



**Unilateral Price Variation & Market Retail Contracts  
Rule Change Request  
for  
Australian Energy Market Commission**

**Consumer Action Law Centre  
Consumer Utilities Advocacy Centre  
October 2013**

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# 1. Introduction

## 1.1. Request for Rule Change

In accordance with section 243 of the *National Energy Retail Law*<sup>1</sup> (the NERL), we request the Australian Energy Market Commission (AEMC) make changes to the National Energy Retail Rules (the NERR) by way of amending Rule 46 to ensure that under fixed term contracts (plans and benefit periods), energy retailers are prevented from unilaterally varying the retail tariff.

As required by section 249 of the NERL, we have undertaken extensive analysis of the issue we are presenting and can assure the Commission that we included a substantive assessment of both the legal and economic aspects of the proposed rule prior to lodging this submission with the AEMC and in developing the Rule change request.

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<sup>1</sup> The National Energy Retail Law is Schedule 1 to the *National Energy Retail Law (South Australia) Act 2011* (SA).

## **1.2. Background**

The National Energy Retail Rules (the NERR) impose minimum requirements that apply in relation to terms and conditions of energy retail contracts. **Rule 46** requires, in relation to market retail contracts, for energy retailers to notify customers of changes to tariffs as soon as practicable, and no later than the customer's next bill. By only regulating the way in which variation to tariffs are notified, this provision implies that retailers can unilaterally vary tariffs under market retail contracts, including tariffs included in fixed-term contracts.

Fixed term contracts are not uncommon in the energy industry, and many fixed term contracts impose significant exit fees. These exit fees, although limited under the NERR to the reasonable costs incurred or to be incurred by the retailer (and do not include costs based on lost supply or lost profits), can discourage consumers from switching to another provider, thereby discouraging competition. Similar limitations in Victoria mean that exit fees of over \$100 can be imposed, depending on the length of the contract and its features. By imposing exit fees, in addition to retaining the right to vary the price or tariff included in the contract, energy retailers can effectively shield themselves from much of the risk of varying costs incurred for the delivery of energy services. Managing risk on behalf of customers is a key role of energy retailers and this shifting of risk to consumers can result in consumer detriment and lead to an erosion of confidence in the competitive market. The Australian Consumer Law (ACL) considers that unilateral variation clauses in consumer contracts are likely to be unfair terms and thus void (section 25(g)). However, where government regulation elsewhere permits such terms, as the NERR do, the ACL does not apply (section 26(1)(c)).

Unilateral variation clauses negatively affect effective competition. For example, a consumer can select an offer that suits their needs at a particular point in time, potentially expending significant search costs, only to find this contract rendered unsuitable and uncompetitive even prior to receiving the first bill if the retailer unilaterally increases the price (which is not uncommon). The customer can then be subject to exit fees if they wish to select a new offer, thereby undermining the benefits of shopping around for a better offer or further engaging in the energy market.

In 2012, the Consumer Utilities Advocacy Centre (CUAC) conducted a survey of 507 consumers (**Appendix 3**), specifically asking for their experience with, and opinions on, fixed term contracts in energy. The results of the CUAC research indicated that 86 per cent of the consumers surveyed were of the view that current arrangements are unfair and 94 per cent of the consumers surveyed believed that a change in the regulations is warranted to prevent retailers changing prices during fixed term contracts. Such a regulatory change will also improve competition by allowing consumers to have confidence in the effort of expending search costs and in maintaining the value of their choices, thus encouraging market participation.

Consumer Action and CUAC have previously advocated against unilateral price variations in fixed term contracts, including to the Victorian Essential Services Commission (ESC) and the Victorian State Government. A change to the NERR will also address the issue in jurisdictions where they apply. The NERR are part of the National Energy Customer Framework (NECF),<sup>2</sup> which has been

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<sup>2</sup> NECF is made up of the NERL, the NERR, and related regulations.

introduced in the Australian Capital Territory, Tasmania, South Australia, and New South Wales. Victoria and Queensland are yet to confirm the date at which the NECF will be enacted.

We are submitting a Rule Change request despite Victoria not currently being part of the NECF, as Victoria proposes to adopt the NECF as its baseline consumer protections to replace the previous protections provided in the Energy Retail Code (ERC) from an as yet unconfirmed date. On this basis, Victorian consumers will be subject to the same consumer protections as the jurisdictions that have adopted the NECF, and will similarly be subjected to the unfair contract terms of unilateral price variation. We see this Rule change proposal as a means to overcome this for both Victorians and all consumers within the NEM.

## 2. What we are seeking

Consumer Action and CUAC, through this Rule Change proposal, are seeking to limit terms in fixed period retail market contracts that permit retailers to unilaterally vary the tariffs and charges that apply under those contracts. The Rule Change proposal is not seeking to limit all terms that allow for unilateral variation, just those terms that relate to tariffs and charges.

We seek to do this through a change to the NERR by including **Rule 46A** as follows:

### **46A Fixed period market retail contracts**

- (1) This rule applies to market retail contracts with a fixed period.
- (2) For such market retail contracts, all tariffs and charges payable by the customer are not to change for the duration of the fixed term.
- (3) For avoidance of doubt, for contracts subject to this rule, the retailer is not able to vary the tariffs and charges that affect the consumer.

### **2.1 Discussion of proposed Rule**

Consumer Action and CUAC have arrived at the position of the proposed limitation on terms that permit retailers to unilaterally vary tariffs and charges in fixed period contracts by considering the following potential options, and whether or how they may benefit or impact upon consumers and competitive market outcomes.

#### **a. Fixed means fixed**

The first option considered is described above as per **Rule 46A**. This option was selected in consideration of the economic analysis provided in **Appendix 1**.

We consider this option to be ultimately more reflective of real costs. This means that the true cost of the product will be available in the market, and consumers will have improved access to transparent and accurate information in relation to contracts that they sign. In particular, consumers will be able to identify the actual price they are to pay over a fixed period.

In adapting to this Rule change, it may be the case that retailers need to amend hedging practices, as well as contract length, both wholesale and retail. Despite this, we see this Rule change proposal as being focused on delivering more effective competition to consumers.

We submit that retailers are able to adapt, as evidenced by the 'locked in price' fixed term products offered by Origin Energy and Energy Australia currently in the Victorian marketplace.

#### **b. Retailer charges to be fixed, with government charges only passed through.**

We consider that retailers who are adequately evaluating market risk, including the five yearly distribution price resets, are sophisticated enough to consider and manage uncertain prices of inputs in the development of fixed term products. Indeed, this is one of their major business drivers.

However, we recognise government charges, those costs borne by retailers due to government policy decisions like energy efficiency targets and solar tariff schemes, may be unforeseen.

While we do not believe that government charges will be unknown to retailers on short term retail contracts, we do consider that for longer term (24 -36 month contracts) there may be some instances where government charges could impact on the cost of a retail product. In these instances, we accept that it may be appropriate to pass government charges through on fixed term contracts.

However, if this option was selected, we consider that there would be a need for information about government charges to be made transparent to consumers and in a consistent (comparable) format. To enable this, further regulation will be necessary to determine how this information is communicated on bills, including unbundling of service costs. Due to the complexities of such regulation and the likelihood of it resulting in additional costs for retailers, we have not recommended this approach.

### **c. Deletion of Rule 46 allowing for the Australian Consumer Law to apply**

We have considered the potential to delete Rule 46 from the NERR, with the result that the terms of energy retail contracts that permit unilateral variation of tariffs and charges would be subject to the unfair term provisions of the ACL. This approach may meet the needs of consumers if it is found that such terms, or at least such terms that are broadly cast, are unfair.

However, as discussed in our legal analysis provided in **Appendix 2**, we do not believe that the simple act of deleting the Rule will provide the protection consumers need from unfair contract terms.

Under the ACL, in determining whether a term is 'unfair', a court must consider if a term is necessary to protect the legitimate interests of the supplier, having regard to the transparency of the term and the contract as a whole. Terms providing for unilateral price variation can be assessed in this manner. However, under the ACL, it could be reasonably argued terms allowing for unilateral variation of price are not unfair if they also allow for a consumer to exit the contract without penalty.

We believe that this is an unacceptable outcome, as it requires consumers to change their behaviour by taking the action to exit the contract. Behavioural economic analysis would indicate that this is unlikely to occur and will therefore expose consumers to continued poor practices by retailers.

### 3. National Energy Retail Objective (NERO)

The National Energy Retail Objective (NERO) forms the primary decision making test for the AEMC in assessing any proposal to change the NERL. In addition to considering the NERO, the AEMC must, where relevant, satisfy itself that the Rule Change is compatible with the development and application of consumer protections.

The discussion that follows provides an interpretative analysis of the decision-making test of the AEMC, considering the NERO, the Minister's second reading speech when enacting the NERL, and the other matters that the AEMC must consider. In summary, we believe that the AEMC must consider (1) whether the Rule Change will contribute to the maximisation of the economic welfare of consumers, over the long term; and (2) whether the Rule Change contributes to consumer protections, particularly where such protections enable consumers to participate in the market to drive efficient outcomes.

#### **3.1 Applying the NERO to the proposed Rule Change**

Section 236 of the NERL states that the AEMC may only make a Rule if it is satisfied that the Rule will or is likely to contribute to the achievement of the NERO. The NERO states:

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

As noted above, where relevant, the AEMC must also satisfy itself that the rule proposed to be made is compatible with the development and application of consumer protections for small customers.<sup>3</sup>

The NERO mirrors the objectives of the laws governing the other sectors of energy markets, including in the National Gas Law and the National Electricity Law. The AEMC's interpretation of these objectives has had a primary focus on economic efficiency. Recognising that the NERL is also about consumer protection, the legislature makes it clear that the NERO is also to be considered in light of consumer protection principles.

When introducing the legislation to parliament, the relevant Minister stated:

*The long term interest of consumers of energy requires the economic welfare of consumers, over the long term, to be maximised. The long term interests of consumers in competitive energy markets are promoted through the application and development of consumer protections to enable customers to participate in the market with confidence, support effective consumer choice and ensure ongoing access to energy on reasonable terms as an essential service.*

*When the National Electricity Law and the National Gas Law were each introduced to this Parliament, the economic efficiency nature of the objective was emphasised in the context of the regulatory frameworks for the wholesale markets and the national access regimes for monopoly infrastructure, to deliver services in the long term interests of consumers. The*

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<sup>3</sup> Section 236(2)(b), NERL.

*national energy retail objective in this Bill operates in the context of a Customer Framework which has as its focus a strong regime of consumer protections for small customers, and further protections and assistance programs for customers in hardship, to ensure that those customers are able to confidently participate in the retail market, thereby maximising their economic welfare.*

*The Bill provides a robust interface between the community and a competitive retail market, and it is important that economic concepts such as the essential service nature of energy, information asymmetry between energy businesses and their customers, and transaction costs for small customers, along with the benefit to the community of ensuring that vulnerable customers are able to maintain their energy supply and pay their bills, are at the forefront of decision making under the Customer Framework.*

*Consequently and necessarily, the Bill also clarifies that the Australian Energy Regulator and Australian Energy Market Commission, in exercising their respective statutory functions under the Customer Framework, are to do so in a way that is compatible with the development and application of consumer protections for small customers, including (but not limited to) protections relating to hardship customers.*

Given this statement, the analysis below submits how the proposed Rule Change will or is likely to contribute to effective consumer protection for consumers and enhance economic welfare. In particular, if enacted the Rule Change can contribute to confident participation in the marketplace by consumers and can support consumer choice, thereby bringing about competitive benefits to the market and an improvement in economic welfare. The key ways in which the Rule Change contributes to the NERO are that it:

- corrects an information asymmetry between energy retailers and consumers;
- encourages efficient business practices in energy retailers to effectively manage the risk on behalf of consumers, rather than place that risk on consumers;
- ensures the long term interests of consumers are met through consumers being charged the competitive price per contract; and
- reduces search and transaction costs for consumers.

### ***3.2 Consumer benefits of the Rule Change as they meet the NERO***

The Rule Change is also compatible with the development and application of consumer protections and would meet the NERO in the following ways:

#### **3.2.1 Corrects information asymmetry**

Information asymmetry would be corrected and economic efficiency would be achieved by more direct and transparent information exchanges between retailers and their customers.

Where a fixed term contract involves the retail tariffs remaining fixed during the period of that contract, it is a more 'complete' contract: it specifies conditions under a greater range of possible futures. The more complete a contract is, the more information it delivers to (all) the parties involved. Currently, retailers have more knowledge of expected future prices than customers do. A fixed price contract would reveal retailers' intentions to customers.

### **3.2.2 Encourages efficient business practices**

Retailers currently rely on consumers to bear marketplace risk on their behalf. Shifting risks back to retailers when they enter into fixed term contracts with their customers will enhance economic efficiency. Business practices within energy retailers will be optimised to fully consider the operation of the market. As firms are better able to manage these risks than consumers, ultimately the market will be more efficient.

### **3.2.3 Meets the long term interests of consumers**

Energy retailers must be responsible for ensuring information is provided in a transparent manner, in particular, in relation to contract terms and conditions with consumers. Currently information is provided and contracts constructed in a manner that means risk is borne unfairly by consumers. The long term interests of consumers would more likely be met should energy be priced more transparently and risks allocated more appropriately, with consumers more clearly understanding contract terms.

### **3.2.4 Minimises transaction costs**

The barriers that many consumers face in engaging with the retail energy market often combine to represent a transaction cost, i.e. the cost of entering into the market with a focus on finding a better deal and switching energy providers. In many instances these transaction costs, given the complex nature of the energy market and the often confusing and incomplete manner in which information is provided to consumers, can exceed any benefit associated with switching. The benefits are further undermined, and indeed the transaction costs increased, with the onset of unfair contract terms and unilateral price variations. The Rule Change would seek to minimise transaction costs through ensuring information provided to consumers was transparent and accurate.

## 4. Statement of issues

### 4.1. *An economic failure*

Consumer Action and CUAC commissioned economist Dr Rhonda Smith<sup>4</sup> to undertake an economic analysis of unilateral contract variation in the energy sector (see **Appendix 1**). The focus of Dr Smith's analysis is on market outcomes in relation to competitive markets, set against the impact of unilateral price variations in contract terms.

Dr Smith's paper notes that currently, through the practice of unilateral price variations, retailers may initially set prices below the competitive level to attract customers, knowing they can raise them once a customer has signed up. She proffers that customers will initially consume more than socially optimal, making of welfare gains that are outweighed by the welfare losses of producers; there is a deadweight loss (assuming price sensitivity >0).

When producers (in this case energy retailers offering fixed term/benefit period contracts) raise prices for captive customers to levels above the competitive equilibrium, customers may respond by altering demand (i.e. using less). This may result in customers consuming less than is socially optimal, thereby resulting in a welfare loss that is greater than the "supra-normal profits" obtained by the producers. This too represents a deadweight loss. To the extent that customers cannot exit the contract, the retailers will approach the position of monopoly provider.

Further, when producers raise prices for captive consumers (those who are locked into fixed term contracts) to levels above the competitive equilibrium and customers are **not** able to alter demand, customers will consume **more** than is socially optimal, their consumption choices having been made based on the initial (too low) price. Total deadweight loss is the same as in the initial (too low) price, but there is a large welfare transfer from consumers to producers.

Consumers who face significant barriers within the energy market are unlikely to switch retailers at the end of contracts, due to market complexity and confusion and specifically due to search costs, switching costs, bounded rationality, status quo bias, and the (possibly true) perception that other retailers will be no better.

In these instances, energy risks are shifted from the retailer to the customer, even though the retailer is much better placed to manage the risks (having both greater incentive and ability to do so).

Dr Smith considers the possible outcomes upon the market behaviour of energy retailers in the event of a Rule Change banning unilateral price variation during the term of a contract. She observed that energy retailers would be less likely to set prices below competitive levels to attract customers then increase prices afterward, and conversely, consumers would be less likely to consume above or below the socially optimal level. This would reduce deadweight loss and result in consumers, very

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<sup>4</sup> Dr Rhonda Smith is a Senior Lecturer in the Economics Department at the University of Melbourne. From November 1995 to November 1998 she was a Commissioner with the Australian Competition and Consumer Commission.

likely, having greater welfare, particularly those unable to adjust their usage over the fixed term of a contract (this could be due to lack of upfront capital or already low usage).

Dr Smith further observes that energy retailers would be likely to take greater steps to manage their risk exposure to cost increases. Energy retail contracts could become shorter if retailers were unwilling to bear the risk of cost increases. However, this may not necessarily be the case—some companies currently offer fixed-term fixed-price contracts with terms of 24 months or longer (e.g. Origin RateFreeze), similar in length to many fixed-term contracts *with* unilateral price variation clauses.

The paper notes that consumers may be more likely to switch retailers, as search costs are reduced (no need to check terms and conditions for price variation clauses) and trust is improved. There would also be a greater perception of fairness in energy markets.

While energy retailers may still set prices higher than the competitive equilibrium, this would be apparent in advance and would (ideally) be counteracted by competition between retailers.

Dr Smith also considers an alternative scenario, where unilateral price variations are allowed but exit fees are eliminated. She observes that while consumers may be more likely to switch retailers, neither search costs, trust, nor perceptions of fairness would be improved. To the extent that consumers are still unlikely to switch, retailers will continue to offer low (below equilibrium) initial rates followed by unilateral escalations, creating a deadweight loss.

Active customers who switch when price rises are announced may be able to collect consumer surplus from producers over several contracts (depending on switching costs). However, to the extent that consumers are still unlikely to switch, all other outcomes from the scenario are likely to remain.

Finally, Dr Smith refers to behavioural economics analysis, which suggests that a consumer is not necessarily likely to switch within the market should a fixed contract term period end, "as sometimes the transaction costs and/or the switching costs associated with finding an alternative retailer exceed any benefit available from change, especially as search tends to be a sunk cost".<sup>5</sup> Or alternatively, given the market complexity present in Victoria consumers may view market choice as just too hard. Further, consumers have bounded rationality and one of the responses in such situations is to remain with the status quo.

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<sup>5</sup> Sunk costs are those costs incurred in entering an industry which cannot be recouped on exit.

## **4.2. Legal architecture**

The legal analysis undertaken by Consumer Action reviews the current regulation of unilateral price variation terms in relation to fixed period energy retail contracts and proposes drafting for a new rule in the NERR to address this.

The analysis reviews energy-specific regulation, including the NECF, discussing the process of its development and adoption by various jurisdictions, noting both Queensland and Victoria are yet to implement the framework. The analysis notes that where adopted, the NERL and NERR have force of law, applying to the sale and supply of electricity and gas or both to customers. The NERL and NERR regulate the terms and conditions of retail energy contracts across both standard retail contracts (which ordinarily arise where premises are new or energy is already connected when the customer moves into the premises) and market retail contracts.

Market retail contracts are those which are available in the competitive market and vary from the terms and conditions offered in standard retail contracts (e.g. by discounted rates, pay on time discounts or other incentives inducing sign up). Market retail contracts must comply with the minimum terms and conditions stipulated in the NERR, but retailers have freedom to 'innovate' and compete for customers based upon the perceived benefit of a different term or condition which essentially trades or offsets an alternative benefit.

The minimum requirements incorporate Rule 46, which provides that retailers must provide notice to the customer of any variation of the tariffs and charges that affect the customer. In particular, the rule requires that retailers must give such notice as soon as practicable, and in any event no later than the customer's next bill. It is very common for fixed period market retail contracts to include terms that allow for tariffs to be varied upwards, with retailers relying on these exact terms.

