

Australian Energy Market Commission
PO Box A2449
Sydney South NSW 1235



Submitted online at www.aemc.gov.au
AEMC Ref: RRC0001

21st March 2014

Dear Commissioners,

Marjorie Black House
47 King William Road
Unley SA 5061

P. 08 8305 4222
F. 08 8272 9500
E. sacoss@sacoss.org.au
www.sacoss.org.au

ABN 93 197 662 296

RE: National Energy Retail Amendment (Retailer price variations in market retail contracts) Rule 2014 – Consultation Paper

Thank you for the opportunity to comment on the Consultation Paper for the first proposed rule change for the National Energy Retail Rules (NERR). SACOSS appreciates the opportunity to host AEMC staff at a community sector forum on March 12th to discuss and debate the rule change proposal.

As the peak body for the community services sector in South Australia, SACOSS has a long-standing interest in the delivery of essential services. Our research shows that the cost of basic necessities like electricity impacts greatly and disproportionately on vulnerable and disadvantaged people. Our advocacy is informed by our members; organisations and individuals who witness these impacts in our community.

The South Australian Government removed price regulation and adopted the National Energy Customer Framework on February 1st, 2013. This makes South Australia the only jurisdiction to have both deregulated prices and adopted the NECF. Recent reports by the AEMC¹ and the Victorian Essential Services Commission (ESCV)² also highlight that South Australia continues to have both the nation's highest electricity prices and highest rates of electricity disconnections for failing to pay bills on time. This remains a priority concern for SACOSS and forms the background for this submission.

Please find a detailed submission attached.

We thank you in advance for your consideration of our comments. If you have any questions relating to the above, please contact SACOSS Senior Policy Officer, Jo De Silva on 8305 4211 or via jo@sacoss.org.au.

Yours sincerely,

Ross Womersley
Executive Director

¹ AEMC 2013 Residential Electricity Price Trends www.aemc.gov.au/market-reviews/completed/retail-electricity-price-trends-2013.html

² ESCV Energy retailers comparative performance report – Customer service 2012-13 Table 3.2, p31 available from www.esc.vic.gov.au/Energy/Energy-retail-performance-reports

SACOSS Submission to:

National Energy Retail Amendment (Retailer price variations in market retail contracts) Rule 2014 – Consultation Paper
AEMC Ref: RRC0001³



Background

The Consumer Utilities Advocacy Centre (CUAC) and the Consumer Action Law Centre (CALC) have submitted a rule change request to the AEMC to make the first formal change to the National Energy Retail Rules (NERR). The NERR form part of the National Energy Customer Framework (NECF) that has applied in South Australia since February 1st, 2013.

Marjorie Black House
47 King William Road
Unley SA 5061

P. 08 8305 4222
F. 08 8272 9500
E. sacoss@sacoss.org.au
www.sacoss.org.au

ABN 93 197 662 296

The rule change request aims to address an issue in the market where energy retailers are able to unilaterally vary retail tariffs in those electricity and gas contracts where consumers sign on for a fixed period of time and face exit fees if they seek to leave the contract before that term expires.

The rule change proponents have formed a view that while this appears to unfairly advantage the retailer over the consumer, the legal architecture of the NECF arrangements protects retailers from allegations of unfair contract terms under the Australian Consumer Law (ACL). In response, the rule change proposal seeks to prohibit retailers from including terms in their contracts that allow them to change prices during the fixed term or fixed benefit period of a retail market contract.

The proposal is backed by a campaign website (fixit.org.au) and a petition. The campaign website makes the intent clear: *fixed contract = fixed pricing*

FIX IT to end unfair sales tactics

Some retailers offer energy at a very low rate to lure in customers, then increase the price once they've got your business. After all, the exit fees customers face for leaving mean we're unlikely to take our business elsewhere. Prices need to be fixed for the term of a contract to stop 'bait and switch' tactics.

The Consultation Paper incorporates a series of 14 questions The SACOSS response to these questions follows the next section.

³ www.aemc.gov.au/Retail/Rule-changes/Open/retailer-price-variations-in-market-retail-contracts.html

What SACOSS has said previously

As outlined in a December 2013 submission to the Essential Services Commission of SA (ESCOSA)⁴, SACOSS is concerned that incentives and opportunities exist for energy retailers to increase prices for contracted 'sticky customers' above what is 'constrained by competition' to attract those customers in the first place.

In the Issues Paper for the legislated review of the National Energy Retail Law in South Australia, ESCOSA stated (p12-13, emphasis added):

Prices are important in assessing the effective competitiveness of the South Australian energy retail market. Competition is not an end in itself, but, where effective, is most likely to deliver prices that are in the long term interests of consumers.

Based on historic data collected from retailers for use in the Commission's relative price movement (RPM) process, there is a significant proportion of market contract customers purchasing electricity under what might be termed 'closed offers' at any given point in time (i.e. still operating, but are closed to new customers), in addition to 'open offers' (those available to customers on request).

By reviewing open and closed offers, the Commission can comment on the extent to which retailers differentiate prices for new and existing customers. It is important to understand the extent to which retailers may be offering significant discounts only to new customers, meaning that retailers may be relying on customer inertia to increase prices for existing customers.

