumers will have remedies available to them under contract law. Under the Commission's more preferable draft rule and more preferable final rule, retailers will continue to be required to comply with the terms and conditions of their contracts relating to price variations. Retailers will now be required to better inform consumers about any terms and conditions relating to price changes on contract entry.

In considering the likely risk premium that would occur under the proposed rule, the Commission notes that comparing the cost of fixed price contracts with variable price contracts over the duration of a contract would be difficult in practice and could

¹⁷⁴ See the Newgate Consumer Research report at page 18.

provide misleading results. This is because only two retailers are currently offering fixed price contracts and these contracts have only been offered for a short period of time. It would also be difficult to accurately assess risk premiums for fixed price contracts because retailers tend to spread their overall costs and risks across their customer base, rather than allocate them to each type of contract. Further, the Commission notes that it does not have the information gathering power to request this type of information from retailers.

Therefore, as outlined in section 7.2.2, the Commission has sought to provide an indication of possible risk premiums under the proposed rule by comparing the entry price of current fixed price contracts with variable price contracts.

The data supplied by CALC and CUAC from the My Power Planner website does not inform how often and by how much prices change during the term of a fixed period contract. Most contract changes occurred in January, which is when changes in network charges occur in Victoria. The Commission therefore notes that the data appears to be consistent with the view that retailers generally amend their offers at around the same time that changes in network charges occur. The Commission also notes that a large number of offers entering and exiting the My Power Planner website could also indicate a high level of competition, as retailers seek to respond to meet consumer preferences and the offers provided by other retailers.

As noted above, as more retailers may have offered fixed priced contracts under the proposed rule, the risk premiums that may have eventuated may be lower than those currently observed. This is because the competitive process, along with an incentive for improved risk management, as noted in the analysis contained in the rule change request, could have reduced these premiums. The actual premiums that would have occurred under the proposed rule would have also been affected by a range of other factors such as changes in the risks of different costs retailers face, as well as the number of customers being supplied under these types of contracts.

However, the Commission considers that some degree of risk premium would have occurred under the proposed rule as retailers would never have complete certainty about how all of their costs may change over the duration of a contract. As a result, prices under fixed period contracts would have been higher for consumers to accommodate this risk premium under the proposed rule.

7.4.2 The Commission's analysis of submissions on alternatives to the proposed rule

In relation to the alternative rules proposed of banning exits fees and providing advanced notification of price changes, the Commission considers that the issues identified by the rule change request do not warrant regulatory changes of this nature. Further, the Commission notes that a number of retailers are already offering contracts that provide these features. As set out in Chapter 8, clearer marketing information about the terms and conditions of different types of contracts, along with the increased promotion of independent price comparator websites such as the AER's Energy Made Easy website, are likely to improve consumer awareness of the range of contracts

available. Banning exit fees for all contracts also has the potential to increase prices for all consumers, as retailers are likely to recover the cost of obtaining and retaining customers through higher prices.

While the Commission considers that advanced notification of price changes should be encouraged as a matter of good customer service by retailers, it considers that a more proportionate response to promote and encourage competition in this practice is to require retailers to be transparent regarding when they will notify consumers of price changes, rather than to mandate advanced notification. The Commission has sought to achieve this through its more preferable final rule. The Commission also notes that requiring retailers provide a set number of days of advanced notice could create additional risks for retailers, where changes in costs occur at short notice.

The Commission considers that the other alternative noted by CALC and CUAC of requiring retailers to fix prices for fixed period contracts for a defined period would have similar drawbacks to those outlined above for the proposed rule. However, it could also increase search costs for consumers where retailers are only able to offer fixed period contracts for a 12 or 18 month period, as it could result in consumers needing to change their contract on a more regular basis.

As discussed in Chapter 6, the Commission has concluded that a regulatory response to address the uncertainty in relation to the application of the unfair contract terms provisions in the ACL is not warranted to address the issues raised in the rule change request. The Commission also notes that it is beyond its role to issue regulatory guidance on the interpretation of the ACL, but that it may be appropriate for the ACCC to issue guidance regarding its approach to regulating compliance with this law.

In relation to the adoption of reforms similar to those recently adopted in the UK, the Commission has set out its reasons in Chapter 2 as to why it has not adopted reforms of this magnitude.

7.4.3 The Commission's conclusions on the proposed rule and alternative rules

The Commission notes the conclusions reached in Chapters 3 to 6 that a number of issues raised in the rule change request are not sufficiently supported by evidence to warrant a regulatory response. However, the Commission has identified that the key issue raised by the rule change request that requires a regulatory response is that some consumers could be better informed about the terms and conditions of their *market retail contracts*, particularly in relation to whether prices may vary during their contracts.

The Commission continues to consider that the proposed rule and alternative rules proposed by CALC and CUAC could have a range of negative impacts on the price consumers pay for energy, as well as on the choices available to consumers and the level of competition in retail energy markets.

The Commission acknowledges that, as set out in the analysis in the rule change request, the proposed rule could result in increased transparency of prices for consumers and improved consumer engagement in retail energy markets, which could promote retail competition. However, the Commission considers that the negative impacts of the proposed rule are likely to outweigh these benefits. In particular, the Commission considers that, on balance, consumer engagement is more likely to be negatively affected by the reduction in choice than promoted through increased transparency of prices.

The Commission also considers that the additional alternatives proposed by stakeholders in submissions to the draft determination are not warranted. In light of these findings, the Commission considers that it is not appropriate to make the rule as proposed or the alternatives proposed because they are not a proportionate or appropriate response to the issues raised by the rule change request.

8 The Commission's more preferable rule and observations on the marketing of market retail contracts

This Chapter:

- outlines the Commission's objectives for its more preferable final rule;
- outlines the current information disclosure requirements in the NECF;
- outlines the Commission's draft rule and a summary of submissions on the draft rule;
- sets out the Commission's more preferable final rule to improve the explicit informed consent requirements and the disclosure of "required information" on entry into a *market retail contract*; and
- provides some observations in relation to the marketing of *market retail contracts*.

8.1 The Commission's objectives for its more preferable rule

The long term interests of consumers are likely to be served where there is effective competition in retail energy markets. The results of effective competition can be seen in:

- prices that trend to efficient costs over time;
- a quality of service that matches consumers' expectations; and
- a range of products and services that meet consumers' preferences.

Effective competition requires active participation in the market by both retailers and consumers. In particular, consumers need to be aware, informed and engaged in order to participate and make decisions in a way that promotes effective competition and the outcomes listed above. Key information regarding the nature of retail energy contracts therefore needs to be transparently disclosed to consumers to assist the competitive process.

The key issue arising from the rule change request that the Commission considers requires a regulatory response is that some consumers could be better informed about the terms and conditions of their energy contracts, particularly regarding whether prices can vary under their contracts. A related issue is that it appears the low take-up of the few fixed price offers available does not accurately reflect the preferences of consumers, given that the Newgate consumer research suggests that around 30 per cent of consumers appear to place a higher value on price certainty than lower prices. This could mean that in practice most consumers make choices based primarily on price, or that some consumers that place a high value on certainty may not be aware that fixed price contracts are available on the market.

The Commission considers that greater transparency and better information in the marketing of *market retail contracts* and on entry into such contracts, would improve consumers' knowledge of the terms and conditions of their contracts. The Commission has made a more preferable final rule that will provide consumers with better information and improve their understanding of the terms of *market retail contracts*, particularly with respect to whether prices can vary under their contract and when they will be notified of price variations.

The Commission considers its more preferable final rule is likely to improve competition in retail energy markets by improving consumer understanding and engagement at key times in their decision making. More informed consumers are likely to select energy contracts that they consider better meet their needs. This in turn is likely to place greater competitive pressure on retailers to develop contracts that meet consumers' preferences with respect to how prices can vary in *market retail contracts* and to price these contracts at efficient levels. The Commission also notes that further actions could be undertaken by the AER, retailers and governments to improve consumer engagement in retail energy markets. This is discussed in section 8.5 below.

8.2 Current information disclosure requirements in the NECF

The Retail Law and retail rules contain a number of obligations on retailers to disclose information to consumers before entry and at the point of entry into a *market retail contract*. Three key sources of these obligations are:

- the requirement in the Retail Law that retailers fully and adequately inform consumers of all matters relevant to their entry into a *market retail contract* in obtaining their "explicit informed consent" to the transaction.¹⁷⁵ The consumer must then consent to the transaction in writing, verbally, or by electronic communication generated by the consumer;¹⁷⁶
- the requirement in the retail rules that retailers disclose information before or as soon as practicable after the formation of a *market retail contract* in relation to prices, charges, early termination payments and penalties and how any of these may be changed during a contract (called "required information");¹⁷⁷ and
- the requirement in the Retail Law for the AER to make and amend a Retail Pricing Information Guideline (AER Guidelines).¹⁷⁸ The AER Guidelines require retailers to prepare energy price fact sheets and provide them to consumers, and require retailers to provide information to the AER for the maintenance of a price

¹⁷⁵ See sections 38 and 39 of the Retail Law.

¹⁷⁶ See section 39 of the Retail Law.

¹⁷⁷ See rules 62 to 64 of the retail rules.

¹⁷⁸ The AER Guidelines can be found at:
<https://www.aer.gov.au/sites/default/files/D12%2090577%20%20AER%20Retail%20Pricing%20Information%20Guideline%20-%20June%202012.pdf>.

comparator website (the "Energy Made Easy" website).¹⁷⁹ The current AER Guidelines require retailers to include information in energy price fact sheets on how prices can vary during each contract.

8.2.1 Role of the Commission in regulating information disclosure

The Commission notes that it has the power to amend the retail rules to include further matters that retailers are required to obtain explicit informed consent for.¹⁸⁰ The Commission also has the power to make provisions in the retail rules for, or with respect to, explicit informed consent for small customers.¹⁸¹ The retail rules already include a range of matters that require the explicit informed consent of consumers, such as consent to billing cycles that differ from the minimum three months.¹⁸²

The Commission also has the power to amend the retail rules to change the required information that retailers must provide before or shortly after entry into a *market retail contract*. It also has the power to make rules relating to the marketing of retail energy contracts. The Commission however cannot rely on either power to amend the AER Guidelines, nor do these powers extend to confining or directing the AER to include particular matters in the AER Guidelines.

This is because the AER's power to make its Guidelines, and the discretion to determine its content, is set out in the Retail Law. To make rules that addressed matters relevant to the AER Guidelines could effectively limit the AER's discretion to make the Guidelines or be in conflict or inconsistent with them. In these cases, any such rules could be invalid if they were inconsistent with the Guidelines.

Therefore, while the Commission is legally able to make rules relating to the marketing of retail energy contracts that address matters relevant to the subject matter of the AER Guidelines, doing so could create a range of unnecessary complexities in practice.

8.3 The Commission's draft rule and submissions on the draft rule

The Commission's draft rule included two changes to the retail rules to improve the information provided to consumers in relation to price changes when entering *market retail contracts*. It was considered that these changes would enable consumers to make more informed decisions and improve consumer engagement and competition in retail energy markets. The Commission's draft rule included:

- a new rule 46A in the retail rules to specifically require retailers to disclose to consumers any term or condition that provides for the variation of tariffs, charges

¹⁷⁹ The AER is required to prepare this guideline under section 61 of the Retail Law and retailers are obliged to present market offers in accordance with those Guidelines under section 37 of the Retail Law.

¹⁸⁰ See section 38(d) of the Retail Law.

¹⁸¹ See section 42 of the Retail Law.

¹⁸² See rule 24 of the retail rules.

and benefits (that is, prices) as part of the existing requirement to obtain explicit informed consent from consumers to the entry into a *market retail contract*. Existing obligations would require the retailer to record the consent of the consumer to entry into the contract.¹⁸³

- amendments to rule 64 of the retail rules to require retailers to provide information about when they will notify consumers of variations to prices, charges and benefits (to the extent not otherwise part of prices) in *market retail contracts*. This disclosure would be included with information provided to consumers shortly before or following contract entry as part of existing product disclosure requirements. Under existing obligations, consumers would have a ten business day cooling off period to withdraw from the contract after receiving this product disclosure information on contract entry.¹⁸⁴

The Commission made this draft rule after reviewing a range of different scripts used by retailers, which indicated that there was a great degree of variability in how clearly they informed consumers of price variation clauses in *market retail contracts* as part of existing explicit informed consent obligations.

The Commission also reviewed existing product disclosure statements from retailers and noted that some retailers did not provide clear information regarding when the consumer would be notified of any price variation.

Further, the Commission also decided to make this draft rule in light of the results from its consumer research which indicated that some consumers do not have a clear understanding of how prices may vary in *market retail contracts*.

8.3.1 Submissions on the draft rule

Submissions on the draft rule from consumer groups and consumers did not support the Commission's draft rule as they considered that improved information was insufficient to address the issues raised in the rule change request.¹⁸⁵ In particular, a number of these submissions noted that providing information at the point of entry to a contract would not change a consumer's decision and would not assist more vulnerable consumers to engage in the market.¹⁸⁶ These submissions supported CALC and CUAC's proposed rule as the best way to address the issues raised in the rule change request.

183 See sections 38 and 39 of the Retail Law.

184 See rule 47 of the retail rules.

185 See for example the submissions of CALC and CUAC, National Seniors Australia, Ethnic Communities' Council of NSW, PIAC, and the Combined Pensioners & Superannuants Association of NSW.

186 See for example the submissions of CALC and CUAC at page 6, National Seniors Australia at page 1, the Ethnic Communities' Council of NSW at page 1 and the Combined Pensioners & Superannuants Association of NSW at page 4.

CALC and CUAC also noted that the Commission did not consider the potential for jurisdictional differences in relation to price notification processes, exit fees, and other responses to consumer detriment, because the existing rule is inadequate.¹⁸⁷

Retailers generally did not agree that there were issues raised in the rule change request that required a change to the retail rules. These submissions generally considered that the Commission's draft rule was unnecessary in light of existing information requirements in the NECF and ACL and was beyond the scope of the issues raised in the rule change request.¹⁸⁸ In particular, the Energy Retailers Association of Australia noted that the application of the draft rule to all *market retail contracts* was beyond the scope of the rule change request and could create further complexity in the market and confuse customers.¹⁸⁹ However, some of the submissions from retailers provided some support for the Commission's draft rule.¹⁹⁰

Submissions from other stakeholders, such as the AER, the South Australian Department of State Development and the Energy Networks Association, generally supported the Commission's draft rule as a mechanism to promote transparency and assist consumer engagement in retail energy markets.

The Energy and Water Ombudsman (Victoria) did not provide any views on the Commission's draft rule, but noted that similar requirements have been in place in Victoria since 2012 and that it has received a substantial and increasing number of complaints about price variations while such disclosure requirements have been in place.¹⁹¹ The Energy and Water Ombudsman (Victoria) noted that between 1 January 2009 and 31 December 2013, complaints related to variation in price or contract terms was raised as a primary issue by 3,381 customers and as a secondary issue by a further 1,450 customers and that most cases involved concerns relating to a change in the tariff and/or discount.¹⁹²

Comments on the detail of the Commission's draft rule

In addition, a number of submissions provided specific comments on the detail of the Commission's draft rule.

In relation to the draft rule relating to the explicit informed consent requirements, Origin Energy considered that the draft rule was confusing and risked adding uncertainty to obligations around explicit informed consent.¹⁹³ In particular, Origin Energy considered that trying to determine when a "benefit" is different from a "price"

¹⁸⁷ See the submission of CALC and CUAC at page 8.

¹⁸⁸ See for example the submissions of Simply Energy, EnergyAustralia, Origin Energy, AGL, Lumo Energy, Red Energy, Alinta Energy and the Energy Retailers Association of Australia.

¹⁸⁹ See the submission of the Energy Retailers Association of Australia at page 2.

¹⁹⁰ See submissions of AGL at page 2 and Red Energy at page 1.

¹⁹¹ See the submission of the Energy and Water Ombudsman (Victoria) at pages 2 to 4.

¹⁹² Ibid at page 4.

¹⁹³ See the submission of Origin Energy at page 3.

creates confusion.¹⁹⁴ Origin also suggested that the drafting of rule 46A should be changed to refer to "the variation of tariffs, charges *or* benefits" rather than "the variation of tariffs, charges *and* benefits".¹⁹⁵ However, Red Energy considered that the Commission's draft rule 46A would "empower customers to make better informed decisions regarding their retail energy contracts", while AGL noted that its current processes already largely align with this draft rule.¹⁹⁶

In relation to the draft rule relating to the product disclosure requirements, PIAC noted that it would be possible for retailers to "technically comply with this provision without providing information that is useful to consumers".¹⁹⁷

AGL and Red Energy raised concerns about the practical implications of the proposed product disclosure requirements for retailers. AGL noted that as retailers cannot predict the precise timing of price variations, there is a risk of providing inaccurate information and that the draft rule could constrain retailers' future price variations.¹⁹⁸

Red Energy noted that this draft rule could reduce retailers' flexibility in how they advise customers of a price change.¹⁹⁹ Red Energy noted that the current flexibility in the retail rules enables Red Energy to take different actions in notifying its customers depending on the circumstances of the price change.²⁰⁰ Red Energy also considered that the draft rule will encourage retailers to set out "the minimum allowable notification method, which may not always be in the customer's best interests".²⁰¹ Red Energy suggested a more preferable amendment would be to require retailers to advise customers of the methods that the retailer may use to notify a customer of a price change.²⁰²

In relation to the implementation of the draft rule, AGL and Lumo Energy indicated that a six month implementation timeframe would be sufficient.²⁰³ Lumo Energy noted that the rule should only be applied to new contracts formed after the commencement of the final rule.²⁰⁴

194 Ibid.

195 Ibid.

196 See submissions of Red Energy at page 1 and AGL at page 3.

197 See the submission of PIAC at page 2.

198 See the submission of AGL at page 3.

199 See the submission of Red Energy at page 1.

200 Ibid at page 2.

201 Ibid.

202 Ibid.

203 See the submissions of Lumo Energy at page 2 and AGL at page 4;

204 See the submission of Lumo Energy at page 2.

8.4 The Commission's more preferable final rule and response to submissions to the draft determination

The Commission has considered the range of issues raised in submissions and continues to consider that its draft rule provides an effective and proportionate response to the issues raised by the rule change request in relation to the impact of price variations on consumer engagement. Therefore, the Commission's more preferable final rule is largely unchanged from the draft rule set out in the Commission's draft determination.

The Commission has decided to maintain the application of the more preferable final rule to all *market retail contracts* as the risk that consumers may be entering contracts unaware that prices may vary is relevant to all types of *market retail contracts*, rather than only those with a fixed term or fixed benefit period. Having regard to this and the other issues raised in the rule change request, the Commission is satisfied that improving information requirements for all *market retail contracts*, rather than limiting it to some types of *market retail contracts*, is preferable as it better serves the long-term interests of consumers, consistent with the NERO.

The Commission also notes that limiting the application of the more preferable final rule to only some types of *market retail contracts* could unnecessarily increase the compliance burden on retailers, as it would create differing disclosure requirements for different types of *market retail contracts*. This could also lead to customer confusion and higher prices for consumers.

While its more preferable final rule seeks to improve the information that retailers provide consumers on contract entry, the Commission recognises that there are a range of other measures that could be undertaken to improve the experiences of all consumers in retail energy markets to further facilitate consumer choice and engagement. The Commission considers that these measures go beyond the issues relating to the impact of price variations on consumer engagement arising from the rule change request. Therefore, the Commission has not sought to address these issues through its final rule. However, the Commission has set out its views on further actions that could be undertaken to address these broader issues in section 8.5 below.

Further details on the Commission's more preferable final rule and the Commission's response to the issues raised in submissions are outlined below.

