

12 March 2019

Energy Division
Department of Environment and Energy
GPO Box 787
Canberra ACT 2601

COMPETITION AND CONSUMER (INDUSTRY CODE – ELECTRICITY RETAIL) REGULATIONS 2019

Dear Mr O’Toole,

Energy Consumers Australia is the national voice for residential and small business energy consumers. Established by the Council of Australian Governments (COAG) Energy Council in 2015, our objective is to promote the long-term interests of consumers with respect to price, quality, reliability, safety and security of supply.

We appreciate the opportunity to comment on the *Competition and Consumer (Industry Code – Electricity Retail) Regulations 2019 (Code)*.

High prices for electricity are causing significant and ongoing detriment for households and small businesses. In the latest Energy Consumer Sentiment Survey (ECSS), households and small businesses ranked electricity behind banking, insurance and mobile phone services on value for money, and less than half indicated that they have the information and tools they need to make choices about energy services. Importantly, only a third of respondents indicate that they believe the market is working in their interests.¹

The measures outlined in the Code aim to address confusing discounting practices and the growing price gap between competitive market offers and standing offers that are key features of a market that is not working for consumers. Standing offers are meant to provide a safety-net for consumers but are instead acting as a source to cross-subsidise competitive market activity.² In this submission we raise several design and implementation matters relevant to the development of the code. We are engaging separately with the AER on the development of the methodologies for the DMO and reference pricing initiatives. It is critical that the design and implementation of these mechanisms helps reset the market and makes competition work for consumers.

Experience in other jurisdictions, notably and recently in the United Kingdom where a price cap has been raised, has shown that interventions in the retail market need to be accompanied by downward pressure on underlying wholesale, network, environmental costs to deliver cheaper prices overall for consumers. A coordinated process to refine and implement the Australian Competition and Consumer Commission (ACCC) Retail Electricity Pricing Inquiry Blueprint to secure the 20-25 per cent bill savings consumers have been promised, should be the highest priority for governments and market bodies.

¹ <https://energyconsumersaustralia.com.au/news/only-1-in-4-say-their-homes-are-energy-efficient/>

² We note that there is also a sizeable cohort of consumers who are technically on market offers with expired fixed benefits periods, most of these consumers are being charged standing offer prices while technically on a market contract.



Implementing the ACCC recommendations as a package

The ACCC identified significant problems across the entire supply chain that are contributing to what the report said is a “market that is not working for consumers”. Getting on with the job of refining and implementing the comprehensive package of 56 REPI recommendations must be the number one priority for governments – both individually and through the COAG Energy Council – to deliver promised savings of 20-25 per cent or \$400 off the average household bill.

There is a lack of transparency about what work is underway through the COAG Energy Council and by jurisdictions to implement various ACCC recommendations. From our understanding of progress more needs to be done to coordinate this work as a package. By working together through the National Electricity Market framework, governments, market bodies, energy companies and consumer organisations, can deliver robust and consistent solutions for households and small businesses across the country.

The implementation of the ACCC Blueprint and getting the market working for consumers will be an ongoing, iterative process. The ACCC’s Electricity Market Monitoring Inquiry, which will publish six-monthly reports until 2025, as well as higher-levels of scrutiny by the AER using strengthened information gathering and enforcement powers, provide a basis for a review and ratchet process in relation to prices and service.³

As the consultation document points out at page 9, there remain significant gaps in publicly available information about the market – including how many consumers with solar PV are on standing offers – that make it difficult to calibrate policy and regulatory solutions.⁴ This, as well as the evolving nature of retail offers, and parallel work on network tariffs, embedded networks, and retail rule changes, underline the importance of a coordinated approach and ACCC and AER oversight.

Industry leadership to re-build trust

Energy companies must demonstrate leadership by acting to reduce prices, re-establish the safety-net and address confusing discounting practices. Improving outcomes and salvaging the idea of a competitive market cannot be achieved through new law and regulation alone – it will require a big cultural shift by energy suppliers to focus on delivering the best possible service for consumers, on their terms. This shift needs to be led by boards in conjunction with senior leadership teams of energy companies across the supply chain and by policy makers and market bodies in the sector.

Recent action by the Big 3 retailers following the roundtable with the Federal Minister for Energy, including to improve concessions support for customers and to reduce prices for standing offer customers, is an important first step in this process. More significant price reductions, and longer-term initiatives like the Energy Charter, should create space for governments to resume a more normal oversight role.

The next round of retail price announcements is an important opportunity for retailers and networks to work together through the Energy Charter framework to deliver improved affordability outcomes for consumers and begin to re-build trust. The resolution of the remittal of the 2014-19 NSW distribution network determinations, means that \$730 million in savings must begin to be returned to households and small businesses in that jurisdiction, from 1 July 2019.

