

Australian Energy Market Commission

DRAFT 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

31 July 2014

RULE
CHANGE

Inquiries

Australian Energy Market Commission
PO Box A2449
Sydney South NSW 1235

E: aemc@aemc.gov.au

T: (02) 8296 7800

F: (02) 8296 7899

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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 draft rule determination

Overview

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

This draft 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 from varying prices during contracts that cover a defined period of time and contracts that offer a benefit, such as a discount, for a defined period.

After careful consideration, extensive stakeholder engagement and consumer research, the Commission has found that the key issue raised by the rule change request is that some consumers may be entering contracts unaware that prices may vary.

The Commission considers that a proportionate response to this issue, which is reflected in the Commission's more preferable draft rule, is to provide greater transparency for consumers in relation to how prices may vary when they sign up to a new contract. This change will assist 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 set out in the National Energy Retail Rules. The terms and conditions of *market retail contracts* are not set out in the Retail Rules however they must meet some minimum standards. These minimum standards currently do not restrict retailers in relation to how often they change their prices or how much prices can increase by. 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*.

Market retail contracts can have a defined period of time, such as a two year contract. These contracts are known as "fixed term" contracts. *Market retail contracts* can also have a benefit which is offered for a defined period, such as a ten per cent discount over a two year period. These contracts are known as "fixed benefit period" contracts. The Commission's draft rule relates to information on how prices may vary during *market retail contracts* that have a fixed term or a fixed benefit period.

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 transporting energy from generators or suppliers to consumers; and
- government policy costs: which include costs resulting from policies of the Commonwealth and/or State and Territory governments.

Some of these costs, such as regulated network costs and some government policy costs, are largely outside of the control of retailers. These costs represent over 60 per cent of a retail energy bill and are passed directly through to retailers. 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 consider that a retailer's ability to change a consumer's price shifts the risk of cost increases from retailers to consumers. They consider that this negatively affects confident consumer participation 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 outside of their control. 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.

Most retail energy contracts currently on the market allow retailers to change their price during the fixed term or fixed benefit period. However, some retailers also offer contracts where the price cannot change. These fixed price contracts are generally more expensive, but allow consumers that prefer price certainty to choose a contract that better meets their needs. The Commission considers that it is important to allow consumers to choose an energy contract that 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 better meet consumers' needs.

The Commission's more preferable draft rule

The Commission has made a more preferable draft rule so that consumers are better informed about how prices may change when they enter *market retail contracts*. As discussed above, more informed and engaged consumers are likely to make better choices in retail energy markets. More engaged consumers are also likely to enhance retail competition, resulting in more efficient prices and contracts that better reflect consumers' preferences.

The Commission's draft 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 draft rule. The requirements under the draft 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 draft rule on prices.

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

- disclose terms or 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 *market retail contract*; and
- provide information about when they will notify consumers of variations to prices during *market retail contracts* as part of existing product disclosure information provided on contract entry. Under the current National Energy Retail Rules, consumers 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.

This draft rule would apply to 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.¹

¹ The Queensland Government has announced its intention to adopt the framework of laws that includes the National Energy Retail Rules (the National Energy Customer Framework or "NECF") on 1 July 2015. See the announcement at <http://www.dews.qld.gov.au/policies-initiatives/electricity-sector-reform/supply/customer-framework>. The Victorian Government has announced that it has deferred its transition to the NECF in order to put in place arrangements to ensure there is no reduction in key protections for Victorian consumers. See the announcement at <http://www.energyandresources.vic.gov.au/energy/about/legislation-and-regulation/national-energy-customer-framework>.

It is proposed that this rule would commence six months following the publication of the Commission's final rule determination to allow time for retailers to implement changes to comply with the new requirements. The final rule determination is expected to be published in late 2014.

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 specific responsibility the AER 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 retail energy contracts.

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 how prices may change during their contracts and the options available to them. These improvements could work alongside the amendments the Commission has made in its draft rule to assist consumers to make more informed decisions when entering retail energy contracts.

Providing a submission

The AEMC welcomes submissions on this draft rule determination, including its draft rule, by **11 September 2014**.

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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).² The rule change request seeks 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 is the first request that the AEMC has received to amend the National Energy Retail Rules (retail rules) since these rules first commenced on 1 July 2012.³

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).⁴ This framework currently operates in Tasmania, the Australian Capital Territory, South Australia and New South Wales.⁵ 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.

The consumer protections under the NECF are intended to complement and operate alongside consumer protections in other relevant laws. These protections include the

² CALC/CUAC rule change request, October 2013.

³ 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 have not yet been adopted in Queensland or Victoria.

⁴ 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.

⁵ The Queensland Government has announced its intention to adopt the NECF on 1 July 2015. See the announcement at <http://www.dews.qld.gov.au/policies-initiatives/electricity-sector-reform/supply/customer-framework>. The Victorian Government has announced that it has deferred its transition to the NECF in order to put in place arrangements to ensure there is no reduction in key protections for Victorian consumers. See the announcement at <http://www.energyandresources.vic.gov.au/energy/about/legislation-and-regulation/national-energy-customer-framework>.

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*.⁶ They are regulated in different ways as shown in Figure 1.1 below.

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,⁷ and to disclose information on prices and how prices may change before or soon after the formation of a *market retail contract*.⁸

The rule change request relates to the regulation of the terms and conditions of *market retail contracts* in the retail rules.⁹ *Market retail contracts* are all retail electricity or gas contracts that are not *standard retail contracts*. Under the retail rules retailers have

⁶ See subsections 20(1) and (2) of the Retail Law.

⁷ See sections 38 and 39 of the Retail Law.

⁸ See rules 62 to 64 of the retail rules.

⁹ These rules are set out in Division 7 of Part 2 of the retail rules.

greater flexibility in the terms they can include in *market retail contracts* compared to standard retail contracts. This includes flexibility in the terms retailers can use in relation to how often 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 only relates to retailers changing their prices during fixed periods in *market retail contracts*. It does not relate to contracts that do not have a fixed term or benefit period.

1.2.3 Current regulatory arrangements for market retail contracts

The retail rules set out certain "minimum requirements" that *market retail contracts* must comply with. These include minimum requirements relating to tariffs and charges.¹⁰ Under these rules, *market retail contracts* can contain terms that allow prices to change in 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.¹¹ 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.¹² 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 first 12 months of the contract and \$45 for termination thereafter.¹³

¹⁰ See section 34(1)(b) of the Retail Law and rules 14(1) and 15(2) of the retail rules.

¹¹ See rule 46 of the retail rules

¹² See rule 49A of the retail rules.

¹³ 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_-_Fi

1.3 Rationale for rule change request

CALC and CUAC note 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 consider that consumers may be discouraged from changing their retailer or contract following a price rise.¹⁴ CALC and CUAC note 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.¹⁵

CALC and CUAC provide 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.¹⁶ CALC and CUAC consider that the customers are then locked into the higher prices because of exit fees. They also suggest 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.¹⁷

CALC and CUAC consider 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 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.

nal_Report_on_early_termination_fees_for_electricity_contracts_for_small_customers_-_16_December_2013.

¹⁴ See page 4 of the CALC/CUAC rule change request.

¹⁵ See page 4 of the CALC/CUAC rule change request.

¹⁶ See for example pages 19 and 20 of the CALC/CUAC rule change request. 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*.

¹⁷ See page 38 of the CALC/CUAC rule change request.

1.4 Solution proposed in the rule change request

CALC and CUAC's preferred outcome is the inclusion of a new rule 46A into 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*.¹⁸ 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 have also been 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 state that this option would also require appropriate further regulation to communicate the risks of changes in government charges to consumers,¹⁹ 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 consumer contracts will then apply.²⁰ CALC and CUAC consider that this would allow consumers to exit fixed period contracts following a price variation without paying an exit fee.²¹

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

¹⁸ See page 6 of the CALC/CUAC rule change request.

¹⁹ See pages 6 to 7 of the CALC/CUAC rule change request.

²⁰ 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.

²¹ See page 7 and more generally Appendix 2 to the CALC/CUAC rule change request.

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.

Submissions 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.²² A summary of the issues raised in submissions and the Commission's response to each issue is contained in **Appendix B**.

On 13 February 2014, the Commission 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 public forums, where appropriate.

The Commission held a public forum on 19 May 2014 to provide an opportunity for stakeholders to share their views on the scope of 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 has also received comments on the rule change request via CALC's campaign website "www.fixit.org.au". Nine 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 customers to have certainty in their energy costs. The emails were largely supportive of the proposed rule. The Commission has taken the views expressed in these emails into account in making this draft 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 1,347 petition responses, which were passed onto the Commission by CALC, supporting this statement. The Commission has taken these petition responses into account in making this draft determination.

22 www.aemc.gov.au.

1.6 Consultation on draft determination

The Commission invites submissions on this draft determination, including its draft rule, by **11 September 2014**.

Any person or body may request that the Commission hold a hearing in relation to the draft determination. Any request for a hearing must be made in writing and must be received by the Commission no later than **7 August 2014**.

Submissions and requests for a hearing should quote project number "RRC0001" and may be lodged online at www.aemc.gov.au or by mail to:

Australian Energy Market Commission
PO Box A2449
SYDNEY SOUTH NSW 1235

2 Draft rule determination

The Commission has found that some consumers could be better informed about the terms and conditions of their *market retail contracts*, particularly with respect to whether prices can vary during fixed periods. The Commission has therefore made a more preferable draft rule to improve the information that retailers provide to consumers at key times in their decision making in relation to whether prices can vary in their *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 draft determination, including the reasoning for its decision.

Appendix A sets out further detail regarding the legal requirements for the making of this draft 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").²³ 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.”²⁴

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").²⁵

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

²³ In accordance with section 236(1) of the Retail Law.

²⁴ See section 13 of the Retail Law.

²⁵ See section 236(2)(b) of the Retail Law.

test have been met.²⁶ 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.

The Commission can also make a rule that is 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.²⁷ Further discussion on how 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.²⁸ 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.²⁹

The Commission considers that, where feasible, competitive markets provide the best means of promoting efficiency. Where competition is effective, retailers will have

²⁶ That is, the legal tests outlined in section 236(1) and 236(2)(b) of the Retail Law.

²⁷ See section 244 of the Retail Law.

²⁸ 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.

²⁹ "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 *allocative* and *productive efficiency* are sustained over time with changing technology and consumer tastes and preferences. Investment and innovation are integral to *dynamic efficiency*.

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.

The rule change request seeks 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 has 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 has considered the following matters in assessing the proposed rule against the consumer protections test:

- 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 Australian Consumer Law), 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).³⁰

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.³¹ 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.

Submissions on the Commission's assessment framework

Most submissions from stakeholders were supportive of the Commission's proposed assessment framework.³² Some consumer groups set out specific consumer protections that they considered the Commission should have regard to in its consideration of the consumer protections test. The South Australian Council of Social Service (SACOSS) noted a jurisdictional requirement in South Australia for each retailer to offer a *market retail contract* with no exit fees.³³ CALC and CUAC and UnitingCare Australia suggested the AEMC consider consumer protections in overseas jurisdictions and Victorian consumer protections such as the Victorian unfair contract terms legislation and the former *Fair Trading Act 1991 (Victoria)*.³⁴

EnergyAustralia considered that the Commission should consider the implicit consumer protections provided in a framework that encourages innovation, competition and efficiency.³⁵

The Commission notes that it is not required to consider international consumer protections or former laws in non-NECF jurisdictions as part of its consideration of the consumer protections test. The Commission also notes 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. The Commission notes however that it has considered the development of consumer protections relevant to this rule change request in a range of international jurisdictions, including the UK.

³⁰ 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.

³¹ Ibid.

³² See for example the submissions of the Australian Energy Regulator at page 2, Alinta Energy at page 1 and Lumo Energy at page 1.

³³ See the submission of the South Australian Council of Social Service at page 7.

³⁴ See the submission of CALC and CUAC at page 4 and UnitingCare Australia at page 4.

2.3 Submissions on the proposed rule

As noted above, the Commission received 38 submissions on its consultation paper which are available on the AEMC website.

The submissions generally fell into three broad categories in relation to the proposed rule:

- consumer group submissions; which generally agreed with the issues raised in the rule change request and supported the proposed rule as the solution to these issues. A number of these submissions emphasised problems with the provision of information to consumers and some of these submissions proposed alternatives to the proposed rule which involved improving the information provided to consumers;³⁶
- retailer submissions; which generally did not agree that there were issues raised in the rule change request that required a change to the retail rules;³⁷ and
- other submissions; which generally considered that an approach that improves the information provided to consumers would be a more appropriate and proportionate response to the issues raised than the proposed rule. These included submissions from the Australian Energy Regulator, Ombudsmen and jurisdictional energy departments.³⁸

The Commission has outlined key points raised by submissions in these categories throughout this draft determination in relation to each of the issues raised in the rule change request and the proposed rule. As noted above, a summary of the issues raised in submissions and the Commission's response to each issue is also contained in **Appendix B**.

³⁵ See the submission of EnergyAustralia at page 8.

³⁶ See for example the submissions of CALC and CUAC, UnitingCare Australia, the South Australian Council of Social Service, the Queensland Council of Social Service, the Public Interest Advocacy Centre, Major Energy Users, Business SA, Consumers SA, the Tasmanian Council of Social Service, the Council of Social Service of New South Wales, the Ethnic Communities' Council of NSW and the Queensland Association of Independent Legal Services.

³⁷ See for example the submissions of Simply Energy, EnergyAustralia, Origin Energy, AGL, Lumo Energy, Red Energy, Alinta Energy, Ergon Energy and the Energy Retailers' Association of Australia.

³⁸ See for example the submissions of the Australian Energy Regulator, the Energy and Water Ombudsman of South Australia and the Energy and Water Ombudsman of Victoria, the Energy and Market Programs Division of the South Australian Department for Manufacturing Innovation, Trade, Resources and Energy and the Victorian Department of State Development, Business and Innovation.

2.4 The Commission's draft rule determination

After considering the range of issues raised in the rule change request, the Commission considers that the issues that require a regulatory response are narrower than those raised in the rule change request.

The Commission considers that the key issue that requires a regulatory response is that some consumers could be better informed about the terms and conditions of their *market retail contracts*, particularly with respect to whether prices can vary during fixed periods.

The Commission considers that its response to this issue should be proportionate and consistent with the promotion of consumer engagement and competitive retail energy markets. The Commission considers that a proportionate approach would be to promote transparency and better information for consumers in relation to the ability for prices to vary during fixed periods in *market retail contracts*.

The Commission has therefore decided to make a more preferable draft rule by amending the retail rules to:

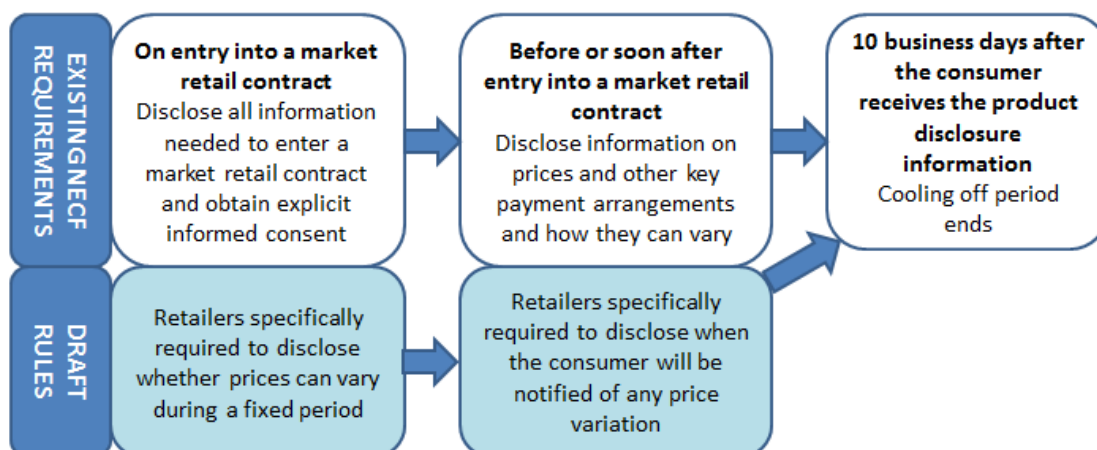
- include a new rule 46A of the retail rules that specifically requires retailers to disclose to consumers any term or condition that provides for the variation of tariffs, charges and benefits (that is, prices) as part of the existing requirement to obtain explicit informed consent from consumers to the entry into a *market retail contract*; 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.³⁹

The Commission's draft rule includes references to tariffs, charges and benefits as they form components of the price paid by consumers under *market retail contracts*.