8.4.1 Explicit informed consent requirements

The current requirement in the Retail Law for retailers to obtain explicit informed consent on entry into a *market retail contract* is not prescriptive in relation to the matters that consent must be sought for. Retailers each develop explicit informed consent "scripts" to comply with this requirement, which are read to or by consumers and their consent is recorded on their entry into each *market retail contract*.

As discussed above, the Commission's review of some of these scripts indicates that there is a high level of variability in how clearly retailers inform consumers about price

variation clauses in *market retail contracts*. The Commission considers that this has the potential to contribute to a lack of understanding by consumers about whether their prices may vary, which could lead to consumers making poor decisions when selecting an energy contract.

The Commission also notes that this variability in how well retailers inform consumers of price variations indicates that the current level of prescription in the Retail Law may not be sufficient to provide consumers with clear information about their contracts. For these reasons, the Commission has amended the retail rules to place clear requirements on retailers to disclose price variation terms or conditions to consumers on contract entry.

Outlined below in Box 8.1 are examples of the variability of different scripts used by retailers to obtain explicit informed consent.

Box 8.1: Examples of current scripts used by retailers in obtaining explicit informed consent

Retailers interpret their explicit informed consent obligation under the Retail Law to inform consumers of all matters relevant to their entry into a *market retail contract* in different ways.²⁰⁵ Outlined below are examples of two retailers' scripts in relation to how prices may vary under the *market retail contracts* they offer.

Example 1

"Do you understand that [we] may vary the market energy rates which are used to calculate your usage charges from time to time, and can vary your tariff structure, charges, billing frequency, and the terms of your energy plan at any time by writing to you?"

Example 2

"By clicking "Agree and submit" you understand that you are entering into a market contractand you are providing explicit informed consent to.. .our being able to vary the Charges including the amount, nature and structure of any of the Charges, by notice to you in accordance with clause 8 of the Agreement Terms."

Under the Commission's new rule 46A of the retail rules, retailers will be required to disclose any term or condition that provides for the variation of tariffs, charges or benefits (that is, prices) as part of the existing requirement to obtain explicit informed consent from consumers to the entry into a *market retail contract*. The Commission's more preferable final rule includes references to tariffs, charges or benefits as they all form components of the price paid by consumers under *market retail contracts*. If the retailer does not inform the consumer of the existence of price variation terms, their

²⁰⁵ See sections 38 and 39 of the Retail Law.

consent to the entry into the contract would not be valid and as a result the *market retail contract* would be void.

The Commission's more preferable final rule includes a small drafting change, as proposed by Origin Energy, to clarify that retailers are required to disclose any terms or conditions relating to the variation of "tariffs, charges or benefits" rather than "tariffs, charges and benefits", as was included in the draft rule. The Commission considers that this drafting change will assist in clarifying retailers' compliance obligations and the intent of the final rule.

The Commission has decided to retain the references to "benefits" in the more preferable final rule, as the Commission considers that benefits, particularly discounts, comprise an important factor in a consumer's decision making process to select an energy contract. The Commission also notes that benefits form a key component of the overall prices paid by consumers. Therefore, the Commission considers that retailers should be required to be transparent about possible changes to a consumer's benefits as part of obtaining their consent to the entry into a contract.

The Commission notes that, as highlighted by the Energy and Water Ombudsman (Victoria), the Commission does not expect all complaints in relation to price variations to cease following the commencement of the more preferable final rule. It notes that, while the final rule may be similar to existing disclosure requirements in Victoria, complaints to the Energy and Water Ombudsman (Victoria) relating to price variations currently comprise a fairly low proportion of the overall complaints received by the Energy and Water Ombudsman (Victoria) each year.²⁰⁶

8.4.2 Disclosure requirements on entry into a contract

As discussed above, retailers are currently required to provide consumers with product disclosure information before or soon after contract entry on prices, charges, early termination payments and penalties and how any of these may be changed.

The Commission's review of a number of product disclosure statements indicated that not all retailers are providing clear information regarding when the consumer will be notified of any price variations. This suggests that current disclosure requirements in the retail rules may not be sufficient to provide this information to consumers. An example of one retailer's current product disclosure statement in New South Wales regarding when the consumer can expect to be notified of price variations is as follows:

²⁰⁶ For example, the Commission notes that the Energy and Water Ombudsman (Victoria)'s 2013 annual report indicated that the Ombudsman received just over 70,000 electricity and natural gas complaints over the 2012/13 financial year. The Energy and Water Ombudsman (Victoria)'s submission to the draft determination indicates that between 1 January 2009 and 31 December 2013, variation in price or contract terms was raised by 3,381 customers and as a secondary issue by a further 1,450 customers. See: Energy and Water Ombudsman (Victoria) 2013 Annual Report at page 14 and Energy and the submission of the Energy and Water Ombudsman (Victoria) at page 4.

“Your Energy Charges, including fees, may be varied at any time by giving you written notice in accordance with the General Terms and Regulatory Requirements. See the General Terms for further information.”

Under the retail rules retailers are required to notify of price variations as soon as practicable, or at the latest in the next energy bill. However, the Commission understands that in practice a number of retailers notify consumers in advance of a price variation occurring as a matter of good customer service. Some retailers also indicate in their marketing material and contract terms and conditions that they will provide a minimum number of days’ advance notice to consumers before a price variation comes into effect.

The Commission notes that an issue arising from the rule change request specifically relates to some consumers having a poor understanding of their retail energy contracts with respect to how prices may vary. The risk of consumer dis-satisfaction could also increase where consumers are informed of price variations long after they have taken effect. Given this, the Commission considers it preferable to specifically require retailers to inform consumers of when they can expect to be notified of price variations in *market retail contracts*. The Commission considers that this is likely to improve transparency and competition regarding when retailers will notify their customers of price variations. This could potentially lead retailers to provide retail energy services that better meet consumer expectations and preferences regarding the notification of price variations.

The Commission’s more preferable final rule amends rule 64 of the retail rules to specifically require retailers to include in their product disclosure statements information on when they will notify consumers of variations to applicable prices, charges and benefits (to the extent both are not otherwise part of prices) in *market retail contracts*. As noted above, as charges and benefits form a component of prices, the Commission’s rule will also require retailers to provide notification of when changes to charges and benefits will be provided. Under the retail rules, consumers have 10 business days to withdraw from a contract after they receive product disclosure information on contract entry.²⁰⁷

The Commission acknowledges concerns from retailers that its more preferable final rule could constrain how retailers communicate with their customers. However, the Commission notes that the intention of the rule is to require retailers to be more transparent in the information they provide to consumers and that as a consequence retailers will need to provide clearer and more accurate information. If retailers are unable to commit to a set timeframe for providing consumers with advanced notice of price changes, they will need to be transparent about this in the information they provide in their disclosure statements.

Where advanced notification of price changes is a particularly important factor for a consumer, the consumer may wish to be supplied by a retailer that can offer this service. However, where this service is not an important factor for a consumer, the

²⁰⁷ See rule 47 of the retail rules.

Commission considers that they are still likely to benefit from increased transparency and certainty about when they will be notified of any price changes.

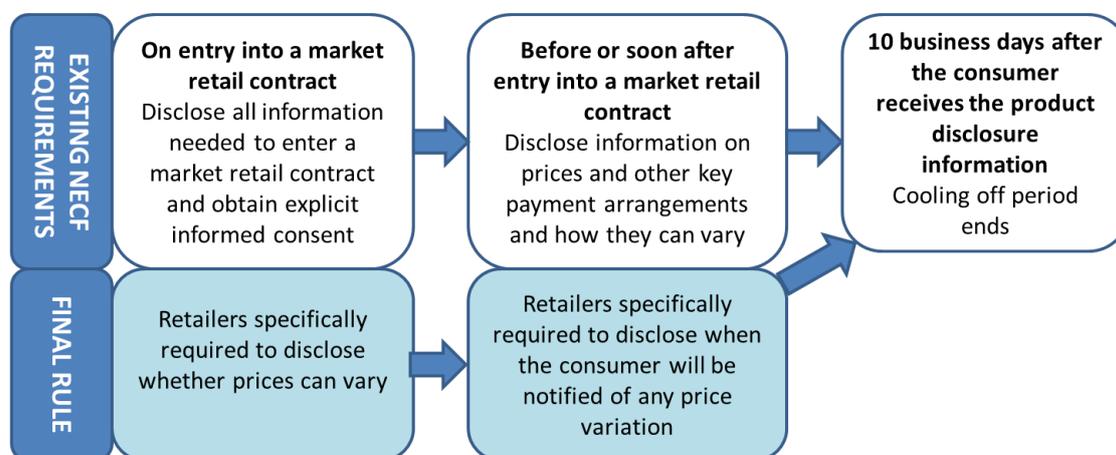
The Commission does not consider that the more preferable final rule will require retailers to constrain their communications to a particular method, as the rule only requires retailers to specify "when" they will notify customers of any price changes rather than how they will notify their customers.

8.4.3 Implementation of the Commission's more preferable final rule

The Commission's more preferable final rule will commence on 1 May 2015. This will provide retailers with six months to implement changes to their processes to comply with the new requirements. As discussed above, the final rule will apply to all electricity and gas *market retail contracts* that are entered into from 1 May 2015 in jurisdictions that have adopted the retail rules. Existing contracts that have been entered into before 1 May 2015 will not be affected by the final rule as the rule only relates to disclosure requirements as part of the entry into a *market retail contract* after that time.

Figure 8.1 outlines how the Commissions more preferable final rule will operate.

Figure 8.1 Changes to the existing requirements under the Commission's more preferable final rule



8.4.4 The Commission's assessment of its more preferable final rule against the NERO

As discussed in Chapter 2, the Commission is able to make a rule that is materially different from the proposed rule if it is satisfied that, having regard to the issues raised in the rule change request, the more preferable rule will or is likely to better contribute to the NERO.²⁰⁸ The rule change request concerns price changes by retailers during *market retail contracts* with a fixed term or fixed benefit period and its impact on customers. The rule change request also raised issues relating to the level of consumer

²⁰⁸ See section 244 of the Retail Law.

understanding of the terms and conditions of *market retail contracts*, particularly in relation to whether the price can vary.

The Commission considers that having regard to the issues raised by the rule change request a narrower regulatory response is preferable to the proposed rule. The Commission is satisfied that its more preferable final rule better addresses the NERO, consistent with the Commission's power to make a more preferable rule. The Commission considers that competitive retail energy markets provide the most effective mechanism for retailers to discover what consumers want and for consumers to discover the service and price combinations that retailers are offering. Competition is an iterative process that drives retailers to attract and retain customers and for customers to seek out the deal that they consider best meets their needs.

The Commission's more preferable final rule will provide consumers with better information regarding whether or not prices can vary and when they will be informed of any variations during fixed periods in *market retail contracts*. The Commission is aware that disclosing too much information to consumers will not necessarily improve their understanding of their retail energy contracts, as it could limit the effectiveness of disclosure. Given this, the Commission notes that its rule is unlikely to add significantly to the amount of information currently disclosed to consumers by retailers. The Commission also considers that it is important for consumers to be informed of the ability of retailers to vary their prices during a contract when they are selecting a *market retail contract*.

The Commission considers that its more preferable final rule will enhance competition by better informing consumers of key aspects of their retail energy contracts at the point of entry into the contract. This will also enable consumers to make a more active decision in relation to the price variation clauses they are comfortable with in their *market retail contracts*. This greater transparency and better information is likely to place competitive pressure on retailers to develop energy contracts that meet consumers' preferences with respect to prices and how they may vary over the duration of the contract.

The Commission also notes that clearer requirements on retailers are also likely to improve retailers' compliance with the retail rules, particularly in relation to the quality of information they provide to consumers, and the AER's enforcement of the retail rules.

The Commission considers that its more preferable final rule meets the NERO because it will or is likely to enhance consumer engagement and competition in the retail energy markets, which is likely result in more efficient prices and contracts that better reflect consumers' preferences. Retailers may still provide additional services or information that go beyond the requirements in the more preferable final rule, where they consider that consumers are likely to value these services.

The more preferable final rule is also likely to avoid a number of potential negative impacts that the proposed rule may have had as it will preserve retailers' current

flexibility in the range of energy contracts that they can offer and the ability of consumers to select contracts that meet their preferences.

Under the final rule, retailers will still be required to comply with the terms and conditions of their contracts, but will now be required to better inform consumers about any terms and conditions relating to price changes on contract entry.

These new requirements are likely to have limited direct implementation costs for retailers, which should limit upward pressure on prices for *market retail contracts*. The Commission notes that some retailers already inform consumers on contract entry about price variation clauses and provide information on when they will inform consumers of price variations during their contract.

The Commission also considers that its more preferable final rule is compatible with the application and development of consumer protections for small customers, as it will work alongside and enhance the current requirements relating to explicit informed consent in the Retail Law and the product disclosure requirements in the retail rules.

The Commission has considered the potential for jurisdictional differences in consumer protections in making its more preferable final rule. In particular, the Commission notes that the Victorian Government is currently considering amending its explicit informed consent requirements to prevent consumers from accidentally entering into fixed term contracts that allow for price changes.²⁰⁹ The Commission also considered recent developments in consumer protections in Queensland and Victoria. This includes the Queensland Government's decision to adopt the NECF from 1 July 2015 and its consultation on draft regulations to implement the NECF.²¹⁰ It also includes the Essential Services Commission of Victoria's amendment of the Victorian Energy Retail Code to harmonise the Code with the NECF.²¹¹

The Commission also notes that its rule also does not limit or otherwise impact the operation of, and interaction with, the unfair contract terms provisions in the ACL.

²⁰⁹ Further information on the Victorian Government's proposed reforms to explicit informed consent requirements can be found here:
<http://www.energyandresources.vic.gov.au/energy/about/legislation-and-regulation/consumer-protection-reforms>

²¹⁰ Relevant differences in the retail rules that may apply in Queensland that are currently being consulted on include a requirement that retailers provide consumers with at least 10 business days' notice before an increase in tariffs and charges are to apply. For more information see the Consultation Draft of the National Energy Retail Law (Queensland) Regulation 2014.

²¹¹ Version 11 of the Victorian Energy Retail Code will apply from 13 October 2014. It will relevantly include a requirement that retailers provide consumers that have smart meters with at least 20 business days' notice before a variation to tariffs or charges are to apply. This is consistent with the previous version of the Code, Version 10a. For more information see
<http://www.esc.vic.gov.au/Energy/Harmonisation-of-Energy-Retail-Codes-and-Guideline>. The Victorian Government has also recently announced that it intends to implement the NECF by the end of 2015. See:
<http://www.energyandresources.vic.gov.au/about-us/publications/victorias-energy-statement>.

The Commission considers that some consumers may continue to have concerns about how retailers have varied prices under their contracts. However, greater transparency in relation to retailers' price variation clauses as part of the entry to a *market retail contract*, in addition to effective retail competition, should assist consumers to make more informed decisions that they consider better meet their needs.

As outlined below, the Commission has also suggested that a range of improvements could be made in relation to the marketing of *market retail contracts* which could improve the information consumers receive from retailers at key moments prior to a consumer's decision to enter into a contract.

8.5 Further observations in relation to the marketing of market retail contracts

In assessing this rule change request the Commission has considered the full range of information requirements under the NECF to determine its preferred approach to addressing the issues raised. Part of this review involved considering the AER Guidelines and the AER's role in regulating the information provided to consumers by retailers when marketing retail energy contracts. The AER is also responsible for overseeing retailer compliance with the Retail Law and the retail rules, including the disclosure requirements set out in section 8.2 above.

8.5.1 AER Retail Pricing Information Guidelines

The AER Guidelines play an important role in regulating the marketing of retail energy contracts to consumers. They seek to achieve this in part through requiring retailers to prepare energy price fact sheets and make them available to consumers. The AER also manages the Energy Made Easy price comparator website.

In its draft determination, the Commission noted that improvements to the AER Guidelines could help improve consumer understanding of their *market retail contracts* in relation to the options available to them. In particular, reviewing the AER Guidelines and the Energy Made Easy website could improve the clarity, quality, accessibility and prioritisation of information, particularly with respect to price variations. The Commission indicated that these improvements could work alongside its draft rule to assist consumers to make more informed decisions when entering retail energy contracts.

The Commission also noted in its draft determination that consumer awareness of independent price comparator websites, such as Energy Made Easy, appeared to be low and that consumers would like better information about their energy contract options.²¹²

In its submission to the draft determination, the AER indicated support for consulting on possible changes to its guidelines to clarify and improve information available to

²¹² See the Newgate consumer research report at pages 10 and 22.

consumers.²¹³ The AER noted that a review of its guidelines could consider a range of matters, including:

- limiting the term "fixed" in disclosure documents and on Energy Made Easy, so that it could only be used to describe energy contracts with a fixed price;
- prioritising information on energy price fact sheets to display key details more clearly and prominently. The AER noted that this could include the use of behavioural economics to make the language used more direct, immediate and personal;
- further standardising the layout and format of energy price fact sheets to improve comparability across energy contracts;
- allowing customers to filter offers based on whether or not prices under *market retail contracts* can vary; and
- requiring information to be presented more clearly and simply.²¹⁴

The AER also noted that it could undertake more targeted reviews of retailers' compliance with disclosure requirements relating to *market retail contracts* and the explicit informed consent requirements of the Retail Law, as non-compliance with these provisions can impact consumer confidence and participation in retail energy markets.²¹⁵

The Commission welcomes and supports the AER's proposed review of its guidelines and considers that this review could provide a range of improvements to the way information is provided to consumers and consumers' experiences in retail energy markets. A number of stakeholders, including the South Australian Department of State Development, retailers, and consumer groups also indicated support for the consideration of retailers' marketing materials to further improve consumers' understanding of energy contracts.²¹⁶ The Commission looks forward to participating in this anticipated review with stakeholders in early 2015.

8.5.2 Further actions that could be undertaken to improve consumer engagement

The Commission also supports the AER's commitment to more targeted reviews of retailers' compliance with the retail rules and Retail Law, as this could assist in further improving consumers' engagement in retail energy markets. Over the longer term,

²¹³ See the submission of the AER at page 3.

²¹⁴ Ibid at page 4.

²¹⁵ Ibid at page 5.

²¹⁶ See the submissions of the Energy Markets and Programs Division of the Department of State Development of South Australia at page 2, Simply Energy at page 1, CALC and CUAC at page 6, the Ethnic Communities' Council of NSW at page 3, AGL at page 1, the Energy Retailers Association of Australia at page 2 and the Combined Pensioners & Superannuants Association of NSW at page 4.

where consumers find it easier to engage in the market, consumers are more likely to make more informed decisions that they consider better meet the needs of their households and retailers are more likely to provide products and services that consumers value.

The Commission notes that the AER has recently amended its Compliance Procedures and Guidelines for the Retail Law, retail rules and regulations, and that a key focus for compliance for the AER will be issues that can undermine consumer confidence in the retail energy market.²¹⁷ The AER has also recently included information on the Energy Made Easy website to assist consumers to understand whether prices may vary in their energy contracts.²¹⁸

While a number of retailers are taking action to improve the way they communicate with their customers, the Commission notes that further action could be undertaken by retailers to improve consumers' understanding of their contracts. As acknowledged by retailers in their submissions, retailers who clearly communicate with their customers are also likely to build better relationships with their customers and enjoy a competitive advantage.²¹⁹

The Commission also notes that there is a potential role for governments to play in increasing the confidence of consumers to shop around for a better deal. As recommended in the Commission's recent 2014 Retail Competition Review, this can include increasing awareness of tools such as independent price comparator websites and making these tools more user friendly.²²⁰ For example, we note the New South Wales Government's "Power's in Your Hands" campaign website seeks to assist consumers to find a better energy deal, and includes links to the Energy Made Easy website.²²¹ It can also include tailoring information and tools for different people in the community, who may have additional challenges in assessing information and their options. The Commission published a consumer engagement blueprint in 2013 that sets out ways governments can empower different consumers to make it easier for them to compare offers and find a contract that they consider suits their needs.²²²

217 For more information see: <http://www.aer.gov.au/node/27514>.

218 See: <http://www.energymadeeasy.gov.au/price-changes-and-your-energy-contract>.

219 See the submissions of EnergyAustralia at page 3 and AGL at page 3.

220 AEMC, Final Report, 2014 Retail Competition Review, 22 August 2014, Sydney at page iv.

221 See: <http://www.yourenergy.nsw.gov.au/>.

222 Further information on the Commission's consumer engagement blueprint can be found on the AEMC website here:
<http://www.aemc.gov.au/getattachment/57d65ebf-9231-4890-a9f0-f3e0723b0a7f/Supplementary-report.aspx>

A Legal requirements under the Retail Law

This appendix sets out the relevant legal requirements under the Retail Law for the AEMC in making this final determination.

