

# Released under FOI

## NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 9/07/2018 1:22:56 PM AEST and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

### Filing and Hearing Details

Document Lodged:	Originating Application - Form 15 - Rule 8.01(1)
File Number:	VID812/2018
File Title:	AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v AMAYSIM ENERGY PTY LTD (TRADING AS CLICK ENERGY)
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	First Case Management Hearing
Time and date for hearing:	03/08/2018, 10:15 AM
Place:	Please check Daily Court List for details



Dated: 9/07/2018 3:34:42 PM AEST

*Wendy Soden*  
Registrar

### Important Information

As required by the Court's Rules, 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 Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

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Form 15  
Rule 8.01(1); 8.04(1)

## Originating application

No. VID of 2018

Federal Court of Australia  
District Registry: Melbourne  
Commercial and Corporations NPA  
Regulator and Consumer Protection sub-area

**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION**  
Applicant

**AMAYSIM ENERGY PTY LTD ACN 116 567 492 (TRADING AS CLICK ENERGY)**  
Respondent

To the Respondent

The Applicant applies for the relief set out in this application.

The Court will hear this application, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing

Place: Federal Court of Australia  
Owen Dixon Law Courts  
Level 7  
305 William Street  
Melbourne VIC 3000

3462-0823-6554v3

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Filed on behalf of	AUSTRALIAN COMPETITION AND CONSUMER COMMISSION, Applicant		
Prepared by	Daniel Marquet, Barbara Bell and Rebecca Burns		
Law firm	Corrs Chambers Westgarth		
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Address for service	Level 22, 567 Collins Street, Melbourne, Victoria 3000		

[Version 2 form approved 09/05/2013]

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2

The Court ordered that the time for serving this application be abridged to

.....  
.....

Date:

Signed by an officer acting with the authority of  
the District Registrar



This is an application for:

- (a) declaratory relief under s 21 of the *Federal Court of Australia Act 1976* (Cth) (**FCA**);
- (b) orders for pecuniary penalties under s 224 of the *Australian Consumer Law* (**ACL**), which is Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (**CCA**);
- (c) orders for injunctive relief under s 232 of the ACL;
- (d) orders for non-party consumer redress under s 239 of the ACL;
- (e) compliance program orders under s 246(2) of the ACL;
- (f) publication orders under ss 246(2) and 247(1) of the ACL;
- (g) costs under s 43 of the FCA; and
- (h) such further or other orders as the Court deems fit,

in respect of misleading or deceptive conduct engaged in, and false or misleading representations made by the Respondent, Amaysim Energy Pty Ltd ACN 116 567 492 (trading as Click Energy) (**Click**) in contravention of ss 18, 29(1)(g), 29(1)(i) and 29(1)(m) of the ACL about the discounts and savings that a consumer could expect to receive on the price paid for electricity or gas (**energy**) if he or she commenced an energy plan with Click.

The legislative basis of the Court's jurisdiction to hear the present case is found at s 138 of the CCA and s 21 of the FCA.

## **Details of claim**

On the grounds stated in the accompanying Concise Statement, the Applicant (**ACCC**) claims:

## **Declarations**

### *Discount Representations*

- 1 A declaration that Click in trade or commerce, in connection with the supply or possible supply of energy or in connection with the promotion of the supply of energy to consumers;
- (a) made false or misleading representations that the supply of energy under the relevant plans had benefits in contravention of section 29(1)(g) of the ACL;
  - (b) made false or misleading representations with respect to the price of energy under the relevant plans in contravention of section 29(1)(i) of the ACL;
  - (c) made false or misleading representations with respect to the conditions relating to the supply of energy under the relevant plans in contravention of section 29(1)(m) of the ACL; and/or
  - (d) engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of s 18 of the ACL;



by:

- (e) between around 1 October 2017 to around March 2018, making representations that under its market offer energy plans, consumers in Victoria and Queensland would obtain a significant discount off Click's energy usage and supply charges in each bill that was paid by the due date,

when in fact:

- (f) there was no standard set of rates for energy usage and supply charges for all customers of Click in Victoria or Queensland;
- (g) the percentage discount was calculated based on Click's market offer rates, which, for the relevant plans, were significantly higher than Click's standing offer rates (by variances of up to 41% for usage rates and up to 8.9% for supply rates);
- (h) when compared with the Click rates for standing offers also available to consumers, the effective discounts were much smaller than promoted and some consumers received no discount; and/or
- (i) Click applied its 'pay on time' discounts as a credit against the charges on the next bill, and therefore:
  - (i) a consumer who paid a bill on time did not receive any reduction in the charges payable on *that* bill; and
  - (ii) a consumer who paid their final bill on time did not receive any discount for paying that bill on time as there was no subsequent bill against which the pay on time discount could be applied.

