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Competition and Consumer (Industry Code – Electricity Retail) Regulations 2019

AGL would like to take this opportunity to respond to the Exposure Draft of the *Competition and Consumer (Industry Code – Electricity Retail) Regulations 2019* (Draft Code) and the associated *Public Consultation Paper: Competition and Consumer (Industry Code – Electricity Retail) Regulations 2019* (Consultation paper) released by the Department of the Environment and Energy on the 26 February 2019.

AGL supports comparator rate but not price regulation

The Australian Government has previously announced it that would adopt the recommendations of the Australian Competition and Consumer Commission (ACCC) in its Retail Electricity Pricing Inquiry (REPI) final report to:

- implement a default market offer (DMO) for retail electricity standing offers to ensure customers who remain on standing offers don't pay inflated rates; and
- address the difficulty for customers in comparing energy offers by using use the new DMO rate as a reference point for advertising of discounts off retail electricity prices.

As AGL has consistently stated, we do not support the re-regulation of retail electricity prices because of the potential long-term impacts it could have on investment, retail competition and customers due to the regulatory risk that it introduces into the market. The recent experiences in the United Kingdom energy market demonstrate that this has not been an effective method for addressing energy affordability.

However, accept the level of concern expressed in various reports (including the REPI) regarding the impact sharp increases in electricity prices is having on customers. AGL also agrees and endorses the ACCC's recommendations aimed at increasing the transparency and comparability of electricity offers.

Consequently, AGL has been reducing electricity prices in all states, developed new measures to help vulnerable customers and implemented a safety net that automatically discounted bills for these standing offer customers. Only 3 per cent of AGL's small customers are now on an undiscounted standing offer[1].

AGL has also been strongly supportive of introducing an industry reference rate and believe it would be the best way to address the difficulties customers face and provide more effective price comparison. AGL has been a willing participant in the AER's consultation processes on the creation of a DMO in this regard.

Draft Code inconsistent with COAG Process

Despite these consultation processes, AGL is extremely concerned that the Government has decided to introduce this Draft Code through regulations made under the *Competition and Consumer Act 2010* (CCA) in order to impose price regulation on the industry.

This is inconsistent with the COAG Energy Council's Communique released following its December 2018 meeting which highlighted that the DMO processes would focus on providing an effective reference price for consumers. The COAG Energy Council has the important function of bringing federal and state governments together to debate energy policy and hopefully align policies in a meaningful way. Given the current disparate state of energy policy across Australian Governments, it is deeply concerning that this Draft Code has been introduced in order to circumvent the agreement of the Energy Council.

AGL does not support this approach given the:

- limited timeframe for public consultation on the on the Draft Code given it was released on the same day the Government announced its intention to implement;
- materiality of the changes involved with the Australian Energy Market Commission (AEMC) identifying that the DMO will not benefit consumers and may significantly harm retail competition;
- absence of any Regulatory Impact Statement (RIS) in support of the changes which would normally accompany a legislative change;
- the Draft Code grants the AER significant powers to determine model annual usage and total annual prices but the AER's determinations will not be subject to judicial review.
    - as the AER's determination will be made through legislative instrument, and therefore disallowable only by Parliament, the AER's considerations and exercise of discretion in relation to the matters set out in the Draft Code will not be reviewable by the courts;
    - this is in direct contrast with the AER's economic regulation powers under the NEL, where AER determinations which set prices for electricity distribution and transmission are reviewable;
    - the disallowance process in Parliament is not an appropriate check on the AER's powers given that the AER's determination will involve complex and technical matters relating to retail pricing and the cost of base of electricity retailers (in addition to any other matters the AER considers relevant). Also, Parliament is a political institution and this approach will introduce a large degree of political risk into retail electricity pricing;

[1] These are usually customers who have only been on a Standing Offer for a short period of time, eg. customers who have just moved in or those that have yet to provide their details.

- in leaving open the matters the AER can consider in determining prices, the Draft Code creates uncertainty and potentially goes beyond the limits of delegated legislation in circumstances where the AER's determination will not be subject to review by the courts; and

- poor legislative precedent being set with a mandatory industry code being imposed to bypass the national legislative framework that governs the Australian energy industry.

The approach is also highly likely to exacerbate the political debate on the energy industry and specifically, on retail energy pricing, with the Draft Code requiring the AER DMO price determination to be tabled in parliament annually. The risk of political interference and the likelihood of uncertainty is therefore high.

