

# Saves and Win-backs Code Amendment

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## Decision Paper

18 February 2020



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# 1 We have decided to prohibit win-backs for 180 days when a consumer switches retailer

- 1.1 The Electricity Authority (Authority) has decided to amend part 11 of the Electricity Industry Participation Code (Code).
- 1.2 The key elements of the amendment include:
  - (a) expanding the saves protection scheme to all retailers (rather than having retailers 'opt-in')
  - (b) prohibiting a losing retailer from targeted marketing to a customer that has switched to another retailer (the gaining retailer) for a 180 day 'switch protected period'<sup>1</sup>
  - (c) specifying limited circumstances in which a losing retailer may contact a previous customer
  - (d) prohibiting a losing retailer from using a switching customer's information during the switch protected period to attempt a win-back or to facilitate a switch by a retailer other than the gaining retailer
  - (e) requiring retailers to provide customers with accurate information as part of the switching process and adhere to high standards of behaviour ('good conduct'), applying the amendment to all retailers
  - (f) applying the amendment to all household and business switches.
- 1.3 The Code amendment does not restrict consumers from initiating contact with the losing retailer or any other retailer: the amendment focuses on the behaviour of the losing retailer. Consumers should talk to their retailer and use the Powerswitch website to shop for the best available electricity plans and pricing.<sup>2</sup>
- 1.4 We expect the amendment to:
  - (a) increase competitive pressure on retailers
  - (b) increase innovation
  - (c) increase customer acquisition efforts by retailers and price and retailer search by consumers
  - (d) reduce retail margins, and
  - (e) reduce information asymmetries between retailers and consumers, and between retailers and their competitors.

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<sup>1</sup> We use the terms 'losing retailer' and 'gaining retailer' to mean, respectively, the retailer that a consumer formerly contracted with and the retailer that the consumer intends (or has begun) to contract with.

<sup>2</sup> See [www.powerswitch.org.nz](http://www.powerswitch.org.nz).

## 2 Background

- 2.1 On 5 November 2019, the Authority published the consultation paper, *Saves and Win-backs Code Amendment*.<sup>3</sup> We consulted on a proposal to amend the Code governing customer switches between retailers. The proposed amendment included the key elements noted in 1.2 above.
- 2.2 In 2015 the Electricity Industry Participation Code was amended with the introduction of a saves protection scheme. The scheme was intended to prevent a losing retailer from exploiting information about an impending customer switch to attempt to retain the customer prior to the completion of the switch (a 'save').
- 2.3 The saves protection scheme did not prevent a losing retailer from attempting to win back a customer after the registry switch process had been formally completed (a 'win-back'). Switch speeds increased after the saves protection scheme was introduced, enabling retailers to substitute win-backs shortly after a switch for prohibited saves.
- 2.4 The increase in switching speeds diminished the effectiveness of the saves protection scheme in supporting retail competition. Existing retailers could use win-backs to discourage customer acquisition activity by competitors, and so reduce retail competition generally and stifle the growth of small and new entrant retailers. A reduction in competition is likely to reduce innovation, increase retail price margins, and increase information asymmetries between retailers and consumers and retailers and their competitors. These effects are to the long-run detriment of consumers.
- 2.5 The Authority commissioned the Market Design Advisory Group (MDAG) to investigate whether problems with the customer acquisition process result in an 'uneven playing field' for acquiring retailers, affecting the durability of the retail electricity market. Under its terms of reference MDAG focused on regulatory problems and market failures.
- 2.6 Following a consultation process, MDAG completed a report on saves and win-backs in March 2019. MDAG concluded there was no strong rationale for regulating saves and win-backs to promote greater transparency in retail pricing. Instead, MDAG recommended that the Authority should monitor saves and win-back practices and their implications for prices and consumers.<sup>4</sup>
- 2.7 The MDAG review noted that the retail market is highly concentrated and there are recurring concerns that saves and win-backs perpetuate this concentration. MDAG also noted that there appears to be an upward trend in the use of saves and win-backs and win-back discounts reduce the transparency of electricity prices, which could affect the rates at which consumers shop around.
- 2.8 During 2018-2019 the Electricity Price Review (EPR) explored issues around win-backs and concluded that they should be prohibited.<sup>5</sup> The Government agreed with this recommendation.<sup>6</sup>

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<sup>3</sup> See <https://www.ea.govt.nz/dmsdocument/25988-saves-and-win-backs-code-amendment-consultation-paper-2019>.

<sup>4</sup> MDAG's recommendations can be found here: <https://www.ea.govt.nz/dmsdocument/25084-mdag-saves-and-win-backs-recomendations-paper>.

<sup>5</sup> See <https://www.mbie.govt.nz/assets/42ac93a510/electricity-price-review-options-paper.pdf>.

<sup>6</sup> The Government's response to the Electricity Price Review is documented in the 3 October 2019 Cabinet paper: *Electricity Price Review: Government Response to Final Report*. <https://www.mbie.govt.nz/assets/electricity-price-review-government-response-to-final-report.pdf>.

- 2.9 In their submission to the EPR, the Commerce Commission observed that “[a] competition concern could arise where the use of win-back discounts result in customer foreclosure and raising [sic] rivals’ costs – increasing the costs of customer acquisition and making it more difficult to achieve minimum efficient scale. This, in turn, means there is potentially less competitive pressure on incumbent retailers and higher prices in the future.”<sup>7</sup> However, the Commerce Commission cautioned that if retailers were forced to make discounts available to all customers, they may not be offered at all.
- 2.10 The Authority’s judgement is that it will be for the long-term benefit of consumers to prohibit retailer-initiated win-backs to support competition in the retail electricity market.
- 2.11 The Authority’s decision differs from the recommendations provided by the independent Market Design Advisory Group. MDAG acknowledged that it is difficult to draw robust conclusions about whether saves and win-backs are problematic. The Authority has decided to proceed in a different direction, taking into consideration submitter feedback and the additional information provided to the Electricity Price Review that was not available to MDAG.
- 2.12 The Authority has attached greater weight than the MDAG review to concerns about market concentration, the need to support ongoing retail competition, and to inefficiencies that arise from information asymmetries between consumers and retailers and between retailers and their competitors. The Authority acknowledges the considered and valuable work of MDAG, which helped the Authority to evaluate the rules governing switching behaviour.
- 2.13 More information about the background of the saves and win-backs project is available on our website at: <https://www.ea.govt.nz/development/work-programme/consumer-choice-competition/saves-and-win-backs/>.

