

## **On-time Payment Discounts Under the Electricity and Gas Industry Acts (Vic)**

### **Background**

1. Most energy retailers offer contracts which provide a discount conditional on on-time payment. If a bill is not paid on-time, the discount (often between 20-35% of the usage charges), is lost. Section 40C(1) of the *Electricity Industry Act 2000* (Vic) prohibits 'fees or charges' for late payment. Section 40C(2) excludes from that prohibition a licensee 'offering an incentive or rebate to a small retail customer for paying electricity bill on or before the due date for payment'. Equivalent provisions are found in section 48B of the *Gas Industry Act 2001* (Vic). For the purposes of discussion this advice will focus on the Electricity Industry Act.

### **The issue**

2. CALC has asked me to consider whether, pursuant to this legislation, a payment structure offering a discount for timely payment imposes a 'fee or charge' for late payment or an 'incentive or rebate' for paying on or before the due date?

### **Opinion**

3. While there are arguments to the contrary, in my opinion the early payment discount structure should be treated as imposing a fee or charge within s 40C(1) and not a mere incentive to timely payment under 40C(2).

### **Discussion**

#### ***The relevant provisions***

4. The *Energy Industry Act 2000* was amended in 2004 to provide:

#### **40C. Prohibition on fees for late payment**

- (1) A term or condition in a contract for the supply or sale of electricity by a licensee to a small retail customer (whether entered into before or after the commencement of this section) is void to the extent that it permits the licensee to charge the customer a fee or charge for late payment of an electricity bill.
- (2) Nothing in this section prevents a licensee from offering an incentive or rebate to a small retail customer for paying an electricity bill on or before the due date for payment.

#### ***Penalty doctrines***

5. Traditionally, one reason for a trader structuring its payments to include a discount for timely payment as opposed to imposing a fee for late payment was to avoid the application of the penalties doctrine. The traditional view is that a lower concession rate for early or 'timely' payment is not subject to the rule

against penalties.<sup>1</sup> Payment of the higher, base price is not premised on a breach of the contract, it is merely that the lower amount is payable if the consumer complies with the conditions of on-time payment.

6. It is unclear if this distinction would still be accepted as defining the application of the rule against penalties. In *Andrews v ANZ Banking Group Ltd*, the High Court held that the penalty doctrine was not limited to where there had been a breach of contract. The court held that a provision imposing a sum payable in the event of certain contingent events may be regarded as a penalty if it secures a primary stipulation. This fits the circumstances where a higher price is paid for late payment even though framed as the loss of a discount.<sup>2</sup> Accordingly, it is possible that post *Andrews* a court would review an early payment discount to decide if it in substance imposed a penalty. This is consistent with a substantive approach to interpretation.
7. Nonetheless, the question under s 40C of the *Energy Industry Act 2000* is not the application of the rule against penalties but whether the early payment discount structure imposes a fee or charge for late payment within the meaning of that provision.

#### **'Fee or charge'**

8. An early payment discount does not in form impose a fee for late payment. The consumer who pays late loses the discount. It might therefore be argued that the discount structure does not involve a fee or charge for the purposes of s 40C(1). The flaw in this analysis is that both payment structures – late fee and early payment discount - have the same impact on consumers. Under both structures a consumer who does not pay on the specified time must pay an additional charge over what they would have paid if they had paid on time.
9. The discount structure imposes the functional equivalent of a late payment fee. There is thus a good argument that the early payment discount structure should be characterised as imposing a fee or charge for late payment rendered void by s 40C(1).

#### **'Incentive or rebate'**

10. The difference between a 'fee or charge' and an 'incentive' under s 40C is not entirely clear. It might be argued that in answering this question the legislation should be interpreted strictly. On this approach the loss of a discount is not called a fee and should not fall within s 40C(1). The discount must therefore operate merely as an incentive to early payment under s 40C(2). An early payment discount is frequently used by traders as an incentive for early payment. This practice might also be argued to support the validity of the early payment discount in energy contracts as an incentive under s40C(2).

---

<sup>1</sup> See eg *Kowalczyk v Accom Finance* [2008] NSWCA 343. (2008) 252 ALR 55, [162]. Also *Kellas-Sharpe v PSAL Ltd* [2013] 2 Qd R 233, [32]-[49],

<sup>2</sup> [2016] HCA 28. See also *Cedar Meats (Aust) Pty Ltd v Five Star Lamb Pty Ltd* [2014] VSCA 32.

