Australian Government
Department of the Environment and Energy

Public Consultation Paper

Competition and Consumer Legislation Amendment (Electricity Retail) Regulations 2019

22 October 2019

CONTENTS

1. CONSULTATION PROCESS

The purpose of this paper is to seek input on proposed amendments to the *Competition and Consumer (Industry Code – Electricity Retail) Regulations 2019* (the Code).

The amendments to the Code are being made through the *Competition and Consumer Legislation Amendment (Electricity Retail) Regulations 2019* (the amending regulations).

The Australian Government is seeking feedback on the key amendments reflected in the amending regulations, which are:

- Extending the standing offer price cap, reference price and conditional discounting obligations to customers with solar photovoltaic systems.
- Extending the standing offer price cap to residential flexible tariff customers
- Clarifying demand tariff exclusions
- Clarifying obligations around price related communications
- Introducing record keeping obligations
- Clarifying of the reference price rounding requirements
- Ensuring Australian Energy Regulator (AER) determinations are non-disallowable under the code.

The outcomes of this consultation will inform the finalised amendments to the Code. Interested parties are invited to submit their responses to the discussion questions in this document.

All stakeholder submissions will be published unless stakeholders have clearly indicated a submission should remain confidential, either in whole or in part. Electronic submissions are preferred.

Please note all submissions, including those that are confidential, will be shared with the Australian Treasury, the Australian Competition and Consumer Commission, the Australian Energy Regulator and other Government agencies as necessary for the purposes of this consultation.

Closing date for submissions: **Wednesday 6 November 2019 (1:00pm AEDT)**

Email electricitycode@environment.gov.au

Enquiries can also be directed to this e-mail address.

2. INTRODUCTION

On 20 August 2018, the Australian Government announced it would implement a default market offer (DMO) for retail electricity standing offers. The rationale for initially taking this action through the Code was outlined in detail as part of the consultation process on the Code.[1] In short, this action was taken in light of the findings and recommendations of the Australian Competition and Consumer Commission (ACCC) in its Retail Electricity Pricing Inquiry (REPI).[2] Amongst other things, the ACCC recommended the implementation of a price cap and reference pricing requirements as are now reflected in the Code.

The Code came into broad operation on 1 July 2019. It operates[3] in New South Wales, South Australia, and South East Queensland, and has the following key effects:

- Applies the DMO price cap to the majority of standing offer prices experienced by residential and small business customers.
- Requires retailers to use a common reference price for comparing electricity offers to address the confusion resulting from discounts being offered against differing base rates.
- Imposes specific requirements on the advertising of conditional discounts.

The Code also sets out the framework under which the AER makes determinations that underpin the price cap and reference price requirements.

2.1. The basic operation of the code

In simple terms the Code requires the AER to determine the reasonable per customer annual price of supply for electricity.[4] This annual price operates as the price cap – a retailer's standing offers must not exceed this price.[5]

In presenting its retail prices to the general population, a retailer must specify how much those prices vary from the AER determined price. This requirement allows consumers to effectively compare the cost of retail offers in their area, as the offers are all referenced against the same benchmark amount.

Additionally, to improve transparency and clarity around discounts, the Code prevents advertising a conditional discount as the most conspicuous price-related matter in an advertisement, and requires retailers to clearly and prominently advertise the terms of any conditional discount that forms part of an offer.

The AER does not make one single price determination for all regions, but different determinations for certain types of customer in each of the electricity distribution regions in NSW, SA and SE QLD. The main purpose of making multiple determinations is to ensure the reference price for a consumer of a given type who lives in a particular region is generally

[1] See the consultation paper and submissions at: https://www.environment.gov.au/energy/electricity-code-consultation
[2] https://www.accc.gov.au/regulated-infrastructure/energy/electricity-supply-prices-inquiry
[3] The Code was designed to apply in jurisdictions which did not otherwise regulate retail electricity prices.
[4] In order to make this determination, the AER is also required to determine a representative amount of electricity usage, and a usage profile for the customer.
[5] That is, a retailer's standing offer tariffs must not exceed this price assuming the customer were to use the amount of electricity determined by the AER to be reasonable for that *type* of customer. In practice, if a customer's actual annual usage exceeds this amount then the annual cost will be higher.

reflective of the annual cost of supply for that customer. The three customer types for which the AER is required to make a determination (in each distribution region) are:

- a residential non-controlled load customer;[6]
- a residential controlled load customer; and
- a small business customer.

The Code explicitly excludes, from each of these customer groups, customers with grid-feeding solar photovoltaic units (solar customers). Consequently, the price cap, reference price and discounting protections in the Code do not extend to those customers.

