

Submission to
**Review of the Effectiveness of Competition in
Gas and Electricity Retail Markets - Issues
Paper**

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EXECUTIVE SUMMARY

This submission focuses on the effectiveness of competition in the energy market, the impact of that competition on tenants and experiences of tenants in the contestable market.

In 2004, the Tenants Union argued that the competitive energy market, in the first two years, had designed products that are contradictory rather than complementary to the fundamental characteristics of the tenancy market.

The ESC specifically commented, “some specific classes of customers are more vulnerable because of the structure of contracts offered by retailers” and noted the Tenants Union submission that “that there is a significant mismatch between the products available in the energy and tenancy markets.”

The Tenants Union acknowledges that there have been changes in the energy market since 2004. There are more retailers offering a greater range of products and contracts. There is also greater innovation with the development of dual fuel and green energy products. However, the contract terms that most impact on tenants remain much the same as in 2004. Thus, despite the changes in the market since 2004, the Tenants Union maintains that tenants making rational decisions would not enter into one or three year contracts containing termination fees.

The Tenants Union is concerned that many regard the removal of price caps as an outcome of the current review as a “fait accompli”. By way of example, the Victorian Government appears to have accepted that the removal of price caps will lead to inevitable increases in energy prices flowing from that decision, the introduction of carbon taxes and drought. The government has responded with plans to focus on energy efficiency measures as a means of reducing energy bills through reduced consumption.

The Tenants Union urges the AEMC to consider carefully whether all classes of consumers, and especially tenants, will benefit from energy efficiency measures before determining that an energy efficiency strategy may ameliorate the effect of price rises occurring after the removal of price caps.

Without targeted measures for energy efficiency, governments and regulators risk exposing tenants, as unattractive customers within a deregulated market to higher prices, at a time when those same tenants are excluded from obtaining the benefits of energy efficiency schemes designed to reduce consumption and lessen the impact of price rises.

INTRODUCTION

The Tenants Union of Victoria welcomes the opportunity to comment on the AEMC Review of the Effectiveness of Competition in Gas and Electricity Retail Markets Issues Paper. Our submission focuses on the effectiveness of competition in the energy market, the impact of that competition on tenants and experiences of tenants in the contestable market.

We would like to thank the Consumer Utilities Advocacy Centre (CUAC) for their assistance in funding the preparation of this submission.

TENANTS UNION OF VICTORIA

The Tenants Union of Victoria was established in 1975 as an advocacy organisation and specialist community legal centre, providing information and advice to residential tenants, rooming house and caravan park residents across the state. We assist about 25,000 private and public renters in Victoria every year. Our commitment is to improving the status, rights and conditions of all tenants in Victoria. We represent the interests of tenants in law and policy making by lobbying government and businesses to achieve better outcomes for tenants, and by promoting realistic and equitable alternatives to the present forms of rental housing and financial assistance provided to low-income households.

THE RENTAL SECTOR CONTEXT

In 2004 the Tenants Union provided the following overview of the market to the ESC for purposes of the previous review of the effectiveness of the full retail contestability in the Victorian energy market. The main change in the rental market has been the widely acknowledged and well-documented shortage of rental properties.

The rental vacancy rate in Victoria is a historically low 1.2%, indicating that demand for rental property is significantly outstripping supply. Because of increased demand, landlords have no inducement to make improvements to their properties in order to attract potential tenants. These market conditions also work against any need for landlords to consider the need to ensure that properties are energy efficient and compound the effects of the split incentive that sees landlords responsible for capital costs but tenants responsible for payment of energy bills.

The rental market is structured around short to medium term leases and occupancies of six to eighteen months. This feature of the rental market is clearly an impediment to energy retailers seeking long loyalty from energy market customers.

In terms of the choice-constraint dichotomy, the reality is that the Australian private rental sector serves a dual function, providing choice for the more affluent and constraint for the poor.

The private rental market is highly segmented, offering choice and flexibility for some and limitations for others. The tenure's role within the broader housing market has taken on greater significance throughout the 1990s. According to the latest ABS data, one in four households is a renter household. In Victoria there are 328,176 households living in the private rental market. There are also 54,805 public tenants, making a total tenant population of 382,981. Once seen as a transitional tenure, renting has become the long-term option for many households who are unable to access home ownership.

Ironically, there is evidence that some households who are in a position to exercise market choices trade down in private rental, paying cheaper rents for less amenity, and effectively squeezing out low-income households who are reliant on the private rental market for long-term housing. Significantly, low cost (low rent) housing in the private rental market declined by 28% between 1986 and 1996, at the same time as there was an increase in low-income households renting privately. The result in Victoria was a shortfall of 36,000 low cost properties across both metropolitan and rural areas in 1996. Little low cost private rental housing is purpose built and a mismatch between the private rental stock profile and changing household needs increases competition for limited stock. In Melbourne, the recent boom in inner city apartment construction has resulted in a glut of rental properties at the

higher cost end of the rental market, with little or no impact at the low cost end.

Affordability is a more significant issue for households in the private rental market than for any other tenure. The Affordable Housing National Research Consortium (AHNRC) found that private tenants are the group most likely to be dealing with housing affordability issues. Their research shows that 54% of private tenant households are experiencing housing stress (paying more than 30% of their income in housing costs), which is twice as high as households who are purchasing, and six times higher than households living in public housing. In the state capital cities of Australia, nearly three-quarters of private renter households in the lowest 40% of total incomes are experiencing housing stress.

Many low-income households are forced to trade off amenity for cheaper rent or share in overcrowded situations. Data on the standard of private rental accommodation in Australia is scarce, partly due to the nature of the private rental market and the exchange of properties between private rental and home ownership markets. However, many private rental dwellings lack basic features, such as heating/cooling, that would be consistent with community standards of appropriateness. Aside from council health and building regulations there are no other standards that landlords are expected to meet prior to renting out a property. Tenants therefore have no control over fixed appliances and must bear the costs of any inefficiency.

