

17 October 2012

By email: electricity.sen@aph.gov.au

Sophie Dunstone
Committee Secretary
Senate Select Committee on Electricity Prices
Parliament House
CANBERRA ACT 2600

Dear Sophie

Supplementary submission: written questions on notice

We write to respond to the written questions on notice provided on 5 October 2012.

The committee has asked the following questions:

1. The organisation One Big Switch (OBS) argues in its submission that a lack of transparency around plans and pricing for consumers is impeding the benefits of competition and they are arguing retailers should be forced to supply more information to customers including immediately informing the market of price rises and publicly releasing price rises for all plans and customers. Do regulations currently prohibit retailers supplying this information to customers and what is your organisations view of OBS's submission?
2. OBS also argues for easy to understand dash board information to be supplied to consumers to make it easier for them to understand their contracts and bills. What information should be included on such a dashboard for consumers?

We agree that there is lack of transparency around plans and pricing that impedes the benefits of competition flowing to consumers. We also agree that existing regulations do not require retailers to inform consumers about changes to tariffs prior to those changes having effect, to the detriment of consumers.

Regulations inhibiting consumer awareness of price rises

In Victoria, there are two types of retail contract—standing/deemed contracts and market contracts. For standing contracts (where a consumer has not provided explicit informed consent to enter into a new contract—commonly, where a consumer has never switched or "move-ins"). The *Electricity Industry Act 2000 (Vic)*ⁱ and *Gas Industry Act 2001 (Vic)*ⁱⁱ state that for standard/deemed contracts the retailer must not vary tariffs that have been in effect for less than six months. If the retailer wishes to change the tariff they must first be published in the Government Gazette not less than one month before the variation is to take effect.

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For market contracts, the situation is different. Clause 26.4 of the Energy Retail Code states that a retailer must give notice to a customer with an accumulation meter (for gas or electricity) of any variation of a tariff as soon as practicable, and no later than the customer's next bill. In short, under existing regulations, tariff changes can be backdated rather than applied after a period of notice.

This is a very weak consumer protection, and can cause issues in relation to household budgeting, bill shock and the ability of consumers to accurately compare other retailers' current prices and search for more competitive offerings, at a given point in time. In a recent paper from the Essential Services Commission of Victoria, it outlined the potential disadvantages that arise for consumers on market contracts:

In an extreme case if an electricity customer with an accumulation meter signs a market contract to be billed quarterly with a retailer on, say, 1 January, the retailer can change its tariffs on 2 January. In accordance with the Code that customer may not be informed of the tariff change until they receive their first bill in April. As a result, that customer would be paying a higher tariff unknowingly for almost the entire billing period. In addition, due to the customer's belief that they are on a lower rate, they would be less likely to change to another retailer.ⁱⁱⁱ

The proposed National Energy Customer Framework (**NECF**) provides for the same outcome for consumers. Rule 46 of the National Electricity Retail Rules provides that a retailer must give notice to the customer of any variation to the tariffs and charges that affects the customers which must be provided as soon as practicable, and in any event no later than the customer's next bill.

It should be noted that as a result of changes to the Victorian Energy Retail Code relating to the introduction of smart meters, this is not the situation for customers with smart meters (electricity only). In that case, the Energy Retail Code requires that the retailer must notify the customer at least 20 business days prior to the variation.

Therefore the Victorian regulatory framework allows smart meter customers to receive prior notice of any contract tariff variation and they are able to decide to accept the variation or change to another retailer prior to the tariff variation coming into effect. The same protection does not extend to customers with accumulation meters, or any customer should the NECF apply (we note that Victoria has proposed to derogate from the NECF with respect to smart-meter related consumer protections^{iv}).

In our oral evidence to the committee, we submitted that it was unfair for a retailer to include terms in a fixed-term market contract that provides for unilateral variation of the tariff. We noted that not only does this practice make household budgeting difficult and any savings very short lived, it is also anti-competitive in that consumers will be less likely to shop around in the first place as the costs and time of doing so may not be recovered where deals can quickly change.

An additional problem for consumers relates to expiry of fixed-term contracts. Clause 24.3 of the Energy Retail Code provides that prior to the expiry of a fixed-term market contract, the retailer must notify the consumer that the contract is due to expire and that tariffs and terms and conditions that will apply to the customer beyond the expiry of the fixed-term if the customer does not exercise any other option. It also states that the retailer may determine the tariff and terms and conditions that apply at its discretion. Some retailers state in their terms and conditions that

if the customer does nothing, then they will enter into another fixed-term contract on a tariff set by the retailer. The NECF imposes rules providing for a similar outcome.^v

We have had consumer complaints about these provisions. Customers in this situation commonly assume (much like renting a house) that upon receiving notice of expiry of a fixed-term contract, and by doing nothing, they were remaining on the same plan on a month-to-month basis. Subsequently, the consumer has found out that they have been moved onto a new market contract with a fixed term that imposes exit fees for early termination (i.e., if the consumer subsequently wants to shop around).

We also note that a term of a fixed-term contract that allows a supplier to unilaterally set the price, terms and conditions that would apply beyond the expiry of the fixed-term, may amount to an unfair term within the meaning of the Australian Consumer Law.^{vi} If a standard-form contract term is one-sided and greatly favours the business over the consumer; there is no satisfactory commercial reason why the business needs such a term; and the consumer will suffer financial loss, inconvenience or other disadvantage if the term is enforced, then it may be unfair. In our view, the terms described above may amount to unfair terms which are prohibited under the Australian Consumer Law. However, a term will not be unfair if it is required or expressly permitted by law (such as the Energy Retail Code).

