

## Undertaking to the Australian Competition and Consumer Commission

Given under section 87B of the *Competition and Consumer Act 2010* (Cth) by M2 Energy Pty Ltd trading as Dodo Power & Gas (ACN 123 155 840)

### Person giving the Undertaking

1. This undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by M2 Energy Pty Ltd trading as Dodo Power & Gas (ACN 123 155 840) (**Dodo**) for the purposes of section 87B of the *Competition and Consumer Act 2010* (**CCA**) (**Undertaking**).

### Background

#### *Dodo*

2. Dodo is a corporation authorised under the National Energy Retail Law to sell electricity. Dodo supplies electricity to residential and small business customers in New South Wales, South Australia and Southeast Queensland.

#### *The Code*

3. The *Competition and Consumer (Industry Code – Electricity Retail) Regulations 2019* (the **Code**) is a mandatory industry code which applies to all electricity retailers that supply small customers (as defined in section 6 of the Code) in applicable distribution regions in New South Wales, South Australia, and South East Queensland. As an electricity retailer supplying electricity to small customers in these regions, Dodo is required to comply with the Code.
4. The purposes of the Code include, among other things, limiting the standing offer prices that are charged to residential and small business customers, and allowing consumers to compare market electricity offers more easily across retailers. The Code imposes several requirements on retailers, including that retailers must not price standing offers above the reference price set by the Australian Energy Regulator for a financial year in relation to electricity supply to a small customer of a particular type in a distribution region (**Price Cap**), how retailers must communicate price information and what records retailers are required to keep. A failure to adhere to Code requirements can impact a consumer's ability to compare energy offers and result in them paying higher prices if offers are priced above the standing offer Price Cap.

### Alleged Conduct

5. The ACCC alleges that:
  - (a) From 1 July 2022 until 31 May 2023 inclusive, Dodo priced two of its standing offers for supplying residential customers in the SA Power Networks distribution region (DOD14015SRE5 and DOD146946SRE4) above the relevant Price Cap for that day. In doing so, Dodo failed to ensure its standing offer prices for supplying residential customers complied with the relevant Price Cap in contravention of section 10(2) of the Code (the **Price Cap Conduct**).
  - (b) From 6 June 2023 to 22 June 2023 inclusive, Dodo sent price change communications to 52,014 small customers in New South Wales, South Australia

and South East Queensland that did not contain information required by sections 12(3)(a)–(c) and (6)(b) of the Code in contravention of section 12(2) of the Code (the **Price Change Conduct**).

- (c) In respect of the Price Change Conduct, Dodo did not make a record of how it calculated or estimated the matters mentioned in sections 12(3)(a), (b) and (c) of the Code in relation to the offered prices, in breach of section 13A(2) of the Code (the **Record Keeping Conduct**).
- (d) Dodo contravened section 51ACB of the CCA by contravening an applicable industry code as described in paragraphs (a) – (c) above.

### **Admission and Resolution**

- 6. In response to the ACCC's investigation, Dodo:
  - (a) admits that it contravened section 10(2) of the Code by engaging in the Price Cap Conduct by pricing standing offers on two of its plans (DOD14015SRE5 and DOD146946SRE4) above the relevant Price Cap between 1 July 2022 and 31 May 2023;
  - (b) admits that it contravened section 12(2) of the Code by engaging in the Price Change Conduct by sending price change communications to small customers without the information required under the Code;
  - (c) admits that it contravened section 13A(2) of the Code by engaging in the Record Keeping Conduct by failing to keep records of how it calculated or estimated the matters mentioned in section 12(3) of the Code;
  - (d) admits that it contravened section 51ACB of the CCA by contravening an applicable industry code as described in paragraphs (a) – (c) above.
  - (e) has offered this undertaking to the ACCC to address the ACCC's concerns.

### **Commencement of this Undertaking**

- 7. This Undertaking comes into effect when:
  - (a) this Undertaking is executed by Dodo, and
  - (b) this Undertaking so executed is accepted by the ACCC (the **Commencement Date**).
- 8. This Undertaking has effect for three (3) years from the Commencement Date (the **Term**).
- 9. From the Commencement Date, Dodo undertakes to assume the obligations set out in paragraphs 10 to 13 below for the purposes of section 87B of the CCA.