With few other options, low-income and marginalised households are spending long periods of time in private rental often in housing stress. Those who find themselves unable to access the private rental market slip into even more marginal forms of housing such as rooming houses and caravan parks.

Discrimination is also a barrier to many households attempting to access private rental. While recourse is available through Equal Opportunity legislation, the complainant must fit within a specified category; the process is often slow and does not ultimately secure accommodation.

The key structures of the private rental market have not kept pace with the demands on the tenure to provide long-term housing. Importantly, security of tenure remains limited, in most circumstances to an initial six- or twelve-month lease only. The underlying assumption of short-term leasing being that the landlord must retain flexibility in order to capitalise on the investment at any time. This places low-income households in a precarious position, being essentially at risk of forced eviction at any time after the initial lease agreement expires.

Unpublished data from the Residential Tenancies Bond Authority (RTBA) suggests that in Victoria the duration of tenancies in 96% of leases where the duration of tenancy was specified did not exceed twelve months and that the average duration of a tenancy is approximately eighteen months. It is common in cases that extend beyond the fixed-term lease to move onto a periodic lease (month to month). Under a periodic lease the landlord can end the lease for no specified reason as long as they give the tenant 120 days notice. It is also worth noting that a landlord can give a tenant a 14-day

notice to vacate if the tenant's rent is 14 days in arrears, regardless of the lease arrangements.

An ABS study on population mobility in 1999 reported that 66.5% of renters had moved in the previous three years. Of the renters who did not move only 7% were unemployed, suggesting that the likelihood of a person moving increases with unemployment. While all tenants are vulnerable to forced mobility, the risk for low-income households is much greater.

ISSUES FOR CONSIDERATION

The Tenants Union of Victoria are concerned that economic regulators have valued competition over consumer protection in the developing markets for energy and telephone services. This has allowed retailers to engage in misleading behaviour, particularly associated with door-to-door marketing, which would not be tolerated in a more mature industry.

This perceived failure or laxity by regulators has meant that many low income tenants are subjected to a constant barrage of apparently competitive offers by retailers under the guise of competition in circumstances where an examination of those market offers suggests that the benefits are illusory but loss of amenity in the homes and neighbourhoods of the tenants is substantial.

The AEMC is urged to recognise that door-to-door marketing is based on pressure sales tactics, targeted at low income and unsophisticated consumers and highly unlikely lead to switching behaviour based upon informed choice.

The Tenants Union believes that there is sufficient awareness of the existence of competition and market offers within the Victorian market. However new market entrants are too reliant on the crude and unsophisticated medium of door-to-door marketing for the delivery of information and offers to tenants.

The Tenants Union is also concerned that non-price inducements, such as DVDs and gift vouchers, lead to poor choices and irrational behaviour. In particular, non-price offers may lead customers to underestimate the value and utility of payment methods such as Centrepay and Easy way and the potential cost of direct debit options.

In particular, we are concerned about the use of misleading and high-pressure sales tactics on vulnerable customers such as government housing tenants. The AEMC should be under no illusion that the removal of price caps might result in some retailers attempting to sell energy contracts at two, five or ten times the competitive price of energy through this type of marketing.

The Tenants Union urges the AEMC to accept that increased market failure and predatory behaviour will be a real possibility if price caps are removed in Victoria. In our view the protection of vulnerable consumers should be prioritised ahead of the marginal benefits that might accrue to middle class consumers from further deregulation of the energy market.

In regard to the impact of regulation it should be noted that some of the Victorian protections have the effect of ensuring connection to supply rather than participation in the market. The AEMC should accept that for some vulnerable consumers access to supply is far more important than choice of supplier.

THE 2004 ESC REVIEW

In 2004 the Essential Services Commission (ESC) had sought to identify particular market segments or classes of consumers that were not benefiting from competition in the Victorian energy market.

The Tenants Union argued that the competitive energy market, in the first two years, had designed products that are contradictory rather than complementary to the fundamental characteristics of the tenancy market. At issue was the term of the products in the respective markets. As a mature market, the tenancy market had fixed upon short- to medium-term leases of between one and twelve months to serve the needs of market participants. The energy market has quickly gravitated towards medium to long-term contracts of between one and three years to create a more efficient market.

In the Final Report to the Minister (made June 2004), the ESC made the following comments in regard to the identification of consumers not benefiting from competition:

“There are likely to be two categories of customers that may, temporarily or permanently, not benefit from competition among retailers relevant to this review.

First, customers may not benefit because they are not included in the current marketing priorities of retailers — that is, there may be a sub-market in which competition is not active and for that reason is ineffective. The Commission has sought to isolate the market features or particular customer characteristics that limit the level or distribution of gains from effective competition identified in the competition analysis described above. It has also sought to identify measures to improve the effectiveness of competition or to protect the interests of customer classes not benefiting from effective competition. Some form of safety net may continue to be appropriate for some of these

Second, there may be a category of customers who will not be active participants in a competitive market due to their low incomes, remote locations or vulnerabilities. For these customers, the host retailers’ obligation to supply their customers and the Commission’s consumer safety net obligations for the local retailers will be of particular relevance.”

More specifically, the ESC identified some classes of customers that were subject to energy market-specific customer vulnerability. This meant that ‘average’ customers (without disabilities or adverse economic circumstances) may still be subject to a risk of detriment in market transactions.) Factors specific to Victoria’s electricity and gas retail markets may contribute to vulnerability for specific customer classes — including the existence of market power through concentration, anti-competitive or misleading conduct (some of which may reflect the exercise of market power), information problems and complex sales transactions.

The ESC then specifically noted that “some specific classes of customers are more vulnerable because of the structure of contracts offered by retailers” and quoted the following extract from the Tenants Union submission:

“that there is a significant mismatch between the products available in the energy and tenancy markets. Tenants are offered short-to-medium term leases of between one and twelve months by estate agents and landlords, and medium to long-term contracts of one to three years by energy retailers...it is unlikely that many tenants would be attracted by the ... offer of a three-year contract. It would be like buying a fur coat for the summer.”

