



**ICRC**

independent competition and regulatory commission

**FINAL REPORT**

# **Improving the transparency and comparability of retail electricity offers**

**Report 13 of 2021, July 2021**



The Independent Competition and Regulatory Commission is a Territory Authority established under the *Independent Competition and Regulatory Commission Act 1997* (ICRC Act). The Commission is constituted under the ICRC Act by one or more standing commissioners and any associated commissioners appointed for particular purposes. Commissioners are statutory appointments. Joe Dimasi is the current Senior Commissioner who constitutes the Commission and takes direct responsibility for delivery of the outcomes of the Commission.

The Commission has responsibilities for a broad range of regulatory and utility administrative matters. The Commission has responsibility under the ICRC Act for regulating and advising government about pricing and other matters for monopoly, near-monopoly and ministerially declared regulated industries, and providing advice on competitive neutrality complaints and government-regulated activities. The Commission also has responsibility for arbitrating infrastructure access disputes under the ICRC Act.

The Commission is responsible for managing the utility licence framework in the ACT, established under the *Utilities Act 2000* (Utilities Act). The Commission is responsible for the licensing determination process, monitoring licensees' compliance with their legislative and licence obligations and determination of utility industry codes.

The Commission's objectives are set out in section 7 and 19L of the ICRC Act and section 3 of the Utilities Act. In discharging its objectives and functions, the Commission provides independent robust analysis and advice.

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# Executive summary

Paying electricity bills is a major concern for many ACT households, particularly those on low incomes. Small businesses are also experiencing cost pressures from high electricity prices. Many consumers could make worthwhile savings on their electricity bills by switching to a cheaper electricity offer that better suits their circumstances. But many consumers experience difficulties in comparing the wide range of electricity offers in the market and choosing an offer that's right for them.

Last year, we consulted with consumers, and surveyed more than 1000 ACT households, on their experiences in navigating the electricity market. We found that most ACT electricity consumers want more help to find the best offer for their circumstances. Comparing offers is difficult because of the large number of plans, different terms and conditions in plans, not enough clear information about how discounts are calculated, and the complexity of comparing the bill impacts of different tariff types.

We have made a new industry code called the ACT Retail Electricity (Transparency and Comparability) Code (the ACT Code) to make it easier for consumers to find an electricity offer that could reduce their bills. The new ACT Code introduces three new obligations on electricity retailers:

- Prices to be compared to a reference price—Retailers must compare the annual price of their electricity plans to a common benchmark (a reference price) in advertising and other communications to make it simpler and faster for customers to compare prices.
- Better offer notification on bills—Retailers must tell customers on their bills if they have an electricity plan that might save the customer money and how the customer can contact the retailer for more information. Retailers must also tell customers about the Australian Government's Energy Made Easy price comparison website where they can compare plans from different retailers.
- Customers entitled to clear advice—Retailers must give clear, timely and reliable advice to their customers to help them choose the best electricity plan for their circumstances.

Retailers are required to comply with these obligations from 1 October 2021, which is the day the reference price determination *Utilities (Representative Consumption and Reference Price) Determination 2021* takes effect.

We have recognised that retailers will need time to make changes to their systems and processes to reflect the new obligations and have decided to delay the commencement date for the full implementation of the better offer obligations in the ACT Code. Retailers will have an additional 9 months after the commencement of the ACT Code to fully implement the better offer obligations (that is, until 1 July 2022). This will provide NERL retailers with around 12 months to make the changes needed to their billing systems and processes. In the meantime, we have introduced transitional arrangements to ensure that ACT consumers can still obtain a better offer check by contacting their retailer.

## Consultation on the draft ACT Code

We have made the ACT Code in response to a direction from the Minister for Water, Energy and Emissions Reduction.

In developing the ACT Code, we invited public feedback on a draft ACT Code in March and April 2021. We also consulted with retailers operating in the ACT to follow up on issues raised in submissions and undertook targeted consultation on amendments to the code to reduce implementation costs.

In developing the draft ACT Code, we aimed to minimise the costs to retailers of implementing the obligations in the code by making them as consistent as possible with similar obligations in other jurisdictions, while meeting the ACT Government's policy intent. We modelled the reference price obligation in the draft ACT Code on the reference price requirements in the Australian Government's Default Market Offer (DMO) framework. We modelled the clear advice obligation on the Victorian 'clear advice entitlement' framework. We developed the better offer obligation based on the Victorian 'best offer' framework, which we adapted because the Victorian framework relies on customers having smart meters which few ACT customers currently have.

Submissions generally supported the objectives of improving the transparency and comparability of electricity offers to help customers navigate the market and find the best deals for their circumstances.

However, some submissions raised concerns about the introduction of ACT-specific obligations on retailers shortly before the Australian Energy Regulator (AER) commences work on new billing guidelines that will apply in the ACT and may cover similar issues as the better offer obligation. Submissions also noted that the Australian Government is about to review the framework for setting the DMO. Retailer submissions suggested that we delay finalising the ACT Code until after those two processes are complete and some suggested alternative options for the better offer obligation to reduce implementation costs.

Some submissions raised: concerns about insufficient detail about how and when the reference price will be determined; suggestions for how the reference price and clear advice obligations should operate together; and concerns about meeting some aspects of the reference price record keeping requirements. Some submissions suggested amendments to specific clauses and asked for clarification of our intent or expectations on some aspects of the code.

We have addressed submissions on the draft ACT Code in finalising the code.

## Amendments to the Utilities Act

Since we developed and consulted on the draft ACT Code, the ACT Government introduced amendments to the *Utilities Act 2000* (Utilities Act), which were passed in May 2021 through the normal legislative process. The Utilities Act has been amended to:

- give the Minister and Treasurer the power to jointly determine the reference price
- require retailers to give customers information that helps them make informed decisions about electricity offers
- support the making of the ACT Code to set out how and when retailers must give customers information.

The amendments introduced new sections to the Utilities Act, and we have made amendment to the draft code to ensure that the final ACT Code reflects these amendments.

## Our decision on the final ACT Code

We are working to the ACT Government's timeline to introduce the ACT Code in 2021. Since the AER's new billing guidelines and the Australian Government's review of the DMO framework are not expected to be

completed until 2022, we cannot wait until after those processes are completed to finalise the ACT Code. However, we have passed the feedback in submissions to the ACT Government and have taken these issues into account in finalising the ACT Code.

### *Reference price obligation*

We have largely modelled the reference price obligation in the ACT Code on the DMO framework to promote consistency across jurisdictions and minimise implementation costs. But we have made a change based on feedback in submissions on the draft code.

We have decided that retailers will not have to communicate the reference price information when they are directly communicating with a customer in accordance with the clear advice obligation. Retailers asked for this change to bring the ACT Code in line with the Victorian framework because the DMO framework does not have a clear advice obligation. This change does not prevent retailers from giving reference price information if they choose but allows them to focus on giving personalised information to the customer where that best assists the customer in making an informed decision about electricity offers.

We considered whether to change the requirements in the ACT Code for retailers to keep evidence of their compliance with the reference price obligations, in particular the requirements to keep records about implementing the reference price obligation. EnergyAustralia told us they will submit to the Australian Government's review about practical difficulties with the record keeping requirements under the DMO framework. We have decided not to change the requirements in the ACT Code so that we maintain consistency with the national framework.

We will consider whether we need to review the ACT Code after the Australian Government has finalised its review of the DMO framework with a view to maintaining consistency where possible.

### *Better offer obligation*

We have retained the requirement for retailers to check whether they have a lower-priced offer and invite their customers to contact them or use the Energy Made Easy website to compare offers from other retailers. Retailers will have to put a message on customer bills at least once every three months.

The ACT Code gives retailers some flexibility in how they check whether they have a lower-priced offer, recognising that retailers in the ACT only have detailed usage information for the relatively low number of customers who currently have smart meters. Retailers will be required to use the information they have about the customer and make 'reasonable endeavours' to check whether they have an offer that would be likely to reduce the customer's bill.

Requiring retailers to use the best information available to them about individual customers will reduce retailers' compliance costs compared to prescribing a detailed process for the better offer check in the code.

We understand that retailers are concerned about incurring costs to change their systems and processes when the AER's billing guidelines may require further changes in the next 18 months to 2 years. We have decided to amend the draft code to minimise retailer implementation costs, as these costs may ultimately be passed onto customers.

We have decided to delay the commencement date for full implementation of the better offer obligation. Retailers will have up to 12 months from the date a reference price is determined to adapt their billing systems and set up new processes to undertake better offer checks for all customers.

We have introduced transitional arrangements that will require retailers to place a transitional message on customers' bills encouraging them to contact the retailer for information and advice and to do a personalised better offer check for customers who contact them, using usage and other information available for that customer. Delaying the full implementation of the better offer notification obligations will also allow time for us to consider whether any changes to the ACT Code are needed after the AER has finalised its billing guidelines. We consider this approach strikes the right balance in avoiding unnecessary costs on retailers in helping their customers find an offer that will help them reduce their electricity bills.

During our public forum and in submissions, some retailers asked us to provide more detailed guidance about what they would need to do to meet the requirement to make 'reasonable endeavours'. We will develop guidelines to help retailers comply with the better offer notification requirement.

### *Clear advice obligation*

In response to feedback in submissions, we have made a change to the information retailers must give customers who are changing to a different tariff structure. Retailers will need to help customers understand how their usage affects what they will pay under the new tariff structure and, where possible, give the customer an estimate of the cost impact of switching. This will ensure that customers receive information to help them understand the potential cost impacts of switching to a different tariff structure, whether or not they have a smart meter.

### *Compliance guidelines*

We will develop compliance guidelines to help retailers implement the ACT Code. Most retailers asked for more detailed guidance in their feedback on the draft code.

We will consider whether we need to review the ACT Code and our compliance guidelines after the AER finalises its mandatory billing guidelines in 2022.



# 1. Background

In 2020, during our price investigation to set retail electricity prices for 2020–24, we found that many ACT customers find it difficult to compare and identify the best electricity offer for their circumstances. The main reasons are the large number and complexity of offers available, retailers' practice of advertising the price of their offers in different ways, and the different terms and conditions on different offers.

To help customers navigate the market, we recommended that the ACT Government make rules about the way retailers can advertise their electricity plans to make it simpler and faster for customers to compare offers. We also recommended that the ACT Government introduce new obligations on retailers to tell their customers about offers that might save them money and to give customers clear and timely advice to help them select the best offer for their circumstances.<sup>1</sup>

Similar obligations already exist in other jurisdictions. Under the Australian Government's Default Market Offer (DMO) framework, retailers in South Australia (SA), New South Wales (NSW) and South-East Queensland must show how the price of each of their offers compares to a DMO reference price determined by the Australian Energy Regulator (AER). Under the Victorian Default Offer (VDO) framework, retailers in Victoria must show how the price of each offer compares to a VDO reference price determined by the Essential Services Commission (ESC). The Victorian framework also has 'best offer' and 'clear advice entitlement' obligations that require retailers in Victoria to tell customers on their bills whether they are on the retailer's best energy offer and how much they could save by switching to another offer. Retailers must also help customers select the best offer for their circumstances.<sup>2</sup>

The ACT Government decided to implement our recommendations in 2021.<sup>3</sup>

## 1.1. The Commission's task

On 26 February 2021, the Minister for Water, Energy and Emissions Reduction directed us to make an industry code that creates a clear advice entitlement and establishes new regulatory obligations on electricity retailers to:

- compare the annual price of their offers to a common reference point to enable customers to compare electricity offers easily

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<sup>1</sup> ICRC, *Final report; Retail electricity price investigation 2020–24*, 5 June 2020.