Delay and further consultation necessary to avoid unintended consequences

We strongly encourage the Government to reconsider this heavy-handed method or, at a minimum, invest further time on consultation including a workshop with industry to understand and clarify the practical impediments of the Draft Code and to ensure that the impacts are not at a detriment to customers. AGL is concerned to ensure that advertising provisions of the Code operate to enhance transparency and comparability, and do not permit conduct from retailers that can create further customer confusion.

The Draft Code prescribes:

- that electricity retailers not set standing offer prices in excess of the AER's determined annual price;
- retailers clearly communicate or advertise the difference between their retail offers and the AER-determined annual price; and
- that conditional discounts not be advertised as the headline discounts.

Despite the short timeframe for consultation, AGL has immediately identified several flaws in the Draft Code regarding all of these elements where it either fails to recognise the practicalities of the retail energy market or where the outcome of the Draft Code will not fulfil the apparent intent of the Government. To be explicit, in its current form, the Draft Code may increase customer confusion.

AGL has included these concerns in its submission as well as detailed responses to the questions raised in the Consultation paper but recognises that each retailer could have different concerns given the variations between retailers with regard to retail products, customer contracts, computer systems and operating models.

A workshop would highlight these issues and enable the development of a more effective Draft Code. If you wish any further information, please contact me on (03) 8633 6207.

Yours sincerely

Elizabeth Molyneux
GM of Energy Markets Regulation

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1. Application of Industry Code

To be clear, AGL does not support regulated pricing, nor the particular manner in which it is being implemented here but AGL offers these comments on the Draft Code in the event that this policy is pursued.

AGL agrees with the AER determination being limited to regions where standing offer prices are not regulated under a law of a state or territory.

1.	*Is the intended scope of the Code appropriately reflected in the definitions, particularly those definitions for 'standing offer prices' and 'small customers'?*

We recognise that the Draft Code is designed to apply only to the most common supply arrangements and tariff types and this interpretation is confirmed in the Consultation Paper.

However, AGL would highlight that the definition of “small customer” in s6(3)(a), which is intended to exclude demand tariffs, could be misinterpreted to exclude time of use tariffs because it refers to the customer not being a small customer if:

> *“a price for the supply varies based on demand, at a time or during a period, for the supply of electricity;*

Section 6(3)(a) should use parentheses around “at a time or during a period” or define the term “demand tariffs” in the definitions section so that the exclusion can be explained more clearly.

2.	*Do you agree that solar customers, which are currently excluded through the definition of small customers at section ^6 should be excluded? If not, how could the current data gaps be addressed to enable the AER to make uniform and equitable price and usage determinations for these customers?*

AGL assumes the exclusion of solar customers from the definition of small customers is because it is expected that the reference price will not be meaningful to solar customers, especially those on flexible tariffs. However, the accuracy of the reference price to customers without solar, but also on flexible or time of use tariffs is likely to be just as inaccurate, yet these are included in the small customer definition

Many solar customers currently access flat tariffs and there would also be number of customers with solar PV systems that are on standing offers which supports their inclusion in the small customer definition.

AGL sees no reason why these any customers on the single rate or flat standing offer tariffs should be excluded from the protection of the price cap.

AGL would also highlight that in practice, it would be difficult to identify these specific customers and exclude from the application of the industry code.

3.	*Is the scope of the instrument at Division 3, which applies to these standard supply arrangements for customers in Australia's main electricity distribution zones, appropriate? Are there any risks associated with limiting application of the instrument to those distribution regions with 100,000 or more consumers?*

AGL cannot readily identify any potential risks of limiting the scope of this arrangement to customers supplied by electricity distribution networks with more than 100,000 customers.

2. Capping standing offer prices at an AER-determined price

The recommendation of the ACCC REPI Final report were for the standing offer to be abolished and replaced with a simplified DMO.

This Draft Code does not abolish the standing offer, but rather requires retailers to ensure their 'standing offer prices' for:

- residential customers without a controlled load;
- residential customers with a controlled load; and
- small business customers;

do not exceed the price as determined by the AER for that region.

The use of the defined term “standing offer prices” runs counter to the previously stated aim of implementing a DMO instrument in place of standing offers. This has the potential to be problematic regarding:

- legacy contractual terms which explicitly refer to standing offer prices and may therefore be unintentionally impacted by the DMO implementation although this is not the stated intent;
- no actual default offer capable of acceptance by consumers as specified by the Draft Code; and
- a lack of clarity of what offer would apply to customers transferring retailers due to a Retailer of Last Resort event.

2.1. Recommendation

AGL supports the Draft Code drawing a clear distinction between the unregulated standing offer prices that existed prior to 1 July 2019 and those that will continue to exist after that time and the DMO prices that will apply once the Draft Code takes effect.