### 3 The amendment promotes our statutory objective

- 3.1 The Authority’s statutory objective is to promote competition in, reliable supply by, and the efficient operation of, the electricity industry for the long-term benefit of consumers.

#### **The amendment promotes competition and efficiency**

- 3.2 After reviewing all submissions on the Code amendment proposal, the Authority considers the final Code amendment will support competition and deliver long-term benefits to consumers, as set out below.
- 3.3 The Code amendment is expected to improve the competitive position of gaining retailers relative to losing retailers by increasing the likelihood that a gaining retailer will successfully retain a customer that has been convinced to switch. The amendment makes it harder for retailers to protect existing customer relationships from their competitors. The change in win-back rules limits the ability of incumbents to use saves and win-backs to create barriers to entry and expansion by small and new firms.
- 3.4 Protection from win-backs should make it easier for small and entrant retailers to increase in size, helping them to reach minimum efficient scale, and thereby increasing competitive pressure on existing retailers, now and in future. Higher customer-retention probabilities for gaining retailers increase the incentive to advertise and make other

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<sup>7</sup> See <https://www.mbie.govt.nz/dmsdocument/4149-commerce-commission-electricity-price-review-first-report-submission>.

efforts to acquire consumers, and reduce information asymmetries between retailers and customers.

- 3.5 The Authority now considers that protecting consumers only from saves does not provide retailers with enough of an opportunity to recoup acquisition costs. The Authority limited the 2015 switch save protection scheme to saves because it then considered that gaining retailers could make use of contractual mechanisms to protect themselves from win-backs. The prevalence of win-backs in the wake of that scheme's introduction and submissions from retailers and others has caused the Authority to reconsider the availability and efficacy of contractual protections. Consequently, the Authority has decided to prohibit retailer-initiated win-backs for a period of 180 days.
- 3.6 Increased competition should reduce retail margins and, other things equal, result in lower prices for consumers. Rebalancing the competitive position of gaining and losing retailers is also expected to improve the flow of information between consumers and retailers (and vice-versa) and result in dynamic competitive benefits by reducing market concentration and increasing innovation.
- 3.7 Increased customer acquisition by retailers and increased price-search by consumers should enable consumers to make better decisions about their retailers and pricing plans. More customer contact is expected to enable gaining retailers to target their offers more effectively by taking customer characteristics into account.
- 3.8 Incumbent and new entrant retailers are both expected to respond to increased competition by developing new product offerings and finding new ways to reduce costs, which will increase the efficiency of the retail sector. These efficiency gains in costs are also expected to pass through to the prices faced by consumers.

### **The amendment has no effect on the reliability of supply**

- 3.9 The Authority does not expect the Code amendment to affect the reliability of supply. The Code amendment modifies rules that govern how retailers can compete for switching customers. The generation, transmission, and distribution of electricity are unaffected.

### **The benefits of the proposal are greater than the costs**

- 3.10 The Authority has assessed the economic benefits and costs of the amendment and expects it to deliver a net economic benefit.
- 3.11 The amendment is expected to
- increase retail competition
  - reduce retail margins
  - increase innovation
  - increase customer acquisition by retailers and price-search by consumers
  - reduce information asymmetries between losing and gaining retailers about the consumers they are seeking to serve.
- 3.12 The Authority will incur costs to implement the Code changes and provide reports that facilitate monitoring of the new Code requirements. Retailers will also face implementation costs as they adapt their internal process to ensure compliance with the new rules.

- 3.13 Retailers will incur ongoing costs to ensure that they comply with the regulations and the Authority will face ongoing costs associated with monitoring and enforcing the provisions. Switching consumers will no longer receive the same array of product offerings from losing retailers, unless consumers actively request them. Under the Code amendment losing retailers are only *temporarily* prohibited from initiating such offers, during the switch protected period of 180 days. Retailers may also undertake general marketing campaigns, providing information to all consumers.
- 3.14 Section 4 of the consultation paper dated 5 November 2019 describes the costs and benefits of the proposal in more detail.

### **The amendment is consistent with regulatory requirements**

- 3.15 The Code amendment is consistent with the requirements of section 32(1) of the Electricity Industry Act 2010.
- 3.16 The amendment is also consistent with the Authority's Code amendment principles: it is lawful and it will improve the competitiveness and efficiency of the electricity industry for the long-term benefit of consumers. The Authority has identified an efficiency gain and has used a cost benefit analysis to assess long-term net benefits for consumers. See the consultation paper for more details.

## **4 The Authority considered the following matters in making this decision**

- 4.1 We received submissions on our November 2019 consultation paper from the 16 parties listed in Table 1. Submissions are available on our website at: <https://www.ea.govt.nz/development/work-programme/consumer-choice-competition/saves-and-win-backs/consultation/#c18250>.
- 4.2 A summary of submissions has been collated, which can be found on the saves and win-backs web-page: <https://www.ea.govt.nz/development/work-programme/consumer-choice-competition/saves-and-win-backs/>.

