

5 August 2015

By email: AERinquiry@aer.gov.au

Ms Sarah Proudfoot
General Manager - Retail Markets Branch
Australian Energy Regulator
GPO Box 520
Melbourne VIC 3001

Dear Ms Proudfoot

Submission on Amendments to the AER Retail Pricing Information Guidelines

Consumer Action Law Centre (**Consumer Action**) is pleased to provide further input into the Australian Energy Regulator's (**AER**) Amendments to the AER Retail Pricing Information Guidelines V4.0, specifically, the consultation paper on 'selected sections'.

We strongly support the AER's proposed amendments relating to 'language requirements'. While it is important that Energy Price Fact Sheets use consistent and clear language, consumers more often engage with retailer's advertising and marketing material. It is positive these language requirements will apply to such material.

In addition to the list of prohibited and acceptable terms, we strongly support the requirement that language that is "clear, simple and widely understood". This takes consumer protection further than merely the obligation not to mislead or deceive, and requires retailers to be clear and simple. It is our view that much of retailer advertising (for example, claims of discounts on usage charges from market rates) is not clear and simple. Once implemented, we urge the AER to take action to ensure compliance with this guidance.

We also support the proposal to extend the guidance on 'conditional discounts' to advertising and marketing.

We have significant concerns, however, with the proposal to weaken the requirements around 'guaranteed discounts'. Our understanding of the proposed change is that retailers will not be required to display the actual tariff from which the discount applies in mainstream advertising and marketing material. The actual tariff will only be displayed where the retailer has the necessary information to determine the tariff rate, which might include websites but only after the consumer has entered information such as their address.

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If this view is correct, we submit that the reform is not worthwhile. The problem to be addressed is consumer misunderstanding relating to retailer discounting practices. For clarity, the comments below apply equally to 'conditional' and 'guaranteed' discounts.

Consumer misunderstanding about discounts relates to advertising claims that the offer attracts discounts of 10 percent, 20 percent or even 30 percent. The claims then sometimes have in much smaller text "off usage rates" and, more commonly, "off market rates".

Many consumers are rightly disappointed that advertising claims of discounts don't amount to a similar discount of the entire bill. This is due to the discount being off usage rates, rather than supply or fixed rates. We submit that retailers should be required to say, in clear and prominent text, that the discount does *not* apply to supply charges, if that is the case.

More concerning however are the claims "off market rates" or "off standing rates". In Victoria, where prices are deregulated, the retailers set their own market or standing rates. This results in the perverse outcome recently noted by the Australian Energy Market Commission when it examined the Victorian market. It found that 'some offers with discounts of less than five percent are better than those with discounts of more than 20 percent'.¹

We think this is an issue not just about consumer protection, but effective competition in the energy market. How is consumer participation meant to bring discipline to retailer's pricing practices if pricing claims are so unclear? Shopping around based on headline claims, which is a common approach taken by consumers, becomes almost meaningless. Recent reports of growing retailer margins suggest that competition is not producing efficient and lowest cost outcomes for consumers in the Victorian market.

The AER states that the Australian Consumer Law (**ACL**) prohibits retailers from representing guaranteed discounts in a manner that misleads or deceives consumers. That is true. What the ACL does not require is for representations to be clear, intelligible or unambiguous.

This is demonstrated by the recent enforcement action by ACCC prosecuting "discounts off what". The case of *ACCC v AGL South Australia Pty Ltd*² concerned the marketing practices of energy retailer, AGL, and the way it marketed its energy plans on the basis of the discounts that were offered. Following many consumers signing up to the energy plans, AGL raised the price from which the 'discounts' were based. The ACCC alleged that communications to customers about these price rises were misleading. There were two communications in relation to two separate groups of customers. For the first, the court found misleading conduct because the communication stated that the consumers' discount remained (it did not, because it was effectively lost through the price rise). In relation to the second communication, however, the Court did not find any misleading conduct. That was because there was nothing in that letter stating that the discount would continue.

The ACCC argued that AGL had a positive obligation to disclose to the customers at the time of the increase that their discounts would be lost but the Court did not agree that this was required.

¹ AEMC, Retail Competition Review, July 2015, available at: <http://www.aemc.gov.au/Markets-Reviews-Advice/2015-retail-competition-review/Final/AEMC-Documents/Final-Report.aspx>

² *Australian Competition and Consumer Commission v AGL South Australia Pty Ltd* [2014] FCA 1369.

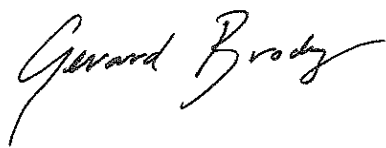
This would've amounted to communication that was clear and timely. The Court stated, however, that the ACCC had shown no basis for a conclusion that the customers had an interest in being informed of the particularised details—there was no 'reasonable expectation for disclosure'.³ This confirms that there is no requirement in the ACL for retailers to be clear and upfront in their marketing materials.

Our initial support for the AER's retail pricing information guidelines was based on our understanding that it was driving systemic change to retailers' representations of discounting. By prohibiting guaranteed discounts unless a tariff rate was also specified, the AER would have encouraged retailers to advertise actual rates or (if this was not possible because the retailer could not pinpoint the exact rate due to locational information being required) to base their marketing and advertising on some other truthful claims. By allowing retailers "to promote a guaranteed discount in a major metropolitan newspaper without specifying the specific tariff rate if the advertisement is clear about what tariff the guaranteed discount will applied to (e.g. the retailer's standing offer tariff)", then we submit that current practices will not change. Consumers will remain confused and competition will suffer.

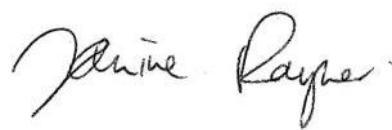
We would welcome an opportunity to further discuss this submission with you. Please contact Janine Rayner on 03 8554 6943 or janine@consumeraction.org.au.

Yours sincerely

CONSUMER ACTION LAW CENTRE



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³ *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited* [2010] HCA 31.