A.1 Final determination

In accordance with section 259 of the Retail Law the Commission has made this final determination in relation to the rule proposed by CALC and CUAC.

A.2 Power to make the rule

The Commission is satisfied that the proposed rule falls within the subject matter about which the Commission may make rules. The proposed rule falls within section 237 of the Retail Law as it relates to regulating the "provision of energy services to customers, including customer retail services and customer connection services" and the "activities of persons involved in the sale and supply of energy to customers".²²³

A.3 Commission's considerations

In assessing the rule change request the Commission considered:

- the Commission's powers under the Retail Law to make the rule;
- the rule change request;
- the fact that there is no relevant MCE Statement of Policy Principles;²²⁴
- submissions, emails, and petition responses received during first and second round consultation; and
- the Commission's analysis as to the ways in which the proposed rule will or is likely to, contribute to the NERO.

A.4 Power to make a more preferable rule

Under section 244 of the Retail Law the Commission may make a rule that is different (including materially different) from a market initiated proposed rule if the Commission is satisfied that, having regard to the issues or issues that were raised by the market initiated proposed rule, the more preferable rule will or is likely to better contribute to the achievement of the NERO.

²²³ See section 237(1)(a) of the Retail Law.

²²⁴ Under section 236 of the Retail Law the AEMC must have regard to any relevant MCE statement of policy principles in making a Rule.

As discussed in Chapter 2, the Commission has made a more preferable final rule. The reasons for the Commission's decision are set out in Chapters 3 to 8.

B Summary of issues raised in submissions to the AEMC's draft determination

The Commission received 20 submissions to its draft determination. The table below provides a summary of the issues raised by stakeholders in their submissions and the Commission's response to each issue.

The submissions are available on the AEMC website at www.aemc.gov.au.

A summary of the issues raised in first round submissions on the rule change request and the Commission's response can be found in Appendix C.

Stakeholder	Comments	AEMC Response
The Commission's analysis of the issues raised by the rule change request		
Ethnic Communities Council of NSW, CALC and CUAC	The draft determination fails to give sufficient consideration to the economic analysis of Dr Smith. The draft determination did not provide any substantive analysis of or critique of Dr Smith's work. It also did not include any discussion of the need to improve trust and perceptions of fairness in the retail energy market (Ethnic Communities Council of NSW, p.1; CALC and CUAC, p.3).	The Commission considered the substance of the analysis of Dr Smith in its consideration of the rule proposed by CALC and CUAC and in making the more preferable draft rule. The Commission acknowledges that it did not specifically refer to Dr Smith's analysis in its draft determination. The Commission has set out Dr Smith's analysis and commented upon that analysis in Chapters 3 and 4.
Ethnic Communities Council of NSW	The Commission has been selective in its analysis of the results of the consumer research. The Commission appears to prefer findings that show people want a range of contract and price options to meet their needs. However Newgate Research noted that in the focus groups people found the relevant questions hard to absorb. The Commission did not acknowledge this statement	The Commission disagrees with the assertion that it misinterpreted or was selective in its analysis of the results of the Newgate consumer research. The Commission carefully considered all of the results of the consumer research and considered the results in light of stakeholder views as well as its own research and investigations. Further information on the Commission's consideration of its consumer

Stakeholder	Comments	AEMC Response
	<p>and still used the research to support its argument.</p> <p>The Commission overstated that consumers do not consider price variations to be an important issue. CUAC's 2012 survey shows that it is.</p> <p>Consumer satisfaction and a failure to express negative emotion is not a good indicator of competition. Consumers have "learned helplessness" so they become passive and don't engage in the market (p.2).</p>	<p>research is provided in section 5.4.1.</p>
<p>CALC and CUAC</p>	<p>There is no recognition by the Commission that the consumer research shows that consumers' broad expectations are that prices within contracts remain fixed. The consumer research findings should be read as showing consumer disengagement as a result of poor retailer practices. To solve these problems by requiring retailers to provide more information is a curious decision. The Commission should not have relied on certain questions in the consumer research due to problems with the wording of the question. A number of important findings from the consumer research seem to have been discounted by the Commission, including findings showing limited consumer understanding of retail energy contracts (p.4-5).</p>	
<p>EnergyAustralia</p>	<p>We understand that this rule change is in response to consumer group representations that there is widespread confusion in the market about the potential for rate variations to occur</p>	<p>A key issue raised by the rule change request is that some consumers are not well informed with respect to the terms and conditions of their energy contracts, particularly with respect to whether prices can vary during <i>market retail contracts</i>. The Commission considers this issue</p>

Stakeholder	Comments	AEMC Response
	<p>during their contract term. EnergyAustralia does not consider that the proponents have provided sufficient evidence to support this assertion (p.1).</p> <p>All Ombudsmen complaints have to first be dealt with by a complaint to the retailer. EnergyAustralia does not consider there are widespread consumer concerns with price variation, or a lack of understanding that prices can change in their contracts (p.2).</p> <p>The Commission has drawn an incorrect conclusion from its consumer research that some consumers have limited knowledge of their contracts and some think prices are fixed when they are not. EnergyAustralia strongly disagrees with this conclusion as the focus group results conflicted with survey results regarding this issue. Some people may have had fixed price products in mind when responding to the survey question regarding that issue (p.2).</p>	<p>requires a regulatory response and has sought to address this issue through its more preferable final rule.</p> <p>The Commission also considers that the results of its focus groups did not conflict with its survey results.</p> <p>Further detail on the Commission's analysis of issues relating to consumer participation in retail energy markets is set out in Chapter 5.</p>
Origin Energy	<p>Some consumers choose to shop around, others take very little time shopping around. Even to the extent that behavioural bias may be present in customer decision making, it does not necessarily follow that those decisions are not valid choices or representative of the consumer's preferences (p.1).</p>	<p>The Commission agrees that consumers have different preferences in relation to how they shop for an energy contract. However some degree of behavioural bias does impact on consumer decision making in energy markets. The Commission considers that clearer information can help consumers overcome behavioural bias. The Commission's more preferable final rule seeks to provide consumers with clearer information about price variations to assist them to make more informed decisions when selecting an energy contract. Further details on the Commission's more preferable final rule is set out in Chapters 2 and 8.</p>
CALC and CUAC,	The Commission has not explained why	The Commission does not take a view on which risks should be borne

Stakeholder	Comments	AEMC Response
Combined Pensioners and Superannuants Association of NSW	consumers should bear risks, rather than retailers. The Commission's suggestion that only efficient risks are passed on to consumers is overly optimistic. Retailers are in a substantially better position than consumers to manage and bear the risks associated with energy supply costs, even if disclosure requirements are improved (CALC and CUAC, p.7; Combined Pensioners and Superannuants Association of NSW, p.3).	<p>by particular parties in retail energy contracts. Rather, the Commission considers that there should be a range of contracts available that reflect the different levels of risk that consumers prefer to bear, and that consumers should be able to make an informed choice regarding the level of risk they are willing to bear in their energy contract.</p> <p>For more information on the Commission's consideration of the allocation of costs and risks in <i>market retail contracts</i> see Chapter 3.</p>
National Seniors Australia	National Seniors Australia is puzzled by the Commission's conclusion that input costs of electricity retailers are so unpredictable that they have to be able to increase prices at any time to manage business risk. We do not think that government policy costs in energy are less predictable or manageable than other industries, such as insurance and telecommunications (p.1).	The Commission set out its views on the risks that retailers face in supplying energy to consumers in the consultation paper and the draft determination. The Commission has provided further comments on the risks that retailers face in its final determination in section 3.4.1.
Ethnic Communities Council of NSW, CALC and CUAC	<p>The Commission did not adequately investigate price baiting. It did not ask retailers for historical information on price changes and timings. Without this information the Commission could not have found evidence of price baiting (Ethnic Communities Council of NSW, p.3; CALC and CUAC, p.8).</p> <p>The consumer protections in the ACL regarding misleading conduct and price baiting are not relevant to the issue of price baiting (CALC and CUAC, p.8).</p>	<p>In developing its draft determination the Commission consulted with consumer groups, Ombudsmen, the ACCC, jurisdictional governments, regulators and retailers, in a range of jurisdictions. A key focus of these consultations was to determine if any of these stakeholders held concerns that price baiting is occurring in retail energy markets on a widespread scale. Stakeholders generally did not hold such concerns.</p> <p>The Commission also considered that price baiting is only likely to occur where competition is not effective, and noted that its recent review of retail competition in NEM jurisdictions found competition to be effective in most jurisdictions.</p> <p>The Commission considers that its investigations of price baiting</p>

Stakeholder	Comments	AEMC Response
		<p>practices for the draft determination were adequate and proportionate to the nature of the issue raised. No new or compelling matters in relation to the prevalence of price baiting were provided in submissions to the draft determination. Therefore, the Commission continues to hold the view that there is insufficient evidence to conclude that retailers are engaging in widespread price baiting practices.</p> <p>For more information on the Commission consideration of issues relating to price baiting see section 4.4.</p>
CALC and CUAC	<p>The Commission's findings regarding the higher prices for fixed price products do not reflect the size of the risk premium. The comparison should not be the price at the time of entry into the contract, but over the life of the contract (p.7).</p> <p>Anecdotally, energy contract prices rise at least twice over the term of a two year contract and data provided by the Victorian price comparator website My Power Planner shows a large number of changes in offer prices over a 10 month period. A total of 3,831 new offers entered the My Power Planner database and 3,875 were removed (p.1-2, supplementary submission).</p>	<p>The Commission considers that comparing the cost of fully fixed price contracts with variable price contracts over the duration of a contract would be difficult in practice and could provide misleading results. The Commission considers that its analysis of the size of any potential risk premium is adequate and proportionate to the nature of the issue raised.</p> <p>The data supplied by CALC and CUAC from the My Power Planner website does not inform how often and by how much prices change during the term of a fixed period contract. The Commission notes however that the data appears to be consistent with the view that retailers generally amend their offers once a year at around the same time that changes in network charges occur. The Commission also notes that a large number of offers entering and exiting the My Power Planner website could also indicate a high level of competition, as retailers seek to respond to meet consumer preferences and the offers provided by other retailers.</p> <p>For further information on the Commission's response to this submission and consideration of risk premiums, see sections 3.4.1 and 7.4.2.</p>

Stakeholder	Comments	AEMC Response
CALC and CUAC	<p>The draft determination does not include any analysis of the experience of the UK market and how any consideration of that market has informed the Commission's thinking. It appears the Commission may have rejected our rule on the basis that the Ofgem reforms have yet to result in improved consumer engagement and competition (p.9).</p>	<p>The Commission noted in its draft determination that it had considered regulatory developments in other jurisdictions, including the UK. The Commission did not reject the proposed rule on the basis that the Ofgem reforms have not demonstrated improved consumer engagement and competition.</p> <p>The Commission considers that international experiences can provide useful insights into the range of possible policy responses that could be adopted, however any changes to regulatory requirements must be appropriate for the circumstances that exist in Australian retail energy markets and proportionate to the issues raised.</p> <p>The Commission considered that the issues raised by the rule change request did not warrant reforms of the nature and magnitude of those adopted in the UK.</p> <p>For more information see section 2.2.2.</p>
CALC and CUAC	<p>The Commission does not acknowledge that the uncertainty in the application of the unfair contract terms provisions of the ACL creates costs for consumers. The Commission's comment that it should not amend the rules to clarify their application before they have been tested in the courts does not recognise that the intention of the ACL provisions is that they be self-regulating. The Commission could issue a statement, jointly with the ACCC, on the application of the unfair contract terms provisions of the ACL to reduce uncertainty about their application (p.10).</p>	<p>The Commission does not agree that the uncertainty in the application of the unfair contract terms provisions in the ACL gives rise to significant additional costs for consumers. For this to occur, retailers would need to be passing on inefficient costs to consumers as a result of this uncertainty.</p> <p>As set out in Chapters 3 and 4, the Commission found insufficient evidence to support the view that retailers are passing through inefficient costs to consumers as a result of price variation clauses or that retailers are engaging in widespread price baiting practices.</p> <p>Although there is some uncertainty in the application of the unfair contract terms provisions in the ACL, the Commission does not consider that it is appropriate to clarify this uncertainty by amending the retail rules to address the issues raised by CALC and CUAC.</p>

Stakeholder	Comments	AEMC Response
		For more information on the Commission's consideration of the application of the unfair contract terms provisions of the ACL see Chapter 6.
AGL	The rule change request relates to concerns regarding the level of transparency and understanding of consumers about the ability of retailers to vary the price during fixed periods. AGL agrees that in a competitive market it is important to ensure that consumers have sufficient and appropriate information to enable them to readily understand energy products (p.2).	Noted. The Commission's more preferable final rule seeks to improve the information retailers provide consumers in relation to how prices may vary during <i>market retail contracts</i> .
Origin Energy	Placing constraints on the competitive market seems contrary to the NEM reform direction to create "opportunities for consumers to make informed choices about the way they use electricity based on the benefits that the end use services provide. Ultimately, consumers will be in the best position to decide what works for them" as noted in the Power of Choice Review (p.1).	The Commission considers that its more preferable final rule promotes opportunities for consumers to make <i>informed</i> choices when selecting an energy contract.
Combined Pensioners and Superannuants Association of NSW	It is grossly unfair, and in many cases misleading, that <i>market retail contract</i> prices do not have a restriction on the number or size of price variations and retailers only have to notify of price changes as soon as practicable and at the latest in the next bill (p.3).	<p>The Commission notes that its more preferable final rule will require retailers to provide clearer information to consumers about price variations in <i>market retail contracts</i>. This should increase consumer awareness of the ability of retailers to vary prices during fixed periods in most <i>market retail contracts</i> as well as increase consumer awareness of the fixed price products currently offered by some retailers.</p> <p>For more information on the Commission's more preferable final rule, see Chapters 2 and 8.</p>

Stakeholder	Comments	AEMC Response
Combined Pensioners and Superannuants Association of NSW	People who lack functional literacy and numeracy, people with a cognitive impairment, people who are not proficient in English and those who are not internet users are not adequately catered for in the current energy market (p.4).	<p>The Commission notes the difficulties faced by consumers who lack the ability to easily engage in retail energy markets. The Commission considers that improved provision of information will assist all consumers to make more informed decisions regarding their entry into <i>market retail contracts</i>. In Chapter 8, the Commission sets out further actions that could be undertaken to improve consumer engagement in retail energy markets, including tailoring information and tools for different people in the community who may have additional challenges in assessing information and their options.</p> <p>The Commission also notes that there are fixed price <i>market retail contracts</i> available in most jurisdictions for consumers who place a high value on price certainty. In addition, some retailers offer <i>market retail contracts</i> which provide advance notification of price changes.</p>
National Seniors	Older consumers are still enticed into discounted contracts assuming the prices are fixed and that energy contracts are "similar to all other major contracts which are fixed for the term of the contract" including telecommunications and insurance contracts (p.1)	
Ethnic Communities Council of NSW	The draft rule is designed to provide greater transparency for consumers, but it may be difficult to achieve this for culturally and linguistically diverse people (p.1).	
Assessment of the proposed rule		
Lumo Energy	The Commission has taken a proportionate response to assessing the proposed rule (p.1).	Noted. Further detail on the Commission's assessment of the proposed rule is set out in Chapter 7.
Simply Energy	The rule proposed by CALC and CUAC would have either increased prices or reduced the range of contracts available in the market (p.1).	
AGL	The rule proposed by CALC and CUAC would have resulted in negative outcomes for consumers, primarily in the form of risk premiums and reduced choice. It would have negatively affected competition. The proposed	

Stakeholder	Comments	AEMC Response
	rule is not an effective response to issue that some consumers may be entering contracts without knowing prices may change (p.2).	
Origin Energy	The rule proposed by CALC and CUAC would have limited the products that retailers could offer consumers, constraining market innovation and competition. It could also lead to higher prices because of inclusion of a risk premium (p.1).	
South Australian Department, AER, Simply Energy, Energy Retailers Association of Australia, EnergyAustralia, AGL, Origin Energy	Support the decision to reject the rule proposed by CALC and CUAC (South Australian Department, p.1; AER, p.1; Simply Energy, p.1; Energy Retailers Association of Australia, p.1; EnergyAustralia, p.1; AGL, p.1; Origin Energy, p.1).	
Ethnic Communities Council of NSW, CALC and CUAC	The Commission appears to have accepted the claims of retailers about the negative effects of the rule proposed by CALC and CUAC regarding increased prices and reduced choice, innovation and competition. These claims by retailers are not based in evidence. The Commission has also accepted retailer views that they cannot control risks associated with changes to network prices and government policy costs (Ethnic Communities Council of NSW, p.3; CALC and CUAC, p.11).	<p>The Commission did not accept the claims of retailers with respect to these matters. Rather, it formed its own views on the subjects after careful consideration of stakeholder views, its consumer research and its own investigations and analysis.</p> <p>Retailers manage a range of costs and risks on behalf of consumers and package these into a retail energy bill for consumers. Some of these costs, such as regulated network costs and some government policy costs, impact retailers equally and are determined by processes that are independent of individual retailers. These costs represent over 60 per cent of a retail energy bill and are passed directly through to retailers. The Commission considers that if retailers are unable to change their prices to pass on unmanageable changes in costs, prices for consumers are likely to increase.</p> <p>The Commission's views on these subjects and its reasons for forming</p>

Stakeholder	Comments	AEMC Response
		those views are set out in Chapters 3, 5 and 7.
The Commission's more preferable draft rule		
Energy Networks Association	We agree with the more preferable draft rule so that consumers are better informed about how prices may change when they enter into <i>market retail contracts</i> (p.1).	Noted. The Commission's more preferable final rule is largely unchanged from the draft rule set out in the draft determination. Further detail on the Commission's more preferable final rule is set out in Chapters 2 and 8.
South Australian Department	<p>The draft rule will ensure that customers continue to benefit from a level of choice in the market which allows them to select an offer which suits their particular needs.</p> <p>The Commission's draft rule helps address complexity and consumers' ability to extract relevant information to help them make efficient decisions (p.1).</p>	
South Australian Department, AER	<p>The Department is supportive of the way the draft rule builds on current information provision requirements and does not create new compliance requirements. It should not result in a price increase for consumers (South Australian Department, p.2).</p> <p>The draft rule builds on existing protections and seeks to address some of the information gaps regarding retailer price variations in <i>market retail contracts</i> identified as part of the proposed rule change. It will help to promote transparency and assist customer engagement in retail markets, while also preserving customer choice and not limiting the types of contracts retailers can offer</p>	