In relation to non-energy market customer vulnerability, the ESC noted that factors specific to personal (or residential household) circumstances and conditions, unrelated to the effectiveness of competition in the relevant market, may create customer vulnerabilities that may:

- adversely affect access to and effective use of information for decision-making; or
- adversely affect access to particular services or price offers; or
- make access difficult so that transaction costs, and hence total purchase costs, incurred are higher than for ‘average’ customers without those attributes.

Some examples of customer vulnerability included: intellectual, mental or physical disability; limited English language proficiency or illiteracy; limited capacity or inclination for critical assessment or comprehension of market offer terms and conditions; low income; insufficient confidence in exercising interpersonal skills to seek relevant and adequate information; limited access to information services due to geographic remoteness; and ‘time deprivation’ (insufficient time to obtain and absorb information relevant to more complex purchase decisions).

However the Tenants Union notes that ESC made specific reference to data prepared for the Department of Human Services that indicated that problems in affording energy, as an example of non energy market vulnerability, are associated with the following variables:

- low household income (for example as indicated by Commonwealth concessions cardholder status);
- rented accommodation;
- country location; and
- larger household size (four or more people).

The Tenants Union submits that the ESC acknowledged that tenants were likely to fall squarely within both categories of consumers that may not benefit from competition in the energy market.

The outcome of the 2004 Review was that ESC supported the retention of both price caps and the regulatory safety net to ensure the protection of consumers such as tenants that were unlikely, at that time, to benefit from competition in the market.

THE 2007 AEMC REVIEW

The Tenants Union has consistently supported the application of competition principles and the establishment of competitive markets as the most effective means of ensuring the welfare of consumers and tenants in particular. However the AEMC must recognise that energy is an essential service, underpinning every form of social and economic activity in Australia. Energy generation and consumption have social and environmental outcomes, and the market cannot be viewed without considering those impacts.

The Tenants Union endorses the National Energy Consumers Roundtable Charter of Principles for Energy Supply, which states “electricity is an essential domestic service. Except in rare and exceptional circumstances, a regular connection to electricity supply is not discretionary or optional. In most instances there is no alternative to electricity. Electricity supports fundamental human needs including safe food (storage, preparation) and safe shelter (hygiene, lighting, independence (health, communication)). Beyond these fundamentals, electricity supports community engagement and family life (social interactions, employment, education). A reliable, safe, affordable supply of electricity is now a matter of right rather than privilege and access must be guaranteed as far as reasonably possible”

The starting point from a tenancy perspective is to determine whether there have been significant changes in the energy and private rental markets since the 2004 review. As already noted, and supported by the Victorian Residential Tenancies Bond Authority statistics, there has not been any significant structural changes in the operation of the rental market (noting the historically low vacancy rates). In view of the maturity of the private rental this is not surprising.

The Tenants Union acknowledges that there have been changes in the energy market since 2004. There are more retailers offering a greater range of products and contracts. There is also greater innovation with the development of dual fuel and green energy products. However, the contract terms that most impact on tenants remain much the same as in 2004.

In July 2006 the ESC released a draft decision on a review of early termination fees compliance. Table 1 of the draft decision contained summary of energy retailer early termination fees. The table revealed that 8 out of 11 retailers were charging termination fees at that time. Even more significant was the assessment of contract periods. The ESC noted:

“Any comparison between retailers is complicated by the diversity in the terms and conditions of contracts being offered. For example, some retailers offer one-year contracts, while others offer contracts with a minimum of three-years. Most of the retailers have an ETF specified as a fee, rather than setting out a formula for calculating the fee.”

The Tenants Union submits that this information suggests that most retailers offer periodic contracts of one to three years in preference to evergreen

contracts that are more appropriate for tenants. Moreover, all but one or two retailers argued for the retention of early termination fees.

As previously, tenants making rational decisions would not enter into three-year contracts containing a termination fee. Even 12-month contracts are problematic to the extent that a tenant may not be able to arrange a twelve-month energy contract until three months into a twelve-month lease. Such an arrangement may well expose the tenant to penalties for early termination if the lease period is not extended by the landlord. It is acknowledged that many retailers allow some portability for energy contracts. However portability will only assist those tenants in a position to enter into an energy contract at their next address and will not assist a tenant moving premises and moving into a household with an existing energy contract or leaving the state or country.

The Tenants Union also acknowledges that in the Final Decision on Termination Fees in December 2006 the ESC “reached the view that the ETF should not be greater than the incremental administrative costs, hedge book imbalance costs and the unamortised inducement costs. This should be no more than \$20 for the incremental administrative costs and hedge book imbalance costs for each energy account plus the observable unamortised cost of an inducement received by the customer”.

However the reduction in termination fees does remove the fundamental problem faced by tenants in the Victorian market. The fact remains that to benefit from competition a tenant would have to enter into a market energy contract in the knowledge that the rental lease period would almost certainly lead to a breach of that contract. It would be a curious outcome for a regulator such as the AEMC to conclude that such a breach was not a concern based on the size of the termination fee. A more appropriate conclusion must be that a tenant making an informed choice would choose a standing offer or evergreen contract without a termination fee in preference to a market contract with a termination fee.

In 2004 the ESC found that some specific classes of customers were more vulnerable because of the structure of contracts offered by retailers. More recently the Tenants Union has noted other structural problems with contracts currently on the market.

