



Memorandum of Understanding

between

Essential Services Commission

and

Director of Consumer Affairs Victoria

November 2022

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THIS MEMORANDUM OF UNDERSTANDING is made on the 9th day of November 2022

between

ESSENTIAL SERVICES COMMISSION

and

DIRECTOR OF CONSUMER AFFAIRS VICTORIA

(collectively, the “parties”)

Preamble

- A. The Essential Services Commission (**commission**) is an independent statutory body established under the *Essential Services Commission Act 2001* (Vic) (**ESC Act**). The commission’s primary objective is to promote the long-term interests of Victorian consumers having regard to the price, quality and reliability of essential services.
- B. The Director (**CAV Director**) of Consumer Affairs Victoria (**CAV**) is a statutory officer established under the *Australian Consumer Law and Fair Trading Act 2012* (Vic) (**ACLFTA**). The Director’s functions include enforcing and ensuring compliance with the ACLFTA and the Consumer Acts. They also include advising and educating consumers and businesses on their rights, responsibilities and changes to those laws. Consumer Affairs Victoria, within the Department of Justice and Community Safety, comprises officers and staff of that Department who together support the CAV Director in their statutory functions relating to consumer affairs regulation
- C. The parties have entered into this memorandum of understanding (**MoU**) to promote effective communication, coordination and information management between them in performing their respective statutory functions.
- D. The parties have also, by way of Part E of this MoU, entered into an information sharing arrangement in accordance with section 60E of the ESC Act and section 133 of the ACLFTA.
- E. This MoU supersedes the MoU dated 5 February 2021 between the parties.

The parties agree to the following:

A. Introduction

1. Definitions

In this MoU, unless the context requires otherwise:

- (a) **ACL** means the Australian Consumer Law text (consisting of Schedule 2 to the *Competition and Consumer Act 2010* (Cth) and the regulations under section 139G of that Act), which is applied as a law of the State of Victoria by the ACLFTA;
- (b) **ACLFTA** means the *Australian Consumer Law and Fair Trading Act 2012* (Vic);
- (c) **business day** means any day that is not a Saturday, Sunday or a public holiday (being a public holiday appointed as such under the *Public Holidays Act 1993* (Vic)) in Melbourne;
- (d) **CAV** means Consumer Affairs Victoria;
- (e) **CAV Director** means the Director of CAV;
- (f) **commission** means the Essential Services Commission;
- (g) **commission instrument** means any legislation administered by the commission or any legislative instrument, code or guideline made under such legislation;
- (h) **Consumer Act** has the same meaning given to it in section 3 of the ACLFTA;
- (i) **Contact Officer** means:
 - (i) in the case of the commission, the person holding the position, from time to time, of Senior Regulatory Manager, Enforcement, Energy; and
 - (ii) in the case of the CAV Director, the person holding the position of General Manager, Investigations,or their respective nominee(s);
- (j) **empowering instrument** has the meaning given to it in section 3 of the ESC Act;
- (k) **first-mentioned party** has the meaning given to it in clause 8.2;
- (l) **ESC Act** means the *Essential Services Commission Act 2001* (Vic);
- (m) **ESC Chairperson** means the person holding the position, from time to time, of the chairperson of the commission, or their nominee(s);

- (n) **ESC Commissioner** means a person holding the position, from time to time, of Commissioner of the commission, or their nominee(s);
- (o) **ISA** means the information sharing arrangement set out in Part E;
- (p) **MoU** means this memorandum of understanding, as amended from time to time in accordance with its terms;
- (q) **party** means a party to this MoU;
- (r) **receiving party** means a party that receives a written request issued under clause 17.1;
- (s) **referring party** means a party that issues a written request under clause 17.1;
- (t) **regulated industry** has the meaning given to it in section 3 of the ESC Act;
- (u) **regulated person** means a person regulated by the commission;
- (v) **relevant legislation** has the meaning given to it in section 3 of the ESC Act; and
- (w) **requesting party** means a party that issues a written request under clause 14.1(b).