Stakeholder	Comments	AEMC Response
	(AER, p.3).	
AER	The new rule would allow the AER to undertake more focussed activities to assess business compliance, once they take effect (p.5).	
Lumo Energy, Alinta Energy, Energy Retailers Association of Australia	The existing NECF and ACL provide sufficient consumer protections for all consumers, particularly in relation to product and information disclosure (Lumo Energy, p.2; Alinta Energy, p.2; Energy Retailers Association of Australia, p.2).	<p>The Commission carefully considered the Newgate consumer research, the views of stakeholders and its own investigations in developing its more preferable final rule and final determination. A key issue raised by the rule change request is that some consumers are not well informed with respect to the terms and conditions of their energy contracts, particularly with respect to whether prices can vary during <i>market retail contracts</i>. For more information see Chapters 3 to 6.</p> <p>The Commission considered in detail the current provisions of the retail rules and Retail Law regarding information provision by retailers. It also carefully considered the application of the ACL. The Commission found that retailers could provide clearer information to consumers in their explicit informed consent scripts and in their product disclosure documentation. The Commission also found that the current level of prescription in the Retail Law and retail rules may not be sufficient to provide consumers with clear information about price variation clauses in their contracts.</p> <p>For more information on the reasons for the Commission's more preferable final rule, see Chapter 8.</p>
EnergyAustralia	We are disappointed the Commission has decided to amend the retail rules. Best practice regulation, as set out in the Australian Government Guide to Good Regulation, suggests regulatory intervention is only appropriate where there is a clear market failure that cannot be addressed without regulation. Neither the rule change request nor the AEMC's research or EnergyAustralia's experience with consumers evidences a material customer confusion issue in relation to price variations during a contract term. Evidence of consumer confusion is equally as scarce as evidence of price baiting (p.1-2).	
Origin Energy	There has not been a thorough examination of whether the existing retail rules require sufficient information to be provided to customers when they enter <i>market retail contracts</i> (p.3).	
Simply Energy	We are disappointed the AEMC has chosen to add to the rules on information considering	

Stakeholder	Comments	AEMC Response
	consumer research demonstrates most retailers already advise customers that prices could vary and that consumers realistically expected prices to vary in practice. The additional regulation appears to be unnecessary (p.1).	
EnergyAustralia	Competitive retail markets will deliver clearer information, products and pricing structures that meet consumer needs, nullifying the need to impose regulation. Allowing retailers to establish dialogue without prescribed form or content is the best way to ensure that consumers are aware of the nature of each particular product as it is the retailer that best engages with consumers that enjoys a competitive advantage (p.1-3).	
Energy Retailers Association of Australia	No assessment of the shortcomings of the current retail rules with respect to information provision has occurred (p.2).	
Ethnic Communities Council of NSW, CALC and CUAC	<p>The draft rule does not take into consideration behavioural economics. Providing more information at the time of entering into the contract will not change consumer decisions (Ethnic Communities Council of NSW, p.2-3).</p> <p>The Commission did not give consideration to the relevant field of behavioural economics. For example, the draft rule would operate at the point where 'explicit informed consent' is provided. This occurs at the point of entry into the contract. Behavioural economics shows that at this stage consumers generally display automation.</p>	<p>The Commission considered all material put before it in submissions to the consultation paper and draft determination, including in relation to the field of behavioural economics. The Commission notes that its rule will require retailers to provide <i>clearer</i> information to consumers regarding price variations in <i>market retail contracts</i>.</p> <p>The Commission also notes that although its more preferable final rule operates at the point of entry into <i>market retail contracts</i>, it has also set out suggestions for the AER to assist it in improving information presented to consumers before contract entry. The Commission has also noted that retailers and governments could take further action to improve the information provided to consumers to assist consumer</p>

Stakeholder	Comments	AEMC Response
	Providing more information at this point will not help consumers make a better decision (CALC and CUAC, p.6).	engagement in retail energy markets.
Michael Davies	The overall aim of the rules should be to simplify the choice of retailer by allowing customers to compare the KWh rate. Any other charges and discounts should reflect the true value of the costs (at p.1)	For more information on the Commission's more preferable final rule and its observations on the marketing of <i>market retail contracts</i> , see Chapter 8.
National Seniors Australia	We are concerned that the draft rule continues to allow retailers to increase costs at any time, so consumers bear all the risk when they have no ability to manage the risks. This is exacerbated because consumers are also locked into contracts with exit fees (p.2).	The Commission's analysis of the issues set out in the rule change request is outlined Chapters 3 to 6. The Commission considers that the rule proposed by CALC and CUAC would have had a range of negative impacts, including unnecessarily increasing prices and reducing choice and competition.
Combined Pensioners and Superannuants Association of NSW	We welcome the decision that Commission requires more specific disclosure, but firmly believe that fixed term contracts should mean fixed prices, like in other industries (p.3).	The Commission considers that a more appropriate and proportionate response to the issues raised by the rule change request is to improve the information retailers provide consumers in relation to how prices may vary during <i>market retail contracts</i> . The Commission's more preferable final rule aims to achieve this. Further detail on the Commission's assessment of the proposed rule and the reasons for its more preferable final rule are set out in Chapters 7 and 8 respectively.
The Hon. Kelvin Thomson MP	CALC make a fair point that allowing retailers to continue varying prices at will for a fixed product is fundamentally unfair on the consumer and makes a mockery of a contractual arrangement where under this system a customer's tariff can be increased mid-contract (p.1).	Retailers currently offer different kinds of <i>market retail contracts</i> . In some of these, retailers are able to vary prices during fixed periods. In others, retailers are not able to vary prices during fixed periods. Retailers must comply with the terms of their contracts or they will be in breach of those contracts and consumers will have remedies available to them under contract law. Under the Commission's more preferable draft rule and more preferable final rule, retailers will continue to be required to comply

Stakeholder	Comments	AEMC Response
		<p>with the terms and conditions of their contracts relating to price variations. Retailers will now also be required to better inform consumers about any terms and conditions relating to price changes on contract entry.</p> <p>For more information on the Commission's response to this submission and the Commission's more preferable final rule, see Chapters 7 and 8.</p>
AGL	<p>The draft rule is better placed than the rule proposed by CALC and CUAC to address the key concern of the transparency of energy contracts and to help ensure consumers have sufficient and appropriate information to make informed decisions without imposing unnecessary costs on retailers and consumers. The draft rule preserves the ability for consumers to choose an energy contract that suits their needs and appetite for risk, while enhancing consumer decision-making by helping to ensure consumers are fully aware that prices may be varied (p.1-2).</p>	Noted.
Lumo Energy, Energy Retailers Association of Australia, Alinta Energy, Origin Energy	<p>We are concerned that the draft rule falls outside the scope of the rule change proposal, which related to <i>market retail contracts</i> with a fixed term or benefit period. The proposed rule 46A on the other hand applies to all <i>market retail contracts</i> and the proposed amendments to rule 64 apply to all retail energy contracts (Lumo Energy, p.2).</p> <p>If the draft rule applies to all market contracts then the Energy Retailers Association of</p>	<p>The Commission notes that the rule change request raises a range of issues relevant to or arising from price changes by retailers during <i>market retail contracts</i>. This includes the level of consumer understanding of the terms and conditions of <i>market retail contracts</i>, particularly in respect to whether prices can vary during contracts. After considering this and the range of issues arising from the rule change request, the Commission is satisfied that a narrower regulatory response is preferable to the proposed rule.</p> <p>The Commission has decided to maintain the application of the more preferable final rule to all <i>market retail contracts</i> as the Commission</p>

Stakeholder	Comments	AEMC Response
	<p>Australia believes this is beyond the scope of the rule change request. The Energy Retailers Association of Australia is also concerned the draft rule will inadvertently capture products where disclosure is not required, such as fully fixed price products (and the obligation to say when they will be notified of price changes) (Energy Retailers Association of Australia, p.2).</p> <p>The draft rule is outside the scope of the rule change request and it is a disproportionate response to an issue separately perceived and identified by the AEMC (Alinta Energy, p.1).</p>	<p>considers that the risk that consumers may be entering contracts unaware that prices may vary is relevant to all types of <i>market retail contracts</i>, rather than only those with a fixed term or benefit period. Having regard to this and the other issues raised in the rule change request, the Commission is satisfied that improving information requirements for all <i>market retail contracts</i>, rather than limiting it to only some types of <i>market retail contracts</i>, is preferable as it better serves the long-term interests of consumers, consistent with the NERO.</p> <p>The Commission also notes that limiting the application of the more preferable final rule to only some types of <i>market retail contracts</i> could unnecessarily increase the compliance burden on retailers, as it would create differing disclosure requirements for different types of <i>market retail contracts</i>. This could also lead to customer confusion and higher prices for consumers.</p>
Origin Energy	<p>The Commission determined that the original problem identified by the rule proponents does not have merit. The Commission however appears to have re-framed the problem as being about consumers lacking knowledge of the terms and conditions of their <i>market retail contracts</i>.</p> <p>The draft rule was aimed at providing greater transparency and better information to improve consumers' knowledge of their contracts. However, CALC and CUAC have rejected this as being a mis-characterisation of the underlying problem (p.2).</p> <p>The more preferable rule power should not be exercised by AEMC to address a problem that is different from that identified in the rule change request. Doing so could set a poor precedent by undermining regulatory certainty around the robustness of the rule change process.</p>	<p>For more information on the Commission's more preferable final rule and power to make more preferable rules see Chapters 2 and 8.</p>

Stakeholder	Comments	AEMC Response
	<p>Commission could find itself indirectly proposing its own rule change proposals in this way (p.2).</p> <p>An appropriate response would be for the AEMC to advise another body of the separate issue of transparency, and then deal with that as a rule change to give due process to stakeholders on the issue. The issue perceived from the consumer research, that some consumers are entering contracts not knowing that prices can change, is outside the scope of the rule change request. It may not be appropriate that the CALC and CUAC rule change is used as a vehicle to provide a solution to this issue (p.2).</p>	
Lumo Energy	The Commission has not advised whether the final rule will only apply to new contracts formed after the amendments take effect (p.2).	The final rule relates to information requirements at the point of entry into <i>market retail contracts</i> . As such, the final rule will only apply to new contracts formed from the date of the commencement of the final rule, 1 May 2015.
The Commission's draft rule on explicit informed consent requirements		
Energy and Water Ombudsman (Victoria)	<p>The draft rule appears to be similar to the existing provisions in Victoria's Retail Code (rule 20(b)), Guideline No. 19 on Energy Price and Product Disclosure (rules 3.4, 4.1 and 4.2) and the Code of Conduct for Marketing Retail Energy in Victoria (clauses 3.3 and 4.1). These requirements have been in place for some time and earlier versions contained similar provisions.</p> <p>Over this period, the Energy and Water Ombudsman (Victoria) has received a substantial and increasing number of complaints</p>	<p>The Commission does not expect all complaints in relation to price variations to cease following the commencement of the Commission's more preferable final rule. The Commission notes that current complaints to the Energy and Water Ombudsman (Victoria) relating to price variations currently comprise a fairly low proportion of the overall complaints received by the Energy and Water Ombudsman (Victoria) each year.</p> <p>Further details regarding the Commission's response to stakeholder views on its more preferable draft rule are provided in Chapter 8.</p>

Stakeholder	Comments	AEMC Response
	<p>between 1 January 2009 and 31 December 2013. Not all of these related specifically to price increases during fixed-term contracts, but most cases involved customers concerned that the tariff and/or discount had changed, or was not the same as they believed when they entered the contract. This suggests that the provisions in Victoria are not working, and that the draft rule would be unlikely to reduce complaints in Victoria should the state adopt the NECF, or amend its harmonised Energy Retail Code in line with the draft rule (p.2-4).</p>	
Red Energy	<p>The new explicit informed consent requirement will empower consumers to make better informed decisions regarding their retail energy contracts (p.1).</p>	Noted.
Origin Energy	<p>The new explicit informed consent requirement is confusing in its drafting. It risks adding uncertainty to otherwise clear explicit informed consent obligations (p.3).</p> <p>Current rules regarding explicit informed consent are sufficient and clear. Introducing notions of variations to benefits and trying to determine when a benefit is different from a price, simply creates confusion where there was none (p.3).</p>	<p>The Commission has decided to retain the references to "benefits" in the more preferable final rule, as the Commission considers that benefits, particularly discounts, comprise an important factor in a consumer's decision making process to select an energy contract. Further details on the Commission's more preferable final rule are set out in Chapters 2 and 8.</p>
Origin Energy	<p>The Commission should change the drafting of rule 46A(2) from "the variation of tariffs, charges and benefits" to " the variation of tariffs, charges or benefits" (p.3).</p>	<p>Noted. The Commission considers that this drafting change will assist in clarifying retailers' compliance obligations and the intent of the final rule. The Commission has made this proposed change to the drafting of its final rule.</p>

Stakeholder	Comments	AEMC Response
The Commission's draft rule on disclosure requirements on entry into a contract		
PIAC	<p>It is possible for retailers to technically comply with the new product disclosure requirement without providing information that is useful to consumers. A retailer could provide vague information about when it will provide notice such as "as soon as practicable" or "when such information becomes available". The proposed rule will be susceptible to this in the same way that such notification in energy price fact sheets currently is (p.2).</p>	<p>The Commission considers that its more preferable final rule to improve the information provided in product disclosure statements will improve transparency and competition regarding when retailers will notify their customers of price variations. This could potentially lead retailers to provide retail energy services that better meet consumer expectations and preferences regarding the notification of price variations.</p> <p>The Commission also notes that the AER has indicated that it intends to undertake more targeted reviews of retailers' compliance with the retail rules and Retail Law. The Commission has also outlined a range of suggestions to improve the information provided in retailers' energy price fact sheets and the AER's Energy Made Easy website. The Commission considers that these actions, along with its more preferable final rule, are likely to improve the quality of information consumers receive from retailers.</p> <p>For more information on the Commission's more preferable final rule and observations on the marketing of <i>market retail contracts</i> see Chapter 8.</p>
Red Energy	<p>We are concerned that under the new product disclosure requirement retailers would no longer have any flexibility as to the methods by which they advise customers of price changes, and would be forced to choose one method of notification for the duration of the <i>market retail contract</i>, possibly to the detriment of a consumer's experience (p.1).</p> <p>If the Commission does make the rule changing</p>	<p>The Commission acknowledges concerns from retailers that its more preferable final rule could constrain how retailers communicate with their customers. However, the Commission notes that the intention of the rule is to require retailers to be more transparent in the information they provide to consumers and that as a consequence retailers will need to provide clearer and more accurate information. If retailers are unable to commit to a set timeframe for providing consumers with advanced notice of price changes, they will need to be transparent about this in the information they provide in their disclosure</p>

Stakeholder	Comments	AEMC Response
	the product disclosure provisions, we suggest an amendment so that in the product disclosure statement the retailer must advise the small customer of the methods that may be used by the retailer to notify them of a price change. This would provide the relevant notification, but still allow retailers flexibility (p.2).	statements. The Commission does not consider that the more preferable final rule will require retailers to constrain their communications to a particular method, as the rule only requires retailers to specify "when" they will notify customers of any price changes rather than how they will notify their customers.
AGL	Retailers cannot predict the precise timing of price variations. For example, variations as a result of removing the carbon price could not have been predicted at the time of entry to many consumers' contracts. Therefore, disclosing a precise timeframe for price changes is impractical and carries a real risk of providing inaccurate information to consumers. Retailers are also unlikely to disclose such information for commercial confidentiality reasons, and doing so may constrain retailers in future price variations (p.3).	
AER	The draft rule requiring consumers to be notified of when they will be notified of price changes is a useful starting point and there may be further actions and options worth exploring as part of the AER's consultation processes to further assist customers (p.5)	Noted. As set out in Chapter 8, the Commission welcomes and supports further work by the AER to review the information requirements for retailers' energy price fact sheets and its Energy Made Easy website.
Proposed alternative rules		
CALC and CUAC	The Commission failed to consider a number of alternative rules that arose during consultation, such as banning exit fees. This includes requiring prices in a fixed period market contract	The Commission considered a range of alternative rules in developing its more preferable draft rule. The Commission acknowledges that it did not set out its views on all alternative rule options presented to it during first round consultation. Rather, the Commission's draft

Stakeholder	Comments	AEMC Response
	to be fixed for a period of time, for example 12 or 18 months (p.7-8).	determination set out its reasoning for its more preferable draft rule and its views on the proposed rule and alternative proposed rules set out in the rule change request.
PIAC	<p>Retailers should be required to give customers 21 days' notice of any price increases (p.1). PIAC understands it is currently unusual for consumers to be informed of price rises before the next bill, hampering consumers' ability to respond to price changes. This issue would not be overcome under the proposed rule on disclosure of when the customer will be informed of price changes (p.2).</p> <p>Modern communications such as email and text can reduce the cost of 21 days' prior notification. Its cost can also be offset by increased competitive pressure as a result of prior notification and the ability for customers to change their consumption behaviour. The AEMC did not address this suggestion in its draft determination. PIAC requests the AEMC state publicly what, in its view, the impact of this proposal would be (p.3).</p>	The Commission has set out its views in relation to the alternative rules noted in submissions to the draft determination in section 7.4.2.
Ethnic Communities Council of NSW, Combined Pensioners and Superannuants Association of NSW	<p>It is unfortunate that the alternative of banning exit fees was only noted in draft determination and not considered in depth, despite being discussed at forums and in submissions. (Ethnic Communities Council of NSW, p.3).</p> <p>The Commission should have banned exit fees. Such fees create a barrier that prevents people, particularly low income people, from being able to shop around (Combined Pensioners and</p>	

Stakeholder	Comments	AEMC Response
	Superannuants Association of NSW, p.3).	
National Seniors	The AEMC should review the draft determination and make the rule proposed by CALC and CUAC. If not, the Commission should prohibit retailers from charging termination fees (p.2).	
Michael Davies (private individual)	Fixed term, variable rate contracts have a place in the market but they should allow a customer to opt out without penalty when a price rise is announced. This will prevent price baiting (p.1).	
The Commission's additional observations on the marketing of <i>market retail contracts</i>		
South Australian Department	The draft rule is supported by other industry activities, such as changes to the Energy Made Easy website currently being undertaken by the AER (p.1)	Noted.
AER	We have been considering the issues raised by the rule change request as part of possible amendments to the AER Guidelines and the Energy Made Easy website. Options for change include limiting use of the term "fixed", prioritising information on energy price fact sheets, requiring retailers to provide prominent information on price changes in marketing materials, standardising the format/layout of fact sheets, making further changes to the Energy Made Easy website and requiring information to be presented more clearly (p.3-4).	The Commission welcomes and supports the AER's proposed review of its guidelines and considers that this review could provide a range of improvements to the way information is provided to consumers and consumers' experiences in retail energy markets.
Energy Retailers	We see merit in reviewing the Energy Made Easy website and the AER Guidelines to review	

Stakeholder	Comments	AEMC Response
Association of Australia	the volume and presentation of information to consumers, assessing whether some of the information provision is warranted or only adds to consumer confusion. The Energy Retailers Association of Australia would be pleased to work with the AER and stakeholders on this task (p.2).	
AGL	<p>AGL supports a review of the AER's Energy Made Easy website and energy price fact sheet requirements as a means to further enhance transparency and comparability of energy contracts for consumers (p.1).</p> <p>AGL considers such developments could work alongside the draft rule to enhance informed decision making. AGL supports the AER's enthusiasm for continuous improvement of the Energy Made Easy website (p.3).</p>	
Simply Energy	We consider the current level of information consumers confront when deciding upon an energy contract is overwhelming and any simplification of the requirements would improve customer understanding (p.1).	

C Summary of issues raised in submissions to the AEMC's consultation paper

The Commission received 38 submissions on the AEMC's consultation paper on the rule change request. The table below provides a summary of the issues raised by stakeholders in their submissions, the Commission's response to each issue in the draft determination, and where relevant a reference to further information on the issue provided in the final determination.

The submissions are available on the AEMC website at www.aemc.gov.au.

