

COMPETITION AND CONSUMER ACT 2010

Undertaking to the Australian Competition and Consumer Commission given for
the purposes of section 87B

by

Red Energy Pty Ltd (ACN 107 479 372)

Persons giving this undertaking

- 1 This undertaking is given to the Australian Competition and Consumer Commission (ACCC) by Red Energy Pty Ltd (ACN 107 479 372) (Red Energy) of 2 William Street, East Richmond in the State of Victoria for the purposes of section 87B of the *Competition and Consumer Act 2010* (the Act).

Background

- 2 Red Energy is a wholly owned subsidiary of Snowy Hydro Limited. Snowy Hydro Limited is a company incorporated under the *Corporations Act 2001* (Cth), and its shareholders are the Governments of the Commonwealth, New South Wales and Victoria.
- 3 Red Energy supplies retail energy to customers in Victoria, South Australia and New South Wales and has approximate shares of 7.5%, 0.5% and 1.1% of the electricity customer base in those states respectively.
- 4 Red Energy uses telemarketing as a sales generation strategy. This function is performed solely by employees of Red Energy based at its Australian offices. Red Energy telemarketing staff are remunerated by payment of a base salary plus a commission based on sales.

Conduct of Concern

- 5 The conduct of concern relates to unsolicited telemarketing calls made by a Red Energy employee for the supply of retail energy to prospective customers.
- 6 The ACCC contacted Red Energy in about November 2012 requesting information in relation to a consumer complaint and subsequently investigated the telemarketing sales conduct of an employee from early 2012 to late 2012.
- 7 As a result of these investigations the ACCC considers that Red Energy has breached the following sections of the Australian Consumer Law (contained in Schedule 2 to the Act) (ACL):

7.1 misleading or deceptive conduct under s. 18 of the ACL by:

- 7.1.1 representing to a consumer that the telemarketer was calling the consumer about their current energy bill with another energy retailer, when in fact the telemarketer was calling the consumer for the purpose of selling retail energy from Red Energy;
- 7.1.2 representing to a consumer that the telemarketer was a representative of, or affiliated with, the consumer's energy distributor or current energy retailer, when this was not the case;
- 7.1.3 representing to consumers who were customers of other energy retailers that the telemarketer was not calling to sell a product or service, when in fact the telemarketer was calling to sell a product or service;

- 7.1.4 representing to consumers that all energy retailers in New South Wales must charge consumers the same price for retail electricity, when this was not the case; and
 - 7.1.5 representing to consumers that all retail electricity prices in New South Wales are regulated by government, when this was not the case.
- 7.2 making false or misleading representations with respect to the price of goods or services under s. 29(1)(i) of the ACL by:
 - 7.2.1 representing to consumers that all energy retailers in New South Wales must charge consumers the same price for retail electricity, when this was not the case; and
 - 7.2.2 representing to consumers that all retail electricity prices in New South Wales are regulated by government, when this was not the case.
- 7.3 making false or misleading representations that the person making the representation has a sponsorship, approval or affiliation under s. 29(1)(h) of the ACL by:
 - 7.3.1 representing to a consumer that the telemarketer was a representative of, or affiliated with, the consumer's energy distributor or current energy retailer, when this was not the case.
- 8 Red Energy admits that the conduct described at paragraph 7 above contravened sections 18 and 29(1)(h) and (i) of the ACL.
- 9 Red Energy wishes to resolve the matter by the provision of this undertaking in accordance with section 87B of the Act and by the payment of four (4) Infringement Notices totalling \$26,400 issued by the ACCC under section 134A of the Act for alleged contraventions of section 29(1)(i) of the ACL.

Commencement of undertaking

- 10 This undertaking comes into effect when:
 - 10.1 the undertaking is executed by Red Energy; and
 - 10.2 the ACCC accepts the undertaking so executed.
- 11 Upon the commencement of this undertaking, Red Energy undertakes to assume the obligations set out in paragraphs 12 to 17 below.