By way of example, should a large proportion of customers on closed offers tend not to respond to increased prices ("stickiness"), then this might encourage retailers to increase closed offer contract prices by more than any underlying cost increases to subsidise market offers to attract new customers. While "sticky" customers have the ability to seek the best offers available to them, it will only be by observing any evidence of stickiness that a potential market failure might be identified. For example, sticky customers perceive high transaction costs in any decision to move to a new contract (which may be real, or only perceived) which might be addressed through making more (or better) information available and/or reduce any barriers to transfer.

It is also considered important to understand the movement in weighted average prices of each type of contract, in order to provide an informed comment on the situation for customers as a whole. Reviewing movements in individual contract prices with no regard to the level of take up of specific contracts would lead to a finding that might have little bearing to that experienced by the majority of customers.

However, in releasing its Final Decision in March 2014, ESCOSA noted that the monitoring of prices for closed contracts was strongly opposed by individual retailers and the ERAA⁵. As a result ESCOSA has decided not to pursue this line of inquiry and stated:

Should the Commission at some future point receive a mandate to review closed offer contracts, then the results would be available for the purposes of the NERL Review at no extra cost.

⁴ The SACOSS submission is available from the ESCOSA NERL Review Methodology Project Page: www.escosa.sa.gov.au/projects/204/nerl-review-methodology.aspx#stage-list=0

⁵ NERL Review Methodology Final Decision, March 2014 p39-41

It is also noted that the AEMC proposes to consider the extent to which customers actively choose products offered by their existing retailer: (AEMC 2014 Retail Competition Review, Approach Paper, 17 January 2014 p10)

Customers changing plans with a retailer [will be considered] to see whether customers are actively choosing new products or services offered by their existing retailer. This is to reflect customer switching activity that is not picked up in churn rates. (emphasis added).

Providing the AEMC is able to obtain information on the level of customers actively choosing new products or services by their existing retailer, and not simply customers being placed on new contracts when their current arrangements expire, this would provide a useful data source to complement average price data.

While relying on the AEMC's Retail Competition Review may reveal some insights, SACOSS stands by statements in its original (December 2013) submission to the ESCOSA Issues Paper:

SACOSS expects retailers to resist Option 1 [the inclusion of 'closed' offers] and favour Option 2 on the basis of the administrative effort required to provide more detailed information or that it compromises confidentiality and hence undermines competition. SACOSS pre-emptively rejects this as a reasonable position and asserts that it is in the interest of retailers to openly demonstrate that competition is effective and that the NECF is in fact advancing the consumer interest. Any resistance of transparency can only exacerbate the feelings of mistrust toward energy businesses that exist in the community.

SACOSS is concerned about the impact on the market's 'sticky customers' – those that do not ever or rarely, exercise their choice of supplier. It is noted that only around 20% of households remained on the standing contract with AGL (the state's sole incumbent retailer) at the time of the introduction of the NECF in February 2013 - some 10 years after the introduction of choice (Full-retail-contestability, FRC, in January 2003). However, it is critically important to remember that over 10% of customers who did switch in the early years of FRC did so in response to a direct financial incentive offered by the South Australian Government. The 'Electricity Transfer Rebate' operated until August 2004 and was paid to around 85,000 households receiving the electricity concession⁶. This represented around 45% of concession recipients at the time. It is entirely unclear if these households have engaged further with the market or should in fact be counted as 'sticky' alongside the 20% that have never moved from the standing contract.

In relation to the issues at the basis of this rule change proposal, SACOSS is concerned that a focus at the competitive frontier of market activity may not address the underlying issue that incentives and opportunities exist to increase prices for contracted 'sticky customers' above what is 'disciplined by competition' to attract those customers in the first place. As AGL asks in a recent Working Paper⁷:

⁶ South Australian Department of Treasury and Finance (DTF) Annual report 2004-5 (<http://www.treasury.sa.gov.au/our-department/about-us/corporate-publications>) "Electricity Transfer Rebate (ETR), which offered concession holders \$50 for transferring their electricity accounts to cheaper market contracts. The program commenced in November 2003 with an original deadline of 30 June 2004. The deadline was then extended to 13 August 2004. More than 85 000 eligible customers transferred to market contracts and qualified to receive the ETR."

⁷ Slmshauser 2013 "AGL Applied Economic and Policy Research Working Paper No. 33 – Regulated Pricing", p13

“The relevant question in a workably competitive market is, do these ‘sticky customers’ represent a problem for policymakers that warrants intervention?”

SACOSS notes that price discrimination in the UK energy market has been an area of interest for the UK regulator (Ofgem). This interest is motivated by its requirement to take account of the interests of vulnerable consumers and the high representation of these households in those referred to as ‘non-switchers’. The Commission is encouraged to consider a review of retail energy price discrimination and Ofgem’s response by Waddams Price and Hviid in *The Economic Journal* (2012) that found that in the case of non-discrimination rules with respect to payment method⁸:

“The net effect on competition is likely to be positive and provide downward pressure on prices, as well as being distributionally progressive.”

Further, as outlined in the SACOSS response to the AEMC’s 2014 Retail Competition Approach Paper (AEMC Ref RPR0002) and raised at the community sector forum with AEMC representatives, engaging effectively with the market requires internet access, numeracy and literacy beyond that of many in the community. This counters any view that ‘sticky’ customers are simply disinterested.

