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**Draft Order in Council to implement the *Victorian Default Offer***

AGL would like to take this opportunity to respond to the draft Order in Council (draft OIC) that has been proposed to implement the Victorian Default Offer (VDO). as well as the accompanying *Victorian Default Offer - Draft Orders: Consultation paper* (Consultation paper) released by the Department of Environment, Land, Water and Planning (DELWP).

The OIC, made under section 13 of the *Electricity Industry Act 2000*, will regulate tariffs for the sale of electricity to small customers in Victoria. AGL does not support re-regulation of energy prices and believes it is an unnecessary policy response given the additional market reforms being initiated to improve the effectiveness and transparency of retail energy markets.

However, AGL recognises that the VDO will start from 1 July 2019 and seeks the best customer experience by minimising the potential for customer confusion and allowing a smooth implementation for energy retailers. In AGL's view, this will require some amendment to the draft OIC.

Specifically, AGL notes the draft OIC:

- sets the prices for the VDO for the initial period (from 1 July 2019 to 31 December 2019);
- give the ESC the power to directly determine prices for the VDO in future periods (from 1 January 2020 onwards); and
- requires the VDO to be used as a reference price any advertised discounts.

Although these fundamental aspects of the draft OIC were both expected and generally understood, AGL has significant compliance and practical concerns with specific obligations in the draft OIC, namely:

- the obligation for information on how to access the VDO to be placed prominently on a retailer's electricity bill; and
- a broad requirement for all discounted offers for any tariff type (including benefits) to refer to the estimated annual cost of the VDO.



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### **Bill message obligation**

The draft OIC states that clear and simple information about how to access the VDO must be prominently placed on a retailer's electricity bill.

AGL was cognisant of the need to provide customers with relevant information on accessing the VDO, however, this requirement has been extended to include this communication, prominently, on every customer's bill.

AGL's immediate issue is that it cannot meet this requirement for 1 July 2019 because its electricity bill has been "locked" in and provided to its third-party vendors.

As DELWP is aware, the electricity bill for the first quarter of 2019-20 must provide and explain a large amount of new information to customers including the inclusion of GST in retail prices, the changes to the solar Feed-in-Tariffs and the "Best Offer" message requirement. Even if greater notice had been provided, AGL was unable to include on the electricity bill without omitting another of the bill messages.

A secondary issue is that the draft OIC currently infers that this message must be on every bill which is even more frequently than the "Best Offer" requirement. These two obligations will severely limit the ability for AGL to provide any other message through its electricity bill, either for marketing purposes or to meet any additional regulatory obligations.

AGL has previously highlighted that a separate VDO bill message will conflict with the "Best Offer" requirement that is seeking to ensure that all customers access the most affordable energy plan for their needs. This is likely to create customer confusion about what is appropriate for them. AGL believes that this fundamental issue and the AGL's other concerns raised above can be resolved if DELWP was able to amend the draft OIC to enable the message on accessing the VDO to be provided in conjunction with the "Best Offer" message, aligning frequency and transitional arrangements.

### **Product discounts to be determined off the VDO in advertising and offer**

AGL was aware of the policy intent that any future discounted products offered in the Victorian retail electricity market would be referenced to the applicable VDO.

However, AGL was not expecting the draft OIC to impose this obligation on 1 July 2019 without prior consultation and was not expecting the obligation to be as broad reaching. AGL was expecting this requirement to be considered by the ESC's when it consulted on the implementation of recommendation 3A of the *Final Report of the Independent Review of the Electricity and Gas Retail Markets in Victoria*.

AGL's concerns are that:

- the implementation timeframe for this obligation is highly compressed given the considerable system and product changes that retailers are already undertaking for 1 July 2019;
- there has been no consultation to date;
- the draft OIC currently refers to "a discount or other benefit". AGL understands the Government is only intending for discounted products to reference the VDO but believes including the term "benefits" is highly likely to capture additional energy and ancillary products; and
- the requirement for referencing discounted products to the VDO includes all other types of non-flat tariffs. This will generate enormous confusion for customers and difficulties for retailers because of the



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information disclaimers that will need to be provided in any advertising or offer to ensure customers are not misled.

