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NOTICE OF FILING

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. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Concise Statement
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



A handwritten signature in blue ink, appearing to read 'Wanda Soden'.

Dated: 9/07/2018 3:34:46 PM AEST

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 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.



Concise Statement

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

A IMPORTANT FACTS GIVING RISE TO THE CLAIM

1. The Applicant (**ACCC**) alleges that the Respondent (**Click**), an online retailer of electricity and gas (together, **energy**) made false or misleading representations about discounts and savings that consumers could obtain through its energy plans, and engaged in misleading or deceptive conduct, in contravention of the *Australian Consumer Law (ACL)*.
2. Click supplies electricity to residential and small business consumers in Victoria, South Australia, New South Wales and Queensland, and gas to consumers in Victoria and New South Wales. It promotes energy offers through its website, clickenergy.com.au (**Click website**).
3. Gas and electricity are goods, as defined in s 2(1) of the ACL. They are supplied to consumers under either a Standard Retail Contract (**standing offer**) or a Market Retail Contract (**market offer**).¹
4. A standing offer is a contract for the supply of energy with set terms and conditions prescribed by the Energy Retail Laws. Under market offers, energy retailers are able to vary certain terms and conditions and provide benefits to consumers, such as pay on time discounts, which are not available under standing offers.

¹ In Queensland, South Australia and New South Wales, energy supply is governed by state legislation adopting the *National Energy Retail Law*; in Victoria energy supply is governed by the *Energy Retail Code* (together, **Energy Retail Laws**).

Filed on behalf of	Australian Competition and Consumer Commission, Applicant		
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5. The amount that a customer pays for their supply of energy is based on the amount of energy they use, the price for each unit of energy used (**usage rate**) and a daily supply rate.
6. Click did not have a single set of usage and supply rates for its standing and market offers. The usage and supply rates under Click's market offers varied considerably and were often much higher than the rates charged under Click's standing offer.
7. From at least October 2017, Click promoted various discounts and annual savings amounts that consumers would receive if they switched to Click and paid their bills on time.
8. The purported discounts and savings were based on the market offer rates for usage and supply which, as stated above, varied considerably and were often much higher than the rates charged under Click's standing offer.
9. Click sought to induce consumers to switch to Click Energy on the promise of these headline discounts and savings.

Discount Representations

10. Between around 1 October 2017 and March 2018, Click represented 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 (**Discount Representations**).
11. Click made the representations by stating on the Click website that consumers who accepted market offers would receive a percentage discount (ranging from 7% to 29%) off their usage and supply charges for paying their bill on time. Examples of statements on the Click website are set out in **column B of Annexure A**.
12. The Discount Representations were false, misleading or deceptive, and/or likely to mislead or deceive, because:
 - (a) there was no single set of usage and supply rates for energy which applied to standing and/or market offers for all customers of Click in Victoria or Queensland;
 - (b) the percentage discount was calculated based on Click's market offer rates, which, for the relevant plans, varied considerably and 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); and/or
 - (c) 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.

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Savings Representations

13. Between around 1 October 2017 and 21 November 2017, the Click website contained statements about estimated annual savings (ranging from \$84 to \$946) for consumers who switched to Click. Since 22 November 2017, the statements on the website have included the words 'pay on time'. By making these statements, Click has represented 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 (since 22 November 2017) if they also paid their bills on time (**Savings Representations**). Examples of statements on the Click website are set out in **columns C and D of Annexure A**.
14. The Savings Representations were false, misleading or deceptive, and/or likely to mislead or deceive, because:
 - (a) 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 (and the ACCC relies on s 4 of the ACL);
 - (b) 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; and/or
 - (c) 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.

Click's Pay on Time Credit Condition

15. At all relevant times, under Click's 'pay on time' policy for market offers, a consumer who pays a bill by the due date is eligible for a discount calculated based on the consumer's energy charges shown on that bill. However, the discount is not applied to the current bill but rather is credited against the charges on the next bill (**Pay on Time Credit Condition**).
16. In addition to the reasons set out above, the Discount Representations, and the Savings Representations were also false, misleading or deceptive, and/or likely to mislead or deceive, because:
 - (a) a consumer who paid a bill on time did not receive any reduction in the charges payable on *that* bill; and

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(b) 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.

17. Click also engaged in conduct that was misleading or deceptive, and/or likely to mislead or deceive, because it did not adequately disclose the Pay on Time Credit Condition to consumers.

B RELIEF SOUGHT FROM THE COURT

18. The ACCC seeks the relief set out in the accompanying Originating Application, which comprises injunctions, declarations, corrective publication orders, compliance program orders, pecuniary penalties and costs.

C PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

19. For the reasons set out in paragraphs 10 to 17, Click, by making the Discount Representations and the Savings Representations, in trade or commerce, engaged in conduct which was misleading or deceptive or likely to mislead or deceive in contravention of s 18(1) of the ACL; and/or made false or misleading representations in connection with the benefits associated with, conditions relating to, and/or the price of, energy supplied by Click in contravention of ss 29(1)(g), (i) and/or (m) of the ACL.

20. In failing to adequately disclose the Pay on Time Credit Condition, Click also contravened s 18 of the ACL.

D ALLEGED HARM SUFFERED

21. As a result of the making of the Discount Representations, the Savings Representations, and the failure to adequately disclose the Pay on Time Credit Condition, consumers were or were likely to be misled about the discounts and/or savings that would apply under the Click energy plans.

22. The harm suffered by the consumers includes:

- (a) the difference between the prices they were (and are still) charged under Click energy plans and the prices that alternative retailers would have charged;
- (b) the loss, or serious distortion, of genuine consumer choice in the ability to select the most suitable and cost effective energy plan; and
- (c) the cash flow difficulties for customers who had to pay a greater amount than expected because their discounts were applied to a subsequent bill rather than the current bill, and the possibility that some consumers would not have been

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able to pay their bill by the due date, which would result in them not receiving a credit on their subsequent bill.

Date: 9 July 2018



.....
Signed by Daniel John Marquet, a partner of **Corrs Chambers Westgarth**
Lawyers for the Applicant

This Concise Statement was prepared by Daniel Marquet, Barbara Bell and Rebecca Burns of Corrs Chambers Westgarth, and settled by Oren Bigos of Counsel.

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ANNEXURE A

Examples of representations and comparisons with standing offer rates

- 1 Column A sets out details of energy plans offered by Click.
- 2 Column B sets out examples of the Discount Representations.
- 3 Columns C and D set out examples of the Savings Representations.
- 4 Column E compares the supply rate under the relevant energy plan with the Click standing offer, at the relevant time.
- 5 Column F compares the usage rate under the relevant energy plan with the Click standing offer, at the relevant time.

No.	A. Energy plan	B. Click Discount Representations	C. Click Savings Representations (March 2017 – 21 November 2017)	D. Click Savings Representations (22 November to filing)	E. Supply rate compared with Click standing offer at the relevant time	F. Usage rate compared with Click standing offer at the relevant time
Victoria						
1.	Click Topaz Electricity	29% prompt-payment off usage & supply charges when you paid your bill on time	<p><i>Switch to Click Energy in just 4 easy steps</i></p> <p>1. Find a Plan 2. Enter Your Details 3. Select Options 4. Confirm Your Switch</p> <p>Estimated Annual Savings^ \$417</p>	<p><i>Switch to Click Energy in just 4 easy steps</i></p> <p>1. Find a Plan 2. Enter Your Details 3. Select Options 4. Confirm Your Switch</p> <p>Estimated Annual pay on time Savings^ \$417</p>	4% lower	25% higher

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No.	A. Energy plan	B. Click Discount Representations	C. Click Savings Representations (March 2017 – 21 November 2017)	D. Click Savings Representations (22 November to filing)	E. Supply rate compared with Click standing offer at the relevant time	F. Usage rate compared with Click standing offer at the relevant time
2.	Click Shine Electricity	7% discount off your usage & supply charges	<p><i>Switch to Click Energy in just 4 easy steps</i></p> <p>1. <i>Find a Plan</i> 2. <i>Enter Your Details</i> 3. <i>Select Options</i> 4. <i>Confirm Your Switch</i></p> <p>...</p> <p>Estimated Annual Savings^A \$91</p>	<p><i>Switch to Click Energy in just 4 easy steps</i></p> <p>1. <i>Find a Plan</i> 2. <i>Enter Your Details</i> 3. <i>Select Options</i> 4. <i>Confirm Your Switch</i></p> <p>...</p> <p>Estimated Annual pay on time Savings^A \$91</p>	Equal	24% higher
3.	Click Shine Bonus	20% discount off your usage & supply charges	<p><i>Switch to Click Energy in just 4 easy steps</i></p> <p>1. <i>Find a Plan</i> 2. <i>Enter Your Details</i> 3. <i>Select Options</i> 4. <i>Confirm Your Switch</i></p> <p>...</p> <p>Estimated Annual Savings^A \$188</p>	<p><i>Switch to Click Energy in just 4 easy steps</i></p> <p>1. <i>Find a Plan</i> 2. <i>Enter Your Details</i> 3. <i>Select Options</i> 4. <i>Confirm Your Switch</i></p> <p>...</p> <p>Estimated Annual pay on time Savings^A \$188</p>	Equal	24% higher