2. Interpretation

In this MoU, unless the context requires otherwise:

- (a) words in the singular include the plural and vice versa;
- (b) headings are for convenience only and do not affect the interpretation of this MoU;
- (c) reference to a clause or Part is a reference to a clause or Part of this MoU (as the case may be);
- (d) subject to clause 3.1, the ISA is part of this MoU; and
- (e) a reference to a statute or regulation refers to Victorian legislation unless indicated otherwise, and includes an amendment or re-enactment to that legislation and subordinate instruments enacted under it.

3. Nature of MoU

3.1 This MoU is not intended to be legally binding on the parties or to create any legally enforceable obligations between the parties, save that:

- (a) the ISA is an information sharing arrangement within the meaning of section 60E of the ESC Act and section 133 of the ACLFTA; and

- (b) this MoU is not intended to interfere with any statutory powers, rights, or obligations of either party, including those that may arise under section 60E of the ESC Act and/or section 133 of the ACLFTA.

3.2 Nothing in this MoU should be construed as preventing or inhibiting either party from acting in the proper performance of their statutory functions or restricting their statutory powers.

3.3 This MoU is a public document and communicates in a transparent way to all stakeholders, the administrative arrangements that operate between the commission and the CAV Director.

4. Term

4.1 This MoU is effective from the last date on which this MoU is signed by a party and continues in force until it is terminated in accordance with clause 23.

4.2 From the effective date of this MoU, the MoU dated 5 February 2021 between the parties is terminated.

5. Relevant functions of the commission

5.1 The commission's functions relevantly include:

- (a) functions relating to the regulation of the electricity, gas, port, commercial passenger vehicle, accident towing and storage, and water industries in Victoria;
- (b) to administer the Victorian Energy Upgrades program and regulate the program participants; and
- (c) to monitor and report on compliance with, and to investigate and commence proceedings in relation to contraventions of, the ESC Act, relevant legislation (in respect of which the commission has powers or functions), and civil penalty requirements.

5.2 The commission's primary objective in performing those functions is to promote the long term interests of Victorian consumers having regard to the price, quality and reliability of essential services.

5.3 The commission must also perform its functions and exercise its powers in a manner that the commission considers best achieves any objectives specified in the relevant empowering instrument.

5.4 Without limiting the purposes of this MoU:

- (a) the commission's statutory objectives and functions are the basis of its concern with the market conduct of persons it regulates; and

- (b) such concern is predominantly about systematic misconduct or systemic non-compliance, particularly where it is suggestive of misuse of market power or the absence of effective competition.

6. Relevant functions of CAV

- 6.1 CAV is a business unit of the Department of Justice and Community Safety and supports the CAV Director in their statutory functions.
- 6.2 CAV's role is to support a fair and competitive marketplace in the State of Victoria where businesses comply with consumer laws and Victorians can exercise their consumer rights.
- 6.3 CAV's functions relevantly include:
 - (a) to support the CAV Director in their regulatory jurisdiction for the ACLFTA, which applies the ACL (a national, uniform law that operates under a 'one law, multiple regulator model' by the Commonwealth and all States and Territories) as a law of Victoria; and
 - (b) to administer the ACL on behalf of the CAV Director.
- 6.4 Without limiting the purposes of this MoU, CAV's concern is predominantly about breaches of the ACL, having regard to the impact of the breach, whether further consumer detriment can be avoided, and whether the business has been the subject of previous enforcement actions. While CAV is most concerned about serious breaches of the ACL, a broader understanding of breaches of the ACL by a business is important to inform CAV of the most appropriate compliance and enforcement action to take against a trader.

B. Purposes

7. Purposes of MoU

- 7.1 The key purpose of this MoU is to set out arrangements to promote effective communication, coordination, and information management between the parties in performing their respective statutory functions.
- 7.2 Without limiting clause 7.1, the purposes of this MoU are to:
 - (a) foster a cooperative working relationship between the parties;
 - (b) ensure that the regulatory and decision-making processes of the parties are closely integrated and better informed;

- (c) avoid overlap or conflict between the parties' respective performance of their functions and exercise of their powers; and
- (d) provide for an information sharing arrangement between the parties in accordance with section 60E of the ESC Act and section 133 of the ACLFTA.

