ACT Government
Chief Minister, Treasury and Economic Development

Modernising the ACT's utility and energy retailer laws

Consultation Paper

Chief Minister, Treasury and Economic Development Directorate

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Updated version with amended Table 3.2 published November 2023

Table 3.2 was amended to:

1. Omit incidences of non-compliance with guaranteed service levels where exemptions from paying the rebate were granted.
    a. This includes 1,906 instances in 2020-21 where COVID-19 protocols and the January 2020 hailstorm prevented timely connections and 498 instances in 2021-22 due to customers rescheduling appointments.
2. Correct the number of instances of non-compliance with guaranteed service levels for gas in 2020-21.

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Definitions / Acronyms

A number of terms are used throughout this paper. To ensure consistency in the meaning of each term, definitions are provided below.

ACCC	Australian Competition & Consumer Commission
AER	Australian Energy Regulator
CMTEDD	Chief Minister, Treasury and Economic Development Directorate
DPP	The Office of the Director for Public Prosecutions
ICRC	Independent Competition and Regulatory Commission
ULAR	Utility Licensing Annual Report

1. Introduction

This Consultation Paper seeks views on the proposed modernisation of the enforcement capabilities of the Independent Competition and Regulatory Commission (the ICRC), to provide it with comparable powers to other economic regulators of electricity, gas and water utility providers and energy retailers.

The ICRC enforces compliance with laws governing utility providers to ensure the service levels that Canberrans expect for essential services are met for electricity, gas and water through the *Consumer Protection Code 2020* (Consumer Protection Code). The ICRC also ensures licensed utilities and National Energy Retail Law (NERL) retailers in the ACT are transparent in their marketing of price offerings, through the *ACT Retail Electricity (Transparency and Comparability) Code 2020* (Transparency and Comparability Code). A NERL retailer refers to a retailer that has obtained a retailer authorisation from the AER, which allows them to engage in the selling of energy (electricity or gas) under the NERL.

The obligation to provide guaranteed service levels is contained in the Consumer Protection Code and requires utilities and energy retailers to pay affected customers for failing to meet the guaranteed service levels. In practice, this means that new connections must be provided in a reasonable time, unplanned interruptions to supply must not exceed 12 hours and customers are notified at least 4 business days in advance of any planned service interruptions.

Failures to meet the guaranteed service levels by the utility providers can result in negative outcomes for consumers. For example, delays in providing new electricity connections can cause significant discomfort and interruption to the life of customers, such as inability to source heating in a cold winter.

Further, NERL retailers are obliged to provide clear, timely and reliable information to assist customers to make it easier for consumers to compare offers. A failure by retailers to comply with this obligation (e.g. not appropriately communicating the electricity reference price in advertising) can limit consumers' ability to save money on their energy bills and lessen price competition in the market.

The ICRC has continued to identify ongoing instances of non-compliance for connection, supply reliability, notifications for service interruption and disconnection rights. More recently, the ICRC has received increasing levels of complaints by customers in relation to utility providers not meeting guaranteed service level requirements. As a result, the ICRC has asked the Government to consider modernising the regulatory framework so that it can better protect the interests of consumers into the future.

Most Australian jurisdictions provide scope for utility providers' obligations to be enforced through civil enforcement powers. This allows, for example, infringement notices to be issued to utilities who have not met their conduct obligations. Further, it allows for entities to give – and to be held to – an undertaking to address a problem.

In contrast, the regulatory powers in the ACT's Utilities Act only enable the ICRC to encourage voluntary compliance by a utility provider, or to consider the viability of a criminal prosecution by the Director of Public Prosecutions (DPP).

Chief Minister, Treasury and Economic Development Directorate (CMTEDD), welcomes contributions from the community and regulated entities on the key issues and questions set out in this Consultation Paper.

