Electricity Division – Wholesale and Retail Markets
Department of Industry, Science, Energy and Resources
GPO Box 2013
Canberra ACT 2601

By email: electricitycode@industry.gov.au

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Competition and Consumer (Industry Code – Electricity Retail) Regulations 2019 - Post implementation review

The Australian Energy Council ('**AEC'**) welcomes the opportunity to make a submission to the Department of Industry, Science, Energy and Resources (the '**Department'**) on the *Electricity Industry Code Post Implementation Review Consultation Paper* (the '**Consultation Paper**').

The AEC is the industry body representing 20 electricity and downstream natural gas businesses operating in the competitive wholesale and retail energy markets. These businesses collectively generate the overwhelming majority of electricity in Australia and sell gas and electricity to over 10 million homes and businesses.

The AEC continues to support efforts by the Government to ensure the retail energy market is transparent and accessible, ensuring that energy consumers are able to benefit from engaging with the market, and seeking out a cheaper deal. While the AEC maintains that well-structured competitive markets, with appropriate regulatory guidance would deliver on this objective, we acknowledge that the Government remains committed to price regulation in the form of the Default Market Offer (DMO), and its complementary reference price.

Given this, the AEC will focus this submission on enhancing the efficacy of the framework, so as to reduce any unintended consequences that commonly occur in price regulated markets. Critically, the objective of the DMO is to allow competition to thrive below it. The AEC considers that this should be the primary lens against which the efficacy of the DMO is measured. The AEC has not sought to answer each question specifically throughout this submission.

Consumer outcomes

Unfortunately, absent the full Newgate Research referenced in the consultation paper, the AEC is unable to make a determinative assessment of the impact of the DMO and reference price on consumer outcomes. While it is positive that when prompted, consumers could identify that the Government had implemented measures such as a price cap and a reference price, this has not played out in practice with our membership. Anecdotally, AEC members have advised that customers rarely ask for information about the DMO or reference price in their interactions, suggesting a lower practical awareness of their function in assisting customers seeking to engage with the market.

The consultation paper notes that approximately two thirds of participants surveyed felt positive about the policy when prompted. Participants noted that they liked the policy because it would make it easier to shop around for new deals. Again, without a clear understanding of the manner in which customers were prompted, the AEC is unable to make a judgement on whether this statement is reasonable. It seems likely the prompting that sought to explain to the participant what the policy intent was would have referred to a key use case being for the reference price to assist customers engaging in the market. The AEC encourages the Department to publish its research as early in this consultation process as possible to enable industry and other stakeholders to genuinely assess the sentiment around the policy and guide any improvement opportunities.

Similarly, the AEC considers it is critical for the Government to release data about unprompted awareness of the policy. If unprompted awareness is low, that would indicate a failure in education and advertising from Government that is likely impacting the influence and efficacy of the policy.

Question 1: What outcomes do you feel the introduction of the DMO and Reference Price has provided to benefit consumers?

The AEC considers that the reference price has made engagement with retailer call centres and sales teams easier. As the Department is aware, price comparisons can be confusing for customers with limited experience in engaging with the energy market. Enabling retailers to compare against a standard metric – a discount off a set price – simplifies this process for sales staff and their customers. As an example, prior to the introduction of the policy, a sales team member would likely have needed to undertake a full bill comparison in order to illustrate to a customer the value of an offer. Utilising the reference price makes this process as easy as comparing one discount against another.

However, for customers who would benefit from a prompt to seek out a cheaper deal, it is likely the introduction of the DMO and reference price may have lowered engagement. The introduction of the reference price appears to have reduced the willingness of retailers to advertise price-based offers, instead preferring to advertise their brand. Retailers have advised the AEC that the complexity of advertising price based offers, in particular, the terms and conditions that must now be advertised alongside the price, makes billboard and radio advertising unwieldy. For customers that were prompted to act by discount led marketing that occurred prior to the introduction of the policy, this would result in lower engagement and worsened outcomes for customers overall, particularly if it meant they remained on a standing offer longer than they might have otherwise.

Question 2: How can the DMO and Reference Price be communicated more broadly to the public?

