

EXPLANATORY STATEMENT

Competition and Consumer Act 2010

Competition and Consumer (Industry Code - Electricity Retail) Regulations 2019

(Issued by the authority of the Minister for Energy)

Purpose and operation

The Australian Competition and Consumer Commission (ACCC) recommended the Australian Energy Regulator (AER) be given power to set maximum standing offer prices for electricity supplied to small customers. It also recommended electricity retailers be required to discount all their offers from a reference price set by the AER. The *Competition and Consumer (Industry Code - Electricity Retail) Regulations 2019* (the Regulations) give effect to these recommendations.

Part 2 of the Regulations prescribes a mandatory industry code for the purposes of Part IVB of the *Competition and Consumer Act 2010*. Under the code, standing offer prices must not exceed a price determined by the AER, small customers must be told how a retailer's prices compare with the AER-determined price, the most prominent price-related feature in an advertisement must not be a conditional discount; and any conditions on other discounts must be clearly displayed.

Part 3 of the Regulations confers associated price-setting functions on the AER.

Background

In 2017, the Treasurer directed the ACCC to hold an inquiry into the retail electricity market. The ACCC found the market was not working in the interests of retail consumers. It identified two key problems: price dispersion between the best and worst offers, and confusing discounting practices.

The ACCC found the gap between the best and worst offers in the market has been widening, effectively acting as a loyalty tax on those customers who are not engaged and remain on standing offers — whether through choice, or due to the complexity involved in choosing an appropriate market offer.

While standing offers were originally intended as a default protection for consumers who were not engaged in the market, they are instead being used by some retailers as a high-priced benchmark from which to advertise discounts. And as a result, disengaged consumers, particularly those facing hardship or other socioeconomic barriers to engagement, are not benefitting from competition but are instead subject to unreasonably high prices.

The ACCC also found the dominant form of competition used by retailers, that is the use of headline 'discounts' applied to market offers, was problematic. This is because each retailer sets its discounts according to their own independently set tariff prices (usually their standing offer rate) rather than a common benchmark, meaning consumers have no easy way to compare offers across retailers.

For instance, under the current arrangements, a consumer could be better off on a no discount offer compared to an offer with a 20 per cent ‘discount’, because the former has a lower underlying tariff rate.

Incorporation

The code incorporates determinations made by the AER under Part 3 of the Regulations. These determinations are disallowable legislative instruments, and will be registered on the Federal Register of Legislation. The determinations are incorporated as in force from time to time.

Authority

Paragraph 44AH(b) and sections 51AE and 172 of the *Competition and Consumer Act 2010* provide authority for the Regulations.

Consultation

The Regulations implement recommendations from the ACCC Retail Electricity Pricing Inquiry Final Report. The ACCC’s report was informed by extensive consultation.

An exposure draft of the Regulations was open for public consultation between 23 February 2019 and 12 March 2019. To ensure full consultation the Government specifically notified the peak body for energy retailers and the peak body for energy consumer groups of the release of the Regulations for consultation. There were 16 submissions to the Regulations consultation process. Most were from retailers, with only four submissions from consumer groups. Consumer groups broadly supported the policy basis of the Regulations, while all retailer submissions opposed it.

Consultation on the Regulations was the fourth time stakeholders were invited to present their views on the policy.

Issues raised under this process were generally consistent with previous consultation on the policy, both through the AER consultation process for the price setting methodology, and the ACCC retail electricity inquiry consultation processes.

Review of the Regulations

It is intended that the Department of the Environment and Energy, in consultation with other government agencies, including the ACCC, will undertake a post-implementation review of the Regulations after two years. Among other matters, the objective of the review is to consider the operation of the Regulations, including in light of any changes, innovations or developments in the retail electricity market.

Human rights implications

The Regulations are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*: see Attachment A.

Regulatory impact

A copy of the Regulation Impact Statement approved by the Office of Best Practice Regulation in relation to the Regulations is at Attachment B.

Details of the *Competition and Consumer (Industry Code - Electricity Retail) Regulations 2019*

Part 1- Preliminary

Section 1 – Name

This section provides that the name of the Regulations is the *Competition and Consumer (Industry Code - Electricity Retail) Regulations 2019*.