In summary, SACOSS not only supports the rule change proposal from the perspective of those who switch to market contracts and find themselves facing elevated prices but is also of the view that ‘sticky customers’ do warrant consideration of market rules that protect their interests. This is particularly relevant post price-deregulation.

⁸ Waddams Price, C & Hviid, M 2012, ‘Non-discrimination clauses in the retail energy sector’, *The Economic Journal*, 122 (August), F236-F252, at page F244

SACOSS Response to Questions posed in the Consultation Paper

Question 1 NERO test

Are there any other matters that the AEMC should consider in its assessment of the NERO test?

The National Energy Retail Objective (NERO) in the National Energy Retail Law (NERL) is derived from the National Electricity Objective (NEO) and National Gas Objective (NGO) and states:

“The objective of this Law is to promote efficient investment in, and efficient operation and use of, energy services for the long term interests of consumers of energy with respect to price, quality, safety, reliability and security of supply of energy”

As this is the first rule change proposal being considered under the Retail Rules, it is the first public opportunity for the Commission to interpret the NERO. However, there has been a long history of interpreting the NEO (and, to a lesser extent, the NGO) in other rule changes so some consistency is expected. The Commission has reiterated the economic efficiency basis for the objective and the three dimensions of efficiency considered: productive, allocative and dynamic.

Section 4.2 of the Consultation Paper sets out the Commission’s intended approach to the consideration of the NERO Test. The Commission has stated that the key consideration will be the “... degree to which the proposed rule is likely to either promote or hinder competition.” The Commission then proposes four criteria:

- Efficient allocation of costs and risks;
- Effective consumer engagement and participation
- Provision of a range of products and services consumers value; and
- Independent rivalry and competition between retailers

SACOSS is of the view, consistent with that expressed by ESCOSA in its NERL Review Methodology, that (emphasis added):

“Competition is not an end in itself, but, where effective, is most likely to deliver prices that are in the long term interests of consumers.”

In relation to the issues at the basis of this rule change proposal, SACOSS is concerned that a focus at the competitive frontier of market activity may not address the underlying issue that incentives and opportunities exist to increase prices for contracted ‘sticky customers’ above what is ‘disciplined by competition’ to attract those customers in the first place. The tendency for economic efficiency analysis to focus on the margins means that many of the market’s most vulnerable customers are not considered.

Question 2 Consumer protections test

- a) Is the scope of the consumer protections that the Commission intends to consider appropriate for this rule change request?
- b) Should the Commission consider any other factors in assessing the rule change request against the consumer protections test under the Retail Law?

In South Australia, there is a requirement for each retailer to offer a market contract with no exit fees (the Standard Contract is also of no fixed term and therefore cannot incorporate exit fees). The requirement applies to both electricity and gas including the Electricity example provided below:

Electricity (General) Regulations 2012⁹ Part 9A – Regulation of NERL retailers

44C—Sale of electricity to small customers—market contract without early termination fee to be offered

- (1) For the purposes of section 63AB(1)(e) of the Act, a NERL retailer must be willing to offer a market retail contract to small customers under which the NERL retailer agrees not to directly or indirectly charge a small customer who is a party to the contract a fee for early termination of the contract no matter what the reason for termination may be.
- (2) In connection with the operation of subregulation (1)—
 - (a) a NERL retailer must clearly identify in naming the contract that it offers for the purposes of subregulation (1) that no fee applies for early termination of the contract; and
 - (b) a NERL retailer must provide information about the contract that it offers for the purposes of subregulation (1) to its existing small customers, and to small customers more generally (and, in so doing, must comply with any requirements specified by the Commission).
- (3) In this section—
market retail contract has the same meaning as in the *National Energy Retail Law*.

This local requirement has also lead to ESCOSA Energy Industry Guideline No. 5 – Information Disclosure for No Early Termination Fee Market Contracts¹⁰

Question 3 Risk allocation in market retail contracts

Do the current rules result in an inefficient allocation of risks between retailers and consumers in retail energy markets?

⁹

www.legislation.sa.gov.au/LZ/C/R/ELECTRICITY%20%28GENERAL%29%20REGULATIONS%202012/CURRENT/2012.199.UN.PDF

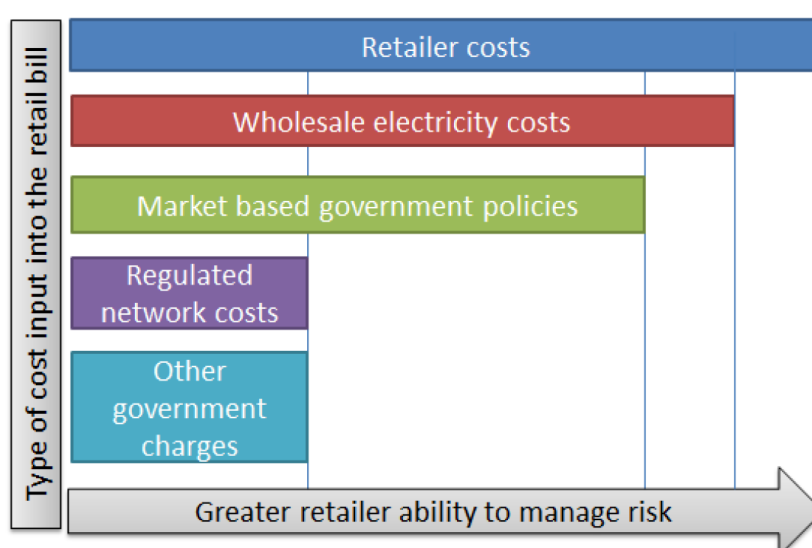
¹⁰ Available from the ESCOSA Project Page: <http://www.escosa.sa.gov.au/Projects/ProjectDetails.aspx?id=193>

