

2 April 2020

Director
Electricity Markets Branch
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

By email: ElectricityMonitoring@acc.gov.au

Dear Director,

Re: Australian Competition & Consumer Commission (ACCC) Draft Guidelines on Part XICA – Prohibited conduct in the energy market

Thank you for the opportunity to comment on the Australian Competition & Consumer Commission (ACCC) *Draft Guidelines on Part XICA – Prohibited conduct in the energy market (Draft Guidelines)*.

The Energy and Water Ombudsman (Victoria) (EWOV) is an industry-based external dispute resolution scheme that helps Victorian energy or water customers by receiving, investigating and resolving complaints about their company. Under EWOV's Charter, we resolve complaints on a 'fair and reasonable' basis and aim to reduce the occurrence of complaints¹. We are guided by the principles in the Commonwealth Government's Benchmarks for Industry-based Customer Dispute Resolution². It is in this context that our comments are made.

The Draft Guidelines clarify the intended operation of energy sector specific provisions of the *Competition and Consumer Act 2010 (CCA)*, to come into effect on 10 June 2020 through the insertion of Part XICA.

Our chief interest in Part XICA lies in section 153E: *prohibited conduct – retail pricing*. This section concerns both the jurisdiction that we serve (i.e. the retail market for 'small customers'), and relates strongly to High Billing – which has been the most prominent complaint sub-issue received by us over the past two financial years³ (and is our top sub-issue so far this financial year). Section 153E should work to ensure that when retailers are in a position to pass cost reductions through to customers, they do so. This in turn should reduce complaints in relation to High Billing.

¹ See Clause 5.1 of EWOV's Charter: <https://www.ewov.com.au/files/ewov-charter.pdf>

² See EWOV's website: <https://www.ewov.com.au/about/who-we-are/our-principles>

³ For context, in the 2018-19 Financial Year we received 3,985 *High Billing* complaints, representing almost 13% of all cases for that year. The next highest complaint sub-issue in 2018-19 was *Billing Error* at 2,749. For more, see our 2018-19 Annual Report at this link: <https://www.ewov.com.au/reports/annual-report/201910>

We note that the Essential Services Commission (**ESC**) has also recently implemented reforms to reduce pressure on customers in the Victorian retail electricity market. Notably, on 1 July 2019 the Victorian Default Offer (**VDO**) came into effect to replace existing standing offers, in addition to the requirement for retailers to issue Best Offer Notices, and ensure that customers receive Clear Advice when switching plans. On 1 July 2020 further ESC reforms will restrict when retailers are able to change prices (once yearly, linked to network tariff price changes in an effort to eliminate ‘bait and switch’ conduct), and require that when a customer’s contract expires they be rolled onto the VDO for electricity, or the retailer’s ‘best offer’ for gas. When taken together, these reforms seek to ensure that customers either find the best deals for themselves, or are protected from excessively high pricing if they are not able to engage in the market, or choose not to.

Part XICA is important to ensure that the deals from which customers must choose actually *are* fair deals, and not artificially inflated through market misconduct.

Collectively then, the combined efforts of the ACCC and the ESC should ensure that fair prices are made available to customers, that they receive appropriate assistance to navigate those prices - and that they are protected from price gouging in the event that they are unable to navigate the market, or choose not to. We are supportive of all of these efforts. If effective, they will reduce the occurrence of complaints.

The Draft Guidelines are thorough and well expressed, and provide industry participants with clear guidance on how the ACCC intends to interpret and apply Part XICA.

Our further comments are set out below.

1. Section 153E: prohibited conduct – retail pricing

The Draft Guidelines clearly explain the ACCC’s views on key concepts relevant to s153E, namely ‘underlying cost of procuring electricity’, ‘sustained and substantial reductions’ and ‘reasonable adjustments’. The examples provided are clear and useful, and serve to convey that the ACCC will take a nuanced approach to enforcing the section – assessing each individual circumstance on its own merits.

It is also clear throughout the Draft Guidelines that the ACCC is mindful of the needs of business, and of the pressure that competition places on new market entrants. For instance, this is stated very clearly in *Example 14: Reasonable adjustments do not expect retailers to operate at a loss*, on page 12. The Draft Guidelines consciously strike a balance between encouraging competition to develop while at the same time protecting customers from harm caused by poor market conduct. While we are supportive of this principle, we are also mindful of the risk of accepting too much consumer harm in the interests of fostering early stage market entrants, with the view that consumers as a whole will benefit in the medium to longer term.