**Table 1: List of submitters**

<b>Submitter</b>	<b>Category</b>
Contact Energy	Large retailer with >200,00 installation control points
Ecotricity	Small retailer with <100,000 installation control points
Electric Kiwi	Small retailer with <100,000 installation control points
energyclubnz	Small retailer with <100,000 installation control points
Flick Electric	Small retailer with <100,000 installation control points
Genesis Energy	Large retailer with >200,00 installation control points
Mercury	Large retailer with >200,00 installation control points
Meridian Energy & Powershop	Large retailer with >200,00 installation control points
Nova Energy	Small retailer with <100,00 installation control points
One Big Switch	Customer aggregator
OurPower	Small retailer with <100,00 installation control points
Paua to the People	Small retailer with <100,00 installation control points
Pulse Energy	Small retailer with <100,00 installation control points
Trustpower	Large retailer with >200,00 installation control points
Vector	Distributor
Vocus Communications	Small retailer with <100,000 installation control points

4.3 Eleven submitters were in favour of the proposed Code amendment, although many had suggestions about how the proposal might be improved. Three submitters were opposed to the proposal and two more submitters were uncertain whether the proposal would achieve the intended objectives.

4.4 Issues raised by submitters fell into 8 categories:

- (a) the costs and benefits of the proposal
- (b) the length of the win-back prohibition period
- (c) the use of customer information by losing retailers
- (d) 'good conduct' obligations
- (e) specific regulatory design issues, such as
  - (i) the application of the regulations to retailers or traders



- (ii) the application of the regulations to all/some classes of consumers
- (iii) conditional termination rules for win-back protection
- (f) monitoring, enforcement, and post-implementation review
- (g) director attestation with respect to compliance
- (h) miscellaneous other suggestions.

4.5 Each of these issues is discussed below.

## **(a) The costs and benefits of the proposal**

### **Submitters' views**

- 4.6 A number of submitters suggested that the 'two tier market' and 'loyalty taxes' paid by non-switching consumers provide ample justification for a revision to the regulations governing win-backs. Referencing calculations by the Electricity Price Review Panel, it was suggested that retail customers would save about \$240 per year on average if they moved to the cheapest electricity pricing plans. Aggregating these numbers, Electric Kiwi suggested that consumers pay 'loyalty taxes' of \$500 million per year.<sup>8</sup>
- 4.7 A number of submitters, such as Mercury and Meridian/Powershop, argued that the costs and benefits of the proposal are difficult to quantify, and made suggestions about monitoring and review. We take up these suggestions in our discussion of monitoring and enforcement (see (f) below).
- 4.8 Other submitters, such as Vocus Communications, indicated that the proposal should contribute to positive benefits by supporting competition and innovation, endorsing the discussion of the costs and benefits in the consultation paper. Vector also submitted that win-backs weaken competition by creating barriers to entry and expansion for smaller independent retailers.
- 4.9 Several submitters referenced the Australian Competition & Consumer Commission's *Electricity Pricing Inquiry* (ACCC, 2018), which observed that prohibiting saves and win-backs is a significant regulatory intervention, one that would add regulatory burden and complexity, with cost impacts on consumers and enforcement difficulties.

### **Our assessment**

- 4.10 The Authority's rationale for the Code amendment focuses on the efficiency gains that can be achieved by increasing competition. This rationale is consistent with the discussion of principle 3 in the Authority's consultation charter: "competition and reliability are assessed solely in regard to their economic efficiency effects". As required by this principle, our assessment also takes into consideration dynamic efficiency effects – ie that arise from increased competition through time. We expect that increased competition will increase innovation in the electricity retail market as retailers seek to develop new products and find new ways to reduce costs. We acknowledge the magnitude of such effects is difficult to quantify.<sup>9</sup>
- 4.11 Some of the benefits identified by submitters associated with the two tier market are likely to reflect wealth transfers between different market participants. These wealth

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<sup>8</sup> See Table 2 and paragraphs 2.4-2.6 in the summary of submissions.

<sup>9</sup> See <https://www.ea.govt.nz/dmsdocument/14242-consultation-charter-december-2012>.

transfers do not underpin the Authority's decision regarding the saves and win-backs prohibition.

- 4.12 In relation to the ACCC views referenced by submitters, we have decided to revise the regulatory intervention and assess the consequences in a post-implementation review rather than pre-judge the outcomes. In part, the ACCC Inquiry based their conclusions on New Zealand's experience with the 2015 saves protection scheme, and the lack of improvement in competition that seemed to eventuate. The ACCC report referenced a lack of positive outcomes from the switch save protection scheme, but we consider that features of the saves protection scheme – namely the fact that win-backs remained permissible – are likely to have undermined the outcomes arising from that scheme.
- 4.13 Trustpower submitted that it was unclear how the Authority had estimated retailer costs and suggested further details would be welcome. The Authority's estimate of its own implementation costs was based on preliminary information from the registry manager. The Authority's estimate of retailer implementation costs was partially informed by the Authority's own estimated costs and was an indicative prompt to elicit feedback from retailers.
- 4.14 Most submitters did not provide substantive evidence on the likely cost implications of the proposal for retailers. One submitter, energyclubnz, indicated that their own implementation costs from the proposal were expected to be zero. Consequently, there has been no reason to revise the Authority's estimates of the costs of the proposal. No submitter provided substantive evidence demonstrating that the assessment of benefits was over-stated.

## **(b) The length of the win-back prohibition/protection period**

### **What we proposed**

- 4.15 We proposed that losing retailers would be prohibited from attempting win-backs during a 180 day switch protected period. We proposed that the protection period would begin either when the retailer is notified of an impending switch or, in the case of back-dated switches, from the date at which the ICP was transferred from one retailer to another, whichever is earlier.