2.2. Rationale for Australian Government action

The Government remains committed to the basis on which the code was made:

- to reduce the impact of high-priced standing offers;
- to ensure customers can more easily navigate the market through a reliable and transparent reference price mechanism; and
- a clearer approach to discounting.

The Government also wants to ensure that the Code operates effectively, and as intended, to protect a broad consumer base.

While the amending regulations make changes to the scope of the determinations, the Government would contend that this is not a substantial shift. These changes are fundamentally aimed at ensuring the framework provides the protections of a price cap and reference price to as many consumers as possible.

Other than changes to the scope of the determinations, the amendments are focused on providing greater clarity in the application of the Code, and ensuring the ACCC can effectively monitor compliance. The government therefore seeks stakeholder advice on these issues, as implemented through the amending regulations, and as described in more detail below.

2.3. Timing

In order to ensure the forthcoming AER determination encompasses the changes proposed in this consultation paper, it is intended that the finalised regulations be made by the end of the year.

The AER has already released its proposed approach to the 2020-21 determination, which reflects on a number of the matters outlined in this paper.[7]

The AER's final price and usage determinations are expected to take effect from 1 July 2020.

[6] A controlled load is an appliance which is metered separately, and to which a different tariff is applied (e.g. an electric hot water system).
[7] See: www.aer.gov.au/retail-markets/retail-guidelines-reviews/retail-electricity-prices-review-determination-of-default-market-offer-prices-2020-21.

3. PROPOSED OPERATION OF THE CODE AMENDMENTS

The draft amending regulations are published alongside this consultation paper (**Attachment A**). These amending regulations will, once made, alter the operation of the Code.

For each of the key changes to the code, the discussion below sets out the policy intent and includes questions on which specific stakeholder comment is sought.

3.1. Extension to solar customers

As noted above, the three types of customer for which the AER must make a determination currently excludes solar customers.[8] The Government has always intended that solar customers are afforded the protections available to other customers under the code, and this is reflected in the Code itself which includes a mechanism to extend the price cap to residential and small business solar customers.[9] Relying on the mechanism built into the Code would, however, be problematic for two key reasons:

- While the price cap would extend to solar customers, it would not explicitly allow the AER's model annual usage and price determinations to reflect variations related to solar customers.
- The reference price and discounting protections would not extend to solar customers.

The amendments to the Code therefore remedy those issues. Under the changes in the amending regulations, the AER will still make determinations for the same customer types, but those determinations allow the AER to take into account solar customers. Consequently, the price cap, reference price and discounting requirements will extend to solar customers.

In practice, it is expected that the extension of the Code to solar customers will have little impact. This is on the basis that:

- Solar customers use broadly the same amount of grid-supplied electricity as non-solar customers.[10]
- In relation to the price cap Code requirements, it is reasonable to assume that the majority of solar customers are likely to be on market offers (to which the price cap does not apply).
- In relation to the reference price Code requirements, generally market offers are available to both solar and non-solar customers on the same terms – that is, market offers with the same underlying rates are available to solar and non-solar customers, but include solar feed-in tariffs provisions that only apply if a customer has a solar system.[11]

Because of the latter point, the reference price and discounting requirements of the Code are already being applied in relation to solar customers. The amendments to the Code merely

[8] See existing regulation 6(3)(d).
[9] See Division 2, Item 11 of the Code.
[10] See p26 of the REPI, and ACIL Allen Consulting, Victorian Energy Usage Profiles, March 2019, p33.
[11] In its consultation on the 2020-21 determination the AER notes: "In general, solar tariffs published on EME are identical to non-solar tariffs, but with the addition of retailer FiTs as a component available to customers with PV systems." (p54).

formalise this arrangement and ensure that offers that are only available to solar market offer customers (to the extent such offers exist) will also be captured by the Code.

While the amendments to the Code are intended to allow the AER to take into account model annual usage and prices for solar customers, it is not intended that the determinations be required to reflect the annual bill of solar customers inclusive of solar feed-in-tariffs. The annual price determination should only be calculated on the cost of providing grid-based electricity for a given level of electricity usage.

The amending regulations therefore include a feed-in-tariff provision that clarifies the Code obligations. For example, the AER's determinations are not to take into account any amount that a retailer pays or credits to a consumer for electricity generated by that consumer's solar unit.[12]

To be clear, this change to the Code will not impose new requirements on the way feed-in-tariffs are marketed to consumers. While the reference price requirements will impact on the presentation of market offer prices to solar consumers, the presentation requirements are exclusive of the operation of feed-in-tariffs included as part of an offer.

Question

1. Do stakeholders have any concerns with the extension of the Code obligations to solar customers?
2. What proportion of retailers' standing offer customers are solar customers?
3. What proportion of retailers' market offers are exclusively available to solar customers?