Figure 2.1 outlines how the Commission's more preferable draft rule would operate.

³⁹ See rule 47 of the retail rules.

Figure 2.1 The changes under the more preferable draft rule



It is proposed that this rule would commence six months following the publication date of the Commission's final rule determination to allow time for retailers to implement changes to comply with the new requirements. The final rule determination is expected to be published in late 2014.

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. More informed consumers are likely to make choices in retail energy markets which 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 meet their preferences. These 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.

The Commission also considers that its more preferable rule is compatible with the application and development of consumer protections for small customers. This is because its more preferable 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.

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

2.5 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 the way in which 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*;
- discusses stakeholder submissions on the issue;
- outlines the Commission's analysis of the issue; and
- provides the Commission's views 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 state 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.⁴⁰ CALC and CUAC argue that it is not efficient for consumers to bear these risks.

In making this point CALC and CUAC argue 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 argue, would reduce the prices paid by consumers in the fixed periods of *market retail contracts*.⁴¹

3.2 Stakeholder submissions

3.2.1 Consumer group submissions

A number of submissions from consumer focussed organisations, including CALC and CUAC, supported the view that the current retail rules have resulted in an inefficient allocation of risk in fixed period *market retail contracts*.⁴²

⁴⁰ See page 11 of the CALC/CUAC rule change request.

⁴¹ See page 11 and pages 16 to 17 of the CALC/CUAC rule change request.

⁴² See for example the submissions of CALC and CUAC at page 5, the Tasmanian Council of Social Service at page 1, UnitingCare Australia at page 5, Council of the Ageing Queensland at page 1, the Public Interest Advocacy Centre at page 3, UnitingCare Wesley Bowden at page 1, the Ethnic Communities Council of NSW at page 2 and the Queensland Association of Independent Legal Services at page 2.

The consumer groups considered that it is economically efficient that the party most willing and able to manage risks does so.⁴³ CALC and CUAC consider that the key consideration for determining the "most willing and able" party to bear risks is to consider the parties' ability to manage risks, *relative* to each other.⁴⁴ Given this, CALC and CUAC and other supporting consumer group submissions argue that it is more efficient for retailers to bear the risks associated with the supply of energy in fixed period *market retail contracts*.⁴⁵

Many of the consumer groups considered that it is unfair that consumers should bear risks when retailers have greater resources available to manage those risks.⁴⁶ A number of consumer groups also noted that vulnerable consumers are poorly placed to bear risks associated with cost increases in the supply of energy.⁴⁷

The Public Interest Advocacy Centre (PIAC) emphasised the economic analysis provided in the rule change request, which suggested that a retailer's ability to vary prices in *market retail contracts* reduces competitive pressures on retailers to assess and properly manage risk.⁴⁸ PIAC argued that, as a result, price variation clauses make *market retail contracts* less efficient.

CALC and CUAC also rejected the notion that currently available *market retail contracts* that allocate risk to consumers in varying degrees reflect consumer preferences. CALC and CUAC state that the likelihood that consumers are generally aware of the risk profiles of different market offers is very low.⁴⁹

3.2.2 Retailer submissions

Retailers noted that the role of the retailer in the market is to manage risks on behalf of consumers. However, the retailers also noted that some risks are outside of their control and that it is more efficient for the costs associated with these risks to be passed on to consumers.⁵⁰

Simply Energy considered that the current retail rules, in conjunction with competitive market discipline and the ACL, are resulting in an efficient allocation of risks between retailers and consumers.⁵¹ Simply Energy also suggested that competition forces

43 See the submissions of CALC and CUAC at page 5, the Public Interest Advocacy Centre at page 3 and UnitingCare Australia at page 5.

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

45 See the submissions of CALC and CUAC at page 5, the Public Interest Advocacy Centre at page 3, the Council of the Ageing Queensland at page 1 and UnitingCare Australia at page 5.

46 See for example the submissions of National Seniors Australia, the Queensland Association of Independent Legal Services, UnitingCare Australia.

47 See for example the submissions of National Seniors Australia at pages 1 and 2 and the Tasmanian Council of Social Service at page 1.

48 See the submission of the Public Interest Advocacy Centre at page 4.

49 See the submission of CALC and CUAC at page 6.

50 See for example the submissions of Origin Energy at page 4 and EnergyAustralia at page 4.

51 See the submission of Simply Energy at Part B - 1.2.

retailers to manage risks when it is cost effective for them to do so, but that price variation clauses are used to allocate part of the risk from changes outside a retailers' control to consumers.⁵²

Similarly, EnergyAustralia stated:

“Adjusting prices throughout the life of the contract allows retailers to pass on only actual changes (including reductions resulting from a decline in wholesale energy costs or regulatory measures such as the potential removal of the carbon tax), rather than on retailers' predictions of what costs will be at a point in the future.”

Most retailers submitted that they generally only vary prices once a year, typically in line with changes in network prices which they are unable to predict or manage.⁵³ Some retailers noted that the need to vary prices to reflect costs outside of a retailer's control is tempered by the need to provide stability in prices for consumers.⁵⁴

Most retailers considered that the rule change request had not proven that there is a failure in the market which is resulting in an inefficient allocation of risk in *market retail contracts*. The Energy Retailers' Association of Australia (ERAA) argued that the evidence provided in the rule change request, including a case study and a theoretical discussion of the proposed rule, did not provide evidence to support the view that there is a problem in retail energy markets that should be addressed.⁵⁵

3.2.3 Other submissions

A number of submissions from stakeholders other than retailers and consumer groups also considered this issue. The Australian Energy Regulator (AER) commented that a number of risks, including those relating to network prices, are largely outside of the control of retailers.⁵⁶ The AER noted:

“Network costs are set by the AER through five year regulatory determination processes and vary year-to-year in line with annual pricing proposals (also approved by the AER). The AEMC notes that retailers currently have limited scope to manage this variability or smooth out costs within the five year regulatory period or between such periods. Distributors may also submit cost pass through applications to the AER to deal with unanticipated cost increases and any approved amounts are able to be passed on to retailers and in turn customers. This is likely to make it difficult for retailers to efficiently predict or manage the level of these costs, or changes in these costs. ”

52 Ibid.

53 See the submissions of EnergyAustralia at page 5 and Alinta Energy at page 3.

54 See for example the submission of Alinta Energy at page 3.

55 See the submission of ERAA at page 5.

56 See the submission of the AER at page 3.

The Energy Markets and Programs Division of the South Australian Department for Manufacturing, Innovation, Trade, Resources and Energy (South Australian Department) considered that in South Australia retailers have responded to consumer preferences for different risk appetites by offering a range of different contracts, including two fully fixed price offers.⁵⁷

3.3 The Commission's analysis

3.3.1 Does retailers' abilities to vary prices result in less efficient prices for consumers?

The Commission considers 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. Not managing these risks (and therefore passing on inefficient costs) would expose the retailers to the competitive threat that other retailers would have lower costs and those other retailers would therefore secure greater market share and profits. In other words, the competitive process should discipline the behaviour of all retailers in the market to reflect efficient costs by efficiently managing or passing on risks in their market offers.

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 the costs of purchasing energy (electricity or gas) in wholesale markets from generators of electricity or suppliers of gas and the retail costs incurred in the sale of electricity or gas to consumers;
- Regulated network costs: which are the costs of transporting energy from generators or suppliers to consumers. These include costs associated with the building and operation of electricity transmission and distribution networks and gas pipeline networks, including a return on capital; and
- Government policy costs: which include costs resulting from policies of the Commonwealth and/or State and Territory governments. The majority of these costs arise from environmental policies or programmes that directly impact energy markets.⁵⁸

⁵⁷ See the submission of the Energy Markets and Programs Division of the South Australian Department for Manufacturing, Innovation, Trade, Resources and Energy at page 2.

⁵⁸ For example, a carbon pricing mechanism, the Renewable Energy Target which includes the large-scale renewable energy target and the small-scale renewable energy scheme and the various state and territory feed-in tariff and energy efficiency schemes.

A retailer's ability to manage risks varies for these different costs. This is due to the different tools available to retailers to manage these costs. For some costs, such as competitive market costs, there are many tools available to retailers to manage risks, including creating efficiencies in operating costs, vertical integration and obtaining hedging contracts. For regulated network costs, as noted by the AER, few tools exist for retailers to manage risks. In general, for government policy costs, market based policies allow a greater ability to manage risks than non-market based policies, due to 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. CALC and CUAC have 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 those risks.

The Commission does not agree with this view. The Commission considers that some risks associated with the supply of energy to consumers are so far outside of the control of retailers that the only means of managing these risks is to pass through changes in costs to consumers as they incur them, or alternatively build a "risk premium" into retail energy prices, if consumers desire a more stable price. The Commission considers that this is the case for most risks relating to changes in network prices and some risks relating to changes in government policy costs.

The risk premium would reflect a margin in the prices charged to consumers to account for the risk that the relevant costs outside of the retailer's control will rise. This would occur even if the retailer is in a slightly better position than the consumer to manage the specific risk. The Commission also notes that consumers have the ability to manage changes in costs by varying their consumption.

In this context, imposing a requirement on retailers to fix their prices is unlikely to promote efficient outcomes. A more detailed analysis of the impact of requiring retailers to manage all risks during fixed periods in *market retail contracts* is provided in Chapter 7 in the Commission's assessment of the proposed rule.

The Commission notes that, even though retailers are able to pass on increased costs in the form of price rises in fixed period *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. This reflects the views provided by retailers who submitted that generally only costs outside of their control are passed on in the form of price variations.

The Commission therefore considers that there is insufficient evidence to show that the ability of retailers to vary prices during fixed periods in *market retail contracts* is resulting in retailers passing through an inefficient allocation of risks and costs to consumers.

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

A key indicator of the existence of a competitive market is the existence of a range of products and services that meet consumer preferences.⁵⁹ The Commission considers that, in order to conclude that price variations in *market retail contracts* are negatively affecting competition and the efficient allocation of risk, a strong indicator would be the degree to which the current allocation of risks and costs in *market retail contracts* is significantly different from consumer preferences.

Almost half of the electricity contracts available in Sydney in July 2014 were fixed period contracts in which the price could vary during the fixed period. Over 95 per cent of the available fixed period contracts did not have a fixed price. In these contracts, risks associated with increases in the cost of supplying energy, to the extent that they are not tempered by competition, are borne by consumers. Two of the available fixed period 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 are borne by retailers. Similar fully fixed price contracts are available in Victoria, South Australia, and most of New South Wales.

It is evident from the terms of the available range of market offers that retailers generally manage some risks (e.g. risks associated with changes in wholesale market costs) and manage others to a lesser degree or not at all (e.g. risks associated with changes in regulated network costs and government policy costs). However, it is also evident that there are a small number of market offers that manage more, if not all, risks for consumers for a fixed period. This can be seen in the fully fixed price market offers currently being offered by some retailers in some jurisdictions.

Quantitative and qualitative research was conducted on behalf of the Commission by Newgate Research regarding consumer preferences and experiences in retail energy markets (the Newgate consumer research report).⁶⁰ This research was conducted across Queensland, Victoria, South Australia, New South Wales and the Australian Capital Territory with 162 participants attending the qualitative forums and 2,213 participants surveyed in the quantitative research.

Consumer responses in the qualitative questions about preferences for higher fixed price contracts compared to lower variable price contracts clearly highlighted that consumers have varying risk appetites in relation to retail energy contracts. Newgate Research noted:

“Participants expressed preference for the option that met the needs of their specific household situation, with the majority of low-income households

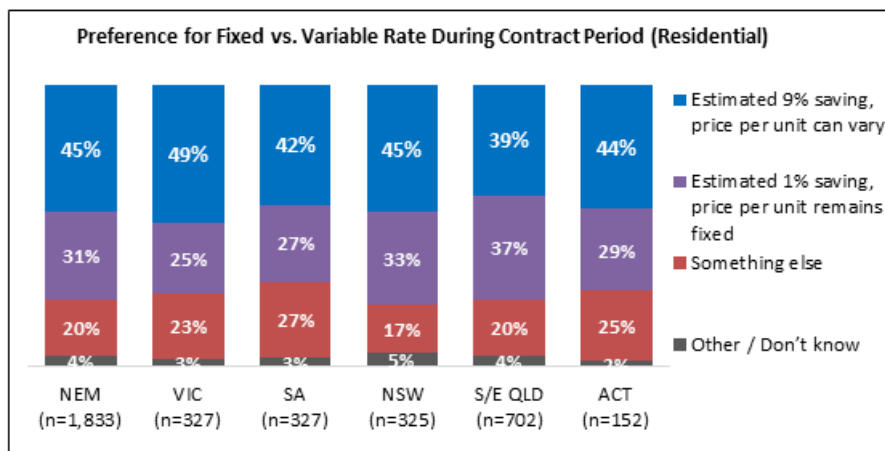
⁵⁹ The Commission undertakes a separate process to review the effectiveness of competition in retail energy markets in each NEM jurisdiction each year. More information on the 2014 Retail Competition Review can be found here: <http://www.aemc.gov.au/Markets-Reviews-Advice/2014-Retail-Competition-Review>.

⁶⁰ Consumer Research on Retailer Price Variations in Market Retail Contracts, Newgate Research, June 2014.

expressing a preference for the fixed rate. Most participants felt a range of different contract options with both fixed and variable rates per unit of energy should be available for consumers to choose from.”⁶¹

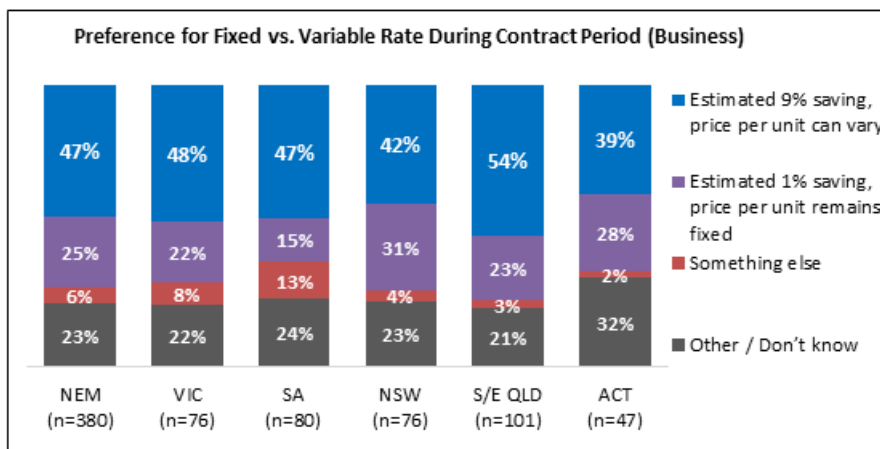
This view was also confirmed in the quantitative research with survey results indicating a mix of preferences. Almost half of the surveyed residential and small business consumers (45 per cent and 47 per cent respectively) preferred a variable rate with a lower price while a third of residential consumers and a quarter of small business consumers preferred a fixed rate with a higher price.⁶² The quantitative responses are represented in Figure 3.1 and Figure 3.2 below.

Figure 3.1 Quantitative consumer research results: Residential consumer preferences for fixed or variable energy prices



Base: All Respondents
 Q45. In principle, which of the following options would you prefer for a fixed term contract of say, two years?