Section 2 – Commencement

This section provides that the Regulations, other than section 11, commence on the day after registration. Section 11 commences on a day to be fixed by the Minister by notifiable instrument. That day must be within two years of the commencement of the Regulations. This will provide the AER with sufficient time to identify and collect relevant data to enable it to make a robust determination with respects to solar customers.

Section 3 – Authority

This section provides that the Regulations are authorised by the *Competition and Consumer Act 2010*. In particular, section 7 is authorised by section 172 of that Act, Part 2 is authorised by section 51AE and Part 3 is authorised by paragraph 44AH(b).

Section 4 – Simplified outline of this instrument

This section sets out a simplified outline of the Regulations.

Section 5 – Definitions

This section defines terms used in the Regulations. Other relevant terms are defined in section 4 of the *Competition and Consumer Act 2010*.

One of the key terms is ‘price’. For the purposes of the Regulations, the price for supplying electricity includes the retailer’s daily supply charge (which is usually a fixed amount), usage charges (which are usually a number of cents per kWh of electricity consumed) and other on-going fees, such as annual membership fees, but excludes:

- a) one-off fees (such as connection or reconnection fees and one-off account establishment fees)
- b) fees associated with a particular payment method (such as credit card transaction fees and fees associated with paying a bill in person at a post office) or with any failure to make a payment (such as late payment fees and direct debit dishonour fees) and
- c) fees associated with special requests made by the customer on an ad-hoc basis (such as special meter reads).

Another key term is ‘standing offer prices’. This is defined to mean the prices for supplying electricity in a distribution region (a region in which a particular electricity distribution

network operates) to small customers (residential customers or business customers that use less than 100 MWh of electricity a year) in circumstances where:

- a) the retailer is required under State or Territory law to offer to supply the electricity (for example, because the retailer is the ‘designated retailer’ for the customer within the meaning of the National Energy Retail Law) or
- b) the electricity is not supplied under a contract (for example, where a customer moves into a house and starts to use electricity before contacting a retailer, continues to use electricity after an electricity supply contract terminates, or is transferred to another retailer under a retailer of last resort scheme).

Other key definitions include:

‘controlled load tariff’, which means a tariff for supplying electricity only for use in specific appliances (for example, a hot water unit a pool pump that is permanently wired to an electricity meter or an air conditioner that may be remotely controlled by the retailer) and

‘flexible tariff’, which means a tariff for supplying electricity that varies according to the time of day when the electricity is supplied (for example, tariffs which include different prices for ‘peak’, ‘shoulder’ and ‘off-peak’ use of electricity). Flexible tariffs are also sometimes called ‘time of use’ tariffs.

A customer may have a combination of tariffs, including a flexible tariff and a controlled load tariff. A controlled load tariff might in some circumstances also be considered a tariff that varies according to the time of day when electricity is supplied, but the definitions are intended to be exclusive. That is, a controlled load tariff is a tariff for supplying electricity only for use in specific appliances (irrespective of whether the tariff varies according to the time of day when the electricity is supplied) and a flexible tariff is essentially a time of use tariff (rather than a controlled load tariff).

‘Conditional discount’ is defined to include a conditional rebate or conditional credit. This would include, for example, a discount, rebate or credit that only applies if the customer pays on time or by direct debit. However, a discount, rebate or credit is not conditional, for the purposes of the Regulations, if the conditions relate to the circumstances in which the customer enters the contract (including, for example, because the contract is only formed if the customer accepts the offer, or signs up on-line or through a particular website).

Section 6 – Small customers

The code requires retailers to ensure their standing offer prices for supplying electricity in a particular distribution region to a particular type of small customer do not exceed the price determined by the AER for that region and type of customer. The types of small customers for this purpose are identified in section 6 as:

- a) residential customers with a controlled load tariff, including residential customers with a controlled load tariff who are on a flexible tariff and residential customers with a controlled load tariff who are on a flat (or single rate) tariff
- b) residential customers without a controlled load tariff, including residential customers without a controlled load tariff who are on a flexible tariff and residential customers without a controlled load tariff who are on a flat (or single rate) tariff
- c) business customers who consume less than 100 MWh of electricity a year which are on neither a controlled load nor a flexible tariff (small business customers).

