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19 September 2019

Mr John Pierce
Chairman
Australian Energy Market Commission
PO Box A2449
Sydney South NSW 1235

By online submission

Dear Mr Pierce

AER Submission – Regulating Conditional Discounting consultation paper

The Australian Energy Regulator (AER) welcomes the opportunity to make a submission in response to the Australian Energy Market Commission's (AEMC) *Regulating Conditional Discounting, Consultation Paper* (consultation paper).[1]

About the AER

The AER works to put consumers at the centre of the transitioning energy market, as we play our part in delivering a secure, reliable and affordable energy future for Australia.[2] Our work is guided by five key strategic objectives – relevant to this consultation, these include driving effective competition, equipping consumers to engage effectively, and protecting those who are unable to safeguard their own interests.

In 2019-2020, it is an AER compliance and enforcement priority to ensure that customers in financial difficulty receive required assistance, with a focus on the new Hardship Guideline.[3]

Overview

Consumer trust in the energy market is low, with only 29 per cent of consumers having overall confidence that the market is working in their interest[4] and less than 60 per cent of consumers across states and territories are satisfied with the value for money of electricity.[5] We consider a key goal in this reform should be to remove from the retail market practices that do not serve consumer outcomes, particularly where these have a heightened negative impact on vulnerable consumers.

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1 AEMC, *Regulating Conditional Discounting, Consultation Paper,* 1 August 2019 https://www.aemc.gov.au/sites/default/files/2019-08/Regulating%20Conditional%20Discounting%20-%20Final%20Consultation%20paper_0.pdf

2 AERr, *Statement of Intent 2017-18*, https://www.aer.gov.au/system/files/AER%20Statement%20of%20Intent%202017-18.pdf

3 AER, Compliance & Enforcement policy & priorities, July 2019, https://www.aer.gov.au/about-us/compliance-enforcement-policy-priorities

4 Energy Consumers Australia, *Energy Consumer Sentiment Survey,* June 2019, p. 108

5 Ibid, p. 13.

Overall, we support the proposed changes as they are likely to foster greater customer confidence and engagement in the retail market by simplifying and reducing conditional discounts, when they are offered. It is important that retail reforms support fair outcomes for energy consumers. We support the objective to improve consumer outcomes by regulating problematic conditional discounting practices. We consider the nature of conditional discounts can result in poor outcomes for customers, especially those experiencing vulnerability. Current conditional discounting practices have become harmful to the market, particularly where discounts are inflated, unclear, confusing or unfair. Improvements to conditional discounting practices are consistent with the AER's interest in promoting better customer outcomes.

Noting a number of reforms to the retail electricity market came into effect on 1 July 2019, early observable trends indicate that retailers have significantly reduced the number of offers with conditional discounts. Early data is indicating that advertising practices are moving away from conditional discounts based on inflated and inconsistent base rates, enabling customers to more easily compare offers. We note however that it is too early to determine whether these trends will be sustained without further intervention.

We outline below our views in response to the consultation questions, with a focus on addressing the current areas of consumer detriment.

Consumer detriment and harm

We note that the rule change request and the consultation paper seek to address current problems with conditional discounting through two lenses: (1) the need to remove the excessive penalties on customers (particularly vulnerable customers) who pay after the due date, whom the consultation paper notes 'paying the highest prices in the market'; and (2) the need to improve the comparability of market offers by simplifying and reducing conditional discounts, thereby reducing barriers to effective consumer engagement and enhancing competition.[6] We consider the first point is a particular driver for change, and that this is the significant problem on which the rule change should be focused in seeking to improve consumer outcomes in the energy market.

We support the implementation of the Australian Competition and Consumer Commission's (**ACCC**) Retail Electricity Pricing Inquiry (REPI) recommendation 33[7], given 'the significant negative impact of grossly inflated conditional discounts on customers, which are adding to confusion and impeding the ability of consumers to anticipate the true cost of their energy plan'.[8] We note this particularly impacts vulnerable customers.