Undertakings

Compliance with Australian Consumer Law

- 12 Red Energy undertakes for the purposes of section 87B of the Act that for a period of 3 years from the date of this undertaking it will not, in trade or commerce, whether by itself, its directors, officers or agents, in connection with the supply of retail energy, make a representation to a consumer to the effect that:
 - 12.1 its representative is calling the consumer about their current energy bill with another energy retailer, when in fact the representative is calling the consumer for the purpose of selling retail energy from Red Energy;
 - 12.2 its representative is a representative of, or affiliated with, the consumer's energy distributor or current energy retailer, when this is not the case;

- 12.3 its representative is not calling consumers, who are customers of other energy retailers, to sell a product or service, when in fact the representative *is* calling to sell a product or service;
- 12.4 all energy retailers in New South Wales must charge consumers the same price for retail electricity when this is not the case; and
- 12.5 all retail electricity prices in New South Wales are regulated by government when this is not the case.

Customer Rectification

- 13 Red Energy undertakes for the purposes of section 87B of the Act that it will, within 30 days from the date of this undertaking, make reasonable efforts to contact all current customers who entered into an agreement for the supply of retail energy with Red Energy following a telemarketing call from the particular employee of concern, informing them that they may have been given misleading or deceptive information, and that they may cancel their contract with Red Energy without incurring any termination fees.
- 14 Red Energy undertakes for the purposes of section 87B of the Act that it will give effect to any request by a customer, contacted in accordance with paragraph 13, to cancel their contract within 14 days of such a request.

Website Corrective Notice

- 15 Red Energy undertakes for the purposes of section 87B of the Act that it will, within 10 days from the date of this undertaking, publish or cause to be published a corrective notice in the form and terms of **Annexure A**, on its website (www.redenergy.com.au) (website notice), and use all reasonable steps to ensure that the website notice:
 - 15.1 is accessible by a prominent one-click link displayed in the top third of the homepage of the Red Energy website entitled "Corrective Notice — Breaches of the Australian Consumer Law" and satisfies the following specifications:
 - 15.1.1 the words "CORRECTIVE NOTICE — BREACHES OF THE AUSTRALIAN CONSUMER LAW" are to be in uppercase, 18 point, bold, black, sans serif font on a white background, centred and in a black bordered box;
 - 15.1.2 the words "Click here for further information" are to be 14 point, black, sans serif font on a white background and centred below the words "CORRECTIVE NOTICE — BREACHES OF THE AUSTRALIAN CONSUMER LAW" in the same bordered box;
 - 15.1.3 the bordered box is to be at least 255 pixels wide by 60 pixels high; and
 - 15.1.4 the bordered box and its contents, including white space, is to operate in the form of a one-click hyperlink to the website notice.
 - 15.2 is substantially the same as the notice in **Annexure A**, including font and formatting, and;
 - 15.2.1 has a headline font of no less than 12 point, bold, black, sans serif font on a white background;
 - 15.2.2 is of at least 540 pixels wide by 500 pixels high;
 - 15.2.3 has a black border that is 3 pixels wide;
 - 15.2.4 the Red Energy, ACCC and Commonwealth logos are in colour, centred, and at least 25 millimetres high;

- 15.2.5 is displayed on a stand-alone webpage that is coded in standard "HTML" format;
 - 15.2.6 is not displayed as a "pop-up" or "pop-under" window; and
 - 15.2.7 is maintained for a period of no less than 60 days from the date of the Undertaking.
- 16 Further, Red Energy undertakes for the purposes of section 87B of the Act that it will, within 10 days from the date of this undertaking, publish or cause to be published a hyperlink to 'Energy Made Easy' (www.energymadeeasy.gov.au) on its website (www.redenergy.com.au), and use all reasonable steps to ensure that the website link:
- 16.1 is accessible by a prominent one-click link displayed in the top third of the homepage of the Red Energy website, and satisfies the following specifications:
 - 16.2 the words "ENERGY PRICE COMPARISON FOR CONSUMERS" are to be in uppercase, 18 point, bold, black, sans serif font on a white background, centred and in a black bordered box;
 - 16.3 the words "Click here for further information" are to be 14 point, black, sans serif font on a white background and centred below the words "ENERGY PRICE COMPARISON FOR CONSUMERS" in the same bordered box;
 - 16.4 the bordered box is to be at least 255 pixels wide by 60 pixels high;
 - 16.5 the bordered box and its contents, including white space, is to operate in the form of a one-click hyperlink to the website notice;
 - 16.6 is not displayed as a "pop-under" window; and
 - 16.7 is maintained for a period of no less than 180 days from the date of the Undertaking.