Stakeholder	Comment	AEMC response
The Commission's assessment framework: NERO test		
Energy Retailers Association of Australia, Simply Energy	<p>The proposed rule removes the link between retail prices and costs, which means that the NERO will not be met because prices will not reflect efficient costs. (Energy Retailers Association of Australia, p. 4)</p> <p>Flexible retail prices create signals about efficient use of energy by consumers and efficient investment in and production of energy upstream of the retailer. (Simply Energy, p. 4)</p>	The Commission agreed that the proposed rule would result in prices that do not reflect efficient costs because a "risk premium" would need to be included for fixed period contracts. More detail on this is provided in Chapter 7.
EnergyAustralia	Support consideration of the rule change request with reference to consumers as a whole rather than specific groups of consumers. When the wider impacts of the proposal are considered, the proposal is unlikely to promote the NERO. (p.8)	The Commission noted that the retail rules apply to all small customers and that it is not required under the NERO to consider a specific sub-group of consumers. The Commission also noted that under the consumer protections test the Commission is required to consider consumer protections for small customers, including hardship customers. See Chapter 2 for further details.

Stakeholder	Comment	AEMC response
South Australian Council of Social Service	The focus at the competitive frontier of market activity may not address underlying issues relating to incentives and opportunities to increase prices for sticky customers, above what is disciplined by competition to attract those customers in the first place. (p. 6)	<p>The rule change request concerns price variations during fixed periods in <i>market retail contracts</i>. The Commission considered that issues relating to increasing prices for "sticky customers" was outside of the scope of this rule change request as such price variations are likely to occur under <i>standard retail contracts</i> or under <i>market retail contracts</i> following the end of a fixed term or fixed benefit period. For more detail on the Commission's assessment framework for this rule change request see Chapter 2.</p> <p>The Commission's 2014 Review of Retail Competition considered the level of competition in NEM jurisdictions and the outcomes experienced by small customers. This report was released in August 2014.</p>
UnitingCare Australia, CALC and CUAC	<p>Proposed rule change is about improving competition in retail energy markets by improving consumer engagement through improving trust in energy markets, reducing transaction costs for consumers, and providing greater certainty. (UnitingCare Australia, p. 5)</p> <p>Improved consumer protection is a necessary precursor to effective competition. (CALC and CUAC, p. 3)</p>	The Commission noted the objectives of the proposed rule. However, the Commission considered that the proposed rule could have a number of negative consequences if made. The Commission therefore made a more preferable draft rule, which it considered would better meet the NERO.
Lumo Energy	The Commission is currently considering changes to distribution network pricing arrangements and other Power of Choice rule changes which seek to promote retailers' ability to innovate and offer	The Commission noted it is aware of the issues raised in the rule change request that overlap with issues raised in other rule change requests currently before it, including the Distribution

Stakeholder	Comment	AEMC response
	products and services to consumers to meet their needs in response to price signals. Lumo Energy notes that the proposed rule is in direct competition with these rule changes and queries how the Commission will deal with these interactions. (p. 3)	Network Pricing rule change request and other Power of Choice rule change requests.
The Commission's assessment framework: Consumer protections test		
EnergyAustralia	The retail rules provide additional implicit protections to consumers by encouraging efficiency, innovation, and competition. For example, the minimum notification requirements for price variations in the retail rules provide customer protections and benefits such as: not prohibiting the development of fixed rate products if they are demanded by consumers; providing consumers with economically efficient pricing; and allowing for decreases in input costs to be passed onto consumers. (p. 8)	The Commission noted that the framework of the NECF, which is designed to promote competition and efficiency for consumers, does not form a consumer protection for the purposes of the consumer protections test. For more detail see Chapter 2.
Lumo Energy	Under the retail rules retailers are required to offer vulnerable customers the best available contract at that time. The proposed rule may erode the benefit of these consumer protections if implemented. (p.2)	The Commission determined not to make the proposed rule. The Commission noted that it did not consider that its more preferable draft rule would erode the benefit of these consumer protections.
Origin Energy	AEMC should give adequate weight to existing consumer protections. This includes: explicit informed consent; provision of 'required information' to customers; 10 day cooling off periods; energy price fact sheets; and ACL provisions such as misleading and deceptive conduct protections. (p. 3)	The Commission considered existing consumer protections in detail and made a more preferable draft rule building on existing consumer protections that require retailers to inform consumers on contract entry of key aspects of their contract and how they may vary over the duration of the contract.

Stakeholder	Comment	AEMC response
South Australian Council of Social Service	Notes the SA Government's requirement for retailers to offer a market contract with no exit fees and associated Essential Services Commission of South Australia guideline. (p. 7)	The Commission considered the development of consumer protections in a range of jurisdictions, including the UK. See Chapter 2 for further information.
UnitingCare Australia; CALC and CUAC	The following consumer protections are relevant to this rule change: Victorian unfair contract terms legislation and relevant cases under that law; <i>Unfair Terms in Consumer Contracts Regulations 1999 (UK)</i> ; and industry specific protections established by the UK's Ofgem. (UnitingCare Australia, p. 13, CALC and CUAC, p. 4)	
Allocation of costs and risks: Do the current rules result in an inefficient allocation of risks between retailers and consumers?		
Alinta Energy, Origin Energy, Simply Energy	Retailers generally only vary prices to reflect changes in their underlying costs of delivering services. To remain competitive retailers must provide consumers with as much stability in pricing as possible. (Alinta Energy p.3; Origin Energy, p. 4) Price variation clauses are used to allocate part of the risk from changes outside a retailers' control to consumers. (Simply Energy, p. 8)	The Commission took these views into account in its consideration of the issues raised in the rule change request and in its consideration of the impacts of the proposed rule. For further information on this issue, see Chapters 3 and 7.
EnergyAustralia	Retailers bear a considerable risk burden already as it is the only player in the supply chain that is not guaranteed income. Therefore, sharing risk rather than concentrating it is more appropriate and beneficial to consumers. The current level of mandated risk is appropriate.	

Stakeholder	Comment	AEMC response
	<p>EnergyAustralia's practice is to vary prices in response to material changes to input costs and generally will only do this once a year with changes in network prices. Retailers use their ability to vary prices as a risk management tool rather than to seek rents. Retailers do not have appropriate information to predict future input costs in many cases (eg network price changes, changes to government policy). (pp. 9-10)</p> <p>It is not EnergyAustralia's or the practice of other retailers to artificially depress the price of energy and inflate it once a customer has signed onto a fixed term contract. As a retailer changes prices in response to changes in input costs consumers are able to alter their usage patterns to ensure they are consuming the optimal, efficient amount. (p. 6)</p>	
Energy Retailers Association of Australia, Origin Energy, Simply Energy	Evidence cited from the AEMC's NSW retail competition review, which showed that 2% of electricity customers were dissatisfied after switching, plus a case study and a theoretical discussion of the proposed rule do not provide adequate evidence that there is an issue with the current rules to be dealt with. (Energy Retailers Association of Australia, p. 5; Origin Energy, p. 2; Simply Energy, p. 2).	The Commission noted that consumer research undertaken on behalf of the Commission indicated that price variations were not a significant cause of consumer disengagement from retail energy markets. For more detail on this issue see Chapter 5.
Consumers Association of SA	It is the role of retailers to manage risk for consumers. Retailers should be able to manage changes in wholesale and retail costs. Network prices and government policies and regulations are less predictable. If the proposed rule is adopted, variations of network charges and government	The Commission determined to not make the proposed rule and therefore it did not further consider this view.

Stakeholder	Comment	AEMC response
	policy would need to take into account fixed pricing. (p. 2)	
Peter Wilson (private individual)	Retailers should be required by law to negotiate and enter into time and condition specific contracts with those in their supply chain so they can offer binding time and condition specific contracts to their customers. (p. 1)	The Commission noted that this proposal would have required changes to the retail rules, the National Electricity Rules and the National Gas Rules that are outside the scope of this rule change request.
Mark Walker (private individual)	Retailers pass through all their "participation risk" onto the consumer through a fixed cost per a day. This skews the price away from the lowest possible cost to a flat fee which impacts more heavily on those least able to afford it. Just using a unit cost of the product would give consumers a clear and unequivocal price signal and enable them to switch between suppliers at will. (pp. 1-2)	The Commission did not agree with this view and noted that it included comments on how retailers generally manage and pass on risks to consumers in the draft determination. Further detail on this issue is also provided in Chapter 3.
Council of the Ageing Queensland, Tasmanian Council of Social Service	<p>Consumers rarely have the ability to predict price changes or hedge against it, particularly due to exit fees. Retailers are more able to manage risks than consumers. (Council of the Ageing Queensland, p. 1)</p> <p>Retailers are in a much better position than consumers to manage risks of price changes. Retailers can manage market risks through hedge contracts, are aware of most network revenue movements in advance, and can temporarily cover any price increases related to government policy changes. Low income households have little capacity to find more money for electricity costs at short notice. (Tasmanian Council of Social Service,</p>	The Commission considered the relative abilities of consumers and retailers to manage risks and predict changes in costs in its analysis of the impact of the proposed rule on prices. See Chapter 7 for more detail.

Stakeholder	Comment	AEMC response
	p. 1)	
Ethnic Communities Council of NSW, Queensland Association of Independent Legal Services	<p>The current rules allocate risk more heavily on to consumers and the costs of switching are carried by the customer through exit fees. (Ethnic Communities Council of NSW, p. 2)</p> <p>Information is provided and contracts are constructed in a manner that means risk is borne unfairly by consumers. (Queensland Association of Independent Legal Services, p. 2)</p>	The Commission considered that retailers have an ability to manage some risks and pass on others to consumers which they are unable to manage. The Commission considered that competition is the best mechanism to discipline retailers to manage risks to the extent they can and only pass on efficient changes in costs to consumers. Contracts without exit fees and contracts with fixed prices are available for consumers that prefer different levels of risk. For more detail on this see Chapter 3.
PIAC	Retailers have a reduced incentive to manage risks as they are able to pass through any price increases to consumers. (pp. 2-3)	
National Seniors Australia	A large number of retailers offer low introductory rates and then increase the price once the consumer is locked into the contract. Retailers should be required to use traditional risk management measures to hedge against this risk. (pp. 1-2)	The Commission found that there was not sufficient evidence to support the claim that "price baiting" practices are widespread in retail energy markets. For more detail on this see Chapter 4.
Tasmanian Council of Social Service	The implementation of the AER's Better Regulation Program and the AEMC's distribution pricing rule change may reduce risks associated with network price uncertainty. Retailers are likely to take a more interested stance in network pricing if they were carrying the risk of ad hoc changes. (pp. 8-9)	The Commission agreed that the AER's Better Regulation Program and the AEMC's distribution pricing rule change may reduce risks for retailers associated with network price uncertainty. However, the Commission considered on balance the costs of the proposed rule were likely to outweigh its benefits. For more detail on this view, see Chapter 7.
CALC and CUAC	The market is not functioning well by enabling consumers to select products that reflect their	The Commission agreed that some consumers could be better informed about the terms and

Stakeholder	Comment	AEMC response
	<p>desired risk level because consumers have a limited understanding of the risks affecting inputs to retail bills and consumers reject the current allocation of risk to them. This is supported by CUAC's 2012 survey which found that 94% of survey respondents supported removing unilateral price variation clauses. (pp. 5-6)</p>	<p>conditions of their contracts, particularly in relation to how prices may vary. The Commission's more preferable draft rule sought to address that issue.</p>
<p>Allocation of costs and risks: Would the proposed rule result in risk premiums being included, and how significant would they be?</p>		
<p>AER, Victorian Department of State Development, Business, and Innovation</p>	<p>Retailers would build in a risk premium under the proposed rule to manage their inability to vary prices in line with shifting costs. This would raise prices for all customers on fixed term contracts, including those who may be otherwise willing to manage the risk of price changes themselves. (AER, p. 3; Victorian Department of State Development, Business, and Innovation, p. 3)</p>	<p>The Commission agreed that the proposed rule would have resulted in increased prices for consumers through the inclusion of a risk premium on fixed period <i>market retail contracts</i>. For more detail see Chapter 7.</p>
<p>Red Energy, Lumo Energy, Ergon Energy, Simply Energy, AGL, EnergyAustralia</p>	<p>A risk premium would be included in retail bills (Lumo Energy, p. 4; EnergyAustralia, p. 9). The figure of 8% provided by the AEMC (in relation to the current premium required under fixed price contracts) gives an indication of the level of the risk premium. (Red Energy, p. 4). This is analogous to the risk premium in fixed rate mortgages (Ergon Energy, p. 4).</p> <p>A risk premium would be included and would be very large, given the large proportion of costs that are uncontrollable and unforeseeable for a retailer that would need to be factored in at the start of a retail contract (Simply Energy, p. 9; AGL, p. 4)</p>	

Stakeholder	Comment	AEMC response
<p>Energy Retailers Association of Australia, Ergon Energy, Simply Energy, Origin Energy, AER</p>	<p>Retailers do not control network prices. Prices change yearly and distributors still have the ability to mandatorily reassign a customer's network tariff type to another type (for example, from flat tariff to time of use) (Energy Retailers Association of Australia, p. 3; Simply Energy, p. 6). Retailers have limited information on future network prices and are only notified of new network prices one month in advance (Ergon Energy, p. 3; Origin Energy, p. 4)</p> <p>Different levels of government make policy changes at any time that can increase costs for retailers. If retailers cannot pass these on, a risk premium will be factored into future retail energy offers to manage risk (Energy Retailers Association of Australia, p. 3; Origin Energy, p. 4). Government policy risks such as carbon pricing can be significant (Ergon Energy, p. 3).</p> <p>Retailers have limited control of network costs and limited scope to manage variability or smooth network costs within or between five year regulatory periods. Distributors may also submit cost pass through applications to deal with unanticipated cost increases and any approved amounts can be passed onto retailers. This is likely to make it difficult for retailers to efficiently predict or manage the level of these costs or changes in these costs. (AER, p.3)</p> <p>The distribution network pricing arrangements rule change may improve retailers' ability to deal with risks associated with changes in distribution</p>	<p>The Commission took views regarding changes to network prices and government policy costs into account in the Commission's consideration of the impact the proposed rule could have had on energy prices. For more detail see Chapters 3 and 7.</p>

Stakeholder	Comment	AEMC response
	charges, but such reforms only relate to electricity and the predictive value of pricing structure statements would decline over the five year determination period. (AER, p. 3).	
Simply Energy	<p>The intention of the AER to transition the networks from a weighted average price cap to a revenue cap will mean that network prices may vary more from one year to another within the five year price path so networks do not over or under-recover.</p> <p>The price path sets out how bundles of network tariffs will be recovered from one year to the next, it does not set out how the individual tariffs within that bundle with vary from one year to the next.</p> <p>The greatest concern for retailers is the variability and unpredictability in government policy changes. The greatest risks are unheralded changes that retailers bear the brunt of. There are frequent reviews and changes to existing policies.</p> <p>There are also other policies and costs, such as corporate tax and accounting requirements that have an impact on the sector. There are a number of uncertain but high impact events that may impact retailers. For example, a failure in the wholesale market that results in a high market price cap for a sustained period, a retailer of last resort event, or widespread network outages. (pp. 6-8).</p>	
Origin Energy	The proposed rule would result in new costs due to increased regulatory burden, the calculation of risk	The Commission considered that the proposed rule would have resulted in increased prices for

Stakeholder	Comment	AEMC response
	<p>premiums for each jurisdiction, and the costs involved in a significant re-orientation of the suite of retail energy products available. (p. 1)</p> <p>Proposed rule will significantly impact retailers' existing marketing and billing processes (p. 5).</p> <p>Other costs would include: the inability for retailers to align changes in standing retail contracts with <i>market retail contracts</i>; additional hedging and portfolio management costs; the cost of retraining all frontline staff; changes to customer relationship management information systems; and redrafting contract terms and conditions.(p. 9)</p>	<p>consumers for fixed period <i>market retail contracts</i>. For more detail see Chapter 7.</p>
Red Energy	<p>The proposed rule would result in retailers' costs of acquiring customers being recovered over a shorter period of time (because contract terms are shorter) and therefore increase costs. The same would go for other costs, like early termination fees. (p. 4)</p>	
Energy Retailers Association of Australia, Simply Energy	<p>Under the proposed rule, if customers choose to lock into a fixed term or benefit period for a longer period, prices may vary greatly from one contract to the next between a customer's contracts, resulting in bill shock (Energy Retailers Association of Australia, p. 3; Simply Energy, p. 2)</p>	<p>The Commission agreed that bill shock may have been more likely to occur under the proposed rule if customers chose a contract with a fixed term or benefit period for a longer period. However, the Commission also noted that this impact may have been mitigated as it was likely that retailers would have restricted longer term fixed period contracts from the market. For more detail on this see Chapter 7.</p>
EnergyAustralia	<p>If the risk premium is calculated incorrectly consumers will face inefficient prices by paying too</p>	<p>This was noted by the Commission. The Commission considered that the proposed rule</p>

Stakeholder	Comment	AEMC response
	<p>much or retailers will face serious financial difficulty. (p. 9)</p> <p>The quantum of the risk premium will depend on the duration of the contract and will lead to permanent increases in the price of fixed period contracts. Retailers will price fixed term contracts between the current efficient price and the expected price at the end of the contract term.</p> <p>Additional resourcing and analysis will be required to minimise risks of assumptions being incorrect. The cost of the risk and additional analysis will be passed onto consumers. (p. 10)</p>	<p>would have resulted in increased prices for consumers due to the inclusion of a risk premium on fixed period <i>market retail contracts</i>. For more detail see Chapter 7.</p>
<p>Council of the Ageing Queensland, Major Energy Users, UnitingCare Australia</p>	<p>Retailers may charge a small risk premium for bearing greater risks but retailers' greater risk management efficiency would lead to a net saving for consumers. (Council of the Ageing Queensland p. 1; Major Energy Users, p. 2; UnitingCare Australia, p. 6)</p>	
<p>Ethnic Communities Council of NSW, UnitingCare Australia, CALC and CUAC</p>	<p>Risk premiums would provide greater transparency for consumers. Competition between retailers should overcome possibility of permanent increases in prices. (Ethnic Communities Council of NSW, p. 2; UnitingCare Australia, p. 6; CALC and CUAC, pp. 7-8)</p>	<p>The Commission noted that under the proposed rule, increased transparency would have placed greater competitive pressure on retailers to reduce the size of risk premiums, however it still considered that the risk premiums would have been material. For more detail see Chapter 7.</p>
<p>CALC and CUAC</p>	<p>The proposed rule would require retailers to bear additional risks and face costs in managing those risks, but these costs are not likely to be material. The net change in consumers costs need to be considered as consumers currently bear the costs</p>	

Stakeholder	Comment	AEMC response
	of managing the risks themselves. (pp. 7-8)	
PIAC	<p>Retailers may respond by including a risk premium, increasing exit fees, or by reducing the length of fixed term contracts. Increasing exit fees or including a risk premium would more likely reflect the true cost of the contract.</p> <p>The AEMC should undertake a comparison of fixed price contracts and variable contracts after the first price increase, as a number of customers have signed up to a contract with a low initial price and have seen the cost go up while the old price is still available to new customers. (p. 4)</p>	<p>The Commission considered that under the proposed rule retailers would have been likely to include a risk premium, reduce the length of contracts, and/or withdraw fixed period contracts from the market. The Commission did not consider that increased prices would have reflected the "true cost" of the contract. Rather, the Commission considered that such increased prices would have been less cost reflective. For more detail see Chapter 7.</p> <p>The Commission did not find evidence that retailers were "price baiting" on a widespread scale. For more detail see Chapter 4.</p>
South Australian Council of Social Service	South Australian Council of Social Service questions whether the proposed rule will exacerbate the net cost of risk or simply make it more explicit. The two fixed price contracts in SA are priced below the same retailers' lowest price no exit fee offer. (p. 9)	The Commission considered that the proposed rule would have increased risks for retailers and would therefore have increased the net cost of risk for all consumers, even where some consumers were willing to bear more risk in return for lower prices. For more detail see Chapter 7.
Consumers Association of SA	<p>The proposed rule will improve innovation amongst retailers in managing energy market risks which will lead to a long term positive effect on pricing. (p. 5)</p> <p>Sceptical that current 8% premium on fixed price contracts is an accurate indication of the true difference in risk between fixed and variable pricing contracts. The limited number of fixed price contracts on offer restricts the competitive</p>	<p>The Commission compared fixed price offers in each distribution area in which they were available with the cheapest market offer available from the same retailer. The price premiums found were between 9.7 (the lowest in NSW) and 20.4 per cent (the highest in Victoria).</p> <p>The Commission agreed that under the proposed rule retailers would have innovated and managed risk more efficiently to some degree as there would</p>

