24 February 2021

Energy Consumer Policy Branch
Energy Sector Reform Division, Energy Group
Department of Environment, Land Water and Planning (Vic)
PO Box 500
East Melbourne VIC 8002

By email: retailmarket.reform@delwp.vic.gov.au

Dear Energy Consumer Policy Branch,

Re: Implementing the Energy Fairness Plan – Stakeholder Briefing Paper

Thank you for the opportunity to comment on the *Implementing the Energy Fairness Plan - Stakeholder Briefing Paper* (**Briefing Paper**).

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 complaints.[1] We are guided by the principles in the Commonwealth Government's Benchmarks for Industry-based Customer Dispute Resolution.[2] It is in this context that our comments are made.

The Energy Fairness Plan (**EFP**) has been long anticipated and it is our understanding that the Government's commitments under the EFP are not open to review. Rather, the purpose of the Briefing Paper is to seek feedback on proposed approaches to implementation. To that end we have sought to provide what data, information and insights we can to inform the Department of Environment, Land Water and Planning (**DELWP**) in their efforts to devise the necessary legislative terms and arrangements.

Unfortunately, we are unable to provide data to inform the proposed ban on 'win back' and 'save' offers, as we do not consider or resolve customer complaints about pricing (as opposed to billing complaints, or complaints relating to erroneously applied tariffs). The setting of prices themselves are the prerogative of our scheme participants (**SPs**), provided they lie within regulatory limits (embedded networks, for example, are not permitted to charge more than the Victorian Default Offer (**VDO**)).

[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

In relation to unsolicited sales and wrongful disconnections we are able to provide some data – although neither issue represents a major part of our activity by case volume.

Our further comments are set out below.

Banning door-to-door sales and cold-calling by energy retailers

EWOV data summary

We capture unsolicited sales under the '*Marketing*' complaint heading, which traditionally form a low percentage of our overall caseload. *Marketing* cases were particularly low in the 2019/20 financial year, registering only 261 cases (or 1% of our overall caseload of 23,786).

We further categorise *Marketing* cases into the following sub-issues:

- *Marketing>Misleading*
- *Marketing>Pressure Sales*
- *Marketing >Information*
- *Marketing>Other*

Each *Marketing* sub-issue is then further categorised as either *Door to Door*, *Phone*, or *Other Sales Channels*.

In 2019/20, *Marketing>Misleading* was the major sub-issue in this area, with 151 cases – accounting for 58% of all *Marketing* cases. *Marketing>Pressure Sales* was next with 55 (21%), while *Marketing>Information* and *Marketing>Other* had only 31 (12%) and 24 (9%) respectively.

Of the 151 *Market>Misleading* cases received, only 30 (20%) were *Door to Door*, while 66 (44%) were *Phone*. The proportions between *Door to Door* and *Phone* were even more heavily skewed in *Marketing>Pressure Sales*, registering 11 (20%) and 42 (76%) respectively, and similar patterns were repeated across the other two sub-issues. Across all *Marketing* sub-issues, only 49 (19%) *Door to Door* related complaints were received, as opposed to 140 (54%) *Phone* related cases.

While our complaint numbers in this area are low, unsolicited sales do lend themselves to particularly harmful and nefarious conduct, which can sometimes occur without the knowledge of the retailer itself. In 2020, for example, we referred a systemic issue to the Essential Services Commission (**ESC**) involving an unsolicited salesperson who had been fraudulently creating new accounts, (and transferring customers without their consent), by having an accomplice purport to be the customer when speaking with the retailer's activation team.

Once the issue was brought to their attention the retailer handled the matter admirably, but that doesn't change the fact that fraudulent activity had been carried out in their name by persons outside of their direct supervision. The 'unsupervised' nature of door-to-door unsolicited sales unfortunately

leaves them open to poor sales conduct, including the potential for unscrupulous sales staff to take advantage of people in vulnerable circumstances.

