

## **EXPLANATORY STATEMENT**

### *Competition and Consumer Act 2010*

#### *Competition and Consumer Legislation Amendment (Electricity Retail) Regulations 2020*

(Issued by the authority of the Minister for Energy and Emissions Reduction)

### **PURPOSE AND OPERATION**

The *Competition and Consumer Legislation Amendment (Electricity Retail) Regulations 2020* (the Regulations):

- extend the electricity retail code of conduct to small customers with solar photovoltaic (PV) systems, the cap on standing offer prices to residential customers on flexible tariffs, and the reference price comparison obligation to price variation notices
- impose new record-keeping requirements on electricity retailers and
- make other technical amendments to clarify the operation of the code.

The Regulations also contain amendments that are consequential to the commencement of Schedule 2 to the *Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Act 2019* (PEMM Act).

### **BACKGROUND**

The electricity retail code of conduct (the code) is set out in Part 2 of the *Competition and Consumer (Industry Code - Electricity Retail) Regulations 2019* (the Industry Code Regulations). The code:

- caps standing offer prices for small customers (other than those with a PV system, who are on a flexible, demand or, in the case of small business customers, controlled load tariff or who are supplied through a prepayment meter or an embedded network)
- requires electricity retailers to compare their prices for small customers with the relevant reference price determined by the Australian Energy Regulator (AER) and
- prohibits the use of headline conditional discounts and requires retailers to state the terms of any non-headline conditional discounts clearly and conspicuously in any advertising material.

The code is a mandatory industry code for the purposes of Part IVB of the *Competition and Consumer Act 2010* (CCA).

### **INCORPORATION**

The code incorporates determinations made by the AER under Part 3 of the Industry Code Regulations. These determinations are disallowable legislative instruments and are registered on the Federal Register of Legislation. The determinations are incorporated as in force from time to time.

Part 3 of Schedule 1 to the Regulations makes the determinations non-disallowable legislative instruments. The determinations will continue to be registered on the Federal Register of Legislation and be incorporated as in force from time to time.

#### **AUTHORITY**

Paragraph 44AH(b) and sections 51AE and 172 of the CCA provide authority for the Regulations.

#### **CONSULTATION**

An exposure draft of the Regulations was made available for public consultation between 22 October 2019 and 6 November 2019. A wide range of stakeholders, including retailers and energy peak bodies were directly informed of the opportunity to submit comments on the Regulations. Eleven submissions to the consultation process were received, with one submission from an energy industry peak body, and the remainder from energy retailers.

#### **HUMAN RIGHTS IMPLICATIONS**

The Regulations are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*: see Attachment A.

#### **REGULATORY IMPACT**

It is estimated that the regulatory burden is likely to be minor (OBPR reference number 25452).

## GLOSSARY

The following terms, abbreviations and acronyms are used throughout this explanatory statement.

<b><i>Abbreviation</i></b>	<b><i>Definition</i></b>
ACCC	Australian Competition and Consumer Commission
AER	Australian Energy Regulator
CCA	<i>Competition and Consumer Act 2010</i>
cap on standing offer prices	the cap that applies to standing offer prices in accordance with section 10 of the Industry Code Regulations
code	the electricity retail code of conduct set out in Part 2 of the Industry Code Regulations
controlled load tariff	a tariff for supplying electricity for use only in specific appliances (such as a hot water system or pool pump)
flexible tariff	a tariff for supplying electricity that varies (wholly or partly) according to the time of day when the electricity is supplied (also known as a time-of-use tariff)
Industry Code Regulations	<i>Competition and Consumer (Industry Code - Electricity Retail) Regulations 2019</i>
model annual usage	the amount, and timing or pattern of the supply, of electricity in a distribution region to a particular type of small customer determined by the AER under paragraph 16(1)(a) of the Industry Code Regulations
PEMM Act	<i>Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Act 2019</i>
PV system	a solar photovoltaic system (such as rooftop solar panels)
reference price	the price for supplying electricity in a particular distribution region to a particular type of small customer determined by the AER under paragraph 16(1)(b) of the Industry Code Regulations
reference price comparison obligation	the obligation that applies to electricity retailers under section 12 of the Industry Code Regulations
Regulations	<i>Competition and Consumer Legislation Amendment (Electricity Retail) Regulations 2020</i>
small customer	a residential customer or a small business customer which uses less than 100 megawatt hours of electricity a year

standing offer prices	the prices that apply to the offers that an electricity retailer is required to make to small customers under State and Territory law, or that apply when electricity is supplied to a small customer otherwise than under a contract (for example, when the customer continues to be supplied with electricity after a contract has expired)
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## **DETAILS OF THE *COMPETITION AND CONSUMER LEGISLATION AMENDMENT (ELECTRICITY RETAIL) REGULATIONS 2020***

### **Section 1 – Name**

This section provides that the name of the Regulations is the *Competition and Consumer Legislation Amendment (Electricity Retail) Regulations 2020*.

