

# Undertaking to the Australian Competition and Consumer Commission

Given under section 87B of the *Competition and Consumer Act 2010* (Cth) by 1st Energy Pty Ltd ACN 604999706.

## Person(s) giving the Undertaking

1. This Undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by 1st Energy Pty Ltd ACN 604999706 (**1st Energy**), for the purposes of section 87B of the *Competition and Consumer Act 2010* (**CCA**).

## Background

2. 1st Energy is an electricity retailer that commenced operations in 2014, originally servicing New South Wales, Victoria, and Queensland. It commenced supplying electricity in Tasmania in February 2019. At that time the Tasmanian market had only one electricity retailer, Aurora Energy Pty Ltd (**Aurora**). 1st Energy has approximately 5,500 customers in Tasmania.
3. During the period 18 February 2019 to 23 August 2019 (the **Relevant Period**):
  - a) 1st Energy offered Tasmanian consumers a 'Switch Offer' which consisted of a 5% discount off electricity usage charges at the 'regulated standing offer electricity price', conditional on paying bills on time. As at December 2018, more than 90% of consumers in Tasmania were on Aurora's standing offer based on the regulated electricity price;<sup>1</sup> and
  - b) 1st Energy engaged third party telemarketing agents (**Agents**) to make unsolicited calls to consumers on behalf of 1st Energy for the purpose of promoting the 'Switch Offer' and obtaining the consumer's consent to transfer to 1st Energy. The Agents were paid commissions based on the number of consumers that completed transfers to 1st Energy.

## Conduct of concern

4. The ACCC is concerned that during the Relevant Period, 1st Energy, by way of unsolicited marketing calls made by its Agents to certain residential consumers in Tasmania, made representations, in trade or commerce, in connection with the supply or possible supply of goods or services, that:
  - a) its sales agents were independent energy advisors, comparators or experts, or affiliated with the incumbent electricity provider in Tasmania (Aurora), when in fact they were sales agents for 1st Energy, seeking to transfer consumers' electricity accounts to 1st Energy (**Affiliation Representation**);
  - b) Tasmanian consumers were eligible to receive discounts on their existing electricity plan, when in fact the quoted discounts were from 1st Energy's electricity plans (**Discount Representation**); and
  - c) Tasmanian consumers were being provided with information about goods or services and/or discounts and would have the opportunity to make a decision whether to receive the supply of electricity from 1st Energy and/or to enter into a plan for the supply of electricity after the marketing call, when in fact the sales agent intended to commence the transfer upon the conclusion of the marketing call (**No Transfer Representation**).

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<sup>1</sup> AER State of the Market Report, 2018, p 50  
[https://www.aer.gov.au/system/files/State%20of%20the%20Energy%20Market%202018%20-%20Full%20report%20A3%20spread\\_2.pdf](https://www.aer.gov.au/system/files/State%20of%20the%20Energy%20Market%202018%20-%20Full%20report%20A3%20spread_2.pdf)

## Contraventions of the Australian Consumer Law (ACL) contained in Schedule 2 of the CCA

5. The ACCC considers that by engaging in the conduct, and making the Representations described at paragraphs 4(a) to (c) above, 1st Energy has in trade or commerce:
  - a) with respect to the Affiliation, Discount and No Transfer Representations, engaged in conduct that is misleading or deceptive or is likely to mislead or deceive in contravention of section 18 of the ACL;
  - b) with respect to the Affiliation Representation, in connection with the supply or possible supply of goods or services, made false or misleading representations that the person making the representation has a sponsorship, approval or affiliation in contravention of section 29(1)(h) of the ACL; and
  - c) with respect to the No Transfer Representation, in connection with the supply or possible supply of goods or services, made false or misleading representations concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy in breach of section 29(1)(m) of the ACL.

## Admissions & Resolution

6. In order to resolve the ACCC's concerns, 1st Energy:
  - a) has taken steps to rectify the circumstances giving rise to the conduct of concern including:
    - suspending relevant Agent channels in Tasmania;
    - applying additional quality assurance checks; and
    - conducting a review and upgrade of sales compliance training and assessment;
  - b) admits that its conduct outlined in paragraphs 4(a) to (c) above is likely to have contravened sections 18, 29(1)(h) and 29(1)(m) of the ACL; and
  - c) offers this Undertaking to the ACCC.