<sup>2</sup> ESC, *New standards for energy bills and marketing 2018*, <https://www.esc.vic.gov.au/electricity-and-gas/inquiries-studies-and-reviews/electricity-and-gas-retail-markets-review-implementation-2018/new-standards-energy-bills-and-marketing-2018>.

<sup>3</sup> ACT Government, *Parliamentary & Governing Agreement; 10<sup>th</sup> Legislative Assembly*, [https://www.cmtedd.act.gov.au/\\_data/assets/pdf\\_file/0003/1654077/Parliamentary-Agreement-for-the-10th-Legislative-Assembly.pdf](https://www.cmtedd.act.gov.au/_data/assets/pdf_file/0003/1654077/Parliamentary-Agreement-for-the-10th-Legislative-Assembly.pdf).

- regularly notify their customers if they have a better offer and ask customers to contact them for information.<sup>4</sup>

The ACT Government also introduced amendments to the Utilities Act, which the Legislative Assembly passed on 11 May 2021. The amendments:

- give the Minister and Treasurer the joint power to determine a reference price and representative consumption each year
- require retailers to give customers information that helps them make informed decisions about retail electricity offers
- support the making of an industry code that sets out the details about how and when retailers are required to give the information to customers.<sup>5</sup>

On 13 May 2021, the ACT Government started consultation with retailers on the determination of the reference price and representative consumption levels.<sup>6</sup>

## 1.2. Related developments

There are two developments that might have implications for the ACT Code. First, the AER is developing new billing guidelines. Second, the Australian Government plans to review the DMO framework.

### AER billing guidelines

On 18 March 2021, the Australian Energy Market Commission (AEMC) amended the National Energy Retail Rules (NERR) to require the AER to make enforceable billing guidelines about how retailers prepare and issue bills to small customers. The AER must finalise its billing guidelines by 1 April 2022.<sup>7</sup>

In its submission on the draft ACT Code, the AER said that it will ‘consider whether the inclusion of comparison information, such as whether a customer is receiving a retailer’s ‘best offer’, would achieve the billing objective and improve customer outcomes.’ It noted that it is undertaking consumer research to test what type of information improves consumer comprehension.<sup>8</sup>

<sup>4</sup> Minister for Water, Energy and Emissions Reduction, *Utilities (Improving Transparency and Comparability of Retail Electricity Offers) Ministerial Direction 2021*, 26 February 2021. Available at: <https://www.legislation.act.gov.au/di/2021-39>.

<sup>5</sup> The Legislative Assembly for the Australian Capital Territory, *Utilities Amendment Bill 2021*, [https://www.legislation.act.gov.au/b/db\\_64114/](https://www.legislation.act.gov.au/b/db_64114/)

<sup>6</sup> Treasurer and Minister for Water, Energy and Emissions Reduction, *Introduction of ACT Electricity Reference Price Framework*, 13 May 2021 letter to retailers

<sup>7</sup> AEMC, *Bill contents and billing requirements*, 18 March 2021, <https://www.aemc.gov.au/rule-changes/bill-contents-and-billing-requirements>.

<sup>8</sup> AER, *Submission on the draft ACT Code*, 8 April 2021, pp. 1-2.

## Review of DMO framework

The Australian Government has committed to reviewing the *Competition and Consumer (Industry Code—Electricity Retail) Regulations 2019*, which set out the DMO framework. The review is expected to start in the second half of 2021, with any amendments to the DMO framework coming into effect on 1 July 2022.<sup>9</sup>

### 1.3. Our process

In developing the ACT Code, we consulted with stakeholders by releasing a draft code and report, holding a public forum, and inviting submissions and other feedback. We also met with electricity retailers, other regulators, and government stakeholders, including targeted follow-up consultation on issues raised in submissions.

The key steps in our process are in table 1.1. We finalised the code after the Legislative Assembly passed the amendments to the Utilities Act so that we could make sure that the code is consistent with the legislation.

**Table 1.1: Timeline for developing the code**

Event	Date
Direction from the Minister	26 February 2021
Draft ACT Code released for consultation	10 March 2021
Consumer fact sheet on draft ACT Code released	23 March 2021
Public forum on draft ACT Code	24 March 2021
Submissions on draft ACT Code closed	9 April 2021
Final ACT Code released	2 July 2021

We received 7 written submissions on our draft ACT Code, from:

- ACT Civil & Administrative Tribunal (ACAT)
- ACT Council of Social Services (ACTCOSS)
- Australian Energy Regulator (AER)
- EnergyAustralia Pty Ltd (EnergyAustralia)
- Origin Energy Limited
- ActewAGL Retail
- Red Energy Pty Ltd and Lumo Energy (Australia) Pty Ltd (Red/Lumo)

The submissions are on our website at: <https://www.icrc.act.gov.au/energy/act-retail-electricity-transparency-and-comparability-code>.

<sup>9</sup> AER, final determination, *DMO prices 2021-22*, pp.11, 23-24.

## 1.4. Requirements under the Utilities Act

Sections 59 and 60 of the Utilities Act set out what the commission must do to determine an industry code. These sections are reproduced in boxes 1.1 and 1.2 below.

We have determined the ACT Code in accordance with subsection 59(2), which says that the commission may determine an industry code to give effect to a direction by the Minister under section 19. The direction is at Attachment B to this report and is also at <https://www.legislation.act.gov.au/di/2021-39>.

In accordance with subsection 59(1), we have consulted the Minister and the Minister responsible for the *Utilities (Technical Regulation) Act 2014* and are satisfied that the ACT Code is not inconsistent with another industry code or a technical code. We also conducted public consultation on a draft ACT Code. We published the draft code on 10 March 2021 and invited submissions until 9 April 2021 in accordance with subsection 60(1).

### Box 1.1. Requirements under section 59 of the Utilities Act

Subsection 59(1) of the Utilities Act provides that the commission may determine an industry code if it has:

- a. consulted the Minister, and the Minister responsible for the *Utilities (Technical Regulation) Act 2014*, in relation to the ACT Code
- b. is satisfied that (i) the ACT Code is not inconsistent in material respects with another industry code or a technical code and (ii) it is necessary or convenient to determine the ACT Code.

Subsection 59(2) further provides that the commission may determine an industry code, for example, in the following circumstances:

- a. if a utility fails to submit a draft industry code in accordance with a direction under section 57
- b. the proponent of a draft industry code fails to submit a further draft of the ACT Code in accordance with a requirement in a notice of refusal under section 58
- c. the commission is satisfied that a draft industry code submitted for consideration or approval is not appropriate
- d. to give effect to a direction by the Minister under section 19.

**Box 1.2. Public consultation requirements under section 60 of the Utilities Act**

Subsection 60(1) of the Utilities Act states that, before the commission approves or determines and industry code, it must:

- a. give public notice that—
  - i. states that the draft code has been prepared
  - ii. states the place or places where copies of the draft code may be inspected or obtained
  - iii. invites interested people to make submissions to the commission about the draft code within the period specified in the notice
- b. make copies of the draft code available for public inspection in accordance with the notice.

Subsection 60(2) further provides that the period stated in the notice must run for at least 30 days after the publication of the notice, while subsection 60(3) says that the commission must have due regard to any submission made in accordance with the notice when approving or determining the industry code.

## 1.5. Structure of this report

The remainder of this report is structured as follows:

- Chapter 2 steps through Part 2 of the ACT Code, which is the reference price obligations.
- Chapter 3 steps through Part 3 of the ACT Code, which is the better offer obligations.
- Chapter 4 steps through Part 4 of the ACT Code, which is the clear advice obligations.
- The ACT Code is at Attachment A.
- The Ministerial Direction is at Attachment B.

## 2. Reference price obligation

Part 2 of the ACT Code establishes a requirement for retailers to show how the price of their offers to supply electricity to customers compares with a reference price. Retailers are required to make these comparisons in advertising and marketing as well as in certain direct communications with customers, such as when they are notifying customers of a price change. Part 2 also prevents retailers from presenting conditional discounts as the most prominent price-related matter and requires retailers to clearly state the terms relating to any conditional discounts.

### 2.1. Purpose of the reference price obligation

The reference price obligation is intended to make it simpler and faster for customers to compare offers from different electricity retailers. This is to address a well-known issue of inconsistent discounting and advertising practices by retailers that create confusion for customers. This issue was also the basis for the introduction of reference price obligations in the DMO and Victorian frameworks.

With a reference price obligation, all offers must be compared to a reference price, which is a common benchmark or reference point. This means customers can have confidence that an offer advertised as 11 per cent less than the reference price is cheaper than another offer that is 5 per cent less than the reference price. Further, because customers are clearly told up-front about terms on conditional discounts, they can make more informed decisions about whether the offer is right for them.

When we surveyed ACT customers about their experiences of navigating the market, 75 per cent of people who completed the survey told us that having a common reference point that all electricity plans must be advertised against would help them to more easily compare plans.<sup>10</sup> Since then, behavioural insights work done by the Australian Competition and Consumer Commission (ACCC) and the AER found that consumers use the reference price information that is given under the DMO framework to accurately identify better offers even if they do not fully understand all the detailed information presented to them.<sup>11</sup> Surveys done by the ESC, where similar obligations also apply, show that an increasing number of Victorians are finding it easier to shop around and identify a better offer.<sup>12</sup>

We expect ACT electricity customers will similarly benefit from introducing a reference price obligation in the ACT.

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<sup>10</sup> ICRC, *YourSay survey results*, 4 February 2020, <https://www.icrc.act.gov.au/energy/electricity/retail-electricity-prices-2020-24>.

<sup>11</sup> ACCC, *Electricity Retail Code; Behavioural insights and the Code*, <https://www.accc.gov.au/business/industry-codes/electricity-retail-code>.

<sup>12</sup> ESC, *Victorian energy insights report – October 2020*, <https://www.esc.vic.gov.au/electricity-and-gas/inquiries-studies-and-reviews/customer-sentiment-surveys-2020>.

## 2.2. Our approach for the draft ACT Code

The draft ACT Code proposed that retailers be required to state clearly and conspicuously when advertising, marketing or otherwise communicating the price of an offer to a customer:

- the percentage difference between the reference price and the price of the offer, excluding any conditional discounts that apply to the offer
- the additional percentage value of any conditional discounts that apply to the offer
- the annual price of the offer for a customer who uses a specified amount of electricity and achieves all the conditional discounts or, for personalised offers, an estimate of the annual amount that the customer would pay under the offer assuming they achieve all the conditional discounts
- the distribution region where the offer is available
- the type of customer that can sign-up to the offer
- the terms on any conditional discounts that apply to the offer.

Retailers would be required to maintain records as evidence of their compliance for at least 6 years. Such records include the content of price related communications and calculations underpinning those communications, excluding any personal information about customers. Retailers would be allowed to maintain a single record where multiple communications are substantially identical apart from being made to different customers.

The reference price obligations in the draft ACT Code were modelled on the DMO framework to promote consistency across jurisdictions and minimise implementation costs.

## 2.3. Submissions on the draft ACT Code and our response

### General

#### Stakeholder views

All submissions supported the concept of a reference price or similar measures to help customers in the ACT navigate the market and compare electricity offers. However, some submissions raised concerns about the effectiveness and potential negative effects of the obligation and suggested the need for consumer testing. Some submissions suggested waiting until after the Australian Government had completed its review of the DMO framework before finalising the ACT Code.

