



EnergyAustralia

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Submitted online aemc.gov.au

Dear Mr Pierce

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Response to the Consultation Paper on Retailer Price Variations in Market Retail Contracts

EnergyAustralia welcomes the opportunity to make a submission on Consultation Paper on Retailer Price Variations in Market Retail Contracts.

EnergyAustralia is one of Australia's largest energy companies, providing gas and electricity to over 2.7 million residential and business customers. EnergyAustralia owns and operates a multi-billion dollar portfolio of energy generation and storage facilities across Australia including coal, gas and wind assets with control of over 5,500 MW of generation in the National Electricity Market.

The attached submission provides responses to the questions raised in the consultation paper and provides additional information and context to assist the AEMC in its decision making.

If you would like more information on this submission, please contact me on (03) 8628 1731.

Yours sincerely

Joe Kremzer
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**EnergyAustralia response
to the AEMC Consultation paper
Retailer Price Variations in Market Retail
Contracts**

March 2014

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1. Introduction

As a retailer operating in a number of jurisdictions, each of which has evolved to a different degree of maturity, EnergyAustralia considers that it has a strong insight into the perspective of customers. We interact with our customers on a daily basis and we recognise that there is no “one size fits all” energy retail solution and that the most appropriate product for an individual may not be the right product for someone else.

EnergyAustralia understands that energy costs are a concern for consumers and we strive to develop an ongoing relationship with customers to allow them to make decisions about their consumption. We understand that when customers receive notice of price increases they assess their options with regard to switching retailers which is why it is in our interests to be upfront about possibility of price variations when a customer commences a contract. Failure to do so would amount to a betrayal in the eyes of the consumer and would increase the likelihood of that customer switching out.

Further, we acknowledge that energy retail is a complex industry. In order to address this retailers attempt to communicate in an open and accessible manner and to ensure that consumers are fully aware of the important details of their energy supply contracts. We believe that we communicate information about potential price variations – either upwards or downwards – appropriately. However based on the proponents’ submission we recognise that there may be a segment of the market that does not fully understand the nature of traditional fixed term energy contracts. Our constant interaction with consumers indicates that if such a customer segment does exist, that it is a relatively small percentage of consumers.

In light of this, we do not believe that regulatory intervention is an appropriate means to address the knowledge gap and we would prefer to work cooperatively with the proponents to ensure that this customer segment is engaged to address any issue which may exist. This approach will resolve any issue in a manner which does not adversely impact upon the broader consumer base.

2. Customer Understanding

As outlined above, we consider that the number of consumers who are unaware that their prices may vary either upwards or downwards under a fixed term contract is relatively small. In most NEM jurisdictions consumers have had the right to choose their energy retailer for a number of years. During this time, those consumers who have entered into fixed term market contracts, overwhelmingly the most popular form of market contract, would have been subject to price increases.

Those consumers who have not entered a market contract would have been subjected to an annual increase in the regulated tariff (or Standing Offer Tariff). Retailers are under no misconception that price rises are unpopular with consumers, however we do not believe that it is reasonable to suggest that consumers are unaware that they will be subject to these changes. In recent years price increases have received media attention and are the subject of articles in the mainstream media¹ ensuring that the message is widely disseminated.

¹ Still no end to rising electricity and gas prices for Victorian households. Karen Collier, Herald Sun accessed at <http://www.heraldsun.com.au/news/victoria/still-no-end-to-rising-electricity-and-gas-prices-for-Victorian-households/story-fni0fit3-1226771700332> 23 March 2014

We believe that there is a customer segment who would value a product that provides the certainty of a fixed rate for the duration of the contract. In response to this demand EnergyAustralia and other retailers have offered contracts which feature this proposition. We believe this option is important and consumers who do value this certainty have taken up these offers in the knowledge that the initial price offered is higher than that which would have been available to them under a traditional contract. EnergyAustralia's sales statistics indicate however that customers overwhelmingly value the lowest rate and are prepared to accept a degree of risk as a tradeoff.

