

17 April 2018

Submitted electronically via: www.aemc.gov.au

Thomas Redmond
Advisor
Australian Energy Market Commission

Dear Mr Redmond

National Energy Retail Amendment (Preventing discounts on inflated energy rates) Rule 2018 Consultation Paper

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the Australian Energy Market Commission (**AEMC**) National Energy Retail Amendment (Preventing discounts on inflated energy rates) Rule 2018 Consultation Paper (**The Consultation Paper**).

We do not support the rule change request and the AEMC's initial position. The Consultation Paper outlines a rule change that will be completely ineffective at addressing a multitude of issues that have been identified with energy retailer's conditional discounting and marketing practices. If the rule change is enacted, people struggling to make ends meet throughout the NEM will still be charged unfair prices and additional penalties disguised as lost 'discounts.' In fact, offers in the market may become more confusing and retailer marketing practices will be less aligned with the national electricity and gas market objectives.

We do, however, support AEMC's proposal to recommend that the COAG Energy Council make retailer's non-compliance with the AER's Retail Pricing Information Guideline (**RPIG**) subject to penalties. We encourage the AEMC to recommend penalty amounts be made available to the AER that will act as a sufficient deterrent. We also encourage the AEMC to recommend enforcement action be taken by the Australian Competition and Consumer Commission (**ACCC**) to address Click Energy's problematic marketing practices that have been identified in the consultation paper.

Our comments are detailed more fully below.

About Consumer Action

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just market place for all Australians.



Penalties for non-compliance with the RPIG

As stated above, we support the AEMC recommending a civil penalty for non-compliance with the RPIG. However, we are concerned that a \$20,000 infringement notice penalty would be an insufficient disincentive for retailers, particularly those that are large ASX listed companies. Misleading customers by presenting information contrary to the RPIG is unacceptable, especially considering that the energy retail market is already too complex and confusing to deliver widespread desirable outcomes for consumers accessing an essential service.

In 2016, COAG Energy Council officials consulted on a general increase in civil penalty and infringement notice penalty amounts.¹ Our submission to that consultation noted that a review of enforcement regimes for National Energy Laws had been on-foot since 2010, including a number of rounds of consultation, and that a significant increase to maximum civil penalties was warranted.² It appears that no action has been taken by the COAG Energy Council since that time, meaning over eight years has passed since it was recognised that the enforcement regime for National Energy Laws should be enhanced. We note this simply to make the AEMC aware of the history of the lack of reform in this area, and the fact that enhancements to enforcement mechanisms will not be prioritised by the COAG Energy Council.

We nevertheless urge the AEMC to recommend that the COAG Energy Council increase the maximum civil penalties for breaches of National Energy Laws, particularly those related to consumers. Maximum penalties should be aligned with those applied to breaches of the Australian Consumer Law (**ACL**). There is government legislation before the Federal Parliament that seeks to increase the maximum penalties for breaches of the ACL to the greater of \$10 million, or three times the value of the benefit obtained from the offence (if this can be determined), or 10 per cent of the annual turnover (if the value of the benefit cannot be determined).³ This increase is designed to ensure that maximum civil penalties are sufficient to provide an incentive against non-compliance, particularly for larger ASX-listed companies. These proposed maximums are much higher than the maximum \$100,000 for the National Energy Retail Law.⁴

We also note and support the position articulated in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers developed by the Australian Government Attorney-General's Department, which notes that the amount payable under an infringement notice should be set at one fifth of the maximum civil penalty rate.⁵ Should the proposed ACL penalties be enacted and aligned with breaches of the NERL (which we note are similar consumer protections), then infringement notices in the range of \$200,000 would be more appropriate.

¹Energy Working Group, 2016. Review of Enforcement Regimes under the National Energy Laws: Proposed policy positions for consultation

² Consumer Action Law Centre, 2016. Submission: Review of Enforcement Regimes under the National Energy Laws: Proposed policy positions for consultation. Retrieved from: <https://consumeraction.org.au/review-enforcement-regimes-national-energy-laws-proposed-policy-positions-consultation/>

³ Treasury Laws Amendment (2018 Measures No. 3) Bill 2018, Schedule 1. Retrieved from:

https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6053

⁴ National Energy Retail Law Act 2011, Part 1. Retrieved from:

[https://www.legislation.sa.gov.au/LZ/C/A/NATIONAL%20ENERGY%20RETAIL%20LAW%20\(SOUTH%20AUSTRALIA\)%20ACT%202011.aspx](https://www.legislation.sa.gov.au/LZ/C/A/NATIONAL%20ENERGY%20RETAIL%20LAW%20(SOUTH%20AUSTRALIA)%20ACT%202011.aspx) p.32

⁵ Australian Government Attorney-General's Department, 2011. A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers



Stronger action to resolve consumer detriment from conditional discounting

Energy retailers would be able to easily circumvent the change to the energy rules and continue to offer confusing and misleading offers under the proposed rule change and initial AEMC position outlined in the Consultation Paper. Retailers could avoid breaching the rule while still providing services that are not in the long-term interests of consumers by:

- altering offers to include minor benefits,
- inflating fees and penalties,
- implementing price rises above the initial contracted market offer rates or
- structuring detrimental market offers so that they are not equivalent to standing offers (such as making a daily charge lower by a cent while greatly increasing a usage rate above the standing offer).