### *Savings Representations*

- 2 A declaration that Click in trade or commerce, in connection with the supply or possible supply of energy or in connection with the promotion of the supply of energy to consumers;
  - (a) made false or misleading representations that the supply of energy under the relevant plans had benefits in contravention of section 29(1)(g) of the ACL;
  - (b) made false or misleading representations with respect to the price of energy under the relevant plans in contravention of section 29(1)(i) of the ACL; and
  - (c) made false or misleading representations with respect to the conditions relating to the supply of energy under the relevant plans in contravention of section 29(1)(m) of the ACL; and
  - (d) engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of s 18 of the ACL;

by:



(e) between around 1 October 2017 and 21 November 2017, making false or misleading representations that, consumers in Victoria and Queensland could save up to a specified dollar amount on their annual energy charges compared to their current energy plan with another retailer if they switched to a plan with Click; and, from 22 November 2017 to the date of the Court's order, if they also paid their bills on time, when in fact:

- (f) Click did not know what a particular consumer was paying under their current plan with another retailer, so it did not have reasonable grounds to estimate the consumer's annual savings on switching to Click;
- (g) Click did not undertake any comparison between a particular consumer's annual energy charges under their existing energy plan with another retailer and the annual energy charges they would pay on switching to Click;
- (h) the specified dollar amounts were estimated annual savings that a Click market offer consumer was to obtain by paying on time compared with paying after the due date, rather than the estimated savings that a consumer that switched to Click from another retailer would obtain in comparison with the annual energy charges under their existing energy plan with another retailer; and/or
- (i) Click applied its 'pay on time' discounts as a credit against the charges on the next bill, and therefore:
  - (i) a consumer who paid a bill on time did not receive any reduction in the charges payable on *that* bill; and
  - (ii) a consumer who paid their final bill on time did not receive any discount for paying that bill on time as there was no subsequent bill against which the pay on time discount could be applied.

3 A declaration that, between 1 October 2018 and the date of the Court's order, Click in trade or commerce, engaged in conduct that was misleading or deceptive, and/or likely to mislead or deceive, in contravention of s 18(1) of the ACL, by reason that it did not adequately disclose to consumers that Click's 'pay on time' discounts are not applied to the current bill but rather are credited against the charges on the next bill.

#### **Pecuniary Penalty**

4 An order that Click pay to the Commonwealth of Australia a pecuniary penalty as the Court determines appropriate in respect of each act or omission constituting a contravention of sections 29(1)(g), 29(1)(i) and/or 29(1)(m) of the ACL declared by the Court.

#### **Injunction**

5 An injunction restraining Click for a period of three years from the date of the Court's order, whether by itself, its servants, agents, affiliates or howsoever otherwise, in trade or



commerce, and in connection with the supply of energy, from making any representations that:

- (a) under its market offer energy plans, consumers would obtain a significant discount off Click's energy usage and supply charges in each bill that was paid by the due date, where the energy usage and supply rates under that energy plan are higher than the energy usage and supply rates under its standing offer energy plans such that the effective discount received by consumers would be smaller than promoted; and
- (b) consumers could save up to a specified dollar amount on their annual energy charges if:

- (i) they switched to a plan with Click; or
- (ii) they switched to a plan with Click and also paid their bills on time,

where Click:

- (iii) does not know what a particular consumer is paying under their current plan with another retailer;
- (iv) has not undertaken any comparison between a particular consumer's annual energy charges under their existing energy plan with another retailer and the annual energy charges they would pay on switching to Click; and/or
- (v) the specified dollar amounts are estimated savings that a Click market offer consumer was to obtain by paying on time compared with paying after the due date, rather than the estimated savings that a consumer that switched to Click from another retailer would obtain in comparison with the annual energy charges under their existing energy plan with another retailer.

### **Non-party consumer redress**

6 An order that, for a period of 1 year from the date of the Court's order, Click be prohibited from:

- (a) charging a fee for; or
- (b) passing on any of the costs associated with,

the transfer of a residential or small business consumer who entered into a Click market offer plan for the supply of energy in Victoria or Queensland from 1 October 2017 to the date of the Court's order (**Non-Party Consumers**) to a new energy retailer.