### **Section 2 – Commencement**

This section provides that:

- sections 1 to 4 and Schedule 1 to the Regulations commence on the day after the Regulations are registered
- Schedule 2 commences on 1 July 2020.

### **Section 3 – Authority**

This section provides that the Regulations are authorised by the CCA, in particular, paragraph 44AH(b) and sections 51AE and 172.

### **Section 4 – Schedules**

This section provides that the Industry Code Regulations and the *Competition and Consumer Regulations 2010* are amended in accordance with the Schedules to the Regulations.

### **Schedule 1 – Amendments commencing day after registration**

#### ***Part 1 – Solar photovoltaic units***

Part 1 of Schedule 1 extends the code to small customers with PV systems. This means that from 1 July 2020:

- standing offer prices for small customers with PV systems will be capped in accordance with section 10 of the Industry Code Regulations
- electricity retailers must compare their prices for such customers with the relevant reference price determined by the AER.

#### ***Item 1 – Subsection 2(1) (table item 2)***

Item 1 amends the commencement provision in the Industry Code Regulations to reflect the repeal of section 11 (made by item 5).

#### ***Item 2 – Paragraph 6(3)(c)***

Item 2 amends paragraph 6(3)(c) of the Industry Code Regulations to reflect the repeal of paragraph 6(3)(d) (made by item 3).

### *Item 3 – Paragraph 6(3)(d)*

Item 3 deletes the existing carve out for small customers with PV systems contained in paragraph 6(3)(d) of the Industry Code Regulations. In effect, for the purposes of the code, the three types of small customers will be:

- residential customers with a controlled load tariff (irrespective of whether or not they have a PV system), other than those on a demand tariff or who are supplied through a prepayment meter or embedded network
- residential customers without a controlled load tariff (irrespective of whether or not they have a PV system), other than those on a demand tariff or who are supplied through a prepayment meter or embedded network
- small business customers (irrespective of whether or not they have a PV system), other than those on a controlled load, flexible or demand tariff or which are supplied through a prepayment meter or embedded network.

### *Item 4 – Section 8A*

Item 4 inserts new section 8A into the Industry Code Regulations. This section provides that, for the purposes of the Industry Code Regulations, any amount that an electricity retailer must pay (or credit) to a consumer for electricity generated by the consumer's PV system must be disregarded. This means, for example, that a retailer's solar feed-in tariffs do not need to be factored into the AER's reference price determinations.

### *Item 5 – Section 11*

Item 5 repeals section 11 of the Industry Code Regulations. Section 11 provides an alternative mechanism for extending the code to small customers with PV systems and is no longer required.

### *Item 6 – Subsection 19(2)*

Item 6 amends the application provision in the Industry Code Regulations to reflect the repeal of section 11 (made by item 5).

## ***Part 2 – Demand tariffs and flexible tariffs***

Part 2 of Schedule 1 extends the cap on standing offer prices to flexible tariffs for residential customers and clarifies that a demand tariff is not a flexible tariff.

### *Item 7 – Section 5*

Item 7 inserts a new definition of 'demand tariff' into section 5 of the Industry Code Regulations. In effect, a demand tariff is a tariff that includes a charge which reflects the maximum demand (in kilowatts) the customer puts on the electricity network during the periods when network-wide demand is highest (for example, between 5pm and 8pm on weeknights). A demand charge is usually in addition to a daily supply charge (which is a fixed amount) and a usage charge (which reflects the total amount of electricity the customer uses (in kilowatt hours) during a billing period).

*Item 8 – Section 5 (definition of ‘flexible tariff’)*

Item 8 amends the definition of ‘flexible tariff’ in section 5 of the Industry Code Regulations to clarify that a demand tariff is not a flexible tariff.

*Item 9 – Paragraph 6(3)(a)*

Item 9 amends paragraph 6(3)(a) of the Industry Code Regulations to clarify that the code does not apply to demand tariffs (as defined in item 7).

*Item 10 – Subsection 10(1)*

Item 10 amends subsection 10(1) of the Industry Code Regulations to extend the cap on standing offer prices to flexible tariffs for residential customers. The cap continues not to apply to flexible tariffs for small business customers.