The proposed rule would remove customer choice and disadvantage the significant segment of the market that is comfortable with the status quo.

3. Retail Price Variations

EnergyAustralia is concerned that the proponents do not fully understand the practical application of the price variation provisions of the National Energy Retail Rules (NERR). Although the retailer has the right to vary the price at any time (subject to notification requirements), retailers will generally only vary rates once a year, typically in line with network price movements (effective 1 July in the current NECF jurisdictions), although there have been exceptions to this rule. Although the frequency and timing of potential price variations may not be explicit in contracts, retailers seek to minimise tariff variations in order to maintain customer satisfaction and because the mechanics of increasing prices actually leads to significant costs being incurred as a result of systems changes and the process requirements.

The proponents seem to be of the view that retailers vary prices much more frequently and do so in order to increase the margin on customers who have recently signed on at heavily discounted rates. The evidence provided to support this view highlights the case of a Victorian customer who signed on with Red Energy in November only to face a price increase in January. Without full knowledge of Red Energy's practices, we believe that this is in fact consistent with the previously outlined practice as network price increases in Victoria take effect from 1 January.

4. The Role of the Retailer

EnergyAustralia notes the proponents' view that retailers are best placed to manage risk. We agree with this statement to a degree and believe that the main purpose of a retailer is to manage wholesale risk on behalf of customers. It would be unreasonable to expect consumers to monitor spot market variations on a half hourly basis and make consumption decisions accordingly. Instead, retailers assume the volatility risk which can see prices rise as high as \$12,500/MWh, and present the end consumer with a stable price.

The retailer also acts as the billing agent for the networks which enable the consumer to use the energy and on occasions as the administrator of government policies on a range of issues primarily relating to the environment and energy efficiency but historically covering more esoteric issues such as ambulance levies. These costs are completely outside the control of the retailer and there is little that a retailer can do to predict or manage them. In order to survive in the market, a retailer must pass these costs on to consumers.

Adjusting prices throughout the life of the contract allows retailers to pass on only actual changes (including reductions resulting from a decline in wholesale energy costs or regulatory measures such as the potential removal of the carbon tax), rather than on retailers' predictions of what costs will be at a point in the future. As the proponents state, retailers would in fact be able to mitigate the risk of future price variations, but to do so would see

retailers making very conservative predictions which would result in higher costs to consumers.

The proponents argue that by transferring additional risk to the retailer it will encourage efficiency as businesses practices will be optimised to fully consider the operation of the market. This argument ignores the existing motive that retailers have to pursue efficiency, which is cost minimisation to enable a margin to be made at a competitive price. Imposing additional uncertainty on retailers would not lead to efficiency improvements.

5. Information Asymmetry

The proponents consider that the current regulatory settings create a significant information asymmetry between the retailer and the consumer. Although this may be true to an extent, we do not necessarily agree that this has led to a market failure which necessitates imposing additional regulation on retailers. Consumers should not be required to have specialised knowledge to allow them to make decisions regarding long term retail price trends as this is effectively the role of the retailer. The retailer's information is however also imperfect as they are subjected to a range of costs outside of their control.

While we do not believe that it is necessary to address the asymmetry (which is inherent in the operation of wholesale and retail markets) we are certain that imposing additional risk on retailers would not actually achieve this outcome anyway. In fact, consumers would have less visibility of the retail price components if retailers were required to factor in price movements ahead of time. Although the consumer does not, and should not be required to have in depth knowledge of the price paths for all a retailer's input costs, they should have visibility of a price which reflects the cost to a retailer at any point in time. The fact that these input costs may change from time to time may be inconvenient for the consumer, but it provides greater transparency than a price which reflects these movements before they happen.

