

## Undertaking to the Australian Competition and Consumer Commission

Given under section 87B of the *Competition and Consumer Act 2010* (Cth)

by

**CovaU Pty Ltd (ACN 090 117 730)**

### Person giving the Undertaking

1. This undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by CovaU Pty Ltd (ACN 090 117 730) (**CovaU**) for the purposes of section 87B of the *Competition and Consumer Act 2010* (**CCA**) (the **Undertaking**).

### Background

#### *CovaU*

2. CovaU is a corporation authorised under the National Energy Retail Law to sell electricity. CovaU is based in Sydney, New South Wales and supplies electricity to residential and small business customers in New South Wales, South Australia, and South East 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, CovaU is required to comply with the Code.
4. The purpose of the Code is to allow consumers to compare market electricity offers more easily across retailers. The Code imposes several requirements on retailers, including how retailers must communicate price information, including in price change communications. A failure to include information required by the Code in price change communications impacts a consumer's ability to compare energy offers and make informed purchasing decisions.
5. Section 12 of the Code relevantly provides that:

(2) *The electricity retailer must not communicate the offered prices to a small customer of that type unless the communication meets the requirements of subsections (3), (6) and (7).*

(2A) *The electricity retailer communicates the offered prices to a small customer of that type if:*

(a) *the electricity retailer advertises or publishes the prices; or*

(b) *the electricity retailer offers to supply electricity in the region to the small customer at those prices; or*

(c) *both of the following subparagraphs apply:*

(i) *the electricity retailer notifies the small customer of the offered prices in writing (other than as mentioned in paragraph (a) or (b)) as part of notifying the small customer of a change to the electricity retailer's prices for supplying electricity to the small customer;*

(ii) *the offered prices are the prices that apply after the change.*

(3) *The communication must state the following matters, making it clear that the matters relate to a representative customer:*

(a) *the difference between:*

(i) *the reference price; and*

(ii) *the unconditional price;*

*expressed as a percentage of the reference price;*

(b) *for each proportional conditional discount mentioned in the communication—the difference between:*

(i) *the unconditional price; and*

(ii) *the conditional price for the discount;*

*expressed as a percentage of the reference price;*

(c) *the lowest possible price.*

...



(6) *The communication must also state:*

(a) *the distribution region; and*

(b) *the type of small customer.*

### **Conduct of Concern**

6. On 30 May 2022, CovaU sent price change communications to 1083 small customers (across seven different tariff types) in three distribution regions in New South Wales, South Australia and South East Queensland (the **Price Change Communications**) that the ACCC considers did not state the following information required pursuant to section 12 of the Code:

(a) the percentage difference between the reference price and unconditional price (pursuant to section 12(3)(a));

(b) the lowest possible price applicable if a customer achieves all conditional discounts (pursuant to section 12(3)(c));

(c) the applicable distribution region (pursuant to section 12(6)(a)); and

(d) the applicable type of small customer (pursuant to section 12(6)(b)).

(the **Code Information**).

7. By omitting the required Code Information from the Price Change Communications sent to small customers, the ACCC considers that CovaU contravened section 12(2) of the Code on each occasion that it sent the Price Change Communication to a customer.

### **History of non-compliance**

8. The ACCC has previously taken action against CovaU concerning alleged non-compliance with the Code and the Australian Consumer Law:

(a) in July 2019, CovaU paid \$12,600 in penalties after the ACCC issued it with an infringement notice for alleged contraventions of the Australian Consumer Law concerning misleading claims about discounts available on their energy plans; and

(b) in January 2022, CovaU paid \$33,300 in penalties after the ACCC issued it with three infringement notices for alleged contraventions of the Code involving the failure to include required price information in website advertising.

### Admission and Resolution

9. CovaU admits that by sending the Price Change Communications to small customers without the Code Information as described in paragraph 6 above, it was likely to have contravened section 12(2) of the Code.
10. In response to the ACCC's investigation and concerns, CovaU has provided this Undertaking to the ACCC.

