



public interest
ADVOCACY CENTRE

**Submission to DISER post-implementation
review: consultation paper**

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

11 October 2021

About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in Sydney.

Established in 1982, PIAC tackles barriers to justice and fairness experienced by people who are vulnerable or facing disadvantage. We ensure basic rights are enjoyed across the community through legal assistance and strategic litigation, public policy development, communication and training.

Energy and Water Consumers' Advocacy Program

The Energy and Water Consumers' Advocacy Program (EWCAP) represents the interests of low-income and other residential consumers of electricity, gas and water in New South Wales. The program develops policy and advocates in the interests of low-income and other residential consumers in the NSW energy and water markets. PIAC receives input from a community-based reference group whose members include:

- Affiliated Residential Park Residents Association NSW;
- Anglicare;
- Combined Pensioners and Superannuants Association of NSW;
- Energy and Water Ombudsman NSW;
- Ethnic Communities Council NSW;
- Financial Counsellors Association of NSW;
- NSW Council of Social Service;
- Physical Disability Council of NSW;
- St Vincent de Paul Society of NSW;
- Salvation Army;
- Tenants Union NSW; and
- The Sydney Alliance.

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Introduction

PIAC welcomes the opportunity to respond to the Consultation Paper (the Paper) for the Post Implementation Review of the Consumer and Competition: Industry Code - Electricity Retail Regulations 2019 (the Code).

PIAC strongly supports a well-designed default pricing mechanism and robust measures to ensure all consumers have access to clear, simple information regarding the relative value of electricity offers. Electricity is an essential service central to households' ability to support their health, wellbeing, and productive participation in society. Residential electricity services are a largely undifferentiated product (electrons), where the intrinsic cost and fair value of the service is not revealed to the consumer when they purchase. Many household consumers are not aware of the comparative value of their service and find the process of service comparison and switching to be intimidating, burdensome, difficult or otherwise not possible. However, households do not have the ability to exercise the fundamental market power of withholding purchase, regardless of their ability to understand or afford the services they need. These factors mean that to protect consumers from potential harm from unfair and unaffordable essential electricity services, regulation of retail electricity pricing and pricing communication is necessary.

The Default Market Offer (DMO) and Reference Price were implemented in recognition of the issues many consumers face paying unjustifiably high prices and being unable to determine whether deals were of fair value or the best fit for their needs. While PIAC has significant concerns about the objectives of the DMO and Reference Price, the way they were formulated and the means by which they have been implemented, we strongly support the continued role the DMO and Reference Price perform in protecting and informing consumers.

This review, in conjunction with that being undertaken by the Australian Energy Regulator (AER), is an opportunity to recognise the positive impacts of these measures and to improve them to achieve better outcomes for consumers. It is also an opportunity to reconsider the objectives of the Code itself and the principles and assumptions which underpin it. The Paper contains a number of aspects which PIAC considers problematic, and which represent outdated misconceptions, a misguided focus upon process and mechanics, or assumptions which are not supported by evidence. More specifically that:

- The protections offered through the Code need not apply to households in distribution areas with less than 100,000 consumers, in embedded networks or those with prepayment metering technology. PIAC considers that, as an essential service, access to pricing protections conferred by the Code should be available to all consumers regardless of their circumstances.
- Market engagement must be facilitated as a priority consideration, regardless of whether or not it delivers good outcomes for all consumers. PIAC considers that this focuses on the mechanism (the market) rather than the outcome (consumers paying fair and efficient prices for an essential service). It also places emphasis on a particular form of engagement

(comparison and switching), where most consumers have demonstrated a preference to engage in the market in other ways.¹