11. However, there are several considerations that mitigate against this conclusion, and support the characterisation of the discount structure as imposing as a fee or charge for late payment under s 40C(1) and not as a mere incentive under s 40C(2).
12. First, the discounts in energy contracts are typically very high (20-30%). By contrast trade discounts are frequently set at a single digit percentage rate comparable to, or just slightly higher than, the interest that would be earned if the consumer kept their money in a bank (1-3%). Until 1 Jan 2017 the ATO offered a 10% discount for early payment of a HECS debt. <http://www.heraldsun.com.au/business/every-step/should-i-make-early-payments-to-my-hecshelp-debt/news-story/a41f2f801d835b6b6ef5f1f4a9724803>. The substantial discount amount means that it more closely resembles a fee or charge than an incentive to timely payment.
13. Secondly, the distinction in the *Energy Industry Act 2000* between a 'fee or charge' and 'incentive or rebate' indicates that these two concepts are mutually exclusive. Something that is in substance a fee or charge under s 40C (1) cannot be an incentive under s 40C(2). In this case, the early payment discount structure is functionally equivalent to a late payment fee. This suggests it cannot be characterised as a mere incentive for timely payment. An example of a genuine incentive that is not a fee or charge would be a gift or reward for early payment.
14. Thirdly, the clear purpose of s 40C(1) is to protect consumers. The Explanatory Memorandum for the amendment bill introducing s 40C states that the object of the added provisions (including s 40C of the EIA and s 48B of the GIA) was 'to make further provision to protect customers of electricity and gas retailers.'<sup>3</sup> Consistently, in the second reading speech for the bill introducing the amendments, Mr J Brumby MP stated that the effect of the new provisions would be 'consumer safety net protections in the EIA and GIA.' Brumby stated that he was aware of the 'growing community concern' allowing retailers to impose late payment fees and that, in response, the 'government does not believe people unable to pay their bills on time should be penalized,'<sup>4</sup> although there would be no 'prohibition on incentives or discounts for timely payment of energy bills'.<sup>5</sup>

---

<sup>3</sup> Explanatory Memorandum, Energy Legislation (Amendment) Act 2004 No. 91 (Vic) 1 ('Explanatory Memo')

<[http://www.legislation.vic.gov.au/domino/Web\\_Notes/LDMS/PubPDocs\\_Arch.nsf/ee665e366dc b6cb0ca256da400837f6b/d79770f3503576d5ca256f8700132dfe/\\$FILE/551228exi1.pdf](http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs_Arch.nsf/ee665e366dc b6cb0ca256da400837f6b/d79770f3503576d5ca256f8700132dfe/$FILE/551228exi1.pdf)>.

<sup>4</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 4 November 2004, 1319–20 (John Brumby, Treasurer)

<<http://www.parliament.vic.gov.au/downloadhansard/pdf/Assembly/Spring%202004/Assembly%20Spring%20Weekly%20Book%205%202004.pdf#page=181>>.

<sup>5</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 4 November 2004, 1319–20 (John Brumby, Treasurer)

<<http://www.parliament.vic.gov.au/downloadhansard/pdf/Assembly/Spring%202004/Assembly%20Spring%20Weekly%20Book%205%202004.pdf#page=181>>..

15. The consumer protection purpose of s 40C means that it should be interpreted in a manner that will further this purpose. Indeed, it might be said that as the legislation gives effect to matters of high public policy', it should be construed so as 'to give the fullest relief which the fair meaning of its language will allow'.<sup>6</sup> The protective purpose of the provision is supported by interpreting s 40C(1) to cover payment structures that impose a fee or charge for late payment in form or in substance. Loss of the early payment discount has the effect of penalising consumers for late payments in the same way as a formal late payment fee.
16. To allow a discount structure that in substance imposes a late payment fee or charge would subvert the consumer protection purpose of s 40C. If a retailer can avoid the prohibition on late fee or charges by reframing those charges as an early payment discount, then the protection in s 40C(1) is rendered nugatory.

### ***Transparency and unfair contract terms***

17. It might be argued that the discount structure is selected by consumers, who will be aware of the loss of discount if they do not pay on-time, and that this makes the structure less offensive from a consumer protection perspective. But the same may be said of the prohibited structure of imposing a fee or charge for late payment, consumers will equally be aware under this arrangement that if they do not pay on-time they will pay more. Thus, the transparency argument does not advance the case as to how to characterise the loss of an early payment discount.
18. The form in which the discount is expressed does possibly make it part of the 'upfront price' for the purposes of the unfair contract terms regime in the Australian Consumer Law. The unfair terms regime does not apply to a term that sets the 'upfront price payable under the contract'.<sup>7</sup> This means that s 40C is the prime source of protection on pricing arrangements for energy consumers and gives force to the need for a purposive interpretation.

### ***19. Other considerations***

20. It can be noted that the UK regulator Ofgem only permits two forms of discounts: for dual gas and electricity and for online accounts. It considers other forms of discount make comparing costs of tariffs too difficult for consumers.<sup>8</sup> In Victoria the discount for early payment is commonly promoted as part of the core price which similarly makes it difficult for consumers to compare base prices and to identify the likely cost of electricity to them.

**Dr Jeannie Marie Paterson, July 2017**

---

<sup>6</sup> *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 528 [99] (Gummow J), citing *Bull v Attorney-General (NSW)* (s1913) 17 CLR 370, 384 (Isaacs J).

<sup>7</sup> ACL s 26(1).

<sup>8</sup> <https://www.ofgem.gov.uk/simpler-clearer-fairer/your-questions-answered>.