It is worth noting that while door-to-door sales do seem particularly open to poor sales conduct, we have also seen instances of similar conduct through telesales. In fact, a systemic issue that we are currently investigating involves multiple customers who were transferred to a third tier retailer without their consent, despite having told the retailer's sales representatives over the phone that they did not wish to do so.

Pertinent to the proposed ban, 73 of our 2019/21 *Marketing* cases (i.e. 28% of the 261 total) related to *Other Sales Channels*, making them significantly more prevalent than *Door to Door* cases. This is relevant, because the ban will not affect unsolicited agreements negotiated in a public place – which are categorised by us as *Other Sales Channels*. Of those 73 cases, 56 (77%) related to misleading marketing (i.e. they were *Marketing>Misleading>Other Sales Channels* cases). Anecdotally, we have received reports of misleading and/or high pressure unsolicited sales approaches from energy sales staff at 'pop-up' stalls – usually located in supermarkets. In fact, some of our own staff encountered these practices when they were off-site conducting outreach activity.

Finally, we note that the ban will also not apply to the unsolicited sale of solar panels. In the 2019/20 year we received 18 solar panel related *Marketing* complaints, of which 14 (78%) were outside our jurisdiction because they did not involve an EWOV SP. We referred those cases to Consumer Affairs Victoria (**CAV**), and note that only two (14%) of them were *Door to Door*, four (28%) of them were *Phone*, and the balance (8, or 57%) were *Other Sales Channels* cases.

Despite these very low numbers, we are conscious that more consumer harm may be occurring through the unsolicited sale of solar panels than our own data would suggest. We are aware, for example, that CAV recently took a solar retailer to the Federal Court, where they successfully claimed that the company had been making misleading claims, failing to comply with protections relevant to unsolicited agreements and were guilty of unconscionable conduct - all through their unsolicited door-to-door sales activity.[3]Further, consumer advocacy organisations such as the Consumer Action Law Centre have identified unsolicited door-to-door selling of solar panels as a significant issue over the past few years.[4]

It should also be noted that the Australian Communications and Media Authority (**ACMA**) has been highly active in addressing the unsolicited telemarketing of solar panels, which they identified as a specific compliance priority in 2019-20.[5]ACMA's focus on this area appears to have had some effect, and

[3] Consumer Affairs Victoria, *Court win against solar company who broke door to door sales laws – Media Release*, (2021): https://www.consumer.vic.gov.au/latest-news/court-win-against-solar-company-who-broke-door-to-door-sales-laws-media-release

[4] See for example, the Consumer Action Law Centre publications, *Knock it off! Door to door sales and consumer harm in Victoria* (2017), and *Sunny Side Up: Strengthening the Consumer Protection Regime for Solar Panels in Victoria* (2019), both are available at the Consumer Action Law Centre website: https://consumeraction.org.au/reports/

[5] ACMA Compliance priorities 2019-20: https://www.acma.gov.au/compliance-priorities-2019-20

they reported in May 2020 that complaints about unwanted telemarketing calls from solar companies have halved since 2018.[6]

1. Does the proposed scheme described above capture the activities intended to be banned?

Yes, the scheme outlined in the Briefing Paper captures the activities intended to be banned. The prohibition on the use of contact details obtained from lead generation marketing is an important element of the proposed scheme, as is the prohibition on using contact details that the customer may have directly provided unless it was for the predominate purpose of negotiating a contract.

The sum effect of the scheme would be to prohibit unsolicited sales approaches from energy retailers to domestic customers, either by door-to-door sales or by phone based cold calling. Based on our own data, the ban is likely to have more impact in relation to cold calling (which seems more prevalent), but both sales approaches are fraught, and have a long history of causing consumer harm and leading to complaints. The knowledge asymmetries and complex behavioural factors at play in unsolicited sales approaches are well documented (as is the relative ineffectiveness of the 'cooling off period' as a consumer protection), and we do not need to elaborate on them here.