Stakeholder	Comment	AEMC response
	pressures on retailers to deliver competitive fixed price contracts. (p. 3)	have been greater competition in fixed price offers. However, the Commission considered that the long term impact would still have been a material increase in prices for consumers. For more detail see Chapter 7.
Consumer participation and engagement: Are consumers confused about the nature of their contract or the nature of available contracts?		
Alinta Energy, Red Energy, Origin Energy, AGL	<p>Energy retailers have obligations to disclose product information in a clear and transparent way to ensure effective explicit informed consent of the consumer is provided on entry to <i>market retail contracts</i>. (Alinta Energy, p. 5)</p> <p>Details around variations to tariffs and charges must be set out by retailers in contract terms and conditions, in energy price fact sheets, and written disclosure statements.(Alinta Energy, p. 5; Origin Energy, p. 5; AGL, p. 3) As a result of disclosure requirements, customers are not confused as to whether prices can rise. (Red Energy, p. 3)</p> <p>Exit fees must also be disclosed in energy price fact sheets and disclosure statements and customers commonly understand that breaking a contract can result in exit fees. If a retailers' exit fees are not a reasonable estimate of the losses incurred by the retailer, the exit fees won't apply. (Alinta Energy, p. 5)</p>	The Commission provided detail on these consumer protections and disclosure requirements under the Retail Law and the retail rules in the draft determination. For more information see Chapters 2, 6 and 8.
Red Energy, Ergon Energy, Origin Energy	Customers are also protected from misleading and deceptive conduct under the ACL. (Red Energy, p.3; Origin Energy, p. 5) Ombudsman schemes, restrictions on exit fees and information	

Stakeholder	Comment	AEMC response
	requirements are sufficient. (Ergon Energy, p. 5)	
AGL	The energy market is a complex industry and AGL is happy to engage in a process whereby industry, consumer groups, and regulators consider better ways to engage with customers so as to ensure they comprehend the terms and conditions of contracts (p. 3).	The Commission noted its support in for CALC and CUAC's suggestion in a supplementary submission that there would be benefit in the AER, retailers and the AEMC considering how consumers' understanding of contract types could be improved. The Commission also considered that retailers could undertake further work to improve consumers' understanding of their contract terms and conditions.
EnergyAustralia	<p>Only a small number of consumers are likely to be confused about whether their price may rise, due to experiences over the last few years of price rises and media attention on this. EnergyAustralia seeks to minimise such misunderstanding as far as possible through its scripting and avoiding confusing terminology like "fixed term".</p> <p>It is possible a significant number of consumers may be unaware of the existence of fixed price contracts as they have been on the market for a short time and are not offered by all retailers. It is likely more retailers will offer these contracts if mid-term price increases are a genuine consumer concern. (pp. 10-11)</p>	The Commission did not agree that only a small number of consumers were likely to be confused about whether their price may rise under their contract. For more detail, see Chapter 5 and the Newgate consumer research report.
Lumo Energy	Customers are actively selecting products that meet their needs. It is this active selection of products that must be encouraged, not limiting this selection as would occur under the proposed rule. (p. 4)	The Commission agreed that consumer participation was critical for competition to deliver benefits for consumers and that the proposed rule would have been likely to reduce the choices available for consumers. The Commission considered that this could have resulted in reduced

Stakeholder	Comment	AEMC response
	Under the proposed rule, consumers may be more likely to choose produces that do not meet their needs and engage and participate less in retail energy markets. This will have a detrimental impact on competition and prices over the long term. (p. 5)	participation by consumers. For more detail see Chapter 7.
Business SA	There is a level of confusion about what a 'fixed term' contract means. (p. 2)	The Commission's consumer research indicated that some consumers may be entering into <i>market retail contracts</i> unaware that prices may vary. This consumer research also indicated that the use of the term "fixed" may lead consumers to consider that prices are fixed, when the term or benefit period is fixed. For more detail, see Chapter 5. The Commission's more preferable draft rule sought to address that issue by better informing consumers of their contract terms and conditions relating to price variations.
South Australian Department of Manufacturing, Innovation, Trade, Resources and Energy (now the Department of State Development).	The Retail Law requires extensive information provision by retailers to small customers, but some customers may be dissuaded from actively engaging in the market because they are overwhelmed or confused by the information available to them or because they don't understand contract terms, such as offers which are defined as "fixed term". (p. 2)	
Victorian Department of State Development, Business, and Innovation	<p>The Victorian Government is considering changes to require retailers to only used the term "fixed" when contracts have a fixed period and fixed terms and to require retailers to obtain explicit informed consent to terms and conditions which allow for tariff changes over the life of the contract.</p> <p>The Victorian Government regularly receives correspondence from the public on issues relating to price variation. It appears a lack of knowledge about price rises can cause consumer disengagement in the market. (pp. 1-2)</p>	<p>Comments from the Victorian Department of State Development, Business, and Innovation, the Energy and Water Ombudsman (Victoria) and the Energy and Water Ombudsman of South Australia in relation to the lack of knowledge of consumers regarding price variations were considered in the development of the more preferable draft rule.</p> <p>For more information on this, see Chapter 5.</p>

Stakeholder	Comment	AEMC response
Energy and Water Ombudsman (Victoria)	<p>The Energy and Water Ombudsman (Victoria) receives complaints relating to price variations. Most cases involve customers who are concerned that the tariff and/or discount had changed or was not the same as they believed when they entered the contract. Customer confusion often arises from misleading information, mis-communication or misunderstanding at the time of marketing.</p> <p>Between 1 January 2009 and 31 December 2013, 3,381 customers raised variation in price/contract terms as their primary issue and a further 1,450 customers raised it as a secondary issue in their case.</p> <p>The Energy and Water Ombudsman (Victoria) also receives cases from customers who complain about being charged a termination fee due to them leaving a fixed-term contract, often after they realise the tariffs are not the same as what they initially agreed to. (pp. 2-3)</p> <p>Case studies suggest some customers believe that the price they agree to at the time of entering the contract is then fixed for the life of the fixed-term or fixed-benefit contract. (p. 4)</p>	
Energy and Water Ombudsman, SA	<p>Over 2012/13, the Energy and Water Ombudsman SA received 916 contract related complaints out of 21, 029 complaints and 411 of these were related to fairness/ conditions of contract.</p> <p>In addition 1-2 enquiries are received a week</p>	

Stakeholder	Comment	AEMC response
	relating to fixed term contracts and a number of enquiries are received from customers under the impression that 'fixed term' means 'fixed price'. (pp. 1-2)	
Consumers Association of SA, Mark Walker (private individual), UnitingCare Australia, CALC and CUAC	<p>It is not unreasonable to consider that a large proportion of consumers would not be aware of fixed price contracts. Misunderstanding of the nature of fixed period contracts would limit consumer investigation into alternatives that they think they already have. (Consumers Association of SA, p. 3; UnitingCare Australia pp. 7-8;8, CALC and CUAC, pp. 9-10)</p> <p>In the energy retail market there is a distinct lack of fixed price contracts available and a plethora of variable price contracts marketed with the confusing terminology as fixed term contracts. Anecdotal evidence suggests customer confusion about fixed period contracts having a fixed price is high. (Consumers Association of SA, p. 3; Mark Walker (private individual), p. 1)</p>	<p>The Commission's consumer research found that some consumers may be entering into <i>market retail contracts</i> unaware that prices may vary and also found that use of the term "fixed" may lead consumers to consider that prices are fixed. For more detail, see Chapter 5.</p> <p>The Commission considered that the existence of some fully fixed price offers in some jurisdictions suggested that retail energy markets were delivering products that met consumers' preferences regarding the level of risk they were willing to bear. However, the number of fully fixed price products may be lower than expected, given that around 30 per cent of residential consumers in the consumer research appeared to prefer price certainty more than lower prices. For more detail see Chapter 3.</p>
Council of Social Service of NSW, Council of the Ageing Queensland, Ethnic Communities Council of NSW, UnitingCare Wesley Bowden, National Seniors Australia, Queensland Council of Social Service, UnitingCare Australia, CALC and CUAC, Consumers Association of SA	<p>Many consumers (eg older consumers, newly arrived migrants and refugees, vulnerable consumers) opt for fixed period energy contracts as they think this will shield them from higher energy prices. Low income earners are more susceptible to market offers that provide short term relief from high prices and may not be in a position to assess the long term value of these deals. (Council of Social Service of NSW, p. 1; Ethnic Communities Council of NSW, p. 2; UnitingCare</p>	<p>The Commission noted the concerns of consumer groups regarding the relative ability of low income and vulnerable customers to understand retail energy contracts. The Commission's more preferable draft rule sought to improve the information consumers are given on entry to <i>market retail contracts</i> to assist consumers to make more informed decisions.</p> <p>The Commission noted that consumers have</p>

Stakeholder	Comment	AEMC response
	<p>Wesley Bowden, p. 1; National Seniors Australia, p. 1)</p> <p>This is due to poor literacy, increasing complexity of energy contracts, and number of potential offers. (Council of the Ageing Queensland, p. 1; Ethnic Communities Council of NSW, p. 2; National Seniors Australia, p. 1; Queensland Council of Social Service, p. 2; UnitingCare Australia pp. 7-8; CALC and CUAC, pp. 9-10) This leads to consumers being unprepared for price risks and increases the likelihood of bill shock, financial distress, and disengagement. (National Seniors Australia, p. 1; Consumers Association of SA, p. 3)</p> <p>Low income customers have little or no flexibility even in relation to small unexpected price changes and paying exit fees to exit a contract is a significant disincentive. (UnitingCare Wesley Bowden, p. 1)</p>	<p>access to fixed price contracts and contracts with no exit fees that allow consumers to select a contract that meets their risk appetite.</p> <p>Chapter 8 also sets out some further actions that could be undertaken to improve consumer engagement in retail energy markets.</p>
Tasmanian Council of Social Service	<p>The Tasmanian Council of Social Service expects that Tasmanian consumers will expect to encounter similar conditions and market rules in an electricity market, such as fixed prices, that they encounter in other similar markets, such as financial services and telecommunications.</p> <p>When it is understood this is not the case, it is possible Tasmanian consumers will not be willing to participate in the market. Retailers have the ability to price contracts above competitive levels and consumers are stuck on a contract with a higher price than expected because of exit fees.</p>	<p>The Commission noted that Tasmanian consumers may initially have a low level of understanding of their retail energy contracts following retail deregulation. However, the Commission considered that improved information provision, rather than regulating the offers retailers can provide, was a more preferable means to promote consumer participation in retail energy markets. The Commission's more preferable draft rule sought to improve the information consumers receive in relation to how prices may vary in <i>market retail contracts</i>. More detail on the Commission's more preferable draft rule was</p>

Stakeholder	Comment	AEMC response
	This could lead to financial hardship and/or rationing. (p. 2)	provided in the draft determination. Detail on the Commission's more preferable final rule is provided in Chapter 8.
UnitingCare Australia, CALC and CUAC	Most consumers do not receive the detailed terms and conditions of offers till after the point of sale, door to door and phone sales are likely to offer consumers a single product and be conducted in a high pressure environment. (UnitingCare Australia pp. 7-8; CALC and CUAC, pp. 9-10)	The Commission's consumer research found that some consumers may be entering into <i>market retail contracts</i> unaware that prices may vary and also found that use of the term "fixed" may lead consumers to consider that prices are fixed, when the term or benefit period is fixed.
CALC and CUAC	Even if consumers know prices can vary, the range of reasons cited in contract terms and conditions for varying tariffs mean that consumers do not understand when how this will be exercised. (pp. 9-10)	The Commission noted that a number of factors could be contributing to consumers' lack of understanding of their energy contracts. The Commission's more preferable draft rule sought to provide consumers with better information regarding price variations in <i>market retail contracts</i> . The Commission also noted that the AER could consider reviewing its Retail Pricing Information Guideline to improve consumers' understanding of their contracts. For more detail on the Commission's response to these issues, see Chapter 8.
AER	<p>The retail market is complex and understanding the detail of energy contracts may be challenging for some consumers. The Retail Law and retail rules contain a range of measures to assist consumers to make informed choices about energy contracts, including the AER's Energy Made Easy website and Retail Pricing Information Guideline.</p> <p>However, there may be some customers who do not read and/or understand energy contracts and energy price fact sheets prior to entering an energy contract. It is unclear how significant a group of customers this may be. The AER welcomes consideration of further initiatives or measures to support consumers to better identify and understand different offerings and make more informed choices based on their preferences. (pp.</p>	

Stakeholder	Comment	AEMC response
	4-5)	
Consumer participation and engagement: Do price variations in fixed periods lead to the view that all retailers are the same and there is no point in switching?		
Origin Energy, EnergyAustralia	<p>There is no evidence that customers see little gain in switching because the new provider may change prices. The rate of switching in the NEM for those jurisdictions that permit customer choice remains the highest in the world. (Origin Energy, p. 5)</p> <p>Consumers are sufficiently sophisticated to make appropriate switching choices that reflect their views of the costs and benefits of switching. (EnergyAustralia, p. 11)</p>	<p>The Commission noted that some NEM jurisdictions have high levels of switching and consumer choice relative to other countries.</p> <p>The Commission noted that its consumer research indicated that while some consumers understand the nature of their <i>market retail contracts</i>, others have a limited understanding of their contracts, particularly with respect to whether prices can vary. Given this, the Commission considers that consumers' abilities to make informed choices could be improved. For more detail on this see Chapter 5.</p>
Simply Energy	<p>Currently, retailers are required to provide so much information, and regulations have been focussed on requiring retailers to provide more information, in the hope that more information will get customers excited and engaged in their energy supply.</p> <p>So much information overwhelms customers and detracts from their willingness to engage with the industry. Much more information is provided than is needed to make an effective purchasing choice, and this is discouraging consumers from engaging (given their interest in the product is low to begin with). More new information requirements have kept increasing search and transaction costs for consumers.</p> <p>The more competitive the market, the higher the search and transaction costs (because there are</p>	<p>The Commission agrees that large amounts of complex information can inhibit consumer participation. The Commission's more preferable rule will require retailers to provide clearer information to consumers regarding how prices may vary in the <i>market retail contracts</i>. For more detail on the Commission's more preferable final rule, see Chapter 8.</p>

Stakeholder	Comment	AEMC response
	<p>more choices for consumers). Any regulation to reduce these costs for consumers will usually result in less competition because it will usually be attempting to reduce the diversity in the product offerings. Search costs also reduce over time as a consumer's understanding of the market increases through experience (pp. 10-11).</p>	
<p>Council of the Ageing Queensland, Major Energy Users</p>	<p>Price variations and exit fees create significant distrust of retailers which suppresses consumer choice and unfairly divides risk between consumers and retailers. (Council of the Ageing Queensland, p. 1; Major Energy Users, p. 1)</p>	<p>The Commission's consumer research did not find that price variations contribute significantly to consumer disengagement in retail energy markets. The Commission noted that the consumer research indicated that, following a price variation, few consumers expressed some form of negative emotional response.</p>
<p>Ethnic Communities Council of NSW</p>	<p>Research undertaken in 2011 by the Council demonstrated that culturally and linguistically diverse communities do not trust energy retailers and are reluctant to engage with retail marketing. The research also indicated that the communities surveyed thought that changing their retailer wouldn't really make a difference to cost or ease and comfort of existing arrangements.</p> <p>The survey also indicated that those that had switched were so dissatisfied with the outcome that they didn't think it was worth the effort. (pp. 1, 3)</p>	<p>The Commission noted the Ethnic Communities Council's research regarding culturally and linguistically diverse communities and took this into account in its approach to this rule change request and forming its more preferable draft rule.</p> <p>Further discussion on this issue is set out in Chapter 5.</p>
<p>Queensland Council of Social Service, South Australian Council of Social Service, Consumers Association SA</p>	<p>Retailers' ability to vary prices, charge exit fees, and make price changes before notifying customers is leading to practical and psychological disincentives for consumers to engage in retail markets. (Queensland Council of Social Service, pp. 1-2; South Australian Council of Social Service, p. 12, Consumers Association SA, p. 3). Slow</p>	

Stakeholder	Comment	AEMC response
	<p>switching times also impact on customer engagement. (South Australian Council of Social Service, p. 12)</p> <p>Exit fees may be unaffordable for many consumers and if consumers do switch they face the risk that their new retailer will also increase the price. Consumers are less likely to investigate offers if they believe benefits may be withdrawn at any time. (Queensland Council of Social Service, pp. 1-2)</p>	
<p>UnitingCare Australia, CALC and CUAC</p>	<p>Retailers' ability to vary prices results in: disadvantaging consumers who are already paying very high energy prices; undermines consumer trust in energy markets; establishes energy market practices that fail to meet reasonable consumer expectations; and reduced consumer engagement which leads to poorer consumer outcomes. (UnitingCare Australia, pp. 3-4)</p> <p>Wasted search costs are also likely to reduce the likelihood of consumers searching for a new offer following a price variation. (UnitingCare Australia, p. 8; CALC and CUAC, p. 12)</p> <p>Transaction costs and/or switching costs may exceed any benefit from changing switching. (CALC and CUAC, p. 12)</p>	
<p>Michael Davies (private individual)</p>	<p>Customers must be given the right to change their retailer whenever they choose. Contracts are anti-competitive when they impose obligations on</p>	<p>The Commission noted that a significant proportion of <i>market retail contracts</i> do not have exit fees. For more detail on this issue see Chapter 3.</p>

Stakeholder	Comment	AEMC response
	the customer but not on the retailer. (p. 1)	
Consumer participation and engagement: How do exit fees and other transaction costs affect consumer behaviour after a price variation?		
Origin Energy, Alinta Energy	Given the current extensive regulation of exit fees, it is doubtful that exit fees present a deterrent to customers changing retailers following a price rise under a <i>market retail contract</i> . (Origin Energy, p. 5; Alinta Energy, p. 5.)The value of a discount is multiple times the cost of an exit fee (Origin Energy, p. 5)	As noted above, the Commission's consumer research did not find that price variations had a significant impact on consumer disengagement. The consumer research indicated that around six per cent of residential consumers searched for a new contract after experiencing a price variation. See Chapter 5 for more detail.
EnergyAustralia	Exit fees reflect that retailers face costs when consumers terminate contracts. This should indicate that switching contracts following a price change may not be efficient for the overall market and consumers would be better off seeking information on a new contract closer to the expiry of their existing contract. (p. 11)	The Commission agreed that exit fees provide a price signal to consumers in relation to the retailer's cost of the customer switching. The Commission also noted there are a range of contracts that do not include exit fees if consumers are concerned about the level of exit fees on some contracts. For more detail see Chapter 3.
Simply Energy	A retailer pricing a contract below cost and using exit fees and other barriers to participation to then increase the price above the competitive norm would not be operating how a prudent retailer operates and would attract the attention of the ACCC for anti-competitive behaviour. (p. 10)	The Commission did not find sufficient evidence to support the view that price baiting practices are widespread in retail energy markets.
Peter Wilson (private individual)	Neither the retailer or a consumer should be able to alter a contract in any way without a penalty. (p. 1)	The Commission considered that consumers should be provided with clear information so they are able to choose the contract that best meets their needs from a range of contracts on the market. The Commission noted there are fixed price contracts available in some jurisdictions for