3.2. Extension of the cap to flexible tariff customers

While the Code allows the AER's determinations for residential customers to take into account customers on 'flexible tariffs', which are otherwise known as Time or Use (TOU) tariffs, the price cap protections do not extend to these customers.[13]

Existing regulation 10(1)(b) explicitly excludes the operation of the price cap provisions in relation to prices which include a flexible tariff. The amending regulations simply repeal that exclusion, ensuring the standing offer price cap, based on the AER determinations for the two residential customer types, will extend to flexible tariff standing offers.

In reality, it is understood that there are relatively few customers on these offers. The practical effect of extending the price cap obligations to these offers should, therefore, be relatively limited.

The extension of the price cap mechanism to flexible tariffs will only apply to residential customers. This is because the AER's determinations for small business customers explicitly exclude small business customers on a flexible tariff.[14]

It is considered more problematic to extend the flexible tariff standing offer cap to small businesses given the significant variability in usage profiles for these customers. And there are

[12] See new regulation 8A.
[13] Existing regulation 10(1)(b) explicitly excludes the operation of the price cap provisions in relation to prices which include a flexible tariff.
[14] See r 6(2)(c)(iii).

a relatively limited number of flexible standing offer small business customers. As such, extending the price cap to these customers is not considered warranted at this stage.

The Australian Government will, however, continue to monitor the behaviour of retailers and the impact of the Code, including through the ACCC's ongoing electricity market monitoring inquiry[15].

Question

4. Do stakeholders have any concerns with the extension of the standing offer price cap obligations to residential flexible tariff customers?

3.3. Clarifying the demand tariff exclusion

The existing provisions of the Code were never intended to apply in relation to 'demand' tariffs.

Demand tariffs are aimed at imposing a cost on consumers that reflects the consumers' use of electricity at times when electricity demand is high across the network.

The Code deals with demand tariffs through existing regulation 6(3)(a), which excludes the operation of the Code in relation to small customers for whom electricity is supplied under an agreement in which price varies with network-wide demand.

While this provision does reflect the nature of a demand tariff, concerns have been raised that it does not operate to effectively exclude all demand tariffs operating across the market. The amending regulations therefore look to replace the existing provisions with an alternative and more specific approach.

In practice, the contractual provisions by which retailers describe demand tariffs vary significantly. The most salient feature of demand tariffs available in the market is that some or all of the price the consumer pays is determined by reference to the customer's maximum demand within a specific window (e.g. between 5-8pm) over a longer period (a month, or a billing period). The amending regulations therefore include a new definition of demand tariff which is aimed at capturing this specific feature.

This new definition is deployed in two ways:

- It replaces the existing exclusion in r 6(3)(a), which ensures that the broad obligations of the Code do not apply in relation to demand tariff customers.
- It ensures that the existing definition of flexible tariff explicitly excludes a demand tariff.

In relation to the latter point, while it is unlikely the existing definition of flexible tariff includes a demand tariff, it is considered appropriate to clarify the approach given the variety of contractual constructions of flexible and demand tariffs in the market.

Question

5. Do stakeholders have any concerns about the proposed approach to demand tariffs?

[15] See: https://www.accc.gov.au/regulated-infrastructure/energy/electricity-market-monitoring-2018-2025

3.4. Price communications

Under existing regulation 12, an electricity retailer must not advertise or publish offered prices or offer to supply at these prices unless they comply with the reference price and discounting obligations.

Some stakeholders have noted that the Code may not clearly articulate whether these obligations operate in all circumstances in which a retailer communicates their prices to a consumer. To provide this clarity, the ACCC published guidance on compliance with the provisions of the Code (the ACCC Guide).[16] That material states:

> *"Where there is a change to an existing market offer, retailers must communicate price changes to an advertisement, publication or offer in compliance with the requirements of the Code, detailed in section 5 [*of the ACCC Guide, which covers pricing and discounting obligations*]. Changes to market offers must be communicated broadly, such as on a website.*
>
> *If retailers vary a tariff, charge, or any price-related term or condition, to existing market contracts, the ACCC expects retailers to communicate changes to affected customers. That is, where the change has an impact on the price that a customer pays under an existing contract, the ACCC expects retailers to notify the customer directly in accordance with the Code requirements detailed in section 5."*

To ensure the Code more effectively communicates these obligations, the amending regulations make changes to the structure of regulation 12. Rather than expressing the obligations in terms of advertisements, publications and offers, the restructured regulation will express the obligations in terms of communications with small customers.

Reflecting the ACCC guidance, as described above, the communications that will be captured are:

- Advertising or publishing prices;
- Offering to supply a customer at those prices;
- Notifying, in writing, a customer of the prices.[17]

In the circumstances of these activities, the reference pricing requirements in regulation 12 will be invoked. In practical terms, however, if retailers are already complying with the requirements of the Code as outlined in the ACCC Guide then the amendments will have little impact.