The ESC is required to ensure that the VDO is applicable for all tariff types and not just flat tariffs in 2020. The ESC has also been tasked with consulting upon and amending the Energy Retail Code to effectively implement the requirement for all discounted products to reference a relevant VDO.

Given these future changes, AGL believes that ideally, DELWP should amend the draft OIC to suspend the referencing obligation until the ESC has made the appropriate amendments to the Energy Retail Code.

However, at a minimum, AGL strongly encourages that any draft OIC obligation for referencing the VDO from 1 July 2019 be limited to any discounted products for the flat tariffs, to enable a true like for like comparison.

AGL's responses to the questions raised in the Consultation Paper follow in the attached submission.

Should you have any questions in relation to this submission, please contact me on [REDACTED] or Patrick Whish-Wilson on [REDACTED].

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Elizabeth Molyneux'.

Elizabeth Molyneux  
GM of Energy Markets Regulation



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## 1. Issues for Consultation

### 1.1. Objective of the Victorian Default Offer

The proposed objective of the VDO is to: “...provide a simple, trusted and reasonably priced electricity option that safeguards consumers unable or unwilling to engage in the electricity retail market.”

#### 1. Is the objective in clause 3 of the draft section 13 Order clear and appropriate?

Clause 3 of the OIC gives the ESC and Government broad and uncontrolled powers to make a VDO price determination that meets the VDO objectives.

Although the clause reflects previous statements by Government regarding the objective of the VDO AGL believes it is not clear and appropriate for a legislative instrument.

The term "trusted" is highly subjective, undefined and ambiguous, and it is not clear to us how either the ESC, the Minister or legal review would be able to determine whether this aspect of the objective is being met.

This in turn creates the risk of decisions that are contrary to the ESC primary objectives under the *Electricity Industry Act 2010* of promoting competition in the generation, supply and sale of electricity.

AGL suggest the objective is amended to remove any ambiguity.

### 1.2. The initial VDO (1 July 2019 to 31 December 2019)

The first VDO will apply for 6 months from 1 July 2019.

#### 2. Does Clause 6 of the draft section 13 Order adequately give effect to the VDO for the initial period from 1 July 2019 to 31 December 2019?

Clause 6 specifies that, during the period of 1 July 2019 to 31 December 2019, only consumers on standing offers comprising a flat tariff (and flat tariff with controlled load) will automatically transition to the VDO for the period from 1 July 2019 to 31 December 2019. Other consumers will be able to 'opt-in' to the VDO.

AGL supports this approach in the draft OIC but does have concerns regarding the ability and practicality of customers on other tariff types being able to take up the VDO in this 6-month period, especially given the draft OIC assumes the VDO will be extended to cover all tariff types in the future regulatory periods.

It is likely that such a change would require a network tariff change or reconfiguration of the provision of metering data in order to put a customer on a different tariff type onto the current VDO during this 6-month period. The potential for customer confusion, especially if the continued reform of network tariffs requires this customer to be placed on another network tariff type, and subsequently, a different future VDO structure is high.

AGL believes that clause 7 is unclear on whether it allows every customer (including new customers) to access a retailer's VDO or whether it remains consistent with current regulations that only require a retailer



to make a standing offer available to customers where they are the financially responsible market participant (FRMP) for the site.

AGL assumes the intention is not to extend the supply obligation to all customers and that it reflects that every customer (including potential customers) can access a retailer's VDO but first it would be required to become a FRMP of the retailer.

AGL would also request clarification of clause 7.

### **1.3. The VDO for future periods (1 January 2020 onwards)**

Clause 9 provides that, at least 42 days before the commencement of a regulatory period, the ESC must make a price determination that determines, for each distribution zone in Victoria:

- (a) the maximum prices a retailer may charge under a standing offer during the regulatory period; or
- (b) the manner in which the maximum prices a retailer may charge under a standing offer during the regulatory period are to be determined or calculated.

