

# Tickets on themselves

## Changes to electricity retail rules

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*Under a draft rule written by the Australian Energy Market Commission energy retailers could use movie tickets and other tricks to cheat consumers. The draft rule waters down a stronger proposal by the federal government.*

Dan Cass  
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# Summary

In December 2017, Environment and Energy Minister Josh Frydenberg submitted a rule change request to the Australian Market Energy Commission (AEMC) that seeks to prevent deceptive marketing of ‘discount’ electricity offers that are actually more expensive than other available contracts.<sup>1</sup>

On 20 March 2018 the AEMC responded to the Government’s proposal with a draft rule change.<sup>2</sup> This draft rule is weaker than the Minister’s proposal, because it defines a breach in much narrower terms (see Figure 1 below).

The draft rule contains loopholes that make it easy for retailers to trick consumers onto expensive and misleading electricity contracts. This could even be through non-price incentives that are entirely unrelated to the provision of electricity, such as tickets to movies or sporting events.

It may be the case that the new regulation would have no material impact on retailer practices in the National Electricity Market (NEM) and thus do nothing to improve energy affordability.

**Figure 1: Key difference between AEMC and Minister versions of rule change**

Minister’s Proposal	AEMC’s Draft
Market offer is prohibited if: -daily supply charge <b>OR</b> -usage charge <b>OR</b> -demand charge is greater than in the standing offer	Market offer is prohibited if: -daily supply charge <b>AND</b> -usage charge <b>AND</b> -demand charge is greater than in the standing offer <b>AND</b> -every energy payment (ie solar tariff) is equal to or less than in the standing offer <b>AND</b> -no additional benefits and services are offered



<sup>1</sup> Frydenberg, “Preventing Retail Energy Discounting on Inflated Base Rates.”

<sup>2</sup> AEMC, “National Energy Retail Amendment (Preventing Discounts on Inflated Energy Rates) Rule 2018.”

# Introduction

We will keep the pressure on the big energy companies to give you a better deal.

Treasurer, Scott Morrison 2018 Budget speech<sup>3</sup>

Between 1996 and 2016, retail electricity prices increased by 183 per cent, almost three times the increase in the wider Consumer Price Index.<sup>4</sup> A key factor driving this increase has been a rise in retailer margins. One of the ways that retailers have inflated their margins has been by luring consumers onto higher rates through misleading 'discount' deals that are actually more expensive than the alternative products offered by the same retailer.

Prime Minister Malcolm Turnbull has made energy affordability a priority for his government and in August 2017, Turnbull and his Energy Minister, Josh Frydenberg, twice met with the seven largest energy retailers, to demand a better deal for consumers.

Most of the Government's measures were purely voluntary undertakings. Retailers promised they would contact consumers on standing offers or expired discount offers and direct them 'to the best electricity plan for them' and make consumption, payment and comparison information more easily available (e.g. work with the Australian Energy Regulator to design a mobile phone scannable QR code or equivalent device on energy bills).<sup>5</sup>

The only mandatory measure announced by the Prime Minister was a new policy to stop retailers using misleading 'discount' offers. In December 2017 the Energy Minister proposed this rule change to the Australian Energy Market Commission (AEMC), in which he said

...the practice of applying discounts to inflated market rates...appears to exist primarily to entice consumers into contracting with a retailer on the basis that believe they are getting a better deal than is otherwise the case.<sup>6</sup>

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<sup>3</sup> Morrison, "Budget Speech 2018-19."

<sup>4</sup> Richardson, "Electricity Costs," p.5

<sup>5</sup> Turnbull and Frydenberg, "Turnbull Government Secures Better Power Deal for Australian Families (Media Release)."

<sup>6</sup> Frydenberg, "Preventing Retail Energy Discounting on Inflated Base Rates." p.7.

Accordingly, the government is seeking to reform the market rules, to try to stop energy retailers defrauding consumers with fake 'discounts'.

