CHOICE

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NATIONAL ENERGY RETAIL AMENDMENT (REGULATING CONDITIONAL DISCOUNTING) RULE

Submission to the Australian Energy Market Commission

ABOUT US

Set up by consumers for consumers, CHOICE is the consumer advocate that provides Australians with information and advice, free from commercial bias. CHOICE fights to hold industry and government accountable and achieve real change on the issues that matter most.

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INTRODUCTION

Pay on time "discounts" offered by energy retailers cause significant detriment to people who cannot pay on time. Conditional discounts can be characterised as "late payment penalties penalties" because they result in a substantial cost to consumers, who are already paying some of the world's highest prices to access energy. Pay on time discounts can be as high as 43% of usage charges, which can translate to hundreds of dollars' worth of late fees if a customer pays their bill just one day late. Residential customers cannot pay their bills before the due date 27% of the time - a number that grows to 59% of people experiencing hardship.[1]

CHOICE welcomes the opportunity to provide the following comments on the Australian Energy Market Commission's (AEMC) National Energy Retail Amendment (Regulating Conditional Discounting) Rule Consultation Paper (Consultation Paper). We consider this a vital first step towards implementing effective regulation that prevents retailers from hurting people through unfair discounting practices.

We strongly support the ban of conditional discounts and advocate that any late fees that energy companies can charge be restricted to a singular, low, capped late fee that is determined by the Australian Energy Regulator (AER). Conditional discounts are by design a misleading marketing tactic, and by nature are unreasonable.

CHOICE's comments will focus on the regulation of conditional discounts for electricity, but CHOICE supports similar interventions to be enforced in the gas market.

Recommendations

1. The AEMC should define excessive penalties as the substantially higher prices paid by customers when they miss conditional discount conditions.
2. The AEMC should design conditional discounting regulation to benefit all consumers.
    - The AEMC should assume that any and all households can be harmed by conditional discounting practices, and should not assume that people who do not access a hardship scheme are able to pay exorbitant late penalties.
3. The AEMC should adopt Option 2, and ban conditional discounts in the energy market.
    - Any discounts offered to consumers should be guaranteed.
4. The AEMC should introduce a rule to prevent retailers from 'double dipping' and charging customers multiple late fees.

[1] ACCC (2018), *Retail Electricity Pricing Inquiry - Final Report*, Melbourne, pg264.

5. The AEMC should direct the AER to determine the amount of a singular, low, capped late payment fee.
    - To determine what this fee may look like, regulators should draw on the amount charged for late payment by other utilities.

Conditional discounting hurts consumers and distorts the energy market

Every household deserves access to fair, affordable energy. Unfortunately, electricity retailers take advantage of people who experience confusion and inertia in a complex marketplace. Electricity companies trick people into paying more for energy by making it difficult to compare offers and offering customers contracts with conditions they cannot meet. This practice is rife: conditional discounts peaked at 78 percent of market offers in 2017,[2] and were still applied to 47% of market offers in 2019.[3]

Discounts influence consumer decisions

Retailers consider discounting 'standard practice,'[4] and the AEMC suggests that 'price dispersion, which sees considerable price differences for the same service in the energy market, is driven by discounting practices' rather than market segmentation based on customer needs and preferences.[5] This is inadequate for consumers, who struggle to compare hundreds of complex offers in a distorted energy market in the hope of getting a good deal.

When choosing an energy offer, discounts are front of mind for many people. 2017 research showed that 84% of Victorian consumers considered discounts 'very important' in their decision to switch retailers, and this was the most significant factor in their choice to switch to another retailer by a significant margin.[6] Given the significant influence that discounts have on consumers' purchasing decisions, energy discounts must be fair, accurate and helpful.