### **Submitters' views**

- 4.16 Submitters were fairly evenly split about whether the length of this switch protected period should be longer or shorter (see Table 4 in the summary of submissions). Five submitters suggested that shorter protection periods, typically around 90 days, would reduce the risk of unintended consequences, while still providing gaining retailers and consumers with enough contact to be able to make informed decisions. Submitters in favour of shorter protection periods noted that submissions to the Market Design Advisory Group review of switching, the Electricity Price Review, and the previous 2015 consultation on the switch save protection scheme nearly all proposed shorter protection periods. Some submitters noted that the optimal length of the protection period could not be determined with any exactness.
- 4.17 Six submitters proposed that win-backs should be prohibited indefinitely. Most of these submitters suggested that an indefinite ban was consistent with the principles of the Privacy Act 1993. One submitter suggested that an indefinite prohibition on win-backs was consistent with the Telecommunications Customer Transfer Code.

### **Our decision**

- 4.18 As per submissions from One Big Switch, OurPower, and Vector, we have decided that a protection period of 180 days strikes a reasonable balance for the length of the protection period. We acknowledge that the optimal length of the protection period cannot be determined exactly. There is no precedent from other countries that we are aware of regarding the length of win-back protection. The Electricity Price Review did not provide any guidance about the appropriate length of the switch protected period.
- 4.19 Nova Energy (p. 3) suggested that a protection period of 180 days offered only a marginal gain relative to a protection period of 90 days, but would significantly increase the probability of an accidental breach or the risk of abuse by rogue traders. We believe that a slightly longer protection period of 180 days would come at little additional cost to a shorter protection period. A longer protection period advantages gaining retailers, and increases the prospect that a post-implementation review will be able to identify the contribution of the Code amendment to competition and market outcomes.
- 4.20 Competition for customers disciplines the pricing and conduct of retailers. We are not persuaded that the protection period should be indefinitely long because losing retailers make an important contribution to this market discipline. We discuss the principles of the Privacy Act 1993 more in the next sub-section.

### **(c) The use of customer information by losing retailers**

#### **What we proposed**

- 4.21 We proposed that losing retailers would not be able to use customer information (such as customer contact details) during the switch protected period to attempt to win back a customer or to enable another retailer (other than the gaining retailer) to gain the customer during the switch protected period.

#### **Submitters' views**

- 4.22 The use of customer information by losing retailers is contentious, with submitters providing contrasting arguments on its use (see paragraphs 2.17-2.19 and Table 5 in the summary of submissions).
- 4.23 Most small retailers submitted that a losing retailer should be indefinitely prohibited from using information that it had acquired through the switch process or as part of a prior commercial relationship. They proposed a blanket prohibition on the use of consumer data by the losing retailer and in some cases suggested that the losing retailer should be required to destroy customer information.
- 4.24 Electric Kiwi, for example, proposed some specific drafting to prevent saves and win-backs that hinged on prohibiting the use of private customer information or customer contact details except to contact a customer to inform them of termination fees or for a specific set of administrative matters.
- 4.25 As discussed in the summary of submissions, Trustpower provided reasons why it was necessary to retain customer information, and noted circumstances in which information would legitimately be passed to a third party.<sup>10</sup>

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<sup>10</sup> For example, clause 11.32A of the Code requires retailers to retain consumer consumption data for 24 months, even if the consumer has switched to another retailer.

## **Our decision**

- 4.26 We have decided to prohibit losing retailers from using consumer data, including contact details, to effect win-backs for the duration of the switch protected period. The losing retailer also cannot pass information to third parties, including other retailers, that would enable the losing retailer to effect a win-back or to enable a retailer other than the gaining retailer to acquire a switching customer during the switch protected period. Losing retailers may use consumer data for other purposes provided they meet other legal obligations, including those of the Privacy Act 1993.
- 4.27 We consider that Electric Kiwi's proposed amendment is too restrictive and would prevent legitimate use of consumer information, such as the transmission of consumer data to the consumer or to the consumer's agent.
- 4.28 Submitters argued that losing retailers should not be able to use consumer information because of the Privacy Act 1993. We are not persuaded by this reference to the privacy principles. Consumers may voluntarily agree to allow retailers to provide them with information about product offerings into the indefinite future even if they do not have a current customer relationship. The principles of the Privacy Act also apply to natural persons and not to (eg) businesses or locations (ICPs).
- 4.29 Section 42.2 of the Telecommunications Customer Transfer Code notes that any service provider "may only use or disclose such information in accordance with the Privacy Act 1993, the Telecommunications Information Privacy Code 2003 *and any Bilateral Agreement in place between the parties*" (emphasis added). We see no reason to indefinitely prevent retailers from transmitting information about product offerings to their current or past customers, provided they have obtained permission to do so. Consumers should of course be able to opt out from receiving such offers if they do not wish to receive them.
- 4.30 As suggested in submissions, we have removed reference to 'direct marketing activities' in 'Restrictions of use of consumer information by retailer' because we considered the term somewhat ambiguous, but we have retained the reference to 'targeted marketing' as being an unacceptable use of customer information. A marketing campaign by a losing retailer that targets customers that have switched away is an example of an activity that this amendment is designed to prevent.
- 4.31 A number of submitters proposed that losing retailers should be required to discard customer information (that may have been costly to obtain and store). Rather than requiring losing retailers to discard information, we prefer losing and gaining retailers to be informed about consumers. This does not disadvantage the gaining retailer, and avoids having the gaining retailer acquire an informational advantage.
- 4.32 We agree with Trustpower's argument that a losing retailer needs to retain consumer data for a period of time after a customer switches to a gaining retailer to meet existing obligations under the Code. We regard Trustpower's suggestion that consumer data could be passed to a third party for debt collection purposes as being a permitted administrative matter (fees owed by the customer). In such a case, customer contact of an administrative kind is simply being mediated by the debt collection agency. The Code also requires retailers to provide historic consumption information to consumers and their agents. Having an unlimited ban on the use of consumer information by losing retailers would interfere with these legitimate obligations.