## Commencement of this Undertaking

7. This Undertaking comes into effect when:
  - a) this Undertaking is executed by 1st Energy; and
  - b) this Undertaking so executed is accepted by the ACCC(the **Commencement Date**).
8. The Undertaking has effect for three (3) years after the Commencement Date (the **Term**).
9. Upon the commencement of this Undertaking, 1st Energy undertakes to assume the obligations set out in paragraphs 10 to 16 for the purposes of section 87B of the CCA.

## Undertaking

### *Cease and refrain from further false or misleading representations*

10. 1st Energy undertakes that for the Term, it will not itself, through its officers, employees, representatives or agents, in trade or commerce, in connection with the promotion, supply or possible supply of goods or services make, the Affiliation Representation, Discount Representation or No Transfer Representation, or similar representations that would contravene the ACL.

### *Direct communication to customers*

11. 1st Energy undertakes that it will:
  - a) by 1 February 2021, send a letter (either by post or email) to customers for whom 1st Energy took steps that resulted in a transfer from Aurora to 1st Energy as a result of an unsolicited marketing phone call by an Agent during the Relevant Period, and who remain customers of 1st Energy as at the date the letter is sent (**Affected Customers**) in the form at **Annexure A**.

- b) In respect of the Undertaking set out in paragraph 11(a), by 1 March 2021, 1st Energy will provide the ACCC with:
  - i. a list of all the Affected Customers; and
  - ii. confirmation that it has written to each of the Affected Customers in accordance with paragraph 11(a).

#### *Customer transfers*

- 12. In the event that 1st Energy is contacted by an Affected Customer requesting termination of their contract with 1st Energy, then 1st Energy will provide a response to that Affected Customer within 7 days, advising that 1st Energy will allow such a termination and any transfer to that Affected Customer's chosen electricity retailer without the need to pay a termination fee or penalty.
- 13. 1st Energy will:
  - a) consider all requests in a reasonable manner and engage with all Affected Customers in good faith; and
  - b) provide reasonable assistance to facilitate a requested transfer in a timely manner, including:
    - i. if a customer emails 1st Energy to request their electricity supply be transferred back to Aurora or away from 1st Energy, providing Aurora's contact details to the customer; or
    - ii. if a customer telephones 1st Energy and asks for their electricity supply to be transferred back to Aurora or away from 1st Energy, telephoning Aurora while the customer remains on the line and transferring the customer's telephone call through to an Aurora representative.

#### *Compliance program*

- 14. 1st Energy undertakes that it will at its own expense, update its competition and consumer compliance program (**Compliance Program**) to ensure it has the requirements set out in **Annexure B**, being a program designed to minimise 1st Energy's risk of future breaches of contravening sections 18, 29(1)(h) and 29(1)(m) of the ACL and to ensure its awareness of its responsibilities and obligations in relation to the requirements of sections 18, 29(1)(h) and 29(1)(m) of the ACL.
- 15. 1st Energy undertakes that it will maintain and continue to implement the Compliance Program three (3) years from the Commencement Date.

#### *ACCC requests for information*

- 16. During the period of this Undertaking, the ACCC may make reasonable inquiries of 1st Energy about its compliance with this Undertaking and 1st Energy will provide any documents and/or information sought within a reasonable period of time as agreed between the parties.

#### **Acknowledgments**

- 17. 1st Energy 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; and
  - c) this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.

## Executed as an Undertaking

Executed by 1st Energy ACN 604999706 pursuant to section 127(1) of the *Corporations Act 2001* by:

	
Signature of director	Signature of a director/ <del>company secretary</del> (delete as appropriate, or entire column if sole director company)
ADAM LANORMY	LIAM FODEN
Name of director (print)	Name of director/ <del>company secretary</del> (print)
Date 16/12/2020	Date 16/12/2020

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

18 December 2020

Date

and signed on behalf of the Commission:



Chair

18 December 2020

Date

## Annexure A – Direct communication to consumers

[1st Energy logo]

Dear [INSERT],

Australian Consumer Law Notice

Between February and August 2019, you may have received a call from one of our sales agents offering a pay on time discount if you switched from Aurora Energy to 1st Energy.