People do not support conditional discounting practices

Consumer sentiment about pay on time discounts demonstrates that many people find retailers' discounting practices unacceptable and want them to stop. The following are just some of the comments from over 14,200 CHOICE supporters who joined our campaigns to make the energy market fairer:

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[2] Australian Energy Market Commission (2019), *National Energy Retail Amendment (Regulating Conditional Discounting) Rule*, Sydney, p3.
[3] Ibid.
[4] ACCC (2018), *Retail Electricity Pricing Inquiry - Final Report*, Melbourne, pg264.
[5] AEMC (2018), *Retail Competition Review - Final Report*, Sydney, pgvi.
[6] Newgate Research (2017), Consumer research for the Victorian Government's review of the state's energy market, prepared for the Victorian Department of Environment, Land, Water and Planning, May 2017, slide 23.

“These are not 'discounts'. They are outrageous late fees that penalise a wide range of people very unfairly - particularly the elderly, the poor and the time-poor. They should be banned.” ***- Muriel, VIC***

“Energy costs already place a high financial burden on families. These expensive sneaky late payment fees are unfair and unethical and should be illegal.” - ***Sandra, NSW***

“If we could get rid of these late fees (disguised as pay on time discounts) then energy prices would be much more transparent giving consumers a clearer picture of what each company offers.” - ***John, VIC***

“The price should be the price. Consumers should not have to decode the energy company’s systems just to be charged a fair price.” ***- Fabian, NSW***

“It is completely unethical to charge late fees in this day and age where so many people are finding it hard to pay even [sic] *the amount due." -* ***Sue, SA***

“Calling it a 'pay on time discount' is misleading, and allows exorbitant late fees to be passed off as normal when they are not. We should just be told the price of the energy used, and advised of a reasonable policy for late payments. Such exorbitant late fees only cause additional stress and hardship to those already finding it difficult to keep up with their bills and are unnecessary.” ***- Elise, QLD***

“There are all sorts of reasons a bill might be paid late, poor health, a death in the family or some other challenge that takes your focus away from the day to day, natural disaster or even just a simple oversight....who doesn't accidentally miss something now and then! Dreadful to charge people like this! Aussies are meant to be about 'a fair go' not highway robbery!!” ***- Liz, QLD***

“It’s a form of double dipping and creates hardship for low wage families.” ***- Peter, 5400, SA***

“It’s blatant profiteering and for people on pensions, almost impossible to avoid. Because we live on a property where we pump our own water/deal with our own sewerage, our quarterly bills are routinely over $1000 - we can’t pay that in one hit most of the time, and usually have to split it into two payments, Even though we always pay, we are always penalised heavily (often more than an extra $500) for doing this. It’s grossly unfair on everyone trying to pay their bill in a timely manner and forces everyone to hop from one provider to another every 12 months in an effort to reduce penalties.” - ***Andrea, NSW***

These comments show that people see missed conditional discounts as excessive late payment penalties. People are eager to see meaningful regulatory change that will curtail these harmful discounting practices.

Nationally representative research by CHOICE[7] shows that the majority of people are in favour of a cap on the price that they may be charged for paying their bill just one day late:

- 70% of people agree there should be a limit on the amount customers are charged for a late payment.
- Parents with children are more likely than households without children to strongly agree that there should be a cap on the amount customers are charged for a late payment.

The majority of people want alternatives to pay on time discounts:

- More than half of consumers (52%) agree energy retailers should offer alternative incentives rather than a pay on time discount/late payment fee.

People experiencing vulnerability

Excessive late payment penalties can not only exacerbate people's experiences of vulnerability, but precipitate them. Anyone can be vulnerable, and vulnerability can be permanent, temporary, or situational. A *single* missed energy payment could result in hundreds of dollars worth of late fees, which may suddenly push a household into financial vulnerability and in some circumstances, a cycle of debt. Given this, changes to conditional discounts should assume that many people experiencing vulnerability may not be easily identifiable as people who cannot afford to pay their energy bills.

Any changes to conditional discounting regulation should be designed to benefit all consumers in the National Energy Market (NEM). The AEMC should assume that any and all households can be harmed by conditional discounting practices, and should not assume that people who do not access a hardship scheme are able to pay exorbitant late penalties.

