

NOTICE OF FILING

Details of Filing

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Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



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CONCISE STATEMENT

FEDERAL COURT OF AUSTRALIA

DISTRICT REGISTRY: VICTORIA

DIVISION: GENERAL

NO VID OF 2023

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

Applicant

ENERGYAUSTRALIA PTY LTD (ACN 086 014 968)

Respondent

A. INTRODUCTION

1. The Respondent (**EnergyAustralia**) is an 'electricity retailer', and one of Australia's largest energy retailers. The Applicant (**ACCC**) alleges that, during the period between 20 June 2022 and 28 September 2022 (the **Relevant Period**), EnergyAustralia contravened s 12(2) of the *Competition and Consumer (Industry Code – Electricity Retail) Regulations 2019* (the **Code**) by failing in its communications with more than 560,000 'small customers', and in certain electricity offers on its website, to provide mandatory pricing information that was required by the Code.
2. The ACCC also alleges that EnergyAustralia made false or misleading representations in contravention of ss 18 and 29(1)(i) of the *Australian Consumer Law (ACL)*, being Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (**CCA**), in its communications to more than 560,000 customers, by stating an 'estimated annual price' for its electricity offer based on an 'average' customer with certain stated characteristics, when the dollar figure stated was not the estimated annual price for such a customer.
3. The Code commenced operation on 1 July 2019. It is a mandatory industry code under the CCA that establishes enforceable requirements in relation to how electricity retailers must communicate pricing information to small customers. It was introduced in response to confusing discounting practices by electricity retailers which made it difficult for consumers to compare electricity offers made by different retailers. The purpose of the Code is to increase transparency in the retail electricity market and allow consumers to easily compare offers and identify which offers in the market represent the best deal for them.

4. In the Relevant Period, the retail electricity market in the eastern states of Australia and South Australia was particularly volatile. The National Electricity Market was suspended between 15 and 23 June 2022, various smaller energy retailers failed and exited the market, and prices were increased.
5. The consequences of EnergyAustralia's conduct are set out in section E ('alleged harm') below.

B. IMPORTANT FACTS GIVING RISE TO THE CLAIM

Key provisions of the Code

6. The Code defines the **reference price** for a financial year, in relation to supplying electricity in a distribution region to a small customer of a particular type, as the per-customer annual price determined by the Australian Energy Regulator under s 16(1)(b) for the year in relation to the supply (s 5). The Code requires retailers, in communications with customers including advertising and publishing price offers, to clearly state the difference between the reference price and their prices and discounts as a percentage of the reference price (s 12). The reference price also operates to set a cap on 'standing offer prices', in that standing offer prices must be set such that, were a small customer to be supplied in a financial year at those prices with the 'model annual usage', the total amount the customer would have to pay for the supply would not exceed the reference price (s 10).
7. The **lowest possible price** means the total amount a 'representative customer' would be charged for the supply of electricity in the financial year at the offered prices, assuming that the conditions on all 'conditional discounts' (if any) mentioned in the communication were met (ss 5 and 12(4)).
8. The **unconditional price** means the total amount a representative customer would be charged for the supply of electricity in the financial year at the offered prices, disregarding any conditional discounts (ss 5 and 12(4)).
9. An electricity retailer must not communicate the offered prices to a small customer of the type specified in s 12(1) unless the communication meets the requirements of s 12(3) (s 12(2)).
10. Communications must clearly and conspicuously state (s 12(7)):
 - 10.1. the difference between the reference price and the unconditional price, expressed as a percentage of the reference price (s 12(3)(a)); and
 - 10.2. the lowest possible price (s 12(3)(c)),
 making it clear that those matters relate to a representative customer.

Price Change Communications

11. Between 20 June 2022 and 28 September 2022, EnergyAustralia sent 591,924 price change communications to 566,827 of its small customers to notify them of changes to its electricity prices (the **Price Change Communications**). More than 95% of the customers who received the Price Change Communications were residential customers.
12. The Price Change Communications did not state the lowest possible price as required by the Code, and each referred to a price described by EnergyAustralia as the 'estimated annual price' for an 'average' customer of the type specified.
13. The dollar amount referred to in each Price Change Communication as the 'estimated annual price':
 - 13.1. was the reference price for the 2022-23 financial year in relation to supplying electricity to a small customer of the type specified, in the distribution region specified; and
 - 13.2. was not the lowest possible price.
14. Further, in each Price Change Communication, EnergyAustralia represented to the recipient of the communication that the estimated annual price of its offer for an average customer of the type specified, using the amount of electricity specified, on the tariff specified and in the area specified, was the dollar amount referred to as the 'estimated annual price' (the **Estimated Annual Price Representations**).
15. By the Estimated Annual Price Representations, EnergyAustralia misrepresented the estimated annual price of electricity for an average customer with the characteristics identified in each Price Change Communication, because the dollar amount referred to was not the estimated annual price of electricity for an average customer with those characteristics, but rather was the reference price referred to in paragraph 13.1 above.

