

Statement of Reasons

in respect of notifications lodged by

Jasmin Solar Pty Ltd

Jasmin Solar Pty Ltd proposes to supply domestic solar panel systems to customers in South East Queensland for a discounted upfront fee on condition that customers use Diamond Energy Pty Ltd as their electricity retailer.

Date: 4 September 2013

**Notification no. N96232 &
N96653**

Summary

Jasmin Solar proposes to supply domestic solar panel systems to customers in South East Queensland for a discounted upfront fee on condition that customers provide their feed-in tariff revenue to Jasmin Solar and use Diamond Energy as their electricity retailer.

On 4 September 2013 the ACCC accepted an undertaking pursuant to section 87B of the *Competition and Consumer Act 2010* given by Jasmin Solar and Diamond Energy (the undertaking). Once accepted, section 87B undertakings are enforceable by the Federal Court. Having regard to the information available to the ACCC and the undertaking given by Jasmin Solar and Diamond Energy, the ACCC is satisfied that the likely benefits to the public from the notified conduct will outweigh the likely detriment to the public from the notified conduct. Accordingly, the ACCC does not intend to take any further action at this time.

1. Introduction

- 1.1. The Australian Competition and Consumer Commission (the **ACCC**) is the Commonwealth agency responsible for administering the *Competition and Consumer Act 2010* (the **Act**).
- 1.2. The Act prohibits exclusive dealing conduct including ‘third line forcing’ which broadly involves the supply of goods or services on condition that the customer also acquires goods or services from a third party.¹ Third line forcing conduct is a breach of the Act regardless of its effect on competition.
- 1.3. Businesses may obtain protection from legal action to engage in third line forcing conduct by lodging a ‘notification’ with the ACCC. Once a valid third line forcing notification is lodged the legal protection provided commences after 14 days. The ACCC may proceed to issue a notice revoking a third-line forcing notification where it is satisfied that the likely benefit to the public from the proposed conduct will not outweigh the likely detriment to the public from the proposed conduct.² The assessment undertaken by the ACCC in this regard is not restricted to considerations of the third line forcing notification’s effect on competition, but may take into account broader public benefits and detriments.
- 1.4. On 31 October 2012 and 12 March 2013 Jasmin Solar lodged third line forcing notifications N96232 and N96653 respectively, proposing to supply discounted solar panel systems on condition that customers use Diamond Energy as their energy retailer.
- 1.5. Having regard to the information available to the ACCC and the undertaking given by Jasmin Solar and Diamond Energy on 4 September 2013 pursuant

¹ Sub-sections 47(6) and 47(7).

² Section 93(3A)

to section 87B of the Act (the **undertaking**) the ACCC formed the view that it is satisfied that the likely benefit to the public resulting from this conduct will outweigh the likely detriment to the public. The court-enforceable undertaking contains obligations on Jasmin Solar and Diamond Energy that mitigate the ACCC's primary concern, namely that Jasmin Solar's customers may be exposed to high and unconstrained electricity prices in the future as a result of the notified conduct. The undertaking is available on the ACCC's website.

- 1.6. This Statement of Reasons outlines the basis on which the ACCC has reached its view in relation to the notifications, including a summary of the implications of the undertaking for consumers. As with any notification, the ACCC may act to remove statutory protection afforded by the notifications at a later stage if it considers that the likely benefit to the public no longer outweighs the likely detriment to the public from the conduct.

2. Background

Parties

- 2.1. Jasmin Solar Pty Ltd (**Jasmin Solar**) is a retailer of Solar Systems to residential customers located in Queensland. Jasmin Solar supplies and installs the various components that constitute a Solar System or arranges for installation to be undertaken by a third party.
- 2.2. Diamond Energy Pty Ltd (**Diamond Energy**) supplies electricity on a retail basis and has an integrated renewable energy generation business in Australia primarily in order to support its retail operations. Diamond Energy offers retail services in Victoria, South Australia, New South Wales and South East Queensland.