WAITING PERIODS

Some retailers impose waiting periods on tenants moving into a property. One example of this concern was illustrated by a retailer that offered contracts for electricity, gas or dual fuel but only if the tenant was already within the host geographic area. If a tenant moving into a new property was previously within the geographic area of a competitor, the offer was conditional upon sign up with, and payment of the first quarterly account, to the host retailer, after which application could be made to the alternative retailer for a market offer. It is not clear whether this practice is restricted to tenants but Tenants Union has received several reports of this practice from tenants (including the current CEO of the Tenants Union)

GREEN ENERGY CONTRACTS

The Tenants Union remains concerned that structural deficiencies within the energy market will continue to disadvantage tenants despite improvements in the competitive energy market. Many green energy contracts have terms that are contrary to current tenancy laws. A community worker recently reported the following experience as tenant seeking a green energy market contract.

“After having left my contact details online at originenergy.com.au requesting further information on their Green Earth program, I received a call from Origin. After being provided with general information on their terms and conditions of signing up to Green Earth, I agreed to change retailers and accept their contract. During the recorded part of the phone call where I was to agree to the terms, I was advised that I would be provided with one flow shower head and several energy saving globes as part of the contract package. I was asked to confirm for the recording that I would agree to install the low flow showerhead and globes. I did not agree to this and stated so to the salesperson. I explained that as I already had a low flow shower head installed and energy saving globes. However I was told that I had to agree for the tape.

I was not questioned as to whether I was a tenant or a home owner or indeed if my hot water system supported a low flow shower head (some do not) before being asked in the recorded section of the call if I would install these items”. Energy Worker - Kildonan Child and Family Services

Whilst it may seem petty, in this example the retailer required a tenant to undertake a task as a pre-condition for a market contract that would constitute a clear breach of the tenancy agreement. A tenant has no right to make changes to fixtures such as the shower. Follow up enquiries confirm that it is a routine practice for this retailer to require installation of energy and water saving devices regardless of tenancy status. Interestingly, at least one major metropolitan water retailer will not supply water saving devices to tenants for fear of breaching their lease.

PRICE CAPS AND ENERGY EFFICIENCY

In the context of our concerns that tenants do not benefit from competition, the Tenants Union was dismayed by comments made the Victorian Premier Mr Bracks on Southern Cross Radio (5 June 2007). He said that Victoria's domestic users had benefited from rises beneath the Consumer Price Index (CPI) under the safety net cap. Mr Bracks then said: “As that cap is lifted, we actually go not to a price determination of the state only, we actually go to a regulator across the eastern seaboard. So it'll be regulated in an energy market between all the users on the eastern seaboard of Australia. You'd expect there'll be some rises because of the drought ... we don't know the levels and we hope that they're minimal, but we know the other states have already had some increases.”

The Tenants Union is concerned that the Victorian Government has apparently accepted the removal of price caps and inevitable increases in energy prices flowing from that decision, the introduction of carbon taxes

and drought with plans to focus on energy efficiency measures as a means of reducing energy bills through reduced consumption.

The recent Victorian Energy Efficiency Target Scheme Issues Paper noted in the introduction that "the scheme will assist (the residential sector) in making a smooth transition to a carbon constrained future, so that they will be well placed to adjust to carbon prices arising from the introduction of an emissions trading scheme"

The Tenants Union urges the AEMC to consider carefully whether all classes of consumers will benefit from energy efficiency measures before determining that an energy efficiency strategy may ameliorate the effect of price rises occurring after the removal of price caps.

In response to that Issues Paper, the Tenants Union submitted that private rental tenants will not receive any significant benefits from recently announced energy efficiency programs, including the \$14 million rebate package. The response identified a number of factors preventing widespread uptake of energy efficiency measures in the private rental market:

- Tenants are prevented by law from making any alterations to rented premises;
- The split incentive implicit in the landlord-tenant relationship; an
- Prevailing rental market conditions do not encourage landlords to invest in improving properties in order to attract tenants.

The Tenants Union argues that the only effective way to improve the energy efficiency of the rental housing sector will be to regulate for minimum standards of energy efficiency. Properties available to rent in the private rental market should be required to conform to some basic standards that promote energy efficiency including:

- A decent level of thermal insulation
- At least one form of in built heating (in the main living area) with a minimum energy efficiency standard
- Efficient and properly installed appliances for cooking, bathing and sanitation
- Efficient and properly installed hot water
- A basic level of window covering

Requiring housing to conform to these basic standards before it can be made available to rent would overcome the barriers imposed by the split incentive and by current market conditions that discourage landlords from making investments and accessing government schemes that would enhance the thermal efficiency of their properties.

The Tenants Union agrees that there is a need for integrated policies to achieve energy efficiencies within the private rental market. This should

include a wider consideration of measures targeted to assist private tenants and could include:

- consideration of regulated minimum standards for rental properties;
- review of eligibility guidelines for the DHS Capital Grants Program;
- quotas for private rental properties within existing schemes;
- access to funds for retrofitting and weatherproofing of private rental stock;
- legislative reform to allow basic energy efficiency measures to be installed by tenants without the need for permission of the landlord.

Without these targeted measures, governments and regulators risk exposing tenants, as unattractive customers within a deregulated market to higher prices, at a time when those same tenants are excluded from obtaining the benefits of energy efficiency schemes designed to reduce consumption and lessen the impact of price rises. This scenario would create a socially inequitable market that favours homeowners over renters and high-income households over lower income consumers unable to enter into the home ownership market.

MARKET STRUCTURE

The Tenants Union believes that the commentary in the Issues Paper overstates the impact of competition based upon a simplistic assessment of crude switching figures within the Victorian market. The AEMC is urged to look beyond the number of consumers involved in switching retailers. The AEMC should investigate:

- Did those consumers make an informed choice?
- Did the contracts with new entrants engender any product loyalty?
- Did new entrants attract a viable market share?

The Tenants Union recently participated in a door-knocking campaign in low-income housing estates in Ascot Vale and Footscray to gain information about the attitudes and experiences of tenants dealing with energy contracts marketed door to door. We found that many tenants had remained loyal to the incumbent retailer. However, and significantly, those tenants that had switched exhibited no loyalty to the new retailer, and had switched more than once or acknowledged a willingness to switch again. There was little evidence of informed choice, information based price sensitivity or retailer loyalty.