## Corrective Publication Orders

- 7 An order that Click, at its own expense, within 21 days of the date of the Court's order, cause a letter in the terms of **Annexure A** to this Application to be published and sent by registered mail and email to all Non-Party Consumers.
- 8 An order that within 21 days of the date of the Court's order and for a period of 120 days, Click must at its own expense publish, or cause to be published:
- (a) in a prominent place on the homepage of the website located at the URL <http://www.clickenergy.com.au> a link, in the typeface of at least 14 point Times New Roman, reading "False and Misleading Conduct by Click Energy – Corrective Notice Ordered by Federal Court of Australia" which directs consumers to a corrective notice in the form and terms set out in **Annexure B** to this Application;
  - (b) a corrective advertisement in the form of the Notice set out in **Annexure B** to this Application or as otherwise determined by the Court in each of the major metropolitan newspapers in Victoria and Queensland, and ensure that each advertisement complies with the following specifications:
    - (i) is placed within the first 10 pages of the newspaper;
    - (ii) is of a size at least 20 centimetres by 7 columns and/or of a size no less than one half of a page in the newspaper;
    - (iii) has a banner font of sans serif 12 point, bold;
    - (iv) has a headline font of 12 point, bold;
    - (v) contains in the body of text font that is no less than 11 point size; and
    - (vi) has the ACCC and Commonwealth logos of at least 20 millimetres in height and centered.

## Compliance Program

11. An order that Click, at its own expense:
- (a) establish, within 90 days of the date of the Court's order, a Consumer and Competition Compliance Program which meets the requirements set out in **Annexure C** to this Application and maintain the compliance program for three years from the date on which it is established; or
  - (b) if it already maintains an existing Consumer and Competition Compliance Program:
    - (i) within 90 days of the date of the Court's order, review the existing compliance program and make any amendments necessary to ensure that it meets the requirements set out in **Annexure C** to this Application; and



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8

- (ii) maintain this program for 3 years from the date on which the amendments referred to in paragraph (i) are made.

## Other orders

- 9 An order that the respondents pay the ACCC's costs of and incidental to the proceeding.  
10 Such further or other relief as the Court deems fit.

## Estimate of length of trial

The estimated length of the trial of this application is 2 days.

## Applicant's address

The Applicant's address for service is:

Place: Level 22  
567 Collins Street  
Melbourne Vic 3000

Email: [daniel.marquet@corrs.com.au](mailto:daniel.marquet@corrs.com.au)

## Service on the Respondent

It is intended to serve this application on the Respondent.

Date: 9 July 2018

A handwritten signature in blue ink, appearing to read 'D.J.M.', written over a horizontal line.

Signed by Daniel John Marquet  
Lawyer for the Applicant



## Annexure A

[Click letter head]

[Customer name  
Address]

Following action by the Australian Competition and Consumer Commission (**ACCC**), the Federal Court of Australia has found that Click Energy contravened the Australian Consumer Law by making false or misleading representations and engaging in misleading and deceptive conduct.

The false, misleading or deceptive conduct concerned the discounts and savings that residential and small business consumers of electricity and/or gas in Victoria and Queensland could obtain through its energy plans if they commenced an energy plan with Click between 1 October 2017 and [insert date of Order].

As a result, residential and small business consumers who entered into a number of Click energy plans in late 2017 to [insert date of Order] effectively received reduced discounts and savings from the commencement of their plan.

**If you commenced a market offer energy plan between 1 October 2017 and [the date of the Order] for the supply of electricity and/or gas to residential or small business premises in Victoria or Queensland please note that until [insert date one year from order], Click is prohibited from charging you a fee for, or passing on any costs associated with, switching to a new retailer, including but not limited to the cost of a final meter reading.**

The Federal Court ordered that this letter be sent. More information in relation to the action taken by the ACCC is available on the ACCC's website at [www.accc.gov.au](http://www.accc.gov.au).



## Annexure B

### CORRECTIVE NOTICE

**Published by order of the Federal Court of Australia**

**[insert Click logo]**

**False or misleading representations and misleading and deceptive conduct by Click Energy**

Following action by the Australian Competition and Consumer Commission (ACCC), the Federal Court of Australia has declared that Amaysim Energy Pty Ltd (trading as Click Energy) (Click Energy) contravened the Australian Consumer Law by making false or misleading representations and engaging in misleading and deceptive conduct.

**Click's conduct**

The false, misleading or deceptive conduct concerned the discounts and savings that residential and small business consumers of electricity and/or gas in Victoria and Queensland could obtain through its energy plans if they commenced an energy plan with Click between 1 October 2017 and [insert date of Order].