The proponents' economic analysis suggests that this information asymmetry leads to suboptimal consumption choices by consumers. This may be the case when the price of energy is artificially depressed, and then inflated once a customer has signed on to a fixed term contract, but as outlined above, this is not EnergyAustralia's practice nor, to the best of our knowledge, the practice of other retailers in the market. As a retailer changes prices in response to changes to their input costs, the price that a consumer faces at any point in time throughout their contract will reflect the true cost of supplying them energy and consumers are able to alter their usage patterns to ensure that they are consuming the optimal, efficient amount.

Furthermore, we consider that a different type of information asymmetry exists in that the consumer is privy to information that the retailer does not have. This information relates to the customer's usage. Mass market energy retail is one of the few industries where a retailer will enter into a contract with a consumer for an unknown quantity. The retailer offers the consumer a price and a contract term but the consumer is under no obligation to consume a set amount of energy, if any at all. Many commercial and industrial energy contracts have take or pay or load-flex provisions which penalise the customer for consuming more or less than their contracted amount, but these do not apply to small customer contracts. EnergyAustralia does not suggest that this arrangement is inappropriate but merely wishes to demonstrate information asymmetry is sometimes unavoidable as measures to address may be costly.

6. Summary

EnergyAustralia believes that the proponents have proposed a solution which is disproportional to the problem it seeks to resolve. This is largely because they have overstated the magnitude of the problem. The proponent's justification for the rule change centres on two key assumptions which are not verified by the evidence they have provided. These assumptions are:

Retailers' price variation practices lead to significant consumer detriment. The proponents appear to assume on the strength of one example that retailers are offering heavy discounts to consumers as enticements to enter contracts and then raise prices in order to increase profits. The example provided actually accords with EnergyAustralia's practice, and our understanding of the practices of other retailers, that retail prices are generally increased in line with network price increases and are kept as cost reflective as possible and we believe has been misunderstood by the proponents.

The second assumption is that there is a belief among consumers that a fixed term retail energy contract not be subject to price variations over the term. We do not believe that consumers are unaware that prices may change over the course of a contract, although we do believe that many customer may have a preference for prices to remain constant. Our research has shown that some customers are willing to pay a premium (at least initially) for price certainty and our experience in the market reflects this however, we do not believe that this should be imposed on the rest of the market who are generally satisfied with the more traditional contract structure. We would in fact venture to say that many of those consumers who may have expressed to the proponents a preference for a fixed energy rate over the term of their contract would not hold this preference if they were aware that this would necessitate a higher up front contract price.

EnergyAustralia believes that the problem of consumer misunderstanding, to the extent that it exists, can be appropriately addressed through improved messaging to consumers and by assisting them to better understand the various product solutions which will best suit their needs.

7. Appendix A – Response to questions raised 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?

As outlined in the consultation paper, the NERO 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.”

EnergyAustralia considers that reference to the interests of consumers relates to consumers as a whole, rather than specific groups of consumers. Although we acknowledge the need for appropriate customer protections and frameworks to assist vulnerable customers, it is necessary to consider whether there is a net benefit to the entire customer base derived from a rule change which is targeted at a small subset of customers, namely those who are confused about the current arrangements.

We consider that wider impacts of the proposal are unlikely to promote the NERO when viewed through this lens. A restriction on price changes during fixed term contracts will remove choice for those customers who are happy to accept a contract which reflects a retailer’s costs at a point in time in recognition of the fact that these costs can vary (upwards or downwards), rather than a contract which forces them to accept a price which will necessarily include a retailer’s conservative view of future costs.

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?**

EnergyAustralia argues that the consumer protections test proposed by the AEMC is not broad enough to provide an adequate assessment of the rule change request. The three elements outlined in the consultation paper deal exclusively with the explicit customer protections in the National Energy Retail Rules (NERR). We contend that the NERR provides additional implicit protection to consumers by creating a regulatory framework which encourages efficiency, innovation and competition and the rule change proposal must be considered in light of this.