A case study provided by the Footscray financial counsellor illustrated this point.

Case Study: Informed consent & unconscionable retailer conduct

72 Year old, single woman (widowed) residing in rented accommodation.
Sole income derived from aged pension - \$460-00 per fortnight.

Client presented – confused because she was paying 4 different electricity and gas retailers via instalments. Caseworker established:

Mrs X was \$700 in credit with retailer A (AGL) although she had not been a customer since August 2004 - because she continued to pay the retailer instalment agreement fortnightly!

- Having signed a contract with new retailer B (Country Energy) Mrs X organised to pay retailer B via fortnightly instalment card. She continued to pay Retailer A after she had signed with new Electricity & Gas retailer, Retailer C, (Energy Australia) in December 2006.
- Mrs Z Signed a door-to-door contract with Retailer D Origin Energy for retail Gas supply in January 2007 and was sent an instalment repayment card at her request.
- Received a notice of unpaid account for \$90 from Country Energy in April 2007 and a notice of impending legal action if the account was not finalised.

In 2004, in response to door-to-door gas and electricity retailer, Mrs X relinquished her standing retailer supplier AGL and signed a market contract with a new retailer Country Energy. Mrs X continued to receive bills from AGL for a 3-month period before the ‘switch’ to Country Energy was implemented.

Confused, Mrs X continued to pay her ‘Easyway instalments’ fortnightly to AGL until the Legal Service contacted the retailer in April 2007. AGL agreed to send Mrs Z a cheque for her accumulated \$700 credit. AGL offered no excuse for not cancelling the account and for continuing to accept ‘instalment repayments’ up to April 2007.

Mrs X is vulnerable to door-to-door retail sales – she did not understand that she was signing market contracts – she stated that she simply understood that the name of her Gas and Electricity retailers were being changed and she believed she was being offered ‘discounts’ on her electricity charges (tariffs) because the sales representatives informed her that her electricity & gas would be cheaper if she agreed to sign for ‘cheaper electricity and gas supply’.

Ms X migrated to Australia from Greece in the 1970’s – because of her age, health and language issues she does not read English well and requires an interpreter.

INDEPENDENT RIVALRY AND BEHAVIOUR OF RETAILERS

The Tenants Union wishes to comment on a number of product features and sales processes that have guided our response to this section of the paper.

In our view some products such as dual fuel and green energy have been popular with educated, middle class consumers capable of informed choice in the energy market place. However, it has been our experience that these products are often targeted at homeowners rather tenants. This is particularly the case with dual fuel in rural areas where many tenants have to rely upon LPG because the landlord has not converted the property to natural gas.

Dual fuel products may lead to price savings but are arguably more attractive as time saving products that reduce the number of contracts, accounts and payments to be dealt with by a consumer.

Green energy products are innovative but more expensive than standing offer or market contracts and not necessarily affordable for many lower income tenants. Additionally, as already noted, tenants may be precluded from entry into green power contracts due to contract provisions that require alterations to the property.

Sales processes in the Victorian market are dominated by door-to-door sales. This sales technique will become even more significant as more consumers sign on to the national call register created to reduce telephone marketing. Historically door-to-door marketing has been associated with major scams and anti competitive behaviour. It is not a sales process associated with informed choice by consumers.

The Tenants Union was particularly disturbed by the evidence of a concentration of door to door sales teams targeting low income and disadvantaged tenants in the Ascot Vale estate based on easy access to large numbers of relatively unsophisticated consumers. These consumers are being overwhelmed by the sheer number of salespeople touting energy products. The tenants regarded the doorknockers as intrusive and did believe the offers to be substantially different or beneficial.

LEVEL, EXTENT AND TYPES OF MARKETING

The Tenants Union has identified marketing strategies targeted at three very different types of customer:

- Loyalty customers

Many customers prefer to remain with the incumbent retailer. These consumers do not readily engage in switching. However these consumers are forced to engage in switching in order to retain their incumbent retailer when moving location across the geographical boundaries that were created within the Victorian market. In terms of marketing this type of customer requires little more than brand reinforcement from incumbent retailers.

- Product innovation – Dual Fuel and Green Energy customers

Dual fuel products are attractive to time-poor and/or -stressed consumers regardless of price. Many customers would be attracted to this product if offered by an incumbent regardless of the levels of competition in the market. In fact a customer is more likely to be offered this product by an incumbent retailer than a new entrant.

It is acknowledged that green energy is a new product that will meet the needs of more affluent consumers - despite the increase in cost. However green products can be readily marketed to existing customers and retailers can rely on the promotion of green products by energy conscious government departments and mainstream influential community agencies such as Australian Conservation Foundation and Choice.

- Door to Door – Pressure sales

This type of mass marketing is dominated by new second tier retailers desperate for market share. The products are said to be based on price reductions supported by inducements such as DVD's and gift vouchers.

The products are marketed to consumers under duress in their own homes and often provided with misleading information by poorly trained inexperienced sales staff desperate for to earn commission. Customers are not given information about disadvantages such as termination fees on existing contracts, the risk of high penalty fees on direct debit payment processes or loss of access to Centrepay or Easyway payment options.

EVIDENCE OF ANTI- COMPETITIVE OR MISLEADING MARKETING BEHAVIOUR

In 2004, the ESC found that “active and expanding rivalry among retailers has taken place (in Victoria) without evidence of systemic misleading or anti-competitive market conduct.” However, this is not the case in 2007.