In Victoria, which as noted above has not yet adopted the NECF, a similar notice framework applies. However, in the case of customers with smart meters, notice must be provided 20 days before variation.

The ACL, which also regulates relations between energy retailers and consumers, contains provisions addressing 'substantive unfairness' in the content of consumer contracts. The ACL provides that a term of a standard form consumer contract is void where the term is unfair. A standard form contract will be typically one that has been prepared by one party and is not subject to negotiation between the parties, that is, it is offered on a 'take it or leave it' basis. Retail energy contracts are almost always standard form contracts.

The ACL provides that a term will be unfair where it:

- a) causes a significant imbalance in the parties' rights and obligations arising under the contract;
- b) is not reasonably necessary to protect the legitimate interests of the supplier; and
- c) causes financial or non-financial detriment to a party.

In determining unfairness, a court must have regard to the transparency of the term and the

contract as a whole in determining whether a term is 'unfair'. However, under the ACL, where a term is required or expressly permitted by a Commonwealth, State or Territory law (as is the NERR and the Energy Retail Code in Victoria), it cannot be considered for unfairness. As such, it may be reasonably argued terms of energy retail contracts that permit unilateral variation of price cannot be considered for unfairness under the ACL because such terms are permitted by energy laws.

Notwithstanding the above, in general, where contract terms permit one party to vary the terms of the contract it can be assessed for unfairness. While the unfair terms provisions of the ACL have not yet been considered in any written court judgement, terms permitting unilateral variation have been found to be unfair under the unfair term regime previously operational in Victoria. In a number of cases, courts found that the broad discretionary powers provided to traders under consumer contracts must be an appropriate response to the risk that is being addressed. In most cases, an absolute right to change the contract agreed by the parties will not be an appropriate response to the risks affecting the suppliers' continued performance of the contract.

There is some consideration that consumer interests may be protected when a trader imposes a unilateral price variation clause by enabling a consumer the right to terminate the contract in response to changes, without penalty. While this may go some way in protecting consumers it is suggested that it is not completely successful in this regard, as it continues to leave consumers in the vulnerable position of having to make a change or forfeit performance of the contract.

It could also be argued that in relation to contracts with terms providing for unilateral variation, consumers should not only be provided a right to exit without penalty, but should be compensated. With energy contracts, for example, consumers have invested time in selecting and connecting to a particular service, and with more complex contracts, e.g. flexible pricing in Victoria, consumer search costs are expected to rise. This could also combine with the opportunity cost of choosing to contract with one supplier, who may have had competitive offers at the contract outset, while with immediate changes to contract terms, the contract becomes uncompetitive and an alternative supplier may be more attractive.

The ACL provides that a term may be fair where it is necessary to protect the legitimate interest of the supplier. While there has been no judicial interpretation of 'legitimate interests' to date, the ACCC has suggested that evidence relating to a business's costs and business structure may need to be provided to demonstrate that a particular term is legitimate. In determining 'legitimate interests', courts might also inquire as to other possible ways of protecting the trader's interests (other than the particular term) that would be less burdensome to consumers.

While energy retailers may submit that their cost structure includes costs outside of their control, it is arguable that just because a business's costs fluctuate, this does not amount to a legitimate interest. In a free market all businesses have to manage fluctuating costs.

Electricity retailers are employed to manage the fluctuating costs of wholesale energy in the National Electricity Market. Wholesale electricity is traded on a spot market, and prices largely vary between \$30 and \$60 per megawatt hour. There is a maximum cap of \$12,500 per megawatt hour.

These fluctuations are managed by vertically integrating with a generator and/or entering into financial contracts to manage the financial risks of spot price volatility.

It is not market practice for energy retailers to manage the fluctuating costs associated with distribution and transmission. It may be arguable that unilateral price variation clauses are required to enable energy retailers to pass through increases in network costs. However, whether this amounts to a legitimate interest is questionable. Retailers benefit from transparency about network costs through the five yearly price reset processes. Given retailers have the necessary expertise to understand the impact of these price resets, it would seem efficient for retailers to manage the risk of fluctuating costs.

Following the analysis above and provided in more detail at **Appendix 2**, we submit that unfair contract term laws generally and a prohibition on unilateral price variation clauses in particular, promote the long term interests of consumers and are compatible with the development and application of consumer protections for consumers.

In support of this, we also, as above, propose the following draft rule.

**46A Fixed period market retail contracts**

- (1) This rule applies to market retail contracts with a fixed period.
- (2) For such market retail contracts, all tariffs and charges payable by the customer are not to change for the duration of the fixed term.
- (3) For avoidance of doubt, for contracts subject to this rule, the retailer is not able to vary the tariffs and charges that affect the consumer.

## 5. Consumer protections—the impact of unilateral price variation

### 5.1. Consumers bear the risk of retailer hedging

In all industries, firms face the risk of changing input costs. Where possible, firms will try and pass these costs on to consumers, a practice usually limited primarily by what consumers are willing to accept before taking their custom elsewhere. In certain circumstances, e.g. when consumers cannot take their custom elsewhere, legal restrictions also apply.

Firms are more likely to pass on input costs that are generated upstream (i.e. outside the business, earlier in the supply chain) than within the business itself. This is because, while a firm has a degree of control over its internal input costs (levels of staff, business processes, etc), it has less control over its upstream costs—and the same goes for its competitors.<sup>6</sup> An inefficient firm can be replaced by a more efficient firm, but if wholesale costs of widgets triple, then all firms retailing widgets will face the same conditions and cannot gain much by competing with each in absorbing the cost to run at a loss. Notable examples are airlines adding “fuel surcharges” to flight costs in recent years as the cost of airline fuels rose, or banks changing retail interest rates to reflect movements in wholesale costs of money (chiefly central bank interest rates).

Where a particular input forms a large proportion of a firm’s costs, however, it is prudent for that firm to ‘hedge’ against changes in that input’s price.

Firms might stockpile goods when they are cheap to produce, reacting to (temporarily) higher input prices by reducing production and selling from stock until prices return to normal.

Alternatively, firms may strike longer-term contracts with suppliers to deliver goods at a certain price, independent of prevailing market conditions. The contracted price will tend to be higher than the market price during ‘cheap’ periods, but lower during ‘expensive’ periods; the (retailing) firm is paying a premium to shift dealing with the risk of higher input costs (in the short term) to the suppliers of those inputs. Should higher input costs prevail over the long term, those contracts will be renegotiated.

Firms can gain more control over their supply chain by ‘vertically integrating’ i.e. becoming upstream producers of inputs for the final retail products.

Finally, firms may purchase hedging products on financial markets, essentially taking out insurance policies that pay out when input costs rise above certain levels.

It is economically efficient that the party most willing and best able to manage risk does so. In some cases this is the retailer of a good or service, the upstream supplier, financial markets, or the customer.

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<sup>6</sup> Excepting conditions such as monopsony, where the firm holds market power over its suppliers.

In the energy retail sector, a major input cost is the wholesale cost of energy (including generation and network costs). Whether a consumer is *able* to manage risk depends significantly on their individual circumstances, especially their ability to change their usage patterns. Generally, however, consumers will be limited in their ability to manage risk by their lack of knowledge of the energy industry and their limited ability to hedge. Consumers will also generally have little *willingness* to deal with the risk of changing wholesale energy prices, as energy bills are not a large proportion of expenditure for most households. Ironically, households whose spending on energy bills is largest relative to their income, and who thus have higher willingness to address price risk, are often least capable of doing so: they are low-income households, who often lack the resources required to decrease their energy usage.

Energy retailers, on the other hand, are quite capable of managing wholesale energy risk or, at least, they should be. Retailers have access to (and use) several opportunities to hedge, including vertical integration, financial products, and striking longer-term contracts. Retailers also have the resources to dedicate time and personnel to the management of wholesale energy risk, which is entirely worthwhile for them to do given its importance to their cost structure.

Where customers have declared a lack of willingness to manage energy price risk by choosing an energy product with fixed terms—which many believe includes fixed *prices*—and have little other ability to manage that risk, it is entirely improper, inefficient, and inequitable that they bear it. Low-income households, especially, can experience significant detriment from unexpected price rises, as they often have even less ability to change their usage (either through behaviour or purchase of more efficient appliances/housing stock) than other consumers.

It would be far more efficient and equitable for energy retailers' "fixed term" products to operate with truly fixed terms, allowing consumers to shift the risks of energy price rises to parties better able and more willing to deal with them.

## **5.2. Consumer experience - the paralysis of choice**

The ability of customers to quickly and easily switch providers is a fundamental source of competitive pressure in the electricity market, forcing retailers to offer the best deals possible to attract and retain customers. Each year, 10-20% of small customers in Queensland, New South Wales and South Australia transfer electricity providers. In Victoria, the average is around 28%<sup>7</sup>, estimated to be one of the highest rates of customer churn in the world<sup>8</sup>. Some retailers view this as evidence of "customers' willingness and ability to move between retailers to carefully select energy plans that are most appropriate to their needs."<sup>9</sup>

More evidence is emerging of the experience of consumers in exercising their choice by switching retailer and in particular, the impact of market complexity on their effective participation in the market. In Victoria, for example, consumers are faced with a staggering array of choice: there are 17

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<sup>7</sup> AEMO (2013) National Electricity Market Monthly Retail Transfer Statistics, August 2013

<sup>8</sup> <http://reneweconomy.com.au/2013/graph-of-the-day-why-australian-households-hate-energy-companies-42376>

<sup>9</sup> AGL submission to the AEMC's *Review of competition in retail electricity and natural gas markets in New South Wales – Issues Paper*, 13.02.2013

electricity retailers,<sup>10</sup> most of which market three or more offers including flat rate and more recently time-of-use or flexible tariffs.

CUAC's research found that the most important factor affecting consumer participation is limited capacity, as individuals, unlike businesses, cannot bring specialised resources to bear on their decision making in a particular market.<sup>11</sup> This is reflected in behavioural studies showing that consumers are more likely to engage with and process information where there are limited rather than abundant options and where the products and services are comparable.

The marketing sales channels and quality of information available to consumers also play a significant role in the ability of consumers to make a choice that is to their benefit. The CUAC study again found significant flaws in the quality of this information, both in the limitations regarding comparable pricing information and potential misleading conduct of door to door sales and in the complexity and accuracy of commercial switching sites. The CUAC mystery shopper survey of switching sites found that:

- none of the switching sites examined consistently provided the best offer in each distribution zone;
- switching sites varied widely in their recommended "best offer", and this was due in part due to the fact that:
  - several switching sites did not include offers from all retailers;
  - calculations made by some switching sites were incorrect; and
  - the calculations and commission arrangements were not transparent.<sup>12</sup>

For a typical consumer, finding the most suitable plan would thus still require visiting multiple websites to make sure he/she wasn't getting poor recommendations – hardly an optimal result.

Even for savvy consumers, the experience is laborious and frustrating. The Chairperson of Victoria's Essential Services Commission (ESC), Dr. Rob Ben-David, recently described his experiences with finding a new plan for his household under conditions approximating that of regular consumers, i.e. without the resources of his office.<sup>13</sup>

To begin, Dr. Ben-David spent 5-6 hours digging out several years of past bills and aggregating the data into a useable spreadsheet. Constraining his search to switching sites that neither wanted his contact details nor proved too confusing or difficult to navigate, he soon found himself "overwhelmed by a plethora of electricity plans, discounts, special offers, bill estimates and claimed savings—with none of the sites seeming to agree on which retailer and which offer was best, or even cheapest, for my household.

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<sup>10</sup> <http://www.yourchoice.vic.gov.au/energy-contracts/choosing-a-retailer>, retrieved 09.09.13.

<sup>11</sup> CUAC (2011), Improving Energy Market Competition through Consumer Participation: A research report.

<sup>12</sup> CUAC (2011) Energy Switching Websites: A briefing paper.

<sup>13</sup> Ben-David, R. (2013), Pursuing competitive accountability in retail energy markets, presented at the Energy 2013 Conference, Sydney, 19.03.2013

“The inconsistent and labyrinthine way in which information is provided within, and across, these sites means that anyone seeking to extract genuine, meaningful and verifiable information from these sources is subjected to what must surely be a modern day ‘trial by ordeal’.”<sup>14</sup>

After 10-12 hours establishing the top 5-6 recommended offers, Dr. Ben-David then turned to the retailers’ websites to answer the question, “What would I be paying if I signed up with you?”. In a further 5-6 hours of searching, Dr. Ben-David encountered opaque discount claims, difficult-to-find and unhelpful product disclosure statements, and very little clarity around what his prospective tariffs would actually be.

Though we have not recorded our experiences as thoroughly, Dr. Ben-David’s travails accord with those of the authors in our most recent efforts to find optimal utility plans for our own households.

Not all 140-150,000 small customers who transfer providers in the NEM each year will face search costs this high:<sup>15</sup> many will be signed up by marketers, who will make the process as quick and painless as possible. Arguably, however, customers switching this way cannot be said to be fully informed about available offers and are unlikely to have chosen the most appropriate offer.

Consumers who *do* inform themselves before switching face significant search costs, and the unfortunate scenario for many consumers is that these costs are potentially entirely wasted as demonstrated by the case study below. The plan that was appropriate at the time of signing can easily become inappropriate due to retailers’ ability to unilaterally vary prices within a contract even where the customer has signed for a fixed term and/or faces high exit fees.

### **Case study**

After moving house in August 2012, **Customer X** entered into a new electricity contract with Red Energy after reviewing a number of energy offers. The contract was for a two-year fixed contract term, offering a ten percent pay on time discount for agreeing to a fixed contract term. The contract offered time of use rates as follows (GST incl w/o discount):

- Peak (Mon-Fri 7am-11pm)—25.85c/KWH
- Off-peak (all other times)—12.1c/KWH

The service to property charge was 0.77c per day, and the agreement included a 100% GreenPower premium of 5.83c/KWH.

**Customer X** received their first bill in November 2012, but by letter dated 13 December 2012 **Customer X** received notice from Red Energy that the tariffs were set to

<sup>14</sup> Ben-David, R. (2013) p. 6

<sup>15</sup> Rough estimate based on AEMO (2013)

increase from 10 January 2013. The new tariffs proposed from that date are as follows (GST incl w/o discount):

- Peak—\$29.48c/KWH
- Off-peak—15.4c/KWH
- Service to property charge—0.88c per day

These increases appear to be in the vicinity of 14 to 15 percent, a not insignificant amount. **Customer X** reviewed other offers before these changes were to come into effect, and noted that these were now very uncompetitive and that if **Customer X** was to exit this contract, **Customer X** would be charged an early termination fee of \$40. Red Energy itself was offering new customers a rate similar to the initial rates **Customer X** had contracted.<sup>16</sup>

**Customer X** contacted Red Energy to inquire about its current rates, but was told that they could not access these rates. After **Customer X** made a further complaint, and indicated that they would take this matter to the Energy & Water Ombudsman Victoria as it was unfair and amounted to baiting tactics, Red Energy agreed to waive any early termination fee and increase the pay on time discount to 12 percent. **Customer X** was then quoted the following rates "inclusive of GST as the Pay On Time Discount".

- Peak—0.2594 c/kwh
- Off Peak—0.1355c/kwh
- Service to Property—0.7744 c/day

The Red Energy representative also stated "The discount also takes the Greenpower into consideration" in response to a request whether these rates included the Greenpower premium—it is unclear what the statement means. In any event, these rates are still in the order of 10 per cent above what **Customer X** initially contracted for.

Of particular concern is the extent to which low income and vulnerable consumers are able to benefit from choice given the complexity of the market and access to appropriate information and in the context of significant price increases, their ability to maintain access to supply. Our experience indicates that vulnerable consumers have additional information needs and often lack the means to

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<sup>16</sup> The service charge was the same, but the peak is now 23.1c for first 11.18KWH per day, and 24.2c thereafter, while off peak is 14.3c

access information, as they may have limited access to computers and the internet due to purchase outlay and ongoing costs.

The proposed Rule change would benefit these groups by providing pricing certainty.

In addition, many Australian consumers face a more fundamental and systemic issue of literacy. Preliminary data released by the ABS in March 2013 found that approximately 44% of Australians aged 15 to 74 years have literacy skills at levels which mean that understanding the most basic level of information presented in the form of energy prices and contracts would be inaccessible to the majority of them.<sup>17</sup> While these figures are alarming at best, a further high proportion of Australians are regarded as functionally illiterate, deeming them unable to participate in the simplest aspects of Australian social life.

In the same vein, a recent report into the Victorian electricity market<sup>18</sup> found the average ability of customers to understand pricing offers had fallen steadily since 2004, as had the ease of comparing new offers to the customer's existing terms and conditions.

Energy market design should accommodate this reality in operating in the long term interests of consumers, particularly the large number of consumers facing these additional barriers. Other markets, such as superannuation, have begun acknowledging these problems and adopting market designs that address the reality of consumer literacy and behaviour. For example, the "My Super" reforms were based on the proposition that outcomes experienced by inert or disengaged consumers should have inbuilt settings that closely suit those consumers' objective needs.<sup>19</sup>

There is an undeniable need to ensure market transparency and simplicity. The inclusion of our proposed Rule is a significant step in achieving this.

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<sup>17</sup> ABS (2013), 4228.0 - Programme for the International Assessment of Adult Competencies, Australia, 2011-2012.

<sup>18</sup> Wallis (2013) Victorians' Experience of the Electricity Market, in Essential Services Commission (2013) Victorian Residential Electricity Retail Market Research Discussion Paper [www.esc.vic.gov.au/getattachment/a662edf7-8852-4618-a4e9-28dffc9d4f0/Victorian-residential-electricity-retail-market-re.pdf](http://www.esc.vic.gov.au/getattachment/a662edf7-8852-4618-a4e9-28dffc9d4f0/Victorian-residential-electricity-retail-market-re.pdf)

<sup>19</sup> Jeremy Cooper (2010), Review into the Governance, Efficiency, Structure and Operation of Australia's Superannuation System, see Chapter 4: [http://www.supersystemreview.gov.au/content/downloads/final\\_report/part\\_one/Final\\_Report\\_Part\\_1\\_Consolidated.pdf](http://www.supersystemreview.gov.au/content/downloads/final_report/part_one/Final_Report_Part_1_Consolidated.pdf)

## 6. Summary of current contract terms in the Victorian marketplace

There are a number of fixed term (and fixed benefit period) contracts within the Victorian marketplace currently. To provide an overview of the way in which retailers approach the issue of fixed term contracts, we conducted a market review. To limit the scope of our review we specifically looked at each Victorian retailer and their contracts within the Citipower distribution area, and the postcode Melbourne 3000, on a single weekday in August 2013.

### ***When fixed is not actually fixed***

Of the energy retailers currently active within the Victorian energy market, we found that 13 energy retailers (below) are offering fixed term contracts as part of their product portfolio.

Table 1 below identifies those retailers with fixed term contracts, the contract name, and the period of the contract.