An example of an implicit protection can be seen in existing code provisions allowing for alteration of prices subject to minimum notification requirements. Although this is strictly a retailer right, it is also a customer protection in the sense referred to above in that it provides consumers with benefits, namely;

- While allowing for products where prices may change, it does not prohibit the development of fixed rate products if they are demanded by consumers;
- It provides consumers with economically efficient pricing by enabling retailers to sell at the lowest possible production cost at a point in time rather than allowing for future price rises; and
- It allows for decreases in the cost of inputs to be passed through to consumers.

These outcomes are fundamental to consumer well being in the market.

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?

A retailer's primary function in the energy market is to bear risk on behalf of the consumer and we can see why the argument that the retailer should be responsible for assuming additional risk in relation to future price movements may be appealing. This argument ignores the fact that doing this may in fact impose additional costs on consumers.

We consider that the current level of mandated risk (acknowledging that retailers may make business decisions to take on additional risk on behalf of consumers) is appropriate. The rule change proposal ignores a key issue relating to risk in the energy market which is that the retailer is the only link in the supply chain which faces considerable credit risk. Each retail business is required to put forward considerable prudential guarantees in order to ensure that generators and networks do not face credit risks, so essentially, the only player in the supply chain that is not guaranteed income is the retailer. While it is true that retailers can require refundable advances from consumers, this practice is not widespread throughout the industry and retailers can be left with considerable credit issues where consumers do not pay invoices. In light of this, EnergyAustralia considers that retailers already shoulder a considerable risk burden relative to other links in the supply chain and that sharing risk, rather than concentrating it is more appropriate and beneficial for consumers.

Restricting retailers' ability to vary prices during the contract term, will subject them to further risk which cannot be adequately managed without imposing a premium on consumers' prices to allow for uncontrollable changes to input costs. If this risk premium is calculated incorrectly, consumers will face inefficient prices (ie, will pay too much) or retailers will face serious financial difficulty and may be unable to meet their obligations and cease trading. Neither of these outcomes is attractive from a consumer point of view.

We are concerned that the rule change proposal is suggesting that retailers may use their unilateral price increase rights to seek rents rather than as a risk management tool. It is EnergyAustralia's practice to vary rates in response to material changes to input costs, generally network tariffs. In recent times rates have also changed due to the imposition of a price on carbon. We understand that other retailers act similarly. Retailers do not vary prices without due cause, and generally, will only do so once a year, at the same time as the network businesses, a retailer's biggest input cost. We want to avoid disruption to our customers as far as possible.

The proposal suggests that retailers are well placed to manage the risk of price variations on behalf of consumers as they have greater knowledge of future price movements that can be the result of numerous factors, such as outcomes in network determinations or regulatory initiatives. Although we agree that consumers should not be required to the same knowledge that retailers do, we do not consider that retailers have appropriate information to predict future input costs in many instances. This view is reinforced by the AEMC's investigation into proposed changes to the National Electricity Rules to "set network prices:

- with greater consultation, to allow customers to better understand any proposed changes and to provide retailers with greater opportunity to understand the impact of any network changes on their pricing strategies and to develop their retail prices, and

- earlier, to allow sufficient notification of network price changes”²

This review is still underway, however it recognises the difficulty that retailers have setting prices due to a lack of timely information. Although supported by retailers, this proposal was in fact raised by the Independent Pricing and Regulatory Tribunal, which (without seeking to pre-empt the outcome) we consider lends considerable weight to the argument that there is an issue in this area.

EnergyAustralia points to a further example which highlights the fallacy that retailers have perfect information. A number of retailers approached the Victorian Department of Primary Industry (now State Development, Business and Innovation) to advocate that the timing of target setting for the Victorian Energy Efficiency Target scheme to be brought forward. This would allow retailers to accurately factor these costs in to retail tariffs before network increases come in to effect and are passed on. Despite a consultation taking place relating to this issue, there was no change to the existing process demonstrating that the extent to which retailers take on risk in the face of inadequate information is not well understood.