2. Key information

Key Dates

Release of Consultation Paper:	27 September 2023
Submissions due by:	25 October 2023

Contacts

For further information please contact:	Mr Nathan Brown (02) 6207 3531
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How to make a submission

Interested parties are encouraged to make a written submission and preferably provide it electronically through the submission form on YourSay. Alternatively, submissions can be sent to:

Modernising the ACT's utility and energy retailer laws
C/- Mr Nathan Brown
Economic and Financial Group
Chief Minister, Treasury and Economic Development Directorate
GPO Box 158
CANBERRA CITY ACT 2601

Submissions do not need to address all issues and questions outlined in the Consultation Paper, and while those considering making a submission are encouraged to provide evidence in support of their views, submissions do not need to be detailed documents.

If confidential information is included in a submission it must be clearly marked "CONFIDENTIAL" either in part or in full, with the reasons included. Where material is only confidential in part, a separate submission should also be provided with the confidential material removed.

All written submissions received will be published on the YourSay website after the removal of any contact details (such as email addresses) and content highlighted as confidential.

However, it should be noted that the documents are subject to the *Freedom of Information Act 2016* (ACT). While we respect the wishes of those making submissions "in confidence" to the extent possible under the Act, the application of the Act in any particular case is ultimately outside our control. Those wishing to make a submission in confidence are asked to contact the contact officer before doing so.

We will consider all submissions submitted by **25 October 2023**.

3. Background

The ICRC is the independent economic regulator of energy and water services in the Australian Capital Territory (ACT). It facilitates better energy and water service delivery and competition for the benefit of Canberra's consumers through ensuring fair prices to Canberrans for electricity and water. Further, it is also responsible, through the Utilities Act, for ensuring utilities and energy retailers meet guaranteed service level requirements and are transparent in their marketing of price offerings.

The Utilities Act is the main vehicle for the ACT Government in driving change in the utility and energy retailer sectors. Under the Act, industry codes play an important role by:

- providing stronger consumer protections;
- improving choice to encourage reliable and affordable energy outcomes;
- providing consumers clear information about the prices and services available; and
- encouraging smarter use of energy.

Non-compliance with industry codes reduces the quality of services received by consumers and their ability to manage cost of living pressures.

This Consultation Paper seeks feedback on the desirability of whether additional enforcement powers, equivalent to regulators in other jurisdictions, should be available to the ICRC.

Regulating utilities and energy retailers

Who is regulated under the Utilities Act?

Electricity, gas, water and sewerage utilities and energy retailers are required to comply with industry codes made under the Utilities Act.

This includes utilities such as:

- Evoenergy, who provide the wholesale electricity and gas network which retailers use to supply consumers,
- Icon Water, who provide the network infrastructure and retail of water and sewerage services, and
- gas and electricity retailers.

What are the current obligations of energy and water utilities?

The Consumer Protection Code applies to energy and water utilities in the ACT. It outlines the basic rights of customers, consumers and utilities with respect to access to, and provision of, utility services. The Code also requires utilities and energy retailers to meet guaranteed service level requirements to ACT customers.

These standards give utilities strong incentives to improve and uphold their performance and ensure consumers are not made worse off when they are affected by poor utility services. If a regulated entity does not meet these standards, the entity must then pay a rebate to the customer in recognition that the service they receive was below the required standard.

The Transparency and Comparability Code requires electricity retailers to advertise their energy plans against a reference price and to provide a consumer with clear advice about the best plan for them. These obligations help consumers to save money on their utility bills and facilitate greater competition in the market.

Utilities must also meet the conditions of their licence, such as to ensure the water pressure in the system allows firefighters to have the water pressure necessary to address fires and similarly for gas, sufficient pressure maintained to allow the function of the network.

What happens when obligations are not met?

Self-reporting

Utilities and energy retailers are required to self-report compliance with the codes and/or licence conditions to the ICRC. The ICRC publishes a Utility Licensing Annual Report (ULAR) monitoring report and energy retailer compliance report. These reports detail the compliance of utilities and energy retailers against their respective obligations, payment of customer rebates, and enforcement actions taken by the ICRC in response to the non-compliance.

While most consumers are unlikely to have issues with the provision of guaranteed service level requirements, there have been higher than normal non-compliance with service levels in relation to electricity in recent years.