Section 6 also provides that a consumer is not a small customer, of any type, if:

- a) the price for the supply of electricity to the consumer varies with network-wide demand for electricity (this paragraph is not intended to exclude residential customers on a flexible tariff)
- b) the supply is through a pre-payment meter
- c) the supply is by means of an embedded network (for example, where an apartment block owner sells electricity to individual apartments in the block) or
- d) the consumer receives a feed-in tariff for a rooftop PV system (this exclusion will cease to apply for section 10 purposes when section 11 commences).

Section 7 – Civil penalty provisions

This section clarifies that where a provision of the code includes a civil penalty of a specified number of penalty units, the provision is a ‘civil penalty provision’ for the purposes of Part IVB and section 76 of the *Competition and Consumer Act 2010*.

Section 8 – Distribution regions to which this instrument does not apply

This section deals with the scope of the Regulations. The Regulations do not apply to the supply of electricity in a particular distribution region if:

- a) any standing offer prices in the region are regulated under State or Territory law or
- b) there are less than 100,000 consumers in the region, and any interconnected region.

Price-regulated regions generally have a large incumbent retailer, low levels of competition, and no (or significantly less) price disparity between standing offer prices and non-standing offer prices. In some cases, the regulated prices are also subsidised by the State or Territory concerned. The concerns identified by the ACCC do not generally arise in these regions, or are adequately addressed through the relevant State/Territory price regulation laws.

The majority of customers are on networks with more than 100,000 consumers (that is, persons to whom a retailer sells electricity). Small regions, with less than 100,000 consumers, are excluded, so as to reduce regulatory burden.

Part 2 – Electricity Retail Code of Conduct

Section 9 – Mandatory industry code in Division 2

This section prescribes the code set out in Division 2 of Part 2 of the Regulations (sections 10- 14) as a mandatory industry code for the purposes of Part IVB of the *Competition and Consumer Act 2010*.

Section 10 – Caps on standing offer prices

This section requires retailers to ensure that their standing offer prices for supplying electricity in a particular distribution region to a particular type of small customer do not exceed the reference price for that region and type of customer. The types of small customers for this purpose are identified in section 6. The reference price for a particular region and type of customer is determined by the AER in accordance with paragraph 16(1)(b).

Compliance is determined by comparing the annual price the customer would be charged by the retailer, if the customer consumed electricity in accordance with the model annual usage for that region and type of customer, with the relevant reference price. The model annual usage for a particular region and type of customer is determined by the AER in accordance with paragraph 16(1)(a)).

For example, if the model annual usage is 5000 kWh a year, then a retailer's compliance would be assessed by multiplying the retailer's daily supply charge by 365 (the number of days in the financial year), adding to that the retailer's usage charge (which is generally expressed as a number of cents per kWh) multiplied by 5000 (the number of kWhs assumed to have been consumed in the year), and comparing the result with the relevant reference price. If the retailer's daily supply charge is one dollar, and its usage charge is 50 cents per kWh, and reference price is \$3000, the retailer's prices would be compliant (\$2865 is less than \$3000, see below for calculation). If the reference price is \$2500, the prices would be non-compliant.

Calculation

$$\begin{aligned} &= (5000 \text{ kWh} * \$0.50) + (365 * \$1) \\ &= \$2500 + \$365 \\ &= \$2865 \end{aligned}$$

This section does not apply to standing offer prices for flexible tariffs. Accordingly, a retailer's standing offer prices for flexible tariffs will not be capped by reference to the relevant reference price. However, in accordance with section 12, the retailer will still need to compare its annualised prices for such tariffs with the reference price.

A civil penalty of 300 penalty units applies for each day a retailer's standing offer prices are non-compliant with section 10. This is the maximum penalty permitted for a civil penalty provision of an industry code (subsection 51AE(2) of the *Competition and Consumer Act 2010*). The imposition of the maximum penalty is necessary to ensure compliance with section 10.