Question 3. How could consumers make better use of, or increase the use of, the Reference Price when looking for a new offer? For example, could it be used in other ways when researching market offers?

The AEC encourages the Government to consider approaches that would communicate to customers that engagement in the market is easy, with a variety of tools available to suit different engagement styles. The DMO and reference price are not perfect tools, but can assist customers in a simple comparison such as those described above. However, for customers who value accuracy, other tools such as 'use my meter data' feature on the Energy Made Easy website can instantly compare offers based on a customer's personal usage profile.

The AEC does not consider that the presence of a reference price will on its own encourage customers who otherwise would not engage to seek out a better deal. As discussed further below, the presence of a DMO may in fact discourage some customers on standing offers from engaging due to an incorrect perception that the Government is ensuring prices are competitive.

Level 14, 50 Market Street
Melbourne 3000
GPO Box 1823 Melbourne Victoria 3001

P +61 3 9205 3100
E info@energycouncil.com.au
W energycouncil.com.au

ABN 926 084 953 07

Given this, the AEC opposes any additional efforts from the Government to expand the application of the DMO and reference price beyond where it is required to be used today. As can be seen through the evolution of marketed offers since the introduction of the policy in 2019, retailers have shifted away from price based marketing. Anecdotally, this shift has been driven in part by the obligations requiring advertising to be in line with the DMO Code. Consideration of further expanding the use of the reference price needs to be contrasted with the challenges of complying with today's obligations.

In terms of usage, the AEC urges the Government to focus its efforts on the functions the reference price is well placed to perform, rather than those it doesn't. The reference price is an average price, and the discount off the reference price is also an average. It is not in any way personalised or tailored to a customer's needs or situation, nor does it allow comparison of anything other than price. Presenting this generic tool as something more than a simple comparison would be detrimental to customer trust in the industry.

Question 4. Are there other features of plans that are difficult to compare across market offers that could be standardised through the Code?

The AEC opposes any further expansion of regulation through the Code. The energy sector is highly regulated, with a robust framework for implementing change. If the Government considers that changes should be made to the manner in which retailers market their energy offers, it should propose rule changes to the AEMC, or make a submission to the many consultation processes run by the AER when considering changes to its Retail Pricing Information Guidelines or the soon to be implemented Better Bills Guideline.

The Code is an imperfect instrument, designed specifically to implement the Reference Price and DMO in a short timeframe. It should not be utilised for any other means.

Question 5. Would expanding the use of the Reference Price be useful? For example, should it be included in electricity bills, or on price comparator websites?

The AEC does not support presenting the generic reference price where personalised information is available. In the context of this question, the AEC considers that presenting the Reference Price on price comparator websites would lead to confusion, not information. When customers utilise these sites, they provide personal information – at a minimum, household size and the presence of high consumption appliances – to tailor the information the comparator presents to the customer. When this occurs, customers are able to obtain a moderately accurate estimate of the value of an offer, based on its specific pricing structure.

Including the reference price in this presentation would not add any value to the process. The generic nature of the reference price would mean it could only be less accurate than the tailored presentation of the comparator, and therefore could only result in confusion.

However, the AEC strongly encourages the Government and the AER to align the information presented in the reference price with the information in the price comparator. Today, the DMO Code requires a retailer to present the average minimum price for an offer, yet nowhere in the Energy Made Easy portal is this minimum price replicated. Aligning these two tools would allow customers to compare results on the reference price and the Basic Price Information Documents the comparator generates. The current inconsistency in calculation methodology is resulting in customer confusion, with the retailer and the Government comparator providing two distinct generic values for an offer. This is suboptimal and should be rectified.

Level 14, 50 Market Street
Melbourne 3000
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E info@energycouncil.com.au
W energycouncil.com.au

ABN 926 084 953 07

Impacts of the DMO on pricing and advertising

It is clear that the initial impact of the DMO on published standing offer prices was significant. This 'reset' meant retailers who had previously inflated the price of standing offers so as to present a larger discount were forced to lower the base rate of their offer to align with the DMO. However, these higher priced standing offers were commonly made by smaller second tier retailers seeking market share. Second tier retailers have very few, if any standing offer customers, so while the DMO introduction resulted in a reduction in the advertised price, it had little effect on the prices paid by the customers of these retailers.

