AEMC

INFORMATION

Preventing discounts on inflated energy rates

Consultation paper published with Commission initial position and indicative drafting for comment

The AEMC has started consultation on a rule change request that proposes to prohibit confusing retailer discounting practices – where retailers apply discounts to electricity rates that are higher than the retailer's equivalent standing offer, making the discount look bigger than it actually is.

Background

This rule change proposal was developed following the Prime Minister's meetings with energy retailers in August last year, which focused on the issue of energy affordability and bill transparency for consumers. While some of the agreements from the meetings resulted in immediate changes, this issue required a rule change request.

The rule change request

On 18 December 2017 the Hon Josh Frydenberg MP, Minister for the Environment and Energy submitted a rule change request on behalf of the Australian Government that aims to address confusing retailer discounting practices where retailers apply discounts to rates that exceed the rates of the retailer's standing offer.

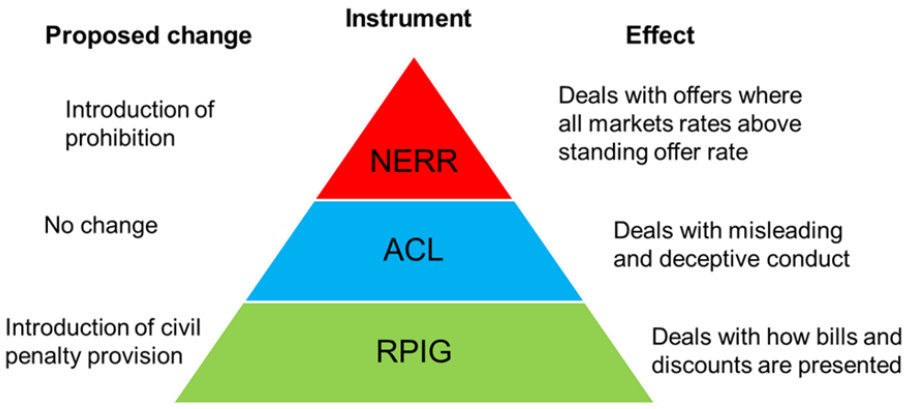
The rule change request contained a proposed rule to amend the National Energy Retail Rules (NERR) to prohibit retailers from applying discounts in an electricity market retail contract where any of its rates are above the retailer's equivalent standing offer. The rule change request argued a civil penalty should apply to the proposed rule.

The rule change request also suggests the Australian Energy Regulator's (AER) Retail Pricing Information Guidelines (RPIG) be strengthened, with a "bolster" to the RPIG identified as an alternative option to the proposed rule.

The Commission's initial position

The Commission supports the intent of the rule change request in addressing the practice of retailers applying discounts to market offers with rates above equivalent standing offers.

To provide an opportunity for detailed stakeholder feedback, this consultation paper provides an initial Commission position which would, if implemented, achieve similar outcomes to the proposed rule, but through a more targeted and integrated approach. This approach, where the rule change is combined with the existing mechanisms of the Australian Consumer Law (ACL) and the RPIG, is displayed in the below figure.



AUSTRALIAN ENERGY MARKET COMMISSION LEVEL 6, 201 ELIZABETH STREET SYDNEY NSW 2000
T: 02 8296 7800 E: AEMC@AEMC.GOV.AU W: WWW.AEMC.GOV.AU

When there are particular retail practices which will cause consumer detriment and are apparently designed purely to confuse consumers, a specific restriction of these practices within the National Energy Retail Rules is appropriate.

The Commission's initial position builds on the existing regulatory framework of the RPIG and ACL. It does so through two proposed changes:

1. A joint Commission-AER recommendation to the COAG Energy Council to make retailers' non-compliance with the RPIG's provisions on presentation of market and standing offer prices subject to a civil penalty under the National Energy Retail Law (NERL). Having these provisions of the RPIG subject to a civil penalty would allow the AER to issue infringement notices with penalties of up to $20,000 (for a body corporate).
2. Introducing a rule in the NERR (not applicable in Victoria[1]) restricting retailers from including discounts in market retail contracts where all of the energy rates in the contract are above the equivalent rates in a standing offer.

The Commission's analysis

A competitive retail energy market is generally better at producing energy offers that meet consumers' preferences at prices they are willing to pay than regulatory measures which restrict the offers that retailers are able to make to consumers. The Commission therefore considers that the primary means of addressing confusion should be through the regulatory instruments governing the presentation and advertising of retail offers, that is, the RPIG and ACL. In this context it is important that these instruments are enforceable. To achieve this, the Commission is proposing a civil penalty apply to the standing and market offer pricing presentation aspects of the RPIG.

The addition of infringement notices would provide the AER greater enforcement options, which it can use to fit the circumstances when faced with a contravention of market and standing offer pricing presentation provisions in the RPIG. The Commission considers infringement notices with penalties are an effective tool for the AER in many of the circumstances where an RPIG provision regarding the presentation of standing or market offer pricing has been breached.

The Commission generally considers that these instruments are appropriate. However, where there are particular retail practices which cannot be in the interest of consumers and are apparently designed purely to confuse consumers, a specific restriction of such practices within the NERR is appropriate.

In its initial analysis, the Commission considers that this is the case where retailers provide discounts in a market retail contract where all of the rates within the contract are above all of the rates of an equivalent standing offer. In this case, no consumer could be better off under the undiscounted market retail contract than under the standing offer. Therefore a key reason the market retail contract may be attractive is through confusing consumers with inflated discounting rates. The Commission's initial position, on which this consultation paper seeks feedback, is that this practice should be prohibited under the NERR.

The benefits of having a prohibition in the NERR are that it provides a clear and stronger deterrent on such practices and avoids the legal costs associated with having to pursue action under the ACL. If there are discounting practices that would constitute misleading or deceptive conduct or a false or misleading representation then these practices can still be prosecuted through the ACL, and the prohibition in the NERR would not be intended to narrow the application of the ACL.

The rule change process

Based on analysis of current energy offers, the Commission considers the request is non-controversial as defined in the NERL. The Commission therefore considers the rule change request should be subject to the expedited rule making process.

While the rule change request meets the tests to be expedited, the Commission notes that the issues presented are contentious and complex. Therefore, the Commission has provided, and will continue to provide, opportunities for consultation above the usual consultation within an expedited process. To date, this has included bilateral meetings, a stakeholder workshop and opportunities for informal written feedback.

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[1] Victoria has not adopted the National Energy Customer Framework, which comprises of the National Energy Retail Law, the National Energy Retail Regulations and the National Energy Retail Rules. As this rule change is a request to amend the National Energy Retail Rules, a rule made under this rule change process would not apply in Victoria.

The Commission's initial position, indicative drafting and questions for consultation contained in this paper, reflect this early consultation.

The Commission will continue to provide such opportunities throughout the rule change process, including through another stakeholder workshop. The table below summarises the Commission's proposed process.

The Commission will continue to provide such opportunities throughout the rule change process, including through another stakeholder workshop.

Milestone	**Date**
Early informal stakeholder workshop	15 February 2018
Publication of consultation paper and rule change commencement	20 March 2018
Objections to Commission decision that the rule change request is for a non-controversial rule (expedition)	3 April 2018
Stakeholder workshop	TBC
Opportunities for individual engagement	Prior to 17 April
Submissions on the consultation paper due	17 April 2018
Publication of final determination and final rule (if made)	15 May 2018

For information contact:
AEMC Director, **Ben Davis** (02) 8296 7851
AEMC Adviser, **Thomas Redmond** (02) 8296 7858

Media: Communication Director, Prudence Anderson 0404 821 935 or (02) 8296 7817

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