EnergyAustralia submitted that ‘it is critical to understand how these concepts are translated into reality and whether they meaningfully address known barriers to engagement’ and that ‘the introduction of reference pricing in other jurisdictions has actually seen retailers move away from using headline discounts and towards a range of inconsistent product features.’<sup>13</sup>

<sup>13</sup> EnergyAustralia, *Submission on the draft ACT Code*, 9 April 2021, pp. 1-2.

Red/Lumo observed that the DMO framework requires retailers to give numerous pieces of information to customers and submitted that ‘it remains unclear as to whether this is the best way of promoting greater understanding of offers and greater consumer engagement.’ They also said that the commission should consider ‘what any advertising requirements mean for competition [as] overly prescriptive obligations that largely reflect current offers by large incumbents can stifle the development and marketing of more innovative retail offers.’<sup>14</sup>

The AER said it ‘considers that efforts to improve transparency and comparability in the energy market will be most effective in improving consumer outcomes, while enabling competition and innovation, if they are consistent, and informed by consumer research and behavioural insights.’<sup>15</sup>

Origin stated that its ‘preference is for the retail sector to operate under a single agreed national regime’ but otherwise the commission should ‘develop rules that are consistent with those that already apply to promote consistency and ease of implementation for retailers.’<sup>16</sup>

ACTCOSS supported the key elements of the ACT Code as it believes ‘these measures will assist small energy customers in navigating the retail electricity market to access more affordable electricity as an essential service.’ It also said that it is ‘keen to ensure that they do not themselves result in additional cost for consumers that outweighs their benefit’.<sup>17</sup>

## Our response

The ACT Government has committed to implement the obligations set out in the ACT Code in 2021. This is before the Australian Government is expected to complete its review of the DMO framework. We have therefore sought to promote consistency with the existing DMO and Victorian frameworks to minimise implementation costs. We will consider if changes to the ACT Code are needed after the review of the DMO framework is completed.

We note that some retailers might move away from price-based advertising following the introduction of the reference price obligation in the ACT. However, the obligation ensures that when customers are eventually presented with price information by the retailer, which is an essential part of the customer journey, they will be presented with information that enables them to readily compare the price of the offer to those from other retailers.

## Commencement date

### Stakeholder views

Red/Lumo said that ‘an implementation timeframe must be agreed with all stakeholders to ensure adequate time for the development of a reference price [and] to ensure retailers are able to implement

<sup>14</sup> Red/Lumo, *Submission on the draft ACT Code*, 13 April 2021, pp. 1, 3.

<sup>15</sup> AER, *Submission on the draft ACT Code*, 8 April 2021, p. 2.

<sup>16</sup> Origin, *Submission on the draft ACT Code*, 9 April 2021, p. 1.

<sup>17</sup> ACTCOSS, *Submission on the draft ACT Code*, 16 April 2021, pp. 1-2.



system changes correctly.’ They noted that inadequate lead times create risk of error, which undermines the benefits to customers.<sup>18</sup>

ActewAGL submitted that the changes ‘are being proposed at a time when ActewAGL, along with other retailers, has a number of other significant regulatory programs underway constraining resources ... it is in this context that ActewAGL considers it not possible to implement the [ACT Code] in full until at least 1 July 2022.’<sup>19</sup>

Origin noted that the draft ACT Code did not provide a set commencement date or suggested approach to implementation. It observed that ‘the application of the [ACT Code] is scheduled to apply when a reference price is in effect, however, it is our understanding that the [commission] has already approved a regulated retail price’.<sup>20</sup>

EnergyAustralia said that a 1 November effective date ‘would allow the Commission to consider and accommodate likely changes to the DMO Code this year [to reduce] the prospect of costs arising from administering different processes across jurisdictions’.<sup>21</sup>

## Our response

The ACT Code does not specify a commencement date for the reference price obligation. Rather, it says that retailers must comply with the obligation when both a reference price and a representative consumption (being the amount of electricity a representative customer uses in a year) are in force.<sup>22</sup>

The Minister and Treasurer are jointly responsible for determining the reference price and representative consumption under section 75GB of the Utilities Act, which was inserted as part of the amendments to support the ACT Code. We have passed feedback about the commencement date for the reference price obligation to the ACT Government.

The reference price and representative consumption were determined on 1 July 2021 and have a commencement date of 1 October 2021.<sup>23</sup>

## Methodology for determining the reference price

### Stakeholder views

ActewAGL said that ‘Ministerial responsibility for setting reference prices reflects a significant change to the regulatory framework in the ACT, which otherwise requires ActewAGL to set standing offer prices within the percentage change allowed by the [commission] each year’. It noted that ‘it is also not currently known what methodology the Minister would use to set this reference price, and ActewAGL would be concerned if it resulted in a reference price [that is] higher or lower than ActewAGL’s standing offer prices’. ActewAGL also submitted its preference is that ‘retailers be advised of the annual reference consumption before

<sup>18</sup> Red/Lumo, *Submission on the draft ACT Code*, 13 April 2021, p. 5.

<sup>19</sup> ActewAGL, *Submission on the draft ACT Code*, 12 April 2021, p. 3.

<sup>20</sup> Origin, *Submission on the draft ACT Code*, 9 April 2021, p. 2.

<sup>21</sup> EnergyAustralia, *Submission on the draft ACT Code*, 9 April 2021, pp. 3-4.

<sup>22</sup> Clause 2.3 of the draft ACT Code and the final ACT Code.

<sup>23</sup> *Utilities (Representative Consumption and Reference Price) Determination 2021*

standing offer tariffs are set'. It outlined a potential approach to setting the reference price based on its regulated standing offers.<sup>24</sup>

Red/Lumo submitted that they are 'concerned by the proposal to allow the Minister to set the reference price based on existing regulated standing offer prices without clear and binding guidance about how the Minister will make this determination or what factors will be used to influence the Minister's decision'. They said that 'once the ACT Government reaches a position, we strongly recommend that it release any draft legislation and/or regulation for consultation with key stakeholders' and that 'the Commission should re-open consultation on [the ACT Code] to ensure it remains fit for purpose'.<sup>25</sup>

The AER noted that it sets DMO reference prices on a financial year basis and that 'costs to serve and regulatory complexity would be minimised if ACT reference price requirements were likewise implemented on 1 July and determined on an annual financial year basis'.<sup>26</sup>

## Our response

The ACT Government is also consulting with stakeholders about the methodology for determining the reference price and representative consumption.<sup>27</sup>

## Type of customers/offers covered

### Stakeholder views

EnergyAustralia submitted 'that customers and offer types should be explicitly identified where they are to be subject to disclosure requirements.' It noted that the DMO framework 'currently operates by exclusion' and that 'this means all other offer types and customers are covered by implication.' EnergyAustralia said that it has 'found this to be an inhibitor in developing and marketing innovative products'.<sup>28</sup>

ActewAGL said that it would like the commission to clarify the process and timing for a decision on the types of customer plans to which a reference price would apply. It observed that 'the number of embedded networks in the ACT is increasing' and submitted that 'reference pricing requirements should also apply to exempt sellers, so that consumers in these networks ... can also compare their prices to the reference price'.<sup>29</sup>

## Our response

The ACT Code does not specify the types of customer and offers covered by the reference price obligation. The Minister and Treasurer will determine the application of the reference price and representative consumption made under section 75GB of the Utilities Act.

<sup>24</sup> ActewAGL, *Submission on the draft ACT Code*, 12 April 2021, pp. 4-6.

<sup>25</sup> Red/Lumo, *Submission on the draft ACT Code*, 13 April 2021, p. 2.

<sup>26</sup> AER, *Submission on the draft ACT Code*, 8 April 2021, p. 2.

<sup>27</sup> Treasurer and Minister for Water, Energy and Emissions Reduction, *Introduction of ACT Electricity Reference Price Framework*, 13 May 2021 letter to retailers.

<sup>28</sup> EnergyAustralia, *Submission on the draft ACT Code*, 9 April 2021, p. 5.

<sup>29</sup> ActewAGL, *Submission on the draft ACT Code*, 12 April 2021, pp. 5, 7.

The ACT Code says that the reference price obligation applies to an offer to a customer if both a reference price and representative consumption are in force for that type of customer.<sup>30</sup> Section 75GB of the Utilities Act allows the Minister and Treasurer to make different determinations for different types of customers.

## Type of communications covered

### Stakeholder views

Origin asked for ‘clarity regarding extent of interactions between retailers and customers that are intended to be captured under clause 2.3.’ It noted that ‘in the Victorian Code, an advertisement does not include any communication by a retail marketer directly with an individual customer regarding the retailer’s offered prices, provided that the retail marketer makes this communication in accordance with the clear advice entitlement.’<sup>31</sup>

EnergyAustralia submitted that ‘consistency should be maintained on whether reference pricing is invoked for price change communications’ and that ‘although we consider it of low value to the customer, our expectation is that the DMO Code provisions around communications will be largely retained as an outcome of the upcoming review.’<sup>32</sup>

### Our response

We consider that the reference price and clear advice obligations work together because giving a customer the reference price information contributes towards meeting the minimum standards for giving clear advice. For example, the reference price obligation requires retailers to clearly state the conditions on conditional discounts, which is consistent with subclause 4.3(1) of the clear advice obligation that requires retailers to explain how certain actions by the customer can affect the customer’s bill (such as pay-on-time discounts). Also, telling a customer how each offer compares to the reference price and the amount the retailer estimates the customer will pay under each offer is consistent with the overall objective of giving customers information that helps them assess the suitability of offers.

However, we accept that some of the reference price information is likely to be unnecessary when communicating with a customer in accordance with the clear advice obligation. For example, telling a customer about which distribution zone or customer type an offer applies to is unnecessary when the retailer should only be talking to the customer about offers that are available to them. Further, it can be counterproductive for customers to receive too much information and customers are likely to benefit most from receiving personalised information rather than the more general reference price information.

We have therefore made a change in the final ACT Code to say that retailers do not have to communicate the reference price information when they are communicating with a customer in accordance with the clear advice obligation.<sup>33</sup> This is consistent with the Victorian framework which, unlike the DMO framework, also has both reference price and clear advice obligations. The circumstances in which retailers

<sup>30</sup> Clause 2.3 of the draft ACT Code and the final ACT Code.

<sup>31</sup> Origin, *Submission on the draft ACT Code*, 9 April 2021, p. 1.

<sup>32</sup> EnergyAustralia, *Submission on the draft ACT Code*, 9 April 2021, p. 6.

<sup>33</sup> Inserted at subclause 2.3(2) of the final ACT Code.

are to communicate the reference price information to customers are otherwise the same as required under the DMO framework.

## Calculating the unconditional price

### Stakeholder views

ActewAGL sought clarification of the difference between ‘green products’ and ‘green charges’ in the context of calculating the unconditional price, stating that the ACT Code should align with the DMO framework.<sup>34</sup>

ACAT submitted that the comparison between the reference price and an offer price should take into account or make the consumer aware of the cost of any break fee/early termination fee or like fee or charge so that the consumer can make a fully informed choice.<sup>35</sup>

### Our response

In the draft report, we said that any charges, unconditional discounts, annual recurring fees such as membership and contribution fees, recurring metering charges, sign-up credits, and charges on green products should be included in the unconditional price. We also said that optional green charges or solar feed-in tariffs should not be included.<sup>36</sup>

Our intent was to clarify that retailers should include charges that relate to green energy in the unconditional price where those charges are an intrinsic and mandatory component of the offer. An example is where the offer is for energy that is 100 per cent supplied from green energy sources. Where the charges that relate to green energy are an optional extra, then retailers should not include those charges in the unconditional price. For example, where a customer can choose to pay an additional fee to have a proportion of their energy supplied from green energy sources (for example, an additional \$2 a week for 25 per cent of their usage to be sourced from an accredited green power source).