C. Consultation and meetings

8. Consultation

- 8.1 The parties recognise that while mutual consultation is important where their functions and/or powers overlap, their respective decisions must be made independently of each other.
- 8.2 Where appropriate, each party (**first-mentioned party**) will endeavour to:
 - (a) provide the other party with prior notice of, and an opportunity to comment on (to the extent relevant to the other party):
 - (i) any activity of the first-mentioned party that is likely to substantially affect the other party's performance of functions or exercise of powers; and
 - (ii) any publication by the first-mentioned party that contains information provided by the other party, or that references the other party, prior to the finalisation and public release of such publication (which may be, for example, a report, media release, guidance material or webpage);
 - (b) where requested by the other party, provide that party with advice on regulatory matters for which the first-mentioned party is responsible;
 - (c) ensure that any notification and consultation under this clause 8.2 occurs as early as practicable in any relevant regulatory, advisory, or decision-making processes;
 - (d) in consulting with the other party under this clause 8.2, avoid overlap or conflict between the parties' respective performance of their functions and exercise of their powers;
 - (e) invite staff from the other party to participate in consumer, industry education and outreach activities; and
 - (f) identify opportunities to coordinate strategic planning and undertake knowledge sharing initiatives to optimise mutual understanding of roles and strategic directions.
- 8.3 Without limiting the activities referenced in clause 8.2(a)(i), such activities include:

- (a) in respect of the commission, any issue that may warrant immediate investigation or enforcement action by CAV under the ACLFTA; and
- (b) in respect of CAV:
 - (i) any proposed enforcement action it intends to take against a regulated person; and
 - (ii) any issue that may warrant immediate investigation or enforcement action by the commission under the ESC Act or relevant legislation.

9. Coordination of investigation and enforcement action

- 9.1 If the parties are aware of market conduct of a regulated person that involves potential breaches of both the ACL and a commission instrument, the parties will confer to enable a coordinated course of action in investigating the matter and taking enforcement action (if any) against the regulated person.
- 9.2 In deciding upon a coordinated course of action, the parties will be guided by the following objectives:
- (a) to achieve the best outcome for the affected consumers;
 - (b) to ensure that the regulated person complies with any applicable laws;
 - (c) to achieve the most timely, cost-efficient and sustainable outcome possible; and
 - (d) to avoid duplication of investigatory process and effort.
- 9.3 Where appropriate in the circumstances and subject to the parties' respective legislative remits, the parties will cooperate to:
- (a) conduct a joint investigation in accordance with clause 17; and
 - (b) take coordinated enforcement action.
- 9.4 If requested by the other party, each party will provide advice on their statutory and regulatory frameworks to assist the other party in any investigation of a regulated person.
- 9.5 The parties may share legal advice with each other where they share a common interest in a matter that is or may be the subject of coordinated enforcement action. Sharing of legal advice under this clause 9.5 is not intended to result in any waiver of privilege in respect of that advice.

10. Meetings – ESC Chairperson and CAV Director

- 10.1 The ESC Chairperson (or an ESC Commissioner) and the CAV Director will meet quarterly, or as otherwise agreed between them, to discuss any matter as agreed between them (which may include any of the matters identified in clause 11.1(a)).
- 10.2 The ESC Chairperson (or an ESC Commissioner) and the CAV Director may invite staff members or other representatives of the respective parties to attend the meetings described in clause 10.1.

11. Meetings – Contact Officers

- 11.1 The Contact Officers will meet quarterly, or as otherwise agreed between them, to discuss:
- (a) compliance and enforcement activities in relation to regulated persons, which may include:
 - (i) areas of compliance focus for each party;
 - (ii) any open referral or joint investigation made under clause 17;
 - (iii) updates on any enforcement action that is proposed to be, or has been, taken by either party against a regulated person;
 - (iv) identification of any significant issues regarding regulated persons that may be of relevance to the parties; and/or
 - (v) any areas of concern that have been identified by either party; and
 - (b) any other matter as agreed between them.
- 11.2 The Contact Officers may invite staff members or other representatives of the respective parties to attend the meetings described in clause 11.1.