### **Undertaking**

#### *Compliance with the Code*

- 10. Dodo undertakes that it will, consistent with its obligations under the Code:

- (a) ensure the prices on its standing offers that are subject to section 10 of the Code comply with the Price Cap on that day in accordance with section 10(2) of the Code;
- (b) when communicating offered prices to small customers pursuant to section 12(2A) of the Code, state all matters required by the Code, including those set out in sections 12(3) and 12(6);
- (c) keep appropriate records of how it calculated or estimated the matters mentioned in section 12(3)(a), (b) and (c) in accordance with the requirements of section 13A of the Code.

#### *Compliance Program*

- 11. Dodo undertakes that it will, at its own expense:
  - (a) establish and implement a Compliance Program (**Compliance Program**) in accordance with the requirements set out in “**Annexure A**” to this Undertaking, being a program designed to minimise Dodo’s risk of future breaches of the Code;
  - (b) maintain and continue to implement the Compliance Program for the Term of this Undertaking, and

#### **ACCC Enquiries**

- 12. For the purposes of monitoring compliance with this Undertaking, the ACCC may make reasonable enquiries with Dodo and Dodo will respond to such enquiries at its own expense and within a reasonable period of time.
- 13. If requested by the ACCC during the Term of this Undertaking, Dodo will, at its own expense, cause to be produced and provide to the ACCC copies of such documents (excluding any legally privileged documents) in its power, possession or control evidencing Dodo’s compliance with the obligations set out in this Undertaking.

#### **Acknowledgements**

- 14. Dodo acknowledges that:
  - (a) 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;
  - (b) the ACCC will, from time to time, make public reference to this Undertaking including in news media statements and in ACCC publications;
  - (c) this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct; and
  - (d) the ACCC may, from time to time, publicly report on compliance with the Undertaking.
- 15. Nothing in this Undertaking is intended to restrict the right of the ACCC to take action under the ACL and the CCA for penalties or other remedies in the event Dodo does not fully implement and/or perform its obligations under this Undertaking or in relation to any other event.

**Executed as an Undertaking**

Executed by M2 Energy Pty Ltd trading as Dodo Power & Gas (ACN 123 155 840) pursuant to section 127(1) of the *Corporations Act 2001* (Cth) by:

<p>DocuSigned by:  BE59B9E77DB84F1...</p>	<p>DocuSigned by:  8CD7DA69DFED46C...</p>
Signature of director	Signature of a director
Ellie Sweeney	Nitesh Naidoo
Name of director (print)	Name of director
21 May 2024   1:16 PM AEST	21 May 2024   4:01 PM AEST
Date	Date


Accepted by the Australian Competition and Consumer Commission pursuant to section 87B of the *Competition and Consumer Act 2010* (Cth) on:

25 June 2024

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Date

and signed on behalf of the Commission:



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Chair

25 June 2024

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Date

## Annexure A

### COMPLIANCE PROGRAM

#### LEVEL 3

M2 Energy Pty Ltd trading as Dodo Power & Gas (ACN 123 155 840) (**Dodo**) will establish a compliance program (**Compliance Program**) that complies with each of the following requirements:

#### Appointments

1. Within three months of the undertaking under s 87B of the *Competition and Consumer Act 2010* (Cth) (**CCA**) provided by Dodo to the ACCC (**Undertaking**) coming into effect (**Commencement Date**), Dodo will appoint a director or a senior manager with suitable qualifications or experience in corporate compliance as responsible for ensuring the Compliance Program is effectively designed, implemented and maintained (**Compliance Officer**). Dodo may replace the Compliance Officer during the term of the Undertaking with a new Compliance Officer who meets the criteria in this paragraph.
2. Within 28 days of the Commencement Date, Dodo will appoint a suitably qualified, external, compliance professional with expertise in competition and consumer law, including expertise in the *Competition and Consumer (Industry Code – Electricity Retail) Regulations 2019* (the **Code**) (**Compliance Advisor**) to complete an independent review of Dodo's compliance obligations under the Code.
3. Dodo will instruct the Compliance Advisor to conduct a review of Dodo's compliance with the Code (**Risk Assessment**) within three months of the Commencement Date and to provide a written report outlining their findings (**Risk Assessment Report**) to Dodo within a further 1 month of conducting the Risk Assessment, addressing, but not limited to the following matters:
  - 3.1. any areas where Dodo is at risk of breaching the Code, taking into account, but not limited to the alleged conduct described at paragraph 5 in the Undertaking.
  - 3.2. whether Dodo's processes and controls are sufficient to ensure Dodo's compliance with its obligations under the Code;
  - 3.3. the extent to which Dodo's processes and controls are not sufficient to ensure Dodo's compliance with its obligations under the Code;
  - 3.4. modifications to Dodo's processes and controls that would be required to ensure Dodo's compliance with its obligations under the Code; and
  - 3.5. any other incidental recommendations regarding Dodo's compliance obligations under the Code.
4. Dodo will implement as soon as reasonably practicable and with due diligence any recommendations made by the Compliance Advisor in the Risk Assessment Report that it,

acting reasonably, considers prudent and practical. Where Dodo does not implement a recommendation made by the Compliance Advisor, it will document in writing the reasons for doing so and provide those to the Compliance Advisor along with a description of any alternative approach it has decided to take to address the risk issue that was the subject of the recommendation.

### **Compliance Policy**

5. Dodo will, within 21 days of the Commencement Date, issue a policy statement outlining Dodo's commitment to compliance with the CCA (**Compliance Policy**).
6. Dodo will ensure the Compliance Policy contains:
  - 6.1. a statement of commitment to compliance with the Code;
  - 6.2. an outline of how Dodo's commitment to Code compliance will be realised within Dodo, including but not limited to its commitment to the implementation of any recommendations that may be made in the Risk Assessment Report in a manner consistent with paragraph 4 above;
  - 6.3. a requirement for all staff to report any Compliance Program related issues and compliance concerns to the Compliance Officer; and

### **Staff Training and Induction**

7. Dodo will ensure that the Compliance Program includes a requirement for Code compliance training at least once a year (**Staff Training**) for all:
  - 7.1. officers, employees, representatives and agents of Dodo, whose duties involve managing or taking action subject to the Code or whose duties could otherwise result in them being concerned with conduct that may contravene the Code; and
  - 7.2. executive and non-executive directors of Dodo.
8. Dodo will ensure that the Compliance Program includes a requirement that awareness of Dodo's obligations under the Code forms part of the induction (**Induction**) of all new:
  - 8.1. officers, employees, representatives and agents of Dodo, whose duties involve managing or taking action subject to the Code or whose duties could otherwise result in them being concerned with conduct that may contravene the Code; and
  - 8.2. executive and non-executive directors of Dodo.
9. Dodo will ensure that the Staff Training and Induction is either:
  - 9.1. conducted in person or virtually by a suitably qualified compliance professional or legal practitioner with expertise in competition and consumer law; or

- 9.2. delivered via online training modules which have been designed with the input of a suitably qualified compliance professional or legal practitioner with expertise in competition and consumer law.

### **Reports to Directors/Senior Management**

10. Dodo will ensure that the Compliance Officer reports to Dodo's Board and/or senior management every 6 months on the continuing effectiveness of the Compliance Program.

### **Compliance Review**

11. Dodo will at its own expense, cause an annual review of the Compliance Program (**Review**) to be carried out in accordance with each of the following requirements:

- 11.1. **Scope of Review** – the Review should be broad and rigorous enough to provide Dodo and the ACCC with:

- 11.1.1. verification that Dodo has in place a Compliance Program that complies with each of the requirements detailed in paragraphs 1 to 10 of this Annexure; and
- 11.1.2. the Compliance Reports detailed at paragraph 12 of this Annexure.

- 11.2. **Independence of Review** – Dodo will ensure that each Review is carried out by a suitably qualified, independent compliance professional with expertise in the Code (**Reviewer**). The Reviewer will qualify as independent on the basis that he or she:

- 11.2.1. did not design or implement the Compliance Program (for which purpose providing recommendations in a Risk Assessment Report does not constitute design or implementation);
- 11.2.2. is not a present or past staff member or director of Dodo or its related bodies corporate; and
- 11.2.3. has no significant shareholding or other interests in Dodo or its related bodies corporate.