This could be achieved by actually naming regulated offers under the Code as “default offers” or “capped standing offers”.

2.2. Questions

4.	*Is the application of the price cap at section ^10, adequately described?*
5.	*Do the proposed price capping provisions give rise to any unintended consequences that need to be addressed? Is the process for determining compliance sufficiently clear?*

The application of the price cap is as a regulated annual price cap that standing offer prices must comply with by being below the price of a hypothetical offer used to calculate the AER reference bill.

As stated above, AGL is concerned the continued use of the concept of the standing offer instead of a new DMO:

- causes difficulty for the application of legacy contracts;
- has a high risk of unintended consequences and appears to be vulnerable to manipulation through its focus on a reference bill rather than actual tariffs; and

- could cause customer confusion during the transition from current standing offers to the new regulated standing offer prices.

Using a new name in the legislation to describe the capped standing offer prices would help delineate between the previous standing offers and would better accord with the intent of the ACCC recommendations.

6. Considering the different systems retailers employ, are there any issues with compliance, particularly for smaller retailers?

7. Do you agree that the tariffs as listed in section ^10 and section ^6 should be explicitly excluded at this time? If not, how could the AER address data gaps that would allow for uniform and equitable determinations across network regions, including for solar customers and those customers on flexible tariffs?

AGL has identified no material issues with compliance and generally understands the exclusion of the tariffs and customers identified in the Draft Code.

AGL generally agree with the exclusion of the tariffs liste din s10 and s6 but sees no reason why solar customers on the single rate or flat standing offer tariffs should be excluded from the protection of the price cap and believes this may create issue of non-compliance.

3. Price comparison

AGL is fully supportive of the need to ensure there is a consistent point of comparison for customers and welcomes the intent of the Draft Code to ensure that electricity offers in the market will be able to be easily compared and that this information will be clearly conveyed to the customer.

However, AGL is highly concerned with the price comparison section, as currently drafted, and believes it is:

- too general in that it captures a raft of activities that are not the intent of the obligation as well as many activities that simply cannot practically comply with the requirement; whilst also
- lacking definition in other regards which could allow for widely varied treatment amongst energy retailers depending on individual interpretations, and this could result in unintended consequences and confusion for customers.

The ACCC REPI Final report recommended that if a retailer chose to advertise a discount product it must refer to the reference bill amount published by the AER in the headline advertising of discounts. The intent being that all advertised discounts used for marketing would use a standardised methodology and therefore be directly comparable by customers.

Instead, the Draft Code captures retailers who "*advertise or publish offered prices or offer to supply electricity at the offered prices*".

AGL's concerns with this wording is that:

- there is no definition of advertisement and it can be interpreted broadly. It would currently capture publishing in the mass media via TV, radio, outdoor, press, websites, social and digital platforms, flyers and brochures as well as mail; email, SMS, webchat, or by voice channels such as contact centres, door to door discussions and voice devices;
- "advertise … the offered prices" can then be interpreted to include the promotion of offered prices even when it is not specified directly what these prices are or whether it is intended to include discounts, rebates or credits. This is highly problematic because most advertising doesn't necessarily provide all of the details of the product being advertised – for example, "Sign up to AGL Essentials for a great low rate"; and
- "offer to supply electricity at the offered prices" can also be interpreted broadly. Firstly, energy retailers make offers to supply to the public all the time without necessarily referencing a specific price that accommodates price comparison. Secondly, this definition can include other aspects of advertising, sales channels and even sales fulfilment than intended. Sales channels are the vehicles with which the customer interacts to enquire about or sign up to a retailer's energy products and services. These include retailer's websites, call centres but also 3rd party channels such as aggregators and brokers. Sales fulfilment is the process whereby the customer is set up to receive the energy product or service

AGL considers many of the definitions and their consequences in more detail below.

The Draft Code also extends the ACCC's original recommendation by requiring retailers to include the information in s11(3) when they "*advertise or publish offered prices or offer to supply electricity at the offered prices*". As highlighted above, this can capture a raft of activities and many will not practically allow for such information to be provided.

Even where specific prices are being offered and the information in s11(3) can be derived and included, AGL has concerns how this obligation overlaps with the current regulatory requirements under the AER's Retail Electricity Pricing Guidelines and the collateral currently being provided to the customer at the time of making an offer. It is important that this requirement does not create greater confusion with customers.