### Commencement of this Undertaking

11. This Undertaking comes into effect when:
  - (a) the Undertaking is executed by CovaU; and
  - (b) the ACCC accepts the Undertaking so executed (the **Commencement Date**).
12. This Undertaking has effect for three years from the Commencement Date (the **Term**).
13. Upon the commencement of this Undertaking, CovaU undertakes to assume the obligations set out in paragraphs 13 to 16 below for the purposes of section 87B of the CCA.

### Undertaking

#### *Cease conduct*

14. CovaU undertakes that for the Term of this Undertaking, when communicating offered prices to small customers pursuant to section 12(2A) of the Code, it will state all matters required by the Code, including those set out in sections 12(3) and 12(6).

#### *Corrective Consumer Communication*

15. CovaU undertakes, within 28 days from the Commencement Date and at its own expense that it will send or cause to be sent to each customer who received a Price Change Communication, and who remains a customer of CovaU, a communication (in terms and layout agreed by the ACCC) that:



- (a) explains the nature of the communication; and
- (b) refers to this Undertaking and provides a copy of or link to the Undertaking.

16. The communication is to be sent to the contact details known to CovaU for each impacted customer.

#### *Compliance Program*

17. CovaU 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 CovaU's risk of future breaches of the Code;
- (b) maintain and continue to implement the Compliance Program for the Term of this Undertaking; and
- (c) provide copies of any documents required by the ACCC in accordance with this Undertaking, including **Annexure A**.

#### **ACCC Enquiries**

18. For the purposes of monitoring compliance with this Undertaking, the ACCC may make reasonable enquiries with CovaU and CovaU will respond to such enquiries at its own expense and within a reasonable period of time.
19. If requested by the ACCC during the Term of this Undertaking, CovaU 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 CovaU's compliance with the obligations set out in this Undertaking.

#### **Acknowledgements**

20. CovaU 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 may, 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 CovaU Pty Ltd (ACN 090 117 730) pursuant to section 127(1) of the *Corporations Act 2001* by:

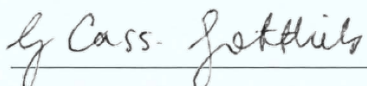
	
Signature of director	Signature of a director/company secretary
CHAO HENG HUANG	JEFFREY MA Director
Name of director (print)	Name of director/company secretary (print)
23 May 2023	23 May 2023
Date	Date

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

23 June 2023

Date

and signed on behalf of the Commission:



Chair

Date 23 June 2023

## Annexure A

### COMPLIANCE PROGRAM

#### LEVEL 3

#### CovaU Pty Ltd

CovaU Pty Ltd (**CovaU**) will establish a compliance program (**Compliance Program**) that complies with each of the following requirements:

#### Appointments

1. Within 21 days of the undertaking under s 87B of the *Competition and Consumer Act 2010* (Cth) (**CCA**) provided by CovaU to the ACCC (**Undertaking**) coming into effect (**Commencement Date**), CovaU will appoint a director or a senior manager as responsible for ensuring the Compliance Program is effectively designed, implemented and maintained (**Compliance Officer**).
2. Within 28 days of the Commencement Date, CovaU will propose a suitably qualified, compliance professional with expertise in the *Competition and Consumer (Industry Code – Electricity Retail) Regulations 2019* (the **Code**) (**Compliance Advisor**) to complete an independent review of CovaU's compliance obligations under the Code.
3. CovaU will engage the Compliance Advisor to conduct an independent review of CovaU's compliance with the Code (**Risk Assessment**) and to provide a written report outlining their findings (**Risk Assessment Report**) to CovaU by 31 August 2023, addressing the following matters:
  - 3.1 whether CovaU's processes and controls are sufficient to ensure CovaU's compliance with its obligations under the Code;
  - 3.2 the extent to which CovaU's processes and controls are not sufficient to ensure CovaU's compliance with its obligations under the Code;
  - 3.3 modifications to CovaU's processes and controls that would be required to ensure CovaU's compliance with its obligations under the Code; and



- 3.4 any other incidental recommendations regarding CovaU's compliance obligations under the Code.