**Table 1**

<b>Retailer</b>	<b>Product Name</b>	<b>Fixed Period</b>
AGL	Select 18	24 months
Australian Power and Gas	Smart Saver 16	36 months
Click Energy	Click Gold	12 months
Energy Australia	Rate Fix	24 months
Lumo Energy	Advantage	24 months
Momentum Energy	Smile Power	12/24/36 months
Neighbourhood Energy	Spilt rate CitiPower domestic	24 months
Origin Energy	Flexichoice	12 months
People Energy	On Time Saver	24 months
Powerdirect	Powerdirect Residential 17%	36 months
QEnergy	Homesaver TOU PAYG	12 months
Red Energy	Living Energy Saver	24 months
Simply Energy	Simply Save 20	24 months

*Electricity retailer terms and conditions for fixed term market contracts in the Citipower distribution area (Melbourne, 3000), electricity only. Collected on 27 of August 2013.*

The market review discovered that fixed terms (as identified in each retailer's product) vary between 12, 24 and 36 months in terms of length. Of those that do offer fixed term contracts, the terms and conditions of that contract in all cases enables the businesses to vary the tariff.

In the majority of cases, the terms and conditions outline the fact that they will notify the customer should the tariffs vary, and in some cases, the way in which notification is to be provided, including advance notice, no later than on the next bill.

Many energy retailers provide reasons as to why they may vary the tariff, with some citing the meter type needing to be correct, or if it changes from accumulation to interval, many cite increases to the Consumer Price Index, changes to wholesale costs or distribution pass throughs, and one retailer's contract provides that prices may vary simply because of their operating costs.

Some retailers provide an opportunity to exit the contract following a price increase, on certain conditions. In some cases the energy retailer (at their discretion) will waive an early termination fee.

The disparity, along with the communication around the terms of the fixed term contract, are largely inconsistent across retailers and comparing the finer detail of these contracts is difficult to understand and ultimately compare. There is little to no transparency in relation to these contracts.

A full summary of key contract terms in relation to fixed term contracts is provided in **Appendix 4**.

***Fixed means fixed – a market anomaly***

Consumer Action and CUAC also found a few Australian fixed term contracts that did fix prices.<sup>20</sup> Two examples are Origin Energy's "Rate Freeze", and Energy Australia's "Rate Fix" plans (see **Appendix 5** for a copy of these offers).

Origin's Rate Freeze is a product that fixed electricity rates for 24 months. While the energy rates (per kWh prices) and supply charges (daily charges) are fixed, Origin reserves the right to vary all other charges. Customers who leave the plan early face a \$22 exit fee. Energy Australia's Rate Fix, by contrast, also fixes prices for 24 months, but guarantees no government, network or Consumer Price Index (CPI) pass-through charges. Its exit fees are \$75 in the first year, and \$50 in the second.

The fixed term fixed price plans compare with the retailers' other current plans, which are summarised in **Table 2**.

**Table 2**

<b>Retailer</b>	<b>Plan</b>	<b>Term</b>	<b>Exit fee</b>	<b>Fixed price components</b>
Energy Australia	Rate Fix	24 months	\$75/\$50	Final price (including no government, network or CPI pass-through charges)
Energy Australia	Everyday Saver	36 months	\$22	None
Energy Australia	Flexi Saver	Ongoing	None	None

<sup>20</sup> Specifically, for customers in Melbourne, 3000, Victoria.

Energy Australia	Standing Offer	Ongoing	None	None
Origin Energy	Rate Freeze	24 months	\$22	Energy tariff, supply charge
Origin Energy	Smart Daily Saver Plus	12 months	\$77	None
Origin Energy	eSaver	12 months	\$22	None
Origin Energy	Flexi Choice	Ongoing	None	None
Origin Energy	Standing Offer	Ongoing	None	None

Origin's fixed term, fixed price offer has a contract length that compares favourably and provides exit fees on par with its other offers. Energy Australia's fixed term, fixed price plan has higher exit fees than Origin's equivalent offer, but fixes all price components. Energy Australia's RateFix has lower exit fees than Origin's most heavily discounted plan, Smart Daily Saver Plus.

### International comparison

Given the small field of fixed term, fixed price contracts in Australia, we sampled similar products from jurisdictions in the UK and the USA. We chose three of the largest electricity retailers (by customer base and turnover) in the UK and two from Texas. Of the 18 USA states that have introduced retail competition, Texas has the most competitive market<sup>21</sup> and highest proportion of competitively supplied electricity.<sup>22</sup>

The plans are summarised in **Table 3**, and listed in full in **Appendix 6**.

Country	Retailer	Plan	Term	Exit fee	Fixed price components
UK	EDF	Blue+Prize Freeeeze	39 months	None	All fixed except those required by law.
UK	E.On	Fixed 2 year	24 months	£10	All except changes in VAT or resulting from government/regulatory action or regulatory/legal requirements
UK	SSE	1 yr Fixed Price	12 months	£50	All except changes imposed by governmental or statutory body
USA	Reliant	Secure	24 months	US\$295	All except due to changes in law or regulatory changes.
USA	TXU	Energy Free Nights 18 <sup>SM</sup>	18 months	US\$295	All except network charges, statutory body fees, changes imposed by laws or regulatory action.

<sup>21</sup> "US Retail Competition Is Alive, And Apparently Well", EEnergy Informer, February 2013

<sup>22</sup> <http://www.eia.gov/todayinenergy/detail.cfm?id=1430>, retrieved 13.09.2013

The international plans show a wide variety of terms and conditions. Part of this is explained by firm-specific characteristics: for example, EDF sources the bulk (69%) its power from nuclear plants, while E.On and SSE generate mainly from coal and gas (each 84% for both fuels),<sup>23</sup> with the coal and gas generation being subject to greater fuel price fluctuation than nuclear.

In each country, though, retailers are able to offer customers prices that will not change for two years except as required by governmental or statutory bodies. These plans, and those of Origin Energy and Energy Australia, show that fixing prices and terms is well within the capability of electricity retailers.

### ***Recent international changes to fixed term contracts***

In its ongoing effort to make the energy market “simpler, clearer and fairer for consumers”, the UK’s Ofgem (the energy market regulator) has imposed new rules banning energy suppliers from increasing prices on fixed term tariffs. Ofgem are also banning suppliers from automatically rolling householders on to another fixed term offer when their current one ends.

Ofgem provides the following detail about its changes, which come into effect from 22 October 2013:

- "Suppliers will be banned from increasing prices, or making other changes to fixed term contracts which are to the disadvantage of a customer. The only exceptions to this are “tracker” tariffs that follow an independent index over which the supplier has no control, or structured price increases set out in advance which are fully in line with consumer protection law. This new rule applies to any contracts entered into on or after July 15 2013.
- Suppliers will be required to notify customers that their current fixed-term is coming to an end between 42 and 49 days before the contract ends.
- Between this notification period and the end of the fixed term contract, suppliers will be banned from charging a termination fee should the customer decide to switch.
- Suppliers will be banned from automatically rolling a customer over onto a further fixed term contract.
- Instead suppliers will be required to default customers to an evergreen contract if the customer takes no switching action before the end of their fixed-term contract (this default contract must be the cheapest evergreen tariff with the supplier from 31st March 2014)."<sup>24</sup>

The same benefits of a simpler, clearer and fairer energy market for consumers will result from our proposed Rule Change.

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<sup>23</sup> **Error! Hyperlink reference not valid.**, retrieved 27.09.13

<sup>23</sup> Sonny Popowsky, personal communication, 27.09.13

<sup>23</sup> ibid

<sup>23</sup> Biedrzycki (2013) Texas Electricity Consumers, Beware of Rep Fees

<sup>23</sup> <http://www.dallasnews.com/investigations/watchdog/20130810-the-watchdog-texas-electricity-companies-profit-from-fees-that-some-call-money-for-nothing.ece>, retrieved 30.09.2013

<sup>24</sup> [https://www.ofgem.gov.uk/press-releases/tougher-rules-fixed-term-energy-deals-come-force-ofgem%E2%80%99s-retail-market-reforms-begin-bite?utm\\_source=Ofgem+Website+Mailing+List&utm\\_campaign=6bf1fad0d4-Ofgem+Email+Alert10+22+2013&utm\\_medium=email&utm\\_term=0\\_a9e586c268-6bf1fad0d4-395492941](https://www.ofgem.gov.uk/press-releases/tougher-rules-fixed-term-energy-deals-come-force-ofgem%E2%80%99s-retail-market-reforms-begin-bite?utm_source=Ofgem+Website+Mailing+List&utm_campaign=6bf1fad0d4-Ofgem+Email+Alert10+22+2013&utm_medium=email&utm_term=0_a9e586c268-6bf1fad0d4-395492941), retrieved 23.10.13

## 7. Effect of the Rule Change

The effect of the Rule Change would be to change the operation of the energy market to better fulfill the NERO. In particular, the Rule Change would achieve the NERO through more efficient market operation and contracting, more efficient and equitable allocation of risk, and increased long term consumer welfare.

The Rule Change would improve the efficiency of market operation by discouraging retailers from setting prices below competitive levels to attract customers and charging prices above competitive levels to customers who have signed on for a fixed term. Discouraging these practices would reduce the associated deadweight losses, as consumer would be less likely to consume above or below the socially optimal levels.

Energy retailers might still set prices higher than the competitive equilibrium, but this would be apparent in advance and would (ideally) be counteracted by competition between retailers.

With more certainty around the prices they would face in a contract, consumers' ability to participate with confidence in the market would be improved and barriers to switching (e.g. search costs of comparing clauses) would decrease. The effectiveness of consumer choices would be improved: without the risk of unilateral price changes, consumers' ex-ante decisions are more likely to be optimal ex-post. Consumers would perceive greater fairness in the market.

Consumers who lack the ability to adjust their usage during the term of a contract (due to e.g. lack of upfront capital or already low usage) would very likely see welfare gains versus the current situation.

Elements of price risk would be more efficiently, equitably, and properly reallocated from the consumer to retailers, i.e. from a party with limited ability and declared unwillingness to deal with risk to a party with much greater ability and high incentives to deal with risk. The reallocation would better recognise the asymmetry of information and opportunities between the various parties.

In line with this reallocation, energy retailers are likely to take greater steps to manage the risks of cost rises. This could include energy retail contracts becoming shorter. However, some companies currently offer fixed-term fixed-price contracts with terms of 24 months or over (e.g. Origin RateFreeze), similar in length to many fixed term contracts *with* unilateral price variation clauses. Fewer than a quarter of residential Victorian consumers recently surveyed indicated their contracts were for longer than 24 months.<sup>25</sup> This suggests consumers are unlikely to experience more limited choice in energy contracts as a result of this Rule Change.

Indeed, material consumer choice is likely to be increased, as consumers will be able to explicitly select between fixed and variable rates. This choice is not currently clear nor widespread in the

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<sup>25</sup> Wallis (2013) Victorians' Experience of the Electricity Market, in Essential Services Commission (2013) Victorian Residential Electricity Retail Market Research Discussion Paper [www.esc.vic.gov.au/getattachment/a662edf7-8852-4618-a4e9-28dffc9d4f0/Victorian-residential-electricity-retail-market-re.pdf](http://www.esc.vic.gov.au/getattachment/a662edf7-8852-4618-a4e9-28dffc9d4f0/Victorian-residential-electricity-retail-market-re.pdf)

energy sector, but is something consumers are familiar with from other industries such as banking (fixed vs. variable mortgages; terms deposits vs. variable rate investments), mobile telephony (“capped” plans, while not strictly fixing prices, are functionally similar), and even gambling (betting on fixed odds vs. the totalisator “tote” system).

## **8. Benefits and costs of Rule Change—summary**

We have not been able to undertake an exhaustive cost-benefit analysis of the proposed Rule Change, largely because we do not possess the sufficient information to undertake the task, much of which is held by industry.

However, as discussed throughout this document, from a theoretical standpoint there are strong economic benefits that may arise from prohibiting energy retailers from including terms in their contracts that permit unilateral variation of price.

In particular, economic benefits arise from the reduced costs borne by consumers. The primary cost borne by consumers from current market practices relates to the allocation of risk—consumers are required to manage the risk of price fluctuations, rather than retailers themselves. Further, the fact that many consumers do not clearly understand that retailers may unilaterally vary prices in fixed period contracts means the ability of such consumers to manage the risk of price fluctuation is stultified. In contrast, it is likely to be less costly for retailers to manage the risk of price fluctuation given that this is the primary role of energy retailers in energy markets.

Another benefit from the Rule Change relates to reduced search costs for consumers. As outlined in previous parts of this document, consumers can be required to expend significant resources if they seek to secure a better energy deal. By being able to choose contracts that have a “true” cost—that is, contracts that provide for all costs and relevant contingencies upfront and not subject to change or revision—it is expected that search costs will be reduced.

The Rule Change may result in costs to retailers. For example, there may be costs to retailers in actually redrafting contracts that comply with the rule. This is unlikely to be significant since retailers in the marketplace appear to regularly change contract terms and conditions, and bringing forward changes would have a small incremental cost at most.

It might be also argued that the rule might result in an upward pressure on prices. For instance, a reduced capacity to impose cost increases on consumers might lead to recovery through higher upfront charges. However, as noted above, any higher upfront charge is likely to be the “true” cost of the contract, and such transparent costs is likely to enable competition to work more effectively to encourage efficient pricing.

More transparency in contract costs should also move to rebalance the complexity of the 'contractual bargain'. This may in turn affect profits, but also place pressure on the competitive nature of the industry. Where there is effective competition in the market this should be manageable, with prices more appropriately reflecting the value of the contract and thereby driving

consumer behaviour. Where businesses are unable to provide this service, their viability in the market will be exposed.

## 9. Out of scope

The proposed Rule Change considers the narrow substantive issue of whether retailers should be permitted to include terms in their retail contracts that allow for unilateral variation of price. It has not considered other issues that are related to unilateral price variation. We submit that there are other issues that are deserved of regulatory attention, including:

1) The notification requirements relating to unilateral price variation. The current drafting in the NERR under Rule 46 places the following obligations on retailers in relation to notification:

*(2) A retailer must give notice to the customer of any variation to the tariffs and charges that affects the customer*

*(3) The notice must be given as soon as practicable, and in any event no later than the customer's next bill*

We submit that there are problems with this notification framework, particularly the timing and actual information provision required under these clauses. In our view, notification of price variations needs to be provided in advance of the variation taking effect with clear information relating to what aspects of tariffs are changing and how, and what the likely impact of this will be on a customer's bill.

2) How consumers exit fixed term contracts and whether they roll into another fixed term contract or onto default rates.

We submit that there are consumer issues in relation to the expiry of fixed period contracts. In particular, we are aware that consumers who do not respond to notification of contract expiry can be automatically entered into another fixed period contract, which can include exit fees

In our view, there needs to be a closer review of how consumers are alerted to the fact that their fixed period contract is ending. We also believe that consumers who do not respond to such a notification should not be put into another fixed period contract, as this can limit competitive pressure in the market.

# Appendices

## ***Appendix 1 - Economic analysis.***

### **Unilateral Contract Variation in the Energy Sector**

**Rhonda L. Smith**

Contracts between businesses and their customers are ubiquitous. Generally economic analysis assumes that contracts are drawn up to maximise the net gain to the parties and that the parties are economically rational, that is, they act in their own interests, seeking to maximise their utility. A *complete* contract is one that specifies and provides for all relevant contingencies within the life of the contract and so does not need to be revised or changed. If contracts were complete there would be no issue of unilateral contract adjustments. However,

*'...rather than attempting to determine all of the many events that might occur during the life of a contractual relationship and writing a prespecified response to each, the gains from exchange are increased by the use of incomplete contracts.'*<sup>1</sup>

The more complex the transaction, the longer the term of the contract and the more uncertain the future, the greater the costs associated with writing a complete contract. Frequently, therefore, writing complete contracts is not feasible: it would involve such large transaction costs that it would not be commercially sensible. To address this problem, provision may be made in the contract for the supplier to initiate a revision of the terms of supply (unilateral variation). This creates the potential for opportunistic or strategic behaviour by suppliers. Retail energy supply contracts typically include a provision for unilateral variation of the contract terms, yet these contracts are not particularly complex and they are relatively short term. So to the extent that there are economic reasons for varying contract terms, they do not apply when contracts are short term, even leaving aside the issue of dealing with consumers who will in no real way have consented to the reallocation of risk to them.

In May 2008 the Productivity Commission released its report, *Review of Australia's Consumer Policy Framework*, in which it recommended the introduction into the consumer law of provisions relating to unfair contract terms, a recommendation that was implemented by government. Part 2.3 of the Australian Consumer Law (ACL) contains a regime that renders void unfair terms in standard form consumer contracts. Unilateral variation clauses are specifically identified in the 'grey list' of the kinds of terms in s 25(g) that may be unfair under the legislation and have been a cause of concern

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<sup>1</sup> Benjamin Klein, Why Hold-ups Occur: The Self-enforcing Range of Contractual Relationships, **Economic Enquiry**, 34(3), 444-463, at.447

to regulators in Victoria and the UK. However, where government regulation elsewhere permits such terms, as does the National Energy Retail Rules (NERR), the ACL does not prevent unilateral contract variation. Consequently, retail energy suppliers are able unilaterally to increase supply prices while customers remain bound by the contract. This study considers the likely consequences for consumers and for welfare of this exemption. If it is considered that these consequences are unfavourable, consideration will be given to policy measures to address them.

Unlike many contracts, retail energy contracts do not specify the quantities to be purchased. Nevertheless, faced with higher prices consumers have limited options to respond at least in the short term. They may be able to switch some of their demand for a particular type of energy to an alternative type of energy but not to an alternative supplier of the same type of energy—for example, they may be able to switch from electricity to gas or vice versa. Additionally, they may install solar panels in the case of electricity, or purchase new, more efficient appliances. These options generally involve an upfront capital outlay which is likely to be high relative to the increase in the consumer's energy bill resulting from the unilateral price increase. In the longer term, however, consumers may respond to higher prices in ways that reduce the quantity of energy consumed.

Unless otherwise specified, the relevant market is assumed to comprise relatively homogeneous energy retailers, each of whom is assumed to behave in much the same way. The analysis focuses on market outcomes and begins by assuming competitive market outcomes as a benchmark against which to assess the impact of unilateral variation in contract terms. The starting point is to consider the position of the consumer when the price is set at the competitive level. It is generally assumed when examining the impact of unfair contract terms that the initial price is the competitive price.<sup>2</sup> However, assuming that the relevant energy retail market is competitive, but not perfectly competitive, it seems likely that retailers may initially set prices below the competitive level to attract customers, knowing that they can raise the price once the customer has signed up. The effects of such conduct are explained in Section 2. Then in Section 3 the consequences for consumers and for welfare of an increase in price above the competitive level when consumers are assumed to respond to the price increase are discussed. Section 4 reconsiders the position on the assumption that consumers are unable to respond within the contract period. Finally, if the analysis indicates that allowing unilateral contract variation is undesirable, solutions such as an opt-out right or prohibition of variation within the period of a contract, are discussed.

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<sup>2</sup> The competitive price approximates the cost of supply, including a return on capital.

## Section 1: Pricing at the competitive level

If retail energy markets are highly competitive consumers will be able to switch between retailers in response to price changes. As a result, retailers strive to satisfy consumer wants, and to supply as cheaply as possible.