AS/NZS ISO 31000:2009 *Risk management – Principles and guidelines* defines risk as the “effect of uncertainty on objectives” and that risk is “often characterised by reference to potential events and consequences”.

SACOSS agrees with the Consultation Paper that the principal role of the retailer in energy markets is to manage risks on behalf of its customers and that a competitive market should allocate the task of managing different risks to the party that can manage each particular risk most efficiently. SACOSS also notes that this also gives retailers (and network businesses too) a strong incentive to increase customers’ (and regulators’) perceptions of risk in the market.

Figure 5.2 of the Consultation Paper provides a useful depiction of retailers’ ability to manage different cost components of a retail energy bill.

Figure 5.2 Ability of retailers to manage different cost components in a retail electricity bill



However, the depiction doesn’t represent the relative size of these components. Clearly, and as illustrated in the AEMC’s 2013 Residential Electricity Price Trends Final Report, the category “Regulated Network Costs” is the one that has the greatest potential to contribute uncertainty and hence risk.

The interests of consumers are clearly served by not just the efficient allocation of risks but the elimination of those risks in the first place. In this regard attention must turn to the implementation of the AER’s *Better Regulation* program and the AEMC’s consultation on the Distribution Pricing Rule Change Proposal (AEMC Ref ERC0161).

SACOSS also understands that retail contracts for larger customers (>160Mh pa) are generally fixed for the ‘energy only’ components for periods of at least 12 months and that network charges and other fees/charges are treated as ‘pass throughs’. SACOSS is also aware of reports that these customers also accept the risk that energy only’ prices may fall (and indeed have) during their fixed term.

Further, in our *Energy Tariffs and Vulnerable Consumers* report of January 2014¹¹, SACOSS has observed that not all retailers pass through network tariff structures. This may be interpreted as retailers not considering the risks presented by network prices as being

¹¹ Available from <http://www.sacoss.org.au/reports/energy-water>

material. However, it is also likely that retailers would take a much more interested stance toward network pricing if they were carrying the risk of ad-hoc changes. This would create a dynamic tension between retailers and network businesses that may well serve the long term consumer interest.

Question 4 Risk premiums

a) If the proposed rule is made, would risk premiums be built into fixed period contracts?

b) How significant would these risk premiums be and would these risk premiums create a permanent increase in the price of fixed period contracts?

Firstly, it is important to reiterate that risk premiums are in effect in all contracts. A critical question then is the extent existing risk premiums are recovered through the practices described in the rule change proposal and whether this proposed rule change exacerbates the net cost of risk or simply makes it more explicit.

SACOSS is aware of two fixed price contracts on offer in South Australia and that, based on Energy Made Easy results, both are priced BELOW the same retailers' lowest priced 'no exit fee' offer as illustrated below in Figure 1.

Of note, the lowest cost 'no exit fee' offer presented in the chart (*dodo*) is also the lowest cost offer available when considering all fixed term and fixed benefit period contracts. The second lowest cost offer (*Alinta*) is also highly competitive compared to the fixed term offers from other retailers. This is illustrated in Figure 2.