It has come to our attention that false or misleading representations were made in the course of some of these telephone calls to certain consumers, in breach of the Australian Consumer Law. These included statements about who was calling, which electricity plan the discount would be applied to, and whether the consumer had agreed to switch retailers on the marketing call.

If you would like to return to Aurora Energy as your electricity retailer you can do so without any termination costs or transfer fees. To transfer back please contact us either by email at [insert email address] or by telephone on [insert phone number]. We will use our best endeavours to assist you with your transfer back to Aurora Energy if you wish to do so. Alternatively you are free to contact Aurora Energy directly to arrange for this transfer.

If you do not wish to do transfer back to Aurora, you do not need to take any action.

We have sent you this letter as part of a court enforceable undertaking that we have provided to the Australian Competition and Consumer Commission following an investigation that was conducted. More information is available at [ACCC to provide URL link to media release].

Please call us on [insert phone number] or visit our website at [link] should you require further information about the transfer process.

Yours sincerely,

## **Annexure B – Competition and Consumer Compliance Program**

### **Appointments**

1. By 1 February 2021, 1st Energy will appoint a director or a senior manager of the business as a compliance officer, with responsibility for ensuring the Compliance Program is effectively designed, implemented and maintained (**the Compliance Officer**).
2. By 1 March 2021, 1st Energy will appoint a suitably qualified external, compliance professional with expertise in competition and consumer law (**the Compliance Advisor**).
3. 1st Energy will instruct the Compliance Advisor to conduct a competition and consumer law risk assessment by 1 June 2021 (**the Risk Assessment**).
4. 1st Energy will use its best endeavours to ensure that the Risk Assessment covers the following matters, to be recorded in a written report (**Risk Assessment Report**):
  - a. identifies the areas where 1st Energy is at risk of breaching sections 18, 29(1)(h) and 29(1)(m) of the ACL;
  - b. assesses the likelihood of these risks occurring;
  - c. identifies where there may be gaps in 1st Energy's existing procedures for managing these risks; and
  - d. provides recommendations for any action to be taken by 1st Energy having regard to the above assessment.

### **Compliance Policy**

5. 1st Energy will, by 1 April 2021, issue a policy statement outlining 1st Energy's commitment to compliance with the CCA (**the Compliance Policy**).
6. 1st Energy will ensure the Compliance Policy:
  - a. contains a statement of commitment to compliance with the CCA;
  - b. contains a requirement for all staff to report any Compliance Program related issues and CCA compliance concerns to the Compliance Officer; and
  - c. contains a clear statement that 1st Energy will take action against any persons who are knowingly or recklessly concerned in a contravention of the CCA and will not indemnify them in the event of any court proceedings in respect of that contravention.

### **Review of Quality Assurance Program**

7. 1st Energy will, by 1 April 2021:
  - a. share the results of any current internal review of its quality assurance program relating to unsolicited marketing calls with the Compliance Advisor;
  - b. instruct the Compliance Advisor to conduct any further inquiries deemed necessary in order to identify amendments to the quality assurance program as are reasonably necessary to ensure that, for a period of at least three (3) years from the Commencement Date, any unsolicited marketing calls that may involve a breach of this Undertaking are reported to the Compliance Officer and to senior management.
8. By 1 June 2021, make such amendments to the quality assurance program as are identified by the Compliance Advisor under paragraph 7.

### **Complaints Handling System**

9. 1st Energy will ensure the Compliance Program includes a competition and consumer law complaints handling system capable of identifying, classifying, storing and responding to competition and consumer law complaints (**Complaints Handling System**).

## Staff and Sales Agent Training

10. 1st Energy will ensure that the Compliance Program includes a requirement for regular (at least once a year) training for all employees and sales agents of 1st Energy whose duties could result in them being concerned with conduct that may contravene the ACL, and deals particularly with sections 18, 29(1)(h) and/or 29(1)(m) of the ACL (**Staff and Sales Agent Training**).
11. 1st Energy will ensure that the Staff and Sales Agent Training is conducted by a suitably qualified compliance professional or legal practitioner with expertise in competition and consumer law.
12. 1st Energy will ensure that the Compliance Program includes a requirement that awareness of competition and consumer compliance issues forms part of the induction of all new directors, officers, employees and sales agents whose duties could result in them being concerned with conduct that may contravene sections 18, 29(1)(h) and 29(1)(m) of the ACL.