The Tenants Union has found references to misleading marketing behaviour in the Annual Reports, newsletters and on websites of consumer affairs and energy regulators, the Energy and Water Ombudsman and numerous community sector organisations. In particular the AEMC is referred to the following materials:

- Consumer Affairs Victoria – Annual Report 2005
- Independent Pricing and Regulatory Tribunal - Annual Report 2006 & Website
- Energy and Water Ombudsman Victoria - Annual Report 2005
- Energy and Water Ombudsman Victoria – Newsletter (Resolution) 20
- CHOICE magazine
- Consumer Law Centre Victoria – Submission on Early Termination Fees Compliance Review
- Financial & Consumer Rights Council Report “Coercion, Cost and Confusion” June 2007
- Footscray and Essendon Legal Services – Response to FRC Issues Paper June 2007

Time does not permit an exhaustive review of these materials. However the Tenants Union does wish to comment on a range of significant examples of misleading behaviour that we believe to be indicative of consumer experiences in the Victorian market.

GREEN ENERGY

CHOICE, previously known as Australian Consumers Association, released a detailed review of green power products in May this year. In regard to misleading behaviour CHOICE identified two main problems for consumers in understanding what they're being sold:

- 'Renewable' energy products that aren't accredited GreenPower.

Red Energy, for example, sells "100% renewable energy" from Snowy Hydro. But this isn't GreenPower (nor does the company claim it is).

Red Energy says the requirement that accredited GreenPower generators be built from 1997 is an "arbitrary line in the sand" and that its power generated by an 'old' renewable source is preferable to some 10% accredited products that source up to 90% of their energy from coal.

The counter-argument is that while energy from the Snowy Mountains scheme comes from a renewable source, buying it doesn't change the proportion of renewable energy being produced in Australia, one of the main aims of the GreenPower scheme.

- Describing the whole of an energy product as '100% renewable' even if parts of it aren't accredited.

GreenPower products sometimes have a non-accredited portion (usually called the 'backfill') made up of old renewable energy – sometimes these products are described as '100% renewable'.

The report (available on the CHOICE website) is supported by consumer member comments about their experiences. CHOICE concluded that this kind of marketing can confuse consumers who are trying to help the environment by purchasing new renewable energy. The Tenants Union notes that this marketing material is targeted at middle class energy conscious consumers and would be incomprehensible to less sophisticated consumers.

LACK OF INFORMED CONSENT

In August 2006, the following material was included in the Consumer Law Centre Victoria submission to the ESC on termination fees. The submission documented a number of instances of anti-competitive or misleading marketing behaviour as evidence that many consumers had entered into market contracts in circumstances that suggest an absence of explicit informed consent as required by Clause 19.2 of the Energy Retail Code.

During 2005 and 2006 two retailers operating in the Victorian energy market, Energy Australia and Jackgreen (International) Pty Ltd entered into enforceable undertakings to discontinue inappropriate marketing practices. Energy Australia entered into undertakings with Consumer Affairs Victoria.

The Undertakings included admissions that the company or its agents had:

- made claims to consumers regarding terms and conditions that did not exist in the contract;
- advised consumers that termination fees were lower than they actually were;
- incorrectly asserted to consumers that rebates applied to individual bills;
- made sales pitches to consumers on the basis of bill payment systems that were not available;
- refused to leave consumers' premises when asked, and/ or behaved in an overbearing manner.

In June 2006, Jackgreen (International) Pty Ltd entered into enforceable undertakings with the Independent Pricing and Regulatory Tribunal (IPART) in NSW in relation to conduct that occurred between December 2005 and March 2006. The retailer admitted that it had transferred customers without their consent and agreed to:

- undertake an enhancement of its compliance systems and procedures
- undertake further independent assessment by auditors of its compliance systems and procedures;
- undertake training and supervision of its marketing staff/ contractors;
- enable Jackgreen customers adversely affected by the conduct of the telemarketing agent to transfer back to their original electricity supplier without cost to them; and
- apologise in writing to all affected customers.

(The full details of these undertakings are available on the websites of Consumer Affairs Victoria and IPART.)

We acknowledge that the undertakings by Jackgreen (International) Pty Ltd related only to activity in NSW. However, that marketing was conducted by a contracted telemarketer and it is highly likely that similar activities were undertaken within the Victorian market on behalf of the same retailer.

These undertakings were evidence of ongoing systematic breaches of the Retail Code and the Marketing Code of Conduct in Victoria during the last three years. We believe that only a small proportion of adversely effected consumers complained to Industry Ombudsman, consumer affairs agencies or regulators. Even after the undertakings, CLCV asserted that it is reasonable to assume that both retailers would have retained a significant number of customers signed up without explicit informed consent.

The submission also pointed to further evidence of failure to obtain explicit informed consent in the statistical information published by EWOV in recent Annual Reports and electronic newsletters, and in case studies from EWOV and financial counsellors. The case studies suggest that there are a wide range of circumstances in which consumers switch energy providers and/or enter market contracts without any knowledge of that fact and where it is unlikely that the consumer can be said to have given explicit informed consent.

The Tenants Union further refers to concerns about consumers being switched without their knowledge and misled by retailers in a recent community sector report by the Financial and Consumer Rights Council (FCRC) in Victoria. That report noted that "There were a number of comments and concerns expressed that people had been signed up by retailers without their consent. The Kensington group expressed considerable concern that because of their lack of language skills they had often been coerced into changing retailers. One said that they offered a deal which would reduce their bill by 5%, but later she found that her bill had gone up by about 10%. Another said that a retailer had come to her door and informed her that her current provider was no good and she felt confused."

The Tenants Union notes that many of these reported examples of misleading behaviour were based on actual findings by regulators and the Ombudsman and admissions by retailers. The Tenants Union urges the AEMC to examine the material contained in the CLCV submission which is available on the ESC website at http://www.esc.vic.gov.au/NR/rdonlyres/2EC87E68-8324-465A-AABE-5320BF428BA0/0/EarlyTerminationDraftDecision_CLCV.pdf

DOOR-TO-DOOR SALES

The Tenants Union is concerned that many of the participants in both the FCRC and Footscray /Essendon Legal Service surveys were low income and vulnerable tenants such as recent refugees or the aged. These tenants are living in concentrated blocks of flats or units on government housing estates - an easily accessible and captive audience to be repeatedly targeted by door-to-door sales teams looking for quick sales.