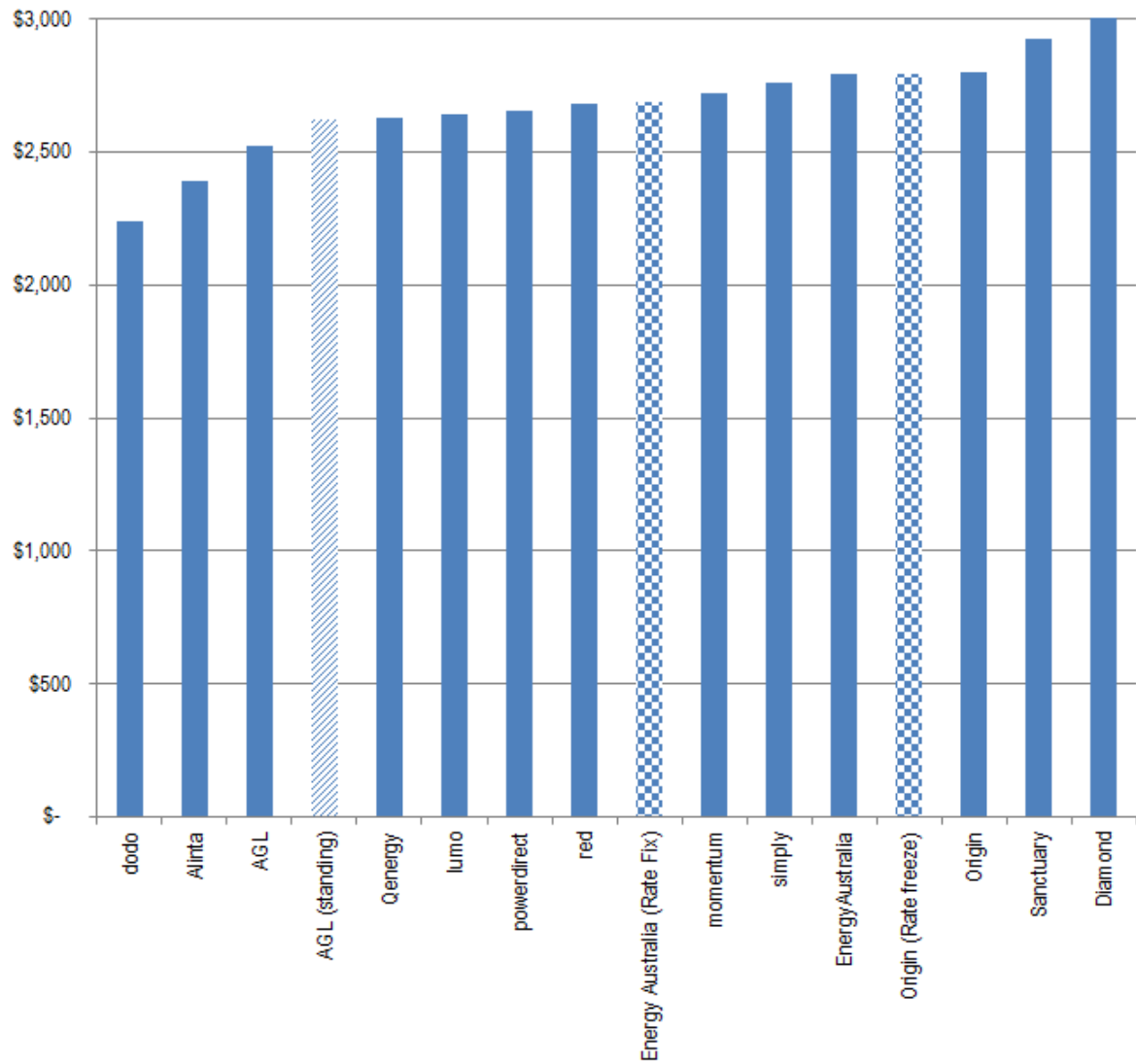


Figure 1: Comparative costs of the lowest priced 'no exit fee' offers from retailers in South Australia plus the two 'fixed price' offers available in South Australia. Source AER www.energymadeeasy.gov.au¹²

¹² Costs inclusive of all discounts, Postcode 5000, 6000kWh peak, 2000kWh off peak as at 05 March 2014.