## Reports to Board/Senior Management

13. 1st Energy will ensure that the Compliance Officer reports to the Board and/or senior management every 6 months on the continuing effectiveness of the Compliance Program.

## Compliance Review

14. On or around 1 May 2022, 1st Energy will, at its own expense, cause a review of the Compliance Program (**the Review**) to be carried out in accordance with each of the following requirements:
  - a. **Scope of Review** – the Review should be broad and rigorous enough to provide 1st Energy and the ACCC with:
    - i. a verification that 1st Energy has in place a Compliance Program that complies with each of the requirements detailed in paragraphs 1 to 13 above; and
    - ii. the Compliance Reports detailed at paragraph 15 below.
  - b. **Independent Reviewer** – 1st Energy will ensure that the Review is carried out by a suitably qualified, independent compliance professional with expertise in competition and consumer law (**the Reviewer**). The Review may be conducted by the Compliance Advisor.
  - c. **Evidence** – 1st Energy will use its best endeavours to ensure that the Review is conducted on the basis that the Reviewer has access to all relevant sources of information in 1st Energy's possession or control, including without limitation:
    - i. the ability to make enquiries of any officers, employees, representatives, and agents of 1st Energy;
    - ii. documents relating to the Risk Assessment, including the Risk Assessment Report;
    - iii. documents relating to 1st Energy's Compliance Program, including documents relevant to 1st Energy's Compliance Policy, Complaints Handling System, Staff and Sales Agent Training and induction program;
    - iv. any reports made by the Compliance Officer to the Board or senior management regarding 1st Energy's Compliance Program; and
    - v. any documents associated with the review of the Quality Assurance Program and any associated amendments.
  - d. 1st Energy will ensure that the Review is completed by 1 July 2022.

## Compliance Report

15. In relation to the Review, 1st Energy will use its best endeavours to ensure that by 31 August 2022, the Reviewer includes the following findings in a report to 1st Energy (**the Compliance Report**):
  - a. whether the Compliance Program of 1st Energy includes all the elements detailed in paragraphs 1 to 13 above and if not, what elements need to be included or further developed;
  - b. whether the Compliance Program adequately covers the parties and areas identified in the Risk Assessment, and if not, what needs to be further addressed;
  - c. whether the Staff and Sales Agent Training and induction is effective, and if not, what aspects need to be further developed;
  - d. whether 1st Energy's Complaints Handling System is effective, and if not, what aspects need to be further developed; and
  - e. whether there are any material deficiencies in 1st Energy's Compliance Program, or whether there are or have been instances of material non-compliance with the Compliance Program, (**Material Failure**), and if so, recommendations for rectifying the Material Failure/s<sup>2</sup>.

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<sup>2</sup> Material failure means a failure, that is non-trivial and which is ongoing or continued for a significant period of time, to:

### **1st Energy response to Compliance Reports**

16. 1st Energy will ensure that the Compliance Officer, within 14 days of receiving the Compliance Report:
  - a. provides the Compliance Report to the Board or relevant governing body; and
  - b. 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 1st Energy can implement any recommendations made by the Reviewer in the Compliance Report to rectify the Material Failure.
17. 1st Energy will implement promptly and with due diligence any recommendations made by the Reviewer in the Compliance Report to address a Material Failure.

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

18. 1st Energy will maintain a record of and store all documents relating to and constituting the Compliance Program for a period not less than 5 years following the Commencement Date.
19. If requested by the ACCC during the period of 5 years following the Commencement Date, 1st Energy will, at its own expense, cause to be produced and provided to the ACCC copies of any relevant documents requested by the ACCC.

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- Incorporate a requirement of the Undertaking in the design of the Compliance Program, for example, if a Complaints Handling System did not provide a mechanism for responding to complaints; or
  - Comply with a fundamental obligation in the implementation of the Compliance Program, for example if no Staff Training has been conducted within the Annual Review period.