The United Kingdom regulatory system has recently responded to problems caused by unfair and unclear pricing. In 2008 and 2009, its regulator, Ofgem, undertook a wide-ranging "Energy Supply Probe" to look at, among other things, consumer perspectives and experience of the market, including access to information and barriers to switching supplier. On the back of this review, acknowledging that disengaged consumers do not shop around and put pressure on their suppliers to provide keener prices and better service, in December 2011 Ofgem put forward tariff simplification proposals aimed at boosting engagement.^{vii} The implication was that if engagement could be increased, more effective competition would follow.

Ofgem's research shows that consumers would be far more likely to engage effectively in the market if it was easier to compare tariffs. Its proposals include:

- all non-standard (or market contract) tariffs are fixed duration with no automatic contract roll-overs;
- all non-standard tariffs would have switching windows with no exit fee, including a time-limited guarantee of the old price until they switch; and
- prices, terms and conditions for non-standard tariffs guaranteed for the duration of the contract.

We believe these sorts of protections should be included in energy retail consumer protections, including the NECF. If enacted, they are likely to encourage consumers to switch and ensure the benefits of competition flow to consumers.

Lack of market information inhibiting switching

We agree with OBS's submission that there should be easily accessible public information of price changes for all energy contracts. Such information is likely to help consumers switch, and may also help intermediaries such as OBS in acting on behalf of consumers and thereby driving

competition. We note that the NECF requires the Australian Energy Regulator to develop a price comparator and for market offers prices that are generally available, and that variations to prices are to be placed on the web comparator as soon as practicable after coming into effect.^{viii} The *Energy Made Easy* website is a very welcome development and that this website is not currently nationally available is a particular downside of the failure of all states to adopt the NECF.

In our view, collective switching intermediaries, such as One Big Switch, have the potential to help consumers move to a better deal by transferring the process to a trusted intermediary. The only effort required by the customer is to register with the intermediary and approve the switch that it secures on their behalf.

Switching together promotes the potential for stronger competitive pressures in the market that customers acting in isolation could not otherwise achieve. The prospect of winning a significant block of market share (or losing a proportion of their current customer base) should compel established retailers to compete for the group's custom.

We note that these initiatives are not without their problems. For example, existing regulations (described above) can limit the consumer benefits from switching, particularly if tariffs can be changed during the period of a fixed term contract. Further, concerns have been raised about the marketing strategies adopted by switching initiatives (and retailers more generally) in promoting "percentage off" discounts—as noted in our oral evidence to the committee, these promotions are likely to be misleading for those consumers not on that particular retailer's standard tariff.^{ix} There is also the prospect of collective switching initiatives resulting in price discrimination between different customers, which might not be justified on cost grounds.

Nevertheless, in our view, properly designed collective switching initiatives clearly have the potential to promote competition and encourage disengaged customers into the market. Even those suppliers that do not take part are likely to offer competing products, which can only be beneficial.

Dashboard for consumers

We broadly support the concept of a dashboard for consumers to help them better understand their energy contracts and bills. We note that the Australian Energy Regulator's Energy Retail Pricing Guideline and its required *Energy Fact Sheets* goes some way to providing consumers with standard information about prices and key contractual terms.^x

We note, however, that consumers still face problems interpreting fact sheets as they are unlikely to be able to determine what a particular offer (that is the tariff and key terms) means for their final bill without knowing their own usage information. It is actually how energy is used in conjunction with tariffs, terms and conditions which affects total benefit and total price for a consumer. In our view, disclosure (such as a dashboard) that describes what a product is and does is increasingly insufficient in the modern world of consumer contracting. To be effective, disclosure needs to focus on product-use information, so that a consumer's consumption information combines with rate information to determine approximate annual cost (and benefit).^{xi} This is likely to result in consumers making better choices.

It is for this reason that we have supported the proposal for an energy information hub, recently considered by the Federal Department of Resources and Tourism. An energy information hub, especially if linked with websites like *Energy Made Easy* or services of trusted intermediaries, may operate to provide consumers with information about which energy contract is appropriate based on their own historical consumption patterns.

Please contact me on 03 9670 5088 or at gerard@consumeraction.org.au if you have any questions.

Yours sincerely

CONSUMER ACTION LAW CENTRE



Gerard Brody
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ⁱ Sections 35 and 37.

ⁱⁱ Sections 42 and 44.

ⁱⁱⁱ ESC, *Energy Retailer Contract Variation Notification Requirements—Issues Paper*, September 2011, page 5-6.

^{iv} DPI, *Decision Paper—The National Energy Customer Framework in Victoria*,

<http://www.dpi.vic.gov.au/energy/about/legislation-and-regulation/national-energy-customer-framework/the-national-energy-customer-framework-in-victoria>

^v National Electricity Retail Rules, rule 48.

^{vi} Australian Consumer Law, Part 2-3 (Schedule 2 to *Competition and Consumer Act 2010* (Cth))

^{vii} Ofgem, *Retail Market Review: Domestic Proposals*, December 2011, available at:

<http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=72&refer=MARKETS/RETMKTS/RMR>

^{viii} National Energy Retail Law, section 62 and 63.

^{ix} See analysis on ABC, Media Watch, 'Always Read The Fine Print', available at:

<http://www.abc.net.au/mediawatch/transcripts/s3566911.htm>

^x Australian Energy Regulator, *Retail Pricing Information Guideline*, available at:

<http://www.aer.gov.au/sites/default/files/D12%2090577%20%20AER%20Retail%20Pricing%20Information%20Guideline%20-%20June%202012.pdf>

^{xi} This approach to disclosure is explored in Owen Bar-Gill's book, *Seduction by Contract: Law, Economics and Psychology in Consumer Markets* (Oxford University Press, UK: 2012).