This is consistent with the DMO and Victorian frameworks. We expect that retailers are clear in their communications with customers about optional green charges so that they are able to make informed decisions about whether they choose to incur those extra charges. We expect this kind of information will be advised to a customer under the clear advice obligation.

In relation to break fees or early termination fees, they are not included in the unconditional price as the definition of ‘price’ given in section 75GA of the Utilities Act expressly excludes one-off fees. This is consistent with the DMO and Victorian frameworks. However, we expect that this information will be clearly explained in communications with customers about the terms and conditions of the offer and will be advised to a customer under the clear advice obligation.

<sup>34</sup> ActewAGL, *Submission on the draft ACT Code*, 12 April 2021, p. 7.

<sup>35</sup> ACAT, *Submission on the draft ACT Code*, 9 April 2021, p. 1.

<sup>36</sup> ICRC, *Draft report; Improving the transparency and comparability of retail electricity offers*, 10 March 2021, p. 15.

## Treatment of discounts, rebates and credits

### Stakeholder views

EnergyAustralia submitted that the ACT Code should explicitly define ‘conditional discount’ and specifically the treatment of sign-up credits that relate to circumstances at the time the customer enters into the retail contract. It noted that the DMO and Victorian frameworks generally treat sign-up credits as unconditional but the ACCC’s guide to the DMO framework creates uncertainty around this issue. EnergyAustralia submitted that all sign-up credits should be treated in the same manner for simplicity and should be consistent with the Victorian framework.<sup>37</sup>

### Our response

Section 75GA of the Utilities Act defines a ‘conditional discount’ as follows:

in relation to the retailer’s price of electricity, means a reduction (however described) in the price a small customer would have to pay for the electricity supplied by the NERL retailer if certain conditions were met other than a condition relating to the circumstances in which the small customer enters into a contract with the NERL retailer for the supply of the electricity.

Although there are some slight differences in wording, this definition is consistent with the DMO and Victorian frameworks and includes a conditional discount, rebate or credit. For example, a conditional discount may include any of the following:

- pay on time discount
- direct debit discounts
- anniversary or loyalty credits.

The definition in the Victorian framework also gives an example which says that a conditional discount does not include a one-off sign-up credit as the conditions on it relate to the circumstances in which a customer enters into the contract.<sup>38</sup>

Consistent with the Victorian framework, we expect one-off sign-up credits would be treated as an unconditional discount rather than a conditional discount under the ACT Code. This is so long as a customer is guaranteed to receive the credit upon meeting the condition at the time of signing up (and there are no ongoing conditions or additional conditions that need to be met at a later time, either by the customer or by someone else).

The ACCC’s guide notes that referral selling, where the receipt of a benefit by one customer is dependent on the customer(s) they refer also acquiring services, is prohibited under the Australian Consumer Law. Retailers should be mindful about how they present ‘refer a friend’ type credits to customers and what conditions must be met.<sup>39</sup>

<sup>37</sup> EnergyAustralia, *Submission on the draft ACT Code*, 9 April 2021, p. 5.

<sup>38</sup> Paragraph (b) of the definition of ‘conditional discount’ in the Victorian Energy Retail Code.

<sup>39</sup> ACCC, *Guide to the Electricity Retail Code; Version 2*, 30 June 2020, p. 17.

## Application to third-party sales channels and comparison websites

### Stakeholder views

ActewAGL submitted that the reference price provisions should apply to agents, brokers and commercial comparison websites so that there is consistency with the way retailers present offers, and that this should be made clear in the ACT Code.<sup>40</sup>

Origin noted that basic price and information documents that are generated using Energy Made Easy do not currently support reference price information and this is beyond the control of retailers.<sup>41</sup>

### Our response

We intend to make a determination under section 56A of the Utilities Act that the ACT Code applies to anyone who holds a retailer authorisation under the *National Energy Retail Law (ACT)*. This means that any third-party sales channels or price comparison websites that hold a retailer authorisation under the *National Energy Retail Law (ACT)* are also subject to the ACT Code when they are offering to supply electricity to customers.

Retailers should ensure that any party acting on their behalf meets the same requirements that they are expected to comply with under the ACT Code. Commercial price comparison websites should follow the standards set out by the ACCC in its *Guide for comparator website operators and suppliers*.<sup>42</sup>

In the case of the Australian government's Energy Made Easy comparison website, retailers are legally required to provide information about their offers to the AER, which is then presented on the website in the manner decided by the AER. Unlike agents, brokers and commercial price comparison websites, there is no commercial relationship between retailers and the AER, and the ACT Code does not apply to Energy Made Easy. The AER works to ensure that offers are presented on the Energy Made Easy website in a way that is easy for consumers to compare prices and make informed decisions about the best deals for their circumstances.

## Record keeping requirements

### Stakeholder views

Origin submitted that the record keeping requirements should align with the Victorian framework. It said that, under that framework, 'where the record relates to comparing the offer to the reference price, or providing clear advice to the customer, then the relevant records only need to be kept for 12 months. Records which relate to complaints that are open with the Energy Ombudsman are required to be retained until the complaint is resolved.' Origin submitted that 'it is unlikely that a complaint about a retailer not meeting the obligations ... would be made more than two years after the requirement was triggered.'<sup>43</sup>

<sup>40</sup> ActewAGL, *Submission on the draft ACT Code*, 12 April 2021, p. 7.

<sup>41</sup> Origin, *Submission on the draft ACT Code*, 9 April 2021, pp. 1-2.

<sup>42</sup> ACCC, *Comparator websites; A guide for comparator website operators and suppliers*, August 2015.

<sup>43</sup> Origin, *Submission on the draft ACT Code*, 9 April 2021, p. 2.

EnergyAustralia said it has ‘issues with record keeping requirements that have been raised with the ACCC under its DMO guide [and it] would be keen to discuss these requirements with the Commission before similar requirements are introduced in the ACT and will also be putting forth views as part of the DMO Code review.’<sup>44</sup>

EnergyAustralia subsequently met with us to explain its concerns about the practicalities of keeping records in the DMO framework. EnergyAustralia demonstrated some complexities with tracking price information communicated to various customers on its website to highlight some of the practical difficulties and the significance of the records required to be kept.<sup>45</sup>

## Our response

The record keeping requirements are not only to ensure information is available when a customer has made a complaint to the ACT Civil and Administrative Tribunal (ACAT). They support our ability to request information from retailers to check compliance with the provisions, particularly for communications that are not publicly available. If we are concerned about a retailer’s compliance, we may wish to establish whether a failure occurred once and the retailer then rectified its processes or if there have been multiple failures, which could indicate systemic non-compliance.

We have maintained the 6-year timeframe for the final ACT Code as this is consistent with the length of time that records are required to be kept under the DMO framework. Retailers have a responsibility to maintain records to demonstrate their compliance with the ACT Code and respond to complaints.

We considered whether to change the requirements in the ACT code for retailers to keep evidence of their compliance with the reference price obligations, in response to EnergyAustralia’s concerns. We have decided not to change the requirements in the draft code so that we maintain consistency with the national framework. We will consider whether we need to review the ACT Code after the Australian Government has finalised its review of the DMO framework, with a view to maintaining consistency where possible.

## 2.4. Changes from the draft ACT Code

The amendments to the Utilities Act to support the ACT Code include definitions for the following terms that are relevant to the reference price requirements:

- tells (instead of ‘communicate’ used in the draft ACT Code and the DMO framework)
- conditional discount
- price
- reference price
- representative consumption (instead of ‘annual reference consumption’ used in the draft ACT Code and ‘model annual usage’ used in the DMO framework)
- retailer’s price (like ‘unconditional price’ used in the draft ACT Code and the DMO framework, noting that ‘unconditional price’ is still used in the final ACT Code)

<sup>44</sup> EnergyAustralia, *Submission on the draft ACT Code*, 9 April 2021, p. 6.

<sup>45</sup> Meeting of commission staff and Energy Australia staff, 20 April 2021

- small customer.

We have changed some terms and definitions in the final ACT Code to be consistent with the terms and definitions in the amended Utilities Act. These changes are listed in Table 2.1.

Aside from terminology, the main change to the reference price obligation for the final ACT Code as discussed in section 2.3 is the addition to subclause 2.3(2) to say that retailers are not required to communicate the reference price information when they are communicating with a customer in accordance with the clear advice entitlement.



Table 2.1: Comparison of terms and definitions used in the draft and final ACT Code

Defined term in the draft ACT Code	Definition in the draft ACT Code	Defined term in the final ACT Code	Definition in the final ACT Code
annual reference consumption	for a regulatory period, in relation to supplying electricity in the Territory to a customer of a particular type, means the amount specified in the reference price determination for the regulatory period in relation to the supply	representative consumption	has the meaning given in section 75GB of the Utilities Act, which says:  an annual amount of electricity the Minister and Treasurer consider broadly represent the amount of electricity supplied to the small customer each year at the time they make the determination
communicate	prices for supplying electricity, has the meaning given by subclause 2.3(3), which says: (a) the NERL retailer advertises or publishes the prices (b) the NERL retailer offers to supply electricity at those prices (c) the NERL retailer notifies the customer of the offered prices in writing (other than as mentioned in paragraph (a) or (b)) as part of notifying the customer of a change to the NERL retailer's prices for supplying electricity to the customer AND the offered prices are the prices that apply after the change	tells	a small customer about prices, has the meaning given in section 75GA of the Utilities Act, which says: (a) if the retailer offers to supply electricity to the small customer at the price (b) if the retailer advertises or publishes the price (c) if the price of the electricity supplied by the retailer to the small customer changes—if the retailer tells the small customer the new price
conditional discount	n/a (relied on definition given in the National Energy Retail Rules)	conditional discount	has the meaning given in section 75GA of the Utilities Act, which says:

			in relation to the retailer's price of electricity, means a reduction (however described) in the price a small customer would have to pay for the electricity supplied by the NERL retailer if certain conditions were met other than a condition relating to the circumstances in which the small customer enters into a contract with the NERL retailer for the supply of the electricity
conditional price	for a proportional conditional discount means the total annual amount including GST that a representative customer would be charged for the supply of electricity in the regulatory period at the offered prices, assuming the conditions on the discount were met and disregarding any other conditional discounts	conditional price	same as draft ACT Code
customer	has the meaning given in the National Energy Retail Law	customer	same as draft ACT Code
distribution region	the region in which a particular electricity distribution network operates	distribution region	same as draft ACT Code
lowest possible price	the total annual amount including GST that a representative customer would be charged for the supply of electricity in the regulatory period at the offered prices, assuming the conditions on all conditional discounts (if any) mentioned in the communication were met	lowest possible price	same as draft ACT Code
NERL retailer	has the meaning given in section 75 of the Utilities Act	NERL retailer	same as draft ACT Code

