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Australian Competition and Consumer Commission  
Level 17  
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Melbourne Vic 3000

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**ACCC Guide to the Electricity Retail Code - Draft for consultation  
- 20 May 2019**



**EnergyAustralia**

LIGHT THE WAY

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EnergyAustralia is one of Australia's largest energy companies with around 2.6 million electricity and gas accounts across eastern Australia. We also own, operate and contract an energy generation portfolio across Australia, including coal, gas, battery storage, demand response, wind and solar assets, with control of over 4,500MW of generation.

We strongly support the ACCC making a guide to the *Competition and Consumer (Industry Code – Electricity Retail) Regulations 2019* (Code) and appreciate the opportunity to comment on the ACCC's draft guide. We support the ACCC's recommendations regarding the default market offer (DMO) to protect customers who are unable to engage in the market. We also welcome more vigorous competition amongst retailers and want to ensure the DMO's reference price is properly implemented, such that customers have confidence in navigating market offers and can easily identify the best offers in their circumstance.

As the ACCC would appreciate, the Code was developed under compressed timeframes, and setting clear and complete regulations for the range of advertising practices and offers by electricity retailers is challenging. While no fault of the ACCC, its guide is also being developed at a somewhat inopportune time given we must comply with the Code from 1 July. Some matters raised in consulting on the ACCC's guide may require resolution in amendments to the Code and in subsequent DMO determinations by the AER. We hope to continue to assist regulators and policy-makers in these processes to achieve our shared objective of delivering more effective competition and realising the associated benefits for customers.

Our observations on the ACCC's draft guide are attached. If you would like to discuss this submission, please contact Lawrence Irlam on 03 8628 1655 or [Lawrence.irlam@energyaustralia.com.au](mailto:Lawrence.irlam@energyaustralia.com.au).

Regards

**Sarah Ogilvie**  
Industry Regulation Leader

## **“The reference price” is critical in delivering the intent of the DMO**

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A major intended benefit of the DMO is to introduce a common point of comparison for all market offers. The Code’s “reference price” is this point of comparison, and customers’ understanding of this will be critical in maximising their ability to identify market offers that best suit their needs.

As the ACCC is aware, the Code currently provides for (and the AER has determined) 15 reference prices in total:

- for residential customers, both with and without controlled loads
- for small business customers
- by distribution zone.

Future AER determinations may provide for additional reference prices catering for residential customers with solar PV.

The various expressions of “the reference price” is a function of the Code. This reflects the practicalities of addressing the “discount off what?” problem. Establishing any common point of comparison will necessarily abstract from the customer’s circumstances and therefore involve a trade-off between accuracy and applicability. Once a point of comparison has been formulated, a further trade-off must also be made in terms of communicating this in a simple manner versus something that is somewhat more complex and therefore less likely to be absorbed.

These trade-offs are mostly embedded in the Code and so outside the ACCC’s scope, even though the ACCC clearly shares an interest in ensuring the DMO reference price is implemented effectively. The Code was developed under compressed timeframes and there are likely to be refinements over time in terms of its advertising disclosure requirements. We believe the ACCC in its enforcement and market monitoring role will be a key stakeholder in any further changes to the Code. We also agree with the ACCC’s observation that retailers will need to provide customers information beyond what is specified in the Code to ensure they can make informed decisions in the market.

The success of the DMO’s reference price depends on customers understanding the retailer-distributor relationship. Our experience is that customers largely do not understand what a distributor is, or which distribution zone they are in. References to the name of a distribution network service provider in advertising will likely be meaningless and confusing. Customers are likely to require further information to determine which region is relevant to them e.g. geographic information.

The disclosures around the reference price should improve comparability of offers with respect to current advertising. As discussed further below, however, the Code’s requirements were drafted without a proper appreciation of different forms of advertising and will not translate well to some forms of media.

We also note the final Order in Council for the Victorian Default Offer (VDO) requires retailers to similarly express discounts relative to the “reference tariff” when advertising Victorian market offers. Our customer communications will be tailored to the customer’s jurisdiction, however customers may see overlapping policy announcements and national media coverage as both the VDO and DMO take effect from 1 July.