Conduct

- 2.3. Jasmin Solar lodged two notifications for third line forcing conduct as outlined below. Jasmin Solar revised its product offering following changes to the Federal Government's solar credits scheme that applied from 1 January 2013. Notification N96653 is relevant to this revised offer.
 - **Notification N96232:** Jasmin Solar proposes to supply domestic Solar Systems to customers in South East Queensland for \$1 on condition that customers use Diamond Energy as their energy retailer. This notification was lodged on 31 October 2012 and statutory protection commenced on 14 November 2012.
 - **Notification N96653:** Jasmin Solar proposes to supply domestic Solar Systems to customers in South East Queensland for \$999 on condition that the customer has been approved for the Queensland

Government's 44c/kWh rebate scheme and the customer uses Diamond Energy as their energy retailer. This notification was lodged on 12 March 2013 and statutory protection commenced on 26 March 2013.

- 2.4. The agreements signed by customers under both notifications have a term of up to 16 years. This means that the customer will be required to purchase energy from Diamond Energy or another energy retailer of Jasmin Solar's choosing for up to 16 years.
- 2.5. During productive daylight hours customers are able to consume energy free of charge, up to the amount generated by their solar panel system. However, customers are required to use Diamond Energy as their energy retailer for:
- all energy consumption in excess of the energy generated by their solar panel system during the day (if any); and
 - all energy consumption outside of productive daylight hours such as during the evening and night.
- 2.6. Aside from the upfront outlay of either \$1 or \$999, the customer effectively pays Jasmin Solar for the solar panel system by redirecting income generated by the solar panel system to Jasmin Solar. This income includes the Feed-in Tariff payments³ generated throughout the 16 year term as well as the one-off Small-scale Technology Certificates⁴ payment.
- 2.7. Jasmin Solar provided supporting submissions which are available on the ACCC's website and are discussed below in section 4.

Section 87B undertaking

- 2.8. On 4 September 2013 the ACCC accepted a section 87B undertaking given by Jasmin Solar and Diamond Energy. The undertaking is available on the ACCC's website. Section 87B of the Act provides the ACCC with the power to accept undertakings in connection with a matter in relation to which the ACCC has a power or function under the Act. Once accepted, section 87B undertakings are enforceable by the Federal Court.
- 2.9. The obligations in the undertaking on Jasmin Solar and Diamond Energy are intended to ensure that retail electricity prices charged to Jasmin Solar customers are reflective of prices charged to other customers with solar

³ Feed-in Tariff payments are paid by the Queensland Government as an incentive for residential consumers to purchase and install solar panel systems. Customers eligible for the Feed-in Tariff receive an amount per kWh of energy exported to the electricity grid.

⁴ Small-scale Technology Certificates are a tradable commodity attached to eligible installations of renewable energy systems including solar panels. These are converted as a one-off payment by the Australian Government.

panel systems in the same geographic region. The undertaking aims to prevent Jasmin Solar's customers being exposed to excessive prices for additional electricity that they are required to purchase from Diamond Energy. The undertaking also ensures that the termination fee contained in the customer's agreement with Jasmin Solar will not apply if the solar system fails within a warranty period, unless the customer has contributed to the failure of the system (such as through their willful action, neglect or negligence).

- 2.10. Further information regarding Jasmin Solar's and Diamond Energy's obligations pursuant to the undertaking is set out below in section 4.12.

Interested party submissions

- 2.11. The ACCC consulted with a variety of interested parties in relation to the notifications, including the Queensland Office of Fair Trading (**OFT**) and the Energy and Water Ombudsman Queensland (**EWOQ**). Copies of submissions from these parties are available on the public register entry for the notifications on the ACCC's website.
- 2.12. The EWOQ submitted that the consumer would benefit from having access to a solar system, which they would not otherwise have access to, and would make savings on their on-going power costs. However, the EWOQ also submitted that it had reservations regarding the proposed conduct, including that customers would be locked into a contract with Diamond Energy.
- 2.13. The OFT submitted that the main benefit is that consumers who may otherwise not have been able to afford solar energy are able to enter the market and that customers may see a decrease in their power bills. The OFT submitted that potential public detriments include that vulnerable customers who may lack skill in dealing with this type of contract are locked-in, and potential issues regarding unfair contract terms.

