

17 January 2020

Lyn Camilleri
General Manager
Electricity Markets Branch
Australian Competition and Consumer Commission

By email: electricitymonitoring@acc.gov.au

ACCC Guidelines on the Prohibiting Market Misconduct Bill

Dear Ms Camilleri,

Energy Consumers Australia is the national voice for residential and small business energy consumers. Established by the Council of Australian Governments (COAG) Energy Council in 2015, our objective is to promote the long-term interests of consumers with respect to price, quality, reliability, safety and security of supply.

We appreciate the opportunity to comment on the Australian Competition and Consumer Commission (ACCC) Guidelines on the Prohibiting Energy Market Misconduct Bill.

These measures are being introduced at a time when consumers are experiencing significant affordability challenges and are not confident that the sector is working in their interests. In this submission we make suggestions to inform the approach to and content of the Guidelines that will support the interpretation and enforcement of the new measures.

Conduct must be assessed from a consumer perspective

As the consultation letter notes, the application of the measures in the Bill will turn on the meaning and interpretation of key concepts, including:

- 'reasonable adjustments'
- 'sustained and substantial'
- 'underlying costs of procuring energy'
- 'preventing, limiting, or restricting acceptance of ... offers'
- 'fraudulently, dishonestly, or in bad faith'
- 'distorting or manipulating prices'

In considering how these terms are interpreted, it is important the Guidelines reflect plain English, generally understood meanings that are linked to consumer outcomes and experiences in the market, rather than solely from the perspective of the energy companies. In a complicated sector in transition, price and service settings that may not appear to be material from the perspective of the business can nevertheless cause detrimental outcomes for consumers.

This is critical in relation to the interpretation of 'sustained and substantial', which is a key element of the test for prohibited conduct in relation to retail pricing (section 153E). Energy consumers are already at the limits of their ability to reduce their energy use and pay their bills and cannot manage



prices at current levels let alone price increases.¹ Recent changes by one retailer to increase the prices for its customers on market contracts by CPI, in a market where supply chain costs are forecast to decrease in the next three years, may be ‘substantial’ for many consumers – even at what might appear to be a relatively modest amount of \$30 per year.²

The Guidelines should not set an unduly high or prescriptive threshold – for example in terms of dollars on the bill – when defining ‘substantial’ given the sensitivity of many consumers, particularly those on low incomes or in vulnerable circumstances. The Guidelines should also be clear that price increases must be justified on the basis of the costs of delivering the service, not vague and uninformed judgments about the customer’s ability to pay. This context-dependent approach, which relies on a level of judgement, is consistent with the way ‘substantial’ has been interpreted in relation to prohibited anti-competitive behaviour under section 45 of the *Competition and Consumer Act 2010*.³

It is worth noting that we sometimes observe energy companies seeking to justify price increases or costs in the supply chain on an ‘ability to pay’ basis – for example, that the additional cost only equates to a “cup of coffee a day”. Our analysis shows that for people on the median income, a cup of coffee a day is more than 3% of their disposable income. For more than 80% of the population a cup of coffee a day is more than 2% of disposable income.⁴ Further, we know that low income households are already spending nearly 8% of their disposable income on electricity bills.⁵

New expectations about business conduct

Some stakeholders have expressed concerns that the new categories of prohibited conduct in the Bill are not adequately defined and, consequently, complying with the new measures will be difficult. To some extent these criticisms of the Bill reflect old thinking about markets and competition that placed all the responsibility on consumers to navigate the market, and very little responsibility on businesses to ensure that the services they were offering were easy to understand and appropriate.

Initiatives like the Energy Charter, which are built on commitments to ‘put consumers at the centre’, are part of shift to a new paradigm where there is an expectation that businesses will not only not do the wrong thing, they will proactively and openly do the right thing. KPMG Chair Alison Kitchen, who recently undertook a survey of CEOs for the Australian Institute of Company Directors, showed that directors were now putting the interests of customers before shareholders:

“The conversation in boardrooms is changing and decisions are already being made through the lens of what the community will think.”⁶

The significance of this shift is that energy companies must be prepared to justify their decisions in broader terms that go to the consumers and community interests – terms that go beyond narrow legal or economic tests, which can be applied, but will not necessarily contribute to better consumer outcomes or help build trust.

The Guidelines should encourage energy companies, and the ACCC, to take a holistic view of conduct. How for example, energy companies engage with their customers about the structure of

¹ See Energy Stressed ANU Research by ACOSS and the Brotherhood of St Laurence <https://www.acoss.org.au/wp-content/uploads/2018/10/Energy-Stressed-in-Australia.pdf>

² <https://www.aemc.gov.au/market-reviews-advice/residential-electricity-price-trends-2019>

³ Australian Competition and Consumer Law Annotated, 2017, p 422-23.

⁴ <https://energyconsumersaustralia.com.au/news/real-price-cup-coffee>

⁵ https://www.aer.gov.au/system/files/Affordability%20in%20retail%20energy%20markets%20-%20September%202019_0.pdf

⁶ <https://aicd.companydirectors.com.au/membership/company-director-magazine/2019-back-editions/april/aicd-kpmg-trust>



offers and price changes is also relevant. For example, efforts by companies to ensure they notify their customers about prices changes using the customers' preferred communications channels (which may be via SMS rather than a letter in the post), and which improves their ability to manage the change (e.g. switch retailer), should be considered in assessing conduct under section 153E.

Thank you for the opportunity to make this submission. Please do not hesitate to contact Jacqueline Crawshaw, Associate Director, Advocacy, on 02 9220 5500 or at jacqueline.crawshaw@energyconsumersaustralia.com.au if you would like to discuss these matters further.

Yours sincerely,

Rosemary Sinclair AM
Chief Executive Officer
Energy Consumers Australia