### **Compliance Policy**

4. CovaU will, within 14 days of completing the Risk Assessment Report, issue a policy statement outlining CovaU's commitment to compliance with the Code (**Compliance Policy**).
5. CovaU will ensure the Compliance Policy contains:
  - 5.1. a statement of commitment to compliance with the Code;
  - 5.2. an outline of how CovaU's commitment to compliance with the Code will be realised within CovaU, including but not limited to the implementation of the recommendations that will be made in the Risk Assessment Report;
  - 5.3. a requirement for all staff to report any Compliance Program related issues and Code compliance concerns to the Compliance Officer; and
  - 5.4. a clear statement that CovaU will take action internally against any persons who are knowingly or recklessly concerned in an alleged contravention of the Code and will not indemnify them in the event of any court proceedings in respect of that alleged contravention.

### **Reports to Board/Senior Management**

6. CovaU will ensure that, following appointment of this role, the Compliance Officer reports to the Board and/or senior management every 6 months on the continuing effectiveness of the Compliance Program.

### **Compliance Program Review**

7. CovaU will, within 12 months of the Commencement Date, at its own expense, cause a review of the Compliance Program (**Review**) to be carried out.
  - 7.1. **Scope of Review** – the Review should be broad and rigorous enough to provide CovaU with a report providing:



- 7.1.1. a verification that CovaU has in place a Compliance Program that complies with each of the requirements detailed in paragraphs 1-6 above; and
- 7.1.2. the compliance reports detailed at paragraph 8 below.
- 7.2. **Independence of Review** – CovaU will ensure that the 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:
  - 7.2.1. is not a present or past staff member or director of CovaU or its related bodies corporate; and
  - 7.2.2. has no significant shareholding or other significant interests in CovaU or its related bodies corporate.
- 7.3. **Evidence** – CovaU 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 CovaU's possession or control, including without limitation:
  - 7.3.1. the ability to make enquiries of any officers, employees, representatives, and agents of CovaU;
  - 7.3.2. documents relating to the Risk Assessment, including the Risk Assessment Report;
  - 7.3.3. documents relating to CovaU's Compliance Program, including documents relevant to CovaU's Compliance Policy; and
  - 7.3.4. any reports made by the Compliance Officer to the Board or senior management regarding CovaU's Compliance Program.

### Compliance Reports

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

- 8.1. whether the Compliance Program includes all the elements detailed in paragraphs 1-6 above and if not, what elements need to be included or further developed;
- 8.2. whether the Compliance Program adequately covers areas identified in the Risk Assessment, and if not, what needs to be further addressed;
- 8.3. whether there are any material deficiencies in the 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<sup>1</sup>.

#### **CovaU response to Compliance Reports**

9. CovaU 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:
  - 9.1. provides the Compliance Report to the Board or relevant governing body;
  - 9.2. 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 CovaU can implement any recommendations made by the Reviewer in the Compliance Report to rectify the Material Failure.
10. CovaU will implement promptly and with due diligence any recommendations made by the Reviewer in the Compliance Report to address a Material Failure. Where CovaU does not implement a recommendation made by the Reviewer in the Compliance Report, it will document in writing the reasons for doing so and provide those to the Reviewer along with any alternative approach it has decided to take to address the matter that was the subject of the recommendation.

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

11. Where a Material Failure has been identified by the Reviewer in the Compliance Report, CovaU will:

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<sup>1</sup> Material failure means a failure, that is non-trivial and which is ongoing or continued for a significant period of time, to comply with a fundamental obligation in the implementation of the Compliance Program.



- 11.1. 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
- 11.2. inform the ACCC of any steps that have been taken to implement the recommendations made by the Reviewer in the Compliance Report; or
- 11.3. otherwise outline the steps that CovaU 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**

12. CovaU 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.
13. If requested by the ACCC during the period of 5 years following the Commencement Date, CovaU will, at its own expense, cause to be produced and provided to the ACCC copies of all documents constituting the Compliance Program, including:
  - 13.1. the Compliance Policy;
  - 13.2. the Risk Assessment Report;
  - 13.3. all Compliance Reports that have been completed at the time of the request;
  - 13.4. copies of the reports to the Board and/or senior management referred to in paragraphs 3 and 11 of this Annexure.

#### **ACCC Recommendations**

14. CovaU will implement promptly and with due diligence any recommendations that the ACCC may make that the ACCC deems reasonably necessary to ensure that CovaU maintains and continues to implement the Compliance Program in accordance with the requirements of this Undertaking.