Question

6. Do the price related communications amendments raise any concerns for stakeholders?

3.5. Record keeping

The Code is made under the industry code making framework set out in the CCA. This framework contains, amongst other things, a number of enforcement and compliance provisions that can be utilised by the ACCC in ensuring compliance with industry codes.

[16] See: https://www.accc.gov.au/publications/guide-to-the-electricity-retail-code
[17] Regulation 12 is restructured in terms of 'communicate', which is a newly defined term in regulation 5.

Amongst those provisions is section 51ADD, which requires retailers to provide the ACCC with certain information or documents.

In relation to any provision of an industry Code that requires a retailer to keep, generate or publish information or a document, the retailer must produce to the ACCC that information or documents within 21 days of notice from the ACCC. In order for the ACCC to conduct monitoring and compliance checks in relation to the Code under s 51ADD, it is appropriate to incorporate specific record keeping obligations in the Code.

The new record keeping framework in the Code centres around the ACCC's ability to monitor compliance with the price cap obligations and the price related communication provisions. In simple terms, a retailer must retain a record of the content of price related communications required under regulation 12(3)(a), (b) and (c), and regulation 13(2), and also the reference price calculations underpinning those communications.[18] Additionally, new regulation 10(4) requires a retailer to keep records demonstrating how they calculated their standing offer prices so as not to exceed the reference price.

To minimise the information that must to be kept by retailers, the framework excludes the requirement to keep name and address or personal information in relation to the customers to whom the communication was made. Additionally, and recognising that many, if not most price related communications are made the same way to more than one consumer, the framework allows a single record to be kept in relation to communications that are substantially identical (apart from being made to different customers) and based on a single template or script.

For example, for an advertising campaign that communicates a particular offer within a given distribution region, a single record would need to be kept which includes the content of the advertisement, the basis on which the reference price information was calculated, and the dates (or date range) over which the campaign ran.

As the new record keeping framework is critical to the ACCC's compliance monitoring efforts, the ACCC will be providing further guidance on the operation of these requirements when the amending regulations are made.

Question

7. Do stakeholders have any concerns related to the operation of the record keeping provisions?

3.6. Rounding

As discussed above, regulation 12 of the Code requires retailers to present pricing information to consumers by reference to the AER determined reference price. Specifically, retailers must present offers in terms of the variation of those offers from the reference price.
Regulation 12(5) requires these variations to be presented in percentage terms as a whole number, rounded up or down as appropriate.[19]

[18] See new regulation 13A. Note that the 'content' of a communication includes matters which are required to be communicated per revised regulation 12(6) – this includes the relevant distribution region and small customer type.
[19] Specifically, the requirement states that the percentage must be rounded up if the first decimal place is 5 or more.

Concerns have been raised as to the interaction between these 'whole number' requirements and the general protections of the Australian Consumer Law (ACL) such as the misleading or deceptive conduct provisions.[20] As the Code is subordinate to the general obligations of the ACL, it is appropriate to remove any resulting confusion by repealing regulation 12(5).[21]

The practical effect of this change is to make clear that the general obligations of the ACL apply to reference pricing requirements. At the same time the amending regulations are made, the ACCC will update its guidance material to outline how it expects retailers to comply with the reference pricing requirements under the ACL.

Question

8. Do stakeholders have any concerns with the repeal of regulation 12(5)?

3.7. Disallowability of AER determinations

Under the existing Code, AER determinations can be disallowed by Parliament. That is, once the AER makes a determination it would be possible for Parliament to, in practical terms, switch off the determination.

While it would have been preferable to have ensured the AER's determinations under the Code were non-disallowable from the outset, it was not possible at the time the Code was originally made. This was due to the operation of subsection 14(2) of the *Legislation Act 2003* (Cth). That provision prevented the Code from incorporating the AER determinations as in force from time to time, unless those determinations were disallowable. If the Code had included non-disallowable determinations, then the whole Code would have had to be re-made every time the AER made a new determination.

Ultimately, ensuring the AER's determinations are non-disallowable is aimed at providing certainty to industry and to customers for the entirety of the determination period. The amending regulations therefore make necessary changes to give effect to this outcome.

For the amendments to have the desired outcome, the operation of s 14(2) of the *Legislation Act 2003* needs to be altered. This is being progressed through the *Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019* (PEMM Bill). The *non-disallowability* provisions in the amending regulations will only take effect if and when the PEMM Bill is passed.

Question

9. Do stakeholders have any concerns about the disallowability of AER determinations?

[20] See s 18 of the ACL.
[21] The Code is made as a regulation under the *Competition and Consumer Act 2010*, while the ACL forms part of the primary CCA framework (it is contained in Schedule 2 of the CCA).