



18 October 2011

By email: declan.leamy@esc.vic.gov.au

Declan Leamy
Project Manager
Essential Services Commission
Level 2, 35 Spring Street
MELBOURNE VIC 3000

Dear Mr Leamy

Submission to ESC's Energy Retailer contract Variation Notification Requirements - Issues Paper

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to make a submission to the Essential Services Commission's (the **Commission**) *Energy Retailer Contract Variation Notification Requirements Issues Paper* (**Issues Paper**).

We have, for a long time, had considerable concerns regarding clauses in retail energy contracts that allow for unilateral variations in key terms and conditions (particularly the price) and the impact these terms have on often unsuspecting consumers. We also have concerns as to whether current contract variations meet legislative requirements under broader consumer laws, such as the prohibitions on unfair terms in the Australian Consumer Law. As such, we are very supportive of the initiative being taken by the Commission to improve consumer protections in relation to contract variation notifications.

We recently released a report, based on research conducted from 2008, entitled *Just sign here.... A review of Victorian retail energy contract terms and conditions* (attached). The report assessed whether terms and conditions of energy contracts fully complied with relevant regulatory instruments and whether retailers proactively ensured consumers were aware of their rights and obligations.

Largely, our findings were that, whether intentionally or unintentionally, energy contracts generally obfuscated the terms relating to consumer rights, and omitted or attempted to subvert the regulatory requirements. Quite simply, the terms were badly drafted suggesting that retailers were not proactively ensuring consumers were aware of their rights and obligations under their contracts.

In particular, the report found significant issues with unilateral variation clauses meaning, once a consumer signed a contract, retailers could change the price they charged at any time. The report recommended: "*retailers should provide, to the greatest extent possible, some indication of how tariffs might change in the future, including a commitment to notifying*

a customer of a variation before the tariff actually changes and an option to exit the contract without penalty".¹

On this basis, we strongly support each of the recommendations made by the Commission in the Issues Paper as discussed below.

Explicit informed consent

We strongly support the Commission's recommendation that retailers obtain a separate action confirming a customer's explicit informed consent to future contract and tariff variations in writing, over the phone, or electronically at the point of sale. Noting that it is common consumer behaviour to not review lengthy written terms and conditions of contracts, we agree that this requirement should mean that it is more likely that a consumer will actually be aware that an energy contract they sign provides energy retailers with a right to vary the contract and/or tariffs.

We suggest a further enhancement of this recommendation by requiring retailers to disclose the impact of its right to vary contract terms and conditions. For example, the separate action confirming a customer's explicit informed consent should also confirm their consent to the price of their energy increasing during the term, or billing frequency being changed from quarterly to monthly. This would further serve to alert consumers to the way in which contract variations may impact upon them.

Contract tariff variation notice requirements

We strongly support the Commission's recommendation to notify customers with accumulation meters of any tariff variation at least 20 business before that variation comes into effect, bringing the obligation in line with customers of smart meters. This is a fair and equitable outcome for all consumers.

We suggest that, in addition, this recommendation stipulates that upon notification of a tariff variation that a consumer has a right to leave that contract without penalty, for example an early termination fee. The freedom to leave a contract and seek a better deal if the price goes up will facilitate more effective competition and empower consumers to drive the retail sector to respond to consumer needs more readily.

Frequency of contract term variations

We strongly support the proposed prohibition on a retailer's ability to vary the terms and conditions of a fixed term or fixed price market contract within the first twelve months or for the term of the contract if less than twelve months. In our view, obtaining a customer's consent to an energy deal only to change the terms of that deal or raise its price can be equated with bait-and-switch practices which are prohibited under general consumer laws.

¹ Consumer Action Law Centre, 2011 *Just sign here.... A review of Victorian retail energy contract terms and conditions*, Pg 7.

Moreover, it is a fair expectation that a retailer which offers a particular deal is in a position to honour that deal for a reasonable period (one year or longer). It is a retailer's role to determine the market price for a particular contract and to align this with their contract hedges—that is, it is the role of a retailer to bear the risk for any market fluctuation in wholesale energy prices. Indeed, it is far more efficient for a retailer to bear the risk of price fluctuation given it is in a far better position than individual consumers to manage that risk. As we understand, retailers price this market fluctuation risk into the overall price consumers are paying for their energy.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia.

Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly. Consumer Action has been actively involved in energy advocacy work in Victoria and nationally since the 1990s. Over this time we have provided key consumer input into important energy regulatory processes for consumers, including the current Victorian smart meter rollout and initiatives relating to improved energy price and product information disclosure following the deregulation of Victorian retail energy prices.

Since September 2009 we have also operated a new service, *MoneyHelp*, a not-for-profit financial counselling service funded by the Victorian Government to provide free, confidential and independent financial advice to Victorians with changed financial circumstances due to job loss or reduction in working hours, or experiencing mortgage or rental stress as a result of the current economic climate.

Consumer Advocacy Panel grant recipient - disclaimer

This project - No. 481 - NEM Network coordinator and consumer advocate, is funded by the Consumer Advocacy Panel (www.advocacypanel.com.au) as part of its grants process for consumer advocacy projects and research projects for the benefit of consumers of electricity and natural gas.

The views expressed in this document do not necessarily reflect the views of the Consumer Advocacy Panel or the Australian Energy Market Commission.

Should you wish to discuss this submission further, please contact me on 9670 5088 or at janine@consumeraction.org.au.

Yours sincerely

CONSUMER ACTION LAW CENTRE

A handwritten signature in black ink that reads "Janine Rayner". The signature is written in a cursive style with a large initial 'J'.

Janine Rayner
Senior Policy Officer