In Figure 1 the retail market<sup>3</sup> is assumed to be competitive. For simplicity of exposition, it is assumed that the average or unit cost of supply equals the marginal cost<sup>4</sup> because the cost per unit of production remains constant irrespective of the level of output. The marginal cost curve is also the market supply curve. The market demand curve shows the amount of product (in this case a particular form of energy) consumers are willing to buy at each price level given the other factors that determine demand—such as the price of substitutes, tastes, and income. With the demand function  $D_1$  the equilibrium price is  $P_1$  and the equilibrium quantity supplied and demanded is  $Q_1$ . Consumers obtain a consumer surplus of  $aP_1e_1$ .<sup>5</sup> The market is efficient in that unit costs are minimised, consumers who are willing to pay at least the cost of the resources used in producing the energy are supplied, and there is no deadweight loss.<sup>6</sup>

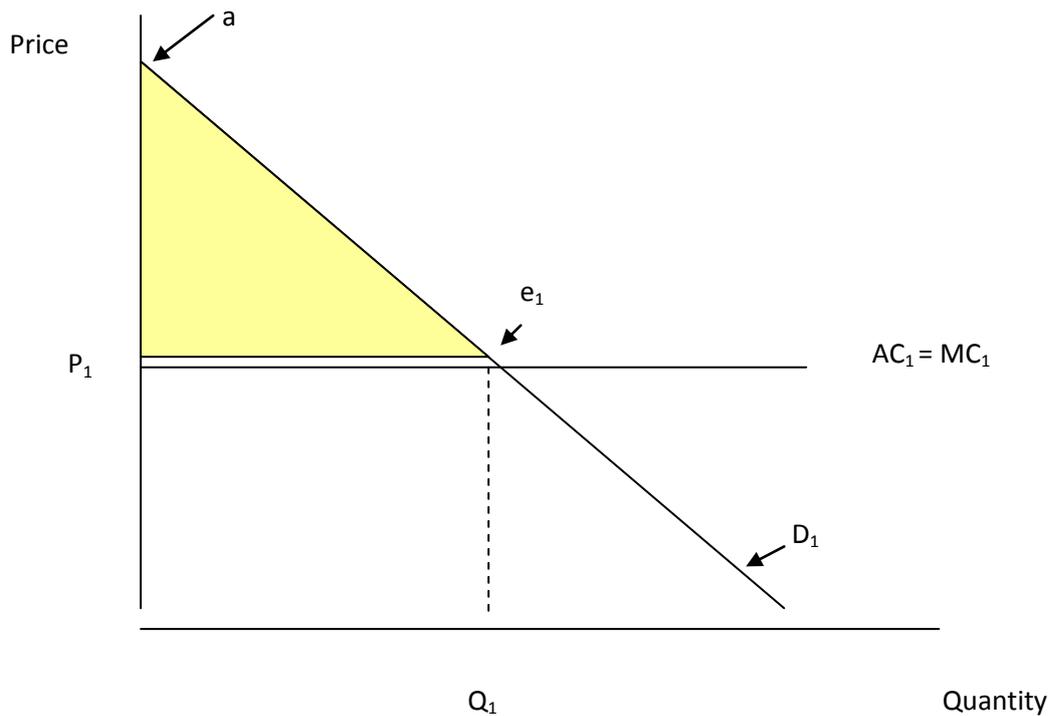
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<sup>3</sup> For the present purpose it is not necessary to decide whether there is a single market for all energy or whether there are separate markets for different energy sources.

<sup>4</sup> Marginal cost is the change in the total cost as a result of producing one more unit of output.

<sup>5</sup> Consumer surplus is the amount by which consumers value a product (their willingness to pay) in excess of what they actually pay for it

<sup>6</sup> A deadweight loss occurs where consumers are unable to buy the product even though their [marginal benefit](#) exceeds the than [marginal cost](#) of supply, or where consumers whose marginal benefit is less than the marginal cost of supply are buying the product. This results in an inefficient allocation of resources.



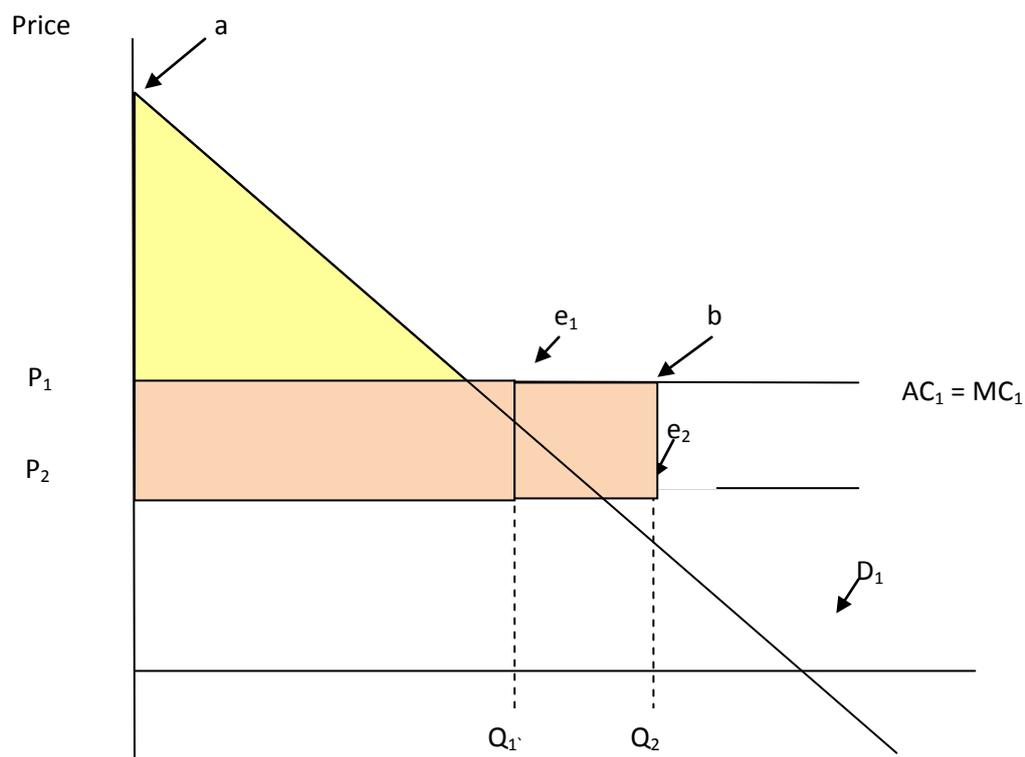
**Figure 1**

## Section 2: Pricing below the competitive price

Assume that energy retailers can increase prices after consumers are contracted but consumers cannot opt out of the contract. Retailers may compete by offering relatively low prices initially to lock-in consumers. Consumers respond by increasing the quantity of energy demanded and too many resources are devoted to energy supply. Consumers benefit but retailers may make losses

Now assume that  $P_2$ , the initial price offered by each retailer, is below the competitive price but that the cost conditions remain as represented by  $AC_1 = MC_1$ , as shown in Figure 2. Apart from the change in price, the factors that influence consumer demand remain unchanged (so the demand curve does not shift) but at the lower price the quantity demanded is greater,  $Q_2$  rather than  $Q_1$ .<sup>7</sup> Compared to the competitive price, consumers benefit in that the consumer surplus is larger than at the competitive price— $ae_2P_2$  rather than  $ae_1P_1$ . There is a transfer from producers to consumers due to the lower price and producers make a loss equal to  $P_1P_2 \times Q_2$ .

<sup>7</sup> For example, consumers may use their appliances more or operate climate control systems at higher/lower temperatures



**Figure 2**

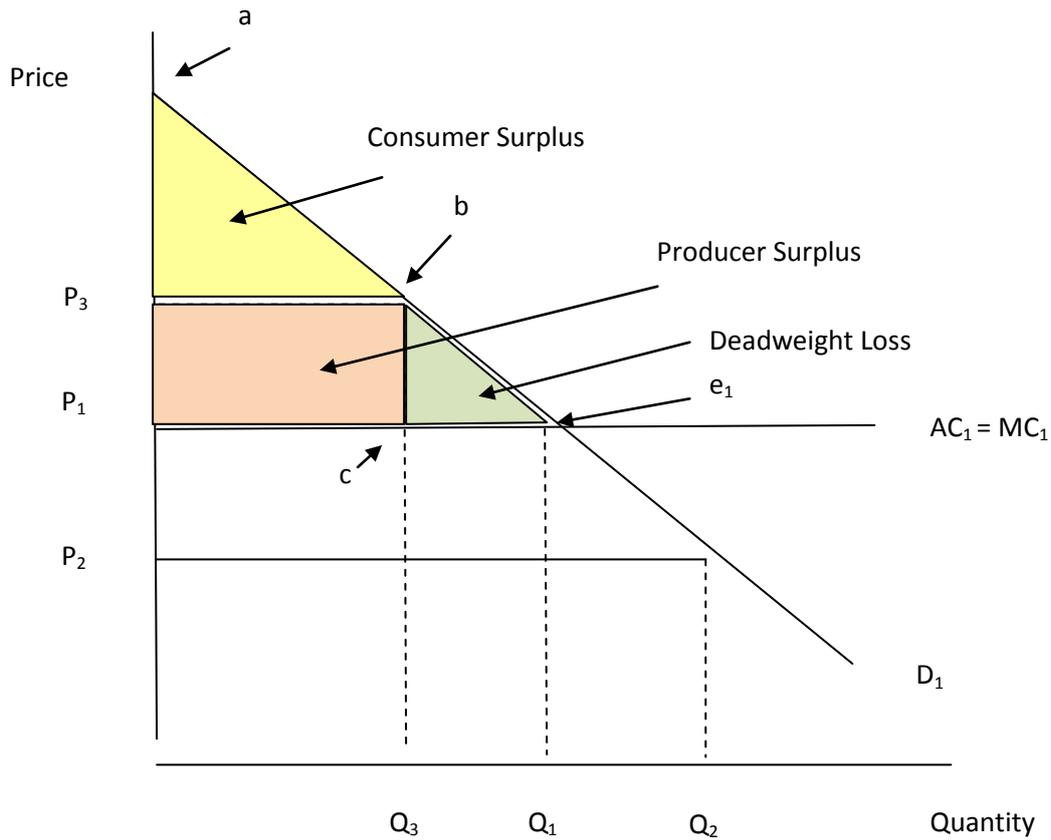
Unless it is anticipated either that costs will be reduced or demand will increase, this position is unsustainable. In the short run producers would cease production and in the long run, suppliers would exit the market until reduced supply forced the price up to the competitive level  $P_1$ . Nevertheless, assuming that the price does increase to  $P_1$ , it appears that temporarily consumers have benefitted from the below cost pricing and that no harm has been done. However, at  $P_2$  there is a misallocation of resources—demand is excessive and too much is being supplied ( $Q_2$  rather than  $Q_1$ ).<sup>8</sup> The extent of the consequent misallocation of resources, the deadweight loss, is represented by  $e_1be_2$ . Total welfare is reduced as a consequence.

<sup>8</sup> Consumers who do not value the product sufficiently to pay a price at least equal to the cost of supply are being supplied.

### Section 3: Prices above the competitive level

After consumers enter into supply contracts, assume that energy retailers raise prices. If consumers were free to respond, the quantity of energy demanded would be reduced to reflect the higher price. Consumers would be less well-off and would make good the shortfall in the particular form of energy by opting for less satisfactory energy sources or by going without, and, in the longer term, possibly by replacing equipment, introducing new technology or adding insulation

Now assume that the supply contract between the retail energy supplier and the consumer contains a clause that allows the retail supply price to be increased unilaterally within the period of the contract. In this case, having attracted customers with a relatively low price, the retail energy supplier can now raise prices not simply to the competitive level but rather to a level that is above  $P_1$ . In the longer term consumers respond to this price increase. Figure 3 shows that compared to the competitive price the quantity demanded falls from  $Q_2$  to  $Q_3$  when the price is  $P_3$ . There is a transfer from the consumer surplus that would be available with competitive pricing to producers to provide the producer with economic rents—consumer surplus decreases to  $abP_3$  and the producer surplus is  $P_3bcP_1$ . There is a misallocation of resources represented by  $be_1c$ , the deadweight loss—this contrasts with the outcome with below cost pricing, with supra competitive prices too little is supplied. This corresponds to the position where there is a monopolist or a cartel.



**Figure 3**

**Section 4: Price changes with little or no consumer response**

Assume that for the duration of the contract consumers are unable to respond to a price increase. Given the relatively short term of retail energy contracts consumers have few options for reducing consumption. As a result they buy too much and the community is worse off because too many resources are devoted to supply. It is likely that consumers are unaware of the risk of unilateral price variation when they sign the contract. Even if they were aware and responded the harm would still occur but it would be less

Next, assume that although retailers can increase their prices, consumers are not released from their contract and that they were unaware of this term, or at least they fail to take it into account at the time they entered into the contract—it is not unreasonable to assume that the consumer has not read or does not understand the retail energy supply contract. As explained above, the quantity demanded is unlikely to change significantly within the period of the contract, even though quantities are not specified in the contract. That is, it will remain at approximately  $Q_2$  and the relevant demand curve  $D_2$  becomes a vertical line corresponding to  $Q_2$ . The producer surplus increases to  $P_1P_3 \times Q_2$  and represents a transfer from consumers. However, that part of the producer surplus above and to the right of  $D_1$  is inefficient because the marginal benefit is less than the marginal cost of supply to consumers. There is a misallocation of resources resulting from overdemand represented by  $e_1e_2f$ .

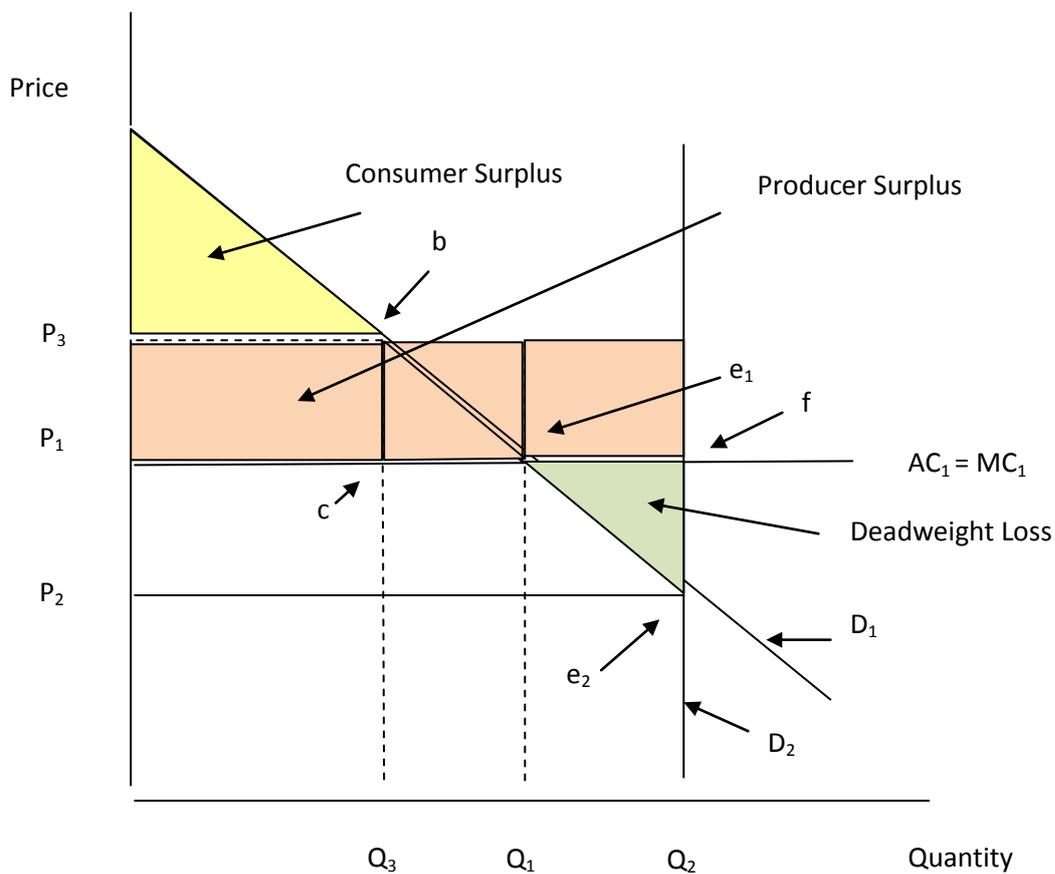


Figure 4



## Section 5: Addressing the problem

It might be expected that, at the end of the contract the retail energy supplier would be punished because its customers would go elsewhere. If this were the case, it would act as a constraint on the retailer's conduct. However, in practice there are several reasons why this is unlikely. The first is that behavioural economics studies suggest that consumers often do not respond to any significant extent. The OFT states:

*'Behavioural economics... highlights that consumers may find it hard to assess information and compare across products. .. Second, it allows us to better understand the underlying causes of search costs (which affect access) and switching (which limits ability to act). ..Third, the prevalence of consumer biases may mean that existing problems within the consumer decision-making process are more entrenched than we had believed, and more prevalent.'*<sup>35</sup>

This is not an irrational response. Sometimes the transaction costs and/or the switching costs associated with finding an alternative retailer exceed any benefit available from change, especially as search tends to be a sunk cost.<sup>36</sup> Alternatively, it is viewed as just being too hard. Consumers may assume that the transaction costs involved in responding would exceed the increased energy cost, and this is especially likely if they assume that all retailers are similar. In addition, consumers have bounded rationality and one of the responses in such situations is to remain with the status quo.

More significantly, however, is that economic theory supports the assumption that in oligopolistic markets, each of the energy suppliers is likely to act in much the same way and will expect its rivals to act as it does. As a consequence the price is likely to be increased not to the competitive level but above that level—rival suppliers are aware of each other's conduct and react to it. The consumer, having identified the retailer that best suits his/her needs, enters into a contract with that retailer. Then they find that the retailer has increased its prices or otherwise changed its terms. If the consumer can and does switch to an alternative retailer, previously considered less satisfactory, the likelihood is that they will soon thereafter go through the same process with their new retailer. The effect is to ratchet prices up towards the monopolistic level. If, as suggested above, all retailers engage in similar conduct, ability to switch will be no more than a temporary solution. Even if one or two retailers are prepared to offer prices that are fixed for the term of the contract, the prices they offer may not be very attractive – they reflect the prices that their competitors are offering and they include an allowance for risk.

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<sup>35</sup>For example, see UK Office of Fair Trading, What does Behavioural Economics mean for Competition Policy?, March 2010, p.11. For elaboration see pp12 – 14.

<sup>36</sup>Sunk costs are those costs incurred in entering an industry which cannot be recouped on exit.

The analysis above suggests that the ability of energy retailers to vary their contract terms unilaterally imposes costs on consumers and reduces welfare. It is sometimes assumed that providing consumers with the right to opt out of the contract if the supplier increases prices (or otherwise offers less attractive terms) is an adequate solution. This is not correct.

Even if consumers could terminate their contracts when terms are unilaterally altered, most will not do so due to inertia or because the expected transaction costs associated with change are too high relative to the expected benefit<sup>37</sup>. Even if consumers fully responded, the consumer surplus would be less than under competitive conditions, although the payments associated with overproduction would be eliminated or at least reduced. Nevertheless, there would still be a misallocation of resources associated with pricing above the competitive level.

Another reason why allowing unilateral contract variation, even with an opt-out provision, is inappropriate is because it encourages and supports inefficient contracting. An efficient contract is one that allocates risk to the party that is best able to manage that risk. In relation to an energy contract, for individual consumers, whilst not an insignificant household expense, specific energy costs are simply one of many such costs incurred. On the other hand, the energy retailer faces a variety of risks and has both the incentive and the ability to hedge those risks or otherwise address them. The ability to unilaterally alter the terms of a contract shifts risk from the retailer to the customer. It removes or reduces the incentive for the retailer to assess and properly provide for risk. The contract is likely to be inefficient.