## **The guide should provide more detail on different advertising mediums**

The draft guide lists a range of advertising mediums on pages 10 and 11, alongside some general guidance on oral and video formats. Aside from this, the guide is almost entirely devoted to visual (and specifically, billboard or print) advertising. This includes all of the examples in section 5, and the guide's definition of "conspicuous" refers to "easily seen, or prominent".

However, the draft guide does not contemplate other forms of media that are covered by the DMO Code. Given the DMO Code has no exceptions, compliance with the reference price requirements needs to be considered across other forms of media. For example, commonly-used media include radio, TV, search engine marketing, social media, dynamic digital banners and out of home displays. Many of these media have content limitations, whether it be a limit on characters, a limit on time or a limit on space. One of the fundamental issues with the DMO Code and, by association, the draft guide, is that there is a lack of understanding of the reality of advertising in a competitive market. The amount of mandatory content means it will be challenging to convey a simple message to customers in an effective manner. The ACCC should further consult with retailers and other stakeholders on how its guide might be expanded address some of these challenges.

Radio poses a specific problem in terms of the volume of information that must be conveyed in a typical 15 to 30 second advertisement. That is, disclosing all the information required under the Code, using audio tools (including speed) to make certain information more or less conspicuous, is unlikely to be effective.

Outdoor advertising is also likely to be crowded by the required disclosures under the Code, in that a customer will not have sufficient time to absorb information, for example, whilst driving past a billboard. Digital advertising, primarily website banners, will also be limited in the amount of space available for the Code's disclosures.

## **The guide should clarify required disclosures beyond advertising**

It would be useful for the guide to clarify the 'alternative requirement' for offers in clause 13 of the DMO Code. Specifically, whether one-on-one customer interactions such as online purchase journeys or phone conversations must be based on benchmark customer characteristics (the 'representative' or 'average' customer) even when the lowest possible price may be calculated on the basis of the retailer's estimate of the customer's usage. The Code's drafting suggests that while the lowest possible price may be based on the customer's usage data, the reference price comparison must be based on the representative customer. However, this seems counterintuitive and will only serve to confuse the customer because the price and comparison will be based on different values. Generally, the draft guide is silent on the operation of clause 13, so we would welcome the ACCC's view on what it considers an acceptable method of presenting a tailored offer to a customer.

## **The guide's examples should include state-wide advertising and diverse tariffs**

An issue we have raised consistently throughout consultation on the DMO (and the VDO) is the ability of retailers to conduct state-wide advertising. Under the Code, advertisements catering for multiple distribution regions must clearly and conspicuously state the various mandatory information for each distribution region. For example, to advertise in NSW, the Code requires three sets of reference price comparisons (assuming an offer could compare differently to the DMO by distribution zone), three sets of lowest

possible prices, each distribution zone and the relevant customer type to be stated. Given, as noted above, the Code provides no exceptions for character- or time-limited media, advertising in NSW will be challenging for some advertising formats. We recommend the ACCC turns its mind to how advertised prices might comply with these constraints that also promotes the interests of consumers in seeking to navigate market offers.

The AER's final determination contains an example reference bill calculation at Appendix J that accommodates residential customers with multiple controlled loads, which are subject to benchmark consumption allocations. We sought further advice from the AER on the calculation of reference bills for market offers with seasonal time of use elements (given Ausgrid has seasonal time of use tariffs), specifically a tariff which does not charge a peak rate during several months of the year. This requires the calculation of daily consumption (and notional bill amounts) in proportion to the AER's benchmark allocations as applicable for each season. Although this requirement is described in the AER's determination, an illustrated example of this calculation would be useful.

A further example could be provided where market offers involve a tariff with peak, shoulder or off-peak time periods that do not match the times of day underlying the AER's benchmark consumption profiles. For example, a retailer may choose to offer a tariff with a narrower peak period and sharper price signal. The benchmark consumption profile would overstate the customer's exposure to this higher price, thus making the reference bill for this offer appear more expensive than would actually be charged. This may be unlikely for many risk averse retailers who match the distribution tariff structure in order to minimise volume risk. However, it highlights an inflexibility of the regulatory framework that may inhibit the offering of cost reflective tariffs. Retailers may also be discouraged from offering innovative tariffs. The ACCC may wish to offer guidance on how these and innovative offers can be advertised in accordance with the Code's requirements.