- Standing offers contain additional consumer protections which justify a price premium. PIAC does not consider that standing offers' mandated requirements involve any additional material features and costs which justify any price premium. Standing offers should simply be regarded as a default offer that ensures all consumers have access to an essential service at a fair and efficient price.
- Awareness of the existence of the DMO and Reference Price is regarded as a valid indicator of their success. PIAC contends that awareness of these mechanisms does not indicate understanding of what they are or how they work. This is particularly important where neither the DMO nor Reference Price are related to 'efficiency' or fair value services. The results of the consumers surveys presented in pages 8-11 of the Paper indicate that consumers are likely to assume the DMO and Reference Price are based upon 'fair' value or efficient costs, offering greater protection than they are. Similarly, research by the Behavioural Economics Team found that 60 percent of respondents indicated that they would not shop around for a better energy deal if they learnt that their energy offer was equal to the Reference Price.² Should awareness of these mechanisms encourage a consumer to remain on a sub-optimal deal on the mistaken assumption that it was a 'low cost' deal because it was cheaper than the Reference Price, this would contribute to consumers being worse off than they need be.
- People who are not on a market offer or who have not assessed or switched deals recently are disengaged and require a 'negative' price incentive to become engaged. PIAC strongly disagrees and regards the persistently high number of consumers on standing offers, or the majority who do not regularly switch retail offers as actively expressing their consumer preference. The market is not designed for these people, who may represent the bulk of all energy consumers, and does not work in their best interests as it ensures many of them pay more than they need to. the Code must consider the outcomes delivered for all consumers, regardless of how they engage in the market.

These issues underpin many of the questions posed in the Paper and PIAC considers it necessary for this review process to reconsider all aspects of the Code, including the assumptions and principles which shaped it.

Consumer outcomes

The DMO has had positive outcomes for consumers as a whole and particularly for individual consumers on standing offers. Following the introduction of the DMO:

- Standing offers have remained at or below the level of the DMO, ensuring consumers on them are paying a fairer price for their electricity service.
- Median market offer prices decreased across all distribution zones and customer types, representing an 'overall' improvement in market price outcomes for consumers.

¹ For example, high uptake of rooftop solar and increasing battery storage, should be considered engagement in the energy market and as a way households attempt to manage their energy costs.

² Behavioural Economics Team of the Australian Government (BETA), [Improving Energy Bills: Interim Report](#), September 2021, 31.

- The spread of market prices decreased, indicating less ‘subsidy’ between consumers.
- The prevalence of conditional discounting has decreased, with increased competition that is not exclusively price-based.

These outcomes demonstrate the value of default pricing in helping to guide the market to deliver better outcomes for all consumers. However, a DMO that reflects efficient costs would deliver more substantial benefits for consumers. Basing the DMO on the efficient cost of supplying energy in a region would ensure a default fair price for those on standing offers and provide consumers with a clear reference for the value of a service many find complicated and confusing.

The role of the DMO as a Reference Price would also be materially improved if it were based on the efficient cost to serve. An efficient Reference Price would indicate to consumers what the fair value of electricity services are, and by extension indicate which are ‘low cost’ services and which are services with a premium attached. This fills a crucial market information gap and helps consumers to decide what service is right for them and importantly whether they are prepared to pay a premium for the service they are receiving, or whether a low cost offer better meets their needs.

PIAC strongly disagrees with the argument that a DMO should only operate as a ‘safety net’ for an undefined (but small) minority of people deemed unable to get satisfactory outcomes from the market. This argument is based upon faulty premises that:

- The number of consumers getting poor outcomes from the market is small, and in any case a minority.
- Regardless of the number affected, a significant (opaque) price dispersion in the delivery of a largely homogenous essential service, is not only acceptable but desirable.
- The consumer is inherently responsible for ensuring that the retail market operates in their interests, by delivering a service that is efficiently and fairly priced. Further, that if they are unable to engage effectively according to the terms set by retailers, then any excess costs that they incur above the efficient price of the retail service, is reasonable.

In this context the problem with the DMO is not one of mitigating the impacts upon a small number of vulnerable people, but of addressing the failure of the retail market to deliver affordable and fair outcomes in the interests of all consumers.

Competition outcomes

PIAC has consistently rejected the assumption that default pricing will lead to poorer long-term outcomes by materially curtailing or impeding competition. Evidence from the operation of the DMO to date supports PIAC’s position. In its most recent retail monitoring report³ the NSW Independent Pricing and Regulatory Tribunal (IPART) made a number of observations regarding the impact of the DMO on the retail electricity market, including:

³ IPART, [Monitoring the Retail Electricity Market 2019-2020: final report](#), November 2020, 1-8.

- 2019-20 saw continued entry of new retailers with 33 (38 brands) operating in NSW.
- The market share of smaller retailers increased to 20 percent.
- The market share of the three largest retailers continued to fall.
- 2019-20 saw a continued increase in the number of NSW consumers on market offers.
- Standing offer, median market offer, and overall prices decreased.
- Product differentiation and other competition not exclusively based on price increased.