The scale of consumer harm associated with conditional discounting practices is significant. REPI found that customers who did not pay on time were 'paying very large payment penalties, often amounting to hundreds of dollars per year'.[9] It has been reported that customers pay an additional $500-$1000 per year when they fail to meet one payment deadline.[10]

We note that conditional discounting practices have resulted in market problems that are experienced disproportionately by vulnerable consumers, and that some practices may compound consumer vulnerability. The ACCC's REPI found that conditions for accessing discounts are achieved only 56 per cent of the time for customers who are signed up to

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6 Consultation paper, p. 1

7 Australian Competition and Consumer Commission, *Retail Electricity Pricing Inquiry Final Report*, June 2018, p. 269-271.

8 The Honourable Angus Taylor MP, Minister for Energy, on behalf of the Australian Government, *Improving customer outcomes and competition by regulating conditional discounting* rule change proposal, 18 February 2019, p. 2.

9 Australian Competition and Consumer Commission, *Retail Electricity Pricing Inquiry Final Report*, June 2018, p. xi.

10 Choice, *Pay-on-time energy discounts on the chopping block*, 18 February 2019,https://www.choice.com.au/shopping/shopping-for-services/utilities/articles/pay-on-time-discounts

payment plans to assist managing their energy bills, and only 42 per cent of the time by hardship customers.[11] We consider these are priority issues which require particular attention and action through the AEMC's consultation. For vulnerable consumers, there can be higher barriers to accessing discount conditions as they may be unable to access credit facilities, experience a lack of secure employment and housing, and manage competing demands for their time, attention and financial commitments to essential services.

We also support the objective to reduce unreasonable penalties for customers who cannot meet the conditions on their discount. As noted in REPI, whilst pay on time discounts can incentivise customers to make timely payments, the 'size of such savings are not commensurate with the high conditional discounts currently available in the market, providing retailers with excessive benefit when the conditions are not met'.[12] Some conditional discounting practices (such as very high discount rates) seek to incentivise customers to sign up to an energy plan, but can have long-term negative impacts if the customer cannot meet the conditions on the discount. Consumers can overestimate their capacity to make payments on time, meaning that retailers to offer and market high conditional discounts may 'win' more customers, but relatively few consumers benefit. In addition to harming vulnerable consumers, these practices can also cause financial vulnerability.

We consider the focus of the proposed reforms should be on addressing consumer harm. We recognise that the ability to make an accurate comparison would assist consumers, with benefit arising from improved information and transparency about offers. At present, the commercial model that underpins conditional discounting relies on the use of large, attractive percentage discounts that 'hook' consumers but require specific consumer actions (e.g. paying on time, using direct debit) and penalise consumers where this action is not taken.

Retailers should use positive practices to develop and offer more diverse and innovative incentives to customers (including through unconditional discounts), rather than relying on pay on time discounts and related practices that are known to disadvantage consumers. If conditional discounts are a continuing feature of the retail market, we consider there are a range of proactive steps retailers should take to ensure consumers positively experience these arrangements, including making it easy for consumers to meet the conditions and removing any unfair terms and conditions.

Consultation question 1: Offer comparability

a) Will comparability issues for conditional discount offers continue to be material with the introduction of the Code?
b) What other factors may be present that contribute to the difficulty of offer comparability?

Consumer harm is the key issue

We consider that comparability can help consumers choose between different value propositions and particularly assist in determining the relative value of different performance-based attributes of consumer goods and services. This can help consumers to shop around and select a better deal, particularly where the performance attribute is complex or there is a lack of available or accessible consumer information. However, the benefits of comparability are limited where underlying practices are known to be harmful to consumers.

Fostering greater comparability in retail markets can have positive effects when there is a consumer benefit to be derived from transparency and competition for consumers related to a particular component of the service. However, in the case of conditional discounts, there is

[11] Australian Competition and Consumer Commission, *Retail Electricity Pricing Inquiry Final Report*, June 2018, p. xi

[12] Ibid, p. 268.

a need to address the inflated presentation of the discounts. The rule change proposal is for a move to cost-reflective discounts, so the incentive should be to reduce the focus on the size of the discount to guard against perverse outcomes where retailers inflate their costs in order to present a higher discount.