- 11.3. **Evidence** – Dodo will use its best endeavours to ensure that each Review is conducted on the basis that the Reviewer has access to all relevant sources of information in Dodo's possession or control, including without limitation:

- 11.3.1. the ability to make enquiries of any officers, employees, representatives, and agents of Dodo;
- 11.3.2. documents relating to the Risk Assessment, including the Risk Assessment Report;
- 11.3.3. documents relating to Dodo's Compliance Program, including documents relevant to Dodo's Compliance Policy, Staff Training and Induction; and

11.3.4. any reports made by the Compliance Officer to the Board or senior management regarding Dodo's Compliance Program.

11.4. Dodo will ensure that a Review is completed within one year of the Commencement Date, and that a subsequent Review is completed annually for 3 years.

### **Compliance Report**

12. Dodo will use its best endeavours to ensure that within 21 days of the completion of a Review, the Reviewer includes the following findings of the Review in a report to the Compliance Officer of Dodo (**Compliance Report**):

12.1. whether the Compliance Program of Dodo includes all the elements detailed in paragraphs 1 to 10 of this Annexure and if not, what elements need to be included or further developed;

12.2. whether the Compliance Program adequately covers areas identified in the Risk Assessment, and if not, what needs to be further addressed;

12.3. whether the Staff Training and Induction is effective, and if not, what aspects need to be further developed;

12.4. whether there are any material deficiencies in Dodo's Compliance Program, or whether there are or have been instances of material non-compliance with the Compliance Program (**Material Failure**)<sup>1</sup>, and if so, recommendations for rectifying the Material Failure.

### **Dodo's Response to Compliance Report**

13. Dodo will ensure that the Compliance Officer, within the latter of (a) 14 days of receiving the Compliance Report, or (b) the date of the next scheduled Board meeting:

13.1. provides the Compliance Report to the Board or relevant governing body; and

13.2. where a Material Failure has been identified by the Reviewer in the Compliance Report, provides a report to the Board or relevant governing body identifying how Dodo can implement any recommendations made by the Reviewer in the Compliance Report to rectify the Material Failure.

14. Dodo will promptly and fully implement with due diligence any recommendations made by the Reviewer in the Compliance Report to address a Material Failure.

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<sup>1</sup> Material Failures are intended to include non-trivial failures that are ongoing or continue for a significant period of time to:

- incorporate a requirement of the Undertaking in the design of the Compliance Program; or
- comply with a fundamental obligation in the implementation of the Compliance Program (e.g., if no Staff Training has been conducted within the Review period).



### **Reporting Material Failures to the ACCC**

15. Where a Material Failure has been identified by the Reviewer in the Compliance Report, Dodo will:
  - 15.1. provide a copy of the Compliance Report to the ACCC within 10 days of the Board or relevant governing body receiving the Compliance Report; and
  - 15.2. inform the ACCC of any steps that have been taken to implement the recommendations made by the Reviewer in the Compliance Report; or
  - 15.3. otherwise outline the steps that Dodo proposes to take to implement the recommendations and inform the ACCC once those steps have been implemented.

### **Provision of Compliance Program Documents to the ACCC**

16. Dodo will maintain copies of all documents relating to and constituting the Compliance Program for a period not less than 5 years from the Commencement Date.
17. If requested by the ACCC during the period of 5 years following the Commencement Date, Dodo will, at its own expense, cause to be produced and provided to the ACCC copies of all documents constituting the Compliance Program, including:
  - 17.1. the Compliance Policy;
  - 17.2. the Risk Assessment Report;
  - 17.3. Staff Training and Induction materials;
  - 17.4. any Compliance Report that has been completed at the time of the request; and
  - 17.5. copies of the reports to the Board or relevant governing body referred to in paragraphs 10 and 13 of this Annexure.

### **ACCC Recommendations**

18. Dodo will fully implement, as soon as reasonably practicable and with due diligence, any recommendations that the ACCC may make (after consultation with Dodo) that the ACCC considers reasonably necessary to ensure that Dodo maintains and continues to implement the Compliance Program in accordance with the requirements of this Undertaking.