The *Competition and Consumer Act 2010* also permits the ACCC to pursue other remedies against non-compliant retailers. For instance, the ACCC could issue an infringement notice (sections 51ACC to 51ACJ), a public warning notice (section 51ADA) or seek redress orders to compensate consumers for loss or damage suffered in relation to the contravening conduct (sections 51ADB and 51ADC). This could include a court order requiring a non-compliant retailer to provide refunds to affected customers. Other potential remedies include injunctions to prevent the non-compliant conduct (section 80), non-punitive orders, such as community service orders (section 86C) and other compensatory orders (section 87). The ACCC can also accept administrative undertakings, under which a non-compliant retailer would agree to remedy the harm caused by its conduct, accept responsibility for its actions and establish or review its compliance programs.

Section 11 – Extension of cap to residential solar customers

This section provides for the extension of section 10 to standing offer prices for residential customers who receive a feed-in tariff for a rooftop PV system.

This section commences on a day to be fixed by the Minister by notifiable instrument. That day must be within two years of the commencement of the Regulations.

Section 12 – Advertisements etc. must compare retailer's prices with reference price

This section requires retailers to tell small customers how their prices for supplying electricity in a particular distribution region to a particular type of small customer compare with the reference price for that region and type of customer. This includes when the retailer advertises or publishes its prices or offers to supply electricity at those prices (including when the offer is made face to face or over the phone). The types of small customers for this purpose are identified in section 6. The reference price for a particular region and type of customer is determined by the AER in accordance with paragraph 16(1)(b).

The advertisement, publication or offer must clearly and conspicuously state:

- a) the difference (expressed as a percentage) between the reference price and the total amount the customer would be charged under the offer if it consumed electricity in accordance with the relevant model annual usage. For these purposes, only guaranteed discounts, rebates or credits may be factored into the total amount
- b) if the offer includes a conditional discount or percentage-based rebate or credit - the difference, expressed as a percentage of the reference price, between the annual guaranteed price (exclusive of any conditional discounts) and the annual price including the conditional discount etc. (assuming the customer consumed electricity in accordance with the relevant model annual usage and satisfied the conditions of the discount). This provides that the annual value of a conditional discount is expressed in relation to the reference price. If there is more than one conditional discount, then this comparison must be made for each discount. Rebates or credits that are not percentage-based (for example, a fixed rebate of \$50 dollars towards the customer's next bill if the customer pays on time) need not be compared to the reference price

- c) unless the retailer provides an estimated annual price based on the customer's individual circumstances – the annual amount (including the value of all discounts, both guaranteed and conditional) the customer would be charged under the offer if it consumed electricity in accordance with the relevant model annual usage.

The advertisement etc. must also clearly and conspicuously state which distribution region, and the type of small customer, the offer relates to.

For example, if the model annual usage for a residential customer without a controlled load tariff in the Ausgrid region is 5000 kWh, the retailer's annualised price for that type of customer and region (including any guaranteed discounts) is \$1500, and the reference price for that type of customer and region is \$2000, the advertisement would need to convey that the total annual amount a customer of that type in that region would pay under the offer, assuming it consumed 5000 kWh in the year (this figure being based on a representative consumer, rather than actual consumption), is \$1500, and that this is 25 per cent less than the reference price. If the retailer provides an annualised price based on the consumer's individual circumstances, then it does not have to provide an annualised price based on the model annual usage, but must still convey that its prices are 25% less than the reference price.

Examples of acceptable advertisements include:

<p>10 % less than the reference bill</p> <p>Plus a further 5 % Pay-On-Time discount</p> <p><i>\$1500 p.a including all discounts for a representative residential customer on the Ausgrid network</i></p>	<p>10 % less than the reference bill</p> <p>but 15 % below the reference price if you pay on time</p> <p><i>\$1500 p.a including all discounts for a representative residential customer with a controlled load on the Ausgrid network</i></p>
<p>5 % more than the reference bill</p> <p>But 10% below the reference bill if you pay on time</p> <p><i>\$1500 p.a including all discounts for a representative residential customer in South Australia</i></p>	<p>10 % less than the reference bill</p> <p>Plus \$50 bonus for every bill you pay on time</p> <p><i>\$1500 p.a including all discounts for a representative residential customer on the Ausgrid network</i></p>
<p>0 % off the reference bill</p> <p>With a 10 % discount if you pay on time</p> <p><i>\$1500 p.a including all discounts for a representative residential customer in South Australia</i></p>	<p>15 % below the reference bill</p> <p>\$1500 p.a <i>for a representative residential customer on the Ausgrid network</i></p>

This section is not intended to prevent retailers from choosing one example distribution region (for example, the Ausgrid region) and customer type (for example, residential customers without a controlled load tariff) for advertising purposes across a jurisdiction (in this case, New South Wales), provided it is clear that the offer relates to the Ausgrid region.