Trends post-July 2019

The AEMC has noted in its *2019 Retail Energy Competition Review,* released just prior to the introduction of the Default Market Offer (DMO) and the Competition and Consumer (Industry Code-Electricity Retail) Regulations 2019 (the Electricity Code), that there has been a recent increase in the number and proportion of 'no discount' offers available in the market, and that retailers are generally moving away from discounting practices.[13] The AEMC found that offers with conditional discounts decreased to 47% of market offers in 2019.[14]

We consider this consultation provides an opportunity to assess the extent to which the commencement of the DMO and the Electricity Code on 1 July continue to influence this in the market. It will be important for the AEMC to have regard to whether the market and customer detriment issues are an ongoing concern. It will be important to monitor the disproportionate negative effect of large discounts on vulnerable energy consumers over this time.

Consultation question 2: Excessive penalties

- ***a) Do stakeholders agree with the characterisation of substantially higher prices paid by customers when they miss conditional discount conditions as excessive "penalties"?***
- ***b) What customer groups are most at risk of failing to realise conditional discounts? How significant are these groups as a proportion of the energy customer base? (e.g. [i] Should payment plan customers be considered? [ii] Hardship customers make up 1.4 per cent of all customers according to AER data).***
- ***c) Do stakeholders have views on the ability of vulnerable customers to anticipate their energy plan costs and ability to pay?***
- ***d) What internal rules do retailers have in place to ensure customers on a hardship program do not lose any benefit or discount for late payment (in line with the commitment announced on 7 August 2017 noted above)? Are retailers still committed to this approach now that the DMO has been introduced?***

There was a significant increase in conditional discount amounts during 2014 to 2017. Discounts advertised by retailers were in the range of 30-40 per cent.[15] As a result, some customers were paying disproportionately large penalties where they could not meet the conditions of the discount.

To support fairer outcomes for consumers, we agree there is a need to reduce the prevalence and amount of conditional discounts, and that conditional discounts should reflect only the reasonable costs a retailer would incur if a customer failed to meet the conditions. In addition, we consider conditional discounts should only be offered where it would result in fair outcomes for consumers.

We note that a 'no penalty' approach would provide consistency with common law principles that generally apply in consumer transactions. We consider this is important given the barriers many consumers experience in asserting their individual rights, and that is often more efficient for a regulator to enforce these.

13 Australian Energy Market Commission, *2019 Retail Energy Competition Review*, Final report, 28 June 2019, p. 82

14 Ibid, p. 36

15 Australian Competition and Consumer Commission, *Retail Electricity Pricing Inquiry Final Report*, June 2018, p. 257.

When considering the extent to which conditional discounts penalise consumers, it is important to take into account the disproportionate impact on vulnerable consumers (also discussed above), and different needs and experiences to ensure the market delivers for all consumers.

At any one time, a large portion of consumers may be considered 'vulnerable', either experiencing 'market-specific' vulnerability (time, complexity and informational barriers to engaging with the market) and/or individual or personalised vulnerabilities that many people experience from time to time (mental health issues, low income, physical disabilities, age, family violence or abuse, or a significant life event or responsibility such as grief or caring responsibilities).

It is relevant to consider the extent of these issues in similar markets. For example, in the UK, the Competition & Markets Authority (**CMA**) notes that between 18-25% of the population in England experience at least one characteristic of personalised vulnerability each year:

- around 25% of the population experience a mental health problem each year, and one in six report experiencing a common mental health problem (such as anxiety or depression) in any given week
- 22% of the UK population (around 14 million people) report having some form of disability
- 18% of the UK population (around 12 million people) are aged 65 or over, and
- 22% of the UK population (around 14 million people) live in low income households (ie with income below 60% of the median income).[16]

The CMA's 2018-2019 reports on consumer vulnerability contain a range of insights that are relevant to the consultation questions, including case studies that illustrate the experience of vulnerable consumers engaging with the energy market.