The requirement to specify customer type and network area also has implications for the mass market advertising envisaged in the Consultation Paper. Most advertisements are agnostic about which region within a State the customer is in or whether the customer has controlled load or not (i.e. publishing an advertisement saying that it only applies to customers without controlled load is unlikely). Are retailers required to provide multiple types of comparison if an advertisement crosses multiple distribution areas and includes all residential customers?

3.1. Definitions and Interpretations

The Draft Code has a number of ambiguous definitions which makes it difficult to determine the scope of the price comparison requirement. This is exacerbated by the lack of definitions for the terms "advertise", "publish" or "offer".

Definition of "price"

The Draft Code takes the definition of "price" from the Competition and Consumer Act which includes a charge of any description. The Draft Code then requires advertisements or publications to provide a comparison with the AER's total annual price when "prices" are mentioned in the advertisement or publication.

It is not clear whether the comparison obligation is only triggered by an advertisement that specifies rates. If so, this would be a narrow definition and given the intent is to capture the advertising of discounts, (even where the rates are not displayed), then the definition must be specified more broadly.

The definition of price may also be too narrow if it is not clear that it would cover percentage-based discounts. Discount-based advertising is intended to be covered by this requirement, but a discount is not a charge of any kind. For example, Part IV of the CCA specifies "discount, allowance, rebate or credit" separately from the concept of "price" in s45AD.

If a broader definition of "prices" is adopted to include percentage-based discounts, AGL recommends continuing to exclude the mention of rebates, credits, fees and passthroughs from triggering the publication or advertising price comparison requirements by themselves. If these were included in the definition of "prices", retailers would be unable to comply with the s11 requirement Draft Code when these "prices" are not referable to any particular product (e.g., "sign up to any AGL product online and receive a $50 credit").

Definition of "discount"

"Discount" is undefined in the Code. The lack of definition makes it unclear whether a dollar value credit applied to a customer's bill would count as a discount, or whether only percentage-based discounts are captured. This is important because credits such as an online signup credit are conditional and would therefore not be able to be the headline "discount" in advertising under the Draft Code.

Definition of "advertising"

"Advertising" is currently undefined in the Code.

This allows for interpretation and advertising is generally any promotional content, collateral or material that references a brand, product, price or service of a retailer or any affiliated 3rd party. It is published by the retailer or affiliated 3rd party and is used to promote the retailer to the general public via either mass market or direct media channels.

It can be published in the mass media, including TV, radio, outdoor, press, websites, social and digital platforms, flyers and brochures; published in addressable or un-addressable direct mail; email, SMS, webchat, or via voice channels such as contact centres, door to door discussions and voice devices.

Advertising may include an offer and any offer may be for a limited time and for a particular product, price or service.

This general definition is broad and all-encompassing and, combined with the current broad definition of price, can require the price comparison requirement to be implemented for more communication channels than is practical. For example, media such as public speeches, regulatory submissions, ASX announcements and financial reports shouldn't be considered advertising even though they may have an ancillary promotional benefit.

Definition of "electricity retailer"

An "electricity retailer" means a corporation authorised by or under a law of the Commonwealth or of a State or Territory to sell electricity.

The Consultation Paper states that the price comparison obligation will apply when the retailer advertises or publishes its prices or offers and circumstances where the offer is made face-to-face or over the phone. However, the current obligation in the Draft Code is limited to "electricity retailers" which would exclude third party sales channels such as aggregators and comparators and may even exclude a related company to the retailer. This does not align with the intent stated in the Consultation paper.

3.2. Recommendations:

AGL proposes that the Draft Code is amended to ensure that the triggering of the price comparison obligations is aligned with the original intent of the price comparison.

- The Draft Code requires a clear definition of the word "advertise" which should be narrowly defined to include promotional marketing and collateral, but not other statements such as media releases, speeches, annual reports and position papers.
- The advertising of offered prices should be further clarified to limit it to actual mention of prices or rates (and percentage discounts) through the relevant mass market channels. Discount advertising needs to be expressly included rather than assuming it is included by implication given the uncertainty of the definition of "prices".
- If the intent is to capture all discount/ credit-based advertising, then the Draft Code needs to allow for a retailer to choose one example distribution area and customer type to provide the information under s11(3). It is not practical to list all possible comparisons when you're considering state-based or all tariff type marketing. about a specific region or type.
- To "offer to supply at the offered prices" should exclude any large scale offering to supply. A general call to action (e.g. "Sign up with AGL today") or an invitation to go to a specific sales funnel is most likely an "offer" to supply in a broad sense but will usually not be in relation to any particular offer

making price comparison impossible. The offer to supply should be expressly defined to capture individual offers made directly to a customer by direct mail, phone or face to face.