## **(d) ‘Good conduct’ obligations**

### **What we proposed**

- 4.33 In keeping with the spirit of the Telecommunications Customer Transfer Code, we proposed good conduct conditions that would require all retailers to refrain from making inaccurate or deceptive statements, harassing or coercing customers, and making false statements or communicating opinions that would bring another retailer’s reputation into disrepute.

### **Submitters’ views**

- 4.34 Submitters had mixed views about the good conduct requirements:<sup>11</sup> some large and some small retailers supported these obligations and other large and small retailers considered them an unwarranted duplication of obligations under the Fair Trading Act 1996 and the Consumer Guarantees Act 1993. One submitter noted the Government is also looking to increase consumer protection from unfair commercial practices.
- 4.35 Several submitters suggested that the limitation on communicating opinions about other retailers was too strict and would prevent them from providing fair comment about competitors.

### **Our decision**

- 4.36 We have decided to incorporate good conduct obligations into the Code, but have implemented these obligations by amending clause 11.2 and the drafting of clause 11.15AB(3) (11.15AC(2) in the consultation paper). We expect good conduct in all retailer-customer interactions, not just during the switch protected period. Good conduct requirements make explicit expected standards of behaviour, provide an additional avenue for enforcement, and ensure that the Authority can act if required. The obligation in the Code also results in retailer obligations in regard to business-to-business transactions, which are not covered by the Consumer Guarantees Act 1993. Codifying such obligations is consistent with the Government’s efforts to protect consumers and businesses from unfair commercial practices.
- 4.37 Clause 11.2 is extended to make clear expectations that retailers (as participants) will provide complete and accurate information and will not mislead or deceive customers (as well as other participants) as part of the switching process.
- 4.38 We have omitted the good conduct obligation regarding communicating an opinion about any other retailer that would or might bring that other retailer’s reputation into disrepute, on the basis that it is not needed to achieve the objective of the amendment, namely an increase in retail competition. Participants will nevertheless need to comply with other legal obligations, such as the Defamation Act 1992. Only the proscription against harassing and coercing customers has been retained in clause 11.15AB (3).
- 4.39 We note that multi-product retailers – such as those supplying gas and electricity or electricity and telecommunication services – are required to adhere to the win-back provisions, including good conduct, and the use of customer information. Though multi-product retailers may contact customers in relation to other services and goods that are being provided, they must ensure that they do not use such occasions to initiate electricity win-backs in order to comply with their obligations under this amendment.

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<sup>11</sup> See Table 6 and paragraphs 2.20-2.26 in the summary of submissions.

## **(e) Specific regulatory design**

### **What we proposed**

4.40 We proposed that:

- the win-back prohibition should target all retailers (rather than traders)
- the win-back prohibition should apply to residential and small business consumers that have category 1 and 2 meters
- the win-back prohibition period should last for 180 days irrespective of whether the consumer moved to a location with a different ICP or switched away from the gaining retailer to another.

### **Submitters' views**

4.41 Eleven submitters agreed that the proposal should apply to retailers rather than traders, four submitters did not discuss the issue and one submitter was indifferent, suggesting that expediting the proposal was most important.

4.42 Submitters were more divided about whether the saves and win-backs prohibition should apply to all consumers or to a subset. Seven submitters, including a large retailer, suggested that it should apply to all; two suggested that it should apply to household consumers, and six consumers suggested that it should be applied to residential and general consumers with category 1 or category 1 and 2 metering installations. Two submitters did not comment on this issue.

4.43 Most submitters suggested that the win-back protection period should not terminate early if the consumer moved to a new ICP or to a new retailer from the gaining retailer. Submitters noted that a losing retailer would generally not be aware that either of these termination conditions for the switch protected period had been met.

### **Our decision**

4.44 We have decided to draft the amendment to prohibit retailers, rather than traders, from effecting saves and win-backs. Traders are a mix of retailers, generators, and other participants, and it is most natural to target the provision to the relevant subset of traders – retailers.

4.45 The great majority of submitters agreed that the saves and win-backs amendment should target retailers. Submitters were concerned that targeting traders might result in perverse incentives for traders to develop non-trader subsidiaries ('type 2 retailers')<sup>12</sup> to avoid the saves and win-backs prohibition. Enforcing the ban on type 2 retailers is more complicated because there is limited visibility of type 2 retailers, but the Authority will consider this issue as part of the on-going review of switching.

4.46 As noted, we proposed applying the prohibition period only to (small) consumers with metering installations of category 1 and 2. Taking on board feedback from submitters, we have decided to apply the win-back prohibition to all consumers. Relationships with large consumers will be included in the saves and win-backs protection scheme, just as they are for the switch save protection scheme developed in 2015. This decision is motivated by several considerations. First, it is simpler for retailers to have a blanket prohibition for consumers at all ICPs. Second, the saves and win-back prohibition is motivated on competition grounds. Applying the scheme to all consumers supports

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<sup>12</sup> See the glossary of terms in the consultation paper for a definition of a type 2 retailer.



competition across the entire array of consumers. Acquiring business customers, both large and small, should be as or more valuable for gaining retailers than convincing household consumers to switch. The threat of losing such customers should prompt incumbent retailers, both large and small, to put their best offers before all consumers.