In Australia, the Consumer Action Law Centre recently identified that 45% of Victorian callers to the National Debt Helpline about energy issues noted a life event was causing a significant vulnerability. Among callers with an energy issue, Consumer Action identified:

- the number of callers who speak a language other than English at home doubled over 18 months
- Centrelink is the primary source of income for over 50% of callers
- over 19% of callers were also experiencing a mental health issue, and
- women were more likely to experience energy issues than men (57% of callers were women).[17]

In considering views about the options posed in the consultation paper and to ensure fair outcomes for energy consumers, we agree it will be important to factor in the different needs and outcomes for vulnerable energy consumers and the potential impact of the reforms. This will be particularly relevant to option 1, which would allow retailers significant discretion to determine whether a particular conditional discount would suit a customer's needs. It will be relevant to consider the extent to which energy retailers are currently positioned to manage

16 Competition & Markets Authority (UK), *Consumer vulnerability: challenges and potential solutions*, 28 February 2019, Foreword by the Chairman https://www.gov.uk/government/publications/consumer-vulnerability-challenges-and-potential solutions/consumer-vulnerability-challenges-and-potential-solutions

17 Consumer Action Law Centre, *Energy Assistance Report – Tracking how Victoria's changing energy policies are impacting households in the state*, July 2019

and assist vulnerable consumers with this, and how they are meeting their current responsibilities to vulnerable consumers and customers experiencing financial difficulty due to hardship. This could include considering the extent to which retailers are meeting new responsibilities under the AER *Customer Hardship Policy Guideline* which will apply from 2 October 2019.[18]

Consultation question 3: Key data needed to establish materiality

The Commission requests data from stakeholders on the following:

- ***Price dispersion data on residential customer contracts, i.e. actual uptake and prices of customer contracts in the post-1 July 2019 period, including the magnitude of discounts in these contracts, the difference between highest and lowest market offers, etc.***
- ***Uptake of different types of market offers (including conditional & guaranteed discounts, as well as other types of market offers), both before and after the introduction of the Code.***
- ***Realisation rates of conditional discounts contracts, i.e. the percentage of customers on conditional discounts who satisfy conditions each payment cycle and earn the discount.***
- ***Information on the scale and effectiveness of retailers' hardship programs with regard to conditional discounts and customers being on appropriate contracts. Including processes in place to comply with their obligations under s. 44 of NERL regarding the review of the appropriateness of a hardship customer's market retail contract.***
- ***Evidence of the impact of conditional discount on retailer debt management. Retailers may want to compare trends in debt levels during periods before and after conditional discounts were introduced.***

Price dispersion, update and realisation data

We note that data and observations relevant to the percentage of customers who regularly satisfy conditions and update pre-July 2019 were discussed in the ACCC REPI report. The ACCC's *Inquiry into the National Electricity Market - August 2019 Report* found that since 1 July 2019, there has been a shift away from the use of conditional discounts. The ACCC has noted that more than 75 per cent of residential flat rate market offers in SA, NSW and SEQ now have no conditional discounts compared with, for example, 39 per cent in NSW a year earlier.[19] The ACCC's report also found that where headline discounts are presented, they are lower than before. For example, in NSW, the average discount level for market offers with a conditional discount was 22 per cent at 1 June 2019, compared to 16 per cent at 12 July 2019.[20]

Our Affordability report released on 5 September 2019 includes analysis on electricity discounting practices over the last year.[21] This report also features an appendix which outlines the changes to highest, lowest and median market offer prices before and after the introduction of the DMO on 1 July 2019.

Overall, we consider it is too early to draw strong conclusions about the impact of the DMO from this preliminary analysis. However, our report makes the following initial observations:

- As expected, the price of the majority of **standing offers** and high priced market offers from October 2018 have reduced to the DMO level

[18] We made our first enforceable *Customer Hardship Policy Guideline* in March 2019, after making a rule change request in 2018. The guideline strengthens protections for customers experiencing financial difficulty due to hardship

[19] Australian Competition and Consumer Commission, *Inquiry into the National Electricity Market- August 2019 Report,* 16 September 2019, p. 10.

[20] Ibid., p.62

[21] Australian Energy Regulator, *Affordability in retail energy markets,* 5 September 2019, p.19

- The **median market offer price has not changed significantly** throughout October 2018 to July 2019 but we have observed a reduction in the number of market offers.

- We have seen **a slight reduction in the price of the lowest market offers** for the residential flat rate (up to 3 per cent) compared to October 2018 but a more significant fall for SMEs (between 6-17 per cent).

    - This appears to be largely driven by Tier 2 retailers. Tier 1 retailers have removed some of their lowest priced market offers in some regions.