³ Presentation AER DMO Forum, 5 December 2018,

<https://energyconsumersaustralia.com.au/publication/default-market-offer-impacts-for-consumers/>

⁴ Issues around transparency and data availability were one of the matters discussed at ECA’s Foresighting Forum 2019 see Finncorn presentation at <https://energyconsumersaustralia.com.au/projects/foresighting-forum/>



The primary responsibility for communicating with customers about transitional issues associated with changes in prices and the structure of retail offers – whether that is in relation to the reference pricing initiative the Australian Energy Council is leading, or the implementation of ACCC recommendations – lies with energy companies. This is consistent with a sector business culture that does not wait for others to step forward, but in line with the Energy Charter principles in action, sees every business taking responsibility for customer outcomes, structuring remuneration and incentives for managers and employees to ensure the whole organisation is aligned to that purpose.

Faster, more flexible tools should be considered

The poor consumer outcomes and the low levels of trust and confidence in the market mean that new tools, including industry codes, should be considered. Codes are not currently part of the NEM framework and may provide a mechanism for faster and more flexible solutions

There are six mandatory codes under the *Competition and Consumer Act 2010* (C&C Act) – which range from the Oil Code of Conduct that regulates the conduct of parties in the wholesale market for petroleum products, through to the Unit Pricing Code, which requires supermarkets and online retailers to make it easier for consumers to compare products.⁵ There are also many voluntary codes which are developed by industry and then registered with the ACCC. ECA is currently working with industry bodies on a Behind the Meter Code of Conduct, to protect and empower consumers in relation to new services that are not covered by the National Energy Laws.

In telecommunications and broadcasting legislation there is a formal process for the development by industry of codes that can be registered by the Australian Competition and Media Authority (ACMA) and then compliance becomes mandatory and can be enforced by the ACMA.

What codes have in common as a regulatory approach is that they ‘are a means of regulating the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry’. They differ from other regulatory instruments that either prohibit something (misleading and deceptive conduct) or require something be done in a specific way by focusing on conduct and often cover a range of acceptable conduct.

The objective of using codes is to address power and information asymmetries between consumers and businesses (or between businesses and businesses). The conduct specified in the code is designed to level the playing field for consumers and businesses in these circumstances.

Chapters 12 (standing offer) and 13 (advertising) of the ACCC REPI Report show that consumers are not engaging with retailers on equal and acceptable terms. Purchasers of electricity almost need specialist energy market expertise to compare offers that vary across multiple, price, service and other dimensions (confusopoly). Consumers who cannot or do not actively engage in the market face the risk of paying hundreds of dollars more than they need to for electricity, even though they are buying the product designed as the safety net.

While the number of households and small businesses on standing offers is falling, a significant number remain on them – between 7-22 per cent depending on the jurisdiction. Importantly, those who are on standing offers contribute more than is reasonable to retailers’ overall revenues: in New South Wales, 18 per cent of customers are on standing offers, but they account for 40 per cent of the Big Three retailers’ revenues. It is also important to note that a higher proportion of small businesses are

⁵ <https://www.accc.gov.au/business/industry-codes>



on high-priced standing offers.⁶ As noted above there are also consumers on market contracts paying the standing offer rate.

The code proposes to address these issues by requiring retailers to compare advertised offers to the AER reference price, and ensure that they do not over-emphasise the conditional discounts in their marketing. Codes are commonly used to address issues relating to marketing conduct of this kind.

In terms of the specific requirements about what is communicated to customers and how, it is important that the requirements are consistent with the AER's improved Retail Pricing Information Guidelines (RPIG). The RPIG now requires retailers to publish Basic Plan Information Documents (BPID) which are a simple summary of the key features of a plan and were informed by consumer testing by the Behavioural Insights Team.⁷ The BPID's have been integrated with the AER's price comparison website Energy Made Easy, which has improved the user experience for consumers.

We are not aware of codes being used to directly set a price cap as the Commonwealth is proposing in relation to the DMO. Stakeholders have raised concerns about risks associated with setting a price cap via a disallowable instrument. We have confidence the AER can develop the underpinning methodologies in a rigorous and open way. The consistency and independence of the process to adjust the price cap may be enhanced by recasting clause 14 of the draft code so that the AER makes a recommendation to the Minister who is deemed to accept the recommendation and make the determination, unless the Minister rejects the recommendation within a specified period and requests the AER make a new determination. We understand there are parallels here with the way that private health insurance premiums are set under section 66-10 of the *Private Health Insurance Act 2007*.

Conclusion

Thank you for the opportunity to comment on the Code. If you have any questions regarding our submission, please contact Chris Alexander on 02 9220 5500 or email on chris.alexander@energyconsumersaustralia.com.au.

Yours sincerely,

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Energy Consumers Australia

⁶ See chapters 13 and 18, ACCC Retail Electricity Pricing Inquiry Final Report,

<https://www.accc.gov.au/publications/restoring-electricity-affordability-australias-competitive-advantage>

⁷ <https://www.aer.gov.au/retail-markets/retail-guidelines-reviews/retail-pricing-information-guidelines-2018/final-decision>