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No.	A. Energy plan	B. Click Discount Representations	C. Click Savings Representations (March 2017 – 21 November 2017)	D. Click Savings Representations (22 November to filing)	E. Supply rate compared with Click standing offer at the relevant time	F. Usage rate compared with Click standing offer at the relevant time
4.	Click Business Prime	14% pay on time discount off usage and supply charges	<p><i>Switch to Click Energy in just 4 easy steps</i></p> <p>1. Find a Plan 2. Enter Your Details 3. Select Options 4. Confirm Your Switch</p> <p>...</p> <p>Estimated Annual Savings^A \$946</p>	<p><i>Switch to Click Energy in just 4 easy steps</i></p> <p>1. Find a Plan 2. Enter Your Details 3. Select Options 4. Confirm Your Switch</p> <p>...</p> <p>Estimated Annual pay on time Savings^A \$946</p>	Equal	24% higher
5.	Click Magenta Gas	21% prompt payment off usage and supply charges	<p><i>Switch to Click Energy in just 4 easy steps</i></p> <p>1. Find a Plan 2. Enter Your Details 3. Select Options 4. Confirm Your Switch</p> <p>...</p> <p>Estimated Annual Savings^A \$206</p>	<p><i>Switch to Click Energy in just 4 easy steps</i></p> <p>1. Find a Plan 2. Enter Your Details 3. Select Options 4. Confirm Your Switch</p> <p>...</p> <p>Estimated Annual pay on time Savings^A \$206</p>	Equal	Between 27% and 41% higher depending on usage

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No.	A. Energy plan	B. Click Discount Representations	C. Click Savings Representations (March 2017 – 21 November 2017)	D. Click Savings Representations (22 November to filing)	E. Supply rate compared with Click standing offer at the relevant time	F. Usage rate compared with Click standing offer at the relevant time
Queensland						
6.	Click Topaz Electricity	22% prompt-payment discount off usage & supply charges when you paid your bill on time	<p><i>Switch to Click Energy in just 4 easy steps</i></p> <p>1. Find a Plan 2. Enter Your Details 3. Select Options 4. Confirm Your Switch</p> <p>...</p> <p>Estimated Annual Savings^a \$221</p>	<p><i>Switch to Click Energy in just 4 easy steps</i></p> <p>1. Find a Plan 2. Enter Your Details 3. Select Options 4. Confirm Your Switch</p> <p>...</p> <p>Estimated Annual pay on time Savings^a \$221</p>	8.9% higher	8.9% higher
7.	Click Shine Electricity	7% discount off your usage & supply charges	<p><i>Switch to Click Energy in just 4 easy steps</i></p> <p>1. Find a Plan 2. Enter Your Details 3. Select Options 4. Confirm Your Switch</p>	<p><i>Switch to Click Energy in just 4 easy steps</i></p> <p>1. Find a Plan 2. Enter Your Details 3. Select Options 4. Confirm Your Switch</p>	8.50% higher	8.50% higher

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No.	A. Energy plan	B. Click Discount Representations	C. Click Savings Representations (March 2017 – 21 November 2017)	D. Click Savings Representations (22 November to filing)	E. Supply rate compared with Click standing offer at the relevant time	F. Usage rate compared with Click standing offer at the relevant time
			... Estimated Annual Savings ^A \$92	... Estimated Annual pay on time Savings ^A \$92		
8.	Click Shine Budget Electricity	15% discount off your usage & supply charges	Switch to Click Energy in just 4 easy steps 1. Find a Plan 2. Enter Your Details 3. Select Options 4. Confirm Your Switch Estimated Annual Savings ^A \$206	Switch to Click Energy in just 4 easy steps 1. Find a Plan 2. Enter Your Details 3. Select Options 4. Confirm Your Switch Estimated Annual pay on time Savings ^A \$206	8.50% higher	8.50% higher
9.	Click Shine Extra	7% discount off your usage & supply charges	Switch to Click Energy in just 4 easy steps 1. Find a Plan 2. Enter Your Details 3. Select Options 4. Confirm Your Switch	Switch to Click Energy in just 4 easy steps 1. Find a Plan 2. Enter Your Details 3. Select Options 4. Confirm Your Switch	8.50% higher	8.50% higher

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No.	A. Energy plan	B. Click Discount Representations	C. Click Savings Representations (March 2017 – 21 November 2017)	D. Click Savings Representations (22 November to filing)	E. Supply rate compared with Click standing offer at the relevant time	F. Usage rate compared with Click standing offer at the relevant time
			... Estimated Annual Savings^ \$85	... Estimated Annual pay on time Savings^ \$85		
10.	Click Business Electricity	7% discount off usage & supply charges	Switch to Click Energy in just 4 easy steps 1. Find a Plan 2. Enter Your Details 3. Select Options 4. Confirm Your Switch ... Estimated Annual Savings^ \$434	Switch to Click Energy in just 4 easy steps 1. Find a Plan 2. Enter Your Details 3. Select Options 4. Confirm Your Switch ... Estimated Annual pay on time Savings^ \$434	4.0% higher	4.0% higher