    - In contrast, from June 2019 the price of the lowest market offers have increased (up to 6 per cent) in the Essential and SAPN zones, and remained flat or marginally increased in the other zones.

    - However, the prices for SMEs have mostly reduced post DMO.

- Retailers have significantly reduced the number of offers with **conditional discounts** (to between 13-25 per cent of all their market offers (down from 47-56 per cent).

- In electricity and gas over last year, customers saw a smaller proportion of offers with a conditional discount. Since the DMO was introduced, we have seen a significant reduction in the size and prevalence of discounts but this does not necessarily mean consumers are worse off. The Code prevents retailers from advertising artificially high discounts, and our analysis shows annual prices have reduced to the DMO level. This suggests a rebalancing in how retailers structure tariffs. This can be observed from the fact that despite the reduction in size of conditional discounts, average bill amounts with conditional discounts have reduced by up to 4 per cent in July 2019.

- Further information on our findings can be found in https://www.aer.gov.au/retail-markets/performance-reporting/affordability-in-retail-energy-markets-september-2019

We also note a range of data relevant to this question is available to the AEMC via our EME platform, and this will provide an indication of the price of energy contracts post 1 July 2019 to inform this consultation. This will include the magnitude of discounts in these contracts, the type of discounts offered to customers and the difference between the highest and lowest market offers.

Effectiveness of hardship programs

The significant problems with the scale and effectiveness of retailers' hardship programs prompted the AER to request a rule change to the National Energy Retail Rules in March 2018, to strengthen protections for energy customers experiencing hardship.[22]

Relevantly, in making the Guideline in March 2019, we observed:

- more Australian households are experiencing difficulty paying their bills, and we are seeing rising levels of energy debt and more people being disconnected
- retailers need to better assist vulnerable customers experiencing payment difficulties as protection for people having trouble paying their energy bills is a consumer right
- more people are going into hardship programs, but fewer people are successfully completing them:

[22] AER, *Request for rule change – strengthening protections in the National Energy Retail Rules for customers in financial hardship*, 21 March 2018 https://www.aemc.gov.au/sites/default/files/2018-05/RRC0017%20Rule%20change%20proposal.pdf

- the AER's 2017-18 retail market data showed that over 82,000 energy customers are in hardship programs and only 22 per cent of electricity and 17 per cent of gas customers successfully complete their program
- there were 72,100 residential electricity disconnections (11,794 gas) in the year, a rise of 11 per cent on the previous year for both sectors
- the average electricity consumer's debt on entry to a hardship program was $1146 ($734 gas).[23]

These observations indicate that retailers had not been proactively screening customers and managing hardship programs to appropriately identify customers experiencing hardship, place individual customers on the right payment plans and contracts, and to keep consumers engaged with their programs. The AER's Hardship Guideline strengthens retailers' responsibilities in this regard. Specifically, the Guideline:

- brings greater clarity and consistency to the support retailers are required to provide to their customers, new penalties will apply where retailers fail to meet their obligations
- requires retailers to ensure hardship programs are easily accessible to customers, and that standard statements explaining how they will help customers are included in their policies
- places an onus on retailers to better identify consumers who may need help. Early identification of customers who may be at risk of falling behind in their payments is a key element of the Guideline and one of the best mechanisms to help vulnerable customers better manage their bills and avoid disconnection
- obliges retailers to not only work harder to quickly identify consumers struggling with their bills, but also to meaningfully engage them to help manage their bills on an ongoing basis, and
- empower customers to know their rights, and to take early action if they can, recognising this is not always possible when people are experiencing hardship and vulnerability.

Noting retailers are required to have the new measures in place by 2 October 2019, it will be relevant for the AEMC to consider any early indications of proactive retailer conduct leading up to the draft determination.