Figure 3.2 Quantitative consumer research results: Small business consumer preferences for fixed or variable energy prices



Base: All Respondents
 Q45. In principle, which of the following options would you prefer for a fixed term contract of say, two years?

61 See the Newgate consumer research report at page 3.

62 Ibid at pages 18 and 19.

Further details of Newgate Research’s consumer research results can be found in the Newgate consumer research report on the AEMC website.

In a competitive market, retailers that better meet the needs of consumers in the contracts they offer will gain a competitive advantage. Different consumers will have different priorities, and this should be reflected in the range of *market retail contracts* offered by retailers to the market, including with respect to the allocation of risk in those contracts.

The Newgate consumer research clearly indicates that surveyed residential and small business consumers have varying appetites for bearing risks. Some are willing to pay more to avoid the risk of price changes, some are willing to bear greater risks to avoid paying higher prices and others are risk neutral or do not make decisions based on the risk of price changes. It appears that retail energy markets are delivering a range of different retail energy contracts that meet consumers' preferences with respect to the allocation of risk in those contracts, including a limited number of fully fixed price contracts.

The Commission also notes that a range of other retail energy contracts exist that allow consumers to bear different levels of risk, including fixed period *market retail contracts* that do not contain exit fees. These no exit fee contracts effectively provide consumers with the ability to switch retailers without any penalty should they be unsatisfied with price variations or with the way their retailer is allocating risks and costs to them. The absence of exit fees on these contracts also place competitive pressure on retailers to only pass through efficient costs, as consumers are able to freely switch from these contracts.

The Commission therefore considers that as consumers have access to a range of contract types which reflect 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 notes however that the Newgate consumer research does show there is a significant proportion of consumers that value price certainty in their energy contracts.⁶³ Given this, it may be that the competitive market is not currently delivering the level of fixed price contracts that one would expect to meet those consumers' preferences. Further discussion on this issue is set out in Chapter 5.

3.4 The Commission's views on whether the issue requires a regulatory response

The Commission considers that there is not sufficient evidence to show that the ability of retailers to vary prices is of itself allowing retailers to pass through inefficient costs to consumers. The Commission also notes there is a range of contracts available which appear to largely reflect the varying preferences of consumers with respect to the level of risk they are willing to bear in *market retail contracts*. Given this, the Commission considers that there is not sufficient evidence to support the view that there is a market

⁶³ See the Newgate consumer research report at pages 12 and 13..

failure in the allocation of risks between retailers and consumers in *market retail contracts*.

Therefore, the Commission does not consider that a regulatory response is required to address this issue in the rule change request.

The Commission considers however that greater consumer awareness and engagement could promote the provision of *market retail contracts* which better reflect consumer preferences. The Commission considers that its more preferable draft rule, which would specifically require retailers to disclose terms or conditions that provide for the variation of prices on contract entry, is likely to improve transparency with respect to the ability of retailers to vary prices. This improved transparency is likely to improve the competitive pressure on retailers to only pass through efficient costs and also allow consumers to better communicate their preferences to retailers with respect to the level of risk that they are comfortable with bearing in their retail energy contracts.

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

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;
- discusses stakeholder submissions on the issue;
- outlines the Commission's analysis of the issue; and
- provides the Commission's views 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 consider 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 practices are occurring in retail energy markets.

CALC and CUAC noted in their rule change request that consumers enter into energy contracts bearing in mind the price and the volume of energy they intend to consume at that price. They consider that, after a price rise during the fixed period of a *market retail contract*, the consumer might react in a number of ways, including: by consuming less energy; paying more to consume the same amount of energy; or some degree of both of these responses.⁶⁴ CALC and CUAC argue that none of these consumption responses is efficient for the market or beneficial for consumers.

4.2 Stakeholder submissions

4.2.1 Consumer group submissions

Few consumer groups focussed on the issue of "price baiting" by retailers. One exception was SACOSS, who considered "the fundamental issue raised in the rule change proposal to be the potential economic losses for consumers due to the ability of retailers to, in effect, capture consumers and exploit both real and perceived barriers to

⁶⁴ 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.

switch away to lower prices."⁶⁵ PIAC also noted that it is aware of a number of consumers who have been subject to price baiting practices from retailers.⁶⁶

4.2.2 Retailer submissions

As noted in Chapter 3, most retailers submitted that they generally only vary prices once a year, typically in line with changes in network charges and other costs.⁶⁷ They submitted they do not increase prices in order to gain greater profits from consumers on fixed period *market retail contracts*.

A number of retailers also submitted that the ACL adequately protects consumers from price baiting practices to the extent that they occur.⁶⁸

4.2.3 Other submissions

Both the Victorian and South Australian Energy and Water Ombudsmen noted that they receive complaints from consumers regarding price rises in *market retail contracts*.⁶⁹ However, they noted that most of these cases are the result of poor information or mis-communication between retailers and consumers.

4.3 The Commission's analysis

The Commission notes that inefficient consumption decisions are likely to occur where retailers are engaging in price baiting practices, such as pricing contracts with low introductory rates that do not reflect the cost of supplying energy and then increasing prices significantly after the customer has entered the contract. The Commission notes that this may occur where competition is not effective.⁷⁰ Inefficient consumption decisions may also occur on a more marginal level where consumers receive notification of a price variation a number of months after their price has varied.

The Commission has received limited evidence in submissions and discussions with stakeholders that retailers are engaging in widespread price baiting practices. The Commission has 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 by retailers in retail energy markets.

⁶⁵ See the submission of the South Australian Council of Social Service at page 17.

⁶⁶ See the submission of the Public Interest Advocacy Centre at page 4.

⁶⁷ See the submissions of EnergyAustralia at page 5 and Alinta Energy at page 3.

⁶⁸ See submissions from: Origin Energy, p. 5 and 7; Simply Energy, part B 1.2; Red Energy, p. 3.

⁶⁹ See the submissions of the Energy and Water Ombudsman of Victoria and the Energy and Water Ombudsman of South Australia.

⁷⁰ The Commission undertakes a separate process to review the state of retail competition in electricity and gas markets in NEM jurisdictions each year. The Commission's 2014 Retail Competition Review report will be published by September 2014.

The Commission also notes the submissions from retailers that stated that they do not engage in price baiting practices. Further, the submissions from the South Australian and Victorian Energy and Water Ombudsmen both note that they receive complaints from consumers regarding price rises. However, these submissions do not provide support for the view that retailers are engaging in price baiting practices.

The Commission also notes the submissions of PIAC and SACOSS, which support the view that price baiting practices are occurring in retail energy markets. However, the Commission notes that these submissions do not provide evidence to support the view that this practice is widespread.

4.4 The Commission's views on whether the issue requires a regulatory response

The Commission considers that there is not sufficient evidence to conclude that retailers are engaging in widespread price baiting practices. As a result, the Commission does not consider that there is sufficient evidence to show that consumers are making inefficient consumption decisions as a result of price variations in *market retail contracts*. Further, where price baiting practices are occurring, the Commission notes that provisions in the ACL relating to unfair contract terms, misleading and deceptive conduct and price baiting itself, already provide protections from this behaviour.

The Commission notes that the Australian Consumer and Competition Commission is currently taking action in two cases against energy retailers under the misleading and deceptive conduct provisions of the ACL.⁷¹ These cases involve alleged misleading communication with consumers regarding prices and discounts. The Commission notes that such actions can help to improve retailers' communications with consumers in the representations they make regarding prices, and the variability of prices, in *market retail contracts*.

To the extent that consumers may be making inefficient consumption decisions due to a delayed notification of a price change, the Commission does not consider that this would be a source of significant or prolonged inefficiency. This is because consumers are required to receive notification of a price change by their next bill under the retail rules. Given this, the Commission does not consider that a regulatory response is required to address this issue raised in the rule change request.

⁷¹ This includes one action brought against AGL South Australia Pty Ltd in December 2013 (see <http://www.accc.gov.au/media-release/accc-takes-action-against-agl-south-australia-for-alleged-false-or-misleading-representations>) and one action brought against Origin Energy Limited in May 2014 (see <http://www.accc.gov.au/media-release/accc-takes-action-against-origin-for-alleged-false-or-misleading-representations>).

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;
- discusses stakeholder submissions on the issue;
- outlines the Commission's analysis of the issue; and
- provides the Commission's views 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;⁷² 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.⁷³

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. This is, they argued, because consumers will not spend further time and effort in finding the best retail contract for them because they expect that their time and effort will be wasted as the new retailer will raise their prices after they switch to them.⁷⁴

⁷² See pages 17 to 21 of the CALC/CUAC rule change request.

⁷³ See page 11 of the CALC/CUAC rule change request.

⁷⁴ See pages 4 and 38 of the CALC/CUAC rule change request.

5.2 Stakeholder submissions

5.2.1 Consumer group submissions

Consumer groups broadly agreed that there is a high probability that consumers are generally not aware of the terms and conditions of the contracts they sign, including with respect to whether the price can vary during a fixed period.⁷⁵ Many submissions considered that consumers probably enter into fixed period contracts on the expectation that the price will be fixed.⁷⁶ These submissions also noted that there is a high probability that the majority of consumers are not aware that fully fixed price retail energy contracts are available in the market for those consumers that prefer greater price certainty.⁷⁷

Consumer groups outlined a number of factors that they consider have contributed to consumers' lack of understanding of a retailer's ability to vary prices in fixed period *market retail contracts*. These include that:

- consumers do not experience similar price variations in contracts in other industries;⁷⁸
- there are low levels of literacy among some consumers and vulnerable consumers such as the elderly or non-English speaking consumers may not understand their contract terms and conditions;⁷⁹
- independent and commercial price comparator websites are not effective, often providing far too many choices to be useful to consumers and there are often problems with the transparency and consistency of such websites;⁸⁰
- many transactions occur as a result of door to door sales in which few options and/or poor information are provided to consumers;⁸¹ and
- the terms and conditions of contracts cite many different reasons as to why prices may vary.⁸²

CALC and CUAC also argue that, even if consumers are aware that prices may vary, they are unlikely to have a good understanding of the level of risk that prices will vary.⁸³

⁷⁵ See submission of CALC and CUAC at page 9.

⁷⁶ See for example the submission of UnitingCare Australia at page 7.

⁷⁷ See submission of CALC and CUAC at page 9, the submission of UnitingCare Australia at page 7.

⁷⁸ See the submission of UnitingCare Australia at page 7.

⁷⁹ See the submissions of CALC and CUAC at page 10, UnitingCare Australia at page 6, the Ethnic Communities Council of NSW at page 2 and Council of the Ageing Queensland at page 1.

⁸⁰ See submission of CALC and CUAC at page 10.

⁸¹ See submission of CALC and CUAC at page 9 and see also the submission of UnitingCare Australia at page 8.

⁸² See the submission of CALC and CUAC at page 9.

A number of consumer groups also noted that consumers are likely to be confused when the word "fixed" is used in the marketing of fixed period contracts.⁸⁴ They considered that this may lead consumers to believe that the price of energy is fixed when in fact the word "fixed" may only refer to the duration of the contract.

Consumer groups generally supported the view that a range of factors, such as wasted search costs and exit fees, also contribute to consumer disengagement in retail energy markets.⁸⁵ The Queensland Association of Independent Legal Services considered that, because prices can change at any time "advertised prices can be misleading and shopping around can be a waste of time."⁸⁶ National Seniors Australia stated:

"Exit fees create a barrier to switching electricity retailers and restrict competition. High exit fees also incentivize retailers to offer low discounted introductory prices and then increase the price."⁸⁷

The Queensland Council of Social Service (QCOSS) noted that a combination of price variations, exit fees, and late notification of price variations have "generated a degree of cynicism and a view among some consumers that the energy market is skewed in favour of retailers."⁸⁸ QCOSS also noted that the current situation "creates both practical and psychological disincentives for consumers to engage in competitive retail markets."⁸⁹

CALC and CUAC considered that, even if exit fees were to be eliminated or waived, consumers may be more likely to switch but search costs, trust, and perceptions of fairness would not be improved.⁹⁰

5.2.2 Retailer submissions

Submissions from retailers generally considered that most consumers are well informed about the terms and conditions of their retail energy contracts.⁹¹ They considered that consumers are generally aware of whether prices can vary during fixed periods in their *market retail contracts*.⁹² Retailers considered that this is due to the

83 See submission of CALC and CUAC at page 9.

84 See for example the submissions of Business South Australia at page 2, National Seniors Australia at page 2, the Ethnic Communities Council of NSW at page 1.

85 See for example the submissions of UnitingCare Australia at page 7, the Tasmanian Council of Social Service at page 2, the Queensland Association of Independent Legal Services at page 2, Consumers SA at page 3, the Queensland Council of Social Service at page 1 and CALC and CUAC at page 13.

86 See the submission of the Queensland Association of Independent Legal Services at page 2.

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

88 See the submission of the Queensland Council of Social Service at page 1.

89 See the submission of the Queensland Council of Social Service at page 2.

90 See the submission of CALC and CUAC at page 13.

91 See for example the submissions of Origin Energy at page 5, Alinta Energy at page 5, Red Energy at page 3 and Ergon Energy at page 5.

92 See submission of Origin Energy at page 5.

extensive disclosure obligations under the NECF that require retailers to properly inform consumers on matters relating to the nature of the contracts they are entering into.⁹³

AGL considered that it is likely that only a small number of consumers are not aware that prices can rise under fixed period contracts due to the experience of price rises over the last few years, together with significant media attention on the issue.⁹⁴

Alinta Energy stated in its submission:

“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 when entering into a market retail contract. Details as to tariffs and charges and how and when they may be varied is required to be specifically articulated not only in the contract terms and conditions, but also in the regulated mandatory collateral provided to consumers at the time of or immediately after entering into a market retail contract. This information is provided in the form of an Energy Price Factsheet and a single written disclosure statement.”⁹⁵

Simply Energy considered there are already too many regulatory requirements for retailers to provide information to consumers and that this is confusing consumers. Simply Energy stated:

“[R]etailers are now required to provide so much information that it is overwhelming customers and detracting from their willingness to engage with the industry. Much more information is provided than that needed to make an effective purchasing choice, and the amount of information is discouraging customers from engaging (given that their interest in the product is low to begin with).”⁹⁶

AGL and EnergyAustralia acknowledged that the energy industry is complex and that there may be a segment of the market that does not fully understand the nature of traditional fixed term energy contracts.⁹⁷ AGL and EnergyAustralia considered that to the extent there is a lack of understanding for a segment of consumers about the nature of their energy contracts, this should not be addressed by regulation. Rather any issues should be addressed by retailers working cooperatively with consumer groups and regulators.⁹⁸

A number of retailers discussed the issue of barriers to consumer participation in retail energy markets. Origin Energy noted that it is not aware of any evidence that

⁹³ See the submissions of Origin Energy at page 5, Alinta Energy at page 5 and Red Energy at page 3.

⁹⁴ See the submission of AGL at page 3.

⁹⁵ See the submission of Alinta Energy at page 5

⁹⁶ See the submission of Simply Energy at Part B - 2.

⁹⁷ See the submission of Energy Australia at page 4.

⁹⁸ See the submissions of AGL at page 1 and EnergyAustralia at page 4.

customers see little benefit in changing to a new retailer because they consider that the new retailer may vary prices.⁹⁹ Origin Energy also noted that this view is supported by high rates of customer switching in the National Electricity Market.¹⁰⁰

Simply Energy considered that:

“Search costs and transaction costs are a feature of any market and are proportional to the competitive state of a market. The more competitive the market, the higher are the search and transaction costs for consumers because there are more suppliers, products and prices to compare...

