

15 June 2020

Submitted via Engage Victoria

Kate Symons
Commissioner and Chairperson
Essential Services Commission

Dear Ms Symons

Maximum prices for embedded networks and other exempt sellers Draft Decision

Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the Essential Service Commission's (ESC) *Maximum prices for embedded networks and other exempt sellers* Draft Decision (**Draft Decision**). We strongly support the general principles applied in the draft decision. Applying the Victorian Default Offer (VDO) as the cap for pricing from exempt sellers is a practical and consistent to ensure customers in embedded networks are not over-charged.

However, delays in addressing this issue have meant that embedded network households have been put at greater risk of detriment than their peers who purchase energy through conventional arrangements for far too long. As such, we oppose the delay—we consider that it is unfair for customers in embedded networks to continue to be charged above-VDO prices beyond 1 July 2020. Particularly in the context of COVID19, we consider it is unreasonable that relevant households should not benefit from price reductions sooner..

Also, there remain gaps in protections for households who source energy from community energy projects and Solar Power Purchase Arrangements (SPPA) under the General Exemption Order. We support the uptake of renewable energy through such arrangements, but a household can be left at risk of ending up stuck in a failed initiative while paying unfair prices. It is unacceptable to leave households unprotected from the risks of unfair essential service charges from businesses, therefore the multiple activity exemption should also be subject to the VDO price caps as a safeguard.

Finally, we note that many embedded network providers bundle other services to customers, including hot water and gas stovetops. There is a risk that implementation of the draft decision will result in these providers recovering lost revenue from these other services, particularly given customers similarly do not have a choice other than to use these services. We recognise this issue is beyond the scope of the current review, but consider the ESC raise this issue with Government so that it is addressed.

We discuss these comments in more detail in the submission below.

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About Consumer Action

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

Setting the VDO as the cap for exempt sellers' pricing

Consumer Action strongly supports the ESC's draft decision to set the cap of exempt seller's pricing at VDO levels. This draft decision is a simple and practical way forward that will lead to pricing protections that are simple to reference for engaged households in exempt energy selling arrangements. It will also lead to fairer outcomes where households are often subject to effective monopoly arrangements within the exempt energy selling framework.

As noted in our initial submission to this process, households in exempt selling arrangements need fair price protections more than their peers because they face greater risks when subject to price gouging. For example:

- Households in exempt selling arrangements do not have the full suite of entitlements to assistance under the payment difficulty framework when experiencing serious financial difficulty;
- The coverage of monitoring, enforcement, and dispute resolution for households in exempt selling arrangements is not yet comprehensive; and
- Many households in exempt selling arrangements may be less willing to challenge unfair pricing because their essential energy supplier is also their landlord or body corporate and an energy dispute might risk creating an adverse outcome in other negotiations.

However, the ESC has made clear that there are potential further efficiencies available to exempt sellers that are not mirrored for conventional energy retailers (whose reasonable cost the VDO's methodology seeks to reflect). The application of the VDO as the cap for exempt sellers' pricing is a good step forward but the ESC should consider whether even lower prices are warranted, due to the further efficiencies available to exempt sellers. As per our initial submission to the consultation paper stage of this process, we recommend that the ESC undertake future work to ensure that the application of the VDO as a cap in exempt selling arrangements does not reflect the inclusion of non-existent costs or inefficiencies.¹ However, this is best left for a later review and for now the VDO is likely to stamp out the most egregious cases of overcharging for essential energy services by exempt sellers.

Also, Consumer Action has not seen examples of exempt selling where anything but a traditional flat tariff structure is applied (apart from the SPPA's discussed later in this submission). We support the ESC applying the same compliant maximum annual bill mechanism for capping non-flat tariffs as exists under the current VDO because this is a pragmatic way forward. However, as in our response to the consultation paper for this process, we reiterate that the ESC should monitor for exempt sellers who may exploit a cap being applied only on the basis of a prescribed modelling of usage at 4mWh per annum when many variables impacting usage patterns may be at play.²

It also appears that detecting non-compliance with the cap relies on households identifying:

- That they are in an exempt selling arrangement;
- That there is a cap for pricing in such arrangements;
- That the cap is the VDO rate for their local electricity distributor;
- Correctly identifying that their tariff charges more than the VDO for that distributor;
- Knowing that they can raise a dispute or complaint about this; and
- Raising a dispute or making a complaint on this basis to the Energy and Water Ombudsman Victoria or the ESC.