Table 3.2 Incidences of non-compliance with guaranteed service levels (Consumer Protection Code)

	2017-18	2018-19	2019-20	2020-21	2021-22
Water and Sewerage	771	1,038	649	294	543
Electricity	234	812	696	1,220	1,684
Gas	256	410	1	2	2
Energy Retailers	-	-	-	275	269

When a utility does not meet its guaranteed service level obligations it needs to pay a rebate to the customer. This mechanism is meant to be largely self-enforcing. However, the levels of non-compliance with guaranteed service levels raise the issue of whether additional regulatory measures may be appropriate noting that currently, the options to address these issues are based on a criminal law enforcement stream.

Options to ensure compliance

Consistent with the approach of other risk-based regulators, the ICRC engages with utilities and retailers with the aim of ensuring that less serious contraventions of the law are rectified without the need to rely on formal enforcement powers.

Box 3.1 provides two examples where the ICRC attempted resolve non-compliance issues of utilities using informal enforcement strategies.

Box 3.1 Examples of ICRC's informal enforcement strategies

Example 1: Greenpower advertising

Under the Utilities Act, energy retailers operating in the ACT must have a greenpower product available for customers to purchase. In choosing a greenpower product, an average customer incurs $160 to $340 in additional fees per year to an annual power bill.

In checking retailer websites, the ICRC has found that retailers have not been disclosing that the ACT has already achieved its target of 100 per cent renewable electricity target and that customers are already contributing to the costs of maintaining this target through their energy bills.

The *Utilities (ACT Retail Electricity – Transparency and Comparability Code) Determination 2020* notes that customers are entitled to receive clear, timely, and reliable information, to assist in addressing the suitability of a retail electricity contract.

In response, the ICRC has written to retailers operating in the ACT to remind them of their responsibilities under the Code with respect to this issue.

Example 2: Guaranteed service level

In 2020-21, instances of guaranteed service level not being met and rebates not being paid promptly by utilities increased significantly.

In these circumstances, the ICRC has been leveraging its informal enforcement strategies to engage with the utilities to solve the issue, such as via informal meetings, and by seeking explanatory information and agreement to action plans.

The ICRC seeks to address failures to meet guaranteed service level obligations, such as to make new electricity connections and restore power connections in timely way, through informal enforcement mechanisms, such as:

- providing oral and written guidance;
- meeting with regulated entities; and
- requesting regulated entities take action to remedy non-compliance.

However, if that approach does not bring about compliance, or the conduct is more serious, the Utilities Act provides scope for criminal prosecutions, which are undertaken by the Director of Public Prosecutions (DPP) in the Supreme Court.

For a breach of a licence condition or contravening an industry code by a utility, the Court may suspend or revoke the licence and additionally may impose a maximum fine of $2,430,000 (3000 penalty units), and if the contravention continues, up to $486,000 (600 penalty units) for each day the utility continues to be in breach;[1]

For a contravention of an industry code by a retailer, the Court may impose a maximum fine of $2,430,000 (3000 penalty units), and if the contravention continues, up to $486,000 (600 penalty units) for each day the retailer continues to be in breach.

No criminal prosecutions have been initiated under the Utilities Act.

The ICRC can also issue a written direction to a utility provider or energy retailer after a period of consultation with the entity. However, this power has not been exercised as it effectively requires a criminal prosecution to be ready to be instituted before the direction is issued. This is unsuitable to address small to medium level contraventions.

- This practical limitation arises as the ICRC must have evidence to sustain a criminal prosecution (i.e. beyond reasonable doubt). Once the direction is issued, the entity can refuse to comply. At that point, the DPP would need to undertake a prosecution for alleged contravention which the direction sought to correct.
- The Court may impose a maximum fine of $1,620,000 (2,000 penalty units) for failure to comply with a lawful direction of the ICRC.

Consultation question 1: About the existing regulatory regime

- Are the ICRC's current enforcement powers appropriate?