The risk for the supplier when entering into a contract with fixed supply terms is that its input costs will change during the life of the contract. The more uncertain the future, the greater this risk. This is often addressed by inserting an escalation clause into the contract which provides for the price to be adjusted in specified circumstances and in a specified way, such as by changes in the Consumer Price Index. The issue of uncertainty is greatest when the contract is a long term contract. Energy contracts are not long term and the term of the contract is chosen by the retailer.

The ability of energy retailers to unilaterally varied contract terms has significant adverse implications for consumers and more generally for welfare. Given the oligopolistic nature of the industry and likely consumer responses, offering a right to opt out of the contract if there is a change of contract terms does not avoid these consequences. The period of retail energy contracts is, or could be, sufficiently short that retailers could reasonably be expected to address the within contract risks without the need to have the right to unilaterally alter the contract terms.

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<sup>37</sup> Consumers may consider switching to a different contract with the same retailer, possibly because they regard the transaction costs of doing so are likely to be lower than searching for another supplier. However, more competitive alternative offers are generally only available to new customers.

## ***Appendix 2 - Legal analysis***

### **Memorandum by Consumer Action Law Centre**

#### **Rule Change—unilateral price variation of fixed period retail energy contracts**

1. This memorandum addresses:
  - 1.1. The current regulation of unilateral price variation terms in fixed period energy retail contracts; and
  - 1.2. Proposes drafting for a new rule in the National Energy Retail Rules (NERR) addressing unilateral price variation terms in fixed period energy contracts.

## **2. Current energy-specific regulation**

### **2.1. National Energy Customer Framework**

- 2.2. Retail energy contracts are regulated by a number of laws and regulations, both energy-specific laws and regulation as well as consumer laws of general application across different industries.
- 2.3. The new National Energy Customer Framework (**NECF**), primarily made up of the National Energy Retail Law (**NERL**) and the National Energy Retail Rules (**NERR**), was finalised in 2011. Each jurisdiction is progressively adopting the NECF.
- 2.4. The NERL is a Schedule to the *National Energy Retail Law (South Australia) Act 2011 (SA)*. Part 10 of the NERL deals with the NERR and section 15 of the NERL states that the NERR have the force of law in jurisdictions where the NERL is adopted. Section 16(1)(a) confirms that the NERL and the NERR apply to the sale and supply of electricity and gas or both to customers.
- 2.5. The NERR supplements the NERL, and the regulations made under the NERL, by setting out in some detail the rights and obligations of retail energy customers, energy retailers and energy distributors. Section 237 of the NERL sets out the permissible subject matters of the NERL, which are wide in nature. The permissible subject matters include “the provision of energy services to customers” and “the activities of persons involved in the sale and supply of energy to customers”. The NERR is therefore able to regulate the terms and conditions of a retail energy contract.
- 2.6. In setting out the rights and obligations of the parties, Part 2 of the NERR provides for two categories of retail contracts:
  - a) standard retail contracts; and
  - b) market retail contracts

- 2.7. Standard retail contracts ordinarily arise between a customer and a local area retailer or financially responsible retailer where the premises are new or energy is already connected when the customer moves into the premises. Customers can also choose to accept the retailer's standing offer and enter into a standard retail contract with that retailer.
- 2.8. Most energy contracts on offer in the competitive market are market retail contracts; as these are generally the contracts that are offered by energy retailers when conduct their marketing activities. Such contracts ordinarily differ from standard retail contracts because they contain discounted rates, pay-on-time discounts or other incentives for customers to induce sign-up.
- 2.9. Model terms and conditions for standard retail contracts are specified at Schedule 1 of the NERR and these terms and conditions must be adopted for standard retail contracts, with limited exceptions.
- 2.10. Conversely, no model terms and conditions are prescribed for market retail contracts. Rather, the NERR provides for minimum terms and conditions. Retailers are free "to innovate and therefore compete for custom and customers' opportunity to benefit from a different term or condition that has chosen to 'trade' for some offsetting benefit".<sup>1</sup>
- 2.11. Following this, Division 7 of Part 2 of the NERR sets out a minimum set of requirements that are to apply in relation to terms and conditions of market retail contracts.
- 2.12. Rule 46 in this division provides, at sub-rule 3 that "the retailer must give notice to the customer of any variation to the tariffs and charges that affect the customer". Sub-rule 46(4) also provides that the retailer must give notice of the variation to tariffs and charges "as soon as practicable, and in any event no later than the customer's next bill". Sub-rule 46(5) provides that:
- The retailer must set out in the market retail contract the obligations with regard to notice that the retailer must comply with where the tariffs and charges are to be varied.*
- 2.13. By providing for a regulatory framework for the way in which variation to energy tariffs are notified, rule 46 implies that retailers can unilaterally vary tariffs under market retail contracts, including fixed period market retail contracts. It is not uncommon for fixed period market retail contracts to include terms that allow for tariffs to be varied upwards, and for retailers to vary tariffs relying on these terms.

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<sup>1</sup> Ministerial Council on Energy Standing Committee of Officials, Policy Response Paper, June 2008, page 39.

### 3. Victorian energy regulation

- 3.1. As noted above, each jurisdiction is to progressively adopt the NERL. To date, the NERL has been adopted by the Australian Capital Territory, South Australia, Tasmania and most recently New South Wales. Victoria is yet to adopt the NERL.
- 3.2. Perhaps because the NERL was based on pre-existing jurisdictional energy laws and regulations, the Victorian energy regulatory framework provides for a similar notice framework relating to variation of energy tariffs in market contracts.
- 3.3. In Victoria, the *Electricity Industry Act 2000* (Vic) (**EIA**) and the *Gas Industry Act 2001* (Vic) (**GIA**) establish a framework for regulating terms and conditions of energy contracts. Section 36 of the EIA and section 43 of the GIA provide that terms of energy contracts must not be inconsistent with terms and conditions decided by the Essential Services Commission. The Essential Services Commission has issued the Energy Retail Code (**ERC**) for this purpose. Version 10 of the ERC is currently in force. (Version 11 of the ERC is currently being developed in a way to make the ERC more consistent with the NERR).
- 3.4. Clause 26.4 of the ERC provides that an energy 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. The same provision provides, in the case of customers with smart meters, that notice is provided 20 business days before variation.
- 3.5. This clause has a similar effect to Rule 46 of the NERR in that it implies that retailers can unilaterally vary tariffs under market retail contracts, including fixed period market retail contracts. In a paper released by the ESC in 2011, it outlined the potential disadvantage this provision causes to 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.<sup>2</sup>*
- 3.6. In Victoria, retail prices for electricity and gas were deregulated in 2009. Since that time, retail prices have been determined by service providers competing for customers and without any involvement of the Government or the ESC. While each retailer must publish its standing offers for each distribution zone in the Government gazette, the tariffs in these 'default' contracts are determined solely by the retailer. The only obligation relating to the tariffs retailers choose to make available in their market offers pertains to the requirement

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<sup>2</sup> ESC, *Energy Retailer Contract Variation Notification Requirements—Issues Paper*, September 2011, page 5-6.

to provide the ESC with at least one widely available market offer for publication on the ESC's *Your Choice* comparator website pursuant to s 36A of the EIA and section 43A of the GIA. From 1 July 2013, for the purposes of the Government's new price comparator website (known as Switch On), a retailer must also submit information on each generally available contract offer for supply and sale of electricity at an advanced metering infrastructure retail tariff.<sup>3</sup> This requirement facilitates the implementation of 'flexible pricing' in Victoria.

- 3.7. In a number of other jurisdictions, governments retain retail price regulation. For example, in New South Wales, Queensland and Tasmania, there is some form of price control. This means that energy retailers in those jurisdictions do not have an unfettered opportunity to vary the prices they charge. They can, however, vary prices up to the ceiling of any regulated price. In Victoria (and South Australia), energy retailers can vary prices as long as they comply with the notification requirements described above.

#### 4. **Australian Consumer Law (ACL) and unfair contract terms**

- 4.1. The ACL, in schedule 2 of the *Competition and Consumer Act 2010* (Cth), is a comprehensive consumer protection regime applying in all Australian jurisdictions.
- 4.2. The ACL contains provisions addressing what is sometimes called 'substantive unfairness' in the very content of consumer contracts. The ACL does this through the unfair contract term provisions of the ACL, which are found in Part 2-3 of the ACL.
- 4.3. Section 23(1) of the ACL provides that a term of a standard form consumer contract is void where the term is unfair.
- 4.4. Section 23(2) provides that a consumer contract includes a contract for the supply of goods or services which are wholly or predominately for personal, domestic or household use or consumption. Section 2 of the ACL confirms that the definition of goods includes gas and electricity.
- 4.5. By virtue of section 27 of the ACL, a standard form contract will be typically one that has been prepared by one party to the contract and is not subject to negotiation between the parties, that is, it is offered on a "take it or leave it" basis. Retail energy contracts will almost always be standard form contracts.
- 4.6. Section 24(1) of the ACL provides that a term will be unfair where it:
  - a) causes a significant imbalance in the parties' rights and obligations arising under the contract;
  - b) is not reasonably necessary to protect the legitimate interests of the supplier; and
  - c) causes financial or non-financial detriment to a party.

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<sup>3</sup> Advanced Metering Infrastructure (AMI Tariffs) Order, made under the EIC, Victoria Government Gazette, No S216 Wednesday 19 June 2013.

- 4.7. A court must have regard to the transparency of the term and the contract as a whole in determining whether a term is “unfair”.
- 4.8. Terms of a standard form consumer contract that relate to the main subject matter or the upfront price of the contract cannot be assessed for unfairness (sub-section 26(1)(a) and (b)). A term providing for unilateral price variation is not such a term.
- 4.9. Terms that are required, or expressly permitted, by a Commonwealth, State or Territory law also cannot be declared unfair (sub-section 26(1)(c)). While there is no case law consider what ‘required, or expressly permitted’ means for the purposes of this provision, it could be reasonably argued that rule 46 of the NERR and clause 26.4 of the ERC (both of which have the force of law) permit the inclusion of a term allowing for variation of price of a retail energy market contract. If this is correct, then such terms could not be considered for unfairness under the ACL.

## 5. Unilateral variation clauses and the ACL<sup>4</sup>

- 5.1. Notwithstanding paragraph 4.9, in general, contractual terms that permit one party to vary the terms of the contract can be assessed for unfairness. Indeed, the ACL includes a non-exhaustive, indicative “grey list” of examples of types of terms that may be unfair in section 25. Sub-section (f) provides for:
 

*a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract.*
- 5.2. While the unfair terms provisions of the ACL has not yet been considered in any written court judgment, terms of standard form consumer contracts that provide for unilateral variation have also been found to be unfair under the unfair term regime that previously existed in Victoria (pursuant to the then *Fair Trading Act 1999* (Vic)). Unilateral variation clauses were found to be unfair in *Director of Consumer Affairs v AAPT Ltd* [2006] VCAT 1493, [50]; *Director of Consumer Affairs v Craig Langley Pty Ltd & Matrix Pilates & Yoga Pty Ltd* [2008] VCAT 482, [30]; *Director of Consumer Affairs v Backloads.com Pty Ltd (Civil Claims)* [2009] VCAT 754, [235] – [238].
- 5.3. The case law outlined above has generally found that broad discretionary powers provided to traders under consumer contracts must be a proportionate response to the risk that is being addressed. In most cases, an absolute right to change the contract agreed to by the parties will not be a proportionate response to risks affecting the supplier’s continued performance of the contract.

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<sup>4</sup> This section and the next had drawn on analysis from Jeannie Marie Paterson and Jonathan Gadir, *Looking at the Fine Print: Standard Form Contracts for Telecommunications Products and Consumer Protection Law in Australia*, Australian Journal of Competition and Consumer Law (Volume 21 Part 3).

5.4. *Director of Consumer Affairs v AAPT Ltd* concerned a term providing that:

*“[w]e may vary any term of this Agreement in writing. To the extent required by any applicable laws or determinations made by the Australian Communications Authority (ACA), we will notify you of any such variation”.*

In defending the clause, AAPT pointed to the fact that it was merely reselling services supplied by Telstra, Optus and Vodafone. AAPT pointed out under the terms of AAPT’s contracts with these various traders, it could be made subject to new terms at relatively short notice, and that it may then need to amend its own contracts to reflect these newly imposed terms. The President of VCAT held that this did not justify the imposition of a term as broad as the term above “which permits AAPT to vary any term of the Agreement, at any time, for any cause”.

5.5. Similarly, in its guide for business on unfair contract terms, Consumer Affairs Victoria states:

*If a contract is to be considered balanced, each party must be subject only to obligations that they have agreed to accept. A term that allows the supplier to pass on an unexpected financial burden to the consumer may be unfair.<sup>5</sup>*

5.6. These comments suggest that, to ensure fairness of a unilateral variation clause, the contract should provide some protection for the interests of consumers affected by changes to the contract.

## **6. Unilateral variation clauses and the protection of the interests of consumers**

6.1. There may be ways that consumers’ interests may be protected when a trader seeks to impose a unilateral price variation clause into a standard form contract. These include allowing consumers a right to terminate in response to changes, or at least in response to adverse changes.

6.2. Some consumer contracts that include a term allowing a trader to unilaterally vary the price of the contract may include a consequent right for consumers to terminate in response without penalty, particularly where the unilateral variation has an adverse effect on them. While this may go some way to protect the interests of consumers, it is suggested that, such a term is not completely successful in this regard.

6.3. For example, the Australian Competition and Consumer Commission (**ACCC**) states in its recent report on an industry review of unfair contract terms compliance states:

*Terms that allow one party to vary the contract during its life without consent of the other party may be considered unfair. Such terms are particularly likely to be unfair if they fail to provide an accompanying balancing right for the other party to consent*

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<sup>5</sup> Consumer Affairs Victoria, *Preventing Unfair Terms in Consumer Contracts: Guidelines for Business* (2011) 15.

*to or reject the change, or to exit the contract. However, the inclusion of such a balancing right may not in itself be sufficient to negate the unfairness of the term. (emphasis added).*<sup>6</sup>

- 6.4. There are good arguments why an unfettered discretionary power to change the terms of a contract is unfair, even if consumers are given notice and termination rights. Contracts are about commitment. It would, accordingly, seem reasonable to suggest that if suppliers want to include in their contracts a unilateral variation to vary the terms and conditions of supply (including price), they should also specify in their contracts the circumstances in which changes can be made and include measures to ensure that any changes are a proportionate response to changes in those circumstances. Otherwise consumers are potentially subject to the whim of the supplier as to the terms and conditions under which they will provide the service.
- 6.5. It is reasonably arguable that a right for consumer to terminate the contract with their supplier if they are affected by adverse changes does not adequately protect consumers. It leaves consumers in the vulnerable position of having to approve the change or forfeit performance of the contract.
- 6.6. It might also be arguable that for a term providing for unilateral variation to be fair, that a consumer should not only be provided with a right to terminate without penalty but they should be compensated. For example, with energy contracts, consumers affected by changes will already have invested time in selecting and connecting to a particular service. With more complex contracts on offer (for example, flexible pricing in Victoria), consumer search costs are expected to rise. Further, with new energy deals with associated energy service offerings, consumers may have incurred costs related to equipment specific to the supplier (for example, in-home displays or communication devices). These are 'sunk costs' that are generally not recouped when the contract is terminated and may again be incurred if the consumer moves to another supplier.
- 6.7. Consumers may have also incurred an 'opportunity cost' in choosing to contract with one supplier as opposed to some other supplier who, at the time of contracting, might have had competitive offers that are no longer available. Again, these are costs that consumers cannot recoup when the contract is terminated and provide for a disincentive against consumers terminating the contract even in the face of detrimental changes to the product terms and conditions.
- 6.8. It is thus reasonably arguable that if suppliers what discretion to change the terms of a contract then the circumstances in which those changes can be made should be defined and they should be limited in relation to changes that impact on consumers. Further, it is reasonably arguable, that for compliance with the unfair contract terms provisions of the

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<sup>6</sup> Australian Competition & Consumer Commission, *Unfair Contract terms: Industry Review Outcomes* (2013) 6.

ACL, a supplier should not be able to vary the essential features of contracts, such as price, that they have entered into.

## 7. Unilateral variation clauses and a trader's legitimate interests

7.1 Sub-section 24(1)(b) of the ACL provides that a term may be fair where it is necessary to protect the legitimate interests of a supplier. Sub-section 24(4) provides that a term of a consumer contract is presumed not to be reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

7.2 To date, there has not been any judicial interpretation of "legitimate interests". In its guide on unfair contract terms, the ACCC provides some commentary on the evidence that might be required to demonstrate why it is necessary for the contract to include the term:

*Such evidence might include material relating to the business's costs and business structure, the need for the mitigation of risks or particular industry practices to the extent that such material is relevant.<sup>7</sup>*

7.3 In her article on the unfair contract term provisions, Dr Jeannie Patterson of the University of Melbourne Law Schools states:

*There would seem to be two stages to this inquiry. First, it must be shown that the term protects a legitimate interest of the trader. This requirement might be satisfied by showing that the term protects the trader from risks inherent in the transaction. Secondly, the term must be reasonably necessary to protect the trader's legitimate interests. It seems likely that a relevant consideration will be the proportionality of the term. Typically, it is suggested that a term will be reasonably necessary to protect the legitimate interests of the trader only where the term represents a proportionate response to the risk it addresses. This inquiry may require courts to consider other possible ways of protecting the trader's interests that would be less burdensome to the consumer. Parties may be expected to bring evidence of this issue. Market practice may also be relevant.<sup>8</sup>*

7.4 Dr Patterson references the case of *Jetstar Airways v Free* [2008] VSC 539 which related to the previous iteration of unfair terms law in Part 2B of the *Fair Trading Act 1999* (Vic). In that case, Cavanough J referred to the term 'legitimate interests' in relation to an argument about whether the particular term was 'contrary to the requirements of good faith' (which was a feature of Part 2B; good faith is not referred to in the ACL):

*It [the argument that unfair contract terms laws necessitate a consideration of the legitimate interests of both the consumer and the supplier] suffers from its own inherent tentativeness. But, moreover, it may call for an inquiry into each individual*

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<sup>7</sup> ACCC, *A guide to the unfair contract terms law* (2010) 3.

<sup>8</sup> Dr Jeannie Patterson, 'The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts', *Melbourne University Law Review*, (2009, p 945-45).

