

19 September 2019

Conrad Guimaraes
Australian Energy Market Commission
PO Box A2449
Sydney South NSW 1235



Dear Mr Guimaraes,

Submission to Regulating Conditional Discounting consultation paper

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in New South Wales. Established in 1982, PIAC tackles systemic issues that have a significant impact upon people who are marginalised and facing disadvantage. We ensure basic rights are enjoyed across the community through litigation, public policy development, communication and training. The Energy + Water Consumers' Advocacy Program represents the interests of low-income and other residential consumers, developing policy and advocating in energy and water markets.

PIAC supports the principle and intent of the proposed rule change. Retail practices that rely on misleading, opaque conditional discounts from inflated base prices have led to widespread consumer confusion. The result has been too many consumers paying more than they should, even when they engage with the market. While a string of market changes, including the introduction of the Default Market Offer (DMO) have sought to address this, there is a need for further reform to ensure clearer and fairer retail energy pricing.

Addressing ongoing issues

The consultation paper (the paper) identifies a number of recent changes, including the implementation of the DMO, that may impact the need for the proposed rule change. PIAC contends that material issues remain, and highlights the following:

- The DMO and the code which enacts it does not apply in Tasmania, regional Queensland or the ACT, where new retail entrants may seek to resort to aggressive discounting in order to build new business
- The DMO measures do not apply to gas or to offers which bundle gas and electricity services
- The implementation of the DMO involved advertising and comparison measures which are overly complicated and may not result in better outcomes for many consumers
- Existing measures do not address the need to relate conditional discounts and fees transparently to the specific retail costs or savings involved.

Other than these gaps in the application of the Code, PIAC contends that the introduction of the Code and the DMO do not address the issues consumers face with comparing retail offers and accessing a fair deal. Specifically:

- While the code stipulates that a conditional discount must not be the most conspicuous price-related matter in the advertisement, this is vague and unnecessarily subjective. Where the intent of any advertisement is to be

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'conspicuous', It is difficult to objectively establish whether the conditional discount is the 'most conspicuous' price related matter. Further, conspicuousness of the conditional discount is not the primary concern. Where a discount exists, it is in the interests of the consumer to be aware of this in order to compare. However, it is necessary that the expression of the terms is clear, allows comparison, and informs a consumer clearly of the behaviour required, and what the price impact of that behaviour will be.

The clauses regarding how a conditional discount must be expressed are overly complicated and are unlikely to add to a consumer's understanding of an offer's impact on them. By requiring a discount be expressed as the difference between the conditional and unconditional price as a percentage of the reference price, the discount is tied to a price that is not directly relevant to the consumer unless they are on a Default Offer and have usage that is comparable to the reference price. This requirement does not contribute to the intention to ensure that discount terms are clearly understandable and comparable.

PIAC contends that discounts should be unconditional. Where conditional discounts continue, they should not be related to actions that are exclusionary or discriminatory. For example, benefit conditions should not require action that excludes people who are having trouble paying their bills, or people who cannot access certain payment or communications technology. Where the retail offer does contain conditional benefit or cost, they must:

- Be clearly expressed as a dollar figure or a percentage of the total bill, with any stipulations and qualifications advertised equivalent with the discount. For example, discounts for paying on time should be expressed as '\$40 (or 5 per cent) off each bill if you pay on time'.

Expression as a simple dollar figure is preferable, as percentages, and their impact upon the final price are poorly understood by many people. This why the ACL's requirements on displaying and advertising prices require the total minimum price over contract period to be displayed as a dollar figure, with any charges included¹. Similarly, where a partial price is advertised it is necessary to display (in equal terms) the total price. Where conditional discounts in retail pricing are shadow 'charges' these pricing rules are relevant and should guide the drafting of the final rule in this case.