- The price comparison should not be required for offers to supply where the retailer is providing a more bespoke comparison to the customer. For example, if the customer has contacted the retailer and estimated their actual annual usage so the retailer could more accurately calculate an average monthly spend. Currently, the retailer would still need to show the comparison against the DMO price for modelled annual usage. This would be very confusing for the customer.
- The price comparison requirements need to be extended to third party aggregators or comparators, including those who make representations about energy plans without acting on behalf of any particular retailer.

3.3. Questions

8.	*Do the reference price provisions at section ^11 adequately cover all circumstances in which consumers may be presented with details of a retail electricity offer?*

As highlighted above, the Draft Code as currently drafted requires retailers to compare prices with the AER-determined total annual price for that region and type of small customer in more circumstances that we believe was intended.

AGL has suggested amendments that should help clarify when s11 is triggered. However, there are other circumstances which are ambiguous and AGL is not clear on the Government's intent.

- A retailer must advertise the DMO reference discount but is it the Government's intent that this should preclude a retailer advertising their actual discount as well (i.e. displaying both a 30 per cent discount of usage and then displaying the DMO Reference is 20 per cent)? The Draft Code does not prevent this but in AGL's view this creates additional confusion and would not be to customers' benefit. We suggest the Draft Code require that retailers can only describe product discounts in relation to the DMO reference price.
- AGL notes the Draft Code requires the DMO reference to be prominent which is a relative concept. It is undefined how channels such as radio, webchat, telephone sales and field sales will accommodate "prominent".
- AGL expects that price change notices will likely be captured by s11 and require price comparison as they would be either a publication of price or an offer to supply at new prices. However, it would be ideal if the Draft Code clearly listed the different kinds of communications that trigger the comparison obligation.
- When an advertisement is about a bundled product like a device, is the price comparison still required and if so, what is the expectation on how to calculate the DMO price comparison. AGL considers that the DMO price comparison should consider the value of the bundled non-energy product which could be separately represented in the advertisement.
- Advertisement is more complex with regard to bundled dual fuel offers. AGL that any incremental value in terms of discounts or rebates applied to the electricity contract should be incorporated into the comparison as long as the conditions of the plan are clearly displayed.

- How are on-going or up-front credits considered when comparing to the reference rate? AGL expects that this calculation should assume that any credits that fall within the fixed benefit period or fixed term contract if for one year OR for the first year in cases of a longer-term contract period, should be included in the comparison with the reference rate. This would ensure the DMO rate comparison is against the total amount the small customer will be charged at the offered prices expected at the time of advertisement, in the first year.

9. In expressing the difference between the reference bill and the retail electricity offer (refer section ^11(4)), should this difference be expressed in dollar terms or as a percentage? Which approach would be more useful for consumers?

AGL's customer testing suggest that customers are comfortable with a reference price being expressed in percentage discount terms or as dollars per annum. They are less amenable to dollars per day comparisons.

AGL has no strong preference for either approach, as both have positives and negatives, but supports that only one option is selected and standardised across the industry to make it easier for customers.

If the percentage discount methodology is preferred, AGL would propose that the Draft Code prescribe that the use of percentage product discounts be prescribed to only refer to the DMO reference price.

This is to prevent a situation where a retailer presents two discounts in advertising or at point of sale, one being the reference DMO as a percentage and the other being a discount off a component of the bill. Such a situation would be extremely confusing for customers and undermine the purpose of the comparison.

In practise an example of this could be an energy plan with a 30 per cent usage discount, represented as a 22 per cent discount to the DMO. Customers would struggle to understand this, and in ongoing terms see a 30 per cent discount line item as part of their offer and product description. When conducting future price comparisons, it is possible that the customer will believe this discount is mistakenly off the DMO. This could result in an increase in the complexity of energy offers rather than a clarification.

10. What compliance issues could retailers potentially encounter through the introduction of the reference price (section ^11)?

AGL has highlighted many instances where the Draft Code can be improved to minimise future compliance issues with the reference price.

However, there will still be compliance issues regarding this obligation from online channels and channel processes where the customers' details cannot be verified.

The requirement to provide the difference between the customer's average bill on a market offer and the AER reference bill is dependent on network region, customer type, usage profiles and relevant tariff and will only be compliant if this information is correct. Any missing information, incorrect data provided by customer or default prices used in error may produce a misstatement of the regulated price disclosure.