*consumer's undefined "legitimate interests" and each individual supplier's undefined "legitimate interests" (including, perhaps, the detailed financial circumstances of each particular consumer and of each particular supplier.). I can see no sufficient warrant for this in the language or history of the relevant provisions. In my view, s 32W is centrally concerned with the fairness of the terms of contracts in themselves, in the light of broad business practices in the relevant industry, and in the light of the circumstances in which each relevant contract was made, and not so much with the multifarious personal interests of individual parties to which their contracts might directly or indirectly relate.*

- 7.5 This analysis may suggest that particular business's financial interests, and general industry practice, might be relevant to determining what amounts to a business's legitimate interests.
- 7.6 An energy retailer may submit that its costs structure includes costs outside of its control, and/or it is not general market practice for energy retailers to manage specific costs.
- 7.7 Just because a business's costs fluctuate, this could not amount to a legitimate interest. In a competitive market, all businesses' have to manage fluctuating costs. Businesses that do this well will succeed, while businesses who do this badly will not.
- 7.8 In the energy industry, it had been market practice for electricity retailers to manage the fluctuating costs of wholesale energy. In the National Electricity Market, wholesale electricity is traded on a spot market and prices can vary significantly—there is a maximum price cap of \$12,500 per Megawatt Hour (MWh) but prices generally fluctuate between \$30 and \$60 per Mwh. Indeed the primary purpose of an energy retailer is to manage these fluctuations. Energy retailers generally manage these fluctuations either by vertically integrating with a generator and/or entering into financial contracts that manage the financial risks associated with the significant degree of spot price volatility that occurs during trading periods. Energy retailers also manage wholesale price risks for gas.
- 7.9 However, it has not been market practice for energy retailers to manage fluctuating costs associated with distribution and transmission. While retail energy contracts are generally not clear in this regard, arguably price variation clauses are imposed to allow energy retailers pass on increases in distributions and transmission costs.
- 7.10 Whether this practice amounts to a business's "legitimate interest", however, would depend on a consideration about whether the practice contributes to efficient market outcomes. In its inquiry report on Australia's Consumer Policy Framework, the Productivity Commission recommended the introduction of national unfair contract term laws, noting the economic

argument that such laws contribute to market efficiency.<sup>9</sup> The work undertaken by Dr Rhonda Smith for the present Rule Change can assist in this regard.

## **8. ACL and varying terms of unsolicited consumer agreements**

- 8.1 The ACL also regulates ‘unsolicited consumer agreements’ at Division 2 of Part 3-2. Section 81 of the ACL provides that the supplier of an ‘unsolicited consumer agreement’ must ensure that amendments to the agreement are signed by both parties to the agreement.
- 8.2 In summary, section 69 of the ACL provides that an unsolicited consumer agreement will arise if:
- a) the agreement is for the supply, in trade or commerce, of goods and services to a consumer;
  - b) the agreement is the result of negotiations between the supplier or a dealer on the supplier’s behalf and the consumer:
    - i. in each other’s presence at a place other than the supplier’s business or trade premises; or
    - ii. over the telephone; and
  - c) the consumer did not invite the dealer to come to that place or make the telephone call.
- 8.3 Accordingly, many retail energy market contracts (such as those entered into by retailers through door-to-door sales or unsolicited telemarketing activities) will be unsolicited consumer agreements for the purposes of the ACL. If so, variations of such agreements should require variations to be signed by both parties.
- 8.4 However, legislation in Victoria (and potentially other Australian jurisdictions) may override the requirements in section 81 of the ACL that variations to unsolicited agreements be signed. For example, section 35(7A) of the EIA provides that section 81 of the ACL, as it applies in Victoria, does not apply to the amendment of an agreement for the sale of supply of electricity that is a result of a variation under sub-sections 35(3) or 35(4). Section 35 in general relates to standing or standard contracts (not market contracts) and sub-sections 35(3) and (4) refer to requirements for variations in tariffs under such contracts to be published in the Victorian Government Gazette.
- 8.5 As noted at paragraph 3.3, section 36 of the EIA and sections 43 of the GIA regulate the terms of market contracts. While these provisions do amend some aspects of the ACL, they do not amend the requirement in section 81 of the ACL that variations of unsolicited consumer agreements must be signed. This could suggest that variations of a market contract to have to be signed to be lawful.

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<sup>9</sup> Productivity Commission, Inquiry Report—Review of Australia’s Consumer Policy Framework, No 45 (April 2008) Appendix D.

- 8.6 However, the ERC (which further regulates market contracts) provides at clause 20 that:
- (a) *The structure and nature of tariff and any terms and conditions of an energy contract between a customer and a retailer may only be varied by agreement in writing between the customer and the retailer.*
  - (b) *If the structure or nature of the tariff changes in accordance with a term or condition of an energy contract previously agreed between the customer and the retailer, no further agreement is required between the retailer and the customer to effect such tariff change, provided that, where the contract is a market contract, the customer had given its explicit informed consent to the inclusion of the relevant term or condition in the energy contract*
- 8.7 There appears to be a dispute between laws; on the one hand the ACL requires variations to unsolicited consumer agreements to be signed while on the other and the ERC provides that no further agreement is required to amend the tariff of an energy market contract (which may also be an unsolicited consumer agreement).
- 8.8 It is difficult to know how to solve this inconsistency. The ACL is of course a Federal law (being a Schedule to the *Competition and Consumer Act 2010* (Cth)) and a state law (being applied in Victoria by virtue of the *Australia Consumer Law and Fair Trading Act 2012* (Vic)), while the ERC is a state law, being an instrument made under the EIA and GIA. According to section 109 of the Constitution, “when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid”. This might suggest that the ACL provision prevails.
- 8.9 It is also arguable that section 81 of the ACL would apply to market contracts arising under the NERL and NERR. For example, the NERL application act in New South Wales (*National Energy Retail Law (Adoption) Act 2013* (NSW)) does not provide for any exceptions from the ACL. Further analysis would have to be done in relation to other jurisdictional adoption legislation.
- 8.10 The above analysis suggests that energy retailers that seek to impose unilateral price variation clauses in relation to energy market contracts that are also unsolicited consumer agreements, and where the retailer seeks to exercise their purported right to vary the price without ensuring the amendments are signed by both parties, they may be in breach of the ACL. It is worth noting that a pecuniary penalty may be imposed for contravention of section 81 of the ACL.

## **9. Amending the NERR**

- 9.1. This section considers the legal machinations of amending the NERR, and the considerations that must be taken into account by the Australian Energy Market Commission (**AEMC**) as the rule-maker of the NERR. As drafted in the next section, and taking into account the analysis of the previous sections, it is proposed that the NERR be amended to require energy

retailers that offer fixed period market contracts be required to do so at a fixed price (i.e. not allow for a provision that permits the retailer to amend the price).

9.2. As noted at paragraph 2.5, section 237 of the NERL sets out the permissible subject matter of the NERR. Clearly the proposed subject matter outlined in paragraph 9.1 is within the subject matter of the rules, being “the provision of energy services to customers, including customer retail services”.

9.3. Section 236 of the NERL provides for the rule-making test. Sub-section 236(1) provides that the AEMC can only make a rule if it is satisfied that the rule will or is likely to contribute to the achievement of the national energy retail objective. Sub-section 237(2) provides that, for the purposes of sub-section (1)—

- (a) the AEMC must give such weight to any aspect of the national energy retail objective as it considers appropriate in all the circumstances; and
- (b) where relevant, the AEMC must satisfy itself that the rule is compatible with the development and application of consumer protections for small customers, including (but not limited to) protections relating to hardship customers; and
- (c) the AEMC must have regard to any relevant MCE statement of policy.

9.4. The national energy retail objective is provided for at section 13 of the NERL:

*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.*

9.5. In the second reading speech enacting the NERL, the relevant Minister stated:

*The long term interests of consumers of energy require the economic welfare of consumers, over the long term, to be maximised. The long term interests of consumers in competitive energy markets are promoted through the application and development of consumer protections to enable customers to participate in the market with confidence, support effective consumer choice and ensure ongoing access to energy on reasonable terms as an essential service.*

*When the National Electricity Law and the National Gas Law were each introduced to this Parliament, the economic efficiency nature of the objective was emphasised in the context of the regulatory frameworks for the wholesale markets and the national access regimes for monopoly infrastructure, to deliver services in the long term interests of consumers. The national energy retail objective in this Bill operates in the context of a Customer Framework which has as its focus a strong regime of consumer protections for small customers, and further protections and assistance programs for customers in hardship, to ensure that those customers are able to confidently participate in the retail market, thereby maximising their economic welfare.*

*The Bill provides a robust interface between the community and a competitive retail market, and it is important that economic concepts such as the essential nature of energy, information asymmetry between energy businesses and their customers, and transaction costs for small customers, along with the benefit to the community of ensuring that vulnerable customers are able to maintain their energy supply and pay their bills, are at the forefront of decision making under the Customer Framework.<sup>10</sup>*

- 9.6. This speech underscores two key concerns that the AEMC must consider as part of its rule-making test—(1) whether the Rule Change will contribute to the maximisation of the economic welfare of consumers, over the long term; and (2) whether the Rule Change contributes to consumer protections, particularly where such protections enable consumers to participate in the market to drive efficient outcomes.
- 9.7. The corresponding analysis by Dr Rhonda Smith submits that the proposed Rule Change contributes to market efficiency and the economic welfare of consumers, over the long term. As such, this memo will not consider that further.
- 9.8. It can be reasonably argued that the proposed Rule Change will contribute to consumer protections. As sections 5 and 6 of this memo outline, the ACL provides that unilateral variation clauses, particularly where they are broadly drawn, are likely to be unfair. It also submits that terms that unilaterally vary an essential feature, such as price, may be unfair even where contracts also provide consumers with a right to terminate. The ACL, largely enacted in 2010, is a very recent update of Australia’s consumer protection framework. It is thus arguable that the adoption of protections in specific-industries that align with the ACL which has general application is a relevant consideration of the AEMC in its rule-making test.
- 9.9. It is also worth noting that the ACL, and particularly the unfair contract term provisions, were enacted to contribute to further competition and efficient market outcomes. As noted at paragraph 7.10, this was a key argument for the Productivity Commission in recommending these laws. Further, as stated by the relevant Minister on the introduction of this bill to Federal Parliament:
- Unfair contract terms can impede competition by making contracts difficult to understand. And they can limit a consumer’s choices and ability to seek out alternative options. They are used by some businesses to transfer all of the risk in a transaction away from themselves and onto the consumer.<sup>11</sup>*
- 9.10. Given this, it is certainly arguable that unfair contract term laws generally, and a prohibition on unilateral price variation clauses in particular, promote the long-term interests of

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<sup>10</sup> South Australian Parliament, Hansard, Second Reading, National Energy Retail Law (South Australia) Bill, 27 October 2010.

<sup>11</sup> House of Representatives, Hansard, Second Reading, Trade Practices Amendment (Australian Consumer Law) Bill, 24 June 2009.

consumers and is compatible with the development and application of consumer protections for consumers.

## **10. Draft Rule**

10.1 The following is a draft rule, following existing Rule 46 of the NERR, that provides that energy retailers that offer fixed period market contracts must do so at a fixed price for the period of the contract:

### **46A Fixed period market retail contracts**

- (1) This rule applies to market retail contracts with a fixed period.
- (2) For such market retail contracts, all tariffs and charges payable by the customer are not to change for the duration of the fixed term.
- (3) For avoidance of doubt, for contracts subject to this rule, the retailer is not able to vary the tariffs and charges that affect the consumer.

END.

## Appendix 3 - CUAC Survey - Fixing up fixed term contracts for energy consumers

### FIXING UP FIXED TERM CONTRACTS FOR ENERGY CUSTOMERS

#### WHAT ARE CONSUMERS SAYING?

##### What is wrong with fixed term contracts in the energy market?

The Consumer Utilities Advocacy Centre Ltd. (CUAC) has been concerned with the current practice in the energy retail industry of offering consumers contracts of a fixed duration that allow the retailer to increase their prices and to impose an exit fee if the consumer wishes to leave the contract. Under such arrangements, consumer gains from switching supplier can be quickly eroded as the supplier increases prices and the consumer is penalised if they then wish to change supplier once more. Such a system does not support the function of the competitive market which should allow consumers to freely select the offer that best suits their interests. In the case of consumers who have a preference for price stability and certainty, the market should support them to enter contracts that provide genuine certainty rather than the current arrangements that provide virtually no benefit for consumers with this preference.



CUAC's proposal to reform the current arrangements is to introduce regulation to ensure that fixed term contracts provide a fixed price for the entire duration of the contract. This would promote a more competitive and flexible market that genuinely meets the diverse needs of consumers. While an alternative approach that has been adopted in other jurisdictions is to ban exit fees, CUAC supports its proposal as it better provides for consumers who have a preferences for genuine price certainty. As part efforts of its efforts to advance the proposed reform, CUAC has conducted a survey of Victorian energy consumers to gauge their views on the current operation of fixed term contracts in the

energy industry. The survey of 500 Victorians responsible for the electricity account in their household provides some valuable insight into the issue and the need for reform.

##### The survey of Victorian consumers

CUAC conducted a survey to 507 Victorians who were the main decision makers for the choice of electricity provider in their household. CUAC contracted a commercial provider, Lightspeed Research, to program the survey and administer it online. The online panel used by Lightspeed is both recruited online and offline and the survey administration is closely monitored to eliminate biases and suspect survey responses. Survey respondent's were asked to complete the survey based on the demographic characteristics of age, gender and whether or not they live in a metropolitan or non-metropolitan area. Survey respondents were compensated through an incentive program that provides redeemable points based on the length of the surveys that they complete. The CUAC survey comprised 3 sections and 16 multiple choice questions and an open question for respondents to provide further clarifying comment. The first section of the survey asked demographic questions, the second section asked about the respondents current electricity arrangements and the third section asked for their experience and opinions on fixed term contracts in energy. The median response time for the survey was under three minutes. The broad demographic characteristics of our survey respondents are highlighted in the adjacent table. Full details of the survey methodology can be provided on request.

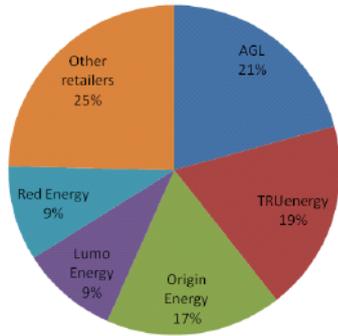
Survey respondents	
Age	18-24 = 31%; 35-54 = 36%; 55-65 = 33%
Gender	Female = 51%; Male = 49%
Region	Metropolitan = 70%; Non-metropolitan = 30%

##### The survey results

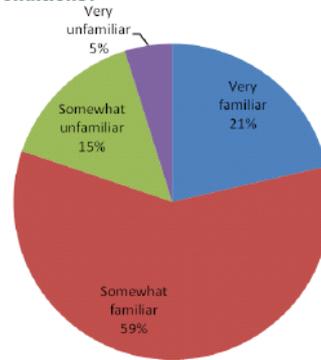
While the survey results indicate that Victorian consumers feel that they are familiar with their energy offers, they also highlight very significant concerns over the current arrangements for fixed term contracts. For example respondents were asked: "In your opinion, is it fair or unfair that energy companies can increase the price a customer is charged during a fixed term contract?" 86 per cent of survey respondents indicated that they thought that this was unfair while only 8 per cent of survey respondents though this was fair. Given this, the level of support for a change to the regulations came as little surprise. When asked whether they would "support a change to Victorian regulations to prevent energy companies from changing the price a customer is charged during a fixed term contract", more than 93 per cent of respondents indicated that they would support such a reform. The following page highlights some of the key survey findings graphically.

**FIXING UP FIXED TERM CONTRACTS FOR ENERGY CUSTOMERS  
WHAT ARE CONSUMERS SAYING?**

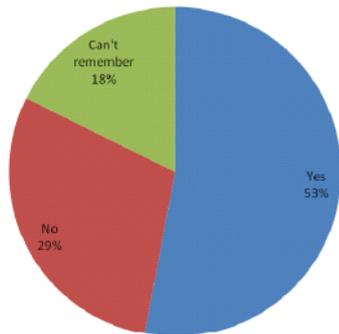
**Which company do you buy electricity from at the moment?**



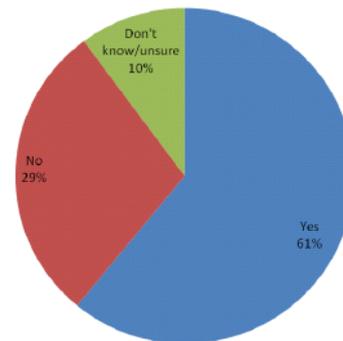
**When you entered into your current contract, how familiar were you with its detailed terms and conditions?**



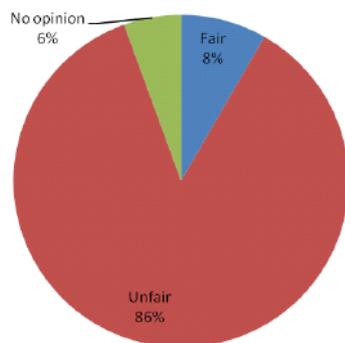
**In Victoria, the rules on fixed term electricity contracts allow the company to increase the price of electricity whenever they like, provided that they have said they may do this in the detail of the contract. Were you aware of this when you entered your current fixed term contract?**



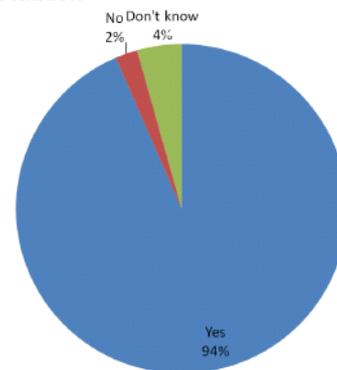
**Since your current contract started, has your electricity company increased the price you pay for electricity?**



**In your opinion, is it fair or unfair that energy companies can increase the price a customer is charged during a fixed term contract?**



**Would you support a change to Victorian regulations to prevent energy companies from changing the price a customer is charged during a fixed term contract?**



## Analysis of survey results

An overwhelming majority of respondents to the survey saw the current arrangements as unfair (86 per cent) and supported a change to the regulation to remove the ability of retailers to vary prices during a fixed term contract (94 per cent).

These consumer perceptions align with broader policy and regulatory trends whereby governments introduce competition enhancing reforms that allow consumers to seek out the best prices at any point in time. For example, the Commonwealth Government recently banned the imposition of exit fees in mortgages and New South Wales and Queensland have introduced restrictions on the imposition of exit fees in energy retail contracts.

It is also interesting to note that these consumer perceptions of fairness and the need for reform came from respondents who reported themselves as being reasonably knowledgeable about their electricity arrangements. In fact, 80 per cent of respondents reported that they were familiar with the terms and conditions of their electricity contract and over 50 per cent of respondents indicated that they knew that the electricity retailer could increase prices when they entered their contract. This is a pleasing result that suggests that consumers are becoming better at navigating the complex retail energy market. However, it also suggests that while consumers are aware of current regulatory arrangements and the impact on the terms of their contract, they were unhappy with the situation.

This was reflected in responses received to the last survey question which allowed respondents to provide comments on the contents of the survey. Of the 507 respondents 148 chose to provide a written comment, which shows substantial interest in the issue of energy. It is noteworthy that many of these comments concerned consumer dissatisfaction with door to door sales, rising energy prices and energy privatisation and deregulation. While these comments reflect displeasure with current energy market regulatory arrangements and practice they are not directly relevant to the issue at hand. However, a number of comments focussed on the issue of fixed term contracts: For example:

*If an electricity company wants to change the price during the term of the contract, then there should be an option for the customer to terminate the contract.*

*The whole process was deceitful from beginning to end, you were offered a lower price and then after the cooling off period the prices increased to greater [sic] than your previous supplier.*

*What is the point of a so-called fixed-price contract if the energy company can break it on a whim?*

*If signing up to a fixed term contract for a specific period of time it should be just that "Fixed Term". It is misleading for companies to use language to 'suck' people in and then change it.*

*Pensioners have enough trouble keeping up with rising prices, without unexpected price rises in vital things like electricity.*

*It is ridiculous you have to pay an exit fee to switch providers if a better offer comes up making it worthwhile to change providers.*

The survey results demonstrate that there are legitimate consumer concerns over the issue of increased prices during fixed term contracts that could easily be addressed through a very minor change to retail market regulations. When the survey results are considered along with policy and regulatory trends in other industries and the high likelihood that such a reform would improve competitive outcomes for consumers, the case for reform looks particularly strong. CUAC has also produced another document to support the proposed reforms entitled *Fixing up fixed term contracts for energy customers: Your questions answered*. This document goes into further detail about the implications of enacting the proposed reforms.