- Be connected to the cost or saving flowing from the behaviour they require. For example, a discount for paying on time should be a dollar figure or a percentage of the total bill owing, on the basis that the 'cost' to the retailer of a customer paying late is likely to be a fixed amount or proportion of the customers total bill. Percentage discounts from the usage alone do not connect the cost/saving to the behaviour of payment. Conditions, in their amount and their expression, should add to transparency and assist consumers to make the correct decisions to control their costs and compare different market offerings. They should not be arbitrary or opaque.
- Be a dollar amount or a percentage amount that represents the reasonable cost or saving to the retailer resulting from the consumers behaviour. For example, a discount conditional on paying by direct debit should be a percentage of the total bill or a small dollar figure representing the direct benefit attributable for the retailer of the customer paying by direct debt, as compared with them paying on time but without direct debit. They should not be arbitrary or unreasonable figures that unduly reward or penalise some consumers for particular actions.

¹ ACCC. <https://www.accc.gov.au/business/pricing-surcharging/displaying-prices>

Preferred response

PIAC supports a variation of the approach proposed by the AEMC, where conditional terms including discounts or fees and charges, are limited to the “reasonable costs” incurred by retailers as a result of the consumer behaviour to which they relate. This approach should enshrine the requirement for reasonable costs in the rules, and allow the AER scope to formulate guidelines for retailers regarding what is reasonable. The AEMC should ensure that these stipulations apply for electricity, gas and combined energy offers.

PIAC has provided more detail in response to the questions contained in the consultation paper in the attached appendix.

Implementation

Should the AEMC proceed with this rule change we recommend implementation as soon as practicable. Any contracts with conditional terms that may be current at the point of implementation should be ‘transitioned’ at the end of the customer’s existing benefit period to minimise disruption or confusion. We suggest that disruption during transition could also be minimised by requiring retailers to convert any continuing benefits to ‘unconditional discounts’ for the remainder of any continuing benefit or contract periods.

Continued engagement

PIAC would welcome the opportunity to meet with the AEMC and other stakeholders to discuss these issues in more depth.

Yours sincerely,

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Appendix 1

Q1.a – Will comparability issues for conditional offers continue to be material with the introduction of the code?

Due to the limited application of the code and issues with the way it is worded (as highlighted in our letter of submission), it is likely that comparability issues with conditional discounts and fees or charges will continue to be material.

Q1.b – What factors may be present that contribute to the difficulty of offer comparability?

Comparability continues to be impeded by:

- The fact that the DMO and reference price is not an efficient or fair price. Where discounts are calculated against the reference price, it is not a 'reasonable' basis from which a consumer can make comparisons regarding the relative value of other offers. This is particularly important where it is possible for market offers to exceed the DMO and reference price.
- The ability for discounts to be expressed as a percentage. Many people have a poor understanding of percentages and are not able to easily calculate the impact of a percentage discount or charge on the eventual cost. This is further complicated when conditional discounts may relate to portions of a future prospective bill, for example where the percentage discount is off the usage component rather than the total bill.
- The requirement for discounts to be expressed as a proportion of the reference price, which may not relate to the actual charges or usage of the consumer, in which case the actual price and discount realised is not likely to match that advertised. It is very challenging for most consumers to understand the different factors involved in various deals and how they may interact with the 'notional' reference price in their own likely circumstances.
- The terms of the conditional discount can still be obscured or presented less clearly than the headline rate of the discount. While there is a requirement for terms to be 'conspicuous' it is not a requirement for terms to be presented prominently and on equal terms with the headline discount in all related advertisements and information.

Q2.a – Do stakeholders agree with the characterisation of substantially higher process paid by customers when they miss conditional discount conditions as excessive 'penalties'?

PIAC agrees that conditional discounts operate as shadow charges. Accordingly, where the discount amounts significantly exceed the reasonable costs related to the behaviour required by the discount, they are operating as excessive, punitive and unfair penalties.

Q2.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?

