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

Dear Mr Pierce

AER Submission – Draft rule determination on regulating conditional discounting

The Australian Energy Regulator (AER) welcomes the opportunity to make a submission in response to the Australian Energy Market Commission's (AEMC) *Draft rule determination on regulating conditional discounting* (Draft rule).¹

Overview

As noted in our [submission](#) of 21 September 2019 to the AEMC's *Regulating Conditional Discounting Consultation Paper* (consultation paper),² we support measures to regulate excessive conditional discounting and fees in retail energy offers.

The AER supports the proposed rule, noting that it:

- aims to prevent retailers recovering excessive costs from consumers if they fail to comply with a payment condition
- will apply to both gas and electricity offers
- will regulate conditional fees to limit duplication of penalties on consumers, and
- proposes the application of civil penalties to act as a deterrent.

¹ Australian Energy Market Commission, *Draft rule determination, National Energy Retail Amendment (Regulating conditional discounting) Rule*, November 2019.

² Australian Energy Market Commission, *Regulating Conditional Discounting, Consultation paper*, August 2019.

We consider there is a continued need to regulate conditional discounting practices in the form proposed by the AEMC, noting the magnitude of current conditional discounts offered in the retail market (up to 25%) is excessive compared to other markets, where discount amounts are capped at reasonable costs or similarly regulated (in the range of 5-8%).

We also consider current practices are unlikely to meet community expectations about reasonable practices, and note that the nature of conditional discounts can result in poor outcomes for consumers, especially those experiencing vulnerabilities. Conditional practices can negatively impact the transparency of the market, particularly where discounts are inflated, unclear, confusing, or unfair. The AEMC's proposed reforms to conditional discounting practices are consistent with the AER's interest in promoting consumer outcomes.

Current need for regulation

We note that the extent of consumer harm associated with conditional discounting practices is significant, and that these practices have a disproportionate impact on vulnerable consumers. The Australian Competition and Consumer Commission's (ACCC) Retail Electricity Pricing Inquiry (REPI) reports highlight that customers who did not pay on time were 'paying very large payment penalties, often amounting to hundreds of dollars per year'.³

It is our view that improved retail practices, including reasonable conditional discounts, will contribute to better consumer trust in the energy market. As we noted in our submission to the consultation paper, consumer trust in the market is currently low, with only 29 per cent of consumers having overall confidence that the market is working in their interest⁴ and less than 60 per cent of consumers satisfied with electricity value for money.⁵

Restricting conditional discounts/fees to 'reasonable costs'

We consider that limiting scope for retailers to recover excessive costs from customers who fail to comply with payment conditions, such as 'pay on time' and direct debit dishonour fee discounts, is likely to improve outcomes for consumers who are unable to, or do not often, meet the conditions of these discounts.

In line with our submission to the consultation paper, the AER supports the proposal to restrict conditional discounts in both gas and electricity offers to the 'reasonable costs' likely to be incurred by the retailer if a customer fails to comply with the payment condition. We consider that codifying common law requirements will ensure more consumers benefit from the general legal requirement that penalties cannot be recovered as costs.

Vulnerable energy customers

As we noted in our submission to the consultation paper, consumers in vulnerable circumstances are disproportionately impacted by current conditional discounting practices. The REPI report found that discounts are only achieved 56 per cent of the time for customers who are on payment plans to assist with managing their energy bills, and 42 per cent of the time by customers on 'hardship' programs.⁶

We also note that the Victorian Essential Services Commission is currently consulting on proposals to regulate conditional discounting, including to ensure that retailers must honour pay-on-time discounts

³ Australian Competition and Consumer Commission, *Retail Electricity Pricing Inquiry Final Report*, June 2018, p. xi.

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

⁵ Ibid, p. 13.

⁶ Ibid.

for vulnerable consumers who are accessing 'tailored assistance' under the Victorian Payment Difficulty Framework.⁷

We encourage the AEMC to continue to consider the disproportionate impact that conditional discounting practices have on vulnerable consumers, and the Victorian proposal which may impact a number of Victorian retailers who also operate in NECF jurisdictions.

Conditional fees

We support the AEMC's proposal to limit both gas and electricity conditional fees to reasonable costs (e.g. late payment fees). The AER supports this addition which we consider will protect against unintended consequences of the rule, such as retailers using conditional fees to recover excessive costs if the rule only applied to conditional discounts.

We also support the AEMC's proposal to prevent customers paying multiple times for the same failure to meet a condition, when both a conditional discount and fee apply to the same contract.

Implementation considerations

As outlined in our submission to the consultation paper, it will be important to ensure that the intended impact and application of the final rule are readily understood to assist implementation, particularly for the 'reasonable costs' requirement.

We note that the proposed rule provides the AER with an important compliance and enforcement function. We consider the draft rule gives the AER appropriate flexibility in relation to these functions and that this will be aided by appropriate interpretive information in the final rule and determination (e.g. examples and case studies on 'reasonable costs' and transitional arrangements). This information will be helpful to retailers, consumer advocates, and the AER.

We consider the inclusion of interpretive information in the AEMC's determination will also assist the AER to clearly communicate our compliance expectations for the new rule, so that consumers may experience the benefits of this reform in a timely and effective way.

To support the AEMC in making the rule and assist the AER in implementing and enforcing it, we provide the following feedback on some specific drafting items:

- Proposed rule 46C and 52B - we consider the word 'likely' (or an equivalent term) should be included in the draft rules, to remove any doubt about application. E.g. Rule 46C would then read: '(a) the value of the conditional discount does not exceed an amount which is a reasonable estimate of the costs incurred, or [add: 'likely'] to be incurred, by the retailer resulting from the customer's failure to comply with the payment condition...'
- Proposed rule 52B – we note the combined effect of the current draft rule is that an unreasonable 'conditional fee' alone would potentially not be enforceable, which we understand is different to the overall intentions of the draft rule. To avoid this scenario, we suggest the rules include a provision that a retailer must not include a conditional fee unless it doesn't exceed reasonable costs etc., so that the limitation on unreasonable conditional *discounts* applies equally to conditional *fees*.
- Transitional arrangements – we consider there is scope for greater clarity about the interaction between Part 13-2(2) and rule 52B of the draft rule. The current drafting of Part 13-2(2) states that 'a retailer must comply with' rule 52B, however the current drafting of rule 52B may not create a direct compliance obligation. We suggest some minor clarifications in the final rule to enable these clauses to operate together to give effect to the rule as relates unreasonable conditional fees.

⁷ Essential Services Commission, *Ensuring energy contracts are clear and fair: Draft decision*, December 2019, p. 7.

Our compliance and enforcement approach with the new rule will be guided by our annual compliance and enforcement priorities, and our *Compliance and Enforcement Policy* which provides direction on how we respond to potential breaches, and the factors we may have regard to when deciding whether to take enforcement action.

Emerging marketing practices

We note that the proposed rule will regulate conditional discounts related to timing and method of payment. We encourage the AEMC to consider the extent to which the rule is 'future-proofed' to regulate any new and emerging discounting practices that may cause harm to consumers.

If you have any questions in relation to this submission, please contact Bronwen Jennings, Director – Consumer Policy, on (03) 9658 6417.

Yours sincerely



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