3. Jasmin Solar's submissions

- 3.1. Jasmin Solar submits there are two primary benefits it believes flow from the notified conduct:
- (a) that the proposed conduct provides customers with the ability to purchase a solar panel system at low upfront cost. Jasmin Solar submits that many of the customers attracted to the offer are on low incomes and would otherwise not be in a position to afford a solar panel system. Jasmin Solar submits that the customer pays a low upfront amount of either \$1 or \$999 (depending on the offer) for a solar panel system with a retail value of up to \$12,000.
 - (b) that customers are able to consume energy produced by the solar panel system free-of-charge during daylight hours.

3.2. Jasmin Solar submits that there is limited or no detriment flowing from the notified conduct.

4. ACCC Assessment

4.1. In examining the benefits and detriments flowing from the notified conduct, the ACCC considered the information provided by Jasmin Solar and interested parties as well as information available to the ACCC and Australian Energy Regulator (**AER**).

Areas of competition

4.2. Defining the areas of competition affected by the notified third line forcing conduct assists the ACCC to assess the likely public benefits and detriments. However, depending on the circumstances, the ACCC may not need to precisely define the relevant markets as it may be apparent that a net public benefit will or will not arise regardless of this definition.

4.3. In relation to these notifications, the ACCC considers that its assessment is unlikely to turn upon precise market definition. Accordingly, it has not formed a concluded view on market definition for the purpose of assessing this notification. However, in considering these notifications, the ACCC has identified relevant areas of competition, being those associated with the:

- the retail supply of electricity in South East Queensland;
- the retail supply and installation of solar panels in South East Queensland.

Public benefit

4.4. The ACCC considers that there are two significant benefits accruing to Jasmin Solar customers under the notified conduct. Those benefits are:

- (a) customers will be able to use (effectively) free electricity during the day when the solar panel system is generating energy; and
- (b) customers gain ownership of the solar panel system with minimal upfront outlay. Aside from the upfront outlay of either \$1 or \$999 (depending on the offer made by Jasmin Solar), the customer effectively pays Jasmin Solar for the system by redirecting the income generated by the solar panels to Jasmin Solar. At the end of the contract between the customer and Jasmin Solar, the entitlement to any income generated by the solar panel system will divert back to the customer.

Public detriment

- 4.5. In considering the potential public detriments arising from the notified conduct, the ACCC notes the following:
- (a) the existence of a number of other competitors to Jasmin Solar and the current nominated electricity retailer (Diamond Energy) in their respective retail businesses.
 - (b) the ability of customers to purchase solar panel systems from Jasmin Solar or retail electricity from Diamond Energy separately.
- 4.6. These factors combined mean that the requirement of customers to purchase electricity from Diamond Energy if they wish to participate in the arrangement is unlikely to significantly distort competition in either the retail supply of electricity or the retail supply and installation of solar panels in South East Queensland.
- 4.7. However, the ACCC considers that, in the absence of the undertaking, public detriments from the notified conduct would be likely to arise as a result of the long term contracts between the customer and Jasmin Solar and Diamond Energy, and the customers' exposure to a range of risks throughout the term of the contracts. In summary:
- **Price and service:** The ACCC is concerned about the inability of customers to choose a different competitive electricity retailer over the 16 year contract term and, therefore, about the extent to which customers would be exposed to electricity prices charged by the nominated electricity retailer (currently Diamond Energy) throughout that term. The ACCC also notes that the inability of customers to choose a different competitive electricity retailer may impact on non-price elements of the service provided.
 - **Termination fees:** The ACCC is concerned about the scale of the termination amounts (up to \$7,000) that may apply to customers under their agreement with Jasmin Solar. The ACCC was concerned to ensure that termination fees would only be applied by Jasmin Solar in appropriate circumstances and that customers are aware of when termination fees apply.