Additionally, we would encourage the AEMC to consider any early indicators about the impact of relevant requirements for hardship customers arising out of recent changes in Victoria. Specifically, the requirements and guidance related to conditional discounting for the Victorian Payment Difficulties Framework, which commenced on 1 January 2019.[24]

[23] AER, *Hardship protections a right not a privilege: AER,* March 2019. https://www.aer.gov.au/news-release/hardship-protections-a-right-not-a-privilege-aer

[24] The Essential Services Commission (Victoria) guidance note to the Payment Difficulty Framework notes 'We would not consider it compliant for an energy offer that includes conditional pay-on-time discounts to be offered by a retailer to a customer, if failure to pay on time would result in a higher cost to the customer than an undiscounted offer' (cls 4.10.4, p. 34) https://www.esc.vic.gov.au/sites/default/files/documents/payment-difficulty-framework-energy-complianc-and-enforcement-policy-guidance-note-20171222_v2.pdf

Consultation question 4: Energy offers not covered by the Code

a) **Do stakeholders consider gas offers should be subject to conditional discount limitations, in line with electricity offers?**
b) **How has the introduction of the Code impacted the prominence and magnitude of gas offers?**
c) **Do retailers expect conditional discounts to become a material issue in the ACT and/or Tasmania?**

We consider there are likely to be customer comprehension and market engagement benefits in creating consistency between electricity and gas offers in line with the rule change proposal.

We note the Electricity Code advertising arrangements and requirements including regarding conditional discounts do not currently apply to gas. As a result, there are fewer restrictions on conditional discounting for gas offers in relevant jurisdictions, and consumer detriment in gas discounting has not been addressed to the same degree as electricity offers. This is likely to contribute to poor outcomes for gas customers.

The AER recently conducted a related consultation on proposed amendments to our Retail Pricing Information Guidelines.[25] In responding to the consultation, a number of stakeholders expressed support for extending the Electricity Code arrangements to gas. A number of stakeholders noted the current inconsistencies are likely to contribute to customer confusion.

Consultation question 5 – Solutions

General questions:

a) **Are there any alternative solutions that should be considered by the Commission?**
b) **What benefits and detriments have stakeholders identified on the options outlined by the proponent?**

We set out our views, below, on the options proposed in the consultation paper to further regulate the conditional discounting. At a high level, for each of the options (and for any alternative options/solutions), we consider it is important for the AEMC to assess the extent to which:

- each potential solution would address the current market problems and consumer detriment issues discussed above, and how to best limit potential for any perverse outcomes or unintended consequences
- there is data and evidence of current consumer detriment, and any observable trends which may indicate one option is more preferable
- the extent to which immediately post-July 2019 trends and retailer practices are likely to be sustained, and
- the solutions will deliver short and long term fairer outcomes for consumers, longer-term certainty for the market and consumers, and any lessons and evidence that can be applied from similar or analogous interventions.

We note that further regulation of conditional discounting using the options identified in the consultation paper is likely to require the AER to undertake additional performance monitoring, policy, compliance, investigation and enforcement activities to ensure the regulatory approach is successful and that consumers derive benefits from the measures. This will need to be considered in the context of the AER's current compliance and

[25] AER, *Draft AER Retail Pricing Information Guidelines,* June 2019. https://www.aer.gov.au/retail-markets/retail-guidelines-reviews/retail-pricing-information-guidelines-review-2019/draft-decision

enforcement priorities and resource commitments. Similarly, it will be important to factor this in to considerations about timing for commencement of new rules, to ensure the AER is appropriately positioned to implement and enforce them.

Option 1 – Customer screening

We consider there are currently limited circumstances in which Option 1 is likely to address the market and consumer problems identified in the rule change proposal and consultation paper.

As noted above, there is limited evidence that retailers are currently positioned to effectively screen and identify customers' for hardship programs and to proactively assist vulnerable consumers to enter and complete programs. We consider this is a useful proxy for assessing retailers' capabilities in early identification, suggesting appropriate alternative plans and tailoring solutions to meet the customer needs, particularly for vulnerable consumers.

We agree that, as a 'principles-based approach', this option would be difficult to implement and enforce. It would likely require the AER to establish, investigate and take action where a retailer has failed to 'take reasonable steps' to make conditional discounts offers available to customer whose needs and circumstances match the risk profile for conditional discounts.

Overall, we consider this intervention is not firm enough to address the significant consumer issues related to conditional discounting.