FCRC survey participants were asked of their experiences when approached by energy retailers and sales people. "The overall experience across the focus groups was that participants were not happy with the way they had been approached. They felt that the door-to-door sales people were very pushy and were difficult to deal with. The focus groups overall expressed that the constant telephone calls intrusive and inconvenient. The COTA and Sunbury participants expressed concern that older people were particularly vulnerable to high pressure sales techniques."

Participants made the following comments about door-to-door sales persons:

- Thought they were pushy
- Felt they were cunning and not happy about comparing other retailer's products or deals

- One person said they asked to be given written confirmation of the offer but the sales person declined
- Some found it difficult to get rid of sales person; they felt intimidated by the sales person's persistent tactics.
- They just don't understand 'no', in the end I just had to be rude and shut the door in their face.
- I just wanted the DVD so I signed.

As noted earlier, the Tenants Union participated in the Essendon/ Footscray survey. Our representatives heard firsthand the tenant's dissatisfaction with constant doorknocking and allegations of misleading statements from retailer representatives.

One complaint in particular is of concern. A number of tenants reported that salesman had offered discounted energy prices without reference to termination fees for breaking an existing contract. This failure is significant. Financial counsellors have confirmed that the energy bill for a single person in a small flat may be as little as \$500. A 5% reduction would be \$25 but reduced to \$5 if there was a \$20 termination fee. Even worse, two respondents in that survey reported payment of termination fees of \$80. Fees of that magnitude would obviously result in switching at a loss.

The Tenants Union is concerned that economic regulators have valued competition over consumer protection in the developing markets for energy and telephony. This has allowed retailers to engage in misleading behaviour, particularly associated with door-to-door marketing, which would not be tolerated in a more mature industry.

This perceived failure or laxity by regulators has meant that many low income tenants are subjected to a constant barrage of apparently competitive offers by retailers under the guise of competition in circumstances where an examination of those market offers suggests that the benefits are illusory but loss of amenity in the homes and neighbourhoods of the tenants is substantial.

The AEMC is urged to recognise that door-to-door marketing is based on pressure sales tactics, targeted at low income and unsophisticated consumers and highly unlikely lead to switching behaviour based upon informed choice.

CUSTOMER CHOICE AND BEHAVIOUR

The Issues paper noted that there are a number of pre-conditions are necessary in order for customers to be able to effectively exercise choice in the market and included commentary on the need for:

- Awareness of competition
- Comparable information
- Ability to exercise choice

At least one further factor, the desire or need for choice, is crucial to the review of full retail contestability. It is time that economic regulators, including the AEMC, accepted that some customers do not want choice for particular products or services. Factors that mitigate against a desire for choice include:

- Time stress – a factor widely recognized by demographers. Some consumers would rather save time than money, particularly if the price benefit is small
- Information overload – consumers can be offered too much information and the time and stress is not worth the price discount offered by the retailer
- Invasive marketing that leads consumers to disengage from receipt of information and choice.

This last response appears to be common among low-income tenants subject to excessive marketing. The AEMC should acknowledge that excessive information, marketing and choice may be a turn-off for consumers.

Furthermore, the Tenants Union submits that there are clear differences in customer choices and experiences in the energy market. In particular:

- Higher-income home owners have sought offers for dual fuel and green energy
- Home owners and tenants have sought market contracts to retain incumbent retailers during times of relocation
- Tenants in large unit or flat concentrations are bombarded with direct marketing offers for price puffery glib sales pitches and non price inducements

These differences are extenuated when better educated and informed consumers can access reviews of green products and energy efficiency measures through online reports on websites such as choice and Australian Conservation Foundation whilst low income consumers are fed a limited and value laden sales pitch during pressure sales on the phone or at the door.

We noted earlier that community sector agencies have recently conducted focus groups and surveys with low-income consumers, many of them were tenants, to obtain information about their experiences with choice in the energy market.

The results of those consultations in terms of receipt of offers, uptake of offers and levels of satisfaction were that 29 out of 39 respondents who 'switched' retailers reported that they were dissatisfied with their decision. The majority of those dissatisfied reported that they did not believe that their gas and/or electricity bills were cheaper (as indicated by the sales representative) or did not believe they gained particular pricing advantages because of bonuses or rebate vouchers.

The FCRC conducted a similar exercise with five focus groups in Mildura, Kensington, Benalla, Sunbury and Melbourne CBD. Participants were asked whether they knew who supplied their utilities and whether they had changed or had remained with their original retailers. They were also asked why they had moved. Only 19 respondents out of 50 had switched. However two of the focus groups, COTA and Sunbury, represented older consumers and these participants expressed concern that older people were particularly vulnerable to high-pressure sales techniques. The overall experience across the focus groups was that participants were not happy with the way they had been approached. They felt that the door-to-door sales people were very pushy and were difficult to deal with. The focus groups overall expressed that the constant telephone calls intrusive and inconvenient.

VULNERABLE CONSUMERS – IMPACT OF COMPETITION

The Issues paper seeks comment on how vulnerability arises in the context of the removal of price caps. The Tenants Union submits that vulnerable consumers are not price sensitive and will not always be protected by competitive prices

Two current consumer scans illustrate this point:

- The share price scam

The ACCC and ASIC have been frustrated in their efforts to prevent rogue share trader David Tweed and similar copy cats from purchasing the shares of vulnerable shareholders at a fraction of their true value

These traders offer to purchase shares from the shareholder at a price well below their true value. The market price of the shares is readily obtainable but the shareholders, often elderly, trust the trader to quote a fair price for the shares.

- Mathematics computer software

There are a number of education service providers using direct marketing – phone and door to door sales – to target low income parents with computer software programs designed to assist their children with school mathematics.

These products are grossly overpriced at \$6000 or more and sold on high interest finance of 28%. There are cheaper and more effective alternatives available to these parents. Unfortunately, many parents are persuaded to purchase this product “to prove they care about their kids.”