- 4.47 We expect that large consumers will proactively contact multiple retailers to consider their pricing options, via tenders and other approaches, and thus the prohibition on retailer-initiated win-backs may not have a large impact for large consumers. As noted above, consumer-initiated contact enables the losing retailer to make a counter-offer or enticement to the consumer, to try to retain the consumer or win them back from a gaining retailer. We also expect that contract durations for large consumers will typically be longer than 180 days, and thus a losing retailer will be able to approach a large consumer *after* the protection period has concluded yet *before* a gaining retailer's contract is up for re-negotiation. Large consumers often tender for electricity supply, and such arrangements should be considered an invitation by a retailer to provide information or an offer, and would not be considered a breach of the prohibition on win-backs.
- 4.48 Submitters observed that the Electricity Price Review drew attention to the 'two tier' electricity market only in the context of households. Thus, some submitters suggested that any win-back prohibition should be targeted at 'retail' or mass-market customers. The final report and options paper of the EPR were not specific about the type of consumers that should be subject to switch protection. We believe that there is little reason to target a subset of consumers given that we are seeking to support competition, and it is less complex and less costly to have a set of rules that applies consistently to all consumer types.
- 4.49 We also consulted on terminating switch protected periods early if a consumer switches away from a gaining retailer to yet another retailer or if the consumer moves to another ICP. We are persuaded by submissions that it is simpler to exclude these 'conditional termination rules'. As some submitters note, losing retailers would not usually know whether either of these conditions had occurred (unless retailers were deliberately exploiting the registry to keep track of consumers who have recently switched away). A blanket 180 day protection period is also simpler to draft, communicate, monitor, and enforce.

## **(f) Monitoring, enforcement, and post-implementation review**

### **What we proposed**

- 4.50 We proposed to undertake a post-implementation review two years after the win-back prohibition was initiated.

### **Submitters' views**

- 4.51 Some submitters noted that the costs and benefits of the win-back amendment are difficult to assess. In light of that difficulty, submitters proposed on-going (eg annual) review of market outcomes and switching behaviour. (See Table 10 and paragraphs 2.35-2.40 in the summary of submissions.)
- 4.52 Other submitters noted that the Electricity Price Review had suggested a three year review of the win-back policy and questioned why the review was being undertaken within just two years. One submitter suggested that the review should take place in three

years to provide a long enough window of time for the policy to impact market outcomes in a discernible fashion.

- 4.53 Some submitters also commented on particular challenges for monitoring.
- Nova Energy (p. 2) raised concerns about retailers providing comparisons of unlike pricing plans (versus competitors) and questioned how such behaviour would be curtailed by enforcement and penalties.
  - Paua to the People (p. 1) noted that it is difficult to monitor interactions between retailers (or the agents) and consumers ‘on the doorstep’, and contended that the penalties for breaching Code provisions are low and the resolution process is slow.

### **Our decision**

- 4.54 The Authority will provide automated reports of market outcomes via the Authority’s website. It will also implement the post-implementation review after three years.
- 4.55 As noted by submitters, the assessment of costs and benefits is challenging and ongoing review of outcomes in a relatively low-cost manner strikes a sensible balance. Ongoing monitoring will also enable us to determine whether switching speeds have worsened, and whether tighter standards need to be specified to ensure that retailers continue to switch customers in a timely manner. A slightly longer period before post-implementation review will also provide more time for dynamic competition benefits to eventuate.
- 4.56 We agree that there are difficulties in observing retailer-consumer interactions and thus it is difficult to ensure that retailer (and their agents) are complying with the provisions. Retailer behaviour can be audited, and the Authority may contact consumers to discuss their switching experience.
- 4.57 With respect to Nova Energy’s concerns, we note that pricing plans will often have dissimilar attributes and believe it would be counter-productive to try to prevent such comparisons. The good conduct requirements that we have incorporated make clear that retailers must not be inaccurate or deceptive and must not mislead consumers.
- 4.58 Submitters raised concerns about the process used to resolve breaches of the Code amendment, and the associated penalties. We have decided not to make any changes at this point in time. We note that the Electricity Price Review suggested the Authority’s compliance framework should be reviewed and updated, and understand this suggestion is an item on the work agenda of the Ministry of Business, Innovation and Employment.

## **(g) Director attestation with respect to compliance**

### **Submitters’ views**

- 4.59 A number of submitters proposed that the boards of retailers should be required to attest to compliance with the win-back regulations. (See Table 11 and paragraph 2.41 in the summary of submissions.) This suggestion was not part of the consultation paper.

### **Our decision**

- 4.60 We have considered this proposal but have decided not to incorporate it into the Code amendment. We believe that it would add additional compliance costs, associated with internal auditing, etc., and do not believe that the benefits of the proposal outweigh these costs. If future evidence indicates that non-compliance is an issue then we may revisit this suggestion.



- 4.61 Once the Code amendment has been implemented, we will contact the management of retailers asking them to detail the steps they have taken, and will take, to ensure that they are compliant with the prohibition on win-backs. We will also monitor retailer behaviour to confirm compliance.

### **(h) Miscellaneous suggestions/observations**

- 4.62 In this subsection we comment on several other issues raised by submitters, namely the need for an urgent Code amendment and complementary regulatory proposals, such as suggestions around mandatory market making in hedge markets.

#### **Urgent code amendment**

##### **Submitters' views**

- 4.63 A number of submitters suggested that the Authority should urgently implement a win-back prohibition prior to Christmas 2019. Here we briefly comment on the legislative framework that governs the Code amendment process that has been followed.