We note the consultation paper refers to a new approach to screening telecommunications customers. The paper outlines amendments to the Telecommunications Customer Protection (TCP) Code which commenced on 1 June 2019 and requires telecommunications providers to run credit and income checks before offering post-paid plans worth more than $1000 per year or more than $45 per month, and to explain the financial implications of the service offered. As this measure has been recently introduced, we will be interested to understand its impact as the AEMC progresses this consultation. In particular, it would be worthwhile considering if there is a quantified impact arising from these changes and whether this has led to any improvement in the customer experience of financial difficulty, evidence of contracting arrangements not compounding vulnerability and levels of original or escalated complaints including to the Telecommunications Industry Ombudsman.

Option 2 – Banning conditional discounts

We consider option 2 would address the issues of comparability and excessive penalties for disadvantaged and vulnerable customers in the market. However, we note this approach may not meet all customer needs and preferences, including those of consumers who are well-positioned to meet conditions.

It will be relevant for the AEMC consider the impact that moves away from late payment fees have had in different markets and jurisdictions, in evaluating this option and others discussed in this consultation.

We generally agree with the considerations noted in the consultation paper regarding this option, and note it would be preferable to assess likelihood of success through consumer testing.

We propose an alternative solution below, related to this option.

Option 3 – Simple percentage cap

We consider this option may result in perverse or unintended outcomes for consumers as it could apply arbitrarily. We agree with the observations that it may result in better outcomes for some retailers compared to others. We note that this approach would have the effect of improving the comparability of offers, as conditional discounts will be set at similar rates between retailers, however it is unlikely to address the underlying consumer harm and market issues discussed above.

Although it is not currently clear, it would appear that the percentage would need to be set in the Retail Rules (and potentially updated from time to time), or set by the AER through a new guideline and require appropriate monitoring, policy review, and compliance and enforcement.

Option 4 – Limit conditional discounts to reasonable costs to retailers

We consider this option, or a variation of it, is most likely to address current consumer detriment and improve retail practices. We note it is consistent with REPI recommendation 33 and could generally serve to codify common law principles which can ensure that penalties do not feature in consumer transactions.

If a new rule is to be created under this option, it will be important for the rule to articulate and provide explanatory material about the circumstances in which costs are likely to be considered 'reasonable'.

We note the consultation paper discusses two alternative methods for limiting conditional discounts to reasonable costs – either through an AER guideline or a new retail rule. Under either approach, it will be important for the AEMC to consider and consult on:

- a workable, enforceable definition of 'reasonable' costs with sufficient guidance in the rule and determination to enable implementation
- an appropriate methodology for calculating reasonable costs, taking into account that costs will vary across retailers with different customer bases. Maintaining a focus on an objective standard of reasonability (rather than actual costs) will be key
- how frequently these costs should be reviewed, and
- appropriate lead times for setting the reasonable costs.

We note that one of the key challenges will be establishing an objective standard and balancing this against a diverse range of costs retailers and other stakeholders may consider to be reasonable.

If the AER Guideline approach is pursued in the final determination, the AER will be required to develop, consult on, implement, monitor and enforce the new rule and guideline. Similarly, if the final determination is to set out relevant requirements in the Retail Rules, the AER will likely be required to develop guidance about their enforcement and interpretation, implement the change, monitor performance and investigate and enforce compliance. Of the options identified in the rule change proposal, option 4 is likely to have the most significant impact on the AER's priorities and resources.

We note that the AER guideline option is likely to add lead time to implementing the changes envisaged in the rule change request, as the AER will be required to develop and consult on the guideline under the Retail Rules consultation procedures before it can be implemented.

Consultation question 6 – Assessment framework

a) Do you agree with the assessment framework outlined by the Commission?
b) Are there any other considerations the Commission should take into account?

We agree with the AEMC's assessment framework. In particular, we consider there are clear customer benefits arising from this rule change proposal, especially for those customers experiencing payment difficulties. By better reflecting a retailer's actual costs in the rates of conditional discounts, we consider this will provide fairer outcomes for consumers.

As the AEMC progresses this consultation, it will be important to ensure the changes are clear and enforceable, and – to the extent to AER may have a role in implementing them – that these are supported by appropriate remedies and powers.

Please contact Bronwen Jennings on (03) 9658 6417 or myself on (03) 9290 6965 if you would like to discuss our submission in more detail.

We look forward to providing further views including when the AEMC publishes its draft determination in November 2019.

Yours sincerely,

Sarah Proudfoot
General Manager
Consumers & Markets Branch