offered price	<p>has the meaning given by subclause 2.3(1), which says:</p> <p>This clause applies, at a time in a regulatory period, to a NERL retailer’s prices (the offered prices) for supplying electricity in the Territory to a customer of a particular type if both:</p> <p>(a) an annual reference consumption</p> <p>(b) a reference price</p> <p>are in force in relation to the supply</p>	offered price	<p>has the meaning given by subclause 2.3(1), which says:</p> <p>This clause applies, at a time in a regulatory period, to a NERL retailer offering to supply electricity in the Territory to a small customer of a particular type at particular prices (the offered prices) if both:</p> <p>(a) a representative consumption</p> <p>(b) a reference price</p> <p>are in force in relation to the supply</p>
price	<p>(a) subject to paragraph (b), includes a charge of any description, including a recurring fee (for example, an annual membership fee)</p> <p>(b) does not include any of the following:</p> <p>(i) a one-off fee (for example, a connection fee or reconnection fee or an account establishment fee)</p> <p>(ii) a fee for making, or failing to make, a payment in particular circumstances (for example, a credit card transaction fee, a late payment fee or a direct debit dishonour fee)</p> <p>(iii) a fee for a service provided on request on an ad-hoc basis (for example, a fee for a meter read requested by a customer)</p>	price	<p>has the meaning given in section 75GA of the Utilities Act, which says:</p> <p>(a) includes a charge of any description, including a recurring fee (for example, an annual membership fee), but</p> <p>(b) does not include any of the following:</p> <p>(i) a one-off fee (for example, a connection fee or reconnection fee or an account establishment fee)</p> <p>(ii) a fee for making, or failing to make, a payment in particular circumstances (for example, a credit card transaction fee, a late payment fee or a direct debit dishonour fee)</p> <p>(iii) a fee for a service provided on request or because of special circumstances (for</p>

			example, a fee for a meter read requested by a customer)
proportional conditional discount	a conditional discount that is calculated as a proportion of all or part of the amount a customer is charged for the supply of electricity at the offered prices	proportional conditional discount	same as draft ACT Code
reference price	for a regulatory period, in relation to supplying electricity in the Territory to a customer of a particular type, means the annual price in the reference price determination	reference price	has the meaning given in section 75GB of the Utilities Act, which says: an annual price for the supply of the representative consumption of electricity to the small customer the Minister and Treasurer consider is reasonable
regulatory period	means the period for which a reference price determination is in effect	regulatory period	means the period for which a representative consumption and reference price determined under section 75GB of the Utilities Act are in force
representative customer	in relation to supplying electricity in the Territory in a regulatory period to a customer of a particular type, means a customer of that type who is supplied electricity in the Territory in the regulatory period in accordance with the annual reference consumption for that regulatory period in relation to the supply	representative customer	means a small customer of a particular type who is supplied electricity in the Territory in the regulatory period in accordance with the representative consumption
residential customer	means a customer in relation to whom the electricity is principally for personal, household or domestic use	n/a	n/a (relies on definition of small customer under the National Energy Retail Law)
n/a	n/a	retailer's price	has the meaning given in section 75GA of the Utilities Act, which says:

			in relation to a NERL retailer, means the total price a small customer would have to pay if the NERL retailer supplied the representative consumption of electricity to the customer disregarding any conditional discounts
small business customer	means a customer in relation to whom both the following apply: (a) the electricity is not principally for personal, household or domestic use (b) the supply is, or will be, at a rate less than 100 MWh a year	n/a	n/a (the final ACT Code relies on definition of small customer under the National Energy Retail Law)
small customer	means a residential or small business customer	small customer	has the meaning given by section 5 of the National Energy Retail Law
Territory	means the Australian Capital Territory	Territory	same as draft ACT Code
type	a customer in respect of which an annual reference consumption is determined in the reference price determination	type	means a class of small customer in respect of which a representative consumption and a reference price determined under section 75GB of the Utilities Act are in force
unconditional price	the total annual amount including GST that a representative customer would be charged for the supply of electricity in the regulatory period at the offered prices, disregarding any conditional discounts	unconditional price	means the retailer's price including GST that a representative customer would be charged for the supply of electricity in the regulatory period at the offered prices, disregarding any conditional discounts

## 3. Better offer obligation

Part 3 of the ACT Code establishes a requirement on retailers to check whether they have an offer that could save a customer money and to put a message on the customer's bill inviting them to contact their retailer for more information and/or use the Energy Made Easy website to compare offers.

We have made an amendment to introduce transitional arrangements until the full commencement of Part 3 of the ACT Code to minimise implementation costs for retailers, while still meeting the ACT Government's policy intent.

### 3.1. Purpose of the better offer obligation

The better offer message is intended to prompt customers to shop around and tell them how they can find better deals. The receipt of a bill is an ideal time for a customer to receive the better offer message as it the point at which customers are most likely to be triggered to engage with the market.

When we surveyed ACT customers about their experiences with shopping around, only 28 – 35 per cent of respondents said that they had switched energy companies or switched from their current plan to another offer from their current retailer. Even fewer (18 per cent) said they were confident that their current plan was the best one for their circumstances. A significant proportion of respondents (70 per cent) said that a price comparison service would help them more easily navigate the market. A further 60 per cent said that they would benefit from receiving a message on their electricity bill telling them about the best plan available for their consumption.<sup>46</sup>

With respect to price comparison services, we found that there was a general sense of distrust or unease about using commercial price comparison websites and that there was a relatively low awareness of the Australian Government's Energy Made Easy website.<sup>47</sup>

A recent survey by the Victorian Essential Services Commission (ESC) found that there has been a gradual increase in the number of Victorians engaging with the market. Although this might be partly due to financial impacts of COVID-19 prompting customers to seek lower-priced offers, the 'best offer' message printed on bills as required under the Victorian framework will likely also have contributed. However, the ESC also found that there was still a low awareness of the Victorian Government's comparison website, Victorian Energy Compare.<sup>48</sup>

These results suggest that improving awareness of Energy Made Easy and requiring retailers to notify their customers if they have an offer that could save the customer money will help customers find a suitable plan.

<sup>46</sup> ICRC, *YourSay survey results*, 4 February 2020. Available at: <https://www.icrc.act.gov.au/energy/electricity/retail-electricity-prices-2020-24>.

<sup>47</sup> ICRC, *YourSay survey results*, 4 February 2020. Available at: <https://www.icrc.act.gov.au/energy/electricity/retail-electricity-prices-2020-24>.

<sup>48</sup> ESC, *Victorian energy insights report – October 2020*, <https://www.esc.vic.gov.au/electricity-and-gas/inquiries-studies-and-reviews/customer-sentiment-surveys-2020>.

## 3.2. Our approach for the draft ACT Code

The draft ACT Code proposed that, at least once every 3 months or every billing cycle if the billing cycle is longer than 3 months, retailers would have to:

- check whether they have an offer that could result in the customer paying less than their current plan (referred to as a ‘better offer check’). Retailers would have some discretion in how they do the better offer check but:
  - if the customer does not have a smart meter or no smart meter data is available,<sup>49</sup> the retailer would have to use reasonable endeavours
  - if the customer has a smart meter and the smart meter data is available, the retailer will have to use the smart meter data in their assessment
- put one of two messages in a border on the front page of the customer’s bill (or bill summary) next to the amount due (referred to as a ‘better offer message’):
  - if the better offer check identified a cheaper plan, the better offer message would have to be titled ‘We think you could save money on another plan’, give clear information about contacting the retailer to find out more about its other plans, and include details about Energy Made Easy
  - if the better offer check did not identify a cheaper plan through its better offer check, the better offer message would have to be titled ‘Could you save money on another plan?’ and include details about Energy Made Easy.

Retailers would otherwise have discretion about the information they give customers in the message and would be required to retain records of their compliance for at least 6 years.

## 3.3. Submissions on the draft ACT Code and our response

### General

#### Stakeholder views

Although supportive of efforts to encourage customers to engage in the market, some submissions raised concerns about the introduction of ACT-specific obligations shortly before the AER develops new billing guidelines that could create a range of new obligations on retailers in the ACT. Some submissions questioned whether placing a message on bills was the best way to engage customers, claiming that the costs to implement could outweigh the benefits, and suggested alternative lower-cost approaches.

Red/Lumo said they support efforts to encourage consumers to engage in the competitive market but ‘there is little evidence that a best offer obligation is the best way to achieve this’. They submitted that ‘further analysis is required before the Commission can be confident about the value to consumers of an obligation on retailers to present the best offer, and the form and timing of when it is presented’. They also said that ‘waiting until [the AER’s billing guidelines] have been implemented will ensure that the

<sup>49</sup> For example, when the customer has not agreed to the collection of information from their smart meter.

Commission is better placed to assess which provisions will apply in the ACT ... and which others could be mirrored through ACT-specific regulations'.<sup>50</sup>

Red/Lumo submitted that while the AER develops its new billing guidelines 'the Commission [should] apply an interim approach to implement a more general obligation on retailers to contact their customers at certain points (annually, for example) to alert them to potential alternative offers that may be available to them'.<sup>51</sup>

ActewAGL submitted that the better offer check outlined in the draft ACT Code would be costly to implement. It said that it will 'require ActewAGL to make changes to its billing system so it can gather customer usage data ... and evaluate it against many different offers and tariff types'. It submitted that a change of this magnitude would be costly, and the costs would outweigh the benefits to ACT electricity customers. ActewAGL suggested postponing the introduction of the better offer requirements 'until there is certainty regarding the outcomes of the AER's considerations relevant to a billing guideline'. It said that this will avoid the possibility of regulatory changes at the ACT level conflicting with regulatory changes at the Federal level and prevent unnecessary costs to customers'.<sup>52</sup>

ActewAGL proposed an alternative approach would be to place the same message on all customer bills to prompt customers to engage with the market. It said that the message 'would suggest contacting the current retailer and/or checking the retailer's website to ensure they are on the best available offer'.<sup>53</sup> ActewAGL said this would remove the requirement for, and cost of, doing a better offer check to see whether the retailer has a better deal for some customers.

EnergyAustralia supported the overarching objective but questioned 'whether specific bill notifications will measurably increase the instances of customers shopping around'. It said that it is 'yet to see any research or direct behavioural testing in Australia which supports the notion that customers would increase their level of engagement with the market on the basis of information provided by bills'. It also submitted that it would be prudent to delay implementation and consultation on ACT-specific obligations until after the AER's billing guidelines are finalised.<sup>54</sup>

The AER noted the amendments to the National Energy Retail Rules, which 'enables the AER to consider whether the inclusion of comparison information, such as whether a customer is receiving a retailer's best offer, would achieve the billing objective and improve customer outcomes'. It plans to undertake consumer research and test whether this type of information improves consumer comprehension and engagement. The AER submitted that 'different approaches can result in fragmentation where there is overlap and/or inconsistency between the AER billing guideline ... the Code and other arrangements'.<sup>55</sup>

## Our response

The ACT Government has committed to implement the obligations set out in the ACT Code in 2021. The AER will not finalise its billing guidelines until March 2022. We acknowledge stakeholders' concerns about the ACT Code being finalised before we know what, if any, new or different requirements will apply to

<sup>50</sup> Red/Lumo, *Submission on the draft ACT Code*, 13 April 2021, pp. 1, 3-4.

<sup>51</sup> Red/Lumo, *Submission on the draft ACT Code*, 13 April 2021, p. 4.

<sup>52</sup> ActewAGL, *Submission on the draft ACT Code*, 12 April 2021, pp. 3, 6, 9-10.