##### **Our response**

- 4.64 We expect to conclude the implementation of this Code amendment within the first quarter of 2020, only a short delay after the Christmas implementation date suggested by some submitters.
- 4.65 Code amendments can be made under urgency without complying with the public consultation required by section 39(1) of the Act if the Authority considers it necessary and desirable for the public interest. An amendment made under urgency still needs to be published in the *Gazette*, but the usual 28 day notice period, before the amendment comes into force, can be shortened provided the Authority explains why urgency is required.
- 4.66 We considered that it was undesirable to implement a Code change under urgency for two reasons. First, the Authority had not consulted on the specifics of a win-backs prohibition, and it was important to obtain feedback on the specific features of the scheme. Second, as per section 40(2) of the Act, urgent amendments expire after 9 months and the win-back prohibition would then need to be re-visited. Rather than repeat this administrative process the Authority considered it more desirable to follow the usual Code amendment process, so that the win-back prohibition could, potentially, subject to consultation, be bedded in for a longer period.
- 4.67 Under section 39(3) of the Act the Authority can implement a Code amendment without public consultation if i) it is technical and non-controversial or ii) there is widespread support by affected parties or iii) if there has been adequate prior consultation (for instance through an advisory group). We did not consider the amendment technical and non-controversial. As expected, some submitters supported the proposal and others were opposed. In principle, the consultation process under section 39(3) of the Act might not apply if there has been adequate prior consultation through an advisory group such as MDAG.<sup>13</sup> As the MDAG review did not consult on a specific win-backs prohibition proposal, we considered it desirable to undertake further public consultation.

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<sup>13</sup> See the consultation charter, <https://www.ea.govt.nz/dmsdocument/14242-consultation-charter-december-2012>.

- 4.68 As this decision paper documents, we have made a number of changes to the proposal in light of the feedback we received. These changes would not have occurred if the amendment had been made under urgency or without public consultation.

### **Complementary regulatory proposals**

#### **Submitters' views**

- 4.69 Several submitters referred to proposals that they considered complementary to the development of a win-back prohibition. In particular, submitters suggested that mandatory market-making in hedge markets by the large generator-retailers was particularly important to foster competition between small and large firms.

#### **Our response**

- 4.70 We note that the Authority is currently working on enhancing hedge market arrangements, but this work lies outside the scope of the win-back prohibition amendment and will not be discussed further here.

## **5 Next steps**

- 5.1 The Authority has expedited this Code amendment to support retail competition. Retailers should promptly adapt their behaviour to comply with this amendment. The Authority will commission new registry reports in the first half of 2020 to monitor retailer behaviour and will update its auditing procedures to incorporate an assessment of retailer compliance with the win-backs policy. The Authority will also contact retailers once the Amendment has come into force to discuss how they have adapted their processes to ensure they comply with this saves and win-backs Code amendment.

## **6 References**

ACCC (2018) *Restoring electricity affordability and Australia's competitive advantage: Retail Electricity Pricing Inquiry---Final report*, Australian Competition & Consumer Commission, June,  
[https://www.accc.gov.au/system/files/Retail%20Electricity%20Pricing%20Inquiry%E2%80%94Final%20Report%20June%202018\\_0.pdf](https://www.accc.gov.au/system/files/Retail%20Electricity%20Pricing%20Inquiry%E2%80%94Final%20Report%20June%202018_0.pdf).

## Appendix A Approved Code amendment

### *Prohibition of Save and Win-Back Approaches by Losing Retailers During a Switch Protection Period*

Insert the following new definitions in clause 1.1:

**gaining retailer** means a **retailer** who has entered into an arrangement to supply **electricity** to a person where, at the time the arrangement is entered into, the person is a customer of another **retailer** (being a **losing retailer**).

**losing retailer** is defined as set out in the definition of **gaining retailer**

**switch** means the process of a customer of a **losing retailer** changing from receiving the supply of **electricity** from the **losing retailer** to receiving the supply of **electricity** from a **gaining retailer**, and the term **switching** has a corresponding meaning

**switch protected period** means the period that:

(a) starts on the earlier of—

- (i) the day on which a **losing retailer** receives notice or otherwise becomes aware that a customer is switching to a **gaining retailer**; or
- (ii) the day on which a **gaining retailer** assumes responsibility for billing a customer of a **losing retailer** for **electricity**; and

(b) ends on the earlier of—

- (i) the date that is 180 days after the relevant date specified in paragraph (a); or
- (ii) the date on which the **losing retailer** receives a notice under clause 4A(1) of Schedule 11.5 from the **Authority** or otherwise becomes aware that the customer is switching from the **gaining retailer** back to the **losing retailer** due to an **event of default**; or
- (iii) if the **gaining retailer** is a **trader** and makes a withdrawal request, the date on which the **losing retailer** (if a **trader**) receives notice of that withdrawal request under clause 22(b) of Schedule 11.3; or

- (iv) if the **trader** for the **losing retailer** and **gaining retailer** (neither of whom is a **trader**) is the same, the date on which the **trader** receives advice from the **gaining retailer** withdrawing the switch request from the **losing retailer**.

Amend the following clauses in Part 11, as marked-up:

### 11.1 Contents of this Part

This Part—

- (a) provides for the management of information in the **registry**; and
- (b) prescribes a process for switching **ICPs** between **traders**; and
- (ba) prescribes a period of protection for **gaining retailers** during which a **losing retailer** may not approach a customer to persuade the customer to stay with the **losing retailer** or to switch back to the **losing retailer**; and
- (bb) imposes restrictions on the use of customer information held by a **losing retailer** during a **switch protected period**; and
- (c) prescribes a process for a **distributor** to change the record in the **registry** of an **ICP** so that the **ICP** is recorded as being usually connected to an **NSP** in the **distributor's network**; and
- (d) prescribes a process for switching responsibility for **metering installations** for **ICPs** between **metering equipment providers**; and
  - (e) prescribes a process for dealing with **trader events of default**; and
- (f) requires **retailers** to give **consumers** information about their own consumption of **electricity**; and
- (g) requires **retailers** to give information about their **generally available retail tariff plans** to any person on request.