2. What (if any) gaps or unintended consequences do you foresee resulting from this proposed scheme?

While they are not intended to be prohibited, (and therefore cannot rightly be described as a 'gap'), omitting unsolicited sales approaches in public places will leave consumers exposed to the 'pop-up' stall activity described in our comments above, as will omitting the sale of other energy products (such as solar panels).

Indeed, while solar panels are currently front of mind in terms of 'other' energy products, it should be noted that home batteries may well form the next 'wave' of energy products that would also be omitted from the ban.

Beyond home batteries, unsolicited marketing of complex emerging energy services such as Virtual Power Plants (**VPPs**), peer-to-peer energy trading schemes (**P2P**), and home energy management systems (**HEMS**) would also be omitted from the ban, as it is currently formulated. While these are still nascent technologies, they are likely to gain more market penetration in the years to come and a pre-emptive unsolicited sales ban may be worth considering. We consider all of these technologies in our 2020 report, *Charging Ahead – New Energy Technology and the Future of Energy Complaints in Victoria*, in which we identified misleading and/or high-pressure sales of home batteries as a potential future area of concern, largely based on the example of solar panels.[7]

[6] ACMA, *Solar telemarketing complaints have halved – Media Release* (2020): https://www.acma.gov.au/articles/2020-05/solar-telemarketing-complaints-halved
[7] EWOV, *Charging Ahead – New Energy Technology and the Future of Energy Complaints in Victoria* (2020): 32. https://www.ewov.com.au/files/ewov_charging_ahead_report_release_june_2020.pdf#page=24

In terms of unintended consequences, switching rates will be one interesting factor to observe in the aftermath of the ban. While unsolicited sales (particularly by cold calling) remain prevalent in the market, it is difficult to know how much switching occurs due to genuine consumer engagement, as opposed to coercion by unsolicited sales staff, who may be conducting misleading and/or high-pressure sales. It is possible that switching rates will fall following the ban, and while this would be an unintended consequence it would not necessarily be a negative outcome, but more a reflection of 'healthy' switching activity.

3. What is an appropriate timeframe for impacted businesses to sufficiently transition away from the banned activities?

We do not have visibility over internal business practices, so we are unable to provide a response to this question. Specifically, we are not aware of the extent to which different businesses may derive new customers through unsolicited sales activity, and that will affect the appropriateness or otherwise of any transition timeline.

4. Are there any other implementation issues that should be considered?

Again, this is a question for the retail energy industry. We are not aware of any other implementation issues, but we do not have visibility over internal business practices.

Banning 'win-back' and 'save' offers

EWOV data summary:

As noted above, we do not consider customer complaints about pricing so we are unable to provide a data summary in response to this part of the Briefing Paper. The prices that our SPs offer customers, (whether in the form of 'win back' offers or otherwise), are their prerogative provided they lie within allowable regulatory limits.

While the ban on 'win backs' has been proposed primarily for the purpose of reducing customer acquisition and retention costs, it is more pertinent to us on the basis that it should improve price transparency, and enhance levels of consumer trust. Over time, improved consumer trust in the energy market may help to reduce complaints.

5. Does the proposed definition of a 'win-back' offer adequately delineate the prohibited period and capture the activities to be banned?

Yes, the proposed scheme does capture 'win back' offers as we understand them, and 6 months is clearly delineated as the proposed prohibited period.

The question arises as to whether a 'win back' offer made after the 6 month period would be permitted, or whether such an approach would then be prohibited by the ban on unsolicited sales – and it would be

useful if DELWP could clarify that point. While it seems unlikely that a former retailer may attempt to 'win back' their old customer six months after they transferred to a new retailer, it is not inconceivable. If such approaches are not caught by the ban on unsolicited sales, they may expose customers to unwanted misleading and/or high-pressure sales approaches from their former retailer. That would be an unfortunate outcome, and would undermine the intent of the reforms to improve customer trust in the market.

6. Does the proposed definition of 'marketing campaign' allow sufficient scope for retailer marketing, while removing pressured direct sales and marketing which can encourage 'churn'?

