17 April 2018

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Submitted electronically

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Dear Mr Redmond

National Energy Retail Amendment (Preventing discounts on inflated energy rates) Rule 2018

EnergyAustralia is pleased to make this submission to the Australian Energy Market Commission (the Commission) on the rule change proposal preventing discounts on inflated energy rates submitted by the Commonwealth Minister for Environment and Energy, the Hon. Josh Frydenberg.

EnergyAustralia is one of Australia's leading energy companies, providing gas and electricity to 2.6 million household and business customer accounts in New South Wales, Victoria, Queensland, South Australia and the Australian Capital Territory.

EnergyAustralia also owns and operates over 4,500MW of generation in the National Electricity Market (NEM). We have a modern and diverse energy portfolio underpinned by coal and gas power plants, and complemented by newer energy sources like wind, solar and batteries.

EnergyAustralia is supportive of the intent of the Rule change proposal and efforts to improve transparency and confidence in retail energy markets. In this context, we have been actively engaged with ongoing work by the Commonwealth Government and Australian Energy Regulator (AER) to make purchasing energy products simpler for customers. This includes participation in (and actioning commitments from) the Prime Minister's Retailer Roundtable last year, and an active contribution to the AER's review of Retail Pricing Guidelines (RPIG) (as a member of the Stakeholder Reference Group). It is important that this Rule change is considered in the context of these changes to ensure there is no unintended consequences and any changes happen in a consistent and integrated manner. Specific comments on the Commission's initial position on the Rule change proposal are included below.

Addressing Specific Discounting Practice

EnergyAustralia considers the practice of inflating reference rates beyond Standing Offer rates to create a larger headline discount to be inappropriate and damaging to a transparent and competitive market. We welcome the AEMC's recognition that the Australia Consumer Law (ACL) has a role to play in this scenario. It is, however, disappointing the Australian Competition and Consumer Commission (ACCC) has not conducted an investigation into this

behaviour to consider whether it is unconscionable under the ACL. Hopefully the ACCC's *Electricity Supply Prices Inquiry* will address the issue.

In any case, EnergyAustralia is largely supportive of the proposed rule change wording and consider it will stop the poor behaviour. We would, however, recommend removing the words "equal to or" from s46B9(1)(c) of the indicative drafting. Retailers should not be prohibited from offering products that are equal to the Standing Offer Tariff (SOT), only from products that are *inferior* to the SOT.

We welcome the AEMC's approach to developing the proposed Rule and consider that it sends a strong signal that misrepresenting prices to customers is not appropriate. We also support the way the AEMC has effectively added protection against inappropriate selling practices without limiting product innovation and flexibility.

Applying Civil Penalties to the RPIG

The National Energy Customer Framework (NECF), which the incorporates National Energy Retail Law (NERL) and National Energy Retail Rules (NERR), was formally established in 2011 by Commonwealth and State/Territory Governments. This included a carefully considered legislative hierarchy with the NERL providing the necessary Heads of Power for more detailed rules and guidelines. This approach effectively establishes robust consumer protections whilst maintaining implementation and enforcement flexibility. Within in that context, jurisdictional Ministers and officials assigned civil penalty provisions to certain parts of the NERL and NERR. Those sections to which civil penalty provisions apply have two key characteristics:

1. They apply to activities that could be considered key consumer protections and warrant a higher level of penalty for breaches (eg. explicit informed consent obligations, life support conditions, Retailer of Last Resort requirements); and

2. They apply to specific unambiguous laws or rules (eg. a retailer requirement to have a hardship policy, submit it to the AER and make it publicly available).

The NERL and NERR require the AER to make guidelines on a range of matters. Guidelines are necessary for the AER to exercise its regulatory functions and powers and are created to assist retailers to comply with their obligations under the NERL or NERR. Depending on the subject matter, guidelines may be written with varying levels of detail and flexibility. This form of drafting is naturally more open to interpretation and less suitable to have civil penalties to applied to it.

Whilst EnergyAustralia acknowledges the intent of the AEMC in proposing that civil penalty provision be applied to the RPIG, we do not consider it appropriate for the following reasons:

- **The policy rationale is not clear:** EnergyAustralia does not consider that the AEMC has made a strong case to warrant applying civil penalties to the RPIG. The Consultation Paper provides no evidence that the AER has faced any significant challenges in administering or enforcing any part of the RPIG. We assume a higher standard of evidence would be required to satisfy Energy Minsters that the introduction of civil penalties for sections 24 and 37 of the NERL is warranted. We consider this justification should be presented for public comment prior to any recommendation to the COAG Energy Council.

- **Regulatory process is devolved:** As discussed above, the regulatory architecture of the NECF provides the AER with authority to create and amend guidelines to facilitate it exercising its regulatory functions and powers and, consequently, assist retailers comply with obligations. The AER can change guidelines and must do so in accordance with the retail consultation procedure. However, by design, guidelines are able to be amended with less formality and process than Energy Rules. For example, the AER is able to initiate changes to a guideline.

  Further, making civil penalties applicable to the RPIG would, in effect, devolve penalty-based rulemaking to the same regulatory body that administers the Rules. This combination would create uncertainty and increase administrative costs for retailers, which seems inappropriate given the lack of robust evidence that civil penalties are necessary. If the AEMC and AER are concerned that some retailers are misleading or deceiving consumers with their presentation of standing and market offer prices, a more appropriate solution may be for the ACCC to take enforcement action against those retailers under the ACL.

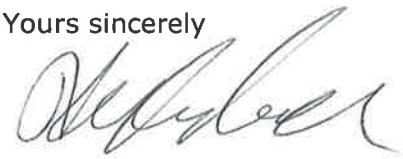
- **The change is disproportionate:** There are many steps to sell and market an energy product and several of those steps are determined by the RPIG. Some of these steps are small discrete actions that can be impacted by system or human error (eg. submitting information into *Energy Made Easy*). We do not consider that applying civil penalties to non-compliance on such matters is proportionate and consider the existing enforcement regime is appropriate for dealing with possible breaches. In any case, our experience is that most breaches are the result of error, not from deliberate action, it is arguable having a civil penalty apply to the RPIG is unlikely to materially the change level of compliance.

- **The RPIG can be ambiguous:** As highlighted above, the RPIG is written as a guidance document and therefore written in a way that could be open to interpretation. This does not align well with the application of civil penalties. We expect that the level of ambiguity in the RPIG will be increased with the recently proposed changes to the definition of 'Generally Available' offers that must be published on the *Energy Made Easy* website.

In summary, EnergyAustralia considers that the proposed Rule change will effectively stop the inappropriate behaviour of most concern to Minister Frydenberg and that extending civil penalty provisions to the RPIG is not warranted based on the information presented by the AEMC.

We look forward to continuing to work cooperatively with the AEMC on this issue and other Rule change proposals currently before it. Should you require further information regarding this submission please contact Lee Evans, Policy and Advocacy Lead, on (03) 8628 1185.

Yours sincerely



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