**3. Does clause 9 of the draft section 13 Order appropriately reflect the objective of the VDO?**

**4. What would be the implications of the alternative option – the VDO continuing to be a flat tariff (or flat tariff with controlled load tariff) only?**

The proposed approach reflects the Government's intention that all standing offers will be subject to price regulation from 1 January 2020 and provides the ESC with discretion as to how these VDO prices are determined in future periods.

This wide 'discretion' may provide unforeseen ongoing challenges for retailers who will need to implement the VDO in each period.

The 42-day period already provides challenges as it does not leave sufficient time for a retailer to determine and then publish their standing offers prices in line with the Government gazettal requirements. However, AGL recognises that making the determination earlier may be more problematic as the ESC would not be in a position to incorporate any final network price change.

AGL notes DELWP has resolved this issue for the initial VDO by reducing the four-week gazettal period to two weeks. AGL suggest that this approach is made permanent.

Alternatively, given the intent is for all standing offers to be subject to price regulation from 2020 then there no longer a need for Gazettal of retailers' standing offer and this requirement should be abolished for retail electricity prices.

The options proposed in the Consultation Paper for future price determinations are both feasible and have different benefits and implementation issues that AGL is happy to work through with the ESC over the next period. It is important the methodology is determined well in advance of the price determination process so that any ongoing implementation challenges for the business can be planned for.



#### 1.4. Approach and methodology to making a price determination

Clause 11 sets out the proposed approach and methodology for making a VDO price determination.

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| <p>5. Does the approach and methodology specified in clause 11 of the draft 13 Order appropriately reflect the objective of the VDO?</p> <p>6. Are there any other matters the ESC should be required to consider in setting prices for the VDO?</p> |
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Clause 11 requires that prices determined by the ESC pursuant to the VDO price determination are to be based on the efficient costs of a retailer.

AGL has provided extensive commentary in its submissions to the ESC about the effective approach to determining a retailer's prudent costs. Efficiency needs to be major factor in determining prices but relying solely on an efficient retailers' costs is likely to undermine competition and any future dynamic efficiencies.

AGL note that clauses 12 and 13 both provide the ESC significant discretion to determine the basis on which it may vary prices during a regulatory period, and the extent to which it will consult on a VDO price determination.

We note there is only a requirement that it have regard to its Charter of Consultation and Regulatory Practice but no requirement for minimum consultation are mandated.

Similarly, as a result of a variation of a VDO price determination, '*the Commission must ensure the retailer is given adequate notice before the variation to the VDO price determination takes effect*' but there is no indication what constitutes 'adequate' notice. AGL requests clarification on this point.

#### 1.5. Information on customer bills

Clause 7(2) requires that a retailer's electricity bill must include clear and simple information about how to access the VDO.

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| <p>7. Will this approach assist customers to access the VDO? Or would it be preferable to prescribe the wording on bills and if so, what should this wording be?</p> <p>8. Are there any implementation issues that should be considered?</p> |
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As indicated above in its letter, AGL cannot comply with this requirement as currently stated in the draft OIC because it no longer has the time to change its electricity bill for the 1 July 2019.

This new bill includes a significant amount of new information including the inclusion of GST in retail prices, the changes to the solar Feed-in-Tariffs and the "Best Offer" message requirement and has already been planned and provided to third parties for final design and implementation.

AGL is able to provide a message around accessing the VDO on its bill by the end of July but only if the government requirements around this message are finalised by the middle of May 2019; to be clear approximately 11-12 weeks lead time is required for bill at this point in time.



However, this message will be a ‘work around’ and it remains unclear:

- how often this message must appear on the electricity bill;
- for how long; and
- how it interacts with the “Best Offer” requirement.

AGL encourages DELWP to consider the VDO message in conjunction with the “Best Offer” requirement to provide the optimal customer experience and avoid customer confusion around the best offer for them to take up.

For example, if the draft OIC requirements for the VDO message are bundled with “Best Offer” then a compliant message (in the “Best Offer box”) could read

*“Based on your past usage, our XXXX may cost you up to \$200 less per year than your current plan. To access this plan and other offers such as the Victorian Default Offer, call xxx xxx.”*

A similar message could be crafted outlining access to the VDO if a customer was already on the best offer, although this would be less relevant for the customer.