Larger retailers with more standing offer customers often had much more reasonably priced standing offer prices, so the distinction between pre-DMO and post-DMO was less marked. That being said, the AEC accepts that the introduction of the DMO has reduced the prices that standing offer customers pay in the NEM.

However, there is little evidence that the DMO is continuing to deliver enhanced outcomes for consumers since the 2019 reset. Retailers are now required to pass through reductions in their electricity procurement costs since the introduction of the 'Big Stick' powers, and the National Energy Retail Rules (NERR) prohibits retailers advertising conditional discounts that are higher than the reasonable costs a retailer could be expected to avoid by the customer meeting the condition. This means that even without the DMO, the impact for customers on standing offers are unlikely to be worse than they are today.

However, there is some risk for customers who take comfort in the fact that the DMO is marketed by the Government as an offer that has been getting cheaper since its introduction. While this is accurate, customers would be significantly better off if they switched off the DMO, and onto a competitive market offer.

Impacts of the reference price

As noted above, the AEC continues to support the reference price as a simple means of comparing the value of a retail offer. While we do not consider its introduction has fundamentally changed the experience and outcomes of consumers engaging in the retail electricity market, we do not consider it has resulted in any detrimental outcomes to date. This assessment acknowledges that while there has been a reduction in price forward marketing, any decreased engagement that has eventuated through this reduction could be said to be offset by the comparable increase in customers being better able to assess the value of an offer at a glance.

The AEC does consider there are opportunities to simplify the reference price to make it more easily published by retailers, and may therefore increase the likelihood of retailers returning to using price based marketing as a means of encouraging customers to engage. The AEC recommends that the disclaimers currently required to be published alongside the reference price could be minimized to the extent possible to make it easier for consumers to understand, or at least, less prohibitive. This might include, for example, only requiring retailers to note that the discount published is "less than the DMO price for an average consumer". Currently retailers are required to publish the following detail in all price based advertising:

- the difference between the unconditional price and the reference price, stated as a percentage of the reference price (comparison percentage)
- for each proportional conditional discount, the difference between the conditional price and unconditional price, stated as a percentage of the relevant reference price

- the lowest possible price of the offer (inclusive of all conditional discounts mentioned in the communication)
- conditions for all conditional discounts
- the distribution region and type of small customer
- a conditional discount should not be stated as the main element of the advertisement, publication or offer.

In the AEC's view, this information might be valuable if the reference price was delivering an accurate and personalised offer, however as a generic comparison of the value of an offer, it provides little additional insight to a customer.

Similarly, the AEC encourages the Government to de-scope innovative energy offers that do not align with the daily fixed charge and kilowatt hour variable charge structure of most of today's offers. Offers that include uncapped energy for electric vehicles, offers that comprise repayment of technology such as solar and batteries within a retail offer, and other two sided charging approaches are not suited to a generic reference price comparison. The AEC suggests that the reference price obligations are limited to flat rate and time of use charging only, with any variation on these charging approaches exempted from the framework automatically.

Ongoing impact of the reference price

The AEC considers that over time, the value and impact of the reference price will diminish as personalised and tailored information becomes more readily available. In 2018, engagement with the energy market was confusing, with retailer discounting practices affecting the ability of customers to confidently identify the cheapest offer. The reference price effectively solved this concern, with a common anchor customers could easily compare the value of offers.

In 2021, customers are able to utilise Energy Made Easy to obtain their own meter data and complete a personalised comparison instantly. This service is excellent, and provides customers with a genuine comparison that will enable them to identify savings that are tailored to their own consumption habits. Actionable information such as this should be further promoted by the Government.

In 2022, customers will begin to be able to utilise the Consumer Data Right (CDR) for energy. The CDR is designed to increase competition in the market by enabling third parties to access customer data instantaneously. The CDR as designed may make switching easier by allowing customers to outsource their engagement to others – further encouraging participation in the market.

Given this continual development, the AEC encourages the Government to assess the efficacy of the reference price as 'yesterday's solution', rather than one that should be further enhanced. That doesn't mean it needs to be removed immediately, there remains a role for simple comparison today, but it is unlikely to provide lasting benefits to consumers, particularly as offers become more personalised with increased DER saturation.