Our experience with customers is that they are very savvy - they know their rights, they are able to find the information they need, are sceptical of offers that seem too good to be true, and are ready to switch if they find a better offer or a retailer that provides them with the service they expect.”¹⁰¹

EnergyAustralia considered that, although there may be some frustration about increasing prices, consumers are "sufficiently sophisticated to enable them to make appropriate choices with regard to switching that reflect their individual views of the respective costs and benefits of switching."¹⁰²

5.2.3 Other submissions

Submissions from other stakeholders focussed on the level of consumer understanding of the terms and conditions of their retail energy contracts and the obligations in the NECF on retailers to provide consumers with information about their contracts.¹⁰³

The AER noted that the retail market is complex and understanding the detail of energy contracts may be challenging for some consumers. The AER considered that 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.¹⁰⁴ The AER noted that 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.¹⁰⁵ The AER considered that it is not clear how large this group of customers this may be. The AER also welcomed consideration of further initiatives or measures to support consumers to better identify

⁹⁹ See the submission of Origin Energy at page 5.

¹⁰⁰ Ibid.

¹⁰¹ See the submission of Simply Energy at Part B - 2.2.

¹⁰² See the submission of EnergyAustralia at page 11.

¹⁰³ See for example the submissions of the AER, the Victorian Department of State Development, Business and Innovation and the Energy Markets and Programs Division of the South Australian Department for Manufacturing, Innovation, Trade, Resources and Energy of South Australia.

¹⁰⁴ See the submission of the AER at page 4. The Energy Made Easy website can be found at www.energymadeeasy.gov.au.

¹⁰⁵ Ibid.

and understand different offerings and make more informed choices based on their preferences.¹⁰⁶

The Victorian Department of State Development, Business and Innovation (Victorian Department) noted that the Victorian Government is currently considering changes to its retail regulations to require retailers to only use the term "fixed" when contracts have a fixed period and a fixed price and to require retailers to obtain explicit informed consent to the inclusion of price variation clauses on contract entry.¹⁰⁷ The Victorian Department noted that it regularly receives correspondence from the public on issues relating to price variations, which suggests that a lack of knowledge about price rises can cause consumer disengagement from the market.¹⁰⁸

The Victorian Department also noted the take-up of fully fixed price energy contracts appears to be low.¹⁰⁹ The Victorian Department considered that a range of reasons could be causing this, including that customers do not know that these contracts exist, do not realise that their current contract allows price variations, or do not wish to pay the higher prices charged under those fixed price contracts.¹¹⁰

The South Australian Department considered that:

“While the [Retail Law] requires extensive information provision to small customers, the Division recognises that some customers may be dissuaded from actively engaging in the energy market because they are overwhelmed or confused by the information available to them or because they simply don't understand the contract terms.”¹¹¹

The Energy and Water Ombudsman of Victoria (EWOV) noted that most complaints it receives relating to price variations involve consumers who are concerned that the tariff and/or discount had changed or was not the same as they believed when they entered the contract.¹¹² EWOV suggested that consumer confusion often arises from misleading information, mis-communication or misunderstanding at the time of marketing.¹¹³ EWOV provided a number of complaints case studies which suggests that some consumers are not sufficiently informed on contract entry that prices can vary during the fixed period in the contract.¹¹⁴

106 Ibid at page 5.

107 See the submission of the Victorian Department of State Development, Business and Innovation at page 1

108 Ibid at page 2.

109 Ibid.

110 Ibid.

111 See the submission of the Energy Markets and Programs Division of the South Australian Department for Manufacturing, Innovation, Trade, Resources and Energy at page 2.

112 See the submission of EWOV at pages 1 and 2.

113 Ibid at page 2.

114 Ibid at page 4.

EWOV also noted that it receives cases from consumers who complain about being charged an exit fee after they leave a fixed-term contract following changes to their tariffs.¹¹⁵

The Energy and Water Ombudsman of South Australia noted similar views and indicated that it receives a number of enquiries per week where "customers were under the impression that 'fixed term' meant 'fixed price'."¹¹⁶

5.3 The Commission's analysis

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

The Commission considers that it has 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 contribute to forming this view. Those findings include:

- consumers are generally satisfied with their current retailer;¹¹⁷
- 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;¹¹⁸ 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.¹¹⁹

The Commission also notes that the submissions it received from consumer groups in relation to this issue generally did not focus on the impact of price variations on consumer participation in retail energy markets. The focus of many consumer group submissions regarding this issue 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 notes that these views are consistent with the findings of its consumer research. These

115 Ibid at pages 2 and 3.

116 See the submission of the Energy and Water Ombudsman of South Australia at page 2.

117 See the Newgate consumer research report at page 10.

118 Ibid at pages 16 and 17.

119 Ibid at page 22.

points were also raised in submissions from the AER, Ombudsmen, the South Australian and Victorian Departments, and some retailers.¹²⁰

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

The Commission considers that, even though it does not appear that price variation clauses are causing significant consumer disengagement from retail energy markets, the level of consumer understanding of retail energy contracts with respect to price variations is low. Poor information and low levels of transparency with respect to the terms and conditions in retail energy contracts have the potential to hinder competition in retail energy markets.

If consumers' expectations and preferences are to be met, retailers need to be able to understand what consumers' preferences are. Consumers tell retailers what they want through the decisions that they make. If consumers do not have all the relevant information, time or understanding 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 is likely to lead to the development of energy contracts by retailers that may not meet the needs and preferences of consumers.

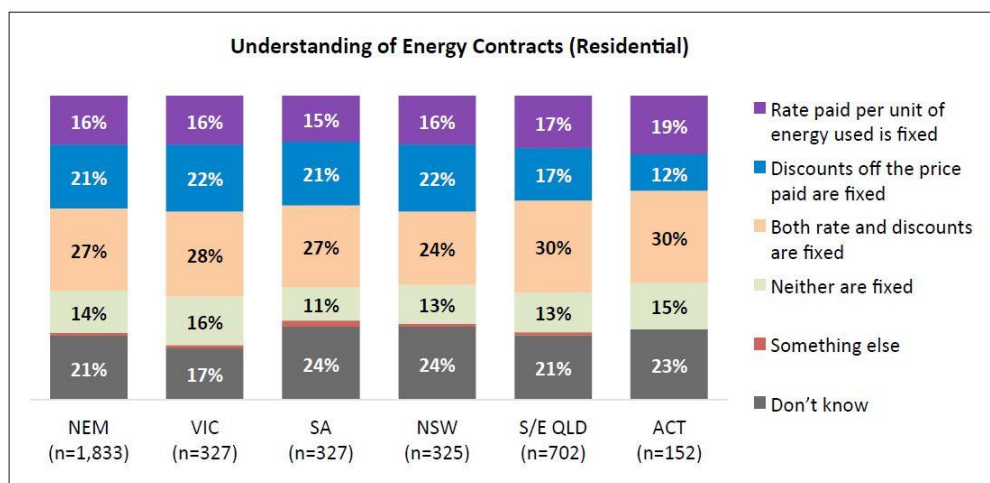
It is clear from the Newgate consumer research that some consumers appear to have limited information or knowledge concerning *market retail contracts*. In particular, when entering contracts with a fixed period, some consumers believe that the prices will be fixed when in fact they are not.

Both the qualitative and quantitative results suggest there is some confusion about what elements of a *market retail contract* are subject to variation during a fixed period.¹²¹ Surveyed participants to the quantitative research were asked what they would expect to be fixed in their energy contracts. The results are shown in Figure 5.1 and Figure 5.2 below.

¹²⁰ See the submissions of the AER at pages 4 and 5, the Victorian Department of State Development, Business and Innovation at page 2, the Energy Markets and Programs Division of the Department for Manufacturing, Innovation, Trade, Resources and Energy of South Australia at page 2, EWOV at pages 1 and 2, AGL at page 1 and EnergyAustralia at page 4.

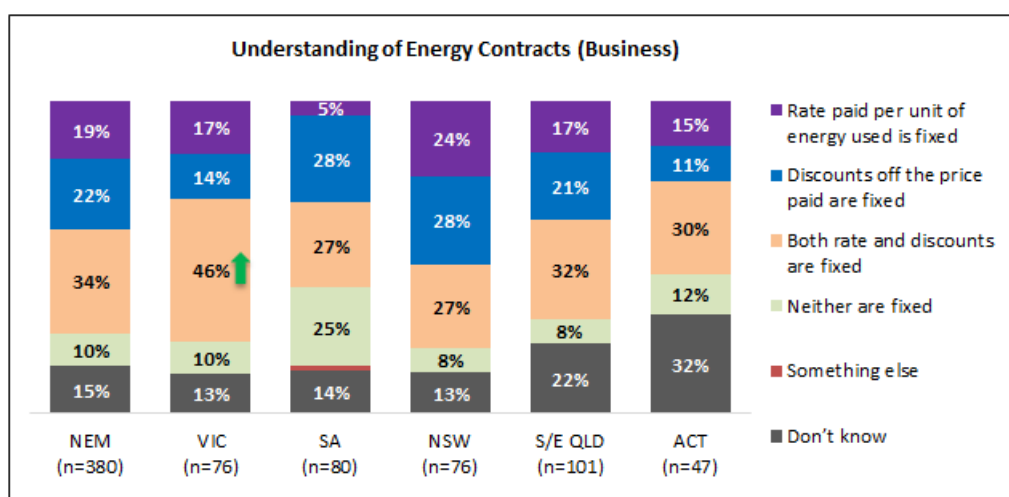
¹²¹ See the Newgate consumer research report at pages 12 to 14.

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?

Figure 5.2 Quantitative consumer research results: What is fixed in your business energy contract?



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

The qualitative research found that most participants had not given much thought to which elements of the contract might remain fixed during a fixed period and which might vary.¹²² 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.¹²³ However, on further discussion, the majority clarified that actually they had hoped the price would be fixed because it would shield them

¹²² Ibid at page 13.

¹²³ Ibid.

from rising energy prices, but they assumed that, realistically, the price would probably not be fixed in practice.¹²⁴

Lower income participants were more likely to believe that the rate they would pay per unit of energy they consumed would be fixed.¹²⁵ 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.¹²⁶

It is also notable that when consumers were asked what they did in response to price variations, only two per cent of residential and small business consumers in the quantitative research noted that they did nothing because price changes were within the terms of their contract.¹²⁷ This may imply that only a small proportion of consumers are aware of their retailer's ability to vary prices and that price variation clauses may not have been clearly communicated to many consumers on contract entry.

5.4 The Commission's views on whether the issue requires a regulatory response

The Commission considers that there is not sufficient 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 during fixed periods in *market retail contracts*. The Commission notes that this has the potential to affect consumers' decision making and could lead to consumers selecting energy contracts that do not reflect their preferences, which could lead to consumer disengagement.

Accordingly, the Commission considers that poor information regarding the inclusion of price variation clauses may pose a risk to consumer engagement in retail energy markets. Given this, the Commission considers that a regulatory response is required to better equip consumers to make informed decisions in relation to the way prices may vary in fixed period *market retail contracts*.

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

124 Ibid.

125 Ibid at page 14

126 Ibid.

127 Ibid at pages 16 and 17.

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*;
- discusses stakeholder submissions on the issue;
- outlines the Commission's analysis of the issue; and
- provides the Commission's views 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 in the general law, including 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 notification of price variations, expressly permits retailers to include terms that allow for price variations during fixed periods in *market retail contracts*.¹²⁸ As a result, they argued that the protections from unfair contract terms under the ACL do not apply.¹²⁹

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.¹³⁰ 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.

¹²⁸ See page 44 of the CALC/CUAC rule change request.

¹²⁹ See page 44 and more generally Appendix 2 to the CALC/CUAC rule change request.

¹³⁰ See Appendix 2 to the CALC/CUAC rule change request.

6.2 Stakeholder submissions

6.2.1 Consumer group submissions

There were different views from consumer focussed organisations in relation to whether the application of the unfair contract terms provisions in the ACL should be clarified. SACOSS and the Tasmanian Council of Social Service (TasCOSS) both noted that any uncertainty in the application of the ACL is unhelpful and should be addressed in some form.¹³¹

However, CALC and CUAC noted that, even if the application of the ACL was clarified, due to the limited case law on the subject there would remain some uncertainty about how this would affect price variation clauses in *market retail contracts*.¹³²

The Major Energy Users considered that making such amendments "would not sufficiently address the problem" identified.¹³³ Business SA noted that it does not support making such amendments "without first testing whether existing regulation is in fact capable of addressing the issues in question."¹³⁴

6.2.2 Retailer submissions

In general, retailers considered that the existing consumer protections in the ACL provide sufficient protections for all energy consumers. This includes the unfair contract terms provisions as well as other protections under the ACL, such as the misleading and deceptive conduct provisions.

Origin Energy did not support changing the retail rules to clarify whether the unfair contract terms provisions apply. They considered such regulatory action would be unnecessary as both the ACL and the retail rules are drafted clearly and are not inconsistent with each other.¹³⁵ Both EnergyAustralia and the ERAA considered that the unfair contract terms provisions in the ACL apply to price variation clauses in *market retail contracts* and are not inconsistent with the provisions of the retail rules.¹³⁶

6.2.3 Other submissions

The AER noted there is a degree of uncertainty regarding the application of the unfair contract terms provisions to price variation clauses in *market retail contracts* and that the

¹³¹ See the submissions of the South Australian Council of Social Service at page 15 and the Tasmanian Council of Social Service at page 3.

¹³² See submission of CALC and CUAC at page 19.

¹³³ See the submission of Major Energy Users at page 2.

¹³⁴ See the submission of Business SA at page 3.

¹³⁵ See submission of Origin Energy at page 8.

¹³⁶ See the submissions of EnergyAustralia at pages 13 and 14 and the Energy Retailers Association of Australia at pages 2 and 3.

application of the ACL provisions has not yet been tested in the courts.¹³⁷ Given this, the AER considered that the unfair contract terms provisions "should not be relied upon to address the issues raised by CALC and CUAC, particularly if other actions can be taken to more effectively address these concerns and that do not require a change to the retail rules."¹³⁸

6.3 The Commission's analysis

The Commission considers that there is a degree of uncertainty in the application of the unfair contract terms provisions in the ACL. This is because rule 46 of the retail rules appears to imply rather than "expressly permit" retailers to include terms that allow for price variations during fixed periods in *market retail contracts*. 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.¹³⁹

The Commission notes 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. Even if this were the case, the Commission does not have power to amend the Retail Law to remove this potential source of uncertainty in the application of the unfair contract terms provisions in the ACL.

The Commission also notes that the unfair contract terms provisions in the ACL apply only to individuals and not businesses, whereas the consumer protections in the NECF apply to both individuals and small businesses. Therefore, clarifying the application of the ACL may not protect all small customers under the NECF. However, the Commission notes that the Treasury of the Commonwealth Government is currently consulting on a proposal to extend the unfair contract terms provisions to protect small businesses.¹⁴⁰

6.4 The Commission's views on whether the issue requires a regulatory response

The Commission has outlined in Chapter 4 that there is insufficient evidence to conclude that retailers are engaging in price baiting practices on a widespread scale. Given this, while the Commission acknowledges that there is uncertainty in the application of the unfair contract terms provisions, the Commission considers that

137 See the submission of the AER at pages 5 and 6.

138 See the submission of the AER at page 6.

139 See section 26(1)(c) of the ACL.

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

there is insufficient evidence to support the need to clarify this uncertainty to address the issues raised by CALC and CUAC.

The Commission also 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, which may expressly permit price variation clauses in *market retail contracts*. Further, the implications of application of the unfair contract terms provisions are yet to be tested in the courts. As such, it is unclear whether a court would find price variation clauses in *market retail contracts* to be unfair. Amending the retail rules before the courts have tested the implications of the unfair contract terms provisions could lead to perverse outcomes.

Further, amending the retail rules to clarify the uncertainty in the application of the unfair contract term provisions may also 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.

Therefore, the Commission does not consider that a regulatory response should be undertaken to address the uncertainty in the application of the unfair contract terms provisions in the ACL.

