



27 March 2014

Australian Energy Market Commission
PO Box A2449
Sydney South NSW 1235

Lodged online: Reference RRC0001

NATIONAL ENERGY RETAIL AMENDMENT (Retailer price variations in market retail contracts) RULE 2014 - CONSULTATION PAPER

Alinta Energy Retail Sales Pty Ltd (**Alinta Energy**) welcomes the opportunity to comment on the AEMC Consultation Paper "*National Energy Retail Amendment (Retailer price variations in market retail contracts) Rule 2014*" (**Consultation Paper**).

Alinta Energy is both a generator and retailer of electricity and gas in Western Australia and the National Energy Market (**NEM**). It has over 2500MW of generation facilities and in excess of 700,000 retail customers, including around 140,000 customers in Victoria and South Australia. As a relatively new entrant retailer in the NEM, Alinta Energy is well placed to comment on the Consultation Paper.

The AEMC has provided a detailed description on the approach it will undertake in considering and assessing the rule change request¹ (**Rule Change Request**) put forward by the Consumer Action Law Centre (**CALC**) and the Consumer Utilities Advocacy Centre (**CUAC**). As this is the first change to the National Energy Retail Rules (**NERR**), comment is sought on the proposed approach. Alinta Energy believes the proposed approach to be adequate, however believes it would also be beneficial for the AEMC to publish details of any assessment against relevant criteria undertaken in determining whether to progress a rule change under the National Energy Retail Law.²

Alinta Energy does not support the Rule Change Request. We are of the view that the Rule Change Request does not promote the National Energy Rule Objective nor is it compatible with the application and development of customer protections in the NEM and therefore the AEMC should reject the proposed rule change. The attached submission details our reasons for not supporting the Rule Change Request.

¹ Consumer Action Law Centre and Customer Utilities Advocacy Centre, *Unilateral Price Variation and Market Retail Contracts Rule Change Request*, October 2013.

² Specifically sections 249(2)-(6) of the National Energy Retail Law.



Should you have any questions or wish to discuss our submission further, Lauren Zambotti may be contacted on (02) 9372 2667 or via email: lauren.zambotti@alintaenergy.com.au.

Yours sincerely

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SUBMISSION

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Rule Change Request

The Rule Change Request is based on CUAC and CALC's (collectively the **Proponents**) perception that the ability of energy retailers to unilaterally vary prices or tariffs shields them of a level of risk of operating in energy markets and negatively affects competition. Retailers will generally only vary prices to reflect changes to the underlying costs in delivering services to consumers. In order to remain competitive retailers must be conscious of their own degree of competitiveness in any market and provide consumers with as much stability in pricing as possible.

Further it is stated that the ability of retailers to unilaterally vary prices or tariffs in market retail contracts is an unfair contract term, while a term that permits one party to unilaterally vary the characteristics of the goods or services to be supplied **may** be considered unfair, this is not the only determinative consideration³. There are numerous considerations that must be taken into account in considering whether in any given circumstance the ability of a retailer to vary prices is an unfair contract term under any given market retail contract, including whether the contract is a standard form contract⁴, and whether the term; would cause significant imbalance in the parties rights and obligations under the contract, is reasonably necessary to protect the legitimate interests of the party who seeks to rely on the term, and would cause detriment to a party if it were to be applied or relied on.⁵

Not only does the proponent's assertion fail to consider these elements in making the generalisation that such terms are unfair contract terms, the issues that require consideration are complex and highly legalistic and only a court of competent jurisdiction can determine whether such a term is in fact an unfair contract term in any particular circumstance. Further should such a term under one market retail contract be deemed unfair does not necessarily mean that all such terms, in all market retail contracts, would be considered an unfair contract term.

Proposed Rule

The proposed rule seeks to prohibit retailers from including terms in their contracts that allow price changes during the fixed term or fixed benefit period of market retail contracts by amending rule 46 through the insertion of a new rule 46A⁶ (the proposed rule).

Additionally the proposed rule introduces a new concept of "fixed period" which has not been defined, if it was defined to include both fixed term and fixed benefit period contracts

³ Such a term is given as an example of the kind of term that may be considered unfair in s 25(g) of the *Australian Consumer Law (ACL)*.

⁴ ACL, s 23(1)(b).

⁵ ACL, s 24(1).

⁶ Consumer Action Law Centre and Customer Utilities Advocacy Centre, p 6.

as contemplated by the Proponents it would significantly reduce the number of popular market product offerings available to consumers. The language “fixed term contract” and “fixed benefit period” are defined in the legislative framework, accepted and used by industry and commonly known and understood by consumers. Further it cannot be said that consumers rely on naming conventions or the description of a single element of an offer, namely a fixed term or fixed benefit period, to determine the attributes of an offer when considering entering into a market retail contract with a retailer.

The Proponents claim the proposed rule change will deliver prices that are more reflective of real costs and deliver more effective competition to consumers. Insufficient evidence is presented in the Rule Change Request to support either of these claims. Where markets are considered to be competitive, such markets should be left to function in response to market conditions without intervention or the imposition of any additional regulatory burden. The need for such intervention should only occur where there is a demonstrable market failure that requires rectification which has not been sufficiently demonstrated by the Proponents in their Rule Change Request.