Conditional discounts

The AEC considers the separate presentation of conditional discounts increases, rather than removes confusion when comparing the value of an offer. This is because the obligations in the Code, as identified by the ACCC in its guidance materials, require retailers to publish multiple discount percentages off the reference price – none of which are reflected on a customer's bill.

For example, if a retailer prices their offer at a guaranteed 10% below reference price, and offers an additional 5% conditional discount for a customer that pays on time, the retailer is required to present the offer as 10% less than the reference price, plus an additional 4% conditional discount. This dilutes the value of the reference price, by developing an alternative publication approach for comparing two different offers.

Worked example:

DMO price	*$1000*
Retailer offer (guaranteed discount)	***10%** less than DMO ($900)*
Conditional discount (5% off bill)	*(5% x $900) = 4**%** less than the DMO*

The AEC understands the policy rationale of the ACCC and Government in requiring these discounts to be published separately in 2019 when discounting was more prevalent in the market, and the presence of the DMO itself, and requirements in the NERR that limit conditional discounting, the value of presenting two separate discounts today is negligible. In the above worked example, there does not appear any benefit to assessing the value of an offer as "10% plus 4% cheaper than the DMO" over presenting an offer as "14% cheaper". Given that the AEC encourages the Government to remove obligations in the Code regarding the publication of conditional discounts, and instead rely on baseline obligations in the Australian Consumer Law that require marketing to not be misleading or deceptive.

Operation of the DMO

The AEC has previously written to the Government highlighting the impact of the timing of the DMO, when compared against the AER's timelines for publication of network pricing. As a key component of the DMO, the availability of accurate network pricing costs is critical to ensure that retailers are able to recover their costs in a price regulated market. In previous years, the AER has been forced to rely on predicted network costs to meet its 1 May deadline, only for the final network prices to be dramatically higher. These types of inequities risk the efficiency of the market.

The AEC believes that a broader review is required of the AER's determination timing to ensure that retailers are not squeezed into the end of process caused by delays on the behalf of networks or the AER itself. AEC members are comfortable with a DMO final decision of 14 May, a two week delay on current timelines, provided that decision is made using final network prices. The AER has advised that it would prefer a date of 21 May to ensure that it is able to meet its own obligations in finalising network pricing prior to publishing the final DMO.

The AEC considers that a better approach would be to assess all the AER's determination timelines, and the network deadlines that affect the AER's decisions, to identify where opportunities to streamline or improve the process are found. This might see network businesses required to submit final prices earlier, or the AER to approve prices more quickly, in order to meet the DMO deadline. The AEC consider this to be the fairest possible outcomes, noting that retailers are willing to forego two weeks of implementation time as a means of facilitating this change.

Regulatory architecture

Level 14, 50 Market Street
Melbourne 3000
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P +61 3 9205 3100
E info@energycouncil.com.au
W energycouncil.com.au

ABN 926 084 953 07

The AEC remains concerned that the architecture of using a mandatory industry code under the CCA to implement the DMO and reference price is inefficient, goes against the spirit of the Australian Energy Market Agreement, and results in increased red tape and compliance costs for retailers. After more than two years of operation, there is no need to maintain this regulatory approach. Energy is one of Australia's most regulated industries, and as noted above, there are many regulatory pathways the Government could utilise if it could prove that its policies were in the long-term interests of consumers.

While at the time the policy was implemented, it could be said the Government was unable to use the appropriate regulatory channels due to its own late decision to implement the policy, this rationale no longer exists today. The AEC encourages the Government to impose a sunset date of 1 July 2023 for the DMO Code, and use the time between now and then to propose regulatory changes to the National Energy Retail Rules and Law as required.

Any questions about this submission should be addressed to me by email to ben.barnes@energycouncil.com.au or by telephone on (03) 9205 3115.

Yours sincerely,

Ben Barnes
Director Retail Policy

Level 14, 50 Market Street
Melbourne 3000
GPO Box 1823 Melbourne Victoria 3001
P +61 3 9205 3100
E info@energycouncil.com.au
W energycouncil.com.au
ABN 926 084 953 07