This problem is widely acknowledged. For example, the annual review of the market by the Australian Energy Regulator (AER) states

[The] variety of product structures, discounts and non-price inducements makes direct price comparisons between retail offers difficult...the extent of discounting in market offers appears to be growing over time, widening the gap between standing and market offers.<sup>7</sup>

Electricity marketing certainly is confusing. The official estimate from the AEMC is that in 2017 there were over 1,600 published offers to small consumers, plus an unspecified number of unreported offers.<sup>8</sup> Given that in 2017 there was a total of thirty-two brands,<sup>9</sup> the official figures equate to an average of fifty offers per electricity retailer brand.<sup>10</sup> According to a database provided by independent analysts, then scale of the market is even bigger, with 2730 offers available, just to residential customers.<sup>11</sup>

It should be emphasised that consumers do not actually get a different kind of electricity when they switch retailer. There is only one set of poles and wires, which means that everyone in a given area receives exactly the same electricity, no matter how much of a premium they pay for it.

The reason for such a proliferation of offers and sub-brands is ostensibly competition from retailers to gain (and retain customers), which is supposed to drive down prices. However, official statistics show that fake 'discounts' and other indicators of supposed competition are in fact *causing* market failure, in that customers are paying excessive prices.

In theory, consumers are supposed to be protected, through a simple two-tier electricity contracts system,

- A basic default or 'standing' offer that protects consumers and which all retailers have to provide
- A range of 'market' offers that retailers design in order to compete against each other for customers

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<sup>7</sup> AER, "State of the Energy Market 2017," p.147.

<sup>8</sup> ACCC, "Retail Electricity Inquiry - Preliminary Report," pp.121-122.

<sup>9</sup> Owned by twenty-eight retail companies.

<sup>10</sup> AEMC, "2017 AEMC Retail Energy Competition Review," p.302.

<sup>11</sup> CME, "MI- Retail Energy."

The electricity rules define the basic contractual structure of a standing offer. But this is not a form of price control - retailers are allowed to set their standing offer prices themselves (except in regional Queensland, Tasmania and the ACT)<sup>12</sup> and can vary these prices every six months.<sup>13</sup>

Market offers are different. They can include additional contract terms, such as real or perceived ‘discounts’. The crux of the issue is that standing offers are not actually price controls in the first place and the market offers can ‘offer’ almost anything, and trick consumers into paying inflated retail rates.

This has become a major problem for consumers and a source of confusion, even for governments and regulators. For example, the Government’s rule proposal focuses on the market offers as if they are the main issue and states that ‘more consumers than ever before [are] on retail market contracts’ and cites a figure of 50% of customers on retail offers.<sup>14</sup> In fact, even more households are on market offers. In 2013-2014 there were already around 63% of small customers on market offers and by the second quarter of the current financial year it was 70% (see Figure 2 below).

**Figure 2: Consumers on market offers**

State	2013-2014 <sup>15</sup>	2017-2018 Q2 <sup>16</sup>
NSW	63%	81%
Queensland		54%
South Australia	85%	88%
Tasmania	16%	9%
ACT		30%
<b>TOTAL</b>	<b>63%</b>	<b>70%</b>



Source: Author’s calculations from Australian Energy Regulator data. NB the National Energy Retail Rules only came into operation in ACT on 1 July 2012 and in Queensland on 1 July 2015.

<sup>12</sup> ACCC, “Retail Electricity Inquiry - Preliminary Report,” p.121.

<sup>13</sup> AEMC, “National Energy Retail Amendment (Preventing Discounts on Inflated Energy Rates) Rule 2018,” p.iv.