### **Some advertising disclosure requirements should be clarified**

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The Code requires various disclosures in advertising market offers, with those in clauses 12(3) and (6), and 13(2) to be conspicuously stated. It also requires conditions for conditional discounts to be conspicuously stated under Clause 14(3), while conditional discounts must not be the 'most conspicuously' mentioned price-related matter under Clause 14(2).

All of ACCC's example advertisements give visual priority to the percentage difference to the reference price, which must be disclosed under Clause 12(3)(a). This appears to mirror the current practice of some retailers in advertising 'headline' percentage discounts and may also be the corollary of the policy intent (given effect by Clause 14(2)) that conditional discounts be stated less conspicuously. The ACCC may take a view that focusing on unconditional percentage discounts, if done by all retailers, could deliver benefits by having customers receive consistent and comparable advertising. Otherwise, the ACCC may wish to explicitly state that retailers are able to give prominence to some conspicuously stated matters over others, which could be illuminated by further examples.

While the Code will ensure some consistency in advertising, the ability of retailers to choose reference prices and emphasise different conspicuously stated matters will give rise to some diversity. This is likely to attract further interest from regulators and policy-makers, particularly if changes to advertising practices from 1 July have limited

measurable impact on customer behaviour. We note the ACCC has already stated it will monitor whether discounts and low-priced offers will remain in the market from 1 July in section 8 of the draft guide. We expect retailer advertising practices will also be the subject of further commentary. In finalising its guide, the ACCC may offer views on whether certain practices, while potentially compliant, are unlikely to be in the spirit of the Code or in the best interests of customers.

The Code invokes disclosures at the point of any “advertisement, publication or offer” under Clause 12(2). There are a range of retailer and customer interactions that may or may not constitute an offer, or involve multiple stages of an offer. We believe there would be value in the guide clarifying whether advertising disclosures are required in a range of typical situations including contract variations (including price or benefit changes), notifications at contract expiry and in written communications that confirm the customer’s prior verbal acceptance of fully disclosed offers.

### **The guide should clarify the Code’s operation relative to existing guidelines**

The draft guide notes that customers in embedded networks are explicitly excluded from the Code’s requirements. We consider that the guide should clarify the extent to which the Code affects customers in embedded networks via operation of the AER’s (Retail) Exempt Selling Guideline. Specifically, condition 7 of the core exemption conditions at Appendix A-2 caps prices paid by customers in embedded networks at the local area retailer’s standing offer.<sup>1</sup> To the extent this standing offer is affected by the DMO, the introduction of the DMO may affect prices in embedded networks. Pricing in embedded networks (including the AER’s exemption guideline) could be affected by rule changes currently being consulted on by the AEMC<sup>2</sup> and the ACCC may need to clarify this in its guide.

The draft guide refers to the AER’s Retail Pricing Information Guidelines and this should be considered further. While outside of the scope of the ACCC’s guide, updates to the AER’s Guidelines will have implications on Code compliance if changes are made in the near term. The ACCC and AER may jointly wish to consider terminology given there is some inconsistency between the Retail Pricing Information Guidelines (which is binding on retailers) and the draft guide. For example, the AER’s Guidelines mandate the use of the “guaranteed” when referring to unconditional discounts<sup>3</sup>, yet the draft guide suggests that term could potentially be misleading.<sup>4</sup>

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<sup>1</sup> AER (Retail) Exempt Selling Guideline Version 5, March 2018, p. 37.

<sup>2</sup> <https://www.aemc.gov.au/market-reviews-advice/updating-regulatory-frameworks-embedded-networks>

<sup>3</sup> AER Retail Pricing Information Guidelines Version 5.0, April 2018, Table 3.

<sup>4</sup> ACCC draft guide, pp. 8, 23.