In the Victorian context, the 2017 *Independent Review into the Electricity and Gas Retail Markets in Victoria*⁴ (**Independent Review**) found that despite a sustained fifteen-year period of deregulation specifically designed to encourage competition, Victorian consumers were paying higher energy prices than consumers in other Australian jurisdictions. In the period since the Independent Review, the ESC has implemented a raft of reforms designed to reduce consumer harm that was occurring in the Victorian retail energy market. We mention this in our submission to emphasise that while fostering effective competition does remain imperative, we trust the ACCC will maintain an ongoing and proactive assessment of consumer harm - and be prepared to take action if an unacceptable limit is reached.

We particularly note the clarification provided by *Example 10: Reasonable adjustments for fixed rate contracts* on page 10. Given the requirement under s153E (1) for retailers to make reasonable adjustments to their prices to reflect sustained and substantial reductions in underlying costs, the question of fixed term contracts naturally arises.

Example 10 clarifies that retailers will be permitted to maintain the price of a fixed term contract, although the longer the period of the fixed term contract the less reasonable that position will become in the eyes of the ACCC. From a Victorian perspective, we wish to briefly clarify that the operation of s153E(1) will not be complicated by 1 July 2020 reforms under which retailers in Victoria will only be permitted to increase a customer's prices once a year. Under those arrangements, retailers will be permitted to increase prices of market contracts on the day that is one month after network tariffs change; or on the anniversary date of a customer's initial fixed price period (providing that period was at least 12 months).⁵To be clear, the 1 July 2020 reform relates specifically to price increases and therefore does not prevent a retailer from passing on a cost saving to decrease their prices if it is reasonable to do in the circumstances.

2. Section 153F: prohibited conduct –electricity financial contract liquidity

Section 153F is important to address the potentially negative impact that generators and vertically integrated electricity providers (i.e. gentailers) may have on competition in the electricity market, if they are less than transparent in negotiating electricity financial contracts. In principle, we are broadly supportive of the measure as it should improve market conditions and generate positive consumer outcomes - and therefore reduce overall complaints. That being said, we offer no further specific comment as we have no expertise in, or regular dealings with, electricity financial contracts.

3. Sections 153G and 153H: prohibited conduct – electricity spot market (basic and aggravated cases)

Sections 153G and 153H both seek to ensure that the electricity spot market operates efficiently, free of distortion that may occur due to fraudulent, dishonest or bad faith bids or offers (or failures to bid or

⁴Independent Review Panel, *Independent Review into the Electricity and Gas Retail Markets in Victoria*, August 2017.

Available at: https://www.energy.vic.gov.au/_data/assets/pdf_file/0030/79266/Retail-Energy-Review-Final-Report.pdf

⁵ Essential Services Commission, *Ensuring Energy Contracts are Clear and Fair – Final Decision*, February 28 2020, p. 8.

Available at: <https://www.esc.vic.gov.au/sites/default/files/documents/clear-and-fair-contracts-final-decision-20200228.pdf>

offer, for the same reasons). Again, we support the provisions in principle for the benefits they may have on the retail market and the potential to generate positive consumer outcomes and reduce complaints. As we have no expertise in or regular dealings with the electricity spot market, we offer no further specific comment.

4. ACCC investigation and enforcement

We encourage the ACCC to leverage the data of all ombudsman schemes, including ourselves, to aid compliance and enforcement work. In particular, we encourage the ACCC to leverage our own data and that of others for the purposes of identifying systemic issues and taking appropriate compliance and enforcement action in response.

Finally, we urge the ACCC to remain flexible and nimble in its approach to compliance and enforcement. We support the comments at paragraph 5.2, page 30 of the Draft Guidelines, that the ACCC *“uses a variety of tools and approaches to encourage compliance and prevent breaches of the CCA”*. We concur that it is important the ACCC utilise the full range of tools at its disposal to achieve the best outcome.

We trust these comments are useful. Should you need any further information or have any queries, please contact Zac Gillam, Senior Policy and Stakeholder Engagement Officer, on [REDACTED]

Yours sincerely

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Cynthia Gebert
Energy and Water Ombudsman (Victoria)