

Australian Capital Territory

Utilities (Consumer Protection Code) Determination 2010

Disallowable instrument DI2010–108

made under the

Utilities Act 2000, s 59 (Determined codes) and s 63 (Public access)

EXPLANATORY STATEMENT

Purpose of Consumer Protection Code

The Consumer Protection Code is an industry code determined by the Independent Competition and Regulatory Commission (the Commission) under the *Utilities Act 2000*. The Code outlines the basic rights of customers and consumers and utilities with respect to access to, and provision of, utility services. Utilities are obliged to give effect to these rights primarily through customer contracts. The Code also deals with the general conduct of utilities (and their agents) in the delivery of utility services.

The Code applies to all utilities licensed under the Utilities Act to provide utility services to customers and consumers. It is divided into a number of parts:

- Part 1 addresses formal matters of the Code.
- Part 2 contains generic provisions that apply to all utilities, including utilities that provide services to large non-franchise customers. However, these utilities may agree with customers terms and conditions other than those specified in the Code.
- Part 3 applies only to utilities in the provision of utility services to franchise customers, that is network services and gas and electricity supply to customers on standard customer contracts.
- Part 4 applies to suppliers of electricity and gas supply services to small non-franchise customers.
- Part 5 deals with marketing of electricity and gas to franchise customers and small non-franchise customers.
- Part 6 deals with customer transfers and new supply arrangements.

The Code is enforceable under the Utilities Act. The Commission is responsible for monitoring the compliance of utilities with this and other industry codes.

Legislative provisions — industry codes

The Utilities Act provides a regulatory framework for utilities in the ACT. Section 21 of the Act provides that a person must not provide a utility service except in accordance with a licence. Licences are subject to a number of conditions with which utilities are required to comply. For example, section 25 of the Act requires all licensees to comply with:

- any requirements under the Act or a related law
- any requirements under any other Territory law that apply to the utility in relation to the provision of a utility service
- any relevant industry or technical codes, and
- any directions given by the Commission or by the chief executive under part 5 of the Act.

Provisions relating to industry codes are set out in Part 4 of the Utilities Act. An industry code ‘may set out practices, standards and other matters about the provision of a utility service’.

Section 59 of the Utilities Act provides for industry codes to be determined by the Commission. The Commission may determine an industry code if it has consulted with the Minister and the Minister responsible for technical regulation and is satisfied that the code is not inconsistent in material respects with another industry code or a technical code; and it is necessary or convenient to determine the code.

Section 60 of the Utilities Act sets out the public consultation requirements for industry codes to be followed unless the Commission satisfied that “the variation is unlikely to adversely affect anyone and would not materially alter the code”.

Under section 62 of the Utilities Act, an industry code determined under section 59 of the Act is a disallowable instrument.

Section 63 of the Utilities Act sets out a number of requirements relating to public access to industry codes.

Revocation and remaking of Code

The Disallowable Instrument revokes the Code determined by the Commission under the Utilities (Consumer Protection Code) (Industry Code) Determination 2009, DI2009-75, as notified on 18 May 2009 and determines a new Code as set out in the Attachment to the Disallowable Instrument.

The variations between the Code as determined under DI2009-75 and the new Code are set out below.

This revocation and remaking process ensures that an authorised version of the Code is available through the Legislation Register.

Consultation on variations to Code

In terms of section 60 of the Utilities Act, the Commission was satisfied that the variations set out in the new Code are unlikely to adversely affect anyone and would not materially alter the Code. As a consequence, a full public consultation process was not followed. Despite this, the Commission consulted on the variations between the new and previous Codes with a number of interested parties including all licensed electricity and gas supply utilities and the ACT Civil and Administrative Tribunal. In accordance with the requirements of the Utilities Act, the Commission consulted with the Minister and the Minister responsible for technical regulation. Issues raised during consultation are noted in the stakeholder letter published on the Commission's website.

Outline of variations to Code

The variations to the Code incorporated into the new Code are as detailed below.

New clause 32A — informed consent

Clause 32 of the Consumer Protection Code states, among other things, that “a utility must not transfer the supply of electricity or gas supply of a consumer unless the utility has the informed consent of the consumer”.

The Commission has re-examined the issue of which transfers of supply should fall within the “informed consent” requirements of clause 32. An unintended reading of clause 32 in the previous version of the Code was that it extended to situations there was a transfer of the retail electricity and gas businesses of licensed utilities to other licensed utilities. For such business sales, actual notice and informed consent would be required in all circumstances and the licensed utilities would be obliged to communicate with each customer and obtain his or her consent to the transfer.