Stakeholder	Comment	AEMC response
		those consumers that value price certainty.
Council of Social Service of NSW, Ethnic Communities Council of NSW	In NSW retailers are allowed to charge very high exit fees compared to Victoria. People on low incomes who cannot afford high exit fees will be further disadvantaged by upward price variations. (Council of Social Service of NSW, p. 1; Ethnic Communities Council of NSW, p. 3)	The Commission noted that there is a variety of no exit fee <i>market retail contracts</i> on the market. For more detail on the Commission's views regarding the issues identified in the rule change request with respect to consumer participation in retail energy markets, please see Chapter 5.
National Seniors Australia	Exit fees create a barrier to switching and restrict competition. High exit fees also incentivise retailers to offer low introductory rates and then increase the price. (p. 2)	
CALC and CUAC, UnitingCare Australia	<p>Imposing exit fees and the right to vary prices allow retailers to shield themselves from much of the risk of varying costs. This shifting of risk to consumers can result in consumer detriment and lead to erosion of confidence in the market. (CALC and CUAC, pp. 13-14; UnitingCare Australia, p. 8)</p> <p>Eliminating exit fees would not improve search costs, trust and perceptions of fairness. The AEMC should engage experts in behavioural economics and consumer psychology when assessing costs affecting consumer behaviour. (CALC and CUAC, pp. 13-14)</p>	
Consumer participation and engagement: Impact of proposed rule on consumer participation and engagement		
Energy Retailers Association of Australia, Simply Energy, EnergyAustralia	New rule will result in higher search and transaction costs as customers will need to re-contract on a more frequent basis. (Energy Retailers Association of Australia, p. 4; Simply	The Commission considered that the proposed rule could have resulted in retailers offering fixed period contracts with shorter contract lengths. If that had occurred, the Commission agrees that consumers

Stakeholder	Comment	AEMC response
	<p>Energy, p. 2)</p> <p>The view put forward by the proponents that consumers will see the true cost of energy is incorrect because the proposed rule will de-link prices from input costs. (Energy Retailers Association of Australia, p. 5; Simply Energy, p. 1)</p> <p>Prices which include assumptions about future costs are less transparent and it is in the retailer's and their customers' interests that there is common understanding of the rationale for price variations and that retailers understand customers' needs. Retailers are well placed to provide information above and beyond regulatory requirements. (EnergyAustralia, p. 12)</p>	<p>may have needed to consider changing their contracts more frequently, which would have resulted in greater search costs.</p> <p>The Commission did not consider that the proposed rule would have exposed the "true cost" of energy, but rather would have resulted in less cost reflective energy prices for consumers due to the inclusion of a risk premium.</p> <p>For more detail on these issues, please see Chapter 7.</p>
Origin Energy	<p>The proposed rule would reduce customer switching because new contracts cannot compete on price with the existing contract a customer is on (p. 5).</p> <p>The basis of the calculation of uncertainty and risk premiums of different retailers will be different and will not be understood by customers. The proposed rule will therefore have the potential to reduce consumer confidence in the market. (p. 6)</p>	<p>The Commission considered that consumer engagement could have been affected under the proposed rule, if consumers found that the market was not meeting their preferences. The Commission has provided its views on the likely impacts of the proposed rule in Chapter 7, including the potential impact of the proposed rule on price, consumer choice and engagement and competition between retailers.</p>
Ergon Energy	<p>Proposed rule would limit customer engagement rather than increase it. Customers need good information to make decisions in their best interests, and the proposed rule would not contribute to this (p. 4)</p>	

Stakeholder	Comment	AEMC response
EnergyAustralia	The proposed rule could lead to consumers taking a "set and forget" to their energy supply rather than an ongoing dialogue between retailers and consumers, which is necessary for true engagement. (p. 12)	
Council of Social Service of NSW, Council of the Ageing Queensland	The proposed rule will offer better protections to vulnerable customers and result in clearer and more transparent contracts which will enable consumers to make more informed decisions. (Council of Social Service of NSW, p. 1; Council of the Ageing Queensland, p. 1)	The Commission did not agree with this view. The Commission has set out its views on the impact of the proposed rule in Chapter 7.
CALC and CUAC, UnitingCare Australia	The proposed rule will foster informed decision making amongst consumers and greater trust amongst consumers, noting that trust of retailers are at very low levels. Downward pressure on prices would also occur due to increased competition for informed consumers.(CALC and CUAC, p. 15; UnitingCare Australia, p. 9)	The Commission acknowledged that the proposed rule could have led to greater transparency of retail energy prices and resulted in better consumer understanding of fixed period contracts which could improve comparability and increased competition for fixed price contracts over time. However, the Commission considered that the negative impacts of the proposed rule on price, consumer choice and competition between retailers would have outweighed those benefits. For more detail see Chapter 7.
Ethnic Communities Council of NSW	The proposed rule, with effective and appropriate communication by energy retailers to develop trust, would improve consumer participation and engagement, particularly if it was clear how engaging could save costs for consumers. (p. 3)	
PIAC, Queensland Association of Independent Legal Services, National Seniors Australia, Tasmanian Council of Social Service, Queensland Council of Social Service, Major Energy Users, Consumers Association of SA	The proposed rule will benefit consumers by improving the ability of consumers to compare offers and make switching decisions, and therefore communicate their preferences more clearly to retailers. (PIAC, pp. 2-3, Tasmanian Council of Social Service, p. 2, Consumers Association of SA,	

Stakeholder	Comment	AEMC response
	<p>p. 5) Consumers will shop around with confidence and have certainty about what they will pay (Queensland Association of Independent Legal Services, p. 2, Queensland Council of Social Service, p. 2)</p> <p>Consumer search costs would be reduced and this would produce a more efficient market. (National Seniors Australia, p. 2, Major Energy Users, p. 2)</p>	
South Australian Council of Social Service	<p>The long term interests of consumers is likely to be best served by a market based on transparency and trust rather than one based on confusion and obfuscation. The proposed rule should be accepted and followed by proposals to fix how discounts are marketed. (p. 13)</p> <p>The proposed rule will significantly reduce the ability of retailers to use 'bait and switch' techniques to exploit the stickiness of customers. (p. 16)</p>	<p>The Commission agreed that transparency and trust are important requirements for consumers to engage in retail energy markets and benefit from competition. The Commission's more preferable draft rule was designed to improve transparency regarding price variations in <i>market retail contracts</i>.</p> <p>The Commission did not find sufficient evidence to conclude that price baiting practices are widespread in retail energy markets. For more detail see Chapter 4.</p>
Consumers Association of SA	<p>If the majority of consumers already believe, incorrectly, that fixed term contracts incorporate fixed prices, then the immediate effects on participation and engagement may be limited. However, the longer term impact in reducing the number of consumers that disengage from the market process through frustration would be significant.</p> <p>Consumer engagement could be improved by addressing the way in which retailers use the pricing of their standard contracts to sell their</p>	<p>As noted above, the Commission acknowledged that the proposed rule could have led to greater transparency of retail energy prices, which could have improved consumer engagement. However, the Commission considered that the negative impacts of the proposed rule on price, consumer choice and competition between retailers would have outweighed those benefits. For more detail see Chapter 7.</p> <p>The Commission noted concerns regarding the comparability of contracts in South Australia due to</p>

Stakeholder	Comment	AEMC response
	market contracts. In South Australia the highly variable nature of standard contracts means that comparing contracts on the basis of how much the market rate discounts the standard contract is a meaningless exercise for consumers. (p. 4)	differences in the pricing of standard retail contracts between different retailers. The Commission suggested that the AER could consider reviewing its Retail Pricing Information Guideline to improve consumers' understanding of their contracts and the offers available to them.
Competition between retailers: How would the proposed rule affect large retailers compared to small retailers?		
Alinta Energy	The proposed rule could cause smaller retailers to exit the market as they are unable to compete and accurately manage the level of risk they would be exposed to. (p. 5)	The Commission considered that the proposed rule could have impacted smaller and newer entrant retailers more than larger and more established retailers. This was because smaller and newer retailers have fewer risk management tools available to them to deal with the additional risks the proposed rule would have required them to manage if they were to offer fixed period contracts. For more detail on this, see Chapter 7.
Origin Energy, Simply Energy	<p>The proposed rule will create additional challenges for new entrants and encourage the development of business models that depend on an exemption from retailer authorisation and therefore from the retail rules. The proposed rule could therefore weaken consumer protections by encouraging separate markets for energy services. (Origin Energy, p. 7)</p> <p>The impact will be greater on second tier retailers which would impair competition. (Simply Energy, p. 12)</p>	
EnergyAustralia	<p>The proposed rule is likely to have a disproportionate effect on smaller retailers as many of these retailers are not vertically integrated and will be required to more fully hedge their load as a result, increasing costs.</p> <p>Smaller retailers have few resources and would</p>	

Stakeholder	Comment	AEMC response
	require additional expertise to assess network prices. This would impose significant costs and some retailers may prefer to be ultra-conservative in setting prices. (pp. 12-13)	
AER	Larger retailers may be able to manage the additional risks imposed by the proposed rule more efficiently and at lower cost than smaller or new entrant retailers. (p. 5)	
South Australian Council of Social Service	Entry into retail markets are more affected by market concentration and the exercise of market power, the proposed rule is unlikely to result in a material barrier to entry. (p. 14)	While the Commission agreed that the level of market concentration has a material effect on barriers to entry, the Commission considered that the proposed rule would have been likely to increase barriers to entry for new retailers. For more detail see Chapter 7.
UnitingCare Australia	More stable pricing in contracts may benefit smaller retailers making entry easier. (p. 10)	The Commission did not agree that prices would be more stable and did not agree that new entry would be easier for retailers under the proposed rule. For more detail see Chapter 7.
CALC and CUAC	<p>Larger retailers may be in a better position to manage risks than smaller retailers. However, there is no obligation for retailers to offer fixed period contracts.</p> <p>The proposed rule would not make it significantly more difficult for new entrants to enter retail energy markets. If a potential new entrant is discouraged by a requirement to manage energy risks on behalf of consumers, it is perhaps appropriate that they do not enter the market. (p. 16)</p>	While the Commission agreed that there is no obligation on retailers to offer fixed period contracts, the Commission considered that there is a risk that the proposed rule would increase barriers to entry and could have impacted smaller retailers more than larger retailers. For more detail see Chapter 7.

Stakeholder	Comment	AEMC response
Competition between retailers: Impact on consumer choice of retail offers and retail competition under the proposed rule		
Alinta Energy	<p>The proposed rule would significantly reduce the number of popular market product offerings available to consumers.(p. 4)</p> <p>The proposed rule will decrease the level of competition. There has been no demonstrated market failing of the market. Where consumers express an interest or need for a particular product structure, retailers will develop and offer these products and services and fixed price products are available on the market currently. (p. 5)</p>	<p>The Commission noted that the proposed rule would have stopped retailers from offering variable priced products with a fixed period. The Commission noted that these are a popular form of contract in the market. The Commission considered that under the proposed rule, retailers may have offered fixed period offers with a shorter duration or withdraw fixed period contracts. The Commission also agreed that retailers would have been likely to charge a premium for fixed period contracts.</p>
Lumo Energy	<p>The proposed rule will limit the product and services Lumo Energy can make available to the market and limit its ability to innovate. (p. 4)</p>	<p>The proposed rule would therefore have limited the range of choices for consumers and the ability for retailers to innovate to meet changing consumer preferences. This could have negatively impacted consumer engagement and competition in retail energy markets. For more detail see Chapter 7.</p>
Origin Energy	<p>Fixed price offerings are in the market, they have a price premium and they are less attractive to the majority of consumers. The proposed rule would result in consumers facing fewer product offerings today, requiring consumers to adopt a type of offer that is currently niche in its appeal. (pp. 4-5). Fixed benefit period contracts would be withdrawn from the market or will include much shorter periods. (p. 7)</p> <p>The proposed rule will result in a reduced range of offers, and more expensive and shorter term offers particularly just ahead of network price resets. Vulnerable customers (such as those renting that have to move house) will be the most affected by</p>	<p>The proposed rule would therefore have limited the range of choices for consumers and the ability for retailers to innovate to meet changing consumer preferences. This could have negatively impacted consumer engagement and competition in retail energy markets. For more detail see Chapter 7.</p>

Stakeholder	Comment	AEMC response
	<p>this. (p. 6)</p> <p>The proposed rule will negatively impact competition and will therefore reduce pressure on prices over the long term. (p. 7) This will also impact dynamic efficiency as further innovation may be seen to face further regulation in the future, and this will further significantly affect future prices. (p. 7)</p>	
Red Energy, Ergon Energy, AGL	<p>A consequence could be that retailers no longer offer multiple year fixed term arrangements. Today the market ranges from 1 to 3 years. This could contract to a period that retailers feel confident with. (Red Energy, p. 4)</p> <p>The AEMC notes around 48% of contracts are fixed period contracts. These would be restricted by the proposed rule. Any limitation would restrict customers from choosing the contract they prefer and this could impact innovation and competition in retail energy markets, driving market inefficiencies. (Red Energy, p. 4; Ergon Energy, p. 4) Retailers should be free to develop a range of products for customers with a range of risk appetites. (AGL, p. 4)</p>	
Energy Networks Association	Competitive and rivalrous markets best promote the long term interests of consumers by providing consumer choice. Regulatory interventions such as that proposed should be based only on demonstrated market failure, which does not exist here (Energy Networks Association, p. 1)	The Commission agreed that there was not a demonstrated market failure that would have warranted the regulatory response proposed in the rule change request. The Commission did however note that it had identified specific issues with consumers' understanding of <i>market retail contracts</i> and had made a more preferable draft

Stakeholder	Comment	AEMC response
		rule to address those issues.
Simply Energy	<p>The proposed rule will result in shorter contracts and higher exit fees (as they are recovered over a shorter period).</p> <p>There will also be increased price risk for consumers. As prices will vary more over time, consumers will need to know more about the energy market in order to time their purchasing decisions right to get the best outcome, vastly increasing search and transaction costs for the consumer (p. 12).</p>	The Commission agreed that under the proposed rule fixed period offers would likely have become shorter in length, become more expensive, and could even have been withdrawn from the market. For more detail on the Commission's views on the likely impact of the proposed rule on consumer choice, see Chapter 7.
EnergyAustralia	<p>The potential responses from retailers include: withdrawing fixed term contracts; offering fixed term contracts with a shorter duration or significantly higher price; retailers ceasing operations in NECF jurisdictions.</p> <p>The overall outcome will be reduced choice for consumers. Withdrawing or shortening contracts could lead to consumers experiencing more frequent price increases. Additional costs are likely to act as a barrier to new entrants and undermine competition and consumer benefits (p. 13).</p>	
Business SA	Do not support prescribing the nature of products which the market can offer as this will stifle competition. (p. 1)	The Commission agreed that the proposed rule could have negatively impacted competition by reducing the range of products that retailers could offer and restricting product innovation. For more detail, see Chapter 7.

Stakeholder	Comment	AEMC response
Ethnic Communities Council of NSW	Greater competition between retailers who would be acting transparently would put downward pressure on prices. (p. 3)	The Commission agreed that the proposed rule could have resulted in greater transparency in fixed period contracts, which could have resulted in some downward pressure on prices. However, the Commission considered that the overall impact of the proposed rule would have been an increase in prices, due to the inclusion of a risk premium on fixed period contracts. For more detail see Chapter 7.
Queensland Council of Social Service	Consumers would have a choice between higher prices with less risk under a fixed period contract or lower prices but greater risk under an evergreen market contract. The rule change would allow consumers to indicate their preferences through the choices they make in the market. (p. 2)	The Commission considered that the proposed rule would have prohibited retailers from offering one of the most popular forms of <i>market retail contract</i> , being those with fixed periods and variable prices. This would have limited the choices available for consumers. For more detail see Chapter 7.
Tasmanian Council of Social Service	If the price of diversity is unfairness in contracts, it is not worth it. (p. 3)	The Commission did not consider that fixed period contracts that have a variable price are inherently unfair or misleading. The Commission considered that the best way to enable retailers to develop products that meet consumers' needs regarding the variability of prices in fixed period contracts would be to provide consumers with better information on how prices may vary on contract entry.
South Australian Council of Social Service	A reduction in misleading offers is a good thing for all consumers, particularly vulnerable customers. (p. 14)	
UnitingCare Australia	A reduction in market offers as a result of the proposed rule would not have a significant effect on retail competition and prices as too many offers with a high level of complexity is likely to reduce consumer engagement due to higher search costs. (pp. 10-11)	The Commission did not agree with this view. The Commission considered that restricting retailers from being able to innovate would be likely to negatively impact consumer engagement and competition. For more detail see Chapter 7.