7 The Commission's assessment of the proposed rule

This Chapter:

- provides a summary of CALC and CUAC's proposed rule and proposed alternative rules;
- discusses stakeholder submissions on the proposed rule and proposed alternative rules;
- outlines the Commission's analysis of the proposed rule and proposed alternative rules; and
- sets out the Commission's determination on the proposed rule and proposed 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*.¹⁴¹

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”;¹⁴² and
- removing the current rule 46 so that the ACL provisions relating to “unfair” terms in consumer contracts would then apply.¹⁴³ CALC and CUAC noted that this is their least preferred option.¹⁴⁴

7.2 Submissions on the impact of the proposed rule and proposed alternative rules

7.2.1 Consumer group submissions

Most consumer focussed organisations supported the proposed rule, as they considered it would improve consumer engagement and trust in the retail energy markets.¹⁴⁵

¹⁴¹ See page 6 of the CALC/CUAC rule change request.

¹⁴² See pages 6 to 7 of the CALC/CUAC rule change request.

¹⁴³ 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.

¹⁴⁴ See page 7 of the CALC/CUAC rule change request.

Most consumer groups considered the proposed rule would result in more transparent market offers and greater consumer understanding of retail energy contracts and prices.¹⁴⁶ CALC and CUAC considered that this would lead to increased competition between retailers, putting downward pressure on energy prices.¹⁴⁷

National Seniors Australia also considered this point, noting:

“[The proposed rule] would remove the current focus on providing the lowest discounted introductory price and may force retailers to compete by providing additional value to consumers. [It] would also simplify the contracts and reduce the consumer search costs of comparing them. This could increase the likelihood that consumers will engage in the electricity market.”¹⁴⁸

CALC and CUAC and other consumer groups also noted that they considered that the proposed rule would require retailers to bear additional risks and that this would result in the inclusion of an additional risk premium on the price of fixed period *market retail contracts*.¹⁴⁹ They considered however that, "as retailers improve their processes for managing the new... risks, they can be expected to do so more efficiently and reduce their risk premiums."¹⁵⁰ Many consumer groups agreed with this view, considering that to the extent that a risk premium is included in the price for fixed period contracts, it will be largely competed away due to the proposed rule's impacts on consumer participation in energy markets.¹⁵¹

Some consumer groups considered that the proposed rule may impact smaller retailers more than larger retailers,¹⁵² while others did not.¹⁵³ CALC and CUAC considered that, even if smaller retailers are impacted more by the proposed rule, this is not a significant concern as smaller retailers do not need to offer fixed period contracts.¹⁵⁴ To support this view they cited a number of smaller retailers that do not offer fixed

145 See for example the submissions of Consumers SA, National Seniors Australia, CALC and CUAC, the Ethnic Communities Council of NSW, the Queensland Association of Independent Legal Services, the Public Interest Advocacy Centre, the Queensland Council of Social Service, the Council of Social Services of NSW and the Council of the Ageing Queensland.

146 See the submissions of CALC and CUAC at page 15, Consumers SA at page 1, the Ethnic Communities Council of NSW at page 2, the Queensland Council of Social Service at page 2, the Council of Social Services of NSW at page 1 and the Council of the Ageing Queensland at page 2.

147 See the submissions of CALC and CUAC at page 15.

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

149 See the submissions of CALC and CUAC at page 7 and UnitingCare Australia at page 5.

150 See the submission of CALC and CUAC at page 7. This point is also made by other consumer groups, such as UnitingCare Australia at page 5.

151 See CALC and CUAC at page 7, UnitingCare Australia at page 5, the Queensland Council of Social Service at page 2 and the Ethnic Communities Council of NSW at page 2.

152 See for example the submissions of CALC and CUAC and the South Australian Council of Social Service.

153 See for example the submissions of UnitingCare Australia and Consumers SA.

154 See the submission of CALC and CUAC at page 16.

period contracts in Victoria.¹⁵⁵ CALC and CUAC also noted that it may be appropriate for new entrant retailers who are unable to bear these additional risks to not enter the market.¹⁵⁶ UnitingCare Australia considered that the impact of the proposed rule would be the same for all retailers and any difference in the impact on retailers would be minimal.¹⁵⁷

Consumer groups had differing views on whether the proposed rule would result in retailers restricting or withdrawing some offers from the market. CALC and CUAC did not consider that retailers would withdraw fixed period offers from the market, however they noted that retailers may withdraw longer fixed period contracts from the market.¹⁵⁸ They considered that retailers generally will not have higher net costs for managing fixed period contracts as they will be able to include a risk premium in their prices.¹⁵⁹ They considered that as a result, fixed period contracts should not be withdrawn from the market unless a retailer has higher risk management costs than other retailers.¹⁶⁰ They considered that "any reduction in offers ... is likely to reflect more effective competition ... as sub-optimal offers are withdrawn from the market and those that best meet consumer needs remain."¹⁶¹

Business SA considered that the proposed rule is not an appropriate regulatory response to the issues identified.¹⁶² Business SA stated that:

“[P]rescribing the nature of products which the market can offer ... will only serve to stifle competition. The key issue of explaining what fixed term contracts entail should be addressed by way of improved product disclosure, not by limiting product offerings.”

Views on CALC and CUAC’s alternative proposed rules

Few consumer groups commented on CALC and CUAC's alternative proposal of fixing prices for the duration of fixed period contracts, but allowing for the pass-through of changes in government policy costs. Those consumer groups that did comment on this generally did not support the alternative proposed rule as the next best option, or supported the option but with reservations. SACOSS considered:

“[L]imited pass throughs may be appropriate under some circumstances. The challenge is to restrict price rises to legitimate pass throughs. However,

155 Ibid.

156 Ibid.

157 See the submission of UnitingCare Australia at page 9.

158 See the submission of CALC and CUAC at page 17.

159 Ibid.

160 Ibid.

161 Ibid.

162 See the submission of Business SA at page 1.

defining and policing these legitimate circumstances is likely to be problematic."¹⁶³

UnitingCare Australia did not consider that this alternative proposed rule would better meet the NERO. It considered that retailers are better placed to manage all upstream energy risks and consumers are unlikely to appreciate why some costs can be passed through and not others.¹⁶⁴ Consumers SA considered that the alternative proposal would "maintain the current confusion in the market over the meaning of fixed contracts".¹⁶⁵

In relation to CALC and CUAC's second alternative option of allowing the unfair contract terms provisions in the ACL to apply, as discussed in Chapter 6, some consumer groups such as SACOSS and TasCOSS considered there would be merit in clarifying the application of these provisions.¹⁶⁶ However, others such as the Major Energy Users and Business SA, considered that there were better alternative solutions to address the issues identified in the rule change request.¹⁶⁷

7.2.2 Retailer submissions

Retailers were unanimously opposed to the rule proposed by CALC and CUAC. The principal reasons provided were that the proposed rule would increase prices and reduce choice for consumers, thereby reducing competition in retail energy markets.

All retailers considered that the proposed rule would require them to include a risk premium in their fixed period contracts, resulting in increased prices for consumers. Retailers generally agreed with the view that the risk premium would represent each retailer's best estimate of the potential change in the costs associated with the supply of energy over the duration of the fixed period contract.¹⁶⁸ The ERAA noted that "this will leave customers paying for the cost of events, regardless of whether they eventuate."¹⁶⁹

Most retailers referred to the size of the risk premium being material due to the size and nature of the costs outside of the control of retailers, such as network costs and government policy costs. AGL noted that the costs that are outside of the control of retailers are significant, representing over 60 per cent of an average retail energy bill.¹⁷⁰ EnergyAustralia considered that:

¹⁶³ See the submission of the South Australian Council of Social Service at page 16.

¹⁶⁴ See the submission of UnitingCare Australia at page 13.

¹⁶⁵ See the submission of Consumers SA at page 5.

¹⁶⁶ See the submissions of the South Australian Council of Social Service at page 15 and the Tasmanian Council of Social Service at page 3.

¹⁶⁷ See the submissions of the Major Energy Users at page 2 and Business SA at page 3.

¹⁶⁸ See for example the submissions of Origin Energy, EnergyAustralia, Lumo Energy, AGL and Simply Energy.

¹⁶⁹ See the submission of the Energy Retailers' Association of Australia at page 5.

¹⁷⁰ See the submission of AGL at page 1.

“The quantum of the risk premium or the degree of forecasting conservatism is likely to depend on the duration of the contracts, increasing with the number of network increases which will occur during the contract term and will certainly lead to a permanent increase in the price of fixed period contracts.”

All retailers also considered that the proposed rule would hinder competition by reducing the ability to innovate and provide different kinds of contracts. EnergyAustralia considered that the proposed rule would require retailers to withdraw the most popular form of retail energy contracts from the market.¹⁷¹ EnergyAustralia also noted that, in response to the proposed rule, retailers could withdraw fixed period contracts from the market, offer fixed period contracts with a shorter duration, offer fixed term contracts with a significantly higher price, or cease operating in NECF jurisdictions.¹⁷²

Few retailers discussed the issue of whether the proposed rule would impact smaller retailers more than larger retailers. Those that did comment on this issue, such as Origin Energy, EnergyAustralia, Alinta Energy and Simply Energy, generally considered that the proposed rule would create additional challenges for new entrants and smaller retailers.¹⁷³ EnergyAustralia stated:

“[T]he rule change is likely to have a disproportionate effect on smaller retailers. Many of these retailers are not vertically integrated and rely on hedging contracts to manage their wholesale market risk. While each retailer's risk profile differs, if the ability to manage wholesale price rises by passing the cost on to the consumer is removed, [smaller] retailers will be required to ... more fully hedge their load, resulting in increased costs...

The market relies on tier 2 retailers to compete vigorously with the major players to put downward pressure on prices. There is no question that the additional costs would act as a barrier to entry for new retailers and would undermine competition and consumer benefit.”¹⁷⁴

Alinta Energy and Simply Energy considered that the greater impacts on second tier retailers may cause them to exit the market if they are unable to compete and accurately manage the greater risks they would be exposed to.¹⁷⁵

Views on CALC and CUAC's alternative proposed rules

Retailers did not support CALC and CUAC's alternative proposal to fix prices for the duration of fixed period contracts, but allow for the pass-through of changes in government policy costs. A number of retailers considered that insufficient evidence of

171 See the submission of EnergyAustralia at page 13.

172 Ibid.

173 See for example the submissions of Origin Energy at page 7 and EnergyAustralia at page 12.

174 See the submission of EnergyAustralia at page 12.

the existence of problems in the retail energy markets had been provided in the rule change request, so that neither the proposed rule nor any alternatives were required.¹⁷⁶ Some retailers also considered that the alternative proposal would have all of the same problems as the proposed rule, but would also be more difficult for regulators to enforce and would place a greater administrative burden on retailers, resulting in higher costs for consumers.¹⁷⁷

Retailers generally did not support CALC and CUAC's second alternative option of clarifying the application of the unfair contract provisions in the ACL. As discussed in Chapter 6, some retailers considered that these provisions already apply to price variation clauses and that other provisions of the ACL, such as the misleading and deceptive conduct provisions, already effectively deal with the issues raised in the rule change request.¹⁷⁸

7.2.3 Other submissions

A number of other submissions considered that the proposed rule would result in the inclusion of a risk premium in fixed period contracts. The South Australian Department noted that fully fixed price offers in South Australia currently trade at a price premium to other offers, but that if demand increased for such offers retailers may respond by making them more attractive.¹⁷⁹ The AER considered that the proposed rule would "raise prices for all customers on fixed term contracts, including those who may otherwise have been willing to manage the risk of a price change themselves."¹⁸⁰ The Victorian Department considered that prices will likely increase as a result of the proposed rule.¹⁸¹ The Victorian Department stated:

"[F]ixing costs that are not within the retailer's control may be expensive for retailers, who may pass the risk of increases on to consumers... It is therefore important to determine as part of the AEMC's review the extent to which consumers will be satisfied with paying higher tariffs in exchange for certainty regarding their prices."¹⁸²

The AER noted that 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

175 See the submissions of Alinta Energy at page 5 and Simply Energy at Part B - 3.1.

176 See for example the submission of Simply Energy at Part B - 5.2.

177 See for example the submissions of the Energy Retailers' Association of Australia at page 6, Origin Energy at page 9, Alinta Energy at page 4 and EnergyAustralia at page 15.

178 See the submissions of EnergyAustralia at pages 13 and 14 and the Energy Retailers Association of Australia at pages 2 and 3.

179 See the submission of the Energy Markets and Programs Division of the South Australian Department for Manufacturing, Innovation, Trade, Resources and Energy at page 2.

180 Ibid at page 3.

181 See the submission of the Victorian Department of State Development, Business and Innovation at pages 2 to 3.

182 Ibid.

and could stifle innovation and competition in retail energy markets.¹⁸³ This view was also held by a number of stakeholders from energy network service providers.¹⁸⁴

The AER also considered that the proposed rule may give larger retailers a competitive advantage over smaller retailers.¹⁸⁵ The AER noted that 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.¹⁸⁶

Views on CALC and CUAC's alternative proposed rules

The AER considered the proposed alternative to fix prices except for the pass-through of changes in government policy costs is likely to result in many of the same impacts on competition and prices as CALC and CUAC's preferred rule, but would also result in more consumer confusion and uncertainty.¹⁸⁷ They also considered that the alternative rule is also likely to be more complex for the responsible regulator to administer due to the requirement to prescribe which costs can and cannot be passed through to consumers.¹⁸⁸

Network businesses considered that the proposed rule may inhibit their ability to recover network charges from retailers.¹⁸⁹ This view arises out of provisions in the National Electricity Rules and the National Gas Rules which state that network businesses cannot recover network charges from retailers if retailers are not able to recover those network charges from their customers.¹⁹⁰

The Energy and Water Ombudsman of South Australia considered that while the proposed rule may improve consumers' understanding of whether or not prices are fixed in fixed period *market retail contracts*, "the provision of clear, upfront information on market contracts ... by retailers to their customers would also significantly reduce the number of enquiries our office deals with."¹⁹¹ Similarly a number of consumer groups, such as PIAC and Business SA, and a number of retailers, such as AGL and EnergyAustralia, also considered that improved information for consumers could help deal with the issues identified in the rule change request.

183 See the submission of the AER at pages 3 to 4.

184 See the submissions of Ergon Energy at page 5 and the Energy Networks Association at page 1.

185 See the submission of the AER at page 5.

186 Ibid.

187 Ibid at page 6.

188 Ibid.

189 See the submissions of the Energy Networks Association at page 2 and United Energy and Multinet Gas at page 2.

190 See clause 6B.A3.1(a) of the National Electricity Rules and Rule 508(1) of the National Gas Rules.

191 See the submission of the Energy and Water Ombudsman of South Australia at page 2.

7.3 The Commission's analysis of the proposed rule and alternatives

The Commission considers that it is not appropriate to make the rule as proposed or the alternative proposed rules in the rule change request because they are not a proportionate response to the issues identified in the request. The Commission has considered the issues identified in the rule change in Chapters 3 to 6. The Commission notes that, given its analysis in those Chapters, the key issue that requires a regulatory response is that some consumers could be better informed about the terms and conditions of *market retail contracts*, particularly in relation to whether prices can vary during fixed periods.

7.3.1 Impact of the proposed rule on consumer choice

The Commission considers that the proposed rule is likely to restrict consumer choice and inhibit retailers' ability to innovate in how they structure energy contracts. These impacts could adversely affect competition in retail energy markets and result in poorer outcomes for consumers.

The proposed rule would prohibit 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 fully fixed price retail energy contracts are offered by retailers, however a number of stakeholders have commented that consumer awareness and take-up of such offers has to date been small.¹⁹² Take up may also be affected by the higher prices charged for these contracts.

As discussed in Chapter 3, the Newgate consumer research has found that consumers have different appetites for risk in relation to retail energy contracts and value having a choice of different contracts. Around 45 per cent of residential consumers surveyed preferred contracts with a lower variable price, 31 per cent of consumers surveyed preferred a higher fixed price and 24 per cent preferred something else or did not know which option they preferred.¹⁹³

While retailers would still be 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 proposed rule would limit the ability of retailers to develop a range of fixed period contracts that currently meet consumers' different preferences regarding price variability. The Commission is 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 effect of this could be a reduction in the range of contracts offered by retailers. This could hinder the competitive process of consumer choices informing retailers of what

¹⁹² See the submissions of the Victorian Department of State Development, Business and Innovation at page 2 and EnergyAustralia at page 5.