The Commission has amended the Consumer Protection Code to exclude from the “informed consent” requirements of clause 32 the transfer of a customer's supply that forms part of the transfer to the same third party of all or substantially all of the supplier's supply business. This is given effect by the insertion of a new clause 32A. The new clause 32A also provides that affected customers be provided with certain information and assurances including an explicit cancellation right.

The previous scope of clause 32 could have produced detriments for suppliers and customers. Obtaining informed consent for each and every contract transfer associated with the transfer of the retail electricity and gas businesses of licensed utilities to other licensed utilities would add considerable cost and complexity to the process, with costs faced by suppliers being linked to the number of customers involved. Customers would face the confusion and inconvenience associated in consenting to a transfer involving no change to terms and conditions, the only substantive difference being the identity of the new supplier. More importantly, if customers could not be contacted or declined to respond, there could be risks to their continued electricity and gas supply.

The amendments in the new version of the Code have no detriments for suppliers and have considerable supplier benefits in terms of reducing costs and assuring streamlined transfers. For customers, the variation would assure continued energy

supply even if informed consent could not be obtained and would avoid inconvenience and confusion. The only possible customer detriment would be the value that a customer may place on “informed consent” and, in more concrete terms, that a customer may have an aversion to the new retailer.

This possible detriment is addressed in the new version of Code to require the provision to customers excluded from the “informed consent” provisions of certain information and assurances no later than three months after the business transfer, within the normal billing cycle. This would mandate the preservation of existing terms and conditions, require that customers be informed that they may choose not to continue with the new supply arrangements and exercise their normal right to choose a further supplier, and provide that no cancellation fees and charges would be payable in such circumstances. A timeframe of one month is provided during which customers can choose to inform the new supplier of their decision not to agree with the new supply arrangements.

Amendment of clause 32 — references to clause 31

The interpretation of the words “subject to clause 31” that qualified the consent provisions of clause 32 in the previous version of the Code was not clear. The words appeared to be the result of a consolidation of the Consumer Protection Code made in 2005 that did not reflect the variations to the Consumer Protection Code notified in 2005 (DI2005-132).

The words “subject to clause 31” are deleted in the new version of the Code to restore the wording notified in 2005. The application of clause 31 is not affected by this change. There are no detriments for suppliers or for customers.

The wording of clause 32(2) in the previous version of the Code related solely to clause 31, and so is oddly located in clause 32. The words did not reflect the variations to the Consumer Protection Code notified in 2005 (DI2005-132) which were in terms of “clause 32(1)”.

Varying to reference to “clause 31(1)” in clause 32(2) to “clause 32(1)” restores the variations notified in 2005 (DI2005-132) but does not change the rights of customers changing from a standard contract to a negotiated contract with the same retailer. There are no detriments for suppliers or for customers.

Amendment of clause 32 — references to “customers” and “consumers”

The definitions of “consumers” and “customers” in the Consumer Protection Code are the same as those in the Utilities Act. “Customers” includes potential customers. “Consumers” includes all customers and also occupiers/invitees of the customer’s premises.

The drafting of clause 32 in terms of “consumers” in previous versions of the Code did not align with the drafting employed in clause 31 and was not correct. It could be taken to imply that a consumer who was not also a customer or a potential customer would have the authority to give informed consent and so agree to a transfer. This, of course, cannot be the case.

All references to “consumers” in clause 32 have been amended to “customers” in the new version of the Code. There are no detriments for suppliers or consumers in redrafting clause 32 to refer to “customers”.

Amendment of Code amendment history

The Consumer Protection Code was first determined on 21 December 2000, under the Utilities (Industry Codes) Determination 2000 (DI2000-368). The Code has been varied or revoked and re-determined by number of instruments that are summarized at Schedule 2 of the Code.

The new version of the Code varies the amendment schedule to the Consumer Protection Code (Schedule 2) to take account of DI 2002-204, variations of the Code originally notified that were made in 2002.

Public access to the Code

Copies of the Code are available for inspection during ordinary office hours from the Commission, Level 2, 12 Moore Street, Canberra City ACT 2601. They are also available on the Commission’s website at www.icrc.act.gov.au. Electronic copies are available on request. No charge will apply.