3.4. Potential for customers to feel misled

AGL is concerned to ensure that these reforms provide greater clarity for customers and avoid where possible the potential for further confusion. To this end, AGL has some concerns with the operation of the price comparison at both the point of advertising as well as at times of price change and recontracting and

encourages the Government to ensure that the obligations outlined in the Draft Code are clear and minimise the potential for misleading customers.

Advertising and comparing all tariffs against one point of consumption comes with the risk that customers will then assume that the most competitive tariff at that level of consumption is the best tariff for their individual circumstances.

For example, given the nature of retail prices with fixed and variables charges, a price that is best for a customer with low consumption may not be the best for a customer with high energy consumption. This situation is exacerbated with flexible or time of use pricing.

The situation is even more extreme regarding SME customers on standing offers as most of these customers are well below the DMO threshold of 20,000 kWh per annum. Therefore, any price comparison will potentially mislead and confuse these customers, as these customers are generally paying less than the DMO annual estimates. Such an outcome could lead to customers becoming disengaged and non-responsive to alternative market offers.

Although AGL would attempt to address this issue on its own accord in its advertising, it would be much more satisfactory if the Draft Code attempted to address this across industry.

One such resolution could be to include with the advertising requirement the reference to an annual bill for Small, Medium and Large defined consumption levels through a particular website (e.g. AER comparator). AGL is not suggesting that these consumption bands are in any way related to the price cap or are referenced to the DMO but to simply to inform the customer that the bill will vary at different levels of consumption.

The impact of the changes needs also to be considered in respect of the price change processes.

The changes are intended to impact standing offers only and will not directly regulate market prices and it is highly likely that in the future, market prices will change at a different rate to the standing offer.

For example, a rate-based product might be advertised at the point of sale with the comparison showing it is 20 per cent lower than the DMO at the specified consumption level. However, if the DMO price increases by 2 per cent but the market rates the customer is on increase by 3 per cent then the customer’s tariff, when compared to the DMO, will is no longer 20 per cent lower at the specified level of consumption.

AGL suggests that in order to ensure customers are not confused or misled then the requirement that changes to market rates need to be communicated compared to the new DMO be more clearly stated. Again, it would be best if this was addressed industry wide to avoid customer confusion.

4. Advertising conditional discounts

The ACCC highlighted concerns with the impact of deep conditional discounts and recommended improving transparency as it related to the operation of discounts.

Consequently, the Government has made a rule change request to the Australian Energy Market Commission (AEMC) to amend the National Energy Retail Rules (NERL) and prohibit retailers offering inflated conditional discounts that do not reflect a retailer's costs. This rule change has yet to be consulted upon.

However, the Draft Code attempts to limit large conditional discounts in a very indirect manner by requiring that if an advertisement mentions a discount, the most prominent discount must not be conditional.

This is an unusual way to regulate conditional discounts. In fact, it fails to limit the size of conditional discounts as long as they are not more prominently mentioned than the guaranteed discount. For example, this may allow an advertisement to say "2 per cent Guaranteed Discount and 25 per cent Pay on Time Discount off the DMO reference price" because the most prominent (e.g. first mentioned) discount is unconditional.

The Draft Code therefore appears to be inconsistent with the rule change request.

Another oddity of the treatment of conditional discounts in the Draft Code is that a retailer would not be able to advertise a conditional discount without referring to an additional discount that could provide the 'headline' offer. This could severely restrict retailer innovation itself depending on the definition of conditional discount.

Noting that there is nothing in this code to prevent a retailer continuing to use conditional discounts, it is also unclear how, if a retailer does choose to continue selling offers with conditional discounts, such as pay on time discounts, but does not advertise this discount – how the value would be calculated in terms of the reference DMO. Would part of the value contribute, or none?

In particular, it is not clear whether a dollar value credit applied to a customer's bill would count as a discount, or whether only percentage-based discounts are captured. This is important because credits such as the online signup credit are conditional and would therefore not be able to be the headline "discount" in advertising under the Draft Code. For example, a bill credit provided online is conditional and therefore could not be advertised on a low rate product that wasn't using a discount that could be put as the 'headline'.

4.1. Recommendation

AGL believes the proposed indirect regulation of conditional discounts will create greater complexities and confusion than direct control of conditional discounts.

AGL has already highlighted above that the term 'discount' needs to be clearly defined in the Draft Code to avoid unintended capture of credits and other conditional rebates as discounts and therefore as conditional discounts. Similarly, advertising needed to be defined to exclude the instances or collateral where retailers are often required to list any conditional discounts, but which are not directly applicable to an energy offer for supply.