Website Offers

16. Between 1 July 2022 and 27 September 2022, EnergyAustralia published 27 electricity price offers on its website (the **Website Offers**).
17. The Website Offers each comprised offers for which the lowest possible price was the same as the reference price. The reference price was stated in each of the Website Offers.
18. The Website Offers did not state, alternatively did not clearly and conspicuously state, the lowest possible price.

19. Further, the Website Offers did not state, alternatively did not clearly and conspicuously state, the difference between the reference price and the unconditional price, expressed as a percentage of the reference price.
20. Approximately 2,157 customers subscribed through EnergyAustralia's website to the Website Offers, and there were more than 223,000 unique visits to the webpages on which the Website Offers were displayed.

C. SUMMARY OF RELIEF SOUGHT FROM THE COURT

21. The ACCC claims the relief set out in the accompanying Originating Application, which includes declarations, pecuniary penalties, compliance orders, orders for a corrective notice, and orders for costs.

D. PRIMARY LEGAL GROUNDS FOR RELIEF SOUGHT

22. By failing to state, or alternatively failing to clearly and conspicuously state, the lowest possible price in the Price Change Communications, EnergyAustralia contravened s 12(2) of the Code and s 51ACB of the CCA.
23. Further, the Price Change Communications were made in trade or commerce, and were also made in connection with the supply or possible supply of goods or in connection with the promotion by any means of the supply or use of goods. By making the Estimated Annual Price Representations in the Price Change Communications, EnergyAustralia:
 - 23.1. engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18 of the ACL; and
 - 23.2. made a false or misleading representation with respect to the price of goods in contravention of s 29(1)(i) of the ACL.
24. By failing to state, or alternatively failing to clearly and conspicuously state:
 - 24.1. the lowest possible price; and
 - 24.2. the difference between the reference price and the unconditional price, expressed as a percentage of the reference price;in the Website Offers, EnergyAustralia contravened s 12(2) of the Code and s 51ACB of the CCA.

E. ALLEGED HARM

25. By the conduct in contravention of s 12(2) of the Code and s 51ACB of the CCA in the Price Change Communications, EnergyAustralia made it difficult for the recipients of

the communications accurately to compare their current electricity plan with offers from other retailers if they wished to determine whether or not to switch retailers, and also made it difficult for those customers accurately to assess the prices which they were ultimately likely to be charged by EnergyAustralia if they remained with EnergyAustralia and thereby to make informed choices about energy retailers.

26. By the conduct in contravention of ss 18 and 29(1)(i) of the ACL in the Price Change Communications:

26.1. Some of the customers who received a Price Change Communication in which the actual estimated annual price for an average customer with the characteristics identified in that Price Change Communication exceeded the dollar amount referred to as the 'estimated annual price' may, as a consequence, have remained on their current offer with EnergyAustralia rather than switching to another offer from EnergyAustralia or an offer from another retailer with prices that may ultimately have been lower for them.

26.2. Some of the customers who received a Price Change Communication in which the actual estimated annual price for an average customer with the characteristics identified in that Price Change Communication was less than the amount referred to as the 'estimated annual price' may, as a consequence, have switched to another offer from EnergyAustralia or an offer from another retailer, rather than remain on their current offer with EnergyAustralia when EnergyAustralia's prices may ultimately have been lower for them.

27. By the conduct in contravention of s 12(2) of the Code and s 51ACB of the CCA in the Website Offers, EnergyAustralia made it difficult for potential customers accurately to compare its electricity price offers with offers from other retailers if they wished to determine whose offer to accept, and also made it difficult for potential customers accurately to assess the prices which they were ultimately likely to be charged by EnergyAustralia if they chose to accept EnergyAustralia's offer.

28. Further, by the conduct in contravention of s 12(2) of the Code and s 51ACB of the CCA in both the Price Change Communications and the Website Offers, EnergyAustralia caused harm to customers by denying them the full benefits of the Code, which was intended to allow consumers to easily compare offers and identify the best electricity deal for them.

F. OTHER

29. The Applicant does not consider that any of the issues in this Concise Statement are suitable for a report by a referee under s 54A of the *Federal Court of Australia Act 1976*.

Date: 22 September 2023



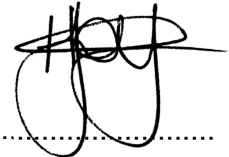
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Helen Joyce
Partner
Baker & McKenzie
Solicitor for the Applicant

This concise statement was prepared by S Parmenter KC and C Cunliffe of counsel.

CERTIFICATE OF LAWYER

I, Helen Joyce, certify to the Court that, in relation to the concise statement filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the concise statement.

Date: 22 September 2023

A handwritten signature in black ink, appearing to be 'HJ', written over a horizontal dotted line.

Helen Joyce
Partner
Baker & McKenzie
Solicitor for the Applicant