¹ See: <https://consumeraction.org.au/households-in-embedded-networks-need-fair-electricity-prices/>

² Ibid, p.4

It is well known that many households struggle to understand or are simply disengaged with energy regulations or have little trust that efforts made to dispute unfair behavior will lead to fair outcomes. Regulators should not rely on households self-identifying breaches for pricing protections to be applied. Households should not be overcharged for essential energy services regardless of their desire or ability to engage. The ESC should therefore actively monitor exempt sellers' pricing or alert relevant decision makers if the ESC does not have the powers to do so.

RECOMMENDATION 1. The ESC commits to a review of the application of VDO pricing to exempt sellers within a reasonable period. The review should ensure that the VDO reflects a fair price for households in exempt selling arrangements and lower the cap where further efficiencies are to be expected in exempt selling arrangements.

RECOMMENDATION 2. The ESC mirror the structures for caps from the VDO but monitor whether exempt sellers offer unfair pricing on non-flat tariffs and take action if required.

RECOMMENDATION 3. The ESC actively monitor exempt sellers' compliance with the pricing cap and publicly report on compliance or alert relevant decision makers if the ESC does not have the powers to do so.

Reforms should come into effect on 1 July 2020

Unfortunately, even though the Department of Environment Water Land and Planning (DEWLP) decided in 2017 that the ESC should address pricing issues from exempt sellers, households continue to be exposed to unfair pricing and now face a further delay.

While we acknowledge the disruption caused by COVID19, it is unreasonable that households bear the costs associated with the delay when businesses have had several years' warning about the new pricing regulation. We do not support customers in embedded networks continuing to be charged above-VDO prices until 1 September 2020. We strongly oppose the delayed implementation of this reform, and recommend changes come into effect as planned on 1 July 2020.

Alternatively, if possible, exempt sellers who charge greater than the VDO between 1 July 2020 and 1 September should be required to refund all charges above the VDO on the next bill.

RECOMMENDATION 4. The Draft Decision come into effect on 1 July 2020, without further delay.

Households accessing essential energy services through SPPA and community energy projects also need price protections

The ESC should reverse the draft decision to exclude suppliers that likely fall under multiple activity exemptions from the VDO price cap. Applying the VDO price cap would create a safeguard that protects households at risk of sustained unfair essential energy service pricing over long periods of time.

Consumer Action's *Sunny Side Up* report demonstrates how the provision of essential energy services to households under these exemptions can lead to sustained detriment. The SPPA case study in the report shows how unfair pricing could have continued for 15 years or more without Consumer Action's intervention to assist the relevant client, as the contract signed by the client stipulated a 15 year term.³ While in this scenario there may have been protections pursued under the Australian Consumer Law, many other issues may arise in the future where price protections for essential energy services are the most appropriate way to ensure fair outcomes for households trapped in multiple activity exemption arrangements.

While there is potentially competition 'on entry' where a household decides to take up an offer of a community electricity arrangement or SPPA, the household may then be stuck in these arrangements and their associated

³ Consumer Action Law Centre, 'Huixuan' case study, [Sunny Side Up: Strengthening the Consumer Protection Regime for Solar Panels in Victoria](#), 2019, p. 63.

costs for decades. The perceived competition discussed by the ESC in the Draft Decision also ignores the practical barriers to effective comparison of complex energy arrangements that could operate over long periods of time and be subject to a multitude of variables.

Also, if the arrangements remain when different people move into a dwelling already being supplied essential energy services through a multiple activity exemption then there is potentially no choice or competition in relation to the arrangement. The arrangement could lock in unfair pricing for many years.