### **1.6. VDO to be the reference price for discounts**

Clause 14 requires retailers to use the VDO as the reference price for all discounted offers until the ESC amends the Energy Retail Code to ensure future VDO price determinations will act as the reference price for discounts.

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| <p><b>9. Will the approach proposed in clauses 14 and 15 adequately meet the Government’s intention to enable discounted offers to be easily compared?</b></p> <p><b>10. Is the proposed method for determining the estimated annual cost of offers in Schedule 3 simple and easy to use?</b></p> |
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It is intended that, from 1 July 2019, all discounts offered in the retail electricity market will be referenced to the VDO. This includes discounted offers relating to any tariff type (not just flat tariff and flat tariff with controlled load tariffs). This reflects the Government’s intention that, from 1 July 2019, comparing discounts will no longer be like ‘comparing apples with oranges.’

As currently drafted, AGL does not believe Clause 14 will meet the Government’s intent for easy product comparison and is likely to further confuse customers rather than increasing consumer trust.

Firstly, AGL is concerned that clause 14 refers to ‘a discount or other benefit’ rather than simply a discounted product. Because the use of the term ‘benefit’ is not defined in the draft OIC, it is likely that clause 14 will extend to products with ongoing or once off benefits such as gifts, credits or fixed rates including ancillary product credits. Ancillary products, such as AGL’s Solar Exchange or Offsite solar plans<sup>1</sup>, are provided in conjunction with other energy supply products. AGL would not be able to capture these benefits in any reference comparison and it would affect if and how such products are launched or advertised.

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<sup>1</sup> <https://www.agl.com.au/solar-renewables/projects/solar-exchange> and <https://www.agl.com.au/newcampaigns/offsite-solar>



The application in section 14 is also inconsistent with the approach under the best offer calculation, which would exclude the value of any one-off benefit, such as a gift or sign up credit.

AGL assumes that this is not the Government's intention and proposes the draft OIC is amended by simply excluding the reference to benefits.

AGL also notes that clause 14(2)(c) is unnecessary as it is already covered under the Clear Advice Entitlement requirement in the new Energy Retail Code and should be removed.

Second, AGL is concerned that clause 14 is extending the reference requirements to the VDO to tariff types other than a flat rate tariff (e.g. time-of-use, demand or some other variable rate), especially for this initial 6-month period when the price determination has not covered non-flat tariffs.

This requirements of the draft OIC may place retailers in a position of conflict between these obligations and the obligation not to mislead or deceive customers in advertising.

The ACCC, in providing guidance on "comparator websites", has emphasised that the advertising of comparisons should "facilitate like-for-like comparisons". This includes by making accurate savings representations and by disclosing any assumptions used when making comparisons.<sup>2</sup> The ACCC has further stated that operators of such websites should "only make savings representations when comparing like-for-like products".<sup>3</sup> These statements illustrate the general principle that, to avoid misleading customers, comparison statements made in the course of advertising should compare like products and prominently disclose the assumptions underpinning the comparison. Disclosures of the assumptions cannot merely occur in small print or disclaimers because these alone cannot cure the misleading effect of a dominant headline comparison.<sup>4</sup>

In relation to TOU tariffs, subclauses 14(3) and (5)(a) of the draft OIC require a comparison statement to be made when offering these tariffs, but the comparison is not a like-for-like comparison. While subclause 15(5)(a) and schedule 3 of the Draft Order state a process for calculating the estimated annual cost for a TOU tariff, they incorporate a series of assumptions on the customer's annual usage, peak, shoulder and off-peak usages.

Given that the comparison statement is not a like-for-like comparison, it may be potentially misleading unless the assumptions are clearly disclosed. Retailers will be required to clearly express that the comparison is an estimate based on assumptions about how much the customer consumes annually, and about when the customer consumes their energy during each day. The difficulty for retailers is that these assumptions must be conveyed in a conspicuous manner in any advertising to qualify the headline comparison disclosure, which must itself be "prominent" per subclause 15(7). Small print will likely not suffice.