As a result, residential and small business consumers who entered into a number of Click energy plans in late 2017 to [insert date of Order] effectively received reduced discounts and savings from the commencement of their plan.

The Court has ordered Click to:

- pay a penalty of [insert amount] and the ACCC's costs of the proceeding;
- refrain from engaging in similar conduct for a period of 3 years;
- publish this corrective notice; and
- not charge a fee or pass on any costs associated with affected consumers transferring to a new energy retailer.

**If you commenced a market offer energy plan between 1 October 2017 and [the date of the Order] for the supply of electricity and/or gas to residential or small business premises in Victoria or Queensland please note that until [insert date one year from order], Click is prohibited from charging you a fee for, or passing on any costs associated with, switching to a new retailer, including but not limited to the cost of a final meter reading.**

More information in relation to the action taken by the ACCC is available on the ACCC's website at [www.accc.gov.au](http://www.accc.gov.au).



## Annexure C

### COMPETITION AND CONSUMER COMPLIANCE PROGRAM

Amaysim Energy Pty Ltd ACN 116 567 492 (trading as Click Energy) (**Click**) will establish a Competition and Consumer Compliance Program (**Compliance Program**) that complies with each of the following requirements:

#### Appointments

- 1 Within 30 days of the date of the Order of the Court (**Court Order**) coming into effect, Click will appoint a Director or a Senior Manager of the business to be responsible for the development, implementation and maintenance of the Compliance Program (**Compliance Officer**).
- 2 Within two months of the date of the Court Order coming into effect, Click will appoint a suitably qualified internal or external compliance professional with expertise in competition and consumer law (**the Compliance Advisor**).
- 3 Click will instruct the Compliance Advisor to conduct a *Competition and Consumer Act 2010 (Cth)* (**CCA**) risk assessment (**Risk Assessment**) within two months of being appointed as the Compliance Advisor.
- 4 Click will use its best endeavours to ensure that the Risk Assessment covers the following matters, to be recorded in a written report (**Risk Assessment Report**):
  - (a) identify the areas where Click is at risk of breaching section 18, and Division 2 of Part 3-2 of the *Australian Consumer Law (ACL)*, being Schedule 2 to the CCA;
  - (b) assess the likelihood of these risks occurring;
  - (c) identify where there may be gaps in Click's existing procedures for managing these risks; and
  - (d) provide recommendations for action having regard to the assessment.

#### Compliance Policy

- 5 Click will, within 30 days of the date of the Court Order, issue a policy statement outlining its commitment to compliance with the CCA (**the Compliance Policy**).
- 6 Click will ensure that the Compliance Policy:
  - (a) is written in plain language;
  - (b) contains a statement of commitment to compliance with the CCA;
  - (c) contains a requirement for all staff to report any Compliance Program related issues and CCA compliance concerns to the Compliance Officer;



- (d) contains a clear statement that Click will take action internally against any persons who are knowingly or recklessly concerned in a contravention of the CCA and will not indemnify them.

## Complaints Handling System

- 7 Click will ensure that the Compliance Program includes a competition and consumer law complaints handling system capable of identifying, classifying, storing and responding to competition and consumer law complaints (**Complaints Handling System**).

## Staff Training

- 8 Click will ensure that the Compliance Program includes a requirement for regular (at least once a year) training for all employees, representative and agents of the Company, whose duties could result in them being concerned with conduct that may contravene section 18, and Division 2 of Part 3-2 of the ACL.
- 9 Click will ensure that the staff training is conducted by a suitably qualified compliance professional or legal practitioner with expertise in competition and consumer law.
- 10 Click will ensure that the Compliance Program includes a requirement that awareness of competition and consumer compliance issues forms part of the induction of all new directors, officers, employees, representatives and agents, whose duties could result in them being concerned with conduct that may contravene sections 18, and Division 2 of Part 3-2 of the ACL.

## Reports to Board/Senior Management

- 11 Click will ensure that the Compliance Officer reports to the Board and/or senior management every six months on the continuing effectiveness of the Compliance Program.