A civil penalty of 300 penalty units applies in relation to each occurrence of non-compliance with this section.

Section 13 – Alternative requirements for offers

This section provides that a retailer is not required to comply with paragraph 12(3)(c) (that is, tell a small customer the annual the customer would be charged under an offer if it consumed electricity in accordance with the relevant model annual usage) if the retailer has given the customer an estimated annual price based on the customer's individual circumstances, including for example the customer's actual usage in the past.

Section 14 – Advertising conditional discounts.

This section prohibits the use of headline conditional discounts (including credits and rebates) and requires retailers to state the terms of any conditional non-headline discounts clearly and conspicuously in any advertising material.

This means that the most conspicuous price-related feature of an advertisement must not be a conditional discount (such as a pay on time discount). If the advertisement mentions any conditional discounts, the terms of the discount must be clearly stated in the advertising material, and not hidden in fine print or in a separate terms and conditions document.

A civil penalty of 300 penalty units applies for each day the advertisement is non-compliant.

Part 3 - Functions of the AER

Section 15 – Functions of the AER

This section provides that, for the purposes of paragraph 44AH(b) of the *Competition and Consumer Act 2010*, the AER has the function of making the determinations referred to in Part 3 of the Regulations. Paragraph 44AH(b) provides that the AER has any functions prescribed by regulations.

Section 16 – Determining model annual usage and annual prices

This section requires the AER to determine:

- a) how much electricity a broadly-representative small customer of a particular type in a particular distribution region would consume in a year (for example, 5000 kWh) and, except in the case of small business customers, the pattern of that consumption (for example, with a certain percentage of the total amount consumed between particular hours of each day or during particular times of the year) (the model annual usage) and
- b) a reasonable total annual price for supplying electricity (in accordance with the model annual usage) to small customers of that type in that region (the reference price).

It is necessary to determine different usage amounts for different regions because of differences in climatic zones between regions (which affect electricity usage in each region). It is necessary to determine different prices for different regions because wholesale electricity prices and network costs differ between regions, and these differences have a significant

impact on retail prices (with network prices alone accounting for around half of a customer's bill).

Different amounts will be determined for different types of small customers. Accordingly, there will be one region-specific model annual usage and reference price for residential customers with a controlled load tariff, one region-specific model annual usage and reference price for residential customers without a controlled load tariff and one region-specific model annual usage and reference price for small business customers without a controlled load or a flexible tariff.

Each determination will relate to a particular financial year.

No specific amount will be determined for residential customers with a flexible tariff. Rather, the amounts applying to residential customers with a controlled load will cover both flat and flexible controlled load tariffs (and similarly for the amounts applying to residential customers without a controlled load). Similarly, upon the commencement of section 11, no specific amount will be determined for residential customers who receive a feed-in tariff for a rooftop PV system. Instead, the amounts applying to residential customers with a controlled load will cover both solar and non-solar tariffs (and similarly for the amounts applying to residential customers without a controlled load).

When assessing what is a reasonable total annual price for supplying electricity to small customers of each type in a region, the AER must have regard to the matters referred to in subsection 16(4), including: retail prices in the region, the principle that retailers should be able to make a reasonable profit in relation to supplying electricity in the region, wholesale and network costs in the region, the costs of complying with relevant laws, the costs of acquiring and retaining small customers, the costs of serving those customers, and any other matter the AER considers relevant. As stated in the ACCC's Report:

“[t]he default offer should not exist to be the lowest price, or close to the lowest price in the market. Its purpose is to act as a fallback position for the disengaged or for those that require its additional protections. Ideally, it should only be utilised by a small number of consumers. It must be set above the price for competitive market offers to avoid incentivising consumer disengagement.”