These observations, which have also been noted by the AER in its reviews of the DMO, indicate the DMO is delivering improved consumer outcomes while business activity increased in the retail market. This supports the position that better consumer outcomes need not come at the expense of retail competition.

PIAC contends that a strong default based upon efficient costs will ensure that a significant proportion of consumers are able to access essential electricity services at a 'fair' price that also provides a reasonable margin to the retailers supplying it to them. A DMO based on efficient costs would also provide necessary information to consumers regarding the intrinsic value of that efficient service, which would serve as a basis for more informed and confident choices in their wider engagement with the retail market. Such regulation would provide added incentive to retailers in the competitive market that competition should be about adding value to attract consumers, not relying upon customer inertia to inflate margins and offer discounts to others.

This would place the retail electricity market on a similar footing with other effectively competitive markets. and provide retailers with a greater incentive to offer innovative products and services. It would also ensure retailers bear more of the risks of not doing so, where consumers currently bear all the risks in relation to engagement with the retail market.

Bundling and product differentiation

PIAC has observed an increase in competition based upon bundled offers and other non-price means of product differentiated competition. Bundling and/or product differentiation is a legitimate way to attract or maintain customers. Offering loyalty discounts, multiple service discounts and service options such as monthly billing can provide advantages for certain households. Where the basic energy 'product' being offered is largely homogenous, competition on these bases is more in line with consumer interests and preferences. In providing less scope for price-only competition the DMO and Reference Price would appear to have provided incentive to compete more through differentiated service in these areas. The operation of the DMO and Reference Price should not impede the ability of retailers to create innovative offers which represent additional value to some consumers.

However, the energy component within these deals must remain clearly comparable to other market products. Bundling must not obscure the actual price of energy, particularly in relation to the reference price. In addition, it can be difficult for consumers to compare whether a deal which involves an annual membership fee and lower usage charges will or will not be cheaper than one with no membership fee but higher usage charges. The Code should ensure that these additional terms and features do not obscure the value of the energy service and its ability to be compared to the DMO and Reference Price.

In the remainder of this submission PIAC will respond directly to selected questions from the Paper.

Questions for feedback

What outcomes do you feel the introduction of the DMO and Reference Price have provided to benefit consumers?

The DMO and Reference Price have benefited all consumers by reducing the cost of offers for those on standing offers, providing a stronger default protection for all consumers. The DMO and Reference Price have also ensured that median market offers have reduced over time, demonstrating ongoing downward pressure on market energy offers. There remain some instances of offers above the DMO, where this is now clearly communicated to consumers, it is not necessarily a consumer detriment. The DMO and Reference Price have also had a number of impacts upon the way deals are structured and advertised, as we outlined earlier in this submission.

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

Improvements to the objectives, principles and method of formulation of the DMO and Reference Price are crucial to improved communication of their existence and purpose to the public. Consumers who are aware of the DMO and Reference Price are likely to make assumptions that they represent 'fair' or well-priced offers. This is a reasonable assumption that would be grounded in general experience that deals default to 'cheap' or 'fair' price arrangements. For example, default super funds are cheap, low fee options intended to protect consumers and ensure fair terms, retaining consumer choice to actively make other arrangements if they wish.

The DMO and Reference Price could be better communicated and better understood by all consumers if they represented an efficient, fair price of service.

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

Consumers could make better use of the Reference Price if it was a more meaningful and better understood comparison point. As outlined above, the Reference Price should be adjusted so that it represents the efficient, fair cost of service. This would allow consumers to determine whether market offers were low cost offers or premium offers that should come with extra features or benefits.

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

In assessing which of these, or other aspects, should be brought into the scope of the Code and standardised, a harm-based approach should be taken. That is, the potential for the feature to result in harm or detriment to the consumer. PIAC considers there are a number of features that

make a direct offer comparison difficult for consumers and have significant potential to result in harm:

- Benefit periods, particularly where the contract timeframes and the benefit periods do not align.
- Contract timeframes, where some contracts are time limited, and some are open-ended.
- Break fees and exit charges, where there may be extra charges if the benefit or contract period is not fulfilled.
- Metering charges, where the installation of an advanced meter may incur extra upfront, ongoing or other charges on exit.
- Bundled services, where electricity offers are included as part of a bundle of other services, it can be unclear what the relative cost of electricity service component is.