A significant risk may arise for households where a supplier of SPPA or community energy project fails and a blow out of costs might send a household's essential energy costs well above the VDO. Unfortunately, suppliers in this category of exemption are not required to be members of EWOV and households are left at greater risk of unfair outcomes without access to free and effective dispute resolution and price protection if the ESC proceeds with their draft decision on caps for multiple activity exemptions.

As our energy system transitions Consumer Action considers that appropriate energy protections should be applied where any business might inappropriately impact the cost of, or interrupt, a household's essential energy supply. The ESC should reverse its decision and apply the VDO as a price cap for multiple activity exemptions as a step towards appropriate regulation of arrangements that risk significant harm to households in the future.

It is possible that scenarios could arise where households do desire to pay above the VDO in order to pursue benefits like greater environmental outcomes rather than lower energy costs. In such scenarios a VDO equivalent cap could still protect other households with essential energy supply through multiple exemption arrangements while enabling a proper exemption from the VDO cap on application (rather than registering activity) with the ESC. This is just one potential work around that could allow better monitoring of fairness in multiple activity exemption arrangements priced above the VDO by application and price protection for all other households in these arrangements.

RECOMMENDATION 5. The ESC also apply the VDO as a price cap for multiple activity exemptions.

Other issues relating to the draft decision

We note that many embedded network providers bundle other services with electricity, for example, the provision of gas hot water or gas stovetops. Other bundled services might include telecommunications (broadband). There is a risk that this draft decision will simply allow service providers to recover lost revenue by increasing the prices charged for bundled services. The same problems occur for consumers – there is limited transparency ahead of moving into an affected household about these arrangements, and then a lack of choice in taking the service once you've moved in. While we recognise that this issue is not in the direct scope of the current review, the ESC should take steps to address it. For example, the ESC could make recommendations to Government about the appropriate regulatory framework to address this concern.

RECOMMENDATION 6. The ESC consider recommendations to address the opportunity that embedded network providers simply recover lost revenue from other bundled services.

Finally, as discussed in other recent consultations relating to exempt sellers, Consumer Action also notes our following recommendations:

RECOMMENDATION 7. The ESC apply all relevant protections that arose from the Thwaites review to households whose electricity is applied through deemed or registrable residential exemption categories.

RECOMMENDATION 8. The ESC or Victorian Government monitor SPPAs for unfair contract terms and pricing.

RECOMMENDATION 9. The ESC monitors businesses to identify if excessive margins are shifted to other offers for essential services at the same dwelling and take action if necessary.

These recommendations either directly relate to this Draft Decision or interact with it.

Please contact Jake Lilley, Senior Policy Officer, on 03 9670 5088 or at jake@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,

CONSUMER ACTION LAW CENTRE

A handwritten signature in black ink, appearing to read 'K Temple', is positioned above the typed name.

Katherine Temple | Director Policy & Campaigns



APPENDIX A - SUMMARY OF RECOMMENDATIONS

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- RECOMMENDATION 2.** The ESC mirror the structures for caps from the VDO but monitor whether exempt sellers offer unfair pricing on non-flat tariffs and take action if required.
- RECOMMENDATION 3.** The ESC actively monitor exempt sellers' compliance with the pricing cap and publicly report on compliance or alert relevant decision makers if the ESC does not have the powers to do so.
- RECOMMENDATION 4.** The Draft Decision come into effect on 1 July 2020, without further delay.
- RECOMMENDATION 5.** The ESC also apply the VDO as a price cap for multiple activity exemptions.
- RECOMMENDATION 6.** The ESC consider recommendations to address the opportunity that embedded network providers simply recover lost revenue from other bundled services.
- RECOMMENDATION 7.** The ESC apply all relevant protections that arose from the Thwaites review to households whose electricity is applied through deemed or registrable residential exemption categories.
- RECOMMENDATION 8.** The ESC or Victorian Government monitor SPPAs for unfair contract terms and pricing.
- RECOMMENDATION 9.** The ESC monitors businesses to identify if excessive margins are shifted to other offers for essential services at the same dwelling and take action if necessary.