

Australian Energy Market Commission
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AEMC Draft Determination – Regulating Conditional Discounting

The Australian Energy Council ('AEC') welcomes the opportunity to make a submission to the Australian Energy Market Commission ('AEMC') on the Regulating Conditional Discounting Draft Rule Determination ('Draft Determination').

The AEC is the industry body representing 22 electricity and downstream natural gas businesses operating in the competitive wholesale and retail energy markets. These businesses collectively generate the overwhelming majority of electricity in Australia and sell gas and electricity to over 10 million homes and businesses.

The AEC recognises that this reform is designed to provide customers with fairer and simpler offers. We agree that the range and scale of conditional discounts, especially without a common base rate, was creating confusion for customers. It is our view that the introduction of the Default Market Offer and reference price has addressed these concerns and the proposed rule change is not necessary at the present time.

With that being said, if the rule change is to proceed, the AEC supports the general direction of the Draft Determination to give retailers flexibility in setting conditional discounts as a reflection of their reasonable costs. Unfortunately, the flexibility afforded to retailers appears to be inhibited by the AEMC prescribing certain factors as 'guidance' for determining reasonable costs. These factors do not appear relevant to the energy retail sector.

Of greater concern is the AEMC's proposal for a transitional provision that will require any existing contract with a conditional discount to be altered once the contract is set for roll over. This is effectively a retrospective application of the Rule and there remain unanswered questions about its interaction with existing customer contracts and explicit informed consent.

Reasonable Costs

We support the AEMC's position that reasonable costs are a widely understood legal concept that do not require a separate guideline to interpret. Energy retailers have different business models and pricing structures that operate with varying degrees of resources. These diverse circumstances make a 'case-by-case' approach to enforcement a sensible option.

To provide retailers with the necessary flexibility, the AEMC should avoid prescribing relevant factors to help determine reasonable costs. In this regard, the AEC views the 'guidance' case studies that the AEMC has outlined in section 5.4 of the Draft Determination as serving as an almost de-facto guideline for determining reasonable costs. We do not believe the comparison to credit card fees or payment surcharges is instructive as the financial sector is too dissimilar to the retail energy sector to inform what might represent reasonable costs.

Furthermore, if conditional discounts are to be classed as a “penalty” as they are in the Draft Determination, they are still substantively different in nature to credit card fees or payment surcharges. The latter penalties are not conditional and serve as an unavoidable penalty the customer must incur in any transaction. Shopping around to avoid a credit card fee is not practical. Conversely, a conditional discount requires the customer’s explicit informed consent to be provided in advance and can be rejected in favour of an alternative and more preferable offer. This effects how an energy retailer calculates reasonable costs because they must account for changes in customer behaviour. We encourage the AEMC to reconsider using these examples as ‘guidance’.

Transitional Provisions/Retrospective Application

The AEC does not support the Draft Determination’s proposed transitional provisions. This provision has a retrospective application. The AEC notes that the NERL does not appear to consider retrospectivity, nor is there precedence in this regard. It is our view that this provision is not consistent with best regulatory practice and should be removed.

The AEMC should also consider the impact of this provision from the perspective of the average customer. The Draft determination recognises that ‘many customers have been satisfied with their current conditional discount arrangements’.¹ These customers will not be aware of this rule change or the reasons behind it. Being notified that their discount has been significantly reduced is likely to diminish the customer’s trust in the competitive market and towards their retailer. This loss of trust will make it difficult for retailers to incentivise and offer new offers to customers in the future.

Any questions about this submission should be addressed to Rhys Thomas, by email to Rhys.Thomas@energy.council.com.au or by telephone on (03) 9205 3111.

Yours sincerely,



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¹ Australian Energy Market Commission, Draft Rule Determination: National Energy Retail Amendment (Regulating Conditional Discounting) Rule, 21 November 2019, p21.