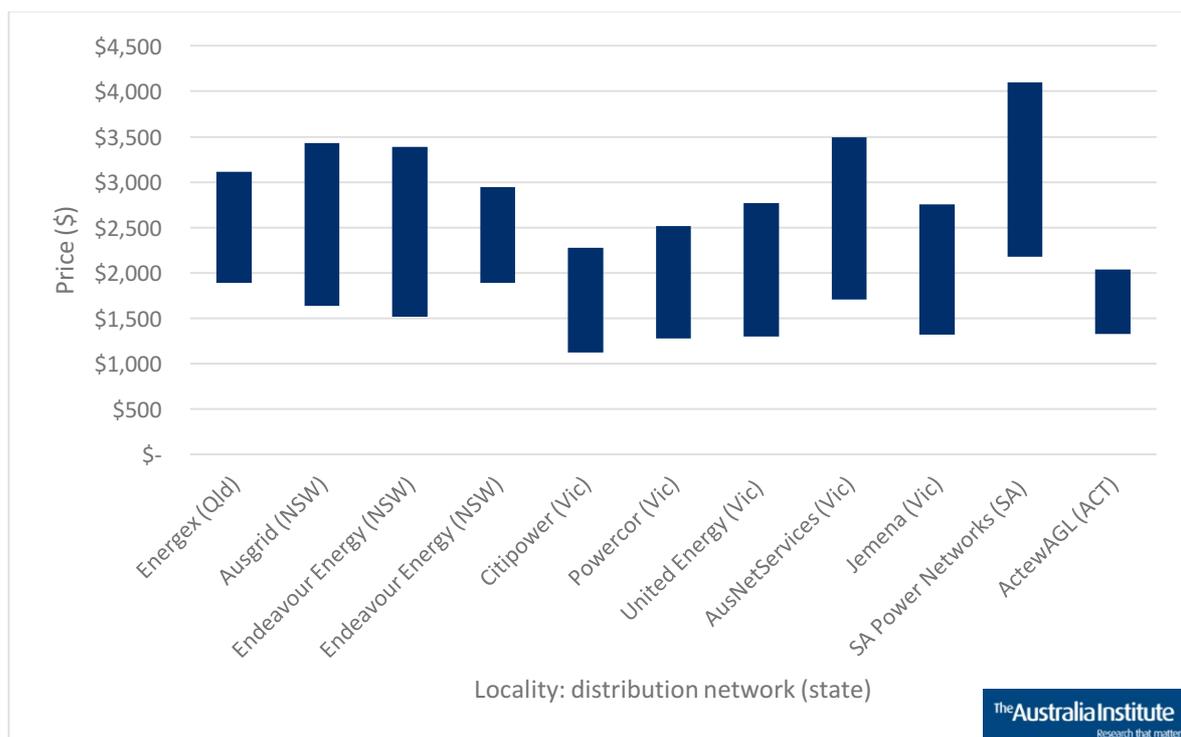
<sup>14</sup> Frydenberg, p.5.

<sup>15</sup> AER, “Annual Report on the Performance of the Retail Energy Market 2013-14.”

<sup>16</sup> AER, “2017-18 Q2 Electricity Contract Types - by Jurisdiction”.

The easiest way to quantify the problem of fake discounts is to analyse the ‘spread’ of prices offered in a given area. The AER has analysed this spread between highest and lowest public electricity contract offers for residential customers. As shown in Figure 3 below, households can be charged very different amounts for the same electricity consumption.

**Figure 3: Estimated price spread of household electricity contract offers in the NEM,**



Source: AER<sup>17</sup>. Household electricity price based on 6500 kwh consumption per year on a single rate tariff at December 2016.

To interpret this figure, consider the example of the third bar from the left. The label indicates that this price spread is for households in NSW, who are connected to the distribution network owned by Endeavour Energy. The retailers who sell electricity to households on this part of the grid offer standing and market contracts which range from \$1515 to \$3386 (for an indicative annual consumption level of 6,500 kWh). That is a price spread of \$1872.

The size of the price spread varies considerably across states. The average state spreads range from \$711 to \$1916 (see Figure 4 below).

<sup>17</sup> AER, p.150.

**Figure 4: Average estimated spread of electricity contract offers**

Average spread from highest to lowest standing and market
ACT \$711
Queensland \$1226
Victoria \$1414
NSW \$1576
South Australia \$1916

Source: Figure 2 above, from AER data

Regulators, government inquiries and independent analysts have attempted to calculate how much consumers are losing out through being on inflated prices. These inflated prices are not entirely due to fake discounts, but it is a major part of the problem. Figure 5 below presents different figures of the price spreads, i.e. the savings foregone by customers, who are paying more for their electricity than they should.

The data from independent analysts CME is notable because it derives from a sample of actual bills and worryingly, it shows that the highest spread in Victoria is \$2393, far higher than the official estimates from the regulators, the AEMC and AER.<sup>18</sup> The AEMC data is estimated from the median value of publicly available offers and the AER uses a comparable estimation basis.

The problem of fake discounts tricking households is more concerning for poorer households. Paul Simshauser and Patrick Whish-Wilson have found that in Victoria ‘a large group’ of vulnerable consumers are paying higher prices than they should be.<sup>19</sup>

**Figure 5: Potential price reduction available to consumers who switch to better contract offers**

Customer comparison basis	Price spread
AEMC ‘median standing’ Vic	\$507
AEMC ‘median standing’ SA	\$481
AER ‘typical’ Vic	\$676
AER ‘typical’ NSW	\$381
CME highest Vic	\$2393
CME high average Vic	\$501
CME Origin Energy Vic median	\$296

Sources: CME,<sup>20</sup> AEMC,<sup>21</sup> AER<sup>22</sup>

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<sup>18</sup> CME, “The Retail Electricity Market for Households and Small Businesses in Victoria.”