## Conclusions

Retail market deregulation was intended to deliver a competitive market that would result in product innovation, greater choice and more efficient prices for consumers. Current retail market practice whereby consumers are offered long contracts with exit fees and little certainty about the ongoing price does not deliver against these objectives. Further improvement is necessary, therefore, to enhance market competitiveness and the outcomes for consumers. A minor change in Victorian regulation to ensure fixed term contracts provide certainty to consumers is appropriate. Not only does this course of action make sense from an economic and competition enhancing perspective it also aligns with community perceptions of fairness as clearly demonstrated by the survey results.

If you require further information about the information contained in this document please contact David Stanford at CUAC on 03 96397 7600 or at [david.stanford@cuac.org.au](mailto:david.stanford@cuac.org.au).

## **Appendix 4 - Unilateral variation clauses.**

Terms and conditions specifically referring to unilateral price variation. As taken from publicly available information on 27 August 2013.

### **AGL (“Select 18” – 24 months)**

5. Variation of this Energy Plan.

(a) If we vary this Energy Plan otherwise than in a way expressly permitted under any other clause of this Energy Plan, then this Energy Plan is varied on and from a specified date if:

- (i) we give you not less than 20 Business Days written notice of the variation to the Energy Plan;
- (ii) the proposed variation is not prohibited by Regulatory Requirements; and
- (iii) you do not terminate this Energy Plan in accordance with clause 13 before the variation takes effect.

(b) Despite clause 5(a), we may by written notice to you vary this Energy Plan to the extent necessary to accommodate any change in any Regulatory Requirements.

(c) If you request a variation to this Energy Plan:

- (i) to add an Ancillary Product, then we will provide you with the Ancillary Product terms and conditions which will be incorporated into this Energy Plan in accordance with those terms; or
- (ii) to remove an Ancillary Product, then the Ancillary Product terms and conditions will cease to be incorporated into this Energy Plan in accordance with those terms.

### **Australian Power & Gas (“Smart Saver 16” – 36 months)**

#### **5. RATES**

##### **5.1 Your rates**

The rates under your Energy Contract (your rates) are based on the set up of your meter and are set out in the Pricing Schedule, subject to changes permitted under this Energy Contract.

##### **5.2 Changes to your rates**

(a) We reserve the right to change your rates from time to time.

(b) We will notify you in writing of any changes to your rates:

- (i) as soon as possible; or
- (ii) by no later than your next Energy Bill; and
- (iii) if you are a resident of Victoria and you have a Smart Meter, 20 Business Days before the change.

##### **5.3 Discounts & concessions**

(a) Discounts on your usage or supply charges may apply from time to time as set out in your Pricing Schedule or as notified by us.

(b) At your request, or as required under the Energy Laws, we will give you information on the availability of concessions, rebates and grants.

### **Click Energy (“Click Gold” – 12 months)**

\$0 exit fee, 3 business days notice?

Market Terms and Conditions are in their Customer Charter (according to them)

#### **Variation**

This Contract may be varied by agreement in writing between you and us.

The tariff you pay for electricity will be set out in your Price and Product Information Statement or Written Disclosure Statement and can change. If the tariff does change you will be notified on your next bill.

The amount of the discount you receive will be set out in your Price and Product Information Statement or Written Disclosure Statement and can change unless guaranteed for an initial period of time. If the amount of the discount does change you will be notified on your next bill.

If this Contract or the Code is amended, we will inform you of any amendment that materially affects your rights, entitlements and obligations as soon as reasonably practicable after the Energy Retail Code is amended. We will provide you with a copy of the Energy Retail Code (a large print copy is available) if you request it.

### **Diamond Energy**

Supply solar-power-related products (e.g. FiTs, rebates), not electricity.

### **Energy Australia (“Rate fix” – 24 months)**

#### **11.2 Changes to tariffs and charges**

(a) We may vary the tariffs and charges set out in your Energy Plan Details. We’ll give you notice of any variations to tariffs and charges that affect you as soon as practicable, and in any event no later than your next bill (unless a longer period is required under energy laws).

(b) We’ll also publish any changes to tariffs and charges on our website.

(c) If we vary the tariffs and charges set out in your Energy Plan Details during the Exit Fee Term in accordance with this paragraph and you end this Contract, we may, at our discretion, waive any applicable exit fee.

From Energy Price Fact sheet:

Your daily electricity charges are made up of consumption and supply charges, both of which will be fixed from the Contract Start Date and apply for two years from the Benefit Start Date. Any other fees may vary during the Benefit Term.

## **Lumo Energy (“Advantage” – 24 months)**

### **7 Variation of charges**

7.1 We reserve the right to vary Your Energy Charges if a Relevant Event occurs. You must pay for any resulting increase in Energy Charges passed on to You. We will give You written notice of the variation (which may occur by way of notification in Your invoice), in accordance with the Regulatory Requirements.

7.2 We may vary Your charges by giving You written notice in accordance with the Regulatory Requirements (which may occur by way of notification in Your invoice) if:

(a) Your use and/or consumption of energy changes in a material way; or

(b) there is a change in Your meter type, and We and/or Your Network Operator place You in a new tariff category.

7.3 We may vary Your Energy Charges for any reason, other than on the occurrence of a Relevant Event or a change in the tariff category applying to You, by giving You prior written notice of that variation (which may occur by way of notification in Your invoice) (Variation Notice).

7.4 If Your Premises is in Queensland, and we vary Your Energy Charges under clauses 7.1, 7.2 or 7.3, We must give you notice of the variation as soon as practicable and in any event no later than in Your next invoice.

7.5 If We vary Your Energy Charges under clause 7.3 by more than the Energy Charge Variation Percentage nominated in the Energy Supply Agreement Schedule, You may terminate this Contract by notifying Us within 20 Business Days of receipt of the Variation Notice and will not be required to pay Us an Early Termination Fee.

7.6 If Your Energy Charges change during an Invoicing Cycle, We will calculate the amount payable by You on a pro rata basis and clearly show the relevant details in Your invoice.

## **Momentum Energy (“SmilePower” – 12/24/36 months)**

### **9 Rates**

9.1 The initial Rates are detailed in the Order.

9.2 Before the Start Date we may visit your Supply Address and, if the information you gave us about your meter does not properly reflect the metering services required at your Supply Address under the Regulatory Instruments, we may vary the Rates accordingly and, if we do so, we will give you details of the variation.

9.3 If the Contract has a Minimum Term, we may vary the Energy Component of the Rates each year to reflect any change in the Australian Bureau of Statistics’ Consumer Price Index (All Groups Weighted Average of Eight Capital Cities) over the preceding twelve months and, if we do so, we will give you details of the variation.

9.4 If the Contract has a Minimum Term then, if the wholesale cost to us of the electricity sold to you increases because of a force majeure event affecting our wholesale supplier, we may vary the Rates to reflect those increased costs by giving one month’s notice.

9.5 We may vary the Rates to reflect any changes in the Pass-Through Costs. If we vary your Rates under this clause 9.5, we will give you details of the variation.

9.6 Where your Contract has no Minimum Term, we may vary the Rates at any time by giving you one month’s notice.

9.7 If the Rates vary during a billing period, we will calculate your bill on a proportionate basis using the old Rates before the variation and the new Rates as varied.

## **Neighbourhood Energy (“Split rate CitiPower domestic” – 24 months)**

### **16. Variations and Amendments**

We may amend or vary this Contract at any time in writing by publishing a variation to these Terms and Conditions on our website and providing you with thirty business-days written notice.

## **Origin Energy (“Flexichoice” – 12 months)**

### **8. Can the Charges change under this Agreement?**

Unless stated otherwise in your Energy Plan (if any), we may vary the Charges (including the amount, nature and structure of any of the Charges) by notice to you at any time including during or after your Energy Plan Period (if any). The notice could take the form of a message contained in your bill, and will specify the effective date of the variation

The notice will be given to you as soon as practicable, and in any event, no later than your next bill. If you are an electricity customer, your Supply Address is in Victoria and you have a smart meter we will give you no less than 20 Business Days prior notice of any changes to the Charges. Despite any other clause in this Agreement, including your Energy Plan, we may also vary the Charges by notice to you, as follows:

- If any of the information about the supply or sale of energy to your Supply Address used in quoting or calculating the Charges for energy or Green Products under this Agreement is incorrect (such as your supply area, meter type or average energy consumption) then we may vary the Charges to the level the Charges would have been had the information used been correct. Similarly, if any of the information used in determining the availability of an Energy Plan at your Supply Address is incorrect, then we may terminate that Energy Plan. Notice of any such termination will be provided to you in writing and will be effective from the date identified in that notice as the date of termination.
- If the metering device at your Supply Address is changed from one which measures energy on an accumulation basis to one which measures energy on an interval basis, we may vary your Charges, including the amount, nature and structure of any of the charges.
- If the Charges are based on or linked to an amount prescribed under any Regulatory Requirement and the Regulatory Requirement is amended, we may vary the basis upon which the Charges are calculated in a manner consistent with that amendment.

If a bill is issued for a Billing Period in which there is an increase in the Charges, then the Charges for energy supplied during the period will be calculated in accordance with any applicable Regulatory Requirements. If your Energy Plan has an early termination fee it may not apply if you terminate as a result of some variations to the Charges under this clause 8 (see clause for further details).

## **People Energy (“On Time Saver” – 24 months)**

### **8.2 Changes to tariffs and charges**

8.2.1 We may vary our tariffs and charges from time to time to reflect increases in the direct or indirect costs we incur when supplying electricity to you under this agreement or operating our business (including increases in wholesale electricity prices, distribution charges, metering charges and our operating costs) provided that the amount of any such increases (expressed as a percentage) do not exceed the percentage increase in our standing offer prices during the same period.

8.2.2 If we vary our tariffs and charges, we will set out details of the variation:

- a. where you have a smart meter, in a notice to you not less than 20 business days prior to the commencement of the variation; or
- b. otherwise, in your next bill after the variation.

### **8.3 Variation of tariff due to change of use**

If a change in your use of electricity means you are no longer eligible for the particular tariff or charge you are on, we may transfer you to a new tariff or charge:

8.3.1 If you notify us there has been a change of use – from the date of notification; or

8.3.2 If you have not notified us of the change of use – retrospectively from the date the change of use occurred.

### **8.4. Other variations of tariff or type of tariff**

8.4.1 If you think you satisfy the conditions applying to an other tariff or type of tariff we offer, you can ask us to review your current circumstances to see whether that tariff or type of tariff can apply to you.

8.4.2 If you meet the requirements for another tariff or type of tariff we may:

- a. transfer you to that other tariff within 10 business days after your request; or
- b. transfer you to that other type of tariff from the date the meter is next read or the type of meter is changed (if needed).

8.4.3 We may charge you an early termination fee under clause 4.5 if the transfer occurs prior to fixed term end date (as set out in your welcome letter).

## **Powerdirect (“Powerdirect Residential 17%” – 36 months)**

12 Variation to Energy Rates and Charges.

### General Price Variation

12.1 You understand and agree that we may vary the Energy Rates and Service Charge under this Agreement at our discretion at any time by giving you written notice of that variation as soon as practicable, and in any event no later than in your next bill.

12.2 Subject to clause 12.3, you may terminate this Agreement by giving us notice of your intention to terminate this Agreement within 20 Business Days after being informed that we are increasing your Energy Rates, if the new Energy Rates are more than the greater of: (a) the energy rates that would be applicable under your local electricity retailer’s standard contract; or

(b) the amounts that would result from increasing your Energy Rates (inclusive of Pass-Through Cost and Emissions and Renewable Energy Charges) by the percentage increase in the CPI since the later of the Start Date (or if applicable, the Agreed Extension Date) and your most recent price variation, and we will waive any applicable Early Termination Fee.

12.3 If you terminate this Agreement in accordance with clause 12.2:

(a) such termination will not be effective until the date you or any other person enter into another retail electricity Agreement with us at the Supply Address, or financial responsibility for electricity supply at the Supply Address is transferred to any other electricity retailer (the ‘Termination Date’); and

(b) subject to clause 12.4, on and from the date we receive notice of such termination until the Termination Date, you will continue to be charged the Energy Rates and Service Charge that were applicable immediately before we informed you of the increase.

12.4 If, within 90 days after terminating this Agreement in accordance with clause 12.2, you have not entered into another retail electricity Agreement with us at the Supply Address, or you have not transferred financial responsibility for your electricity supply to any other electricity retailer, then you agree that clause 12.3(b) will not apply and you will be charged the increased Energy Rates and Service Charge as notified to you pursuant to clause 12.1.

### CPI Adjustment

12.5 Subject to clause 12.6, the Energy Rates and Service Charge (or the Energy Rates as previously adjusted under this clause 12.5) may at our discretion be adjusted on and from each anniversary of the Start Date or the Agreed Extension Date (whichever is applicable) to reflect the percentage increase in the CPI for the preceding 12 months. We will give you written notice of any such adjustment as soon as practicable, and in any event no later than in your next bill.

12.6 Where the Energy Rates and Service Charge set out in the Supporting Documentation include Pass-Through Costs, the increase in accordance with clause 12.5 will only not apply to the component of the Energy Rates and Service Charge which comprises the Pass-Through Costs.

### Interval Meter Upgrade

12.7 Where a basic or accumulation Meter is operating at your Supply Point and your Distributor installs a manually or remotely read interval Meter, or we are required by a Regulatory Requirement to install a manually or remotely read interval Meter, we may vary your Energy Rates, the Service Charge, or the structure of your Energy Rates to take into account any additional cost incurred by us, or any change in your Network Charges, as a result of the installation and operation of that interval Meter.

### Variation of Retail Fees

12.8 We may vary the Retail Fees at any time by giving you written notice of that variation as soon as practicable, and in any event no later than in your next bill.

### Change in Pass – Through Costs and Excluded Service Fees

12.9 We do not control Pass-Through Costs or Excluded Services Fees. We may apply any change to the Pass-Through Costs or Excluded Services Fees occurring after the date of this Agreement (including prior to the Start

Date or Agreed Extension Date, whichever is applicable) at any time and without having to give you notice to reflect any such change. We will advise you of any applicable cost or charge upon request.

#### Other Increased Cost Events

12.10 We may vary the Energy Rates, Service Charge or other Charges, or apply an additional fee or charge to compensate us for the financial effect of (or connected with):

- (a) any new Regulatory Requirement or a change in an existing Regulatory Requirement including the interpretation or administration of, or compliance with any Regulatory Requirement;
- (b) any new tax or charge imposed by law or any change in an existing tax or charge including a change to the interpretation of any Regulatory Requirement relating to a tax or charge;
- (c) any change in, or additional, Metering charges, including introduction of or changes to the amount of, or basis for calculation of, any charges imposed on us by the relevant Metering providers for the provision, maintenance, testing or Meter Reading of electricity Meters;
- (d) any change to an Emissions and Renewable Energy Scheme or the introduction of a new Emissions and Renewable Energy Scheme, for electricity consumed or reasonably expected to be consumed at your Supply Point, which has the effect, directly or indirectly, of increasing our costs, or reducing an amount received or receivable by us, in connection with our business of purchasing, trading, selling or arranging supply of electricity or in connection with a Third Party Contract. In this context:
  - (e) the charge, or variation to the Energy Rates or Service Charge, is to be determined on a cost pass-through basis (or a reasonable approximation of that); and
  - (f) where the financial effect is indirect, we are to apportion the financial effect fairly among our customers and, in doing so, may use averaging, attribution or any other method of calculation (or approximation) we consider appropriate, provided it is fair and reasonable.

## **QEnergy (“HomeSaver TOU” PAYG – 12 months)**

### **3.4 Notification of Changes**

Changes to the charges under this Market Contract will be notified to you as soon as possible and in any event in your next bill, and the change will only be effective after 20 business days' written notice to you prior to the change having effect. You agree to receive this written notice by email. If in the unlikely event this change results in costs to you that are higher than the regulated price in your area as determined by the Minister, QEnergy will notify you of this fact and will give you the option to terminate your contract in respect of each nominated premises, along with details on how to do this.

### **11.3 Variation**

This Market Contract or any customer connection services contract QEnergy procures for you, may be varied in respect of one or more nominated premises:

- by written agreement with you which may be in the form of an email exchange;
  - by written notice to you as required to comply with any applicable law; by 20 business days' notice to you of changes to the charges and fees in accordance with clause 3.4 of this Market Contract;
- by your oral consent upon entering into this agreement, you give explicit informed consent to this provision.

## Red Energy (“Living Energy Saver” – 24 months)

### 6. MISCELLANEOUS

(1) Notwithstanding any other provision in these Terms and Conditions:

(a) Red Energy may:

(i) to cease to proceed with all or any part of this Offer for any reason at any time; and/or

(ii) to vary the terms or content of all or any part of this Offer including (without limitation) any time or date in this Offer and these Terms and Conditions, as a result of circumstances outside of Red Energy’s reasonable control; and/or

(iii) not to provide a Rewards Book or Rewards Card to any Eligible Customer who has not fully complied with these Terms and Conditions; and.

(b) Red Energy will not be liable to any person for any cost, loss, damage, liability, expense or claim arising, whether directly or indirectly, in connection with the Offer including the Red Energy Rewards™ Book, except if the cost, loss, damage, liability, expense or claim arises out of Red Energy’s breach of contract, negligence or breach of a term implied by consumer protection law.

(From product “quote”):

Variation

We may vary your tariff and/or Pay on Time™ Discount by providing you with notice of that change. The notice will be given to you as soon as possible and in any event, no later than your next bill.

## Simply Energy (“Simply Save 20” – 24 months)

### 3. CHARGES

#### 3.1 Energy charges

You must pay us our *energy charges*.

#### 3.2 Rates

The *contract sheet* states the initial *rates* we use to determine our *energy charges*. Your first bill will also state the *rates* that apply.

