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Mr Rod Sims  
Chairman  
Australian Competition and Consumer Commission  
GPO Box 3648  
Sydney NSW 2001

31 May 2019

Dear Mr Sims,

**Submission to the Australian Competition and Consumer Commission (“ACCC”):  
Draft Guide to the Electricity Retail Code**

The Energy and Water Ombudsman (SA) Limited (“EWOSA”) welcomes the opportunity to comment on the ACCC’s Draft Guide to the *Competition and Consumer (Industry Code – Electricity Retail) Regulations 2019* (Draft Guide). In this submission, EWOSA intends to comment on both the Draft Guide and the Regulations themselves (“the Code”) as review of the Draft Guide has raised questions about the Code.

EWOSA is an independent Energy and Water Ombudsman Scheme in South Australia. It receives, investigates and facilitates the resolution of complaints by customers with regard to (*inter alia*) the connection, supply or sale of electricity, gas or water.

## **Background**

Issues related to the standing offer framework have been well established by stakeholders. In its submission to the ACCC Inquiry into Retail Electricity Supply and Pricing, the Energy and Water Ombudsman NSW (“EWON”) raised multiple issues related to the rising standard offer price including sharp price rises and impacts for customers at the end of a contract, move-in customers and customers with a poor credit history.<sup>1</sup>

In the ACCC Retail Electricity Pricing Inquiry Final Report, the ACCC made four recommendations related to the standing offer (recommendation 30, 32, 49 and 50). These recommendations were designed to address two deficiencies in the operation of the standing offer:

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<sup>1</sup> EWON (2018) Submission to the AER Position Paper on Default Market Offer at <https://www.aer.gov.au/system/files/EWON%20-%20AER%20Default%20Market%20Offer%20-%20Submission%20to%20Position%20Paper%20-%206%20December%202018.pdf>

- “In non-price regulated jurisdictions, the standing offer and standard retail contract are no longer fit for purpose. The standard retail contract is not operating as an effective default offer, nor is it delivering essential consumer protections that justify the high price of the offer.
- In recent times, standing offer prices have often been set at a high level to enable retailers to advertise high headline discounts for market offers.”<sup>2</sup>

On 22 October 2018, the Commonwealth Treasurer and Minister for Energy requested that the AER begin immediate work on developing a default market offer (“DMO”), consistent with the ACCC’s recommendations. The AER was also asked to develop a reference bill for each network distribution region as part of this. The reference bill was intended to be a point from which headline discounts could be calculated.<sup>3</sup>

In the process of responding to the Commonwealth Treasurer and Minister for Energy, the AER has stated that the DMO is “intended to be a service which all retailers in a non-price regulated distribution zone are obliged to offer customers that do not otherwise take up a market offer for the provision of electricity retail services. That is, it is to replace retailer-set standing offers.”<sup>4</sup>

The AER made its DMO Final Determination on 30 April 2019. Given that there are substantial savings to be made for small electricity customers currently on standing offers, as well as substantial savings to be made from switching from standing offers to market offers, EWOSA generally considers that the proposed DMO prices strike a reasonable balance between providing electricity bill relief for many of those customers currently on standing offers and enabling ongoing competition in the retail electricity market. However, we note that one of our main concerns with the implementation of DMO prices is that customers on lower standing offers and on lower priced market offers are found to be worse off as a result. As for example cautioned by the South Australian Energy Minister, “In South Australia there is a significantly higher proportion of customers on market offers compared to standing offers. This results in a larger portion of the market who may be worse off under the default offer than those who will benefit.”<sup>5</sup>

## Legislative Framework

The Department of the Environment and Energy released a public consultation paper on the Code in February 2019. This paper notes that Commonwealth Government committed to working with the states and territories to introduce a DMO under the National Energy Retail Law (“NERL”). However, as the state and territory governments were unable to reach full agreement about the NERL changes required, the Commonwealth proposed to introduce the DMO and reference bill through regulations made under the *Competition and Consumer Act 2010* (“the Act”).<sup>6</sup> The Code is the instrument that was made under the Act and was registered on 5 April 2019.