¹⁹³ See the Newgate Consumer Research report at page 18.

their preferences are and retailers responding by adapting their product offerings to meet these preferences. There is also a risk that consumer engagement in the market could be affected if consumers find that the market is not meeting their preferences.

Further, as discussed above, the Commission notes that consumers in some jurisdictions already have access to fully fixed price offers which they are able to select if they prefer certainty of price over lower and less certain prices. These contracts suggest that the market is already meeting, at least to some degree, the preferences of some consumers for price certainty.

7.3.2 Impact of the proposed rule on retail prices

The Commission considers that it is likely that the proposed rule would result in higher prices for fixed period *market retail contracts*.

The proposed rule would require retailers to manage more risks on behalf of consumers. In particular it would require retailers to manage risks that they have a limited ability to predict or manage, such as the 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.¹⁹⁴ While retailers may have a better ability to manage changes in network prices and government policy costs than consumers, the Commission notes that retailers still have a limited ability to predict or control these changes in costs.

For example, as noted by the AER, 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.¹⁹⁵ These changes in costs are passed directly through to retailers by the network businesses. In these circumstances, the Commission notes that some consumers may be in a better position to manage changes in network costs relative to retailers by adjusting their consumption.

The proposed rule would require retailers to make predictions about what their costs would be in the future, and they are 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 be passed on to consumers in the prices they pay as a risk premium. Consumers would be paying for the risk that an event outside of a retailer's control could occur, even if the event does not occur.

The Commission investigated the level of price premiums that are priced into current fully 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 fully fixed price offers against the cheapest market offers from the same retailers (assuming all discounts are included), in each distribution area

¹⁹⁴ AEMC, 2013, 2013 Residential Electricity Pricing Trends Report, 13 December 2013, p. 12.

¹⁹⁵ See the submission of the AER at page 3.

in each state in which those contracts are offered.¹⁹⁶ The Commission found that the premium paid for fixed price offers over the cheapest market offers varied significantly between states. In NSW the premium for an annual electricity bill ranged from 10.3 per cent to 12.1 per cent, in South Australia the premium ranged from 9.7 per cent to 13.1 per cent and in Victoria the premium ranged from 13.3 per cent to 20.4 per cent. The Commission notes that these figures may not in each case accurately reflect the greater risk involved for retailers in fully fixed price *market retail contracts* due to the low level of competition in the provision of these contracts.

The Commission acknowledges that the size of the risk premiums that result from the proposed rule would be subject to competition. It is likely that over time, if required to offer fixed prices in fixed period contracts, retailers would seek to more efficiently manage the additional risks they would face. For example, retailers may take 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 then be passed on to consumers over time in the form of smaller risk premiums.

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

The Commission therefore considers that, even though risk premiums would be subject to competitive pressure if retailers were required to offer fixed prices for fixed period contracts, those premiums would still be material and increase prices for consumers. This would result in prices for consumers that are less reflective of the actual costs to retailers of supplying energy to consumers. As a result, the Commission considers that the proposed rule would result in less efficient prices for consumers.

The Commission also notes that requiring retailers to offer fixed prices may also result in consumers not receiving the benefit of any reductions in retailers' costs. While energy prices have risen steeply in recent years, this may not be the case in the future with falling demand, which is creating downward pressure on wholesale and network costs, and changes in government policy.

The Commission acknowledges that the proposed rule could result in greater transparency of retail energy prices for consumers entering *market retail contracts* with a fixed period, which may improve consumer engagement. The greater transparency could occur as consumers would be more likely to understand that prices could not vary during the fixed period. The Commission considers however that the benefits to consumers from this improved transparency are likely to be marginal compared to the negative impacts of the proposed rule on consumer choice, prices and competition in retail energy markets.

¹⁹⁶ 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.

7.3.3 Impact of the proposed rule on retail competition

The Commission considers that the proposed rule would be 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 require 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 help reduce the costs of complying with the proposed rule. They may therefore only be 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.

This may result 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 impact the level of competition in retail energy markets as smaller retailers are not able to effectively compete with larger and more established retailers in providing fixed period contracts. Over time, lower levels of competition and a reduced threat of new entrants are likely to reduce competitive pressure on existing retailers to offer efficiently priced contracts that reflect consumers' preferences.

7.3.4 Impacts of the alternatives to the proposed rule

The Commission considers 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 the same or similar impacts as the proposed rule. However, the Commission also considers that the alternative proposed rule would have the following additional negative impacts:

- greater regulatory uncertainty for retailers regarding which costs can and cannot be passed through to consumers as a result of the need to create a prescriptive list of costs, or to define categories of costs, that may 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 vary.

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

The Commission notes that it has set out its views in Chapter 6 in relation to the second alternative proposed rule. That is, the proposal to remove rule 46 of the retail rules so that the unfair contract terms provisions of the ACL apply to price variation clauses in *market retail contracts*. The Commission concluded in Chapter 6 that a regulatory response is not required to address the uncertainty in the application of the unfair contract terms provisions in the ACL. 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.

7.4 The Commission's determination on the proposed rule and alternatives

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 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 how prices may vary during fixed periods.

The Commission considers that the proposed rule and alternatives 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 considers that these negative impacts of the proposed rule would outweigh the benefits of the proposed rule from increased transparency of prices for consumers and improved consumer engagement.

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 draft rule and observations on the marketing of market retail contracts

This Chapter:

- outlines the Commission's objectives for its more preferable draft rule;
- outlines the current information disclosure requirements in the NECF;
- sets out the Commission's more preferable draft 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* and the regulation of them under the AER's Retail Pricing Information Guidelines.

8.1 The Commission's objectives for its more preferable draft 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 that the Commission has focussed on in its draft determination and draft rule is that some consumers could be better informed about the terms and conditions of their energy contracts, particularly regarding whether prices can vary during fixed periods. Related to this issue is that it appears that the low take-up of the few fully 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 value price certainty more than lower prices. This could mean that in practice most consumers make choices based primarily on price, or that some consumers that value certainty may not be aware that fully 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 draft 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 during fixed periods and when they will be notified of price variations.

The Commission considers its more preferable 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 select energy contracts that 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.

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 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 inform consumers of all matters relevant to their entry into a *market retail contract* in obtaining their "explicit informed consent" to the transaction;¹⁹⁷
- 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");¹⁹⁸ and
- the requirement in the Retail Law for the AER to make and amend a Retail Pricing Information Guideline (AER Guidelines).¹⁹⁹ 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 comparator website (the "Energy Made Easy" website).²⁰⁰

There are various information disclosure requirements for retailers under the NECF. To obtain explicit informed consent from consumers in relation to some transactions,

¹⁹⁷ See sections 38 and 39 of the Retail Law.

¹⁹⁸ See rules 62 to 64 of the retail rules.

¹⁹⁹ 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>.

²⁰⁰ 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.

retailers must fully and adequately disclose all matters relevant to the consent of the consumer to the transaction. The consumer must then consent to the transaction in writing, verbally, or by electronic communication generated by the consumer.²⁰¹ Another form of disclosure is the requirement to provide key information on pricing and other matters to consumers before or shortly after entry into a contract.

A separate disclosure regime is set out in the AER Guidelines, which provides a more prescriptive list of information that retailers are required to include in energy price fact sheets. The AER Guidelines also prescribe how retailers are required to make fact sheets available to consumers on their websites, in their marketing materials and when consumers enter contracts, including in door to door sales. The current AER Guidelines require retailers to include information in energy price fact sheets on how prices can vary during the contracts.

The Commission notes that it has the power to amend the retail rules to add further transactions that retailers are required to obtain explicit informed consent in relation to.²⁰² The Commission also has the power to make provisions in the retail rules for, or with respect to, explicit informed consent for small customers.²⁰³ 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.²⁰⁴

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*. The Commission however cannot amend the AER Guidelines, nor does its power extend to confining or directing the AER to include particular matters in the AER Guidelines.

8.3 The Commission's more preferable draft rule

8.3.1 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 regarding the matters in relation to which consent must be sought. 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*.

The Commission has reviewed a range of scripts from different retailers. The scripts vary greatly in how they inform consumers in relation to price variation clauses in *market retail contracts*. Some scripts inform consumers of the ability of the retailer to vary prices during a fixed period, while some do not inform consumers of this but do

201 See section 39 of the Retail Law.

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

203 See section 42 of the Retail Law.

204 See rule 24 of the retail rules.

inform the consumer of when they will be notified if the price is changed. Some other scripts do not inform the consumer of either the ability of prices to vary or when they will be notified, but may inform the consumer of other matters, such as the ability for discounts, charges or penalties to vary during the term of the contract.

In light of this variability in retailers' scripts and consumer research indicating that some consumers do not have a clear understanding of how prices may vary in *market retail contracts*, the Commission has decided to amend the retail rules.

This new rule 46A of the retail rules would specifically require retailers to disclose to consumers any term or condition that provides for the variation of tariffs, charges 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*. The Commission's draft rule includes references to tariffs, charges and benefits as they all form components of the price paid by consumers under *market retail contracts*. Existing obligations require the retailer to record the consent of the consumer to entry into the contract. If the retailer does not inform the consumer of the existence of price variation terms, the consent would not be valid and as a result the *market retail contract* would be void.

8.3.2 Disclosure requirements on entry into a contract

As noted above, retailers are currently required to provide consumers with information regarding prices, charges, early termination payments and penalties and how any of these may be changed. This information is usually contained in a product disclosure statement and is provided to consumers before or soon after entry into a contract.

The Commission has reviewed a number of product disclosure statements. The Commission notes that, while these statements generally provide clear information regarding whether or not prices may vary during the term of a contract, some retailers do not provide clear information regarding when the consumer will be notified of any price variation. For example, one product disclosure statement reads:

“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.”

The current minimum requirement in the retail rules regarding notification of price variations in *market retail contracts* is that 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 the issue identified in 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 that a proportionate response is to explicitly 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 regarding notification of price variations.

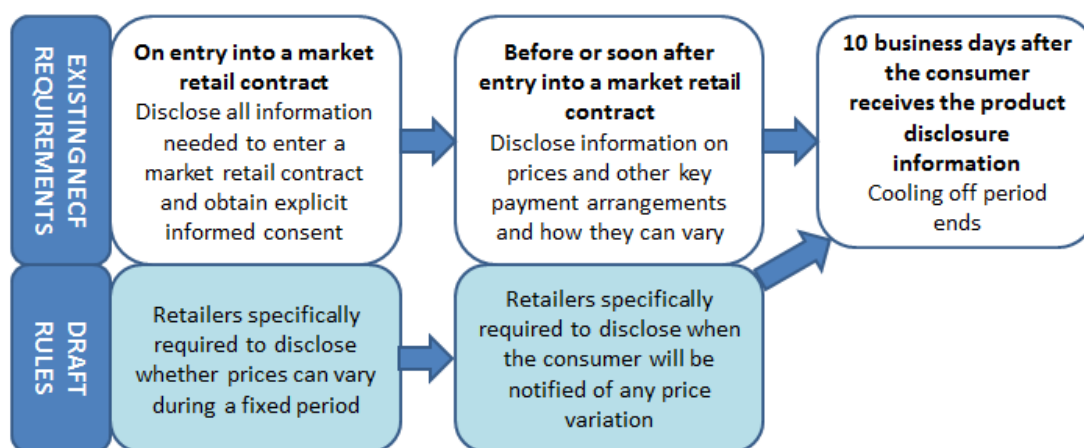
The Commission’s draft rule will explicitly require retailers to include in their product disclosure statements information on when they will notify consumers of variations to prices, charges and benefits (to the extent both are not otherwise part of prices) in *market retail contracts*. As noted above, as charges and benefits form a component of prices, the Commission’s draft 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.²⁰⁵

This clause in rule 64 of the retail rules will operate alongside the other amendment the Commission has made to specifically require retailers to disclose price variation terms to consumers when obtaining their explicit informed consent on contract entry. Therefore, under the Commission’s draft rule consumers will:

- be specifically informed of any price variations clauses on contract entry; and
- be informed before or shortly after contract entry of when they will be notified of price variations during the duration of the contract.

Figure 8.1 outlines how the Commissions more preferable draft rule would operate.

Figure 8.1 The changes under the Commission’s more preferable draft rule



²⁰⁵ See rule 47 of the retail rules.

It is proposed that this rule would commence six months following the publication date of the Commission's final rule determination to allow time for retailers to implement changes to comply with the new requirements. The final rule determination is expected to be published in late 2014.

8.3.3 The Commission's assessment of its more preferable draft rule against the NERO

The Commission's draft rule will provide consumers with better information regarding whether or not prices can vary and how 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 more preferable draft 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 draft 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 considers that its more preferable 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.

The more preferable 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. These new requirements are also 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 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 also 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.²⁰⁶ The Commission notes that its draft rule also does not limit or otherwise impact the operation of, and interaction with, the unfair contract terms provisions in the ACL.

8.4 Further observations in relation to the marketing of *market retail contracts*

In considering 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.

The Commission notes that the purpose of the AER Guidelines under section 61 of the Retail Law is to:

“provide guidance to retailers in the presentation of standing offer prices and market offer prices, and thereby assist small customers to consider and compare standing offer prices and market offer prices offered by retailers.”

The AER Guidelines play an important role in regulating the marketing of retail energy contracts to consumers. The AER Guidelines primarily seek to achieve this 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, which is designed to assist consumers to compare retail energy contracts.

The Commission has reviewed a number of energy price fact sheets and also the Energy Made Easy website. The Commission makes the following observations relevant to the issues raised in this rule change request:

- retailers are required to include information on whether prices can vary during the term of a contract in their energy price fact sheets, however this information is at times limited or unclear. For example, some energy price fact sheets will only state that prices may vary in accordance with the terms and conditions of the contract. This disclosure however does not provide consumers with clear information on how prices can vary during the term of the contract;
- retailers are required to provide a large amount of information in their energy price fact sheets, which may make it difficult for consumers to easily determine the key information to help them make informed decisions when choosing a retail energy contract;

²⁰⁶ 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>

- energy price fact sheets are often not prominently displayed on retailers' websites and often require consumers to enter a range of information before they can access these fact sheets;
- the Energy Made Easy website relies on the information provided to the AER by retailers under the AER Guidelines, which largely mirrors the information provided in energy price fact sheets. As such, the website also often provides limited or unclear information on whether prices can vary in *market retail contracts*; and
- the Energy Made Easy website currently filters available offers primarily based on price, however this often results in fully fixed price contracts being placed towards the end of the list of available offers.²⁰⁷ There is also no ability for offers to be filtered by whether prices can vary or not. This could result in less consumers being aware, when using the website, of the availability of fixed price offers.

The Commission notes that the AER is in the process of reviewing and relaunching its Energy Made Easy website to better enable consumers to compare retail energy offers. The AER has also recently included information on its Energy Made Easy website to explain the difference between fixed price contracts and contracts with a fixed period. The Commission also notes the AER's statements in its submission that, as an alternative to the proposed rule:

“[T]he AER could amend the [AER] Guideline to clarify and improve information available to customers to address concerns raised by CALC/CUAC. For example, requiring retailers to present information more clearly and prominently about the applicability of price variations for energy contracts in their energy price fact sheets; being more prescriptive (as well as promoting better practice across retailers) about how they describe fixed price and fixed term contracts...”²⁰⁸

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.²⁰⁹

The Commission considers that improvements to the AER Guidelines could be made to help improve consumer understanding of their *market retail contracts* in relation to how prices may vary and the options available to them. In particular, the Commission considers that the AER could consider reviewing the AER Guidelines and the Energy Made Easy website to improve the clarity, quality, accessibility and prioritisation of information, particularly with respect to price variations. This could assist consumers

²⁰⁷ Indeed, the South Australian Department has noted that a consumer seeking a fully fixed price offer would need to scroll through up to eight pages of offers before finding the first fully fixed price offer. See the submission of the Department for Manufacturing, Innovation, Trade, Resources and Energy of South Australia at page 2.