#### 3.3 Rate variations

- a. If the *rates* stated in the *contract sheet* are not the rates we generally apply to *customers* of your type, in your distribution area, with your meter type and any other characteristic referred to in the *contract sheet*, then we may vary your *rates* to those we generally apply.
- b. We will give you notice of any *rate* variation under paragraph 3.3(a). If any *rate* is to increase, we will notify you a reasonable period before the date from when the *rate* variation takes effect. In the intervening period you may terminate the *contract* immediately by giving us notice, with no liability to pay any early termination fee if you transfer to another retailer as soon as possible after the date you terminate. However, if for any reason we continue to sell you *energy* after the effective date, then from that date you will be liable to pay the varied *rates*.
- c. If after the *contract* starts a new type of meter is installed at your *premises* or the network tariff or the structure of the network tariff attributable to your meter is changed, then, with effect from the installation date or the date of the change, as the case may be, we may vary your *rates* to those generally applicable to that type of meter or to reflect the change in network tariff or in the structure of the network tariff.
- d. If there is, or we fairly and reasonably expect there will be, an increase in our *costs* relative to our *costs* as at the date we initially set the *rates* applicable to you or on which we last varied your *rates* or imposed an *additional charge* under this paragraph 3.3(d), and that *costs* increase is specifically or otherwise attributable to you or to the *energy* we sell you, then we may either vary your *rates* or impose an *additional charge* to recover those increased *costs*.
- e. The amount of any *rate* variation or *additional charge* under paragraph 3.3(d) in respect of:
  1. any *costs* increase which is specifically attributable to you or to the *energy* we sell you will fairly and reasonably reflect that increase; and
  2. any other *costs* increase will fairly and reasonably reflect that increase by way of allocating to you a share of that increase corresponding to your share of the *energy* we purchase for you and other *customers* to whom the *costs* increase is also attributable.
- f. If in the year preceding an *annual review date* we have not varied your *rates* or imposed an *additional charge* under paragraph 3.3(d) to reflect an increase in any one of the *cost* categories which exceeds the *percentage increase in the CPI*, then on or after the *annual review date* we may vary your *rates* under paragraph 3.3(d) as if that *cost* had increased on the last day of that year such that, over that year, that *cost* increased by the *percentage increase in CPI*.
- g. We will give you notice of any *rate* variations or any *additional charges* under paragraph 3.3(c), 3.3(d) or 3.3(f), which may be in a message on your bill. If the *rates* vary during a billing period, we will calculate your bill on a proportionate basis using the old *rates* before the variation and the new *rates* afterwards.
- h. This paragraph 3.3(h) applies in respect of any *rate* variation or *additional charge* under paragraph 3.3(d) which reflects a *wholesale costs* or *other costs* increase exceeding the *percentage increase in the CPI* for the preceding year. In any such case we will give you the notice under paragraph 3.3(g) at least 1 month before the date from when the new *rates* or *additional charge* is effective. In the intervening period you may terminate the *contract* immediately by giving us notice, with no liability to pay any early termination fee if you transfer to another retailer as soon as possible after the date you

terminate. However, if for any reason we continue to sell you *energy* after the effective date, then from that date you will be liable to pay the new *rates* or the *additional charge*.

## Appendix 5 - Fixed term fixed price contracts

Accessed 27 September 2013, Citipower network Victoria

### ELECTRICITY

VIC RESIDENTIAL Energy Price Fact Sheet (Effective 16 September 2013)

Rate Freeze

CITIPOWER Distribution Zone



The offer set out in this Energy Price Fact Sheet is only available to customers in the relevant distribution area with the necessary metering system/configuration. Your charges for the sale and supply of electricity are listed below. The prices are exclusive of any applicable usage discount.

Residential Peak Anytime (GD/GR)	Unit	Excl GST	Inc GST
Consumption of first 1020 kWh/qtr	cents per kWh	21.09	23.199
Remaining consumption kWh/qtr	cents per kWh	23.50	25.850
Daily Supply Charge	cents per day	86.80	95.480
Residential 5-Day Time of Use (Winner Tariff GH/GL)	Unit	Excl GST	Inc GST
Peak - All Consumption (7am-11pm AEST, Mon-Fri)	cents per kWh	27.11	29.821
Off Peak - All Consumption at other times.	cents per kWh	12.02	13.222
Daily Supply Charge	cents per day	86.80	95.480
Residential Time of Use (Flexible Pricing)	Unit	Excl GST	Inc GST
Peak Consumption (3pm-9pm weekdays, AEST)	cents per kWh	30.07	33.077
Shoulder Consumption (7am-3pm, 9pm-10pm, weekdays and 7am-10pm weekends, AEST)	cents per kWh	22.10	24.310
Off Peak - All Consumption at other times.	cents per kWh	15.45	16.995
Daily Supply Charge	cents per day	89.63	98.593
Dedicated Circuit (Where applicable)	Unit	Excl GST	Inc GST
All Consumption	cents per kWh	11.08	12.188

#### Important information

##### Key Terminology

Daily supply charge A charge that applies for supplying electricity to your premises for each day of the billing period, regardless of how much electricity you use.

kWh A 'kWh' stands for kilowatt hour and is the unit of measurement for your electricity bill.

##### Discounts

Direct debit discount A 1% discount on the energy usage charges will apply if your bill is paid by direct debit - see direct debit terms.

Applicable discounts Any applicable discounts apply to the usage component of the charges only and do not apply to the other components such as the daily supply/service to property or the green product components.

##### Solar feed-in tariffs

Solar feed-in tariffs Origin offers feed-in tariffs. Please contact us on 1300 791 468 to discuss your eligibility and available tariffs. Further information is also available at [www.originenergy.com.au/2716/Feed-in-tariffs](http://www.originenergy.com.au/2716/Feed-in-tariffs).

ELECTRICITY  
VIC RESIDENTIAL Energy Price Fact Sheet

Rate Freeze

CITIPOWER Distribution Zone

Agreement Details	
Agreement length	The agreement continues until terminated by you or us. The Energy Plan period (fixed term benefit period) is 24 months. At the end of your Energy Plan period the benefits of your plan will end.
Flexible Pricing Information	Between now and 31 March 2015, if you are still with us at the same supply address you can choose to change back to your previous tariff. Simply contact us on 13 24 61 or write to us at PO Box 1199, Adelaide SA 5001. Please note: If you revert to your previous tariff during that time you will not incur any administration or early termination fees. You may not be able to revert to your previous tariff in some circumstances, which may include where you have a solar PV system. If you wish to revert to your previous tariff we will put you back on that tariff, or, if that tariff has been replaced or varied, the replaced or varied tariff. This will not necessarily mean your prices will be the same as they were before you chose flexible pricing. After 31 March 2015 you may not be able to revert to your previous tariff but there will be a flat rate tariff available to you except in some circumstances, which may include where you have a solar PV system. If you move retailers you will not be able to revert to your previous tariff. To obtain further information about flexible pricing and your rights please visit <a href="http://www.switchon.vic.gov.au/">http://www.switchon.vic.gov.au/</a>
Charges may vary	During the Energy Plan Period we will not vary the energy rate or supply/service to property components of the Charges, but may vary all other components of the Charges by notice to you. After the Energy Plan Period we may vary all components of the Charges by notice to you. This includes varying the amount, nature and structure of any of the charges. The notice may take the form of a message contained in your next bill and will specify the effective date of the variation.
Cooling off period	You may cancel this agreement at any time during the 10 business day cooling off period.
Terms and conditions	Eligibility and availability criteria and terms and conditions apply. For full terms and conditions, visit <a href="http://www.originenergy.com.au/46/Electricity-and-natural-gas">http://www.originenergy.com.au/46/Electricity-and-natural-gas</a> .
Fees	
Dishonoured payment fee (cheque via Australia Post)	A \$15.00 (GST Incl) fee may apply if your cheque payment through Australia Post is dishonoured or reversed.
Disconnection fee	A \$26.51 (GST Incl) fee may apply when your property is disconnected (including when you move). This fee is passed through from your distributor and may vary. Please visit your distributor's website to find out the current fee.
Reconnection fee	A \$26.17 (GST Incl) fee may apply when your property is reconnected (including when you move). This fee is passed through from your distributor and may vary. Please visit your distributor's website to find out the current fee.
Payment processing fee	A 0.6% fee (GST Incl) may apply to bill payments made by VISA and Mastercard.
Distributor charges	You must pay us any charges that your distributor imposes on us in relation to the services performed by your distributor (or any other person) at your supply address.
Additional fees	For information on additional charges that may apply visit <a href="http://www.originenergy.com.au/2402/Additional-charges">www.originenergy.com.au/2402/Additional-charges</a> .
Early Termination Fee	A \$22 (GST incl) fee may apply if the Energy Plan is terminated before the end of the Energy Plan period.

Origin has a no exit fee offer - if you're interested please call us on 13 24 61. For further details on the information presented in this Energy Price Fact Sheet, please visit [www.originenergy.com.au](http://www.originenergy.com.au) or call us on 13 24 61. This Energy Price Fact Sheet is presented in accordance with requirements of the Essential Services Commission (ESC) - the independent regulator of the retail energy industry in Victoria. For information about choosing an energy retailer, visit: [www.esc.vic.gov/yourchoice](http://www.esc.vic.gov/yourchoice).

## Energy Price Fact Sheet VIC Residential (Electricity)



### Rate Fix - Home

#### Fix your electricity rates for 2 years

This is a simple plan that allows you to lock in your electricity rate to avoid price rises. We don't charge higher rates before fixing your rate, which means you'll be guaranteed to pay today's electricity rate for the next two years.

- No government, network or Consumer Price Index pass-through charges for the next two years
- No premium added before your rate is fixed, plus a \$100 credit off your first bill

Citipower

E\_R\_V\_RFPR-E\_CI\_0\_1-07-2013

#### Electricity Charges: Peak

Applicable Charges		Price (excl. GST)	Price (incl. GST)
Consumption	First 11.178 kWh of Peak usage per day	22.0000 cents per kWh	24.20000 cents per kWh
	Balance	24.4000 cents per kWh	26.84000 cents per kWh
Daily Supply Charge		90.0000 cents per day	99.00000 cents per day

#### Electricity Charges: Peak + Controlled Load 1

Applicable Charges		Price (excl. GST)	Price (incl. GST)
Consumption	First 11.178 kWh of Peak usage per day	22.0000 cents per kWh	24.20000 cents per kWh
	Balance	24.4000 cents per kWh	26.84000 cents per kWh
	Off-Peak usage per day (if applicable)	16.3000 cents per kWh	17.93000 cents per kWh
Daily Supply Charge		90.0000 cents per day	99.00000 cents per day

#### Electricity Charges: Residential Time of Use

Applicable Charges		Price (excl. GST)	Price (incl. GST)
Peak Consumption	Between 7am & 11pm, Monday to Friday	28.3000 cents per kWh	31.13000 cents per kWh
Off Peak Consumption	All other times	16.2000 cents per kWh	17.82000 cents per kWh
Daily Supply Charge		92.0000 cents per day	101.20000 cents per day

Visit [energyaustralia.com.au](http://energyaustralia.com.au) or call 133 466 to take advantage of this offer

## Benefits

<b>Fixed Rate Plan</b>	Your daily electricity charges are made up of consumption and supply charges, both of which will be fixed from the Contract Start Date and apply for two years from the Benefit Start Date. Any other fees may vary during the Benefit Term.
<b>Benefit Term</b>	The Benefit Term for this plan is for 2 years. We will provide you with notice of your options prior to the end of the Benefit Term. Your contract will continue until it is ended by either party. We also reserve the right to review the continuation of any promotional discounts (in addition to those shown on this sheet) 12 months after they are applied to your account; and charge an additional exit fee (if applicable) to recover the cost of the value of any campaign rewards you may have received as part of this plan if you leave within 12 months of the start of your Benefit Term.

## Fees

<b>Exit fee</b>	<p>The following fees (incl. GST) are payable if you break your Contract in the periods outlined:</p> <p>Year 1 - \$75 Year 2 - \$50</p> <p>If you received any campaign rewards with this offer, you may need to repay the value of those rewards should you end this Contract within 12 months of the Benefit Start Date.</p>
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Charges are correct at time of publishing.

### DEFINITIONS

**Daily supply charge:** a charge that applies for supplying electricity to your premises for each day of the billing period, regardless of how much electricity you use.

**kWh:** stands for kilowatt hour and is the measurement for electricity usage on your bill.

**ELIGIBILITY** The details presented in this fact sheet are for an applicable billing period for a customer located in the distribution area outlined with a metering configuration as described. Unless otherwise specified, 'Peak Only' is the default meter type.

**FURTHER INFORMATION** This document presents a summary of the tariff and the key terms and conditions applicable to this offer. If you would like further information or are interested in taking up this offer, please visit our website, [www.energyaustralia.com.au](http://www.energyaustralia.com.au) or call 133 466.

**ABOUT THIS DOCUMENT** This energy price fact sheet is presented in accordance with the requirements of the Essential Services Commission (ESC) - the independent regulator of the retail energy industry in Victoria. For information about choosing an energy retailer, visit [www.esc.vic.gov.au/yourchoice](http://www.esc.vic.gov.au/yourchoice)

**OTHER CHARGES**

To view connection, disconnection and special meter read fees for your area please visit [www.energyaustralia.com.au/other-charges](http://www.energyaustralia.com.au/other-charges)

**SOLAR OFFERS**

This offer is available for customers with solar photovoltaic systems. Solar customers may be eligible for feed-in tariffs. Visit [www.energyaustralia.com.au/residential/products-services/solar-power/solar-feed-in-tariffs](http://www.energyaustralia.com.au/residential/products-services/solar-power/solar-feed-in-tariffs) for eligibility requirements.

## Appendix 6 - International fixed term contract examples

Accessed 11 September 2013

### United Kingdom

#### British Energy (“Fixed Price October 2014” – 14 months) [T&Cs](#)

Fixed Price October 2014 rates are fixed until 31st October 2014. This tariff is based on a daily standing charge and a single unit rate. At the end of Fixed Price October 2014, we will move you onto our standard variable tariff in market at that time. Fixed Price October 2014 is subject to availability and may be withdrawn at any time.

...

We will honour Fixed Price October 2014 rates unless we are prevented from doing so by the action or anticipated action of any governmental or statutory body.

...

#### 7 Changes to this contract

7.1 We can change the terms of this contract (including price and payment methods) at any time (unless we have agreed otherwise with you). We will put the changes on our website at [britishgas.co.uk](http://britishgas.co.uk). We will let you know in writing if we make a change. If you are not happy with the change, you can end this contract as set out in clause 8.1.

7.2 If we raise your prices or make a change to this contract that puts you at a significant disadvantage, we will let you know in writing at least 30 days before the change. The price rise or change will not affect you as long as:

- on or before the day that the price rise takes effect, you tell us that you want to end this contract;
- you arrange for another supplier to supply your gas and electricity and we receive notice of this from your new supplier within 15 working days of the day you gave us notice that you wanted to end your contract; and
- within 30 working days of us telling you that we may stop you switching to another supplier (in line with our rights under clause 8.2), you have paid any money that you owe us under this contract.

7.3 We can change the names or property on your account with your permission (for example if you move house and want us to continue to supply you at your new property or if a new person becomes jointly responsible with you under this contract).

### **EDF (“Blue+Price Freeeze” – 39 months)**

The Blue+Price Freeeze November 2016 tariff will come to an end on 30 November 2016. While you are supplied on this tariff, you will not receive any further price increases until at least after 30 November 2016. There are no cancellation or early-termination fees associated with the Blue+Price Freeeze November 2016 tariff

11. To avoid any doubt, we will not increase your price until 30 November 2016. However, we will be allowed to change any other part of Blue+Price Freeeze November 2016 full tariff rules at any time by publishing the amendments on our website. All these changes will apply from the date we publish the change on our website. If, by law, we have to make any significant changes to the full tariff rules, we will let you know about the changes in writing and in line with the conditions of our supply licence.

We can withdraw the Blue+Price Freeeze November 2016 tariff from sale at any time by telling our customers about this on our website. We will not accept any applications we receive after this date.

### **E.ON (“Fixed 2 year v4” – 24 months)**

#### **5 Changes to prices or this contract**

We may change your prices and/or discounts (unless plan-specific additional Terms and Conditions apply) or other terms of this contract. If we make changes to your significant disadvantage, we will notify you at least 30 days in advance of when they will take effect. If you do not accept the changes, you can end this contract however you must tell us on or before the date the changes are due to take effect and arrange to switch to a different supplier. If you do this, the changes will not affect you unless we don't hear from your new supplier about the switch within 15 working days and your transfer to the new supplier has not been completed within a reasonable time. In that case we reserve the right to implement the new terms. If you have an outstanding debt with us then you'll need to pay this before you can switch supplier or we may object to the transfer taking place. You have 30 working days to clear the debt from when we object and for the price increase not to take effect.

#### **15 E.ON Fixed Price Plan**

These Terms and Conditions are additional to those above and only apply to customers on our Fixed 2 Year plan.

#### **Fixed Price Terms**

We agree to fix your prices and rewards until the end date set out in your plan.

We may change the Terms and Conditions of this contract, but we will not change the prices unless:

- the information you have given us is incomplete or incorrect;
  - there is an increase in VAT payable on electricity or mains gas;
  - there is an increase in our costs as results of any action by a governmental or statutory body;
  - you move home.
- we need to make changes, in order to comply with new or amended regulatory and legal requirements. These changes may include, but are not limited to price structure, prices, rewards and discounts.

Cancellation fee of £10 per fuel

## USA

Only some states have retail contestability. \* denotes less than 1% retail sales occurred through competitive suppliers (2010).<sup>49</sup>

California *	New Jersey
Connecticut	New Hampshire *
Delaware	New York
District of Columbia	Ohio
Illinois *	Oregon *
Maryland	Pennsylvania
Massachusetts	Rhode Island *
Michigan *	Texas
Montana *	

The most competitive state is Texas. The USA equivalent of a PDIS is an Energy Facts Label (EFL).

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<sup>49</sup> 2010 figures. <http://www.eia.gov/todayinenergy/detail.cfm?id=6250>

## **TXU (“TXU Energy Free Nights 18<sup>SM</sup>” – 18 months)**

\$295 exit fee

### **1) Fixed Rate Products**

**Term and Pricing** – Fixed rate products have a contract term of at least three months. The price of a fixed rate product may only change during a contract term to reflect actual changes in TDU (Transmission and Distribution Utility) charges; changes to the Electric Reliability Council of Texas ("ERCOT") or Texas Regional Entity ("TRE") administrative fees charged to loads; or changes resulting from federal, state or local laws that impose new or modified fees or costs on REPs, including TXU Energy, that are beyond our control. Price changes resulting from these limited circumstances do not require us to provide you with advance notice; however, each bill issued for your remaining contract term will notify you that a price change has been made.

**Changes to Contract Provisions** – Non-price related changes to the provisions of fixed rate products can be made by providing you with advance notice, with the exception that we cannot change the length of your contract term. We will notify you at least 14 days before the change is applied to your bill or otherwise takes effect. If you do not cancel your Contract before the effective date of the change, the change will become effective on the date stated your notice. Notice is not required for a change that benefits you.

## **Reliant (“Secure<sup>®</sup> 24 plan with MileagePlus<sup>®</sup> miles”, 24 months)**

\$295 exit fee

### **Fixed Rate Products (Term)**

#### **Changes to Contract Provisions**

We can make changes to the provisions of the contract at any time during the contract term with appropriate notice except for changes to your price other than stated in this section or the length of your contract term. We will notify you of any material change to the contract in writing at least 14 days before any change to the contract will be applied to your bill or take effect. If you do not cancel the contract before the effective date of the change, the change will become effective on the date stated in the notice. Notice is not required for a change that is beneficial to you. Your price during the contract term is only subject to change to reflect changes in the TDSP (transmission and distribution service provider) charges, changes to the ERCOT (Electric Reliability Council of Texas) or Texas Regional Entity administrative fees charged to load or changes resulting from federal, state or local laws that impose new or modified fees or costs on REPs (Retail Electric Providers), including Reliant, that are beyond the control of REPs.

#### **Contract Expiration Notice**

A contract expiration notice will be sent to you at least 30 days before the end of your initial contract term specified in your EFL. If you do not take action to ensure that you continue to receive service upon the expiration of your contract you will continue to be served by us automatically under a default renewal product on a monthly basis after the end of your initial contract term, until you switch to another provider, select another Reliant electric service plan, or we terminate or disconnect your electric service.