This submission has repeatedly expressed concern about the use of misleading and pressure sales tactics targeting vulnerable customers such as government housing tenants. The AEMC should be under no illusion that the removal of price caps might persuade some retailers to sell energy contracts at two, five or ten times the competitive price of energy through this type of marketing.

Is this an alarmist prediction? The AEMC need look no further than the uniform credit laws for an answer. The 1994 Credit Code was introduced without caps on either fees or interest rates. Subsequently, overwhelming

evidence of predatory behaviour has forced New South Wales to reform the legislation and impose caps on both fees and interest rates.

The Tenants Union urges the AEMC to accept that market failure and predatory behaviour will be a real possibility if price caps are removed in Victoria. In our view the protection of vulnerable consumers should be prioritised ahead of the marginal benefits that might accrue to middle class consumers from further deregulation of the energy market.

The Tenants Union regards the following customer groups as vulnerable:

- Tenants

Tenants face a number of factors in a contestable market that contribute to vulnerability. These include the structure, terms and conditions of market contracts, the impact of split incentives on energy efficiency programs, low consumption levels that lead to a lack of attractiveness to first tier retailers and exposure to high pressure sales campaigns organised by second tier retailers.

- Rural consumers

Rural consumers, and particularly rural tenants, are disadvantaged by lack of access to dual fuel, lack of access to subsidies for transfer to reticulated gas, and exposure to LPG prices. Many rural consumers also reside in poor quality, energy inefficient properties that lead to high consumption levels. These consumers lack access to energy efficiency programs and will be exposed to rising energy prices.

- Centrelink recipients

While low-income households use less energy than average households, as a proportion of their weekly expenditure, they expend almost double the amount compared to the average household. Centrelink recipients will be more exposed to rising prices, less likely to reduce consumption and more vulnerable to misleading marketing practices that appear to offer price reductions.

- Older consumers

Older consumers, including Centrelink recipients, may reduce consumption if faced with rising prices. This is partly due to the number of asset rich, income poor consumers within the aging community. There is significant evidence that even middle class older consumers reduce spending on services when concerned by lack of income. The reduction in energy use within this group is likely to have adverse health effects and lead to increases in government spending on health and welfare as a consequence.

The Tenants Union regards the following factors as likely to lead to contribute to customer vulnerability:

- Contract terms and conditions

Many consumers including tenants are better served by standing offer or evergreen contracts. The move to periodic contracts with termination fees will disadvantage some consumers. As the market becomes more sophisticated and moves towards greater segmentation based on techniques such as credit referencing and scoring there will be an increase in the use of contractual conditions that disadvantage vulnerable customers.

- Payment methods

Vulnerable customers on Centrelink income have been able to reduce their exposure to risk through payment by Centrepay and/or Easypay. Retailers, both first and second tier, have sought to reduce costs by offering discounts through market contracts that require payment by direct debit. These contracts are often marketed door to door without an adequate explanation of the risk of high bank default fees for late payment. Most community agencies regard direct debit as an unsuitable payment mechanism for Centrelink recipients.

- Energy Efficiency Programs

As noted earlier in this submission, energy efficiency programs intended to reduce consumption are being promoted as a solution to rising energy prices. Tenants are often locked out of these programs by the impact of split incentives that require payment of capital costs by landlords to enable tenants to obtain the benefit of reduced fuel bills.

The Tenants Union regards the following aspects of the market structure as likely to contribute to customer vulnerability:

- Second tier marketing practices

New market entrants are too reliant on the crude and unsophisticated medium of door-to-door marketing for the delivery of information and offers to tenants. Second tier retailers have targeted low-income government housing estates in an attempt to build market share. However many of those residents have complained about the inaccurate or misleading information.

There has been concern that second tier retailers rely on direct debit payment arrangements and often lack access to the Centrepay system. There is further concern that until recently second tier retailers have not been required to have hardship programs in place to deal with vulnerable customers. Whilst second tier retailers are now required to implement hardship programs there is ongoing concern about the lack of experience and expertise of these retailers in managing vulnerable customers.

The Tenants Union has the following concerns about the capacity of the Victorian regulatory policies to protect vulnerable customers:

- Market Contracts

The Tenants Union has been concerned that market contracts offer a lower level of protection than standing offers. This is of particular concern when second tier retailers have targeted vulnerable consumers for intensive marketing campaigns.

- Regulatory Change

The Victorian regulatory policy has been an outstanding success. However those protections are under threat with the move to a national market and national regulation. Protections such as the wrongful disconnections legislation is unlikely to be adopted nationally and may not be retained by the Victorian government. The successful impact of this legislation has been well documented in ESC and EWOV reports.

It should be noted that some of these protections have the effect of ensuring connection to supply rather than participation in the market. The AEMC should accept that for some vulnerable consumers access to supply is far more important than choice of supplier.

CONSUMER SAFETY NET

The Tenants Union believes that the consumer safety net arrangements that have operated in the Victorian energy market since the introduction of full retail contestability have been effective in ensuring access to electricity and gas supply. It is our view that removal of the safety net will result in inferior outcomes for consumers.

The safety net tariffs achieved through the price path negotiated between retailers and the State Government effectively function both as a ‘price to beat’ among retailers and a cap on prices charged. These current also require retailers to service low-income consumer groups – the consumers most likely to suffer disadvantage in an unregulated marketplace.

Currently, there is very little evidence that there is sufficient competition in the market for residential energy to deliver lower prices and high quality services to consumers. Furthermore, there is no evidence that, in the absence of regulation, retailers will provide appropriately priced energy services to low-income households. Until a sufficient level of competition can be established, we believe that it would be highly irresponsible to abandon the existing safety net arrangements.

Please do not hesitate to contact Rebecca Harrison, Research and Policy Worker at the Tenants Union of Victoria, on (03) 9411 1410, if you wish to discuss any of the matters raised in this submission further.

Yours sincerely,

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