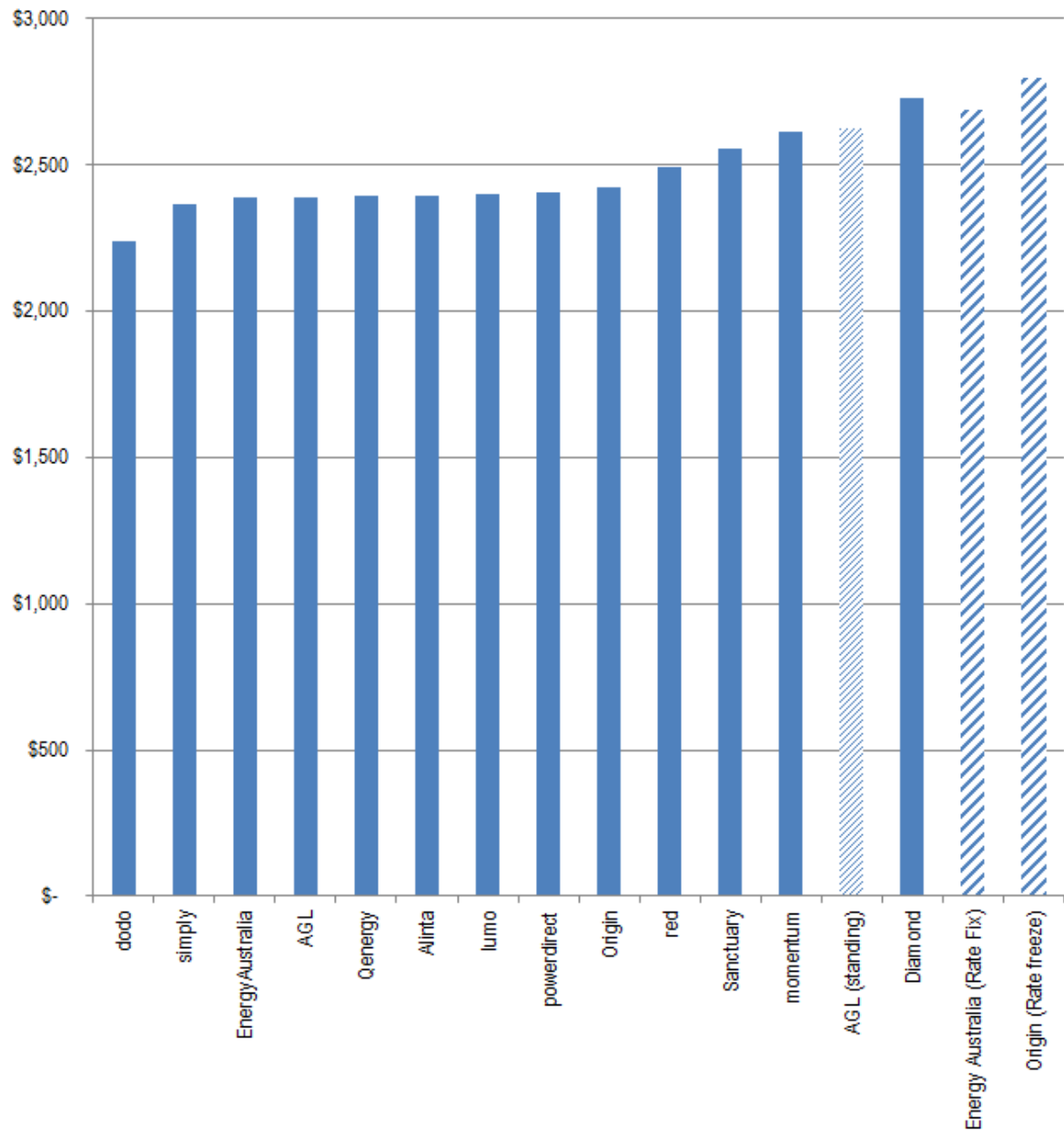


Figure 2: Example offers South Australia, lowest offer from each retailer (of any contract duration) Source: Energy Made Easy¹³

¹³ Accessed 5th March 2014: Annual consumption 6000kWh peak, 2000kWh off-peak hot water, postcode 5000, including all discounts

Question 5 Transparency and market retail contracts

- a) When entering fixed period contracts, do some consumers believe that the prices will be fully fixed when in fact they are not? If so, what proportion of consumers are likely to fall into this category?
- b) Are there some consumers that are not aware that fixed period contracts with fully fixed prices are available on the market? If so, what proportion of consumers are likely to fall into this category?

SACOSS can only defer to the survey results contained in the Rule Change Proposal and anecdotal feedback from our membership that this widely regarded as an unfair practice.

In relation to fixed price contracts on offer, SACOSS is aware of two such offers in South Australia as discussed in the response to Question 4, above. We are not aware of the extent of awareness or uptake of these offers.

Question 6 Barriers to consumer participation and engagement

- a) Does the ability for retailers to vary prices lead to a perception for consumers that changing to a new retailer or contract would waste search costs?
- b) To what extent might the existence of exit fees and other transaction costs affect consumer behaviour after a price variation in a fixed period of a *market retail contract*?

SACOSS is of the view that perceived search costs are as important as exit fees in dampening the enthusiasm to react to a price variation. Further, as acknowledged by the AMEC in their review of Electricity Customer Switching (AEMC Ref EPR0038), slow switching times also impact on customer engagement. After investing significant personal time choosing a supplier and then waiting weeks or months for the change to occur and then finding that the new prices are higher than originally agreed it is not surprising that many customers would just 'give up'.

Question 7 Impact of proposed rule on consumer participation and engagement

- a) Would the proposed rule improve the level of consumer participation and engagement in retail energy markets?
- b) To what extent would the proposed rule place downward pressure on prices in retail energy markets due to improved consumer engagement and participation?

SACOSS finds it difficult to believe that the proposed rule change would reduce levels of consumer participation and engagement.

The long term interest of consumers is likely to be best served by a market based on transparency and trust than one based on confusion and obfuscation. It is important to not just consider the impacts of this rule in isolation. SACOSS believes that the proposed rule change should be accepted and followed by proposals to fix some of the other elements of the market such as the infamous “Discounts off what?” issue. According to ACCC Chairman Mr Rod Sims, 21 February 2014 (Speech to CEDA Conference)¹⁴:

In the energy sector our focus in 2013 was on addressing unlawful door-to-door sales conduct by energy retailers. AGL and APG were ordered to pay penalties greater than \$1 million, and our proceedings against Energy Australia and Origin Energy are still before the Federal Court.

Our next area of focus in the energy sector is misleading discount claims. The ACCC is increasingly concerned about possible misleading conduct by energy retailers in their promotion of energy plans. These concerns relate to the promotion of discounts and savings off energy use and/or supply charges under those plans. We refer to this new focus of our energy work as “discounts off what?”

This new focus will not come as a surprise to the sector. In August 2013 the ACCC wrote to energy retailers about our concerns. In December 2013 the ACCC commenced legal action against AGL South Australia for allegedly misleading residential consumers in South Australia about electricity discounts.

There will soon be further court action.

This is illustrated further by comparing offers between the two biggest retailers: AGL Energy and Origin Energy. In this example, an Energy Made Easy search return's AGL's best offer as its “Select 8% South Australia residential electricity market offer”¹⁵ and Origin's as “eSaver up to 16% electricity usage discount”¹⁶. For a single person on a two rate tariff (ie with off-peak hot water) EME returned the following estimated cost (including all non-conditional and conditional discounts):

- AGL: \$1,271 per annum
- Origin: \$1,297 per annum

So, to be clear Origin's “up to 16%” is MORE expensive than AGL's “8%”.