Future retail electricity prices and service

- 4.8. In the absence of the undertaking, Jasmin Solar customers who are the subject of the notified conduct are obliged to use Diamond Energy (or potentially another energy provider to be determined by Jasmin Solar) for up to 16 years.

- 4.9. Currently, residents in Queensland pay either a default tariff set by the Queensland Competition Authority or a price set out in a market contract. Prices established in market contracts may be below or above the default tariff, and customers have a choice about which type of energy agreement they enter into. For customers on market contracts, obliging those customers to use Diamond Energy for up to 16 years may expose those customers to energy prices significantly higher than the prices available to them were they free to make their own choice of energy retailer. As the relevant customers are likely to have limited or no choice of electricity retailer over a lengthy 16 year term⁵, this is potentially a significant public detriment associated with the notified conduct.
- 4.10. The inability to choose an electricity retailer also has the potential to lead to undesirable outcomes for Jasmin Solar customers with respect to non-price elements of the service provided by the electricity retailer. However, the ACCC notes that the extent of any such detriment is likely to be limited by obligations on electricity retailers as a result of the National Energy Retail Law and various guidelines produced by the AER under this law. Further the ACCC also notes that where a customer is not able to resolve a dispute or grievance with their electricity retailer, they are able to contact the relevant ombudsman, in this case, the EWOQ.

Termination fees

- 4.11. As noted previously, under their agreements with Jasmin Solar, Jasmin Solar customers may be required to pay significant termination fees of up to \$7,000 in particular circumstances. The ACCC considers that the requirement to pay such termination fees may result in public detriment, particularly if the Jasmin Solar customer has chosen to source solar panels from Jasmin Solar on the basis that they could not otherwise afford to purchase solar panels.

Obligations contained in the undertaking

- 4.12. The obligations on Jasmin Solar and Diamond Energy contained in the undertaking include:
- that retail prices charged to relevant customers will be reflective of prices charged to other customers with solar panel systems in the similar geographic region, or will be the default tariff set by the Queensland Competition Authority;
 - that should retail prices charged by the electricity retailer exceed the contract rate, Jasmin Solar will provide the relevant customers with a rebate equal to the amount they have been overcharged;

⁵ The ACCC notes that Jasmin Solar may nominate other retailers in addition to Diamond Energy.

- that Jasmin Solar will not require customers to pay the termination amount when the solar panel system fails within a warranty period or when covered by consumer guarantees for any reason other than wilful action, neglect or negligence by the customer;
- that Jasmin Solar will refer to the Queensland Civil and Administrative Tribunal any unresolved dispute about the payment of the termination amount, and will comply with the Tribunal's order in relation to that dispute;
- that customers affected by the conduct will be provided with a plain English summary of their rights and responsibilities arising from the arrangements as well as the implications of the undertaking;
- that customers will have a minimum three year retail warranty period (which is in addition to any existing consumer guarantee rights) on the solar system. In some circumstances, Jasmin Solar will also assist customers in making warranty claims outside of this period where the customer has consumer guarantee rights or rights under a manufacturer's warranty;
- that Jasmin Solar will appoint an ACCC approved independent auditor to monitor compliance with the undertaking.

4.13. The ACCC considers that these commitments sufficiently mitigate the detriment concerns noted above.

Balance of public benefits and detriments

4.14. After taking into account the effect of the undertaking, the ACCC is satisfied that the likely benefit to the public from the notified conduct will outweigh the likely detriment to the public.

5. Conclusion

5.1. Having regard to the information available to the ACCC and the undertaking given by Jasmin Solar and Diamond Energy, the ACCC is satisfied that the likely benefits to the public from the notified conduct will outweigh the likely detriment to the public from the notified conduct. Accordingly, the ACCC does not intend to take any further action in this matter at this time.

5.2. As with any notification, the ACCC may act to remove the statutory protection afforded by the notifications at a later stage if it is satisfied that the likely benefit to the public from the conduct no longer outweighs the likely detriment to the public from the conduct.