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?**

We consider that risk premiums will be built into fixed term contracts if this rule change is successful. Each retailer will have its own approach to price setting and some may include an explicit component in their pricing whereas others’ risk premiums may be implicit in the form of conservative forecasting of future price movements (although neither approach would be visible to the consumer).

The quantum of the risk premium or the degree of forecasting conservatism is likely to depend on the duration of the contracts increasing with the number of network increases which will occur during the contract term and will certainly lead to a permanent increase in the price of fixed period contracts. In order to maintain margins, retailers will price fixed term contracts at some point between the current efficient price and the expected price at the end of the contract term. To enable this, additional resourcing and analytical rigour will be required to minimise the risk that future price assumptions are incorrect. While this additional analysis may reduce the risk that a retailer faces with regard to price movements, it will not eliminate it entirely, and the cost of the risk and the additional analysis will both be passed on.

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?**

EnergyAustralia has no reason to doubt the proponents’ assertions that some consumers may be under the impression that prices are fixed for the duration of a contract however, in our experience this understanding does not appear to be common among consumers and we seek

² Annual network pricing arrangements – Rule change proposal Submission on AEMC’s Consultation Paper December 2013

to minimise such misunderstandings as far as possible. EnergyAustralia endeavours to ensure that consumers are properly informed with regard to their contractual rights and obligations, and have taken a number of steps to this end. These steps include ensuring that scripting reflects that prices may change and avoiding the potentially confusing terminology such as “fixed term” in favour of the phrase “benefit term” which generally denotes the period of time for which a consumer is eligible to receive a discount.

We consider that it is reasonably unlikely that large numbers of consumers are under the impression that prices are fixed within contract terms due to the maturity of the contestable retail market; the proponents’ discussion of the problem does not lead us to conclude otherwise or that this will be a persistent issue. Those jurisdictions in which full retail contestability exists have been this way for some time and although not all consumers would have entered fixed term contracts since contestability commenced, those who have would have experienced multiple annual price increases during this time. Not only would these customers have been made aware of increases through regulatory requirements around notification, but considerable media attention generally precedes annual price increases. We acknowledge that there may be a level of customer dissatisfaction around price increases however we do not believe that this is borne of a lack of knowledge.

With regard to the issue of fixed period contracts with fully fixed prices, we believe that it is possible that a significant number of consumers are unaware of the existence of these products as they have only been introduced to the market relatively recently and are not offered by all retailers. We believe that these contracts will be offered by a greater number of retailers if the potential for mid-term price increases is a genuine concern amongst consumers.

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?**

We do not believe that the ability for retailers to vary prices leads to a perception that changing to a new retailer or contract would waste search costs. Although there may be a frustration among consumers about the seeming inevitability of price increases we believe that consumers are sufficiently sophisticated to enable them to make appropriate choices with regard to switching that reflect their individual views of the respective costs and benefits of switching – in terms of price and service quality outcomes.

Furthermore, consumer experience with other services where heavy penalties are applied for early termination should indicate that constant switching is not always the most beneficial course of action for them. Although termination fees may apply to energy contracts, these are regulated by 49A(1)(b) of the NERR which states “the early termination charge is a reasonable estimate of the costs to the retailer resulting from the early termination”. In NSW these costs have been quantified by IPART and have been further regulated. This reflects reality that retailers do face costs when consumers terminate contracts which in turn should indicate that perhaps a consumer switching contracts as soon as there is a price change may not be efficient for the overall market and that consumers would be better off seeking information relating to a new contract closer to the expiry of their existing contract.

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?

EnergyAustralia believes that the rule has the potential to have a negative impact on consumer engagement. Although we believe that consumers should not be required to understand the energy industry in great detail in order to make informed decisions, we encourage our customers to engage with us and with other industry participants in relation to their energy supply. We are concerned that the rule would lead to consumers taking a “set and forget” to their energy supply. EnergyAustralia believe that true engagement requires an ongoing dialogue between retailers and consumers and that price variations which reflect changing conditions in the sector facilitate this dialogue.