²⁰⁸ See the submission of the AER at page 7.

²⁰⁹ See the Newgate consumer research report at page 22.

to make more informed decisions to enter retail energy contracts that better meet their preferences. This in turn would enhance competition between retailers in the long term interests of consumers.

The Commission notes that CALC and CUAC have suggested in a supplementary submission that there would be benefit in the AER, energy retailers, and the AEMC considering how consumers' understanding of contract types could be improved.²¹⁰ The Commission supports these efforts, but also notes that any changes to the AER Guidelines would need to be considered through a public consultation process as required under the Retail Law.

The Commission also notes that its consumer research has indicated that awareness of independent price comparator websites, like Energy Made Easy, is low.²¹¹ Efforts to improve consumer awareness of independent price comparator websites will improve the ability of consumers to access the information they need to make informed decisions.

Finally, the Commission also notes that a number of retailers have indicated that they are continually seeking to improve the way that they communicate with their customers to minimise the potential for misunderstanding and improve their service. The Commission supports these commitments and also notes that further work by retailers could be undertaken to further develop consumers' understanding of their contract terms and conditions.

²¹⁰ CALC/CUAC, Second supplementary submission to the consultation paper, p. 3.

²¹¹ See the Newgate consumer research report at page 10.

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 draft determination.

A.1 Draft determination

In accordance with section 256 of the Retail Law the Commission has made this draft rule 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".²¹²

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;²¹³
- submissions, emails, and petition responses received during first 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.

²¹² See section 237(1)(a) of the Retail Law.

²¹³ 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 determined to make a more preferable 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 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 and the Commission's response to each issue.

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

Stakeholder	Comment	AEMC response
The Commission's assessment framework: NERO test		
ERAA, 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. (ERAA, 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 agrees 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 section 7.3.2.
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 notes 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 notes that under the consumer protections test the Commission is required to consider consumer protections for small customers, including hardship customers. See section 2.2 for further details.
SACOSS	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)	The rule change request concerns price variations during fixed periods in <i>market retail contracts</i> . The Commission considers that issues relating to increasing prices for "sticky customers" are 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

Stakeholder	Comment	AEMC response
		<p>change request see section 2.2.</p> <p>The Commission's 2014 Review of Retail Competition will consider the level of competition in NEM jurisdictions and the outcomes experienced by small customers. This report will be released by September 2014.</p>
<p>UnitingCare Australia, CALC/CUAC</p>	<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/CUAC, p. 3)</p>	<p>The Commission notes the objectives of the proposed rule. However, the Commission considers that the proposed rule could have a number of negative consequences if made. The Commission has therefore made a more preferable draft rule set out in Chapter 8, which it considers would better meet the NERO.</p>
<p>Lumo Energy</p>	<p>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 products and services to consumers to meet their needs in response to price signals. Lumo 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)</p>	<p>The Commission is aware of the issues raised in this rule change request that overlap with issues raised in other rule change requests currently before it, including the Distribution Network Pricing rule change request and other Power of Choice rule change requests.</p>
<p>The Commission's assessment framework: Consumer protections test</p>		
<p>EnergyAustralia</p>	<p>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</p>	<p>The Commission notes 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 section 2.2.</p>

Stakeholder	Comment	AEMC response
	passed onto consumers. (p. 8)	
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 has determined not to make the proposed rule for the reasons set out in Chapter 7. The Commission notes that it does 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 has considered existing consumer protections in detail and has 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 of the duration of the contract. See Chapter 8 for more detail.
SACOSS	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 has considered the development of consumer protections in a range of jurisdictions, including the UK. See section 2.2.2 for further information.
UnitingCare Australia; CALC/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/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	<p>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)</p> <p>Price variation clauses are used to allocate part of the risk from changes outside a retailers' control to consumers. (Simply Energy, p. 8)</p>	The Commission has taken these views into account in its consideration of the issues raised in the rule change request at sections 3.3.1 and Chapter 4 and in its consideration of the impacts of the proposed rule in section 7.3.2.

Stakeholder	Comment	AEMC response
EnergyAustralia	<p>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.</p> <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>	
ERAA, Origin, Simply Energy	<p>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. (ERAA, p. 5; Origin Energy, p. 2; Simply Energy, p. 2).</p>	<p>The Commission notes that consumer research undertaken on behalf of the Commission indicates that price variations are not a significant cause of consumer disengagement from retail energy markets. For more detail see Chapter 5.</p>
Consumers Association of SA	<p>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 policy would need to take into account</p>	<p>For the reasons set out in Chapter 7, the Commission has determined to not make the proposed rule and therefore it has not further considered this view.</p>

Stakeholder	Comment	AEMC response
	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 notes that this proposal would require 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 does not agree with this view and notes that it has included comments on how retailers generally manage and pass on risks to consumers in section 3.3.1.
COTA Queensland, TasCOSS	<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. (COTA 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. (TasCOSS, p. 1)</p>	The Commission has 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 section 7.3.2 for more detail.
Ethnic Communities Council, 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, 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 considers that retailers have an ability to manage some risks and pass on others to consumers which they are unable to manage. The Commission considers 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 which favour different levels of risk. For

Stakeholder	Comment	AEMC response
PIAC	Retailers have a reduced incentive to manage risks as they are able to pass through any price increases to consumers. (pp. 2-3)	more detail on this see sections 3.3.1 and 3.3.2.
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 has found that there is not sufficient evidence to support the claim that "price baiting" practices are widespread in retail energy markets. For more detail please see Chapter 4.
SACOSS	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 agrees 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 considers that this does not impact the Commission's analysis of the implications of the proposed rule on prices and choices for consumers, which is set out in section 7.3.
CALC/CUAC	The market is not functioning well by enabling consumers to select products that reflect their 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)	The Commission agrees that some consumers could be better informed about the terms and conditions of their contracts, particularly in relation to how prices may vary. The Commission's more preferable draft rule seeks to address this issue. Further details on the Commission's draft rule can be found in Chapters 2 and 8.
Allocation of costs and risks: Would the proposed rule result in risk premiums being included, and how significant would they be?		
AER, Victorian Department of State Development, Business, and Innovation	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)	The Commission agrees that the proposed rule would result in increased prices for consumers through the inclusion of a risk premium on fixed period <i>market retail contracts</i> . For more detail see section 7.3.2.
Red Energy,	A risk premium would be included in retail bills (Lumo Energy, p. 4;	

Stakeholder	Comment	AEMC response
Lumo Energy, Ergon Energy, Simply Energy, AGL, EnergyAustralia	<p>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>	
ERAA, Ergon Energy, Simply Energy, Origin Energy, AER	<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) (ERAA, 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 (ERAA, 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</p>	<p>The Commission has taken views regarding changes to network prices and government policy costs into account in the Commission's consideration of the impact of the proposed rule on energy prices. For more detail see sections 3.3.1 and 7.3.2.</p>

Stakeholder	Comment	AEMC response
	<p>improve retailers' ability to deal with risks associated with changes in distribution 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).</p>	
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 will 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	<p>The proposed rule would result in new costs due to increased regulatory burden, the calculation of risk 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</p>	<p>The Commission considers that the proposed rule would result in increased prices for consumers for fixed period <i>market retail contracts</i>. For more detail see section 7.3.2.</p>

Stakeholder	Comment	AEMC response
	<p>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>	
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>	
ERAA, 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 (ERAA, p. 3; Simply Energy, p. 2)</p>	<p>The Commission agrees that bill shock may be more likely to occur under the proposed rule if customers choose a contract with a fixed term or benefit period for a longer period. However, the Commission also notes that this impact may be mitigated as it is likely that retailers would restrict longer term fixed period contracts from the market. For more detail on this see section 7.3.1.</p>
EnergyAustralia	<p>If the risk premium is calculated incorrectly consumers will face inefficient prices by paying too 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</p>	<p>Noted. The Commission considers that the proposed rule would result 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 section 7.3.2.</p>

Stakeholder	Comment	AEMC response
	analysis will be passed onto consumers. (p. 10)	
COTA Queensland, Major Energy Users, UnitingCare Australia	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. (COTA Queensland p. 1; Major Energy Users, p. 2; UnitingCare Australia, p. 6)	
Ethnic Communities Council, UnitingCare Australia, CALC/CUAC	Risk premiums would provide greater transparency for consumers. Competition between retailers should overcome possibility of permanent increases in prices. (Ethnic Communities Council, p. 2; UnitingCare Australia, p. 6; CALC/CUAC, pp. 7-8)	The Commission notes that under the proposed rule increased transparency would place greater competitive pressure on retailers to reduce the size of risk premiums, but considers that the risk premiums would still be material. For more detail see section 7.3.2.
CALC/CUAC	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 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 considers that under the proposed rule retailers would be likely to include a risk premium, reduce the length of contracts, and/or withdraw fixed period contracts from the market. The Commission does not consider that increased prices would reflect the "true cost" of the contract. Rather, the Commission considers that such increased prices would be less cost reflective. For more detail see Chapter 7.</p> <p>The Commission has not found evidence that retailers are "price baiting" on a widespread scale. For more detail see Chapter 4.</p>

Stakeholder	Comment	AEMC response
SACOSS	SACOSS 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 considers that the proposed rule would increase risks for retailers and would therefore increase the net cost of risk for all consumers, even where some consumers are willing to bear more risk in return for lower prices. For more detail see section 7.3.2.
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 pressures on retailers to deliver competitive fixed price contracts. (p. 3)</p>	<p>In section 7.3.2 the Commission compared fixed price offers in each distribution area in which they are available with the cheapest available market offer 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 agrees that under the proposed rule retailers would innovate and manage risk more efficiently to some degree as there would be greater competition in fixed price offers. However, the Commission considers that the long term impact would still be a material increase in prices for consumers. For more detail see section 7.3.2.</p>
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</p>	The Commission provides more detail on these consumer protections and disclosure requirements under the Retail Law and the retail rules in Chapter 6 and section 8.2.

Stakeholder	Comment	AEMC response
	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)	
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 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 notes its support in section 8.4 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 considers 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 does not agree that only a small number of consumers are likely to be confused about whether their price may rise under their contract. The Commission's consumer research has found that some consumers may be entering into <i>market retail contracts</i> unaware that prices may vary. For more detail, see section 5.3 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	The Commission agrees that consumer participation is critical for competition to deliver benefits for consumers and that the proposed rule would be likely to reduce the choices available for consumers.

Stakeholder	Comment	AEMC response
	<p>limiting this selection as would occur under the proposed rule. (p. 4)</p> <p>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)</p>	<p>The Commission considers that this could result in reduced participation by consumers. For more detail see Chapter 7.</p>
Business SA	<p>There is a level of confusion about what a 'fixed term' contract means. (p. 2)</p>	<p>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 section 5.3.</p> <p>The Commission's more preferable draft rule seeks to address this issue by better informing consumers of their contract terms and conditions relating to price variations.</p>
SA Department of Manufacturing, Innovation, Trade, Resources and Energy.	<p>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)</p>	
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, EWOV and the Energy and Water Ombudsman of South Australia in relation to the lack of knowledge of consumers regarding price variations have been considered in the development of the Commission's more preferable draft rule.</p>
EWOV	<p>EWOV 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</p>	

Stakeholder	Comment	AEMC response
	<p>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>EWOV 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 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)</p>	
Consumers Association of SA, Mark Walker (private individual), UnitingCare Australia, CALC/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/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</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 section 5.3.</p> <p>The Commission considers that the existence of some fully fixed price offers in some jurisdiction suggests that retail energy markets are delivering products that meet consumers' preferences regarding the level of risk they are willing to bear. However, the number of fully fixed price products may be lower than could be expected, given that around 30 per cent of residential consumers appear to prefer price</p>

Stakeholder	Comment	AEMC response
	<p>period contracts having a fixed price is high. (Consumers Association of SA, p. 3; Mark Walker (private individual), p. 1)</p>	<p>certainty more than lower prices. For more detail see section 3.3.</p>
<p>Council of Social Service of NSW, COTA Queensland, Ethnic Communities Council, UnitingCare Wesley Bowden, National Seniors Australia, QCOSS, UnitingCare Australia, CALC/CUAC, Consumers Association of SA</p>	<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, p. 2; UnitingCare 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. (COTA Queensland, p. 1; Ethnic Communities Council, p. 2; National Seniors Australia, p. 1; QCOSS, p. 2; UnitingCare Australia pp. 7-8; CALC/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>The Commission notes 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 seeks 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>As discussed in section 3.3, the Commission notes that consumers have access to fixed price contracts and contracts with no exit fees which allow consumers to select a contract which meets their risk appetite.</p>
<p>TasCOSS</p>	<p>TasCOSS 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</p>	<p>The Commission notes that Tasmanian consumers may initially have a low level of understanding of their retail energy contracts following retail deregulation. However, the Commission considers that improved information provision, rather than regulating the offers retailers can provide, is a more preferable means to promote consumer participation in retail energy markets. The Commission's more preferable draft rule seeks to improve the information consumers receive in relation to how prices may vary in <i>market retail</i></p>

Stakeholder	Comment	AEMC response
	consumers are stuck on a contract with a higher price than expected because of exit fees. This could lead to financial hardship and/or rationing. (p. 2)	<i>contracts</i> . For more detail on the Commission's approach to its more preferable draft rule, see Chapter 8.
UnitingCare Australia, CALC/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/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. For more detail on this see section 5.3.2.
CALC/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 notes that a number of factors could be contributing to consumers' lack of understanding of their energy contracts. The Commission's more preferable draft rule seeks to provide consumers with better information regarding price variations in <i>market retail contracts</i> . The Commission also notes 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 the 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. 4-5)</p>	
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,	There is no evidence that customers see little gain in switching because the new provider may change prices. The rate of switching	The Commission notes that some NEM jurisdictions have high levels

Stakeholder	Comment	AEMC response
EnergyAustralia	<p>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>of switching and consumer choice relative to other countries.</p> <p>The Commission notes that its consumer research indicates 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 section 5.3.</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 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>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 draft rule, see Chapter 8.</p>
COTA Queensland, Major Energy Users	<p>Price variations and exit fees create significant distrust of retailers which suppresses consumer choice and unfairly divides risk between consumers and retailers. (COTA 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 notes that the consumer research indicated that following a price variation, few consumers expressed some form of negative emotional response. See section 5.3 and the Newgate Research consumer research report for more</p>
Ethnic	<p>Research undertaken in 2011 by the Council demonstrated that</p>	

Stakeholder	Comment	AEMC response
Communities Council	<p>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>detail.</p> <p>The Commission notes the Ethnic Communities Council's research regarding culturally and linguistically diverse communities and has taken this into account in its approach to this rule change request and its more preferable draft rule.</p>
QCOSS, SACOSS, Consumers Association SA	<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. (QCOSS, pp. 1-2; SACOSS, p. 12, Consumers Association SA, p. 3). Slow switching times also impact on customer engagement. (SACOSS, 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. (QCOSS, pp. 1-2)</p>	
UnitingCare Australia, CALC/CUAC	<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/CUAC, p. 12)</p>	

Stakeholder	Comment	AEMC response
	Transaction costs and/or switching costs may exceed any benefit from changing switching. (CALC/CUAC, p. 12)	
Michael Davies (private individual)	Customers must be given the right to change their retailer whenever they choose. Contracts are anti-competitive when they impose obligations on the customer but not on the retailer. (p. 1)	The Commission notes that a significant proportion of <i>market retail contracts</i> do not have exit fees. For more detail please see section 3.3.2.
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 have a significant impact on consumer disengagement. The consumer research also indicated that around six per cent of residential consumers searched for a new contract after experiencing a price variation. See section 5.3 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 agrees that exit fees provide a price signal to consumers in relation to the retailer's cost of the customer switching. The Commission also notes there are a range of contracts which do not include exit fees if consumers are concerned about the level of exit fees on some contracts. For more detail see section 3.3.2.
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 such 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 considers 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 notes there are fixed price contracts available in some jurisdictions for those consumers that value price certainty.

