

12 March 2019

Energy Division – Electricity Retail Code
Department of the Environment and Energy
GPO Box 787
CANBERRA ACT 2601

By email: Electricitycode@environment.gov.au

Dear Energy Division,

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

1. The Competition & Consumer Committee of the Business Law Section of the Law Council of Australia (the **Committee**) appreciates the opportunity to consult on the exposure draft of the *Competition and Consumer (Industry Code – Electricity Retail) Regulations 2019 (Exposure Draft)*.
2. The Committee holds concerns about the method by which the Government proposes to introduce specific price regulation in the retail electricity industry. Although the Committee recognises community concerns about standing offer prices and price transparency, it believes that such significant intervention in the market should be implemented cautiously and not by means of a disallowable instrument without being subject to detailed consideration.

A Mandatory Industry Code

3. The Committee does not consider it appropriate that the granting of power to the Australian Energy Regulator (**AER**) to determine standing offer prices be determined by way of regulation, given the very high potential for unintended consequences.
4. The proposed regulatory approach put forth by the Exposure Draft is to regulate standing offer prices and the advertising of retail electricity offers through the introduction of a mandatory industry code, which although it can be disallowed, is not subject to parliamentary debate.
5. Whilst the Committee recognises the community concerns around standing offers and price transparency, it urges that specific price regulation in the retail electricity industry be implemented very cautiously. The Committee reinforces its concerns about the risk of specific price regulation leading to unintended consequences, as expressed in its submissions to the Electricity price monitoring and response legislative framework consultation paper, and Electricity price monitoring and response draft legislation:

... retail price regulation has the obvious potential to reduce the economic incentives for the very investments in capacity that are the primary and best longer term mechanisms for putting downward pressure on retail electricity prices. Retail price caps can also tend to dampen natural market-driven price competition by acting as a benchmark price around which retailers target

*their offers rather than making offers based on their own marginal costs ... which has the serious potential to cause unintended and counter-productive long term effects that are not necessarily in the long term interests of consumers.*¹

6. Given these risks, the Committee considers that a more extensive consultation and review process to determine the best means of regulating and determining standing offer prices is necessary to ensure that the Government's policy objectives are achieved, and potential adverse consequences are avoided. For example, the economic regulation of airports has been the subject of a number of periodic reviews by the Productivity Commission to determine the effectiveness of the regulatory regime, its impact on price and investment, and any unintended consequences. As a result of an inquiry conducted in 2002, the price regulation of airport services, which was found to negatively affect productivity and airport investment, was replaced with a price and quality of service monitoring scheme. The Committee submits that a similar level of scrutiny needs to be undertaken in relation to price regulation in the retail electricity industry.

B. AER determinations

7. Section 14 of the Exposure Draft states:

(1) The AER must, by legislative instrument, determine the following matters for a financial year in relation to supplying electricity in a distribution region to small customers of a particular type:

- (a) both of the following that the AER considers to be broadly representative, at the time it makes the determination, of the supply of electricity in that region in the year to small customers of that type:
 - (i) the per-customer amount of electricity supplied;
 - (ii) the timing or pattern of the supply (subject to subsection (2));
- (b) what the AER considers would be a reasonable per-customer annual price for supplying electricity in that region to small customers of that type in accordance with the matters determined under paragraph (a)...

Disallowance

(2) Despite subsection 44(1) of the *Legislation Act 2003*, section 42 (disallowance) of that Act applies to a determination made under subsection (1) of this section.

8. The Public Consultation Paper for the Exposure Draft notes that the Government intends to introduce legislative amendments to allow the Code to incorporate any non-disallowable legislative instruments made by the AER as in force or existing from time to time.
9. The Committee objects to this course and submits that the significant powers given to the AER to make annual price determinations should be subject to parliamentary oversight, particularly in view of the unintended consequences the determinations may have on the retail electricity industry, as discussed above.

¹ Law Council of Australia, *Submission to the Electricity price monitoring and response legislative framework*, 9 November 2018, 6.

Please contact Geoff Carter, Chair of the Competition and Consumer Committee (geoff.carter@minterellison.com or 0402 891 372) in the first instance, if you require further information or clarification.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Rebecca Maslen-Stannage', written in a cursive style.

Rebecca Maslen-Stannage
Chair, Business Law Section