<sup>53</sup> ActewAGL, *Submission on the draft ACT Code*, 12 April 2021, p. 9.

<sup>54</sup> EnergyAustralia, *Submission on the draft ACT Code*, 9 April 2021, pp. 3-4, 6-7.

<sup>55</sup> AER, *Submission on the draft ACT Code*, 8 April 2021, pp. 1-2.



retailers because of the AER's guidelines. We have therefore sought to ensure that the ACT Code is flexible and not overly prescriptive. We will consider if changes to the ACT Code are needed after the AER has finalised its billing guidelines.

We appreciate that retailers are concerned about incurring costs to make changes to their systems and processes when the AER's billing guidelines might result in them needing to make further changes in the next 18 months to 2 years. We agree that any changes required now should be done in a way that allows retailers to minimise the costs, as these costs may ultimately be passed onto customers.

At the same time, customers should not have to wait 18 months to 2 years to begin receiving information that may help them to find better deals.

We have considered how to achieve an appropriate balance that minimises retailer costs while helping ACT customers save on their electricity bills while the AER develops its billing guidelines.

We have decided to introduce transitional arrangements for the better offer checks to give retailers more time to adapt their billing systems to use the usage and other information available for their customers, including smart meter data where available, in their better offer checks. Delaying the full implementation of the better offer notification obligations will also allow time for us to consider whether any changes to the ACT Code are needed after the AER has finalised its billing guidelines. The revisions to the code and the transitional arrangements are discussed in the section titled 'Commencement date' and the sub-section titled 'Transitional better offer message and better offer check'.

We agree that customer research and testing are important for informing the approach to be taken. We considered whether the Victorian framework could be applied in the ACT, noting that the ESC undertook behavioural insights testing to inform its approach to the form and content of the messages to be presented to customers on their bills under the Victorian framework. The ESC found that a message titled 'Could you save money on another plan?' located immediately adjacent to the bill due amount that also included a personalised dollar-estimate of the amount the customer could save by switching and information on how to contact the retailer to switch would provide an appropriate 'nudge' to customers.<sup>56</sup>

However, retailers told us during our 2020–24 retail electricity price investigation that it would be too difficult and costly to implement a requirement to include a personalised dollar estimate of the potential savings in the ACT because the relatively low number of smart meters meant that retailers do not have detailed usage data for most customers. Our recommendation in our final report for the price investigation adapted the Victorian approach to how retailers should go about checking whether they have a better offer for a customer and the content of the better offer messages to be presented on customer bills for the circumstances in the ACT.<sup>57</sup> But we retained the Victorian approach to the delivery of the message and how it is to be presented on customer bills.

We will monitor the effects of the introduction of the better offer obligation over time, including by seeking feedback from ACT customers on the helpfulness of the information. We will also consider the findings made by the AER during its development of billing guidelines.

<sup>56</sup> ESC, *Building trust through new customer entitlements in the retail energy market; Final decision*, 30 October 2018, pp. 45-46.

<sup>57</sup> ICRC, *Final report; Retail electricity price investigation 2020–24*, 5 June 2020.

## Commencement date

### Stakeholder views

Origin said that ‘although retailers already perform many of these requirements, this does not mean the obligation can be met in a different jurisdiction without appropriate lead time’. It said the implementation timeframe to display the better offer on bills in Victoria was 7 months. Origin submitted that it would need at least 5 months to make similar changes for the ACT.<sup>58</sup>

Red/Lumo said the ESC gave retailers 8 months (plus a 3-month transitional period) to implement the best offer changes in Victoria and that a similar timeframe was given for the NSW Social Program Code.<sup>59</sup>

ActewAGL said there was a lead time of around 12 months for the best offer requirements in Victoria and submitted that ‘given the [commission’s] better offer check is modelled on the Victorian approach, ActewAGL’s view is that a similar period is needed for retailers operating in the ACT’. It also proposed an alternative approach that it believes could be achieved by the end of 2021.<sup>60</sup>

### Our response

We understand that retailers will need time to make changes to their systems and processes to reflect the new obligations. We acknowledge retailer submissions that changes in regulatory requirements imposed by other regulators have stretched retailers’ IT capacity and increased the costs of implementing other changes to their billing systems.

Following further targeted consultation, we have decided to delay the commencement date for the full implementation of the better offer obligations in the ACT Code. Retailers will have an additional 9 months after the commencement of the ACT Code to fully implement the better offer obligations (that is, by 1 July 2022). This will provide NERL retailers with around 12 months to make the changes needed to their billing systems and processes.

After the AER has made its enforceable billing guidelines in March next year, we will consider whether any changes to the ACT Code are needed and, if so, whether any further extension of time may be needed for retailers to fully implement the better offer obligations in the ACT Code.

In the meantime, we have introduced transitional arrangements to help customers find out if their retailer has a better offer that would help them save money on their electricity bills. These are discussed in the subsection titled ‘Transitional better offer message and better offer check’.

## Approach to the better offer check

### Stakeholder views

ACAT submitted that the requirements in relation to a better offer check will likely ‘operate more to the benefit of people with a smart meter than those without’ while also noting that ‘clause 3.3(2)(b) of the

<sup>58</sup> Origin, *Submission on the draft ACT Code*, 9 April 2021, p. 3.

<sup>59</sup> Red/Lumo, *Submission on the draft ACT Code*, 13 April 2021, p. 4.

<sup>60</sup> ActewAGL, *Submission on the draft ACT Code*, 12 April 2021, pp. 8-9.

draft Code when read with clause 3.3(3) is probably as prescriptive as practicable'. ACAT said it would be interested to know whether and how reasonable endeavours will be assessed.<sup>61</sup>

Red/Lumo said that 'if the Commission elects to move forward with its proposal ... it should clearly define that any comparisons only relate to generally available products that the consumer is eligible for (based on distribution network assignment policies, for example)'.<sup>62</sup>

Red/Lumo also mentioned at the public forum on 24 March 2021 that it was concerned that the differentiation between customers with and without smart meters in the draft ACT Code could result in some retailers having to run two separate systems to meet the requirements.

ActewAGL submitted that government rebates, concessions and reliefs should be excluded from the annual total cost amount when retailers are performing their better offer check. It said that 'this information is highly personalised and varies by customer ... [and] would be costly to implement'. It noted that these amounts could be considered when communicating directly with the customer as required under the clear advice entitlement. ActewAGL also sought 'confirmation that the better offer notification is to be based solely on price'. It noted that customers value a range of other product attributes that are not currently considered in the best offer check.<sup>63</sup>

EnergyAustralia said that much of the implementation cost is for the better offer check rather than for prescribed bill contents. It said that retail and market interventions occurring over the coming year create bottlenecks that increase costs.<sup>64</sup>

## Our response

The draft ACT Code proposed to give retailers discretion about how they perform the better offer check with the caveat that, if the customer has a smart meter, they must use the smart meter data to perform their check.

In the draft ACT Code, we proposed to give retailers flexibility about how they perform a better offer check, with the only requirements being that they needed to use 'reasonable endeavours' and, if the customer has a smart meter, they needed to use the smart meter data to inform their assessment. Where a customer has a smart meter, we considered that smart meter data should be used because it enables the retailer to accurately assess which offers would likely be cheaper having regard to not only the customer's total historical usage but also the timing and pattern of that usage.

The draft ACT Code gave examples of information that should be used where it is available, which includes the tariff structure that the customer is currently on, the rate at which electricity was supplied to the customer in the past and the timing and pattern of that past supply.<sup>65</sup>

We appreciate that 'reasonable endeavours' is not a static concept and depends on the circumstances at the time. We consider this may have caused some retailers to have concerns about our expectations for what better offer checks they would have to do.

<sup>61</sup> ACAT, *Submission on the draft ACT Code*, 9 April 2021, pp. 1-2.

<sup>62</sup> Red/Lumo, *Submission on the draft ACT Code*, 13 April 2021, p. 4.

<sup>63</sup> ActewAGL, *Submission on the draft ACT Code*, 12 April 2021, pp. 10-11.

<sup>64</sup> EnergyAustralia, *Submission on the draft ACT Code*, 9 April 2021, p. 7.

<sup>65</sup> The words 'and the timing or pattern of that past supply' have been added to subclause 3.3(3).

To address retailer concerns, we will develop compliance guidelines setting out our expectations about what constitutes ‘reasonable endeavours’.

We expect that retailers will, as a minimum, check whether they have a market offer that is lower-priced than their comparable standing offer and tell their standing offer customers that they could save money by moving to a market offer. This would ensure that customers who are on higher-priced standing offers, which is the customer group of most concern, are told if there is a lower-priced option.

We will set out more detail in the compliance guidelines on what information we expect retailers to use in these endeavours. This approach will give us flexibility to update the compliance guidelines as required, such as when market conditions change. It will also allow us to revise the guidelines, if necessary, after the AER has finalised its billing guidelines.

Depending on the content of the AER’s billing guidelines, we will consider whether we need to review the ACT Code or whether an amendment to the compliance guidelines is sufficient.

We consider this approach will reduce the implementation cost for retailers and give retailers more certainty about how to comply with the requirements in the ACT Code.

We have considered retailer submissions on the time needed to develop systems and processes to undertake better offer checks. We accept that developing appropriate systems is likely to take longer than implementing the other obligations in the code. We have therefore amended the draft code to provide for a later commencement date for the better offer obligation. Retailers will have around 12 months from the date a reference price is determined to adapt their billing systems and processes to allow them to undertake better offer checks (discussed in the section titled ‘Commencement date’).

In response to ActewAGLs’ question about whether the better offer notification is to be based solely on price, we note that section 75GA of the Utilities Act defines a ‘better offer’ as ‘a discount or alternative offer for the supply of the electricity by the retailer that, if the small customer were to accept, may reduce the amount payable by the small customer for the electricity’. We consider this clarifies that ‘better offer’ is based solely on price as opposed to other factors, which might be discussed between the retailer and customer under the clear advice entitlement. Given the definition of ‘better offer’ provided in the Utilities Act, we have removed the term ‘annual total cost’ from the ACT Code.

We consider that government rebates, concessions and reliefs do not have to be considered when making an initial assessment of whether there is a lower-priced offer as these are generally factored into the amount a customer pays, rather than the price of the plan itself. These matters would be discussed between the retailer and customer under the clear advice entitlement.

In relation to which types of offers retailers should consider in their better offer checks, the ACT Code refers to offers that are ‘available to the small customer’. We consider this provides sufficient clarity that retailers only need to check for offers that the customer is eligible for and not offers where the distributor, for example, has an assignment policy that excludes the customer.

## Threshold for better offer notification

### Stakeholder views

Origin noted that the better offer notification in the Victorian framework is subject to a dollar savings threshold of \$22 and that ‘this means that retailers are not required to provide a better offer notification

for offers that are only marginally different from the customer's existing plan'. Origin submitted that a similar threshold should apply in the ACT Code as this 'would ensure customers only receive better offer notifications for annual differences that are likely to incentivise a customer to action to investigate whether a better plan exists and provide a meaningful reward and experience'.<sup>66</sup>

## Our response

The \$22 threshold in the Victorian framework is based on the view that most customers would need to make more than trivial savings to view switching as worthwhile.<sup>67</sup>

As Victorian customers have smart meters, retailers have access to data that enables them to readily assess the potential savings available to a customer by switching plans. However, smart meters are less prevalent in the ACT, and so it is more difficult for retailers to calculate personalised dollar estimates of the savings a customer could make by switching. This is why we have not adopted the Victorian approach of requiring retailers to include personalised savings estimates on customer bills.