Yes, the proposed definition limits 'marketing campaigns' to general campaigns, (therefore excluding campaigns specifically directed at transferring or former customers), and prohibits promotion of marketing campaigns by phone or door knocking. Those measures should ensure that marketing approaches are not targeted or high-pressure, and instead provide the scope for retailers to advertise their plans while at the same time protecting customers from unwanted marketing practices.

Ultimately, the ideal market is one where customers are engaged and well informed of the options available to them, and are empowered to make their own choices. The proposed scheme banning 'win backs' and the related limits on 'marketing campaigns' seem well designed to serve that purpose.

7. What is an appropriate timeframe for impacted businesses to sufficiently transition away from the banned activities?

We do not have visibility over internal business practices, so we are unable to provide a response to this question. Specifically, we are not aware of the resources that businesses currently commit to 'win back' activities, and that will affect the appropriateness or otherwise of any transition timeline.

8. Are there any other implementation issues that should be considered?

Again, this is a question for the retail energy industry. We are not aware of any other implementation issues, but we do not have visibility over internal business practices.

New criminal penalties

EWOV data summary:

While we cannot provide data related to the provision of false or misleading information to the ESC, we do undertake wrongful disconnection investigations and can report the following:

- In the 2019/20 we finalised 395 Wrongful Disconnection Payment (**WDP**) assessments, 60% of which related to electricity disconnections and 40% to gas.

- 248 of the 395 wrongful disconnection payment assessments resulted in payments being made. That is to say, 85% of the assessments resulted in payments.
- We referred 10 WDP assessments to the ESC, as we were unable to reach an agreement with the retailer about whether the disconnection was wrongful.
- Wrongful disconnection payments resolved by us ranged substantially in quantum from $15.28 to $85, 984.38.

Under clause 111A of the *Energy Retail Code* disconnection for non-payment is clearly stated as a 'last resort' measure, to be undertaken by the retailer only after all of their other regulatory obligations have been met, including those set out under the Payment Difficulty Framework (**PDF**).

Our recent research report, *Missing the Mark – EWOV insights on the impact of the Payment Difficulty Framework (PDF) 1 January 2019 to 1 October 2020*, provides a detailed assessment of the impact of the PDF since its implementation, as viewed through our casework. The report finds that while disconnections (and credit cases generally) have dropped significantly, that does not mean all customers are receiving their full PDF entitlements. In fact, *Missing the Mark* outlines several cases where retailers have badly failed to meet their obligations, sometimes prior to disconnecting the customer.

The cases described in *Missing the Mark* are by no means isolated, and there is a risk that some retailers could fail to meet their regulatory obligations around disconnection in a systemic manner. In late 2020, for example, we experienced a sudden spike in disconnections being actioned by one third-tier retailer – not all of which could be justified under the *Energy Retail Code*. As we enter a sustained COVID-19 related economic recession, it will be crucial to ensure access to essential services is maintained as much as possible, despite increasing levels of payment difficulty in the community (and the pressure that will inevitably place on some energy retailers). The proposed new penalties are substantial, and should provide a strong disincentive to retailers who may otherwise commit wrongful disconnections. On that basis, and on the basis that less wrongful disconnections will lead to less complaints, the new penalties have merit.

In relation to the penalties proposed for providing false or misleading information to the ESC, we can only state that full and accurate data is critical for the regulator to properly fulfil its role in the sector. There can be no justification for retailers knowingly providing the ESC with false or misleading data, and therefore no reason that any retailer (or their employee) should ever fall foul of the new penalties.

9. Are there any other implementation issues that should be considered in relation to these penalties?

The penalties proposed by the Briefing Paper have been known for some time, and were announced in 2018 when the Government first committed to the EFP. Given they involve no internal systems changes for retailers, (and instead simply install higher penalties for regulations that are already in place), it is difficult to envisage any implementation issues.

We trust these comments are useful. Should you like any further information or have any queries, please contact Zac Gillam, Senior Policy and Stakeholder Engagement Officer, on (03) 8672 4285.

Yours sincerely

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