Cross-jurisdictional approaches to compliance

The ACT is the only jurisdiction in Australia that does not provide a pathway for civil enforcement of obligations on utilities and energy retailers. Most jurisdictions provide both civil and criminal streams, with criminal sanctions available for the most serious breaches of the law.

The ICRC and Australian Energy Regulator (AER) have overlapping jurisdiction in relation to some conduct obligations of electricity and gas providers in the ACT.

When the interstate counterparts to the ICRC or the AER use their formal enforcement powers, they typically seek and obtain court enforceable undertakings and issue

[1] The Utilities Act 2000 sets out the maximum fines that can be imposed by a court in a criminal prosecution in "penalty units". A penalty unit for a corporation is presently $810.

infringement notices that are available as civil enforcement powers, rather than seeking criminal prosecutions.

Other jurisdictions have moved to this model to assist industry regulators to provide better outcomes for customers of utility providers and energy retailers. Queensland recently amended its laws governing utility providers and energy retailers to ensure its regulator had equivalent enforcement powers and civil sanctions as the AER.

The ICRC has less capacity to secure compliance with obligations by utilities than interstate counterparts or the AER, who have a modern suite of powers to allow a gradated approach to securing compliance, spanning from low, mid-level and high-level non-compliance.

The gap in the ICRC's regulatory toolkit is further evidenced by the fact that Icon Water, the ACT's water and sewerage utility, can issue infringement notices when its customers fail to comply with water conservation measures. However, the ICRC cannot issue an infringement notice to utilities should they fail to meet guaranteed service level requirements.

The table below summarises the utility and energy regulatory powers in other jurisdictions.

Table 3.3 Summary of utility and energy regulators' powers in Australian jurisdictions

Enforcement Power	ICRC	NSW	Victoria	QLD	Tasmania	SA	WA	AER
Infringement notices	✗	✓	✓	✓	✓	✓	✓	✓
Enforceable undertakings	✗	✓	✓	✓	✗	✓	✗	✓
Civil pecuniary penalties	✗	✓	✓	✓	✓	✓	✓	✓

Consultation questions 2: Benchmarking approaches from other Australian jurisdictions

- How could the ICRC's enforcement powers be improved to deliver better outcomes for consumers?

4. The proposed changes under consideration

While the ICRC has successfully utilised informal enforcement to respond to a number of breaches of the law, **Table 3.2** indicates that overall compliance remains an issue. Some complaints in relation to general service level obligations have not been able to be resolved in a timely way under the present system where criminal prosecutions are the only available path to address matters that cannot be resolved with the utility or energy retailer.

The regulatory approaches of other Australian jurisdictions indicate that the ACT could improve its regulation of utilities and energy retailers by introducing greater regulatory enforcement options.

The ACT Government is considering an update of the commission's regulatory enforcement capacity. This update would align with other Australian jurisdictions and provide the commission with regulatory tools better suited to current and emerging issues.

The following enforcement avenues are being considered:

- power to accept enforceable undertakings from utilities and energy retailers;
- power to an issue infringement notice;
- updating the Utilities Act to include civil law remedies and civil pecuniary penalties that bring parity to sanctions in the ACT as comparable jurisdictions, while maintaining criminal law sanctions; and
- increasing the level of criminal fines to equal the level of civil pecuniary penalties, understanding that a finding of a criminal liability, where an offence is established beyond reasonable doubt, an individuals may be imprisoned, would be reserved for the most serious contraventions.

Should such a regime be available, the ICRC would look to exercise its enforcement discretion having regards to the likely impact of the alleged non-compliance and the entity's attitude towards compliance. Such an approach to compliance is taken by other regulators, as illustrated in the figure below.

Figure 1 Regulation action pyramid



Source: Queensland Government - Compliance program | Your rights, crime and the law | Queensland Government (www.qld.gov.au)

The lower sections of the pyramid, for initial actions and for lower-level contraventions, currently exists for the ICRC. So does the highest escalatory action, criminal proceedings.

The ACT Government is considering additional options to fill the current gap to address intermediate contraventions and lower-level contraventions that are not remedied by lower-level enforcement actions.