<sup>19</sup> ACCC, p.124.

# Government rule change proposal

Australia's energy system involves many different federal and state bodies because it is managed by a cooperative federal agreement, through the COAG Energy Council. The Federal Energy Minister cannot unilaterally change the rules of the electricity market as it operates in each state and territory. Like any other citizen, the Minister has to propose reforms to the Australian Energy Market Commission.

There are really only two ways to protect consumers from price gouging. The direct measure is to control prices themselves. The indirect measure is to regulate marketing, which is the approach taken by the Federal Government with its proposed rule and the AEMC in the draft rule.

The weakness of this approach of trying to 'nudge' prices down through the regulation of marketing behaviour – rather than simply setting a price - is that firms adapt their marketing practices and the offers they make, to mitigate the impact of that regulation. The Minister's proposal acknowledges this regulatory risk and says that if retailers 'circumvent the rule by altering tariff structures', then the Government would consider further rule changes, to tighten loopholes.<sup>23</sup>

The Government makes clear that it desires some sort of financial penalty for breaking the rule but does not propose a level. The proposal says, a 'specific prohibition is a far clearer signpost to retailers on their legal obligations and would amount to a simpler and stronger deterrent.'<sup>24</sup>

The rule proposed by the Minister would prohibit a 'discount' if any part of the tariff is higher than a standing offer (see Figure 1 above). So if the daily supply charge was higher, then it could not be marketed as a 'discount'. Likewise if the usage rate or any demand charge is higher, then it can not be marketed as a 'discount' offer.

The AEMC's draft rule defines a prohibited offer in narrower terms, which means that even less misleading 'discounts' are struck out as deceptive. The draft rule only prohibits a 'discount' that has *all* three charges – daily supply, usage and demand - above a standing offer. It also has to have payments i.e. solar feed in tariffs that are equal or less than the standing offer. The 'discount' only breaches the rule if it also

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<sup>20</sup> CME, "The Retail Electricity Market for Households and Small Businesses in Victoria," p.76, 78.

<sup>21</sup> AEMC, "2017 AEMC Retail Energy Competition Review," p.92

<sup>22</sup> AER, "State of the Energy Market 2017," p.147.

<sup>23</sup> Frydenberg, p.8.

<sup>24</sup> Frydenberg, p.6.

provides no additional benefits or services, such as movie tickets (see loophole three below).

What this means is that the AEMC has defined what is deceptive according to its rule in such narrow terms, that it may end up not capturing any deceptive offers.

The AEMC draft does create a penalty (of up to \$20,000 for an energy company)<sup>25</sup> for making a prohibited form of 'discount' offer, but this will have no impact if firms can readily avoid the AEMC's very narrow definition of what constitutes a prohibited offer.

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<sup>25</sup> AEMC, "National Energy Retail Amendment (Preventing Discounts on Inflated Energy Rates) Rule 2018." p.ii.

# AEMC's draft rule

The AEMC states that it 'supports the intent of the rule change request' and claims that its draft rule would 'achieve similar outcomes to the proposed rule, but through a more targeted and integrated approach'.<sup>26</sup>

The rule would prohibit a misleading discount only in the very narrow case that a retailer duplicates a standing offer as a market offer, then puts up the total cost but offers a discount on one particular charge, the marketing of which entices the customer onto the more expensive offer (see Figure 1 above for a summary of the rule's logic).

The fundamental flaw in the whole approach is that the levels of market offer and standing offer prices are unregulated. When it comes to price level, retailers can basically invent any range of standing and market offer price levels they want, the only restrictions are on contractual forms for standing offers and the rate at which they can then vary the prices.

**Figure 6: AEMC draft catches one third as many breaches of residential electricity offers as Minister's proposed rule**

Electricity offer type		Breaches	
Standing	Market	Govt Proposed	AEMC draft
585	1145	53 (4.6%)	17 (1.5%)

Source: AEMC<sup>27</sup>



The draft rule is even weaker than the Minister's Proposal and would only prohibit seventeen market offers (see Figure 6 above).<sup>28</sup> This is very small in proportion to the number of offers available. According to the AEMC there were 1600 offers available to residential and small business customers in the NEM in 2017,<sup>29</sup> although a private data provider, [MI] Retail Energy, calculates that there are 2730 offers available just to residential consumers and 3712 for residential and small business combined (10 May 2018).<sup>30</sup>

<sup>26</sup> AEMC, "National Energy Retail Amendment (Preventing Discounts on Inflated Energy Rates) Rule 2018," p.i.