In the Consultation Paper the AEMC explains that 'seven major energy retailers committed to the Commonwealth government that customers on a hardship program "will not lose any benefit or discount for late payment"' and that 'under section 44 of the NERL, retailers are required to include processes to review the appropriateness of a hardship customer's market retail contract

[7] CHOICE Consumer Pulse June 2018 is based on a survey of 1,075 Australian households. Quotas were applied for representations in each age group as well as genders and location to ensure coverage in each state and territory across metropolitan and regional areas. Fieldwork was conducted from the 15th to the 29th of June, 2018.

as part of their customer hardship policy.'[8] These are important consumer protections, but rely too heavily on retailers' abilities to identify people experiencing vulnerability and provide them with safe, affordable energy offers in a timely manner.

The Consultation Paper suggests that hardship customers make up 1.4% of all energy customers, according to AER data.[9] When we compare this seemingly small number of identified hardship customers against the 13.2% of Australians living below the poverty line,[10] we can speculate that many households experiencing vulnerability are not accurately identified by retailers as people requiring access to a hardship programme and may not reap the benefits of these protections.

For a single adult with no children, the poverty line was a very frugal (50% of median household disposable income) $433 a week ($353 after housing costs are deducted) in 2015-16.[11] CHOICE has observed missed discounts adding over $560 in late payment penalties to a household energy bill. In instances where a late payment penalty is as high as $560, the additional penalty alone, excluding usage and daily supply charges, already exceeds the weekly income of an individual living below the poverty line.

Recommendations 1 and 2

- The AEMC should define excessive penalties as the substantially higher prices paid by customers when they miss conditional discount conditions.
- The AEMC should design conditional discounting regulation to benefit all consumers.
    - The AEMC should assume that any and all households can be harmed by conditional discounting practices, and should not assume that people who do not access a hardship scheme are able to pay exorbitant late penalties.

Providing better, fairer market offers

The *ACCC Retail Pricing Inquiry* illuminated the breadth of the harm that electricity retailers inflict on people accessing energy in the NEM.[12] The *ACCC Retail Electricity Pricing Inquiry Preliminary Report* (Preliminary Report) raised conditional discounting as a practice that causes substantial harm to energy consumers.[13]

[8] Australian Energy Market Commission (2019), *National Energy Retail Amendment (Regulating Conditional Discounting) Rule*, Sydney, p7.
[9] Ibid. p8.
[10] ACOSS and UNSW Sydney, *Poverty in Australia 2018*, Sydney, p.15.
[11] Ibid. p21.
[12] ACCC (2018), *Retail Electricity Pricing Inquiry - Final Report*, Melbourne.
[13] ACCC (2017), *Retail Pricing Inquiry Preliminary Report*, Canberra, p.131.

The impact of the ACCC identifying conditional discounts as a significant issue in the Preliminary Report generated a market response, with many retailers introducing fixed rate offers such as AGL's *Essentials*, Energy Australia's *Securesaver*, and Origin's *One Low Rate*.[14] Despite some retailers reducing the number of offers with conditional discounts, the ACCC's *Retail Electricity Pricing Inquiry Final Report* (Final Report) concluded that a regulatory market intervention was still necessary, as articulated in the following recommendation:

> **Recommendation 33**
> Conditional discounts should be no higher than the reasonable savings that a retailer expects that it will make if a consumer satisfies the conditions attached to the discount. Retailers should bear the onus of substantiating that the conditional discount is reasonable.[15]

Conditional discounts continue to cause harm

Since the ACCC's final recommendations the prevalence of conditional discounts on market energy offers has dropped significantly.[16] It is unclear how much this decrease can be attributed to negative publicity. We assume that at least some energy retailers were motivated to change due to time-limited media and public pressure. Without strong and clear regulation, there is no guarantee that this drop in the use of conditional discounting will continue.