Compliance Program

- 17 Red Energy undertakes for the purposes of section 87B of the Act that it will:
- 17.1 within three months of the date of this undertaking coming into effect, review its existing compliance program and make any amendments necessary to ensure that it meets the requirements set out in **Annexure B**; and
 - 17.1.1 maintain this program for three years the date on which the amendments referred to in paragraph 17.1 are made; and
 - 17.1.2 provide, at its own expense, a copy of any documents required by the ACCC in accordance with **Annexure B**.

Acknowledgments

- 18 Red Energy acknowledges that:
- 18.1 the ACCC will make this undertaking publicly available including by publishing it on the ACCC's public register of section 87B undertakings on its website;
 - 18.2 the ACCC will, from time to time, make public reference to the undertaking including in news media statements and in ACCC publications;
 - 18.3 this undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct; and

- 18.4 a summary of the Compliance Program review reports referred to in **Annexure B** of the undertaking may be held with this undertaking in the public register.


Executed by

Red Energy Pty Ltd ACN 107 479 372 and by its authorised officers pursuant to section 127(1) of the *Corporations Act 2001*.


.....
~~Secretary~~/Director

.....
Director
This 25 day of July 2013

ACCEPTED BY THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION PURSUANT TO SECTION 87B OF THE *COMPETITION AND CONSUMER ACT 2010*.


.....
Rod Sims
Chairman
This 2nd day of September 2013

CORRECTIVE NOTICE
MISLEADING CONDUCT AND FALSE REPRESENTATIONS MADE BY RED ENERGY

[Insert RED ENERGY logo]

Red Energy uses telemarketing as a means of selling retail energy to consumers in New South Wales, Victoria and South Australia.

In the period July 2012 to October 2012, Red Energy, through one of its employees (a telemarketer), made telemarketing calls to consumers. During a number of these telemarketing calls, the telemarketer made the following false or misleading representations to prospective customers:

- the telemarketer was calling the consumer about their current energy bill with another energy retailer when in fact the telemarketer was calling the consumer for the purpose of selling retail energy from Red Energy;
- and,
- the telemarketer was a representative of, or affiliated with, the consumer's energy distributor or current energy retailer;
 - the telemarketer was not calling the consumer to sell them a good or service;
 - all energy retailers in New South Wales must charge consumers the same price for retail electricity; and
 - all retail electricity prices in New South Wales are regulated by government,

when this was/is not the case.

The ACCC has alerted Red Energy to this conduct. Red Energy admits that, by making these false and misleading representations, it has contravened sections 18 and 29(1)(h) and (i) of the *Australian Consumer Law*.

In order to address this conduct, Red Energy has:

- a. paid four Infringement Notices, totalling \$26,400.00; and
- b. provided a court enforceable undertaking to the ACCC to minimise the risk of any further false or misleading representations arising in the future.

If you believe you have been affected by the conduct outlined above, please contact Red Energy Customer Solutions on 131 806.



**Australian
Competition &
Consumer
Commission**

TRADE PRACTICES COMPLIANCE PROGRAM

LEVEL 4

Red Energy Pty Ltd (**Red Energy**) will ensure its Trade Practices Compliance Program (**Compliance Program**) complies with each of the following requirements:

Appointments

- 1 Within one month of the date of this Undertaking coming into effect Red Energy will appoint a Director or a Senior Manager with suitable qualifications or experience in corporate compliance as **Compliance Officer** with responsibility for ensuring the Compliance Program is effectively designed, implemented and maintained.
- 2 Within three months of the date of this Undertaking coming into effect Red Energy shall appoint a qualified, internal or external, compliance professional with expertise in trade practices issues (**the Compliance Advisor**). Red Energy shall instruct the Compliance Adviser to conduct a Competition and Consumer Act risk assessment (**Risk Assessment**) in accordance with 2.1 - 2.4 below:
 - 2.1 identify the areas where Red Energy is at risk of breaching sections 18 and/or 29 of the *Competition and Consumer Act 2010*;
 - 2.2 assess the likelihood of these risks occurring and the consequences of the risks to the business operations of Red Energy should they occur;
 - 2.3 identify where there may be gaps in Red Energy's existing procedures for managing these risks; and
 - 2.4 provide recommendations for action having regard to the assessment.