Stakeholder	Comment	AEMC response
Council of Social Service of NSW, Ethnic Communities Council	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, p. 3)	The Commission also notes 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 section 5.3.
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/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/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/CUAC, pp. 13-14)</p>	
Consumer participation and engagement: Impact of proposed rule on consumer participation and engagement		
ERAA, Simply Energy, EnergyAustralia	<p>New rule will result in higher search and transaction costs as customers will need to re-contract on a more frequent basis. (ERAA, p. 4; Simply 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. (ERAA, 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</p>	<p>The Commission considers that the proposed rule could have resulted in retailers offering fixed period contracts with shorter contract lengths. If that occurred, the Commission agrees that that consumers may have needed to consider changing their contracts more frequently, which would have resulted in greater search costs.</p> <p>As noted above, the Commission does not consider that the proposed rule would expose the "true cost" of energy, but rather would result in less cost reflective energy prices for consumers due to the inclusion of a risk premium.</p>

Stakeholder	Comment	AEMC response
	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)	For more detail on these issues, please see section 7.3.
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>	The Commission considers that consumer engagement could be affected under the proposed rule, if consumers find that the market is not meeting their preferences. The Commission sets out its views on the likely impacts of the proposed rule in section 7.3, including impacts on price, consumer choice and engagement and competition between retailers.
Ergon Energy	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)	
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, COTA 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; COTA Queensland, p. 1)	The Commission does not agree with this view and has set out its views on the impact of the proposed rule in section 7.3.
CALC/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	The Commission acknowledges that the proposed rule could lead to greater transparency of retail energy prices, considers that the proposed rule could result in better consumer understanding of fixed period contracts which could improve comparability and competition

Stakeholder	Comment	AEMC response
	consumers.(CALC/CUAC, p. 15; UnitingCare Australia, p. 9)	for fixed price contracts over time. However, the Commission considers that the negative impacts of the proposed rule on price, consumer choice and competition between retailers would outweigh these benefits. For more detail see section 7.3.
Ethnic Communities Council	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, TasCOSS, QCOSS, Major Energy Users, Consumers Association of SA	<p>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, TasCOSS, p. 2, Consumers Association of SA, p. 5)</p> <p>Consumers will shop around with confidence and have certainty about what they will pay (Queensland Association of Independent Legal Services, p. 2, QCOSS, 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>	
SACOSS	<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 agrees 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 is designed to improve transparency regarding price variations in <i>market retail contracts</i>. For more detail see Chapter 8.</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	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	As noted above, the Commission acknowledges that the proposed rule could lead to greater transparency of retail energy prices, which could improve consumer engagement. However, the Commission

Stakeholder	Comment	AEMC response
SA	<p>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 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)</p>	<p>considers that the negative impacts of the proposed rule on price, consumer choice and competition between retailers would outweigh these benefits. For more detail see section 7.3.</p> <p>The Commission notes concerns regarding the comparability of contracts in South Australia due to differences in the pricing of standard retail contracts between different retailers. The Commission has 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.</p>
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 considers that the proposed rule could impact smaller and new entrant retailers more than larger and more established retailers. This is because smaller and newer retailers have fewer risk management tools available to them to deal with the additional risks the proposed rule would require them to manage if they are to offer fixed period contracts. For more detail on this, see section 7.3.3.
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 require additional expertise to assess network prices. This would impose significant</p>	

Stakeholder	Comment	AEMC response
	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)	
SACOSS	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 agrees that the level of market concentration has a material effect on barriers to entry, the Commission considers that the proposed rule would be likely to increase barriers to entry for new retailers. For more detail see section 7.3.3.
UnitingCare Australia	More stable pricing in contracts may benefit smaller retailers making entry easier. (p. 10)	The Commission does not agree that prices would be more stable and does not agree that new entry would be easier for retailers under the proposed rule. For more detail see section 7.3.3.
CALC/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 agrees that there is no obligation on retailers to offer fixed period contracts, the Commission considers that there is a risk that the proposed rule would increase barriers to entry and could impact smaller retailers more than larger retailers. For more detail see section 7.3.3.
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</p>	The Commission notes that the proposed rule would stop retailers from offering variable priced products with a fixed period. These are currently a popular form of contract in the market. As discussed in section 7.3.1, the Commission considers that under the proposed rule, retailers may offer fixed period offers with a shorter duration or withdraw fixed period contracts. The Commission also agrees that

Stakeholder	Comment	AEMC response
	structure, retailers will develop and offer these products and services and fixed price products are available on the market currently. (p. 5)	retailers would be likely to charge a premium for fixed period contracts.
Lumo Energy	The proposed rule will limit the product and services Lumo can make available to the market and limit its ability to innovate. (p. 4)	The proposed rule would therefore limit the range of choices for consumers and the ability for retailers to innovate to meet changing consumer preferences. This could negatively impact consumer engagement and competition in retail energy markets. For more detail see section 7.3.1.
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 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</p>	

Stakeholder	Comment	AEMC response
	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)	
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 agrees that there is not a demonstrated market failure that would warrant the regulatory response proposed in the rule change request. The Commission does however note that it has identified specific issues with consumers' understanding of <i>market retail contracts</i> and has made a more preferable draft rule to address these issues. For more detail on the Commission's draft rule, see Chapter 8.
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 agrees that under the proposed rule fixed period offers would likely become shorter in length, become more expensive, and could even be withdrawn from the market. For more detail on the Commission's views on the impact of the proposed rule on consumer choice, see section 7.3.1.
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>	

Stakeholder	Comment	AEMC response
Business SA	Do not support prescribing the nature of products which the market can offer as this will stifle competition. (p. 1)	The Commission agrees that the proposed rule could negatively impact competition by reducing the range of products that retailers can offer and restricting product innovation. For more detail, see section 7.3.
Ethnic Communities Council	Greater competition between retailers who would be acting transparently would put downward pressure on prices. (p. 3)	The Commission agrees that the proposed rule could result in some greater transparency in fixed period contracts, which could result in some downward pressure on prices. However, the Commission considers that the overall impact of the proposed rule would be an increase in prices, due to the inclusion of a risk premium on fixed period contracts. For more detail see section 7.3.
QCOSS	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 considers that the proposed rule would prohibit 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 limit the choices available for consumers. For more detail see section 7.3.1.
TasCOSS	If the price of diversity is unfairness in contracts, it is not worth it. (p. 3)	The Commission does not consider that fixed period contracts which have a variable price are inherently unfair or misleading. The Commission considers that the best way to enable retailers to develop products that meet consumers' needs regarding the variability of prices in fixed period contracts is to provide consumers with better information on how prices may vary on contract entry. For more detail on the Commission's more preferable draft rule see Chapter 8.
SACOSS	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 does not agree with this view. The Commission considers that restricting retailers from being able to innovate is likely to negatively impact consumer engagement and competition. For more detail see section 7.3.
CALC/CUAC	As retailers are likely to recover additional risk management costs	The Commission considers that fixed period contracts are likely to

Stakeholder	Comment	AEMC response
	<p>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>become shorter, more expensive or could be withdrawn from the market. As noted above, the Commission considers that this would negatively impact consumer engagement and competition in retail energy markets. The contracts that would be 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 its views on the impacts of the proposed rule on the availability of fixed period offers in section 7.3.1.</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 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)</p>	
Victorian Department of State Development, Business, and	<p>The prohibition on price variations on fixed term contracts will remove offers that some customers are happy with. (p. 2)</p>	

Stakeholder	Comment	AEMC response
Innovation		
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 notes that 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> . See section 6.3 for further discussion.
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 agrees with this view and notes that the issue of whether price variation clauses in <i>market retail contracts</i> are "unfair" under the unfair contract terms provisions in the ACL has not yet been considered by a court.
Origin Energy	<p>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 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>	The Commission considers 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 is not sufficient evidence to show that clarifying the application of these provisions would have an appreciable benefit to consumers with respect to the issues in the rule change request. For more detail on this, see section 6.4.
AER	Agree there is some uncertainty around the potential application of the unfair contract terms provisions and it is untested by the courts. (p. 6)	The Commission agrees with this view. See section 6.3.

Stakeholder	Comment	AEMC response
Consumer protection issues: Should changes be made to the retail rules to clarify application of ACL?		
Origin Energy, Simply Energy, Lumo Energy	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)	The Commission agrees 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 provides its reasons in section 6.4.
Alinta Energy	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. Customers also are currently provided protections under rule 46 which would be removed if this rule was deleted. (p. 4)	
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)	As discussed in section 6.4, the Commission does not consider that a regulatory response is required to address the uncertainty in the application of the unfair contract provisions in the ACL. The Commission agrees that small business consumers currently fall outside of the protections afforded by the unfair contract terms provisions of the ACL, but notes that the Commonwealth Government is currently consulting on a proposal to extend these provisions to small business consumers. For more detail see section 6.3.
Business SA	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) Small businesses fall outside the scope of the ACL. (p. 4)	
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 does not consider that all consumer protections need to be set out in retail energy regulations to give consumers clarity.

Stakeholder	Comment	AEMC response
TasCOSS, SACOSS	If the rules do expressly permit price variations, TasCOSS considers this is at odds with the intention of Australian Governments to ensure all contracts are fair. (TasCOSS, p. 3) Uncertainty in the application of the ACL provisions is unhelpful and should be addressed in some form. (SACOSS, p. 15)	As noted above, the Commission considers that there is some uncertainty in the application of the unfair contract terms provisions in the ACL, but does 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 provisions would not sufficiently address the problem. (p. 2)	
CALC/CUAC, UnitingCare Australia	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> . 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/CUAC, pp. 18-20; UnitingCare Australia, p. 12)	
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	The Commission considers 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

Stakeholder	Comment	AEMC response
	industries. (p. 8)	periods. The misleading and deceptive conduct provisions in the ACL should not be relied on solely to address this. The Commission has therefore made a more preferable draft rule to address this issue. This is set out in Chapter 8.
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)	
UnitingCare Australia, CALC/CUAC	Misleading and deceptive conduct provisions do not sufficiently protect consumers who are 'confused'. (UnitingCare Australia, p. 13; CALC/CUAC, pp. 21-22)	The Commission agrees 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. pg. 4.	Noted. The Commission considers 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 <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 considers that changes to the retail rules are 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 has therefore made a more preferable draft rule which is set out in Chapter 8.
ERAA	This option will result in risk premiums, will create 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)	The Commission agrees that this option would still require retailers to include risk premiums in fixed period contracts, would be administratively burdensome, and would not deal with consumer confusion about the costs that can be passed through by retailers.

Stakeholder	Comment	AEMC response
Alinta Energy	This would be administratively burdensome for retailers to manage. (p. 4)	For more detail see section 7.3.4.
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 agrees that this option would require regulators to define which costs can and which cannot be passed through and considers that this would be difficult to define and enforce. For more detail see section 7.3.4.</p> <p>The Commission also agrees that there may be limited benefit in this option, given that it could allow some network and government policy costs to be passed through and these make up the majority of current price increases for <i>market retail contracts</i>. See section 7.3.4 for more detail.</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)	As noted above, the Commission agrees with this view.
SACOSS	Limited pass throughs may be appropriate in some circumstances, but defining and policing these legitimate circumstances is likely to be problematic. 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)	As noted above, the Commission agrees that defining and managing compliance with the limited pass-through option may be difficult. However, the Commission does not agree that retailers have significant influence over costs such as network costs and some government policy costs. This is discussed in section 3.3.1.
UnitingCare Australia, CALC/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/CUAC, p. 31)	

Stakeholder	Comment	AEMC response
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 agrees 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.	<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. (pg. 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. (pg. 4)</p>	The Commission considers 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 notes its support for efforts to improve the communication of contract terms and conditions to consumers. See section 8.4 for more detail.
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 agrees 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 considers 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 seeks to achieve this. See Chapter 8 for more detail.
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)	

Stakeholder	Comment	AEMC response
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> <p>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)</p>	<p>The Commission considers 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 section 8.4 for more detail.</p>
ERAA	<p>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)</p>	<p>The Commission notes that its more preferable draft rule, which focuses on improving information for consumers, is unlikely to have significant implementation costs for retailers. See section 8.3.3.</p>
EnergyAustralia	<p>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)</p>	<p>The Commission considers that there are issues raised in the rule change request that require a regulatory response. In particular, some consumers could be better informed of the nature of their contracts with respect to price variations. The Commission has made its more preferable draft rule to address this issue. The Commission however also supports retailers and consumer groups working collaboratively to improve the information provided to consumers about retail energy contracts.</p>
AGL	<p>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).</p>	

Stakeholder	Comment	AEMC response
Simply Energy	<p>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.</p> <p>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)</p>	<p>The Commission notes the views of Simply Energy and considers that a broad review of the information requirements in the NECF is not within the scope of this rule change request.</p>
United Energy and Multinet	<p>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)</p>	<p>The Commission considers that clearer information on price variability at the point of entry into <i>market retail contracts</i> is a proportionate response to the issues identified in the rule change request. The Commission notes that a number of stakeholders have proposed alternative approaches that are designed to achieve this.</p> <p>The Commission has 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. See section 8.3.1 for more detail.</p> <p>The Commission notes that a number of retailers are already providing advance notification of price variations as a matter of good customer service, as set out in section 8.3.2.</p>
Energy Networks Association	<p>The key issue for CALC/CUAC appears to be that customers don't know that a fixed term contract can have a variable price. If 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).</p>	
Business SA	<p>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.</p> <p>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)</p>	
PIAC	<p>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 consumers being informed of price increases</p>	

Stakeholder	Comment	AEMC response
	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/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). (Supplementary submission, p. 2)</p>	<p>The Commission does not consider that there is a problem with the nature of fixed period contracts that include price variation clauses.</p> <p>The Commission considers that providing clearer information to consumers about the nature of their contracts, particularly in relation to whether prices can vary, will help them to select energy products that better meet their needs. This in turn is likely to place greater pressure on retailers to develop products that meet consumers' needs with respect to how prices can vary.</p> <p>For more detail see Chapter 8.</p>
Alternative approaches to the issues identified in the rule change request: Restriction/regulation of exit fees following price rises		
ERAA	The restriction of exit fees will result in increased prices and	Noted. The Commission does not consider that restricting exit fees is

Stakeholder	Comment	AEMC response
	increased customer transaction costs. (p. 6)	<p>an appropriate response to the issues identified in the rule change request.</p> <p>The Commission also notes that there are a number of contracts which do not have exit fees. For more detail, see section 3.3.2.</p>
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	<p>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.</p> <p>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. (pg. 3)</p>	
Alternative approaches to the issues identified in the rule change request: Other alternative proposals		
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 considers that an issue that requires a regulatory response is that some consumers may not understand how prices may vary during their <i>market retail contracts</i> . For more detail see section 5.3.
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)	Noted.

Stakeholder	Comment	AEMC response
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 considers that insufficient evidence has been provided in relation to the need to restrict the types of contracts that can be offered.

Abbreviations

ACL	Australian Consumer Law
AEMC	Australian Energy Market Commission
AEMO	Australian Energy Market Operator
AER	Australian Energy Regulator
AER Guidelines	AER Retail Pricing Information Guideline
CALC	Consumer Action Law Centre
CUAC	Consumer Utilities Advocacy Centre
ERAA	Energy Retailers' Association of Australia
EWOV	Energy and Water Ombudsman of Victoria
Commission	See AEMC
MCE	Ministerial Council on Energy
NEL	National Electricity Law
NERO	National Electricity Retail Objective
NECF	National Energy Customer Framework
PIAC	Public Interest Advocacy Centre
QCOSS	Queensland Council of Social Service
Retail Law	National Energy Retail Law
Retail rules	National Energy Retail Rules
SACOSS	South Australian Council of Social Service
South Australian Department	Energy Markets and Programs Division of the South Australian Department for Manufacturing, Innovation, Trade, Resources and Energy
TasCOSS	Tasmanian Council of Social Service
Victorian Department	Victorian Department of State Development, Business and Innovation