Energy is an essential service and all consumers have a right to access retail energy services without the fear of being unreasonably penalised. For consumers on hardship and payment plans, and others struggling to pay their bills, additional unfair penalties compound vulnerability. Some consumers on these plans may be unable to meet the conditions of their conditional plans and end up unreasonably penalised as a result. However, the evidence presented in the Consultation paper indicates that a significant cohort of all consumers, regardless of whether or not they are on payment or hardship plans, are at risk of being unreasonably penalised when they do not meet the discount conditions. The issue of transparency and fairness in conditional contract terms is significant for all consumers.

Q2.c – Do stakeholders have views on the ability of vulnerable customers to anticipate their energy plan costs and ability to pay?

Many consumers struggle to understand then full impact of contract conditions, and anticipate how these conditions will affect their own future energy bills. PIAC does not consider this problem to be restricted to 'vulnerable' consumers. Further, it is increasingly evident that the group of consumers who are vulnerable to unaffordable energy costs now includes middle- and

higher-income households. For the purposes of assessing the materiality and bounds of this proposal all consumers should be considered potentially 'vulnerable'.

Q2.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?

While internal retailer policies referred to in the consultation paper may intend to prevent people on payment plans and hardship policies from losing any benefits from paying late, PIAC does not consider this commitment to be effective, because:

- There is no evidence that all retailers systemically ensure that their customers are on the best possible offer for their circumstances.
- Retailers have discretion as to who is offered a payment plan or hardship support as regulatory rules do not set objective triggers for when support must be provided.
- Retailers have discretion in setting the terms of participation in, and maintenance of a payment plan or hardship support, including the quantum of payments required and when payments are required.
- While retailers may commit not to penalise hardship of payment plan customers through loss of discount or benefit when they pay late, incomplete payment or late payment while on a payment plan or hardship program can result in people being removed from those assistance programs. Further, people who have had a payment plan or hardship support cancelled for late payment can be excluded from future payment assistance.

We contend that reliance upon 'commitments' is not appropriate or sufficient, and that measures to address the transparency and fairness of conditional terms is needed for all consumers, particularly those who are struggling to pay their bills.

Q4.a – Do stakeholders consider gas offers should be subject to conditional discount limitations in line with electricity offers?

Conditional contract terms that are transparent, fair and reasonable are an important matter of principle to ensure consumers are able to clearly understand the terms of retail offers, compare them, and make choices that assist their affordable access to energy. Accordingly, PIAC supports gas and joint gas and electricity offers being subject to measures regulating conditional contract terms.

Q5.a – Are there any alternative solutions that should be considered by the Commission?

PIAC remains concerned about the employment of conditional terms that undermine market transparency, consumer understanding, choice and the ability of consumers to control their costs and get a fair deal. Accordingly, PIAC supports the Commission proceeding with an approach that addresses the issues with conditional terms at a principle level, ensuring that current issues with discounts do not simply persist in another form.

PIAC supports a variation of Option 4, that implements principle-based regulation of the conditional terms of retail energy contracts. That is, an option which is symmetrical and which does not limit its application to conditional 'discounts' but all conditional terms that relate a cost or saving for the retailer to behaviour of the customer.

Further, enshrining a requirement for conditions to reflect 'reasonable costs' in the rules is preferable, though PIAC supports an approach also involving AER guidelines on what constitute 'reasonable costs'. It is worth noting that future calculation of the DMO may involve a 'bottom up' approach that requires the AER to determine a reasonable benchmark for retail cost to serve. Such a process would require the AER to understand the reasonable costs imposed or saved by consumer behaviour, such as late payment.

PIAC makes no comment in relation to options 1-3 as we do not consider these options to be appropriate.

Q.5h – If a reasonable cost limitation was imposed, should this limitation be enforced through an AER guideline or should it be left to retailers?

PIAC supports requiring the AER to produce a guideline for 'reasonable' retail costs that help to ensure that retailers understand their responsibilities to deal fairly and reasonably with consumers, and signal what will be regarded as reasonable and acceptable in relation to conditional terms in retail contracts.