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Australian Energy Market Commission  
PO Box A2449  
SYDNEY SOUTH NSW 1235

Your reference RRC0012

Submitted online: <https://www.aemc.gov.au/>

### **National Energy Retail Amendment – Preventing discounts on inflated energy rates (RRC0012)**

The Australian Energy Council (the AEC) welcomes the opportunity to make a submission on the National Energy Retail Amendment (Preventing discounts on inflated energy rates) Rule 2018.

The AEC is the industry body representing 21 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 has a number of members who will contribute their own submissions on this rule change proposal.

The AEC supports the Commission's approach to amending the National Energy Retail Rules (NERR) as set out in the indicative drafting (ie, part two of the initial position), subject to our comments below. Applying discounts on market contracts with base prices in all respects higher than all equivalent standing offer prices creates a high risk of customer confusion. Our comments on the key issues which arise in the consultation paper are set out below.

We are, however, concerned about the AEMC's proposal to recommend that the non-compliance with sections 24 and 37 of the NERL would attract civil penalties (ie, part one of the initial position). While we are mindful of the AEMC's desire to 'bolster' the Retail Pricing Information Guidelines (RPIG) in line with the rule change request, the consultation paper does not point to any compliance issues currently with the RPIG based on the AER's current enforcement measures.

We consider that the AER is already in the process of enhancing the RPIG through the amendments made as part of a recent RPIG review.

We are further concerned that there are conflicting views on what effect the imposition of a civil penalty on sections 24 and 37 of the NERL would have in practice – and whether it would effectively render the non-compliance with any provision of the RPIG subject to a civil penalty. We recommend that the AEMC further considers whether there is sufficient clarity about which provisions of the RPIG would attract civil penalties under the proposed approach. If not, we would query whether those provisions of the NERL are appropriate to be made the subject of civil penalties.

#### **Role of ACL, RPIG and NECF**

The AEC agrees that the ACL and RPIG are appropriate mechanisms governing the making and presentation of market offers. The NERR is also relevant in determining minimum standards applicable in market contracts.

The ACL is a broad national law providing consumer rights and prohibiting misleading and deceptive conduct, unfair practices and certain consumer guarantees.

The NERL establishes energy-specific consumer protections which complement more general consumer protection laws including the ACL. Under the NECF, the AER has particular responsibility for making and amending guidelines to provide guidance to retailers in the presentation of standing offer prices and market offer prices. The RPIG may specify the manner and form of standing offer prices and market offer prices when retailers publish, advertise or notify the AER of those prices or any variation.

The NERL also provides that the NERR may set out minimum requirements that are to apply in relation to the terms and conditions of market retail contracts (NERL section 34(1)(b)). We agree with the AEMC that, generally, retailers' energy offers should be restricted through the NERR as a competitive energy market is the best means of determining offers to suit customer preferences. We consider the approach taken by the AEMC in the rule change reflects the respective roles of the ACL, RPIG and NERR and is appropriate in this context.

### **Indicative drafting**

We support the approach taken in the indicative drafting to establishing a concept of *equivalency*. Where a market offer is structured differently from a standing offer, the standing offer cannot be reasonably considered as establishing a 'base rate' for the purposes of the market offer. Any approach which seeks to treat different offer structures as comparable creates a risk of unintended consequences, including stifling innovation in market retail offerings.

We agree with the exclusion of fees from the definition of 'energy rate'. The effect of this exclusion is that fees applying to a market offer are not relevant to the prohibition; nor are they relevant to determining equivalency of a standing and market offer. However, the inclusion of the term 'penalty' in the indicative drafting is problematic as any contractual clause which would be considered a penalty would be unenforceable as a matter of law. In the AEC's view, it is preferable for the NERR to avoid any potential implication that market offers would include penalty clauses (and in our view the term 'fee' captures the relevant concept adequately).

### **Treatment of dual fuel**

We note the AEMC's proposed revisions to its treatment of dual fuel offers, as presented at the stakeholder workshop on 4 April 2018. The revised approach seeks to match like for like dual fuel offers and is logically consistent with the approach otherwise taken in the indicative drafting. In the AEC's view, the revised approach is preferable to that taken in the indicative drafting.

We acknowledge the short time frame that the AEMC faces to implement this rule change (if the AEMC decides to make a rule) and note that indicative drafting on the proposed revised dual fuel approach has not been provided as part of the AEMC's consultation to date. We would welcome the opportunity to provide comment on the proposed drafting, if possible within the timeframes.

Yours sincerely

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