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

Consumers do want to be able to know how their energy offer compares to other offers available and having this information on bills would be of benefit for consumers.⁴ However, the use of the Reference Price should not be extended in its current form. As noted in previous answers, the Reference Price would be improved if it represented the efficient price of service. A Reference Price based on efficient costs could be more usefully employed on bills and comparator websites as a valuable tool of market information for consumers. The expansion of the use of the Reference Price under any other circumstances would be likely to result in consumer misunderstanding and detriment.

How could the policy be improved to further increase market participation?

PIAC does not regard increased market participation as a valid objective of the Code, or a necessary contributor to good consumer outcomes.

Has the policy altered the value proposition of standing offers?

The policy has improved the value proposition of standing offers by reducing the unreasonable price premium they attracted. PIAC strongly disagrees that standing offers represent a premium product with any meaningful special protections that justify a higher value. The value to consumers on standing offers is in their status as a default. The Code has helped improve the value of standing offers as a default. Further improvements should be made by ensuring that standing offers are fair value defaults based on efficient costs to provide an essential service.

Have you observed any impacts on innovation in the retail energy market from the DMO?

Innovation in the retail energy market has not been negatively impacted by the introduction of the DMO. PIAC strongly contends that an appropriately structured DMO and Reference Price should be a greater incentive for innovation and a powerful direction to innovation that improves outcomes that benefit and respond to consumer preferences.

⁴ For example, see BETA (n 2) 11.

Has the Reference Price led to an increase in offers of non-financial incentives to customers? Should these incentives be captured in the Reference Price obligations?

There is a greater prevalence of non-financial incentives and other incentives provided through the bundling of energy contracts with other services such as phone and internet services. PIAC considers it important the Code ensures that the DMO and Reference Price appropriately account for other incentives. The Reference Price should not seek to capture or account for the value of non-price or other service incentives, but should ensure that the energy component of all products is clearly and easily comparable to the Reference Price. Reference Price obligations should be extended to cover the energy component of any service that provides energy.

Does the reported data reflect your experience with the policy? That is, have you seen the number and size of conditional discounts fall?

PIAC understands that conditional discounting is less prevalent as a result of a number of measures, including the DMO and Reference Price, and that the conditional discounts that are available are less significant. Where evidence supports this understanding, it should be seen as a positive outcome of policies implemented to date and justification for those policies to continue. PIAC contends discounts should be unconditional and related to behaviour and the fulfilment of contract terms that do not disadvantage certain people, for instance those who are unable to pay by direct debit or operate online-only accounts. Where conditional discounts are employed those discounts should be restricted to the reasonable cost avoided by the targeted behaviour. For instance, pay-on-time discounts should be limited to the reasonable costs avoided by the retailer due to payment being received on time.

Has the Code appropriately covered all customer types that should be able to access the protections provided by the Default Market Offer? For example, should the Code be extended to embedded network customers, demand tariff, prepayment meter, and/or other customers not currently covered?

The Code should apply to all consumers within the jurisdictions where it applies. All customers in these jurisdictions should have equal access to the protection afforded by the DMO regardless of the number of other customers or the business model or technology platform through which their essential service is provided. The Code should be expanded to cover all consumers in embedded networks and all consumers with pre-payment meters. PIAC understand that demand tariffs present a range of issues and recognise that further work is needed to determine a practical and effective means of applying the DMO to demand tariff offers. While demand tariffs do not impact a significant number of consumers at this time, the rapid transformation in the electricity market indicates this will change. The review of the Code should identify ongoing work to incorporate demand tariffs in future iterations.

Is the current application of the Code to DMO jurisdictions with more than 100,000 consumers still appropriate?

PIAC does not consider the current lower-limit of coverage to be appropriate and should be removed. In principle there is no reasonable justification to exclude consumers from the protection afforded by the Code on the basis of the number of other consumers within their

jurisdiction. Consumer protections in essential services should be extended universally as a matter of principle and be applied on the basis of the potential consumer harm they are responding to. High prices for electricity services impact all consumers and have significant potential to do ongoing harm to consumers, regardless of where they reside and how large or what type of business is providing their essential service.

Are the DMO determination timeframes in the Code fit for purpose?

The DMO determination timeframes in the Code appear to be practical and have demonstrated they are fit for purpose.

Continued engagement

PIAC welcomes the opportunity to meet with DISER and other stakeholders to discuss these issues in more depth.

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