## Compliance Review

- 12 Click shall, at its own expense, within three months of the date of the Court Order, cause an annual review of the Compliance Program (**the Review**) to be carried out in accordance with each of the following requirements:
  - (a) **Scope of Review:** the Review should be broad and rigorous enough to provide Click and the ACCC with:
    - (i) a verification that Click has in place a Compliance Program that complies with each of the requirements detailed in paragraphs 1-11 above; and
    - (ii) the Compliance Reports detailed at paragraph 13 below.
  - (b) **Independent Reviewer** – Click will ensure that each Review is carried out by a suitably qualified, independent compliance professional with expertise in competition and consumer law (**the Reviewer**). The Reviewer will qualify as independent on the basis that he or she:



- (i) did not design or implement the Compliance Program;
  - (ii) is not a present or past staff member or director of Click;
  - (iii) has not acted and does not act for, and does not consult and has not consulted to, Click in any competition and consumer law matters, other than performing Reviews under this Court Order; and
  - (iv) has no significant shareholding or other interest in Click.
- (c) **Evidence** – Click will use its best endeavours to ensure that each Review is conducted on the basis that the Reviewer has access to all relevant sources of information in Click’s possession or control, including without limitation:
- (i) the ability to make enquiries of any officers, employees, representatives, and agents of Click;
  - (ii) documents relating to the Risk Assessment, including the Risk Assessment Report;
  - (iii) documents relating to Click’s Compliance Program, including documents relevant to Click’s Compliance Policy, Complaints Handling System, Staff Training and induction program; and
  - (iv) any reports made by the Compliance Officer to the Board or senior management regarding Click’s Compliance Program.
- (d) Click will ensure that a Review is completed within one year from the date of this Court Order, and that a subsequent Review is completed within each year for three years.

## Compliance Reports

- 13 Click will use its best endeavours to ensure that in within 30 days of a Review, the Reviewer includes the following findings of the Review in a report to Click (**the Compliance Report**):
- (a) whether the Compliance Program of Click includes all the elements detailed in paragraphs 1-11 above, and if not, what elements need to be included or further developed;
  - (b) whether the Compliance Program adequately covers the parties and areas identified in the Risk Assessment, and if not, what needs to be further addressed;
  - (c) whether the Staff Training and induction is effective, and if not, what aspects need to be further developed;
  - (d) whether Click’s Complaints Handling System is effective, and if not, what aspects need to be further developed;



- (e) whether there are any material deficiencies in Click's Compliance Program, or whether there are or have been instances of material non-compliance with the Compliance Program (**Material Failure**), and if so, recommendations for rectifying the Material Failure/s.<sup>1</sup>

## **Click response to Compliance Reports**

- 14 Click will ensure that the Compliance Officer, within 14 days of receiving the Compliance Report:
- (a) provides the Compliance Report to the Board or relevant governing body;
  - (b) where a Material Failure has been identified by the Reviewer in the Compliance Report, provides a report to the Board or relevant governing body identifying how Click can implement any recommendations made by the Reviewed in the Compliance Report to rectify the Material Failure;
- 15 Click will implement promptly and with due diligence any recommendations made by the Reviewer in the Compliance Report to address a Material Failure.

## **Reporting Material Failure to the ACCC**

- 16 Where a Material Failure has been identified by the Reviewer in the Compliance Report, Click will:
- (a) provide a copy of the Compliance Report to the ACCC within 14 days of the Board or relevant governing body receiving the Compliance Report;
  - (b) inform the ACCC of any steps that have been taken to implement the recommendations made by the Reviewer in the Compliance Report; or
  - (c) otherwise outline the steps Click proposes to take to implement the recommendations and will then inform the ACCC once those steps have been implemented.

## **Provision of Compliance Program documents to the ACCC**

- 17 Click will maintain a record of and store all documents relating to and constituting the Compliance Program for a period not less than five years.
- 18 If requested by the ACCC during the period of five years following the date of this Court Order Click will, at its own expense, cause to be produced and provided to the ACCC copies of all documents constituting the Compliance Program, including:

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<sup>1</sup> Material failure means a failure, that is non-trivial and which is ongoing or continued for a significant period of time, to:

- Incorporate a requirement of the Undertaking in the design of the Compliance Program, for example, if a Complaints Handling System did not provide an mechanism for responding to complaints; or
- Comply with a fundamental obligation in the implementation of the Compliance Program, for example if no Staff Training has been conducted within the Annual Review period.



- (a) the Compliance Policy;
- (b) the Risk Assessment report;
- (c) an outline of the Complaints Handling System;
- (d) Staff Training materials and induction materials
- (e) all Compliance Reports that have been completed at the time of the request;
- (f) copies of the reports to the Board and/or senior management referred to in paragraphs 11 and 16.

#### **ACCC Recommendations**

- 19 Click will implement promptly and with due diligence any recommendations that the ACCC may make that the ACCC deems reasonably necessary to ensure that Click maintains and continues to implement the Compliance Program in accordance with the requirements of this Court Order.