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<sup>2</sup> <https://www.accc.gov.au/system/files/CSBS%20-%20Comparator%20web%20sites%20project%20-%20Industry%20Guidance%20-%20final.pdf> at pp 2-3

<sup>3</sup> <https://www.accc.gov.au/system/files/CSBS%20-%20Comparator%20web%20sites%20project%20-%20Industry%20Guidance%20-%20final.pdf> at p 10

<sup>4</sup> ACCC v TPG [2013] HCA 54 at [52]; <https://www.accc.gov.au/business/advertising-promoting-your-business/false-or-misleading-statements#fine-print-and-qualifications>



The number of assumptions to be disclosed, and the need to clearly convey to customers that their own usage may differ (perhaps greatly) from the estimated usage, raise the substantial risk that advertising offers for TOU tariffs will require long, text-heavy advertisements that are apt to confuse and frustrate customers.

A further risk for retailers is that, should an advertisement be misleading, retailers cannot correct that breach by making customers aware of the true position before entering the contract for energy. Australian courts have held in numerous cases that a business may mislead customers by “enticing” them into negotiations based on an erroneous belief.<sup>5</sup> In the case of the comparison required by subclauses 14(3) and (5)(a), telling customers later what they will actually save compared to the VDO on a TOU tariff is irrelevant if they have contacted a retailer in the erroneous belief that they will receive a higher discount.

These risks are heightened in the case of demand tariffs. Subclause 14(5)(b) indicates that, in the case of demand tariffs, the relevant estimated annual cost should be “based on a reasonable estimate having regard to any relevant information available to the retailer”. However, due to their calculation based on the maximum electricity usage during a particular period per day, and their variation between summer and winter, demand tariffs vary greatly between customers. It is hard to consider that any estimate is “reasonable” when individual customers are likely to have significantly different demand charges to the average or median demand tariff customer. Attempts to make such comparisons are likely to result in confusion for customers, and to be misleading in the same ways that TOU tariff comparisons may be.

Importantly, compliance with the regulatory requirements of the draft OIC may not be considered a sufficient defence to a claim of misleading conduct in these cases. This risk is most acute where the regulatory requirement is broad and open to interpretation (“reasonable estimate”). Retailers honestly attempting to comply with this regulatory requirement may still be penalised for misleading conduct on the basis that they should have chosen another “reasonable estimate” to use in offers.

Finally, AGL believes that DELWP needs to better define some of the obligations in the draft OIC so that they do not result in unexpected outcomes. These include:

- the disclosure clause 15(7) is required to be ‘prominent in the offer’ and ‘in any advertising in respect of the offer’. It’s unclear how retailers can disclose a reference price comparison for all distribution areas and tariff types (this would require significant disclosure) or whether it would only apply where the advertisement is for a particular distribution area and tariff type, such as a targeted advertisement or as part of the customer sign up process;
- we assume that offer documentation that is provided to the customer, such as welcome packs and fact sheets, is not covered by this clause but this should be made clear;
- clause 14 is limited to discounted products which is assumed to be instances where percentage discounts are provided off the bill, total prices or usage rates. However, discounted products are not defined and may capture products with rebates or benefits that could be generally classified as discounts;

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<sup>5</sup> Some recent instances include: *ACCC v Singtel Optus Pty Ltd* [2010] FCA 1177; *ACCC v TPG Internet Pty Ltd* [2013] HCA 54 at [48], [50]; *ACCC v AGL South Australia Pty Ltd* [2014] FCA 1369 at [148]-[172]; *ACCC v Hillside (Australia New Media) Pty Ltd trading as Bet365* [2015] FCA 1007 at [76].



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- whether a retailer's website is considered advertising in respect of an offer. If so, there are significant challenges around how a retailer can disclose every reference price comparison figure when there are multiple tariff types (including multiple TOU tariffs with differing usage allocations).

All of these issues need to be carefully considered. AGL expects that the ESC consultation, as part of its amendment of the Energy Retail Code to implement the requirement for all discounted products to reference a relevant VDO, will resolve these concerns. The current draft OIC has not allowed for appropriate consideration of these issues.

AGL suggests that the draft OIC be amended so that the obligation to reference the VDO for discounted products from 1 July 2019 be limited to the flat tariffs that are currently regulated.