***Part 3 – Functions of the AER***

Part 3 of Schedule 1 makes the AER’s model annual usage and reference price determinations non-disallowable legislative instruments and makes other amendments consequential to the commencement of Schedule 2 to the PEMM Act.

A model annual usage determination specifies how much electricity the AER considers a representative small customer would consume in a year (and the pattern of that consumption); a reference price determination specifies the annual price the AER considers reasonable for that quantity. Different determinations are made for different types of customers and for each different distribution region. When making a reference price determination, the AER must have regard to a range of factors, including the principle that an electricity retailer should be able to make a reasonable profit in relation to supplying electricity in a region. This type of function is most suited to an independent economic regulator, and it is therefore appropriate that the determinations are non-disallowable.

The determinations were initially made disallowable (subsection 16(5) of the Industry Code Regulations) to ensure that the code did not need to be remade each time the determinations were updated (as per subsection 14(2) of the *Legislation Act 2003*). The effect of subsections 44AH(3) and 51AE(3) of the CCA (inserted by Schedule 2 to the PEMM Act), together with the amendments made by Part 3 of Schedule 1 to the Regulations, is that the code can now incorporate non-disallowable determinations as in force from time to time.

Making the determinations non-disallowable is consistent with the position that would apply in any event under subsection 44(1) of the *Legislation Act 2003* (at least to the extent that the AER is an intergovernmental body within the meaning of that section, on account of it consisting of Commonwealth and State/Territory members and being established in accordance with an intergovernmental agreement (the Australian Energy Market Agreement) for the purposes of furthering an intergovernmental scheme (the national energy laws)). In particular, subsection 44(1) provides that section 42 of the *Legislation Act 2003* (which deals with the disallowance of legislative instruments) does not apply in relation to a legislative instrument, or a provision of a legislative instrument, if the enabling legislation for the instrument (in this case, Part 3 of the Industry Code Regulations): (a) facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more States

and (b) authorises the instrument to be made by the body or for the purposes of the body or scheme, unless the instrument is a regulation, or the enabling legislation or some other Act has the effect that the instrument is disallowable.

While the AER determinations will be non-disallowable, they will continue to be freely and easily accessible to the public on the Federal Register of Legislation.

*Item 11 – Section 5 (definition of ‘model annual usage’)*

Item 11 amends the definition of ‘model annual usage’ to reflect the repeal of section 18 of the Industry Code Regulations (made by item 16).

*Item 12 – Section 5 (definition of ‘reference price’)*

Item 12 amends the definition of ‘reference price’ to reflect the repeal of section 18 of the Industry Code Regulations (made by item 16).

*Item 13 – Section 15*

Item 13 repeals section 15 of the Industry Code Regulations and splits it into two new sections. New section 14A provides that Part 3 of the Industry Code Regulations is made for the purposes of paragraph 44AH(1)(b) of the CCA. This reflects changes to the numbering of section 44AH made by Schedule 2 to the PEMM Act. New section 15 provides that the AER has the function of determining the matters required or permitted by the rest of Part 3 to be determined by the AER.

*Item 14 – Subsection 16(5)*

Item 14 repeals subsection 16(5) of the Industry Code Regulations. The effect of this repeal, when read together with subsection 44AH(3) of the CCA, is that determinations made by the AER under Part 3 of the Industry Code Regulations are non-disallowable legislative instruments.

*Item 15 – Paragraph 17(5)(b)*

Item 15 amends paragraph 17(5)(b) of the Industry Code Regulations to reflect the amendments made by item 14.

*Item 16 – Section 18*

Item 16 repeals section 18 of the Industry Code Regulations to reflect the amendments made by item 14.

*Item 17 – Regulation 7AA of the Competition and Consumer Regulations 2010*

Item 17 amends regulation 7AA of the *Competition and Consumer Regulations 2010* to reflect the changes to the numbering of section 44AH of the CCA made by Schedule 2 to the PEMM Act.



#### ***Part 4 – Other amendments***

##### *Item 18 – Paragraph 8(a)*

Item 18 corrects a minor typographical error in paragraph 8(a) of the Industry Code Regulations.

#### ***Part 5 – Application of amendments***

##### *Item 19 – Section 21*

Item 19 inserts a new section 21 into the Industry Code Regulations dealing with the application of the amendments made by Parts 1, 2 and 3 of Schedule 1 to the Regulations.