<sup>27</sup> AEMC, p.44.

<sup>28</sup> AEMC, p.28.

<sup>29</sup> ACCC, "Retail Electricity Inquiry - Preliminary Report," p.121.

<sup>30</sup> CME, "MI- Retail Energy."

The AEMC concedes that its version 'is likely to allow some offers that are not in consumers' interests'.<sup>31</sup> In the next section we discuss how loopholes in the draft rule could be used to undermine the interests of consumers.

Another important clarification is that the proposed rule would not apply in Victoria, because that state has not adopted the National Energy Customer Framework.

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<sup>31</sup> AEMC, p.17.

# Loopholes

So how can companies use the loopholes in the rule, to continue to trick consumers onto more expensive contracts?

There are three main ways that a company can construct an expensive offer so that it is legal under the AEMC's draft rule to market it as a 'discount'.

## Loophole 1: Shift the goalposts

This is the simplest ruse of all. Retailers can simply increase all their standing offers so they are above all the 'discount' market offers they wish to make. Then every market offer is already a discount against the corresponding, inflated standing offer. This is the same trick used by the apocryphal dishonest used car salesman. He has a Toyota Corolla worth \$12,000 to sell, so he puts a price on the window that reads "\$15,000, discounted to \$13,000". The buyer sees the \$2000 'discount' and snaps up a bargain, that turns out to be \$1000 more expensive than it should be.

In a footnote (on page 21) of its March 2018 consultation paper, the AEMC explicitly concedes this problem is a weakness of the draft rule:

Early informal consultation suggested that the most likely response to the proposed rule would be to increase standing offers to remain in compliance.<sup>32</sup>

## Loophole 2: Juggle the prices

The AEMC Draft allows a 'discount' offer if any of the charges in the market offer are cheaper than a charge in the comparable standing offer. (The logic of the rule structure is explained in Figure 1 above).

Consider the worked example in Figure 7 below. The 'discount' contract offers a vastly more expensive usage charge but a one cent reduction on the daily supply charge and a headline discount of 10%. The spread between the 'discount' market offer is \$1,048.34, that is it is actually over one thousand dollars *more expensive* than the standing offer. This would be allowed under the draft rule.

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<sup>32</sup> AEMC, note 43, p.21.

**Figure 7 : Loophole example of price juggling to deceive consumers**

	Standing offer	Market offer
Daily supply charge	\$0.75	\$0.74
Usage charge / kWh	\$0.23	\$0.44
Discount	0%	10%
Yearly cost	\$1,768.75	\$2,817.09
Difference		\$1,048.34

Assumptions: household consumption 7000 kWh – uses daily supply and usage charges from worked example in AEMC rule analysis<sup>33</sup>



### Loophole 3: Ticket to ride

The last major loophole is to simply make the ‘discount’ offer inequivalent to any standing offer, with a ‘benefit or service’ that does not even need to be a price reduction, nor even related to electricity. It is then a ‘discount’ against whatever the retailer says is the baseline.

As the AEMC explains;

Benefits and services under subrule (2)(d) can cover benefits associated with a contract such as movie ticket passes, non-financial benefits and offering “green power”.<sup>34</sup>

These kinds of non-price and indeed non-electricity incentives are specifically allowed by the National Electricity Retail Law and guidelines. The new version of the national guidelines on retail energy marketing, developed by the Australian Energy Regulator, which come into force on 31 August 2018, states:

Examples of non-price incentives include vouchers for use in energy retail stores, magazine subscriptions, cinema tickets or tickets to sporting events.<sup>35</sup>

What this means is that, under the proposed rules, a retailer can make a new ‘discount’ offer by increasing the electricity charges, but adding free tickets to see Wonder Woman, or a Rugby game, and that counts as fair. Simply Energy, for example, already has a discount offer that includes one Village Cinemas Gold Class ticket every three months for two years.<sup>36</sup>

<sup>33</sup> AEMC, Box 3.2, p.10.

<sup>34</sup> AEMC, p.18.

<sup>35</sup> AER, “AER Draft Retail Pricing Information Guidelines for Consultation - January 2018”, p.9.