The more serious the contravention or the circumstances that surround it, the higher up the regulation action pyramid that the resulting enforcement action is based, for example:

- Where there is a minor case of non-compliance or a first-time breach the commission could continue to address it through education and guidance.
- If a matter involved a more significant impact on consumers, or the business had not given attention to compliance, then the commission could consider the issue of an infringement notice.
- If there is a pattern of non-compliance or if ongoing changes to business practices are required, the commission could engage the business to voluntarily agree to an enforceable undertaking to demonstrate its commitment to addressing the issue.
- In the case of serious non-compliance, the commission could consider taking civil law action such as monetary penalties or court ordered corrective action.
- Where there was deliberate or wilful non-compliance, the existing criminal enforcement could be pursued. This could include, when dealing with a licenced utility, suspension of its licence

If the ACT Government proceeds with providing these additional enforcement options, the ICRC would develop guidance advising regulated entities and the public on how it would exercise its powers.

Enforceable undertaking

An enforceable undertaking mitigates the risk of a future breach by having the business undertake to act in a certain way in the future, or to provide consumer redress to address the problem.

A business cannot be compelled to offer an undertaking. That is not its purpose. Rather, it operates where a business wishes to address non-compliance by providing significant flexibility to quickly and fully address mid-level breaches of the law, than proceeding to court. Further, once the undertaking is provided, the entity can be compelled by a Court to honour its commitment.

How the enforceable undertaking capacity might work in practice:

- The Victorian counterpart to the ICRC, the Essential Services Commission accepted a court enforceable undertaking from Simply Energy following the alleged transfer of gas and electricity customers to new plans without any contact to obtain explicit informed consent. Simply Energy agreed to ensure its agents were trained to obtain explicit informed consent from its customers before switching them over to a different energy plan.

- Similar obligations exist in the ACT under the Transparency and Comparability Code, where NERL retailers are required to give customers clear and useful information to help them understand and compare energy plans before signing a new contract. The availability of court enforceable undertakings in the ACT would assist the ICRC to ensure energy retailers in the ACT take appropriate steps to identify the cause of the issue and address it.

Utilities already have a financial incentive to meet the guaranteed service level requirements, through rebates payable under the Consumer Protection Code. However, if this is not sufficient to drive improvement in service delivery, the ICRC through enforceable undertakings would have the capacity to get utilities to look at their performance over time and to undertake additional actions that would ensure improvements to compliance rates.

Consultation question 3: Proposed enforcement powers – court enforceable undertakings

- Should the ICRC be able to seek court enforceable undertakings from a utility or energy retailer?
    - If yes, what matters need to be considered in developing this power?

Infringement notices

The ability to issue an infringement notice would authorise the ICRC to issue a financial penalty on a regulated entity when there was a reasonable belief the entity had not complied with the law. This mechanism is commonly used by other regulators to address lesser breaches of conduct obligations, and provides the potential for speedier resolution of matters than action through the Courts.

An infringement notice power would provide for the ICRC to issue a penalty notice to the regulated entity. The notice would set out the alleged contravention and the facts or evidence relied upon by the commission in issuing the notice. The regulated entity then would have the option to pay the infringement notice amount without admission.

Alternatively, the entity could choose not to pay the infringement notice penalty, at which point the ICRC would have the choice to initiate civil proceedings. The Court would need to consider whether there was a breach of the law, and if the contravention was proven, the maximum sanction available to the Court would be substantially greater than the amount of penalty under the infringement notice.

However, noting the role of infringement notices to deal with low to mid-level breaches, if the regulated entity chooses to pay the financial penalty set out in the infringement notice, it would not be possible to commence court proceedings for the alleged contravention.

How the infringement notice might work in practice:

- Utility provider A has a licence condition to keep records to enable them to meet their reporting requirements, such as to notify the ICRC of failure to meet guaranteed service level requirements. This information then ensures rebates can be provided to customers affected by the failure to meet service level requirements.
- While this obligation is important, it is unlikely to be desirable to take up the resources of the criminal justice system to seek a sanction for failure to comply with the obligation. An infringement notice would allow the issue to be addressed quickly and any repetition could invite consideration of stronger enforcement action.