Given the less prescriptive and less precise nature of the calculations needed to meet the requirements under the ACT Code and the fact that no dollar-savings amounts are presented on customer bills, we do not consider it necessary or appropriate for there to be a dollar savings threshold.

## Form and content of the better offer message

### Stakeholder views

EnergyAustralia said that retailers should have discretion about the text used in telling customers whether a better offer is available or not. It said that the prescriptive text in the draft ACT Code appears to be largely the same regardless of whether a better offer is available and that 'prescribing the same text for every bill has a higher chance of being ignored'. EnergyAustralia submitted that 'giving retailers the ability to change wording over time, including as a result of their own customer testing, might better capture the customer's attention'.<sup>68</sup>

EnergyAustralia also said that the draft ACT Code 'does not appear to contemplate additional disclosures, and the reference to retailer discretion as appears in Victorian [Code] clause 70S(3) could be mirrored in the ACT Code'.<sup>69</sup>

Origin submitted that clause 3.4(3)(c) should be amended to remove 'including a hyperlink where the bill is sent electronically'. It said that this would allow retailers to meet the obligation in the most effective manner, noting that it is currently 'unable to embed working hyperlinks in the customer's actual bill, even where these are delivered as electronic attachments'.<sup>70</sup>

<sup>66</sup> Origin, *Submission on the draft ACT Code*, 9 April 2021, p. 2.

<sup>67</sup> ESC, *Building trust through new customer entitlements in the retail energy market; Final decision*, 30 October 2018, pp. 65-66

<sup>68</sup> EnergyAustralia, *Submission on the draft ACT Code*, 9 April 2021, pp. 7-8.

<sup>69</sup> EnergyAustralia, *Submission on the draft ACT Code*, 9 April 2021, p. 8.

<sup>70</sup> Origin, *Submission on the draft ACT Code*, 9 April 2021, p. 2.

ActewAGL submitted that an alternative approach to the draft ACT Code is for the same message to be placed on all customer bills to prompt customers to engage with the market. It said that the message ‘would suggest contacting the current retailer and/or checking the retailer’s website to ensure they are on the best available offer’.<sup>71</sup>

## Our response

The ACT Code gives retailers significant discretion about how and what information they provide to customers in the better offer message as long as they do so in a way that promotes the objectives of the Part. This gives retailers the ability to change their messages over time, as suggested by EnergyAustralia, while also ensuring that there is a level of consistency in the messages that customers of different retailers receive.

We have accepted Origin’s request to remove the requirement for hyperlinks on electronic bills from the code. We will consider this matter further in drafting guidelines to help retailers implement the ACT Code. Hyperlinks are relatively standard and readily used in electronic documents, and we consider that customers would benefit from being able to simply click on the relevant link to be taken to the appropriate website. We will invite further submissions from retailers on feasible, cost-effective ways to make it easy for customers to be taken to the appropriate website.

Our response to ActewAGL’s proposal is discussed in the next sub-section (‘Transitional better offer message and better offer check’).

## Transitional better offer message and better offer check

### Stakeholder views

As outlined in the section titled ‘General’, ActewAGL suggested postponing the introduction of the better offer requirements ‘until there is certainty regarding the outcomes of the AER’s considerations relevant to a billing guideline’.<sup>72</sup> ActewAGL proposed an alternative approach of placing the same message on all customer bills to prompt customers to engage with the market and avoid the cost of doing a better offer check for all customers.<sup>73</sup>

Red/Lumo submitted that while the AER develops its new billing guidelines we should ‘apply an interim approach to implement a more general obligation on retailers to contact their customers ... to alert them to potential alternative offers that may be available to them’.<sup>74</sup>

EnergyAustralia also submitted that it would be prudent to delay ACT-specific obligations until after the AER’s billing guidelines are finalised.<sup>75</sup>

<sup>71</sup> ActewAGL, *Submission on the draft ACT Code*, 12 April 2021, p. 9.

<sup>72</sup> ActewAGL, *Submission on the draft ACT Code*, 12 April 2021, pp. 3, 6, 9-10.

<sup>73</sup> ActewAGL, *Submission on the draft ACT Code*, 12 April 2021, p. 9.

<sup>74</sup> Red/Lumo, *Submission on the draft ACT Code*, 13 April 2021, p. 4.

<sup>75</sup> EnergyAustralia, *Submission on the draft ACT Code*, 9 April 2021, pp. 3-4, 6-7.

Origin said ‘retailers already perform many of these requirements’, but it would need more time to implement them through more formal processes to comply with the draft ACT Code.<sup>76</sup>

## Our response

As discussed in other sections of this chapter, we have considered retailers’ submissions and decided to delay the full implementation of the better offer obligations in Part 3 of the ACT Code. We consulted with retailers and other stakeholders on this amendment and transitional arrangements that would reduce implementation costs while still helping customers find an offer that could save them money.

In particular, we sought detailed information from retailers on the checks they currently perform when a customer contacts them to ask whether the retailer has an offer that would better suit the customer’s circumstances.

We have decided to introduce transitional arrangements (clause 3.5 in the final ACT Code) that will require retailers to include a transitional better offer message on the customer’s bill that encourages the customer to contact the retailer for more information and advice. The message will also have to tell customers about the Australian Government’s price comparator website, Energy Made Easy.

All customers will receive the same message during the transitional period. We recognise that an undifferentiated message may not be as effective as differentiated messages in encouraging the customers who are most likely to save money on another plan to take action to contact their retailer or check the Energy Made Easy website. We also recognise that some customers may find that they are already on their retailer’s best plan when they contact them. However, with around 40% of ACT customers still on standing offers and most likely able to save money by moving to a (discounted) market offer, we consider that a large proportion of ACT electricity consumers would benefit from a ‘nudge’ to contact their retailer. Many customers already on market offers may still be able to save money by moving to another market offer that better suits their circumstances.

We have confirmed that when a customer contacts their retailer, the retailer will typically go through a personalised, manual ‘better offer check’ that is very similar to the better offer checks that will be required for all customers after the transition period. Our compliance guidelines will include more information for retailers about what we expect these personalised ‘better offer checks’ to cover.

The clear advice entitlement (discussed in chapter 4) will apply to advice given to customers by their retailer based on personalised ‘better offer checks’.

We consider that these transitional arrangements set the right balance between minimising retailer implementation costs and benefiting consumers by making it easier for them to find an offer that reduces their electricity bills.

## 3.4. Changes from the draft ACT Code

The amended Utilities Act defines the following terms that are relevant to the better offer notification:

- better offer

<sup>76</sup> Origin, *Submission on the draft ACT Code*, 9 April 2021, p. 3.

- small customer.

We have therefore made some changes to the terms and definitions used in the final ACT Code to reflect the amended Utilities Act. The changes are listed in Table 3.1.

Aside from terminology, the most notable changes to the better offer obligation for the final ACT Code as discussed in section 3.3 above are:

- addition of a specified commencement date as the day the reference price determination takes effect
- a later commencement date for the obligation in ss. 3.4 and 3.4 of the ACT Code
- the introduction of transitional arrangements at clause 3.5 of the ACT Code.



Table 3.1: Comparison of terms and definitions used in the draft and final ACT Code

Defined term in the draft ACT Code	Definition in the draft ACT Code	Defined term in the final ACT Code	Definition in the final ACT Code
annual total cost	means the minimal possible amount payable by the customer under the offer excluding the value of any one-off gift or sign-up credits calculated on the basis of the tariff, charges and discount rates current at, as relevant, the date a bill or bill summary will be issued with all discounts applied (except any discount which applies because the customer buys another good or service) and including any amounts deducted, credited or received by the retailer under a government funded rebate, concession or relief scheme	n/a	n/a (better offer check relies on definition of better offer given in the Utilities Act)
n/a	n/a	better offer	has the meaning given in section 75GA of the Utilities Act, which says: in relation to the supply of electricity to a small customer by a NERL retailer, means a discount or alternative offer for the supply of the electricity by the retailer that, if the small customer were to accept, may reduce the amount payable by the small customer for the electricity
better offer check	has the meaning given by clause 3.3	better offer check	has the meaning given by clause 3.3, which is amended as previously noted
better offer message	has the meaning given by clause 3.4	better offer message	same as draft ACT Code

bill summary	means a communication from the NERL retailer to the customer that informs the customer that the NERL retailer has issued a new bill, and which includes the bill due date and the amount due	bill summary	same as draft ACT Code
market retail contract	has the meaning given in the National Energy Retail Law	market retail contract	same as draft ACT Code
price comparator website	means Energy Made Easy ( <a href="http://www.energymadeeasy.gov.au">www.energymadeeasy.gov.au</a> ) operated by the Australian Energy Regulator	price comparator website	same as draft ACT Code
residential customer	means a customer in relation to whom the electricity is principally for personal, household or domestic use	n/a	n/a (relies on definition of small customer under the National Energy Retail Law)
retail electricity contract	means a standard retail contract or a market retail contract in connection with the sale and supply of electricity to a customer	retail electricity contract	same as draft ACT Code
retail electricity offer	means an offer by a NERL retailer to a customer to supply electricity under a retail electricity contract	retail electricity offer	same as draft ACT Code
small business customer	means a customer in relation to whom both the following apply: (a) the electricity is not principally for personal, household or domestic use (b) the supply is, or will be, at a rate less than 100 MWh a year	n/a	n/a (the final ACT Code relies on definition of small customer under the National Energy Retail Law)
small customer	means a residential or small business customer	small customer	has the meaning given by section 5 of the National Energy Retail Law

smart meter	means an interval meter that is designed to transmit metering data to a remote location for data collection and does not, at any time, require the presence of a person at or near the meter for the purposes of data collection or data verification	n/a	n/a (the final ACT Code does not explicitly refer to smart meters, but does refer to timing or pattern of past supply as information that retailers should have regard to)
standard retail contract	has the meaning given in the National Energy Retail Law	standard retail contract	same as draft ACT Code

## 4. Clear advice obligation

Part 4 of the ACT Code introduces an entitlement for customers to receive clear, timely and reliable information from retailers to help them assess and select an electricity offer that best suits their circumstances.

### 4.1. Purpose of the clear advice obligation

The clear advice obligation supplements the better offer obligation by ensuring that, when customers contact their retailer to switch to an alternative offer, they receive an appropriate level of assistance to identify the best plan for their circumstances and avoid switching to one that is not suitable for them. It is intended to make customers aware of terms and conditions that affect how much they will pay so that they can make more informed decisions about electricity offers.

The challenges of selecting a suitable plan are greater for vulnerable customers, such as those from culturally or linguistically diverse backgrounds or customers with lower education levels, who may find it difficult to understand the terms and conditions of the offer. The National Energy Retail Law requires a customer to contact a retailer to give explicit informed consent before switching to another offer. This point of contact is a good time for retailers to explain the terms and conditions in a readily understood manner.

### 4.2. Our approach in the draft ACT Code

The draft ACT Code proposed to adopt the Victorian framework and would require retailers to tell the customer in a readily understandable manner:

- terms and conditions that affect how much the customer will pay, which are affected by the customer's actions or by the retailer's actions (for example, conditional discounts or price change events)
- where possible, the estimated dollar impact of those terms and conditions (including tariff structures)
- any of the retailer's other offers that the retailer reasonably believes to be better suited to the customer based on the information the retailer has about the customer (for example, the customer's past usage or response to questions during the interaction).