We agree that greater consumer engagement will put downward pressure on prices but as outlined above, do not believe that this rule will facilitate this outcome. Engagement will lead to greater understanding of the reasons for price increases, the relationship between retailers, distributors and consumers and will create a more cooperative relationship between customers and their retailer, resulting in lower customer management costs, decreased bad debt costs as consumers are proactive about payment difficulties and lower complaint handling costs as customer better understand what issues are the responsibility of their retailer and what issues are handled by the distributor.

Ensuring that information is available to customers is vital to improve engagement but we consider that it is important that the information available empowers the customer to make informed decisions. Information which reflects prices at a point in time is already available to consumers via regulated and commercial comparator sites. These sites provide consistent, easy to digest information about retailer offers and yet many still consider that there is an information and engagement issue. We consider that prices which are less transparent as they include assumptions about future costs provide less rather than more information. More generally, we believe it is in our commercial interests and the interests of our customers that there is common understanding of the rationale for price variations and that we understand our customers’ needs.

Having recognised the value in increasing consumer engagement, retailers are well placed to provide information above and beyond regulatory requirements. We do not believe that restricting price increases throughout the contract term is a positive step in this regard.

Question 8 Competition between retailers

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

Although EnergyAustralia does not believe that it is efficient for any retailer to be managing 100% of the risk associated with changes to input costs, particularly network costs, the rule change is likely to have a disproportionate effect on smaller retailers. Many of these retailers are not vertically integrated and rely on hedging contracts to manage their wholesale market risk. While each retailer’s risk profile differs, if the ability to manage wholesale price rises by passing the cost on to the consumer is removed, retailers will be required to hedge more fully hedge their load resulting in increased costs.

In addition to this, smaller retailers generally operate with fewer resources than major providers and would require additional expertise to assist with analysis of network price paths in order to provide even a small chance of them mitigating this risk. Engaging such resources

can impose significant costs and retailers may simply choose to be ultra-conservative in setting prices in order to avoid taking on the additional resources required to analyse factors which have previously been outside the scope of their risk management framework.

The market relies on tier 2 retailers to compete vigorously with the major players to put downward pressure on prices. There is no question that the additional costs would act as a barrier to entry for new retailers and would undermine competition and consumer benefit.

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 offers available is reduced, what effect will this have on retail competition and prices in retail energy markets over the long term?**

Retailers may respond to the rule in a number of ways. It is likely that the market will experience a period of upheaval as retailers seek alternatives to what is currently the most popular type of market contract and will adopt various strategies to fill the void that is created. Potential responses include:

- Withdrawing fixed term contracts from the market;
- Offering fixed term contracts with a shorter duration;
- Offering fixed term contracts at a significantly higher price;
- Retailers ceasing operations in NECF jurisdictions.

Whatever the predominate approach taken by retailers, the overall outcome is a contraction in the choice available to consumers. It is worth noting retailers withdrawing or shortening fixed term contracts could lead to consumers being subject to more frequent price increases (as generally speaking retailers currently only vary prices one a year). This would be a perverse outcome indeed.

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?**

We believe that the current contract variation provisions of the NERR are consistent with the Australian Consumer Law. A contract term is considered unfair when:
*it causes a significant imbalance in the parties' rights and obligations arising under the contract; it is not reasonably necessary to protect the legitimate interests of the supplier; and it would cause financial or non-financial detriment to a party.*³

Although other industries can face increases in input costs, the electricity retail industry is unique in that no quantity is specified under the contract. Where a consumer may reasonably enter into a contract for a fixed number of widgets at a fixed price and be protected from any change to the supplier's costs, a contract for electricity supply requires the supplier to provide an unspecified quantity for a period of time. In light of this, the right to change the price is "reasonably necessary to protect the legitimate interests of the supplier".