The amendments made by Parts 1 and 2 of Schedule 1 apply in relation to financial years starting on or after 1 July 2020, and advertising that occurs on or after that date. This means, for instance, that the cap on standing offer prices for small customers with PV systems and residential customers on flexible tariffs applies from 1 July 2020. The AER may, however, make relevant determinations under Part 3 of the Industry Code Regulations from the day after the Regulations are registered (when Schedule 1 commences). The timing requirements in subsection 17(1), paragraph 17(2)(b) and subsection 17(3) of the Industry Code Regulations do not apply to the 2020-21 determinations. This is to accommodate the fact that the AER released its draft 2020-21 determinations before Schedule 1 to the Regulations commenced.

The amendments made by Part 3 of Schedule 1 apply in relation to a determination made on or after the commencement of Schedule 1.

#### **Schedule 2 – Amendments commencing 1 July 2020**

##### ***Part 1 – Main amendments***

Part 1 of Schedule 2 extends the reference price comparison obligation to price variation notices and imposes new record-keeping requirements on electricity retailers.

##### *Item 1 – Section 5 (after paragraph (c) of the note to the heading)*

Item 1 amends section 5 of the Industry Code Regulations to note that ‘personal information’ has the meaning given in the CCA.

##### *Item 2 – Section 5*

Item 2 amends section 5 of the Industry Code Regulations to signpost that ‘communicate’, in relation to electricity prices, has the meaning given by subsection 12(2A).

##### *Item 3 – subsection 10(4)*

Item 3 inserts new subsection 10(4) into the Industry Code Regulations, requiring an electricity retailer to make a record demonstrating how it calculated the total annual amount that a small customer of a particular type would pay for electricity at the retailer’s standing offer prices if the customer consumed electricity in accordance with the relevant AER model annual usage determination. The record must be kept for six years from the end of the relevant financial year.

A civil penalty of 300 penalty units applies for non-compliance with this requirement. This is the maximum penalty permitted for a civil penalty provision of an industry code (subsection 51AE(2) of the CCA). The imposition of the maximum penalty is necessary to ensure compliance with subsection 10(4) and is in line with the penalties that apply to record-keeping requirements in other industry codes (such as the Horticulture Code of Conduct).

The CCA also permits the ACCC to pursue other remedies against non-compliant retailers, including the issue of infringement notices (sections 51ACC to 51ACJ) or public warning notices (section 51ADA), injunctions (section 80), non-punitive orders, such as community service orders (section 86C) and other compensatory orders (section 87). The ACCC can also accept administrative undertakings, under which a non-compliant retailer agrees to remedy the harm caused by its conduct, accept responsibility for its actions and establish or review its compliance programs.

Under section 51ADD of the CCA, if a corporation is required to keep, to generate or to publish information or a document under an applicable industry code, the ACCC can require the corporation to give that information or document to the ACCC for investigation and auditing purposes.

*Item 4 – Subdivision B of Division of 2 of Part 2 (heading)*

Item 4 amends the heading of Subdivision B of Division 2 of Part 2 of the Industry Code Regulations to reflect the new definition of ‘communicate’.

*Item 5 – Section 12 (heading)*

Item 5 amends the heading of section 12 of the Industry Code Regulations to reflect the new definition of ‘communicate’.

*Item 6 – Subsection 12(2)*

Item 6 amends subsection 12(2) of the Industry Code Regulations to reflect the new definition of ‘communicate’ and inserts new subsection (2A), which defines that term.

An electricity retailer ‘communicates’ its prices for supplying electricity in a particular distribution region to a small customer of a particular type if it:

- advertises or publishes the prices (for example, on a website)
- offers to supply electricity in the region to the small customer at those prices (including over the phone or face to face) or
- gives a small customer written notice of a change to the retailer’s prices (for example, a letter or email notifying the customer that the retailer’s prices have increased or a benefit has ceased).

A customer’s bill is not a ‘communication’ for these purposes, nor is a message informing a customer of an over or underpayment.

*Item 7 – Subsection 12(3)*

Item 7 amends subsection 12(3) of the Industry Code Regulations to reflect the new definition of ‘communicate’.

*Item 8 – Paragraph 12(3)(b)*

Item 8 amends paragraph 12(3)(b) of the Industry Code Regulations to reflect the new definition of ‘communicate’.

*Item 9 – Subsection 12(4) (definition of ‘lowest possible price’)*

Item 9 amends the definition of ‘lowest possible price’ in subsection 12(4) of the Industry Code Regulations to reflect the new definition of ‘communicate’.

*Item 10 – Subsection 12(4) (note to the definition of ‘lowest possible price’)*

Item 10 amends the note to the definition of ‘lowest possible price’ in subsection 12(4) of the Industry Code Regulations to reflect the new definition of ‘communicate’.