Retailers would need to tell their customers about terms and conditions that are determined by or within the control of the retailer or are reasonably known to the retailer. This would not include charges payable for distribution services except for standard control services that are central to the electricity supply and make up the general network charges recovered through customer bills.

Retailers would be required to retain records of their compliance for at least 6 years.

## 4.3. Submissions on the draft ACT Code and our response

### General

#### Stakeholder views

Red/Lumo said that they consider the clear advice obligation to be ‘a redundant provision in light of retailers’ current obligations under the Australian Consumer Law and to obtain explicit informed consent.’ They said that it would ‘only add to retailers’ cost to serve (through higher call handling times) for little consumer benefit’. They noted that there is a 10-day cooling off period in the energy sector, which exceeds that for other significant purchases, and that this allows consumers to consider financial implications and get advice from others including financial counsellors or legal counsel.<sup>77</sup>

ActewAGL submitted that the clear advice obligation ‘should be amended to remove several aspects of regulatory duplication’. It said the following three obligations already apply under provisions of the National Energy Retail Law and Consumer Protection Code:

- Conditional discounts (subclause 4.3(1)(a)) have been subject to regulation since 1 July 2020.
- Regulation of price changes (subclause 4.3(1)(b)) is already in place in the National Energy Retail Law.
- Regulation of benefit changes (subclause 4.3(1)(c)) reflects the AER’s June 2018 Benefit Change Notice Guidelines.<sup>78</sup>

#### Our response

Rather than duplicate existing provisions, the clear advice obligation builds on and supplements the obligations that apply under other regulations, such as the explicit informed consent under the National Energy Retail Law. The clear advice obligation sets out, in one place, our expectations of what retailers should communicate to customers to obtain explicit informed consent before the customer signs up to an offer. The regulations applying to conditional discounts, price changes and benefit changes do not require retailers to explain the terms and conditions in advance of the customer signing up. These regulations place limits on the size of a conditional discount and require retailers to notify customers before a price or benefit change happens.

The AER’s Retail Pricing Information Guidelines require retailers to tell their customers about the availability of certain information that is intended to help them assess offers and to send this information to customers on request. However, it does not require retailers to help customers understand and assess their offers with the aim of helping the customer sign up to a plan that best suits their circumstances.

On cooling off periods and the ability for customers to seek legal advice, we consider that customers should not have to incur significant expense, either financial or in time and effort, to assess and select a suitable plan. The cost of seeking financial or legal advice when making a significant purchase, such as a house, is proportionate to the risk and capital outlay for that purchase. In the case of energy, which is an essential

<sup>77</sup> Red/Lumo, *Submission on the draft ACT Code*, 13 April 2021, p. 4.

<sup>78</sup> ActewAGL, *Submission on the draft ACT Code*, 12 April 2021, p. 11.

service, customers should be able to readily engage with the market without incurring additional costs and retailers are best placed to help customers understand the details of their offers.

## Commencement date

### Stakeholder views

Origin said that implementing the clear advice obligation would ‘involve updating processes and providing agent training to ensure that ACT customers are provided with the correct clear advice when entering an energy contract’. It submitted that a 3-month period from the initial reference price determination would be an appropriate commencement date for the clear advice entitlement.<sup>79</sup>

### Our response

We have decided that the commencement date for the better offer notification will be the same day the reference price determination takes effect.

## Matters about which clear advice is to be given

### Stakeholder views

ACTCOSS noted that small energy consumers would be assisted by greater clarity about different types of tariffs (single rate, time-of-use, controlled load, and demand tariffs). It said that subclause 4.3(1)(e) addressed this to a certain extent. However, ACTCOSS recommended that the ACT Code ‘explicitly state that retailers must provide readily understandable information about it and/or how the timing of energy use will determine whether the customer would be likely to pay more or less for their electricity under the new tariff structure’.<sup>80</sup>

ActewAGL submitted that subclause 4.3(1)(e) should be modified to remove the requirement for retailers to outline the impact that a new tariff structure may have for a small customer who has a basic meter. It said that most customers still have basic meters or have had their smart meter for less than 12 months and so it is not possible to tell most customers how much a time-of-use or demand tariff will cost compared to their existing flat tariff.<sup>81</sup>

### Our response

We found in our 2020-24 retail electricity price investigation that many ACT customers do not understand the different tariff types and this makes it harder for customers to compare plans.<sup>82</sup> For a customer to make an informed decision about whether a plan is right for them, they need to understand what the tariff type is and how their usage affects what they will pay.

<sup>79</sup> Origin, *Submission on the draft ACT Code*, 9 April 2021, p. 3.

<sup>80</sup> ACTCOSS, *Submission on the draft ACT Code*, 16 April 2021, p. 2.

<sup>81</sup> ActewAGL, *Submission on the draft ACT Code*, 12 April 2021, p. 12.

<sup>82</sup> ICRC, *Final report; Retail electricity price investigation 2020–24*, 5 June 2020.

A customer who has a basic meter cannot sign up to tariff types that are not supported by a basic meter. Retailers only need to tell customers with basic meters about the cost impacts of different plans that are available to those customers. We do not accept that retailers cannot do this for customers with basic meters.

Where a customer has only recently obtained a smart meter and is switching to a new tariff type that was not previously available to them, we accept that a retailer may not be able to accurately estimate the cost impact without enough information about the timing and pattern of their usage. In this case we would expect retailers to help the customer understand the tariff type and how their timing or pattern of use will affect how much they will pay.

We have clarified the wording of subclause 4.3(1)(e) to better reflect our expectations. Rather than say that a retailer must give information about the cost impact that the new tariff structure may have for a small customer, we have amended the wording to say that a retailer must give information about how the timing or pattern of usage affects what the customer may pay under the new tariff structure. When read in conjunction with subclause 4.3(4)(a), which says that retailers need to give an estimate of the dollar impact where possible, we consider that this change addresses both ACTCOSS's and ActewAGL's comments.

## Offers that retailers must consider

### Stakeholder views

ActewAGL submitted that subclause 4.3(1)(d) of the draft ACT Code should clarify that eligibility criteria may continue to be used. ActewAGL considered the draft ACT Code was unclear about whether retailers are required to offer plans to a customer even if the plans are targeted at an exclusive group and the customer does not meet the eligibility criteria. It says that amending the requirement so that retailers must consider 'generally available plans' rather than 'retail electricity offers' would address its concern.<sup>83</sup>

EnergyAustralia also submitted that retailers should only have to consider generally available offers. It said that concession customers can already get advice under its retailer hardship program as required under section 44(f) of the National Energy Retail Law. It also said that it is important for product innovation that retailers can still offer trial plans that may contain partner programs and other eligibility criteria.<sup>84</sup>

### Our response

Retailers are only required to consider plans that they know are available to the customer. This means that retailers do not need to tell customers about plans that they are not eligible to sign up to. Where a retailer has a plan that is targeted at an exclusive group, and the retailer has information that establishes that the customer meets the eligibility criteria to sign up to the plan (such as information divulged during the interaction), then we expect the retailer to tell the customer about it if the retailer thinks the plan is more suitable for the customer. This does not require the retailer to specifically ask the customer questions to establish their eligibility for each plan that is targeted at an exclusive group. We consider this intent to be sufficiently clear by the phrase 'the NERL retailer's other retail electricity offers available to the small customer' when read in conjunction with 'having regard to any information the NERL retailer has about the

<sup>83</sup> ActewAGL, *Submission on the draft ACT Code*, 12 April 2021, pp. 11-12.

<sup>84</sup> EnergyAustralia, *Submission on the draft ACT Code*, 9 April 2021, p. 8.

small customer wherever practicable to do so' in subclause 43.(1)(d) (underlining added to highlight the relevant words).

Under the National Energy Retail Law, retailer hardship programs do not require retailers to help customers find a more suitable offer unless they are experiencing payment difficulties due to hardship. A concession customer is not automatically deemed to be a hardship customer. The ACT Code will ensure all customers are given information that helps them make an informed decision when assessing and selecting a plan, whether or not they meet the criteria to be assisted under a retailer's hardship program. This includes information about any plan that they are eligible for and would likely see them pay less over the term of the contract.

## Disclosure of miscellaneous fees

### Stakeholder views

ActewAGL supported the approach in the draft ACT Code where the clear advice obligation does not apply to miscellaneous fees and charges that are charged by the distributor and regulated by the AER. It submitted that the ACT Code should also not apply to other miscellaneous fees and charges, including:

- administrative fees, such as late payment fees and credit card processing fees
- fees from a third-party entity which ActewAGL may pass-through to customers
- fees charged by metering coordinators to retailers for a range of services, which retailers have discretion about passing through to customers.<sup>85</sup>

### Our response

Our intention is that retailers tell customers about fees and charges that they would have to pay in the normal course of events and particularly those that are set by the retailer or are within the control of retailer or are reasonably known to the retailer. This intention is captured in subclause 4.3(1), which requires retailers to give information about:

- how the customer's actions influence the cost of their bill (such as the cost impact of not paying a bill on time where the offer has a pay-on-time discount)
- actions the retailer can take that influence the cost of the customer's bill (such as changing the price during the term of the contract).

This requires retailers to exercise some judgement about whether they need to disclose a specific fee or charge having regard to the intent of the requirement. For example, we would expect retailers to tell customers about disconnection or reconnection fees where the retailer passes those costs through from the distributor and credit card payment processing fees where the customer signs up to pay by direct debit with a credit card.

We will consider whether to include in compliance guidelines (discussed in section 3.2 of this report) more detailed guidance on the types of fees and charges that need to be disclosed.

<sup>85</sup> ActewAGL, *Submission on the draft ACT Code*, 12 April 2021, p. 12.



## Information that retailers must have regard to

### Stakeholder views

ActewAGL asked for clarification of whether clause 4.3(3) requires retailers to use information a customer provides during the signup process as well as historical information a retailer may have about a customer to inform their advice. It observed that ‘an increasing proportion of customers are engaging with retailers through digital platforms’ and submitted that ‘updating digital platforms to provide customers personalised tariff estimates based on historical information the retailer holds about that customer, would be costly to implement’.<sup>86</sup>

### Our response

The ACT Code gives retailers the responsibility for determining what information about the customer they consider when meeting their clear advice obligation.

We accept that a retailer will be more likely to have access to historical information where a customer is communicating directly with a retailer (such as through a call centre) than might be the case where a customer is comparing offers on the retailer’s website. This is because, for a retailer to access historical information and give personalised information, it needs to verify the identity of the customer for privacy purposes. We appreciate that this may not be possible where a retailer’s website does not currently support that functionality. However, we expect retailers to consider information provided by the customer during the interaction which, on digital platforms, might include a response to a question about their typical usage.

## 4.4. Changes from the draft ACT Code

We have not changed any terms and definitions that were in the draft ACT Code, but we have made one change to the clear advice obligation for the final ACT Code as discussed in section 4.3, which is:

- amending the wording of subclause 4.3(1)(e) to say that, if switching the customer to a new plan involves moving the customer to a new tariff structure, the retailer must give the customer information about how the timing or pattern of usage affects what the customer may pay under the new tariff structure in a readily understandable manner.

<sup>86</sup> ActewAGL, *Submission on the draft ACT Code*, 12 April 2021, p. 13.



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