AGL also believes the Draft Code should consider directly regulating the use of conditional discounts rather than relying on other 'headline' discounts to minimise its usage. This would better align with the ACCC recommendations and the Government proposed rule change.

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4.2. Questions

11.	*The ACCC raised strong concerns over the prevalence of conditional discounts in advertised 'headline offers'. Does the requirement to prominently display the term of conditional discount balance the risks to consumers and protecting retailer innovation?*
12.	*Should the section on conditional discounting apply in all network regions in Australia, considering conditional discounts are not unique to price-deregulated network regions?*

AGL has recommended that the section in the Draft Code around conditional discounting needs to be amended to be more explicit and ensure that the intent is clearly articulated.

Rather than provide flexibility for retailers, the current ‘headline’ discount approach confuses the obligation and will increase the risk to consumers while increasing the likelihood of obtuse rather than innovative retail products.

Until the treatment of conditional discounting is fully understood, AGL is reluctant to suggest that it should apply to all network regions of Australia.

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5. AER functions

The Draft Code requires the AER to act as the independent regulator and make an annual price determination, by legislative instrument, in respect of each distribution region and customer type, and to publish the final DMO prices on 30 April. Before they are applied, these DMO prices will currently need to be tabled in Parliament for 15 sitting days with the potential for these prices to be disallowed.

AGL is extremely concerned that this legislative approach gives the AER significant powers to determine retail electricity prices with Parliament, the body granting the AER these powers, as the only check on its decision-making. The disallowance process further will introduce a large degree of political risk and uncertainty into retail electricity pricing.

AGL does not support regulation of retail energy pricing but we would expect, at a minimum, for any regulated prices to be set by an independent regulator using a transparent pricing methodology and subject to judicial review. In this instance, if the AER identifies a future price increase in the DMO because of an increase in wholesale costs then industry should be able to expect a recovery of these costs and consumers should be able to trust the that the regulator is only allowing the pass-through of efficient cost changes. Further, if the AER fails to consider relevant considerations or incorrectly applies the requirements under the Draft Code in identifying a price increase, interested persons may seek judicial review of the determination.

However, given the political environment, it is likely that a price increase, despite its merits, could become the subject of political debate and possibly disallowed for political gain. This creates significant regulatory uncertainty and potentially impacts the AER's ability, as an expert body, to independently apply its expertise in evaluating the matters the Draft Code requires it to have regard to when making a determination.

This situation is untenable and highlights why AGL would encourage the Government to consider a different legislative approach.

5.1. Recommendation

AGL proposes that the AER determinations are not made as legislative instruments, which can only be disallowed by Parliament. Rather, they should be subject to judicial review by the courts.

This would bring the regime in line with what currently applies in respect of the AER's economic regulation functions under the NEL and National Electricity Rules. That is, in setting prices for electricity distribution and transmission, the AER's determinations are subject to judicial review:

- on grounds such as breach of natural justice, procedural fairness, error of law and other grounds as listed in the *Administrative Decisions (Judicial Review) Act* 1977 (Cth); and
- with persons interested, including consumer groups and not just electricity retailers, having the ability to challenge the AER's determinations.

This consistency is appropriate given that network prices have a significant impact on the prices that electricity retailers charge and one of the matters that the AER must have regard to in determining total annual prices is the cost of distributing and transmitting electricity on the region.

5.2. Questions

13. In determining a reasonable annual price for supplying electricity in a region to a small customer at section ^14(4), are there other matters to which the AER should have regard? Does this approach appropriately balance regulatory certainty and clarity with flexibility?

The Draft Code reasonably identifies the cost elements that the AER needs to have regard to when determining the annual price for supplying electricity.

However, it is important to recognise that these elements are temporal and are not matters than can be recorded on the day of the determination but will usually require an estimate or forecast of their impact on the financial year in question. These cost elements should also estimate the costs incurred by a 'benchmark retailer' to ensure competition is maintained as much as possible.

AGL is comfortable with the inclusion of market factors as a matter of regard as part of a pricing determination to provide some flexibility for the AER.

AGL has some reservation about the AER's ability to have regard to any other matter that it considers relevant, as this potentially undermines the certainty around the AER's process which is exacerbated by the fact that the AER's determination will not be subject to judicial review. In making its determinations, the AER should provide stakeholders with adequate notice as to what these additional matters are and consult on them.

14. Does the AER require mandatorily acquired retailer information to inform its determination process in future determination processes? What are the issues with basing prices on retailer costs?

The AER's first price determination process will apply from 1 July 2019 and relies on public information.