Determinations are specifically expressed to be disallowable legislative instruments. This is to ensure that they are not rendered non-disallowable by the operation of subsection 44(1) of the *Legislation Act 2003*. This subsection provides that a legislative instrument is not disallowable if the enabling legislation for the instrument (in this case, the Regulations): (a) facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more States and (b) authorises the instrument to be made by the body or for the purposes of the body or scheme, unless the instrument is a regulation or the enabling legislation (here, the Regulations) or some other Act has the effect that the instrument is disallowable. The AER consists of Commonwealth and State/Territory members and was established in accordance with an intergovernmental agreement (the Australian Energy Market Agreement) for the purposes of furthering an intergovernmental scheme (the national energy laws). A legislative instrument made by the AER would, to the

extent that the AER is an intergovernmental body, be non-disallowable if the Regulations did not specially state that they are disallowable.

Section 17 – Requirements relating to making determinations

This section provides that the AER must publish a draft determination at least six weeks before publishing a final determination. It must give stakeholders at least three weeks to make written submissions on the draft determination, and must consider any submissions made within that period before finalising the draft. The final determination for a particular financial year must be made between 1 July and 1 May of the previous year.

A determination can be remade after 1 May in certain limited circumstances, including to correct minor or technical errors (in which case, the requirement to consult on a new draft determination does not apply) or if the determination is found to be invalid or is disallowed (in which case, the requirement to consult on a new draft determination does apply).

Determinations must not take effect within eight weeks of being registered. This is to give retailers time to prepare for the effect of the new determination.

In order to meet these requirements, it is expected that the AER would publish a draft determination by 1 April each year and (after considering any submissions received in respect of the draft) make the final determination by 1 May, with the determination taking effect on 1 July.

Section 18 – Previous model annual usage or price applies if determination disallowed

This section provides that if an AER determination for a particular financial year is disallowed, the model annual usage or the reference price (as the case may be) for that year is taken to be the model annual usage/reference price that was determined for the previous year. This arrangement applies until the AER replaces the disallowed determination.

Part 4 – Application

Section 19 – Application of this instrument

This section deals with the application of the Regulations.

The Regulations apply to financial years starting on or after 1 July 2019.

Section 11 applies to financial years starting on or after the commencement of that subsection.

Section 14 applies to advertising that occurs on or after 1 July 2019.

Subsection 17(1) and paragraph 17(2)(b) do not apply in relation to a determination made on or before 30 June 2019 (that is, to the AER's first determination), and paragraph 17(2)(c) applies to that determination as if the reference in that paragraph to 1 May were a reference to 30 June 2019. This is to address the fact that the AER issued a draft of its first determination on 15 March 2018, before the Regulations were made, and invited stakeholders to submit written responses by 25 March 2019 (that is, within a two week, rather than a three week period). Despite this, the AER undertook extensive consultation about its first determination. In addition to the formal period of consultation on the draft determination, it released a

position paper on 9 November 2018, invited stakeholders to submit written responses by 7 December 2018 and held a public forum in Sydney on 5 December 2018.

Section 20 – No acquisition of property otherwise than on just terms

This section provides that section 10 (caps on standing offer prices) does not apply if its application would result in an acquisition of property otherwise than on just terms (within the meaning of section 51(xxxi) of the Constitution).

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Competition and Consumer (Industry Code - Electricity Retail) Regulations 2019

The Regulations are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

The *Competition and Consumer (Industry Code - Electricity Retail) Regulations 2019* (the Regulations) prescribe a mandatory industry code for the purposes of Part IVB of the *Competition and Consumer Act 2010*. Under the code, standing offer prices for electricity supplied to small customers (residential customers and small business customers) must not exceed a price determined by the Australian Energy Regulator (AER), small customers must be told how a retailer's prices compare with the AER-determined price, headline discounts in advertising material must not be conditional and any conditions that are attached to any non-headline discounts must be prominently displayed.

The Regulations also confer associated price setting functions on the AER.

Human rights implications

The Regulations regulate business conduct, and do not engage any of the applicable rights or freedoms.

Conclusion

The Regulations are compatible with human rights as they do not raise any human rights issues.

REGULATION IMPACT STATEMENT