Stakeholder	Comment	AEMC response
CALC and CUAC	<p>As retailers are likely to recover additional risk management costs via a risk premium, there is no reason why retailers should withdraw fixed period offers.</p> <p>However, retailers could regard the premium for managing fixed period risk of contracts for longer durations as higher than consumers are willing to pay. Any reduction in offers is likely to reflect effective competition as sub-optimal offers are withdrawn from the market and those that best meet consumer needs remain. (p. 17)</p>	<p>The Commission considered that fixed period contracts would have been likely to become shorter, more expensive or could have been withdrawn from the market. As noted above, the Commission considered that this would have negatively impacted consumer engagement and competition in retail energy markets. The contracts that would have been restricted or removed are contracts that some consumers appear to prefer, given their popularity and the results for the Commission's consumer research. The Commission provides has set out its view on the impacts of the proposed rule on the availability of fixed period offers in Chapter 7.</p>
Consumers Association of SA	<p>The proposed rule change is unlikely to see retailers withdraw fixed period contracts from the market, however longer fixed period contracts may prove to be unviable. There is likely to be increased competition for fixed price contracts and there would be no significant increase to the barriers to new entrants above what already exists in the retail market. (p. 4)</p>	
AER	<p>Under the proposed rule retailers may be unwilling to take on the additional risk and cease to offer fixed term or fixed benefit period contracts or only offer contracts with a shorter fixed period. This would reduce choice for consumers and could stifle innovation and competition in retail energy markets. (pp. 3-4)</p> <p>The AER considers a more efficient market outcome could see retailers offering a greater selection of fixed price contracts in response to</p>	

Stakeholder	Comment	AEMC response
	demand from those customers who are willing to pay for price certainty, supported by adequate information for customers to understand different offerings and choices. (p. 5)	
Victorian Department of State Development, Business, and Innovation	The prohibition on price variations on fixed term contracts will remove offers that some customers are happy with. (p. 2)	
Consumer protection issues: Do the unfair contract terms provisions of the ACL currently apply?		
Red Energy, Simply Energy, EnergyAustralia	Rule 46 does not adversely impact the unfair contract terms provisions of the ACL. (Red Energy, p. 3; Simply Energy, p. 2, 13). EnergyAustralia believes the ACL applies. (EnergyAustralia, p. 14)	The Commission noted that there was some uncertainty in the application of the unfair contract terms provisions of the ACL to price variation clauses in <i>market retail contracts</i> . See Chapter 6 for further discussion of this issue.
Alinta Energy	<p>There are numerous considerations to determine whether in any given circumstances the ability for a retailer to vary prices is an unfair contract term under any given <i>market retail contract</i>.</p> <p>These considerations are complex and highly legalistic and only a court of a competent jurisdiction can determine whether such a term is unfair in any particular circumstance. (p. 3)</p>	The Commission agreed with this view and noted that the issue of whether price variation clauses in <i>market retail contracts</i> were "unfair" under the unfair contract terms provisions in the ACL had not yet been considered by a court.
Origin Energy	If the unfair contract terms provisions apply, it is appropriate they be relied upon to address this issue raised by CALC and CUAC. Those provisions deal appropriately with this issue, including weighing up a range of factors taking into account the interests of both customers and	The Commission considered that even though there is some uncertainty in the application of the unfair contract terms provisions of the ACL to price variation clauses in <i>market retail contracts</i> , there was not sufficient evidence to show that clarifying the application of these provisions would have resulted in an appreciable benefit to consumers

Stakeholder	Comment	AEMC response
	<p>retailers.</p> <p>There should not be a change to the policy position that business customers are not afforded the same protections as individuals under the unfair contract provisions. Origin is not aware of any characteristics of retail energy offers or contracts that mean that business customers require more protections than they do currently. (p. 7)</p>	<p>with respect to the issues in the rule change request. For more detail on this, see Chapter 7.</p>
AER	<p>Agree there is some uncertainty around the potential application of the unfair contract terms provisions and it is untested by the courts. (p. 6)</p>	<p>The Commission agreed with this view. See Chapter 6 for further detail.</p>
Consumer protection issues: Should changes be made to the retail rules to clarify application of ACL?		
Origin Energy, Simply Energy, Lumo Energy	<p>Changes should not be made to clarify whether the unfair contract terms provisions of the ACL apply (Origin Energy, p. 8; Simply Energy, p. 2). The existing NECF and ACL provide sufficient consumer protections for all energy consumers. (Lumo Energy, p. 5)</p>	<p>The Commission agreed that rule 46 of the retail rules should not be deleted to clarify the application of the unfair contract terms provisions in the ACL and provided its reasons in the draft determination. For further detail see Chapter 6.</p>
Alinta Energy	<p>Do not support deleting rule 46 and allowing the ACL to apply as it is yet to be determined whether rule 46 expressly permits price variations and whether a contract term that allows price variations may be considered unfair under the ACL.</p> <p>Customers also are currently provided protections under rule 46 which would be removed if this rule was deleted. (p. 4)</p>	

Stakeholder	Comment	AEMC response
Ergon Energy	AEMC should further analyse the operation of the retail rules and its effect on the ACL and improve what is currently ineffective, rather than importing additional obligations from the ACL, which as highlighted by CALC and CUAC don't function consistently with the retail rules. (p. 5)	<p>The Commission did not consider that a regulatory response was required to address the uncertainty in the application of the unfair contract provisions in the ACL.</p> <p>The Commission agreed that small business consumers fell outside of the protections afforded by the unfair contract terms provisions of the ACL, but noted that the Commonwealth Treasury was consulting on a proposal to extend these provisions to small business consumers. For more detail see Chapter 6.</p>
Business SA	<p>Do not support any regulatory change without first testing whether existing regulation is capable of addressing the issues raised. Consumer protections should be consistent across markets, if the retail rules are inconsistent with the ACL there will need to be additional government resources to enforce compliance. (p. 3)</p> <p>Small businesses fall outside the scope of the ACL. (p. 4)</p>	
Consumers Association of SA	It is preferable for consumer protections to be dealt with by energy retail legislation as it will provide greater clarity for consumers. (p.5)	The Commission did not consider that all consumer protections needed to be set out in retail energy regulations to give consumers clarity.
Tasmanian Council of Social Service, South Australian Council of Social Service	If the rules do expressly permit price variations, the Tasmanian Council of Social Service considers this is at odds with the intention of Australian Governments to ensure all contracts are fair. (Tasmanian Council of Social Service, p. 3) Uncertainty in the application of the ACL provisions is unhelpful and should be addressed in some form. (South Australian Council of Social Service, p. 15)	As noted above, the Commission considered that there is some uncertainty in the application of the unfair contract terms provisions in the ACL, but did not consider that the retail rules should be amended to clarify the application of those provisions. For more detail see Chapter 6.
Major Energy Users	Extending the ACL's unfair contract terms	

Stakeholder	Comment	AEMC response
	provisions would not sufficiently address the problem. (p. 2)	
CALC and CUAC, UnitingCare Australia	<p>There is some uncertainty about whether the unfair contract terms provisions in the ACL apply. However, even if a change was made to the retail rules to clarify the application of the unfair contract terms there would remain some uncertainty about what this requires in terms of price variation terms in fixed period <i>market retail contracts</i>.</p> <p>This is because there is limited case law on this area. Also, consumers may still not be empowered by clarifying the application of the unfair contract terms. (CALC and CUAC, pp. 18-20; UnitingCare Australia, p. 12)</p>	
AER	As the application of the unfair contract terms provisions are uncertain and have not yet been tested by courts, the AER considers these provisions should not be relied on to address the issues in the rule change, particularly if there are other actions which could more effectively address these concerns and do not require a change to the retail rules. (p. 6)	
Consumer protection issues: Use of the misleading and deceptive conduct provisions in the ACL to address the issues raised in the rule change request		
Origin Energy	Misleading and deceptive conduct rules should be relied on to address information provision issues. There is no evidence to show that the energy industry should be treated differently to other industries. (p. 8)	The Commission considered that some consumers could be better informed about the terms and conditions of their energy contracts, particularly with respect to whether price can vary during fixed periods. The misleading and deceptive conduct

Stakeholder	Comment	AEMC response
EnergyAustralia	EnergyAustralia believes the ACCC has to date been comfortable with retailer practices regarding disclosure of price variations. Current retailer practices by and large conform to ACL requirements (p. 14)	provisions in the ACL should not be relied on solely to address this. The Commission therefore made a more preferable draft rule to address this issue.
UnitingCare Australia, CALC and CUAC	Misleading and deceptive conduct provisions do not sufficiently protect consumers who are 'confused'. (UnitingCare Australia, p. 13; CALC and CUAC, pp. 21-22)	The Commission agreed that the misleading and deceptive conduct provisions do not sufficiently address the issues raised in the rule change request.
SA Department of Manufacturing, Innovation, Trade, Resources and Energy	The ACCC undertakes regular compliance activities to ensure retailers' marketing materials comply with the ACL. The retail rules and ACL provide consumers with a 10 day cooling off period and require retailers to provide comprehensive information to consumers. Further, retailers have sought to address issues around misrepresentation of market offers by establishing a code of conduct for door to door sales and Ombudsman scheme to deal with complaints. (p. 4)	The Commission noted this view. It considered that in addition to these regulatory requirements and voluntary actions, consumers should be provided with better information in relation to how prices may vary during their in <i>market retail contracts</i> in order to make more informed decisions. For more detail, see Chapter 8.
Alternative approaches to the issues identified in the rule change request: Limited pass-through option proposed by the rule change proponents		
Origin Energy, Simply Energy	Do not support this option as there is no evidence of market failure. Current regulations are sufficient. (Origin Energy, p. 9; Simply Energy, p. 14)	The Commission considered that changes to the retail rules were required to better inform consumers of the terms and conditions of their <i>market retail contracts</i> , in relation to how prices may vary. The Commission therefore made a more preferable draft rule which was set out in the draft determination.
Energy Retailers Association of Australia	This option will result in risk premiums, will create	The Commission agreed that this option would still

Stakeholder	Comment	AEMC response
	consumer confusion about which costs can and can't be passed through, will limit the range of market offers, and will be difficult to administer (p. 6)	have required retailers to include risk premiums in fixed period contracts, would have been administratively burdensome, and would not have dealt with consumer confusion about the costs that could be passed through by retailers. For more detail see Chapter 7.
Alinta Energy	This would be administratively burdensome for retailers to manage. (p. 4)	
EnergyAustralia	<p>A limited pass through of costs will be beset by definitional issues relating to allowable and non-allowable costs. Consumers could face a number of smaller increases throughout the contract rather than current practice which involves an annual price increase covering all cost changes.</p> <p>Retailers already increase prices on an annual basis in line with network increases, so restricting pass-through to network increases will not make a change to status quo. (p. 15)</p>	<p>The Commission agreed that this option would have required regulators to define which costs could and which could not be passed through and considered that this would have been difficult to define and enforce.</p> <p>The Commission also agreed that there may have been limited benefit in this option, given that it could have allowed some network and government policy costs to be passed through and these make up the majority of price increases for <i>market retail contracts</i>.</p>
Business SA	Any pass throughs would need to allow pass throughs for changes in Government policy and potentially regulatory decisions on network revenues. As the majority of price rises have been from network costs and Government policy decisions, the benefits of fixing electricity prices for consumers would be limited. (p. 3)	
Consumers Association of SA	This option would retain current confusion about the meaning of fixed contracts. (p. 5)	
South Australian Council of Social Service	Limited pass throughs may be appropriate in some circumstances, but defining and policing these legitimate circumstances is likely to be problematic.	As noted above, the Commission agreed that defining and managing compliance with the limited pass-through option may have been difficult.

Stakeholder	Comment	AEMC response
	Retailers are effective and efficient risk managers that can not only prepare for and accommodate changes in costs but influence the extent and timing of these changes. (p. 16)	However, the Commission did not agree that retailers have significant influence over costs such as network costs and some government policy costs. This issue is discussed in Chapter 3.
UnitingCare Australia, CALC and CUAC	Retailers should be fully aware of their obligations in relation to government policies. There should not be pass throughs for changes in distribution prices or government policies. (UnitingCare Australia, pp. 14-15; CALC and CUAC, p. 31)	
AER	This option would have the same impacts on competition and prices as the proposed rule and would also result in consumer confusion and uncertainty. It would also be more complex for the regulator to administer and result in a higher regulatory burden on retailers. (p. 6)	The Commission agreed with this view.
Alternative approaches to the issues identified in the rule change request: Improving information requirements		
SA Department of Manufacturing, Innovation, Trade, Resources and Energy (now the Department of State Development).	<p>Support improvements to the Energy Made Easy website to allow more refined filtering and clearer contract terminology to assist consumers in comparing offers. Also supports stakeholders working together to develop clearer contract terminology for use in energy markets that is easier for consumers to understand. (p. 3)</p> <p>This represents a more proportionate response to the issues identified in the rule change request. Also support improving customer engagement to correct these issues through competitive market forces. (p. 4)</p>	The Commission considered that improvements could be made to the Energy Made Easy website and the AER Guidelines to improve consumer understanding of how prices may vary during their contracts and the options available to them. The Commission also noted its support for efforts to improve the communication of contract terms and conditions to consumers. See Chapter 8 for more detail.

Stakeholder	Comment	AEMC response
Victorian Department of State Development, Business, and Innovation	<p>Amendments to the retail rules could be made so that retailers are required to expressly advise customers that their contract is subject to change before the contract is signed.</p> <p>If consumers are more aware of the pros and cons of contract types, the take up of fixed price offers may increase which would result in these contracts being made more widely available by retailers. This would allow consumers to pick the best contract to meet their needs and this is preferable to limiting choice for consumers. (p. 3)</p>	The Commission agreed that a proportionate response to the issues raised by the rule change request would be to amend the retail rules to better inform consumers that a contract is subject to variable prices. The Commission considered that clear information at the point of entry into a contract would help consumers to make informed decisions that better meet their preferences. The Commission's more preferable draft rule sought to achieve this.
Energy and Water Ombudsman SA	Clear upfront information on market contracts and offers from retailers to consumers would significantly reduce enquiries to the Ombudsman. (p. 2)	
AER	<p>The AER could amend its Retail Pricing Information Guideline to clarify and improve the information available to consumers. This could include requiring retailers to present information more clearly and prominently about the applicability of price variations on their energy price fact sheets and being more prescriptive about how retailers describe fixed price and fixed term contracts on these fact sheets.</p> <p>The AER could also work in partnership with retailers and consumer organisations to improve customers' understanding and awareness of different contracts.</p>	The Commission considered that improvements could be made to the Energy Made Easy website and the AER Guidelines to improve consumer understanding of how prices may vary during their contracts and the options available to them. See Chapter 8 for more detail.

Stakeholder	Comment	AEMC response
	The AER has also recently added content to the Energy Made Easy website to explain the difference between fixed price contracts and contracts with a fixed term or benefit period. (p. 6)	
Energy Retailers Association of Australia	Improving information will impact on costs which will be factored into retail prices, information will need to be consistent to be effective. There is likely to be no impact on the range of products and services provided (p. 6)	The Commission noted that its more preferable draft rule, which focussed on improving information for consumers, was unlikely to have significant implementation costs for retailers.
EnergyAustralia	Not convinced that the issues outlined in the rule change request are sufficiently material or persistent to warrant a regulatory intervention. EnergyAustralia prefers to work collaboratively with consumer organisations to ensure consumers are fully engaged and able to make informed decisions. (p. 15)	The Commission considered that there were issues raised in the rule change request that required a regulatory response. In particular, the issue that some consumers could be better informed of the nature of their contracts with respect to price variations. The Commission made its more preferable draft rule to address this issue. The Commission however also supported retailers and consumer groups working collaboratively to improve the information provided to consumers about retail energy contracts.
AGL	AGL would be happy to work with industry, consumer groups, and regulators, to consider means of improvement of engagement with customers to ensure there is better comprehension of terms and conditions of contracts. There may be merit in consulting on the alternatives suggested by PIAC. (p. 5).	
Simply Energy	Noting that information requirements are too great and new requirements have continued to increase search and transaction costs for customers, the AEMC should reconsider the whole question of what information consumers need to make effective energy purchasing decisions.	The Commission noted the views of Simply Energy and considered that a broad review of the information requirements in the NECF was not within the scope of this rule change request.

Stakeholder	Comment	AEMC response
	Simply Energy's view is that if there was less regulation, and retailers were allowed to compete on the quantity and type of information they provide to consumers, the outcomes that consumers experience would be improved. (p. 10)	
United Energy and Multinet Gas	A more preferable approach would be to require retailers to specifically highlight the clause that allows price to be varied when gaining explicit informed consent for a fixed period contract. (p. 2)	The Commission considered that clearer information on price variability at the point of entry into <i>market retail contracts</i> would be a proportionate response to the issues identified in the rule change request. The Commission noted that a number of stakeholders proposed alternative approaches that were designed to achieve this.
Energy Networks Association	The key issue for CALC and CUAC appears to be that customers don't know that a fixed term contract can have a variable price. If the AEMC considers there is an issue here an appropriate response could be a requirement that if a fixed term offer has a variable price this must be made clear in the name/title of the market offer (p. 2).	The Commission made a more preferable draft rule that would specifically require retailers to disclose terms and conditions that provide for price variations as part of the existing requirement to obtain the explicit informed consent of consumers to the entry into a <i>market retail contract</i> . Retailers would also be specifically required to inform consumers on contract entry about when they will notify consumers of price variations during the contract.
Business SA	Support changes to ensure the level of disclosure for fixed term contracts is more explicit on the basis and frequency in which prices or other charges are subject to change. The retail rules should ensure consumers can easily understand key features of electricity contracts, but increasing the level of competition will be the most effective way to protect consumers' long term interests. (p. 4)	The Commission noted that a number of retailers were already providing advanced notification of price variations as a matter good customer service.
PIAC	Retailers should be required to inform consumers in a clear and consistent manner about how price may vary during the contract. (p. 6) PIAC supports	Further discussion on these issues is set out in Chapters 7 and 8.

Stakeholder	Comment	AEMC response
	consumers being informed of price increases 21 days before they take effect. (p. 5)	
National Seniors Australia	If the proposed rule isn't made, retailers should be required to notify customers a minimum of 12 business days prior to a change in price. (p. 3)	
CALC and CUAC	<p>Removing the term "fixed" in fixed period contracts will not address the issues identified as the problems with these contracts rest with their nature not their name. It will do little to improve consumer understanding and market efficiency.</p> <p>Even if the term "fixed" is not used consumers may still be confused as to why their contract allows for price changes as it is unlikely they will remember that they gave their explicit informed consent to this. Such a change is unlikely to also result in the increased availability of fixed price contracts.</p> <p>Providing advance notification of price variations is also not supported as this would only contribute to consumer confusion in understanding the full price of the contract at the outset. (pp. 29- 30; p. 32)</p> <p>Improved information alone is not enough as consumers: tend to disengage when faced with complexity; have a bias towards the status quo; tend to use short cuts to problem solve which is not likely to be optimal (eg relying on contracts being "fixed"); and prefer smaller rewards today over a larger one later (eg by choosing lower price variable rate contracts over rate freeze contracts).</p>	<p>The Commission did not consider that there was a problem with the nature of fixed period contracts that include price variation clauses.</p> <p>The Commission considered that providing clearer information to consumers about the nature of their contracts, particularly in relation to whether prices can vary, would help them to select energy products that they consider better meet their needs. This in turn would be likely to place greater pressure on retailers to develop products that meet consumers' preferences with respect to how prices can vary.</p> <p>For more detail see Chapter 8.</p>

Stakeholder	Comment	AEMC response
	(Supplementary submission, p. 2)	
Alternative approaches to the issues identified in the rule change request: Restriction/regulation of exit fees following price rises		
Energy Retailers Association of Australia	The restriction of exit fees will result in increased prices and increased customer transaction costs. (p. 6)	The Commission noted this view. It did not consider that restricting exit fees was an appropriate response to the issues identified in the rule change request. The Commission also noted that there are a number of contracts on the market that do not have exit fees. For more detail, see Chapters 3 and 7.
PIAC	Consumers should be able to exit the contract without fee before the price increase occurs. (PIAC, p. 5, UnitingCare Wesley Bowden, p. 1)	
National Seniors Australia	Retailers should be banned from charging hardship customers an exit fee for early termination of contracts. The definition of hardship customers should include all pension concession card holders. (pp. 2-3)	
SA Department of Manufacturing, Innovation, Trade, Resources and Energy (now the Department of State Development)	SA Government's requirement for retailers to have one exit free <i>market retail contract</i> which is clearly identified and which customers are informed of allows customers to move freely between a range of market offers without paying an exit fee. Consultation in relation to removing exit fees entirely found neither retailers nor consumer groups supported their abolition. The SA Department considers that its approach has struck the right balance in providing flexibility for retailers and consumers. (p. 3)	
Alternative approaches to the issues identified in the rule change request: Other alternative proposals		

Stakeholder	Comment	AEMC response
Momentum Energy, Origin Energy	Does not consider that evidence has been provided by the rule change proponents to warrant the proposed rule or any form of alternative rule change. (Momentum Energy, p. 2; Origin Energy, pp. 9-10)	The Commission considered that an issue that required a regulatory response was that some consumers may not understand whether prices may vary during their <i>market retail contracts</i> . For more detail see Chapter 5.
AER	The AEMC might take account of the unfair contract terms provisions in the ACL in considering retailers notifying customers in advance of a price change or allowing customers a limited amount of time to switch retailers without paying an exit fee following a price variation. (p. 6)	The Commission noted this view.
Consumers Association of SA	Strongly support the proposed rule, but other alternative solutions could include removing the ability to include both variable pricing and exit fees in the same contract and a requirement for retailers to offer both a variable price and fixed price market contract.(p. 5)	The Commission considered that insufficient evidence was provided in relation to the need to restrict the types of contracts that could be offered. For further detail on the Commission's analysis, see Chapters 3 to 7.

Abbreviations

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
AEMC	Australian Energy Market Commission
AER	Australian Energy Regulator
AER Guidelines	AER Retail Pricing Information Guideline
CALC	Consumer Action Law Centre
CUAC	Consumer Utilities Advocacy Centre
Commission	See AEMC
MCE	Ministerial Council on Energy
NERO	National Electricity Retail Objective
NECF	National Energy Customer Framework
NEM	National Electricity Market
PIAC	Public Interest Advocacy Centre
Retail Law	National Energy Retail Law
Retail rules	National Energy Retail Rules