Compliance Policy

- 3 Red Energy will, within 30 days of the Undertaking coming into effect, issue a policy statement outlining Red Energy's commitment to trade practices compliance (**the Compliance Policy**). Red Energy will ensure that the Compliance Policy:
 - 3.1 is written in plain language;
 - 3.2 contains a statement of commitment to compliance with the *Competition and Consumer Act 2010*;
 - 3.3 contains a strategic outline of how commitment to trade practices compliance will be realised within Red Energy;
 - 3.4 contains a requirement for all staff to report any Compliance Program related issues and trade practices compliance concerns to the Compliance Officer;
 - 3.5 contains a guarantee that whistleblowers will not be prosecuted or disadvantaged in any way and that their reports will be kept confidential and secure; and
 - 3.6 contains a clear statement that Red Energy will take action internally against any persons who are knowingly or recklessly concerned in a contravention of the Competition and Consumer Act and will not indemnify them.

Complaints Handling System

- 4 Red Energy will ensure that the Compliance Program includes a trade practices complaints handling system. Red Energy shall use its best endeavours to ensure this system is consistent with AS/ISO 10002:2006 **Customer satisfaction - Guidelines for complaints**

handling in organizations, though tailored to Red Energy's circumstances. Red Energy will ensure that staff and customers are made aware of the complaints handling system.

- 5 Red Energy will ensure that the Compliance Program includes whistleblower protection mechanisms to protect those coming forward with trade practices complaints. Red Energy shall use its best endeavours to ensure that these mechanisms are consistent with Australian Standard 8004, though tailored to Red Energy's circumstances.

Reports to Board/Senior Management

- 6 Red Energy will ensure that the Compliance Officer reports to the Board and/or senior management meetings every six months on the continuing effectiveness of the Compliance Program.

Training

- 7 Red Energy will ensure that the Compliance Program provides for regular (at least once a year) and practical training for all directors, officers, employees, representatives and agents of Red Energy, whose duties could result in them being concerned with conduct that may contravene sections 18 and 29 of the Australian Consumer Law (ACL). Red Energy must ensure that the training is conducted by a suitably qualified compliance professional or legal practitioner with expertise in trade practices law.
- 8 Red Energy will ensure that the Compliance Program includes a requirement that awareness of trade practices compliance issues forms part of the induction of all new directors, officers, employees, representatives and agents, whose duties could result in them being concerned with conduct that may contravene sections 18 and 29 of the ACL.

Supply of Compliance Program Documents to the ACCC

- 9 Red Energy shall, at its own expense, within twelve months of the date of this Undertaking coming into effect, cause to be produced and provided to the ACCC copies of each of the documents constituting the Compliance Program and implement promptly and with due diligence any recommendations that the ACCC may make that are reasonably necessary to ensure that Red Energy maintains and continues to implement the Compliance Program in accordance with the requirements of this Undertaking.

Review

- 10 Red Energy shall, at its own expense, cause annual Reviews of the Compliance Program (**the Reviews**) to be carried out in accordance with each of the following requirements:
 - 10.1 **Scope of the Reviews** — the Reviews should be broad and rigorous enough to provide Red Energy and the ACCC with a supportable verification that Red Energy has in place a program that complies with each of the requirements detailed in paragraphs 1 - 9 above and to provide the Review reports and opinions detailed at point 11 below;
 - 10.2 **Independence of Reviewer** — Red Energy shall ensure that the Reviews are carried out by a suitably qualified, independent compliance professional with expertise in trade practices law (**the Reviewer**). The Reviewer will qualify as independent on the basis that he or she:
 - 10.2.1 did not design or implement the Compliance Program;
 - 10.2.2 is not a present or past staff member or director of Red Energy;
 - 10.2.3 has not acted and does not act for Red Energy in any trade practices related matters:

- 10.2.4 has not and does not act for or consult to Red Energy or provide other services on trade practices related matters other than Compliance Program reviewing; and
- 10.2.5 has no significant shareholding or other interests in Red Energy.
- 10.3 **Evidence** — Red Energy shall use its best endeavours to ensure that the Reviews are conducted on the basis that the Reviewer has access to all relevant sources of information in Red Energy's possession or control, including without limitation:
 - 10.3.1 enquiries of any officers, employees, representatives, agents and stakeholders of Red Energy;
 - 10.3.2 Red Energy's records, including Red Energy's complaints register/reports and any documents relevant to Red Energy's training or induction program; and
 - 10.3.3 documents created by Red Energy's consultants and legal practitioners for use in Red Energy's Compliance Program.
- 10.4 Red Energy shall ensure that the first Review is completed within one year and one month of this Undertaking coming into effect and that each subsequent Review is completed within one year thereafter.

Reporting

- 11 Red Energy shall use its best endeavours to ensure the Reviewer sets out the findings of the Review in two separate reports as set out below:

Company Compliance Program Review Report (to be provided to Red Energy)

- 11.1 Red Energy's Company Compliance Program Review Report will provide particular and specific information regarding the performance of the Compliance Program to the corporation including:
 - 11.1.1 if, and to what extent, the Compliance Program of Red Energy includes all the elements detailed in paragraphs 1 - 10 above;
 - 11.1.2 if, and to what extent, the Compliance Program adequately covers the parties and areas identified in the initial Risk Assessment;
 - 11.1.3 if, and to what extent, the trade practices training is effective;
 - 11.1.4 if, and to what extent, Red Energy's complaints handling system is effective;
 - 11.1.5 if, and to what extent, Red Energy is able to provide confidentiality and security to whistleblowers, and staff are aware of the whistleblower protection mechanisms; and
 - 11.1.6 recommendations for rectifying deficiencies in 11.1.1 - 11.1.5 above that the Reviewer thinks are reasonable necessary to ensure that Red Energy maintains and continues to implement the Compliance Program in accordance with the requirements of the Undertaking.

ACCC Compliance Program Review Report (to be provided to ACCC)

- 11.2 The ACCC Compliance Program Review Report will provide particular and specific information regarding the scope of the Review and the effectiveness of the Compliance Program including:
 - 11.2.1 details of the evidence gathered and examined during the Review;

- 11.2.2 the name and relevant experience of the person appointed as the company Compliance Officer;
 - 11.2.3 the Reviewer's opinion on whether Red Energy has in place a Compliance Program that complies with the requirements detailed in paragraph 1 - 10 above;
 - 11.2.4 actions recommended by the Reviewer to ensure the continuing effectiveness of Red Energy's Compliance Program;
 - 11.2.5 confirmation that any actual and potential inadequacies in Red Energy's Compliance Program have been brought to the attention of the Compliance Officer and the Board;
 - 11.2.6 confirmation that the Reviewer has revisited any actual and potential inadequacies in Red Energy's Compliance Program identified in any previous Company Compliance Program Review Report, and assessed how they have been addressed by Red Energy;
 - 11.2.7 any reservations that the Reviewer might have about the reliability and completeness of the information to which the Reviewer had access in the conduct and reporting of the Review; and
 - 11.2.8 any comments or qualifications concerning the Review process that the Reviewer, in his or her professional opinion, considers necessary.
- 11.3 Red Energy will ensure that the Review Reports are completed and provided to Red Energy within two months of each Review.
 - 11.4 Red Energy will retain the Company Compliance Program Review Report and cause the ACCC Compliance Program Review Report to be provided to the ACCC within 14 days of its receipt from the Reviewer.
 - 11.5 Red Energy acknowledges that a brief statement regarding the ACCC Compliance Program Review Report may be included in the ACCCs 87B public register.
- 12 **Recommendations** — Red Energy shall implement promptly and with due diligence any recommendations made by the Reviewer or required by the ACCC that are reasonably necessary to ensure that Red Energy maintains and continues to implement the Compliance Program in accordance with the requirements of this Undertaking.
 - 13 If requested by the ACCC Red Energy shall, at its own expense, provide copies of documents and information in respect of matters which are the subject of the Compliance Program.
 - 14 In the event the ACCC has sufficient reason to suspect that the Compliance Program is not being implemented effectively, Red Energy shall, at its own expense and if requested by the ACCC, cause an interim or additional Review to be conducted and cause the resulting ACCC Review Report to be provided to the ACCC.