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Guide to the Electricity Retail Code – Draft for Consultation

The Australian Energy Council (the AEC) welcomes the opportunity to make a submission to the Australian Competition and Consumer Commission (the ACCC) on the Guide to the Electricity Retail Code – Draft for Consultation (the Draft Guide).

The AEC is the industry body representing 23 electricity and downstream natural gas businesses operating in the competitive wholesale and retail energy markets. These businesses collectively generate the majority of electricity in Australia and sell gas and electricity to over 10 million homes and businesses.

The AEC has strongly supported the development of a simple and effective offer comparison mechanism for a number of years. We continue to support the Reference Price brought in to force by the Electricity Retail Code (the Code). However, we are concerned that the manner in which the Code requires retailers to present relevant data will lead to negative outcomes for some consumers. These concerns are exacerbated by the inconsistencies between the Code, the Explanatory Memorandum published alongside the Code, and the Draft Guide. This submission will focus on these practical concerns and encourages the ACCC to pursue simplicity and intuitiveness to the extent possible in the Draft Guide.

It is also critical to remember that the reference price is merely a means to enable comparison between energy offers. It does not provide any indicator of the relative value of the offer. We therefore encourage the ACCC to make interpretations regarding the application of the Code through this lens.

The AEC considers the Reference Price to be a fundamental change in the way retailers advertise energy offers. As such, it is critical to understand where we are today – and how such a shift might impact engagement with retailers – before we start considering what the future market should look like. Consumers using the reference price will not have the benefit of a comprehensive education campaign, so the new obligations can only be effective if they are simple and intuitive enough to be understood at face value. This creates a high bar for any guidance developed by the ACCC. There is a risk that consumers will disengage further if they are unable to quickly and easily understand the reference price.

The AEC accepts that the ACCC merely has an enforcement role in the development of the Code. Unfortunately, the drafting of the rules appears to create some unintended consequences. Of greatest concern are the substantive issues of interpretation being considered at a time after the Code process is

complete, and unable to be rectified. We encourage the ACCC to be pragmatic in enforcing the Code in instances where the exact wording would not appear to result in good customer outcomes.

Inconsistency with the Code

An unenforceable guide should not seek to change the obligations under the original regulation. The AEC considers a number of the recommendations in the draft guide to be out of line with retailer obligations set out in the Code. This is of greatest concern where the ACCC considers the Code inconsistent with its empowering legislation, the Australian Consumer Law (ACL). The starkest example of this is where the Code, through section 12(5), requires retailers to 'round up' decimals of five and over, whereas the Draft Guide suggests this might be misleading under the ACL. The ACCC must call out other areas where it considers that the wording of the Code might breach the ACL, particularly given the combined obligation to comply with both instruments.

Other inconsistencies are less concerning, albeit necessary to call out. The Code utilises the term 'representative customer' to depict a customer consuming the AER's model usage. The Draft Guide, however, suggests retailers use the term 'average' customer. Whilst the AEC agrees this term is simpler to understand, we have concerns that it may be misleading to some customers. The AER's model usage is not necessarily reflective of an average user, but rather that of a broadly representative user. The AEC would not support the term 'average' being extended to the reference bill (i.e. referring to the 'reference bill' as an 'average bill').

Similarly, despite the explanatory memorandum published alongside the Code using the term 'reference bill' in its example advertisements, the ACCC instead prefers the term 'reference price' in the Draft Guide. While we do not oppose this suggestion, we encourage the ACCC to only deviate from the Code where there is clear behavioural or other evidence suggesting that such a change would be valuable.

Application of the advertising obligations

The Code sets out that retailers must comply with section 12 if they advertise or publish the offered prices or offer to supply electricity at the offered prices. Collectively, we refer to the obligations in section 12 as the 'advertising obligations'.

The AEC seeks clarification from the ACCC as to when a retailer would be considered to be advertising, publishing, or offering the offered prices. While advertising is relatively clear, publishing or offering is broader, and might unintentionally capture obligations in the energy laws under which the retailer might be required to provide the customer with their prices.

For example, the AEC agrees that during a sales call, the retailer will be offering their prices to a prospective customer and the advertising obligations should be complied with. But, during an ongoing market retail contract, a retailer is required under the regulatory obligations to provide pricing details to the customer. This presents a range of scenarios where retailers will need to determine if the advertising obligations apply.

We would welcome further guidance from the ACCC as to how they might interpret the specific terms advertise, publish, and offer. We would encourage a principled approach be taken – that is, the advertising obligations should only need to be complied with where a customer is in the process of comparing electricity offers.

Application to restricted offers

Under the AER's Retail Pricing Information Guideline, offers are classified as either generally available or restricted. How an offer is classified determines how the offer must be presented. Restricted offers are not

required to be presented on EnergyMadeEasy, nor are retailers required to publish a Basic Plan Information Document with a comparison table. These offer classifications have not been replicated in the Code, and as such the advertising obligations will apply to any residential offer with a flat or flexible tariff structure. Effectively, only demand-based offers are exempted. The underlying tariffs of most offers available today are either flat, or time varying (flexible) in some manner.