We note that AGL's equivalent standing contract offer in this case was \$1,383. The “8%” offer is therefore a genuine 8% reduction on the total cost of its standing offer. Origin's equivalent standing offer was \$1,478, 7% above AGL's. Origin's “up to 16%” was in fact a 12% discount on the total cost of the equivalent standing offer.

Repeating the above for a larger household (6 persons instead of 1):

- AGL: \$2,580 per annum (against a standing contract offer of \$2837, a 9% reduction)
- Origin: \$2,613 per annum (against a standing contract offer of \$3,029, a 14% reduction)

So, as was the case for smaller consumption, Origin's “up to 16%” is MORE expensive than AGL's “8%”.

¹⁴ <http://www.accc.gov.au/speech/ceda-conference-looking-forward-to-2014>

¹⁵ Offer ID: AGL7334MR

¹⁶ Offer ID: OR29155MR

This issue has been on the ACCC's radar since early 2013 and it is unclear why this practice continues to be permitted but is clearly not in the interests of consumers.

Question 8 Competition between retailers

- a) How would the proposed rule affect larger retailers compared to smaller retailers?
- b) Would the proposed rule make it more difficult for new entrants to enter retail energy markets?

An important consideration here is the availability of hedge contracts for small, non-vertically-integrated retailers. As outlined in the ACCC rejection of AGL's proposed acquisition of Macquarie Generation on March 4th, 2014, extensive vertical integration can impair the ability of small retailers to secure hedge cover over the timeframes considered. Given the extent of vertical integration in South Australia (around 99% of small customers are contracted to one of five vertically integrated businesses), it is likely that the non-integrated retailers will be exposed to a different scale of risk than the majority.

However, this is more a result of market concentration and the consequential exercise of market power than the proposed rule change. As outlined in the SACOSS response to the AEMC's 2014 Retail Competition Approach Paper (AEMC Ref RPR0002), it is the market structure that presents the material barriers to entry in the South Australian market. In the SACOSS view, the proposed rule change would be unlikely to impact on this.

Question 9 Innovation in retail market offers

- a) If the proposed rule is made, are retailers likely to withdraw or offer shorter fixed period offers from the market?
- b) If the proposed rule is made and the range of market offers available is reduced, what effect will this have on retail competition and prices in retail energy markets over the long term?

SACOSS considers that it is likely that retailers will respond that the vast majority of offers will be withdrawn and that competition and diversity will be crushed. SACOSS pre-emptively dismisses this and draws attention to the approach of energy retailers to 'innovate' through what can only be described as misleading discount claims. This is covered in our response to Question 7. Until this is resolved, the SACOSS view will be that a reduction in misleading offers is a good thing for all consumers but in particular for those vulnerable consumers of most interest to us.

Question 10 Application of the unfair contract terms provisions in the ACL

- a) If the unfair contract terms provisions in the ACL generally apply to price variation clauses in *market retail contracts*, should these provisions be relied on to address the issues raised by CALC and CUAC?
- b) Should changes be made to the retail rules to clarify whether the unfair contract terms provisions in the ACL apply to price variation clauses in *market retail contracts*?

SACOSS is not in a position to speculate how a court may interpret the unfair contract terms provisions in the ACL. However, we would draw the Commission's attention to the comments of the Productivity Commission in its 2008 Review of the Australian Consumer Policy Framework¹⁷:

"There are good reasons to supplement the generic consumer law with specific measures to protect and empower energy consumers. They are essential services, with disconnection having potential harmful effects; billing is lumpy increasing the risk of financial stress for low income households; price menus and product bundling can be complex; and some areas of supply are not yet fully competitive.

... Consumer protection arrangements for utility services — energy, telecommunications and water — aim to secure a basic level of access for all consumers, to facilitate informed choice, to encourage 'fairness' in contracts and to minimise and deal with disputes effectively."

As a general comment, SACOSS believes that uncertainty in the applicability of the ACL provisions is unhelpful and should be addressed in some form.

Question 11 Misleading and deceptive conduct and other ACL provisions

- a) Should the misleading and deceptive conduct provisions of the ACL be relied on to effectively address the issues raised by CALC and CUAC?
- b) Are there any other consumer protections under the ACL that are relevant to this rule change request?

SACOSS is of the view that the Commission should seek a submission from the ACCC as well as independent legal advice in this regard.

¹⁷ Productivity Commission 2008, *Review of Australia's Consumer Policy Framework*, Final Report, Volume 2 Chapter 5 page 108 – available from <http://pc.gov.au/projects/inquiry/consumer/docs/finalreport>

Question 12 Impacts of proposed rule

- a) Taking into consideration the potential benefits and costs of the proposed rule, on balance how would the proposed rule affect competition in retail energy markets?**
- b) Considering the issues identified by CALC and CUAC, is the proposed rule a proportionate and appropriate response to address these issues?**

As stated, SACOSS is of the view that competition is a means to an end and not an end in itself. SACOSS remains concerned that, for a range of reasons, many vulnerable customers are relatively 'sticky' and that price discrimination by retailers may disproportionately harm these 'sticky' customers. The proposed rule change significantly reduces the ability of retailers to use 'bait and switch' techniques and to exploit the stickiness of customers.