Noting the AER and the ICRC enforce similar obligations, the ACT would look to ensure there is parity in the financial sanction from an infringement notice for comparable conduct.

Consultation question 4: Proposed enforcement powers – infringement notices

- Should the ICRC be able to issue infringement notices to a utility or energy retailer?
    - If yes, should the level of infringement notice penalties be the same as those available to the AER for comparable conduct?
    - What matters need to be considered in developing an infringement notice power?

Civil pecuniary penalties and injunctions

The ACT Government is also considering whether the ICRC should be able to seek civil pecuniary penalties, from a Court, as is possible in other jurisdictions.

Comparable obligations as those contained in the Utilities Act can, if established by the AER, result in maximum court awarded civil pecuniary penalties of around $10 million for companies.

As noted previously, there is likely a benefit in the same type of conduct attracting the same type of sanction, such that the entity has the same incentive to comply with ACT obligations as Commonwealth obligations.

For example, since 2014 Queensland has had provisions that allow a nominated regulator to have the same compliance, investigating or enforcement powers in relation to the modified sections of the National Energy Retail Law (Queensland) as the AER has in compliance, investigation or enforcement provisions.

The ACT Government is also considering the option for the ICRC to seek a court order to compel a regulated entity to either perform an action or to refrain from performing an action. The ability to obtain injunctions from the Court in civil proceedings, either as a final outcome, or as a temporary order to protect the positions of the parties while the matter is being decided by the court, is well established in like jurisdictions.

Any change in the level of pecuniary penalties or fines payable by a regulated entity may give rise to concern that those costs are passed through to customers. Existing laws and guidelines operate to ensure that only the prudent and efficient costs of the utility are recoverable. While these are likely to prevent regulated utilities passing on costs of fines to consumers, feedback is sought on whether any amendment is required to ensure this remains the case in any new framework.

Consultation question 5: Proposed enforcement powers – court awarded penalties and injunctions

- Should court awarded civil pecuniary penalties and injunctions be introduced for contraventions of the Utilities Act?
    - If yes, should the level of civil pecuniary penalties that can be awarded by a Court in the ACT be equivalent to penalties that can be issued by the AER?
    - If equivalent penalties become available in the ACT, should the level of criminal fines also be lifted accordingly?

Consultation questions 6 to 8: Other changes?

- Are existing mechanisms to prevent regulated utilities passing on costs of fines to consumers sufficient?
- Are there other changes to the existing regulatory framework of the Utilities Act that you would suggest to improve outcomes for consumers?
- Are there any transitional issues that need to be addressed?

5. Consultation questions

The existing utility licensing regime

1. Are the ICRC's current enforcement powers appropriate?

Proposed changes

2. How could the ICRC's enforcement powers be improved to deliver better outcomes for consumers?

Court enforceable undertakings

3. Should the ICRC be able to seek court enforceable undertakings from a utility or energy retailer?
    a. If yes, what matters need to be considered in developing this power?

Infringement notices

4. Should the ICRC be able to issue infringement notices to a utility or energy retailer?
    a. If yes, should the level of infringement notice penalties be the same as those available to the AER for comparable conduct?
    b. What matters need to be considered in developing an infringement notice power?

Court awarded penalties and injunctions

5. Should court awarded civil pecuniary penalties and injunctions be introduced for contraventions of the Utilities Act?
    a. If yes, should the level of civil pecuniary penalties that can be awarded by a Court in the ACT be equivalent to penalties that can be issued by the AER?
    b. If equivalent penalties become available in the ACT, should the level of criminal fines also be lifted accordingly?

Other changes?

6. Are existing mechanisms to prevent regulated utilities passing on costs of fines to consumers sufficient?

7. Are there other changes to the existing regulatory framework of the Utilities Act that you would suggest to improve outcomes for consumers?

8. Are there any transitional issues that need to be addressed?