The AEC is concerned that the Code will have detrimental impacts on competition and innovation. Some offers are not readily comparable, for example a capped price product, or a pay in advance product would be based off an underlying flat tariff, however such a product would be difficult to compare against the reference price in the manner envisaged by the Code. If it is difficult to compare an innovative offer to the reference price, there is a risk a retailer would be discouraged from making such an offer. This would not be in the interests of customers.

Failing to exclude restricted offers also captures other scenarios in which retailers have standing offers available merely to comply with their regulatory obligations. This might include a forcing a retailer who only sells energy to commercial and industrial customers with aggregated small sites to comply with the advertising obligations.

The AEC would welcome further guidance from the ACCC about the application of the Code to restricted offers and to also consider what mechanisms might be available to mitigate any negative impacts to energy consumers and minimise cumbersome compliance obligations.

Varying a market offer

The AEC seeks clarification from the ACCC about its intent regarding the application of the advertising obligations to price changes and other variations that might occur within an ongoing energy contract. Section 5.9 of the Draft Guide suggests that retailers who vary market contracts would need to comply with the advertising obligations as the variation constitutes an offer. In the same section, the ACCC notes that the NERL and NERR set out obligations regarding the presentation and marketing of offers, and in particular price changes, which apply in addition to, and do not alter the application of the Code.

The AEC opposes any suggestion that the advertising requirements would need to be complied with if a retailer undertook a price change in accordance with section 46 of the National Energy Retail Rules (the NERR). Section 46 of the NERR is clear – retailers are able to vary prices within an existing energy contract, provided advance notice is given to the customer, and the customers' explicit informed consent was provided that the prices were subject to change at the commencement of the contract. It is clear that, given the framing of the existing Rules, amended prices (where explicit consent has previously been provided by the customer) would not be considered a new offer.

Similarly, the Code does not make any suggestion that it intends to expand the advertising obligations beyond the publication or advertisement of new offers. Given this, we consider any suggestion from the ACCC that retailers should comply with the advertising obligations for price changes and other variations within an existing contract to be inappropriate, unnecessary and out of line with the current requirements.

Presentation of the Reference Price

As noted above, the AEC recognises that the ACCC is publishing the Draft Guide as a means of assisting retailers to comply with their obligations under the Code and has no role to play in determining the obligations themselves. That being said, we are concerned that the drafting of the Code, and its subsequent strict interpretation by the ACCC, will lead to consumer confusion.

For example, the Code requires retailers to provide customers with the calculation which reflects the difference between the reference price and the unconditional price, expressed as a percentage of the reference price. This is intuitive where the offer is below (or above) the reference price, but not where the offer is equivalent to the reference price. The AEC suggests the intent of the Code could similarly be met by presenting an offer as ‘equal to the reference price’.

The application of the Code to offers containing conditional discounts presents further complications. The drafting requires retailers to present discounts separately – that is, first note the unconditional amount in the most prominent manner on the advertisement, and then less prominently note the conditional elements. The AEC anticipates this will lead to significant confusion. Practically, as highlighted in example 6 & 7 in the Draft Guide, the customer will be presented with two different discounts in the advertisement, of which neither will be the discount that appears on the bill. In the example provided, the headline discount will be 11%, the conditional discount will attract an additional 3%, and the bill will show 5%. This is obviously confusing for customers and should be mitigated where possible.

The AEC considers that it would be preferable to encourage retailers to present offers with conditional discounts as a total discount below the reference bill, rather than in an itemised manner. For the offer described in example 6 & 7, this would mean advertising a headline guaranteed discount of “11% less than the reference price, or 14% less than the reference price if the bill is always paid on time”. Although this does not mitigate the structural issues embedded in the Code, it should make the presentation more intuitive. Using the AEC’s proposed approach, a customer would be less likely to directly correlate a 14% comparison rate to the 5% conditional discount shown on their bill.

Simplification

Ultimately, the only piece of genuinely comparable information provided to the customer under the advertising obligations is the lowest possible price. All other information is inconsequential and could be removed without diminishing the comparability of the offer. Given this, it is necessary for the ACCC to consider how to encourage retailers to develop the simplest possible presentation of the Code obligations, while ensuring that customers understand the methodology behind the calculation of the lowest possible cost. The wording proposed by the ACCC in their example advertisements does not place enough weight on the relative importance of the many pieces of information provided. The AEC considers that the ACCC’s suggested disclaimer is overly wordy, and should be redrafted into simple language, focusing on the important pieces of information. For example:

*The minimum annual cost of this offer for an average customer who pays on time is **\$1254**. An average customer consumes **3900kWh** per year. This offer applies to residential customers with a **flat rate tariff** in the **Ausgrid** network.*

Alternative presentation of the reference price

The ACCC does not provide any guidance about how a retailer might comply with the alternative advertising requirements where the retailer is aware of the customer’s usage patterns (s13 of the Code).

This clause is intended to prevent the need for retailers to provide generic information to customers in instances where they are aware of actual consumption data, enabling retailers to deliver more accurate cost information. This clause should be encouraged wherever possible, however without guidance from the ACCC as to how s13 of the Code should integrate with the other obligations in the Code, there is a risk it will be underutilised. This outcome would not be in the interests of customers, particularly those with consumption profiles vastly different to the average customers determined by the AER.

For any questions about our submission please contact me by email at ben.barnes@energycouncil.com.au or on (03) 9205 3115.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'B. Barnes', written in a cursive style.

Ben Barnes
Director, Retail Policy