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<sup>2</sup> ACCC (2018) Retail Electricity Pricing Inquiry – Final Report at [https://www.accc.gov.au/system/files/Retail%20Electricity%20Pricing%20Inquiry%E2%80%94Final%20Report%20June%202018\\_0.pdf](https://www.accc.gov.au/system/files/Retail%20Electricity%20Pricing%20Inquiry%E2%80%94Final%20Report%20June%202018_0.pdf) p.240

<sup>3</sup> The Hon Josh Frydenberg, Treasurer and the Hon Angus Taylor, Minister for Energy, Letter to the AER, 22 October 2018. 8. Available at: <https://www.aer.gov.au/system/files/Letter%20to%20the%20AER%20Chair%20-%20default%20pricing.pdf>

<sup>4</sup> AER (2019) Final Determination Default Market Offer Price 2019-20 at <https://www.aer.gov.au/system/files/AER%20Final%20Determination%20-%20Default%20Market%20Offer%20Prices%20-%20April%202019.pdf> p.14

<sup>5</sup> Hon Dan van Holst Pellekaan MP, Letter to Department of the Environment and Energy at <https://www.environment.gov.au/submissions/electricity-code/sa-gov.pdf> p.2

<sup>6</sup> Department of the Environment and Energy Public Consultation Paper at <https://www.environment.gov.au/system/files/consultations/6ad36235-5acd-4453-bfef-f3c97b672c93/files/electricity-code-consultation-paper.pdf>

The Code contains the legislative framework for implementing DMO prices and the reference price.

Part 2 of the Code prescribes it is a mandatory industry code under which:

- standing offer prices for small customers must not exceed a price determined by the AER
- small customers must be told how a retailer's prices compare with the AER reference price
- conditional discounts must not be the most prominent price-related feature in an advertisement, and any conditions on other discounts must be clearly displayed.

Part 3 of the Code proscribe the price setting functions of the AER including:

- the model annual usage or average household annual usage
- the 'DMO' or reference price<sup>7</sup>

## The Reference Price

In the Draft Guide, released 20 May 2019, the ACCC define the DMO as the reference price set by the AER. The ACCC consider retailers should adopt in their advertising practices the term 'reference price' rather than 'DMO' or 'reference bill'. The Draft Guide is consistent with the Code in this respect as the Code makes no reference to the DMO or reference bill.

EWOSA supports the development of a reference price because of its action of limiting standing offer prices and as it is likely to enhance the ability for consumers to compare market offers. In relation to the second point, the use of a reference price has the potential to be helpful for residential consumers in comparing different energy offers and reduce the confusion that currently exists for some consumers in making such comparisons. Framed correctly the reference price could provide transparency and clarity around the extent of discounts being provided by retailers in their market offers.

## The Draft Guide

EWOSA commends the ACCC for an accessible and well considered Draft Guide. Broadly speaking, the Draft Guide is a helpful resource which distils the key elements of the Code and makes them tangible. The ACCC guidance on how to implement the DMO is clear and the example market offer advertisements provide practical illustrations of the implications of the Code. The suggested language for retailers to adopt in their advertising practices appears to encourage a move away from some of the less intuitive phrases and in this respect, EWOSA particularly supports the substitution of the term DMO.

However, EWOSA wishes to submit some areas for improvement for the Final Guide:

- guidance to retailers to help customers to understand what the reference price is
- revised guidance to retailers about how to explain to customers that the reference price is on an average household annual usage and that their own usage and final billable amount will differ
- guidance for retailers about how to explain to small customers whose arrangements are not covered by the Code
- providing clarity to retailers about the use of the term 'representative customer' in the Code vs 'average customer' in the Draft Guide

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<sup>7</sup> <https://www.legislation.gov.au/Details/F2019L00530>

- avoiding confusing examples of advertising of discounts
- reference to section 13 of the Code.

Each of these points is referenced below.