AGL notes the Government intends to provide the AER with specific information gathering powers for the purposes of setting default prices and model usage profiles in future years in order to support the introduction of solar customers and flexible (time of use) tariff types by 2020.

AGL can accept the AER obtaining information on usage profiles to include other customer classes in its future determination process but is concerned with the collection, interpretation and subsequent use of retailers cost information for the purposes of setting default prices.

However, AGL strongly urges the AER to conduct its reviews on the basis that the only relevant costs are those that are likely to be experienced by a 'benchmark retailer' – not the costs incurred by an actual retailer. As has been accepted by all jurisdictional regulators who have had responsibility for regulating retail prices, the regulator must seek to identify the range of costs likely to be incurred by a prudent retailer operating in the competitive market, with an emphasis on public market data wherever possible. While AGL understands that the AER might believe that actual retail cost information might inform the AER's decision on changes and trends in retailers operating' customer acquisition costs, interpreting this data is highly complicated as:

- energy retailers using different operating models with different cost structures;
- the methodologies used by retailers for allocating costs across their business also differ; and
- even financial reports by publicly listed retailer are not directly comparable because of differing accounting treatments.

Other inputs, such as the cost of wholesale electricity and the cost of compliance with Government green schemes will also differ greatly amongst retailers depending upon many factors such as contracts, timing of procurement of the required services and each business's risk profile. The actual costs incurred by vertically integrated retailers is extremely difficult to identify, and subject to a large number of assumptions. AGL notes that jurisdictional retailers have sought to focus on the range of costs incurred by a prudent retailer as determined by reference to market wholesale prices.

In order to mitigate the distortionary effect price regulation can have on the competitive market as much as possible, it is essential that the AER's process should be attempting to set a default price based on the range of future cost projections that could be incurred by a benchmark retailer adopting a range of risk management and operating cost strategies. It should not be focussed on identifying the actual costs for the following financial year with a focus on benchmark retailer – this is necessary to ensure competition protected as much as possible.

15.	*Is a six-week period between the AER's determination of a total annual price and a model annual usage by 15 May each year (refer section ^15(2)) and commencement of that determination on 1 July sufficient notice for retailers to finalise electricity pricing and offer information?*

Under the Draft Code, determinations for a particular financial year must be made between before the 15 May of the previous year. The Draft Code also requires determinations to not take effect within six weeks of being registered.

This is intended to provide retailers with enough time to prepare for the new determination and the six weeks would be the minimum period for implementation of the DMO requirement by retailers. However, the recent rule change requiring prior notice for price notification for market contracts suggest that six weeks is not sufficient time and AGL recommends that 10 weeks would give sufficient time for compliance. AGL does question whether any regulatory changes are planned for price change notification to customers given the introduction of the DMO.

However, AGL also has concerns with other impacts on the timetable such as:

- the balance between an up-to-date price determination and minimum time allowed for practical implementation. A price determination process is usually better informed when it is made closer to the financial year due to the reliance on the approval of network prices and the need for up-to-date wholesale market forecasts and contract price information;
- the process for notification of the final DMO to retailers given the AER determination is currently a disallowable instrument; and
- how will the *energymadeasy* website be changed to accommodate the DMO and will any such changes be affected by the start of the financial year?

16.	*Would enabling the Code to incorporate any AER price or usage determinations made as non-disallowable legislative instruments as in force or existing from time to time give rise to any unintended consequences?*

Both the total annual price determination and the model annual usage determination for each region and customer type are currently characterised as disallowable legislative instruments.

As highlighted above, AGL is extremely concerned that such an approach will introduce a large degree of political risk and uncertainty into retail electricity pricing which should be avoided.

However, if they are made as non-allowable instruments, there is then no check at all on the AER's exercise of its functions under this Code. As noted above, the more appropriate approach is to give the AER's the power to make these determinations but have them subject to at least judicial review (if not merits review) rather than disallowance by Parliament.

6. Transitional issues

17. How will the proposed price cap and comparison obligations affect pre-existing retail electricity contracts?

AGL believes most of its existing customer contracts for the supply of electricity will be largely unaffected by the operation of the price cap.

However, some legacy contracts may be impacted because of the method used in the Draft Code to implement the DMO – namely, requiring retailers to ensure that 'standing offer prices' do not exceed the price determined by the AER for that region.

Therefore, AGL may be required to amend customer contract as at 1 July 2019 given the change in regulations, even if the total cost of their bill remains the same.

AGL supports the Draft Code creating a DMO price instrument that replaces the current standing offer prices as at 1 July 2019 which would enable further transitional issues to be avoided.