### 11.2 Requirement to provide complete and accurate information

- (1) A **participant** must take all practicable steps to ensure that information that the **participant** provides to any person under this Part (including customers) is-
  - (a) complete and accurate; and

- (b) not misleading or deceptive; and
  - (c) not likely to mislead or deceive.
- (2) If a **participant** becomes aware that the information the **participant** provided under this Part does not comply with subclause (1)(a) to (c), even if the **participant** has taken all practicable steps to ensure that the information complies, the **participant** must, as soon as practicable, provide such further information as is necessary to ensure that the information complies with subclause (1)(a) to (c).

~~11.15AA — Trader may elect to have switch saving protection~~

- ~~(1) — A **trader** that buys **electricity** from the **clearing manager** may elect to have switch saving protection by giving written notice to the **Authority**.~~
- ~~(2) — The **Authority** must **publish** the name of each **trader** that has elected to have switch saving protection as soon as practicable after receiving the written notice from the **trader**.~~
- ~~(3) — A **trader's** switch saving protection comes into effect on the day after the day on which the **Authority publishes** the **trader's** election.~~

~~11.15AB — Switch saving protection~~

- ~~(1) — This clause applies if a trader (the "protected **trader**") has switch saving protection.~~
- ~~(2) — If the protected **trader** enters into an arrangement with a customer of another **trader** (the "losing **trader**") to commence trading **electricity** with the customer, the losing **trader** **must** comply with subclause (4).~~
- ~~(3) — If a **trader** enters into an arrangement with a customer of a protected **trader** to commence trading **electricity** with the customer, the protected **trader** must comply with subclause (4).~~
- ~~(4) — A losing **trader** referred to in subclause (2) or a protected **trader** referred to in subclause (3) must not, by any means, initiate contact with the customer to attempt to persuade the customer to terminate the arrangement referred to in subclause (2) or subclause (3) (as the case may be) during the period specified in subclause (5), including by —~~
  - ~~(a) — making a counter offer to the customer; or~~

~~(b) offering an enticement to the customer.~~

~~(5) The period starts on the day on which the **trader** receives notice of the switch request under clause 22(a) of Schedule 11.3, and ends on the **event date** for the switch.~~

#### **11.15AA Restrictions during switch protected period**

A **losing retailer** must not, by any means, including by using a third party or agent acting on its behalf, contact any customer who is switching from the **losing retailer** to a **gaining retailer** to attempt to persuade the customer to terminate the arrangement with the **gaining retailer** during the **switch protected period** including by—

- (a) making a counter-offer to the customer; or
- (b) offering an enticement to the customer.

#### **11.15ABC ~~Trader~~Retailer may communicate with customers for certain purposes**

~~(1) Despite clause 11.15AAB(4) does not prohibit a **trader**~~**losing retailer** may contact a customer who is switching to a **gaining retailer** for any of the following purposes—

- ~~(a) contacting a customer~~ to advise the customer of any termination fees that the customer is required to pay as a result of the customer ceasing to trade with the **trader****losing retailer**; or
- ~~(b) to contacting~~ a customer regarding administrative matters, including—
  - (i) any fees the customer owes the **trader****losing retailer**;
  - (ii) the customer's final meter reading;
  - (iii) how the **trader****losing retailer** will return any keys it holds on the customer's behalf;
  - (iv) the effect of the customer ceasing to buy **electricity** from the **trader****losing retailer** on other contracts between the customer and the **trader****losing retailer**, for example, for the supply of gas; or
- ~~(c) providing to provide~~ a factual response to a question asked by a customer; or
- ~~(d) making to make~~ a counter-offer or ~~offering an~~offer an enticement to a customer ~~who~~ where the customer has:
  - (i) ~~contacted~~invited the **trader****losing retailer** without the losing retailer

having first prompted the customer to do so; and

(ii) invited the **losing retailer** to attempt to persuade the customer not to complete the **switch** to the **gaining retailer** but to remain with or return to the **losing retailer** instead to terminate the arrangement referred to in clause 11.15AB(2) or (3); or

(e) to offering an enticement to a customer as part of a general marketing campaign; or

(f) to contact the customer to address network fault issues or to follow up a complaint from the customer.

(2) If a **losing retailer** contacts a customer under subclause (1), the **losing retailer** must not communicate with the customer for any other purpose other than a purpose specified in subclause (1).

(3) Without limiting any of its other obligations, a **retailer** (whether a **gaining retailer** or a **losing retailer**) must not harass or coerce a customer.

**11.15AC Restrictions on use of customer information by retailer prior to or during switch protected period**

(1) A **losing retailer** must not use information relating to a customer that it obtained prior to or during the **switch protected period**, including information that may be used to contact the customer, during the **switch protected period** to do any of the following:

(a) contact the customer for any purpose other than a purpose specified in clause 11.15AB:

(b) include the customer in a marketing campaign other than a general marketing campaign:

(c) enable any other **retailer**, except the **gaining retailer**, to contact the customer.

(2) This clause does not limit any other requirement to maintain the confidentiality of any information relating to a customer that is imposed by the contract entered into between the **losing retailer** and the customer or otherwise by law.

**11.15AD Cancellation of switch saving protection**

- (1) ~~A **trader** that has elected to have switch saving protection may cancel its switch saving protection by giving written notice to the **Authority**.~~
- (2) ~~However, —~~
- (a) ~~a **trader** may not cancel its switch saving protection earlier than 12 months after the date on which the switch saving protection came into effect; and~~
  - (b) ~~a **trader** that has cancelled its switch saving protection may not elect to have switch saving protection earlier than 12 months after the date on which the **trader** cancelled its switch saving protection~~



## Appendix B Glossary of abbreviations and terms

Term	Definition
ACCC	Australian Competition & Consumer Commission
Code	The Electricity Industry Participation Code 2010
EPR	Electricity Price Review
Gaining retailer	The retailer that a consumer is switching to
ICP	Installation control point
Losing retailer	The retailer that a consumer is switching away from