### **Guidance to retailers to help customers to understand what the reference price is**

Based on our interactions with customers, EWOSA is concerned that the first reaction of many customers to advertising about the reference price is that customers will seek an explanation of the meaning of the term 'reference price'. For those not immersed in the industry, the term reference price is very broad and open to interpretation. EWOSA is concerned that many customers will want to know background about the reference price and that the explanation about this is not simple. EWOSA believes that it would be beneficial for consumers for the ACCC to provide some standardised statements around this. EWOSA believes that standardised statements would minimise customer confusion over the long term.

### **Revised guidance for retailers about how to explain to customers that the reference price is on an average household annual usage and that their own usage and final billable amount will differ**

EWOSA believes that there is potential for customers to be dissatisfied with their bill if they do not understand that the advertised offer which they accepted was based on an average household annual usage. While the example market offer advertisements provide this information, EWOSA is concerned that the information presented makes the advertisement too complex and that many customers are likely to overlook this information. EWOSA is keen to see the ACCC further refine the proposed communication around this.

### **Guidance for retailers about how to explain to small customers whose arrangements are not covered by the Code**

EWOSA is concerned that the Code does not cover all arrangements for all customers and that this will cause confusion for these customers. The following arrangements are not covered:

- residential customer with time of use tariff (not covered by DMO standing offer price cap)
- embedded networks customers
- prepayment meter customers
- where prices vary due to network-wide demand tariffs
- solar photovoltaic units with feed-in tariffs.

EWOSA believes that it would be beneficial for the ACCC to provide some standardised statements around how retailers explain this situation to customers. Standardisation will help ensure a smoother implementation of the reforms.

### **Providing clarity to retailers about the use of the term 'representative customer' in the Code vs 'average customer' in the Draft Guide**

The Draft Guide uses the term 'average customer' at times when referring to a 'representative customer'. EWOSA is seeking clarity from the ACCC about how retailers can utilise the term average customer and still be compliant with the Code.

### **Avoiding confusing examples of advertising of discounts**

A review of example 5 and example 7 of the Draft Guide highlight some of the problems of implementing the Code as it stands. EWOSA submits that elements of these advertisements are confusing, such as the use of the term reference price and the lengthy description about average household annual usage. Example 7 is contrasted with the top right example shown on page 9 of the Code Explanatory Memorandum which is a better example. The use of two

discounts in example 7 is confusing. EWOSA would encourage the ACCC to seek further advice from communications experts to simplify these advertisements. EWOSA also encourages the ACCC to provide further examples for use by retailers, which cover different communication methods and requirements, e.g. advertising of multiple products on websites and newspaper advertisements.

### **Reference to section 13 of the Code**

The Draft Guide provides no guidance to retailers about section 13 of the Code. EWOSA encourages the ACCC to reference this clause in the Final Guide, as it allows retailers to provide tailored advice about the relative value of the offer in the given situations.

### **The Code**

While EWOSA supports the broad intent of the Code, we submit that analysis of the Draft Guide reveals some aspects of the Code which require further attention. We anticipate a need to review the Code within a relatively short time frame from commencement of the Code. We believe that it is vital that the reference price reforms succeed and early attention to address any resultant customer detriment will be in the long-term interest of the reforms.

The following issues have been identified:

- The term 'reference price' is not easy to understand and its use in advertising may be confusing for customers
- As per the EWON submission to the AER DMO Position Paper, the DMO should cover all customers on time of use standing offers
- The use of the term representative customer rather than average customer is potentially ambiguous for retailers
- There is a need for further investigation of whether advertising of discounts should be in dollars instead of as a percentage
- The use of the term price cap is ambiguous as the DMO does not cap the total cost of electricity for above average consumers and does not represent the maximum price that some customers will pay for their electricity in any given year.

While we understand that review of the Code is out of jurisdiction for the ACCC, we wish to draw the ACCC's attention to these matters for further consideration.

Should you require further information or have any enquiries in relation to this submission, please contact Jo De Silva via [jo.desilva@ewosa.com.au](mailto:jo.desilva@ewosa.com.au) or phone (08) 8216 1851.

Yours sincerely,



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