<sup>36</sup> “Village Cinemas Gold Class Offer.”

The only substantial protection is the general prohibition under the Australian Consumer Law, 'from representing discounts in a manner which misleads or deceives consumers'.<sup>37</sup>

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<sup>37</sup> AER, p.17.

# Conclusion

The Prime Minister and Energy Minister were right to take on energy retailers over their inflated margins and tackle misleading ‘discount’ offers. Retailers make electricity (and gas) confusing and consumers pay inflated prices as a result. As Choice puts it, ‘The energy market may be the most confusing confuse-opoly of all.’<sup>38</sup>

Unfortunately however, the AEMC’s own analysis of its draft rule change reveals that the it will capture only seventeen of the thousands of offers available to retail customers.

It also concedes that retailers will be able to use loopholes in the new rule to evade it:

1. Increase standing offers to that all ‘discounts’ market offers are below the standing offers (Loophole 1 above)
2. Juggle prices so one charge is cheaper in the ‘discount’ offers, even while the total bill is higher (Loophole 2 above)
3. Offer a movie or sport ticket or any other ‘benefit or service’ in a ‘discount’ market offer (Loophole 3 above)

The rule change is not going to fix the problem the Government has sought to address and may even make matters worse.<sup>39</sup>

If the Federal Government and regulators want to protect consumers from misleading ‘discounts’ and other measures that result in inflated retailer margins, they will have to go further and be prepared to question the philosophy of fully deregulated retail markets.<sup>40</sup>

For example, in November 2016 Victoria instigated an Independent Bipartisan Review of Electricity and Gas Retail Markets, led by former Labor Deputy Premier, John Thwaites and former Liberal Minister for Roads/Public Transport, Terry Mulder. The Thwaites Review was distinguished for commissioning the first major regulatory research on actual prices paid by consumers, rather than relying on retailer assurances

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<sup>38</sup> “Energy Bill Comparison Sites.”

<sup>39</sup> The Consumer Action Law Centre says the ‘offers in the market may become more confusing’ as a result of the rule change and ‘the proposed rule change is simply window dressing’ (Brody, “National Energy Retail Amendment (Preventing Discounts on Inflated Energy Rates) Rule 2018 Consultation Paper Submission,” p.1) and Choice concurs that it ‘risks encouraging retail practices that could lead to consumer detriment’ (Przhedetsky, “National Energy Retail Amendment (Preventing Discounts on Inflated Energy Rates) Rule 2018 Consultation Paper Submission from Choice,” p.6)

<sup>40</sup> Ben-David, “The Forgotten Question about Competition.”

and estimates based on published offers. This data revealed a price spread in Victoria of \$2393 (see Figure 5 above).

The Review pointed out ‘the existence of standing offers has become increasingly irrelevant’ and suggested it has actually contributes to failures in the retail market.<sup>41</sup> The Review proposed that standing offers be abolished and a new regulated price (Basic Service Offer or BSO) be created (Recommendation 1).

This is still what is known as a ‘light-handed’ regulatory approach to prices. It does not set a maximum price that retailers can charge for electricity, but merely sets a maximum benchmark price, against which consumers could evaluate market offers.

In the Thwaites model, retailers would have to provide a benchmark BSO but would still be explicitly allowed to keep offering all and any market offers to customers;

Retailers may make any other offers available to consumers, including offers priced above their Basic Service Offer (BSO).<sup>42</sup>

The response to the BSO from the industry body representing retailers was surprisingly vigorous. The Australian Energy Council (AEC) said it would be a ‘deeply retrograde step for an energy market which policymakers are keen to see transition to a low emissions and more customer-centric future’. The AEC even claimed to be concerned that the setting and policing of a clear, reference price for consumers would place ‘huge pressure on the regulator’ and went on to alleged it would actually ‘*kill competition*’.<sup>43</sup>

There are good arguments for full regulation of electricity prices but it seems like the best first step is to adopt a credible, national ‘light-handed’ approach, that at least establishes a clear benchmark against which fake ‘discounts’ can be assessed.

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<sup>41</sup> Thwaites, Faulkner, and Mulder, “Independent Review of the Electricity & Gas Retail Markets in Victoria,” p.55.

<sup>42</sup> Thwaites, Faulkner, and Mulder, p.xi.

<sup>43</sup> “The Big Reveal.” (emphasis added)

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