The rule change may also provide additional incentives for retailers to increase the price on standing offers which is detrimental to deemed consumers who are likely to be financially vulnerable and denied access to market offers. This makes the rule change ineffective and potentially likely to further increase complexity in the energy retail services market.

That the Consultation Paper itself discloses that 0.5 per cent of all energy offers across electricity and gas offer types for small business and residential consumers would be in breach of the rule proposed by the Commission demonstrates its complete ineffectiveness.⁶ This is insignificant in contrast to the AEMC's most recent Retail Energy Competition Review which identified that around 80 per cent of generally available offers include some form of discount and 90% of discounts offered are conditional discounts.⁷ The AEMC seems to be advocating for a rule that would do almost nothing. Consumer Action considers the proposed rule change is simply window dressing and cannot be said to be in accordance with the national electricity and gas market objectives.

Consumer Action continues to advocate for substantial action to address problematic conditional discounting. As noted in the Consultation Paper, discounts are often applied to varying base rates including standing offer prices which vary among retailers. Discounts are therefore arbitrary marketing constructs, useless for comparing offers for consumers. The consequence of the useless marketing practice is those struggling to make ends meet end up being charged unnecessarily large penalties after paying only a day late. For instance, a caller to the National Debt Helpline who was experiencing hardship in 2017 forwarded an energy bill to Consumer Action that included an amount over \$500 added to a quarterly bill.

The Victorian Government recently confirmed that it would implement recommendation 4D and 4E of the Independent Review of The Electricity and Gas Retail Markets in Victoria (**the Victorian Review**).⁸ This means conditional discounts on energy retail offers in Victoria will be evergreen and the costs incurred

⁶ AEMC, 2018. National Energy Retail Amendment (Preventing discounts on inflated energy rates) Rule 2018 Consultation Paper, p.28

⁷ See ACCC calculation of AEMC data: ACCC, 2017. Retail Electricity Pricing Inquiry Preliminary Report, p.127-130

⁸ Department of Environment, Land, Water and Planning (Victoria), 2018. Victorian Government Interim Response; Bipartisan Independent Review of the Electricity and Gas Retail Markets in Victoria



by consumers when failing to meet a condition will be capped at the reasonable cost to the retailer. This is a preferable way forward for addressing the issues related to conditional discounting on a national scale, especially when coupled with a published reference price from which these discounts must consistently be applied for easy comparison. We note that the ACCC also identified issues with discounting practices and stated that it was “open to the idea of some form of regulatory limitation on pay on time discounts, for example a cap”⁹ in the Preliminary Report for the Retail Electricity Pricing Inquiry.

Consumer Action also supports the implementation of a Basic Service Offer, as proposed by the Victorian Review.¹⁰ This recommendation would make an offer available to all consumers at a regulated price that does not include discounts and be based on the reasonable cost of providing services excluding customer acquisition and retention costs. Such an offer would protect consumers from being ripped off or misled by marketing practices while also providing them with a reference price to compare offers other than the Basic Service Offer. We believe a policy along these lines would be much more effective at assisting consumers throughout the NEM to benefit from competition among energy retailers.

ACCC action

As noted in the consultation paper, the ACCC previously made proceedings against Origin Energy which resulted in Origin paying \$325,000 for breaching the ACL after an Origin discounted market offer was based off rates higher than Origin’s standing offer.¹¹ The AEMC should recommend that the ACCC undertake similar action in relation to the Click Energy offers discussed in the Consultation Paper as well as investigate whether action needs to be taken due to instances of similar conduct by Click or other energy retailers in Victoria.

Please contact Jake Lilley on 03 9670 5088 or at jake@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,

CONSUMER ACTION LAW CENTRE



Gerard Brody
Chief Executive Officer

⁹ ACCC, 2017. Retail Electricity Pricing Inquiry Preliminary Report, p.131

¹⁰ Faulkner, Mulder & Thwaites, 2017. Independent Review of the Electricity & Gas Retail Markets in Victoria

¹¹ ACCC, 2015. Origin Companies ordered to pay penalties of \$325,000 for misleading consumers about discounts under energy plans. Retrieved from: <https://www.accc.gov.au/media-release/origin-companies-ordered-to-pay-penalties-of-325000-for-misleading-consumers-about-discounts-under-energy-plans>