Though this is likely to have had a benefit for consumers in the NEM, energy retailers continue to use pay on time discounts to hurt and mislead consumers. This is supported by AER data from the *Quarterly Retail Performance Report Q3 2018-19*, that shows a total of 411,701 residential customers missed their pay on time discounts during the quarter.[17]

Large numbers of households continue to be penalised for not being able to pay their bills on time, and individual penalties can be hundreds of dollars. The March 2019 *Monitoring of supply in the National Electricity Market* Report lists a recent example of a market offer contract in which a household can receive a '34 per cent discount off the entire bill. If conditions are not met, then the annual price amount increases by $859 to $2528, which is $364 more than the most expensive offer with no discount attached ($2164).'[18]

[14] Potter, Ben (2018), '*Bracing for ACCC report, big energy retailers try simple 'fixed offers''*, The Financial Review, 29 June, accessed 03 September 2019.
[15] Ibid. p.269.
[16] Australian Energy Market Commission (2019), *National Energy Retail Amendment (Regulating Conditional Discounting) Rule*, Sydney, p3.
[17] Australian Energy Regulator (2019), *Quarterly Retail Performance Report - Q3 2018-19*, Melbourne, p.7.
[18] Ibid. p.ii. Note: Assumes a consumption level of 1200 kWh per quarter based on the AER's annual average consumption figure of 4811 kWh for Victoria

Conditional discounting practices are still causing substantial harm, and retailers' recent actions to reduce the number and the size of conditional discounts on the market have not done enough to protect consumers when they access this essential service. One missed conditional discount can have severe impacts on people, and this must be prevented through effective regulation.

Regulating conditional discounts effectively

Energy companies are charging their customers huge penalties through the loss of conditional discounts when they pay just one day late.[19] The ACCC suggests that pay on time discounts have 'emerged as a response to attempts to constrain late payment fees', and considers conditional discounts 'excessive and punitive' for consumers.[20] Though the ACCC acknowledges that retailers can make savings when consumers pay on time, the regulator notes that 'the size of such savings are not commensurate with the high conditional discounts currently available in the market, providing retailers with an excessive benefit when the conditions are not met.'[21]

The AEMC's Consultation Paper suggests it is "possible that increased limitations on conditional discounts would mean that energy retailers may have greater incentives to use different pricing strategies to attract customers," including loyalty incentives.[22] The regulation of conditional discounting practices presents a valuable opportunity to strengthen Australia's competitive energy market by ensuring that customer mobility is driven by retailers' incentives, not deterrents.

Proposed regulatory options

The AEMC's Consultation Paper provides four solutions to regulate conditional discounting practices. CHOICE supports 'Option 2 - Banning conditional discounts' as this is the most effective way to protect energy consumers from harm.[23] Conditional discounts are not working for consumers, and the AEMC should rule that all discounts offered by energy companies are guaranteed.

The other three options presented by the AEMC will continue to enable retailers to harm consumers through conditional discounting practices:

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[19]In Victoria, *Section 40C(1) of the Electricity Industry Act 2000 (Vic)* prohibits 'fees or charges' for late payment. Pay on time discounts are still permitted under *Section 40C(2)* of the *Act.*
[20] ACCC (2018), *Retail Electricity Pricing Inquiry - Final Report*, Melbourne, p.v.
[21] Ibid. p.268.
[22] Australian Energy Market Commission (2019), *National Energy Retail Amendment (Regulating Conditional Discounting) Rule*, Sydney, p.11.
[23] Australian Energy Market Commission (2019), *National Energy Retail Amendment (Regulating Conditional Discounting) Rule*, Sydney, p.11.