The Rule Change Request also includes a number of alternatives to the proposed rule, our comments on each alternative are summarised below:

a) First alternative, retail charges to be fixed with government charges passed through only

This alternative would require the approval of a definitive list of costs that could be passed through to consumers during a fixed term or fixed benefit period contract. This would require additional regulation and has the potential to create increased levels of consumer confusion as to what can trigger a variation to the prices and tariffs payable under a fixed term or fixed benefit period contract. Additionally this option would be administratively burdensome for retailers to manage. The Proponents recognised this alternative would result in increased regulation and they also do not support such a rule change.

b) Second alternative, deletion of rule 46

The Proponents state that the deletion of rule 46 would allow the ACL to apply. This statement (in our view) is inaccurate and based on the assertion that the ACL does not apply to market retail contracts and that unfair contract terms are somehow permitted by NECF and the NERR. While it is yet to be established whether a contract term that allows for the variations of tariffs within a fixed term or fixed benefit period may be considered unfair, unfair contract terms can only be included if they are expressly permitted and whether rule 46 does this has also not been determined. The proposed alternative also fails to appreciate the additional protection provided to consumers by rule 46. For these reasons this alternative cannot be supported.

Information Provision Requirements

Energy retailers have obligations to disclose product information in a clear and transparent way to ensure effective explicit informed consent of the consumer is provided when entering into a market retail contract.⁷ Details as to tariffs and charges and how and when they may be varied is required to be specifically articulated not only in the contract terms and conditions, but also in the regulated mandatory collateral provided to consumers at the time of or immediately after entering into a market retail contract. This information is provided in the form of an Energy Price Factsheet and a single written disclosure statement.⁸

Exit fees or early termination charges must also be disclosed in the Energy Price Factsheet and disclosure statement. Further it is commonly understood by consumers that breaking a contract can result in exit or termination charge. Under rule 49A the amount of such fees or charges must be a reasonable estimate of the losses incurred by the retailer, and the retailer must provide for the method of calculation.⁹ If the minimum requirements of rule 49A are not met the early termination charge is not payable. There is no evidence to suggest that such exit fees discourage competition as alleged in Rule Change Request.¹⁰

Market Retail Contracts and Competition

Competition in markets drives competitive product offerings and increased benefits and choice for consumers, the proposed rule will only serve to re-regulate another aspect of a competitive market where there has been no demonstrated market failing. There is no evidence to suggest that the proposed rule will increase competition in the market, nor that there is a need to regulate retailers to provide a fixed price product. Where consumers express an interest or need for a particular product structure, retailers will develop and offer these products and services. Fixed price products are available in these markets. Alinta Energy believes that adoption of the proposed rule will only serve to decrease the level of competition and number of product offerings in retail energy markets.

National Energy Retail Objective (NERO)

Alinta Energy does not believe that the proposed rule will or is likely to promote the long term interests of consumers as required under the NERO.¹¹ Consequences of the proposed rule include; increased prices, diminishment of product innovation, reduced product offerings, decreased consumer engagement and sentiment of the market and could possibly cause smaller retailers to exit the market as they are unable to compete and accurately manage the level of risk they would be exposed to as a consequence of the proposed rule.

Customer Protections

The AEMC in the Consultation Paper states that the customer protections under the National Energy Customer Framework (**NECF**) are intended to complement and operate

⁷ National Energy Retail Law, Part 2, Division 5.

⁸ National Energy Retail Rules, r 46.

⁹ National Energy Retail Rules, r 49(A).

¹⁰ Consumer Action Law Centre and Customer Utilities Advocacy Centre, p 4.

¹¹ National Energy Retail Law, s 236(1).

alongside consumer protections in other relevant laws, including the Australian Consumer Law (**ACL**).¹²

Under NECF, prices paid under standard retail contracts cannot vary more than once every six months.¹³ In jurisdictions where price regulation has been removed retailers are required to publish their standing tariffs, these standing tariffs generally form the base price for market product offers and by association the variation of tariffs and prices under market retail contracts is subject to the six month moratorium applicable to standing tariffs. Existing consumer protection provisions in all jurisdictions require the clear and transparent disclosure of the terms and conditions to consumers when marketing a product offering. This disclosure includes information on the prices and tariffs offered to the consumer and how and in what circumstances the retailers may vary these.

In addition to protection available under NECF, jurisdictional regulations (and derogations) impose additional customer protections applicable to energy contracts with small consumers, including limits on termination fees and the requirement to have a no fixed term offer. Alinta Energy believes that should a consumer protection issue be identified in a particular market, only where a demonstrated market failure has been identified should intervention occur in the form of regulatory/rule changes.

Conclusion

Alinta Energy does not believe a rule change is required or warranted as there has been no demonstration of a material market failure and the requisite legal / benefit tests have not been met.

¹² AEMC, Retailer price variations in market retail contracts, Consultation Paper, 2014.

¹³ National Energy Retail Law, s 23.