*Item 11 – Subsection 12(5)*

Item 11 repeals subsection 12(5) of the Industry Code Regulations, effectively removing the requirement that electricity retailers express the difference between the reference price and their unconditional and conditional prices as a whole percentage, rounded up.

*Item 12 – Subsections 12(6) and (7)*

Item 12 amends subsection 12(6) and (7) of the Industry Code Regulations to reflect the new definition of ‘communicate’.

*Item 13 – Section 13A*

Item 13 inserts a new section 13A into the Industry Code Regulations. This section requires an electricity retailer to make and keep a record of:

- the content of its communications or, where the communications involve the application of a template or script (for example, where a notice to an individual small customer of an electricity price rise is based on a template notice, or offers made to a particular small customer by telephone follow a script), a copy of that template or script
- the date of the communication or, in the case of templates and scripts, the dates within which the template or script was used
- how the retailer calculated the difference between its prices and the reference price (as per subsection 12(3) of the Industry Code Regulations) or estimated the total annual price payable by a small customer based on the customer’s individual circumstances (as per subsection 13(2) of the Industry Code Regulations).

The record is not required to contain any personal information about a particular customer.

Records must be kept until 6 years after the end of the financial year to which the record relates.

A civil penalty of 300 penalty units applies for non-compliance with this requirement. This is the maximum penalty permitted for a civil penalty provision of an industry code (subsection 51AE(2) of the CCA). The imposition of the maximum penalty is necessary to ensure compliance with subsection 12(8) and is in line with the penalties that apply to record-keeping requirements in other industry codes (such as the Horticulture Code of Conduct).

The CCA also permits the ACCC to pursue other remedies against non-compliant retailers, including the issue of infringement notices (sections 51ACC to 51ACJ) or public warning notices (section 51ADA), injunctions (section 80), non-punitive orders, such as community service orders (section 86C) and other compensatory orders (section 87). The ACCC can also accept administrative undertakings, under which a non-compliant retailer agrees to remedy the harm caused by its conduct, accept responsibility for its actions and establish or review its compliance programs.

Under section 51ADD of the CCA, if a corporation is required to keep, to generate or to publish information or a document under an applicable industry code, the ACCC can require the corporation to give that information or document to the ACCC for investigation and auditing purposes.

#### *Item 14 – Before section 14*

Item 14 inserts a new subheading before section 14 of the Industry Code Regulations.

### ***Part 2 – Application of amendments***

#### *Item 15 – Section 22*

Item 15 inserts a new section 22 into the Industry Code Regulations dealing with the application of the amendments made by Schedule 2 to the Regulations. In effect, those amendments apply in relation to financial years starting on or after 1 July 2020.

## STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

*Competition and Consumer Legislation Amendment (Electricity Retail) Regulations 2020*

The Regulations are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### OVERVIEW OF THE LEGISLATIVE INSTRUMENT

The electricity retail code of conduct (the code) set out in Part 2 of the *Competition and Consumer (Industry Code - Electricity Retail) Regulations 2019*:

- caps standing offer prices for small customers (other than those with a PV system, who are on a flexible, demand or, in the case of small business customers, controlled load tariff or who are supplied through a prepayment meter or an embedded network)
- requires electricity retailers to compare advertised, published or offered prices for small customers with a reference price determined by the Australian Energy Regulator (AER) and
- prohibits the use of headline conditional discounts and requires retailers to state the terms of any non-headline conditional discounts clearly and conspicuously in any advertising material.

The code is a mandatory industry code for the purposes of Part IVB of the *Competition and Consumer Act 2010*.

The *Competition and Consumer Legislation Amendment (Electricity Retail) Regulations 2020* (the Regulations):

- extend the code to small customers with PV systems, the cap on standing offer prices to residential customers on flexible tariffs and the reference price comparison obligation to price variation notices
- impose new record-keeping requirements on electricity retailers and
- make other technical amendments to clarify the operation of the code.

The new record-keeping requirements do not require retailers to make records that contain any personal information about individuals.

The Regulations also contain amendments that are consequential to the commencement of Schedule 2 to the *Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Act 2019*.

## **HUMAN RIGHTS IMPLICATIONS**

The Regulations regulate business conduct and do not engage any of the applicable rights or freedoms.

## **CONCLUSION**

The Regulations are compatible with human rights as they do not raise any human rights issues.

**The Hon Angus Taylor MP**  
**Minister for Energy and Emissions Reduction**