- 'Option 1 - Customer screening' will neither effectively identify all customers experiencing vulnerability, nor protect households from excessive penalties;
- 'Option 3 - Simple percentage cap on conditional discounts' will not do enough to limit the size of penalties, and risks concentrating harm to people with less-energy efficient homes and appliances; and
- 'Option 4 - Limit conditional discounts to reasonable costs to retailers' risks stretching the definition of what is 'reasonable' to retailers, and continuing to facilitate price gouging penalties.[24]

Option 4 runs the risk of being exploited by industry.[25] The definition of 'reasonable' in the context of late payment fees has been tested by ANZ, who defended their dishonour fees and over-limit fees on credit cards against a class action in 2014. The decision upheld the bank's position that the size of late payment fees could be justified by a range of business activities, meaning that late payment fee could significantly exceed the cost of late payment fees.[26]

We are also concerned about the possibility of retailers determining what they consider to be reasonable costs, and do not think that this is appropriate. No late fee that is inflicted on consumers as a result of a forgone conditional discount is a 'reasonable' fee. Conditional discounts are by design a misleading marketing tactic, and by nature are unreasonable. Retailers have been deliberately designing unfair energy contracts to exploit consumers. Though enshrining a 'reasonable cost' requirement in the rules would narrow the ways in which retailers can harm consumers, it will not be enough to effectively prevent harm. The AEMC should ensure that any late payment penalties incurred by consumers are limited to a low, capped fee determined by the AER, so that retailers cannot exploit regulatory loopholes to the detriment of consumers.

An additional issue is that some retailers are double dipping: penalties incurred through the loss of conditional discounts are charged *in addition to* existing late payment fees.[27] Penalising people twice enables electricity retailers to price gouge consumers. The AEMC should regulate discounting practices by preventing electricity retailers from charging people multiple penalties. Retailers should be prevented from simultaneously charging late fees and penalising customers with the loss of conditional discounts. Any late payment penalties that are incurred by consumers should be limited to a low, capped fee that is determined by the AER. CHOICE's first preference is that this fee is restricted to a total dollar amount, as opposed to a percentage amount. This would provide energy customers with a clear understanding of the penalty to

[24] Ibid. pp.11-12.
[25] Australian Energy Market Commission (2019), *National Energy Retail Amendment (Regulating Conditional Discounting) Rule*, Sydney, p.11.
[26] Barnett, Katy (2015), 'Paciocco v Australia and New Zealand Banking Group Ltd: Are Late Payment Fees on Credit Cards Enforceable?', *Sydney Law Review*, Vol.37(4).
[27] CHOICE research conducted in August 2018 showed that standard energy late payment fees ranged between $12-$15.

expect if they cannot pay their bill on time and will restrict the penalty to a small, capped amount. Retailers would still retain the choice to charge a lower or no amount.

In order to design and implement conditional discounting regulation effectively, the AEMC should draw on the design of capped late fee models across other utilities. CHOICE research conducted in August 2018 showed that many mobile phone contracts across major phone networks had a standard late fee of $15 per bill.[28] This amount is substantially lower than the hundreds of dollars worth of late payment penalties resulting from the loss of conditional discounts that can be applied to energy consumers' bills. Given that many energy companies charge between $12-15 in late fees at present, the AEMC should consider whether late payment penalties should be capped below this amount.[29]

Recommendations 3, 4 and 5

- The AEMC should adopt Option 2 and ban conditional discounts in the energy market.
    - Any discounts offered to consumers should be guaranteed.
- The AEMC should introduce a rule to prevent retailers from 'double dipping' and charging customers multiple late fees.
- The AEMC should direct the AER to determine the amount of a singular, low, capped late payment fee.
    - To determine what this fee may look like, regulators should draw on the amount charged for late payment by other utilities.

[28] CHOICE research observed a limited portion of available offers across major telecommunications companies in August 2018. Observed Optus contracts charged $15 late fees on bill amounts between $50-100, Telstra contracts charged a $15 late fee on a bill over $70, and Vodafone charged $15 late fees on all bills.
[29] CHOICE research conducted in August 2018 showed that standard energy late payment fees ranged between $12-$15.