SACOSS is also conscious of the fact that this is the first change proposed for the National Energy Retail Rule and that the Commission will be alert to the precedents set by their deliberations on this proposal. SACOSS is concerned that the Commission may consider that the retail market is immature and will defer to regulatory stability instead of reform. SACOSS is strongly of the view that while the Commission's oversight of the market may be immature, the retail markets and the issues tackled by this rule change proposal are longstanding ones.

SACOSS believes the proposal is a proportionate and appropriate response to the issues and strongly urges the Commission to resist the urge to not intervene in this matter. SACOSS is of the view that a long-term perspective to market evolution is reasonable but inaction in the face of circumstances that do harm to vulnerable consumers is not.

Question 13 Limited pass-through of costs

- a) Would a rule that requires retailers to manage all costs aside from some limited cost pass-throughs better meet the NERO than the proposed rule?**
- b) If so, which types of costs should retailers be allowed to pass-through to consumers and why?**

SACOSS acknowledges that limited pass throughs may be appropriate under some circumstances. The challenge is to restrict price rises to legitimate pass throughs. However, defining and policing these legitimate circumstances is likely to be problematic. On balance, SACOSS has formed a view that energy retailers are, by and large, effective and efficient risk managers that can not only prepare for and accommodate changes in input costs as they come along but actually influence the extent and timing of these changes.

The challenge of ensuring that these efficiencies are shared with consumers may remain but to deny the long term potential of that possibility is to deny the existence of genuine competition in the market.

Question 14 Other alternative rules

- a) Are there any alternative approaches that could better address the issues raised by CALC and CUAC and minimise the potential costs of the proposed rule?**
- b) If so, what could these alternative approaches include and what would be the potential costs, benefits and impacts of these alternatives?**

SACOSS understands the fundamental issues raised in the rule change proposal to be the potential economic losses for consumers due to the ability of retailers to, in effect, capture consumers and exploit both real and perceived barriers to switch away to lower prices. Exit fees and behavioural economics combine to give retailers scope to charge prices above competitive levels. The analysis presented in the proposal outlines how this is likely to exceed any benefit that might accrue to consumers at large from prices below competitive levels used to attract customers to a retailer in the first place.

SACOSS expects that retailers will encourage the Commission to pursue options that see more and more small customers operating at the 'competitive frontier' of the market and to avail themselves of the competitive offers in the market. SACOSS does not dismiss the appeal of such a response for many customers who are simply not motivated to engage. However, SACOSS reiterates that the most vulnerable customers in the market are those that are in fact not so much *unwilling* but *unable* to effectively engage with the market. These are the 'sticky customers' most at risk of being harmed by the issues raised in the rule change proposal.

If the retail market currently suits anyone it is the well-educated, tech-savvy, highly literate and numerate. While we respect the desire that this cohort expands to include a greater proportion of the community, we are not able to support arrangements that may do unnecessary harm to vulnerable consumers in the meantime.

Unfortunately, many customers at genuine risk of disconnection are likely to be paying prices significantly more than what is available to others. The market has 'innovated' to deliver magazine subscriptions, discount football club memberships and a diverse array of misleading discount claims but has failed to deliver a simple, no-frills, low-cost, 'home-brand' energy offer for those at genuine risk.

In summary, SACOSS not only supports the original rule change proposal from the perspective of those who switch to market contracts and find themselves facing elevated prices but is also of the view that 'sticky customers' do warrant consideration of market rules that protect their interests. This is particularly relevant post price-deregulation.

Discount off what? Energy plan promotions a concern¹⁸

27 June 2013

The Australian Competition and Consumer Commission will be writing to energy retailers to put them on notice about possible misleading promotions.

In a speech to the Consumer Action Law Centre's energy workshop in Melbourne, ACCC Deputy Chair Delia Rickard said the ACCC is increasingly concerned about possible misleading conduct by energy retailers in their promotion of energy plans.

"These concerns relate to the promotion of discounts and savings off energy use and/or supply charges under those plans."

Ms Rickard said no one should be surprised that the ACCC will take a firm approach where it forms the view that misleading representations are being made to consumers about savings.

The Deputy Chair also spoke about other energy consumer issues which form part of the ACCC's compliance and enforcement priorities.

"The ACCC has taken court action and we've obtained significant penalties against energy retailers and their marketing companies for poor conduct in door-to-door sales.

"This includes misleading statements about the purpose of salesperson's visit, such as representing they were not there to sell anything, and making misleading statements about the price of products, and claims that consumers were being overcharged by their current supplier."

In opening the workshop, Ms Rickard said comparability is a dilemma facing Australian energy consumers.

"While retail competition and choice have delivered many benefits, unfortunately it is a difficult and complex process for the average consumer to compare and decide on which energy plan suits them best."

Ms Rickard discussed the Australian Energy Regulator's price comparator website, Energy Made Easy, which allows households to compare gas and electricity offers as well as consider their energy usage.

Ms Rickard also provided an update on some of the key developments which will provide consumers with a voice at the energy regulation table.

Release number: 144/13

¹⁸ <http://www.accc.gov.au/media-release/discount-off-what-energy-plan-promotions-a-concern>