³ 2010, Commonwealth Attorney General, The Australian Consumer Law: An introduction

Further, we believe that the ACL will apply regardless of the existence of Rule 46 as although Rule 46(3) places a requirement on the retailer to notify customers of a price variation, it does not expressly permit retailers to include terms that allow for price variations and consequently should not be viewed as contrary to ACL requirements.

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?**

The Australian Competition and Consumer Commission (ACCC) has publicly stated that it will be scrutinising energy retailers and taking enforcement action where appropriate. To the best of EnergyAustralia's knowledge, the ACCC has to date been comfortable with retailer practices regarding disclosure of when prices may vary. In light of this, it is our belief that current retailer practices by and large conform to ACL requirements.

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?**

We acknowledge that there may be some benefit to a particular group of consumers who would prefer to have their rates locked in for the duration of their contract. EnergyAustralia has conducted considerable research which has indicated that consumers are aware that they may be subjected to price increases during fixed term contracts and that there is indeed a desire for fixed price contracts. Despite this stated desire, sales figures indicate that consumers prefer an initial lower price and are happy to take on some risk. We also acknowledge that there may be a small segment of consumers who are unclear about the right of a retailer to vary prices during a contract however we suggest that this group is the minority and any benefit that they receive is likely to be eclipsed by the cost to consumers overall.

We are also concerned that those customers who do not understand that prices may vary over the course of their contract may be less sophisticated consumers and not understand that locking in prices would necessarily mean that the prices at the time they enter into a contract will be higher. It is unclear that these consumers would in fact benefit if the rule was made.

Prohibiting price variations will ultimately remove consumer choice in the market. EnergyAustralia and other retailers have acknowledged the demand for fixed price contracts by making them available to customers. This illustrates the value of a regulatory framework which facilitates innovation and response to consumer demand and highlights the benefits of a light handed approach to regulation

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?

A limited pass-through of costs will inevitably be beset by definitional issues regarding allowable, and non-allowable costs. While some such as network increases, are easily defined and impact all retailers relatively evenly, others are more troublesome.

During any 12 month period, retailers face a range of regulatory changes which impact on their costs. The costs of implementing such changes vary from retailer to retailer and are largely dependent on system capabilities. There is no fair and uniform basis for a pass through of these costs.

A more easily quantifiable cost to retailers arises from the impact of environmental and energy efficiency targets which require retailers to purchase and surrender certificates to acquit a liability. Although the cost per certificate varies somewhat from one retailer to the next due to the fact that they are generally traded on an open market, the real issue arises in that the quantities are unknown until well into the compliance period. If the costs associated with these were allowed as pass throughs as they became known, it would result in the consumer facing a number of smaller increases throughout the contract rather than the current practice where prices are generally revised annually to account for a full suite of cost changes. We do not believe that this will be a beneficial outcome.

With regard to network costs, once determined by the AER the impact on retail prices is generally quite easy to quantify and consequently would these would make a suitable candidate for a limited passthrough component. However, current practice is for retailers to increase prices on an annual basis in line with network increases, so it is difficult to see how restricting passthrough to network increases is materially different to the status quo.

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?

EnergyAustralia is not convinced that the issue, as outlined by CALC and CUAC, is sufficiently material or persistent to warrant regulatory intervention. As outlined in this submission, the simple sounding solution which has been proposed may or may not benefit a particular segment but would impose a significant burden on the customers more broadly.

As a result of daily interactions with customers, retailers are generally well attuned to the needs of consumers however in some instances where miscommunications arise, we appreciate the work of agencies such as CUAC and CALC to bring these matters to our attention. EnergyAustralia does not consider that regulatory intervention will necessarily lead to the optimal outcome for consumers and believe that a collaborative approach between consumer organisations and retailers is more appropriate to ensure that consumers are fully engaged and able to make informed decisions.

Placing a regulatory prohibition on what is considered by most to be a valid contract option will disempower and disengage consumers in a climate where it is important that they are informed and aware.