12. Contact information

Each party will ensure the other party is provided with up-to-date contact information of their Contact Person.

D. Information management

13. Information management

- 13.1 Each party recognises that:

- (a) it has legal obligations in relation to the collection, use and disclosure of information, including in relation to the following types of information:
 - (i) personal information or sensitive information under the *Privacy and Data Protection Act 2014* (Vic);
 - (ii) health information under the *Health Records Act 2001* (Vic); and
 - (iii) family violence information that constitutes any of the information described in clause 13.1(a)(i) and (ii) above; and
- (b) the provision of any information to it by the other party is subject to any reasonable restrictions imposed by that party to comply with law or internal policies.

13.2 Each party will:

- (a) use, or disclose to a third party, any information provided to it by the other party only to the extent:
 - (i) required or authorised by law (for example, where required by a court or under the *Freedom of Information Act 1982* (Vic)); or
 - (ii) subject to any relevant law, as agreed with the other party;
- (b) take reasonable steps to protect any information provided to it by the other party from unauthorised or illegal use and disclosure;
- (c) comply with any reasonable request of the other party relating to the management or protection of information to comply with law or internal policies; and
- (d) to the extent that there is any legal barrier preventing the sharing of information under the ISA, use all reasonable endeavours to overcome the barrier by lawful means (for example, by seeking consent from the entity to whom the information relates if such consent would enable the information to be shared in accordance with law).

14. Process for information sharing

14.1 Subject to this MoU and any relevant law, each party may:

- (a) voluntarily share information with the other party; and/or
- (b) issue a written request to the other party to obtain information held by that party.

14.2 If a written request under clause 14.1(b) relates to information that falls within the scope of clause 16, the requesting party will ensure that the written request:

- (a) specifies the precise information requested and explains how that information falls within the scope of clause 16; and

- (b) specifies the purpose of requesting the information and explains why that information is reasonably necessary to assist in the exercise of the requesting party's functions.

14.3 A party that receives a written request under clause 14.1(b):

- (a) has the discretion to accept or refuse the request;
- (b) will provide a written response to the requesting party, within 10 business days of the date of the request (or such other timeframe as agreed between the parties), that specifies:
 - (i) whether it accepts the request; and
 - (ii) if it refuses the request, the grounds for such refusal; and
- (c) will endeavour to provide the requested information to the requesting party within a reasonable timeframe (subject to this MoU and any relevant law) to the extent that it accepts the request.

E. Information Sharing Arrangement

15. Nature of arrangement

- 15.1 This ISA is entered into by the parties under section 60E of the ESC Act and section 133 of the ACLFTA, for the purpose of sharing or exchanging information held by the parties.
- 15.2 This ISA applies in relation to any sharing or exchanging of information held by the parties, only to the extent that the information falls within the scope of clause 16.
- 15.3 The parties shall only share information under this ISA consistent with the laws of the State of Victoria in relation to the use and disclosure of information, including the *Privacy and Data Protection Act 2014* (Vic).
- 15.4 This ISA does not require or authorise a party to use or disclose information if a party reasonably believes that doing so may be inconsistent with the laws applying in the State of Victoria.
- 15.5 Nothing in this ISA is intended to change or modify any law which may otherwise bind or regulate a party in relation to the collection, storage, retention, use or disclosure of any information.
- 15.6 Without limiting clauses 3.2 and 15.5, this ISA:

- (a) does not limit the matters set out in section 60E(8) of the ESC Act, including the giving of information with the written authority of the person to whom the information relates; and
- (b) does not in any way prevent or inhibit either party from obtaining information by other lawful means.

16. Information that may be shared

16.1 The information to which the Information Sharing Arrangement relates is limited to:

- (a) information obtained by the commission under section 37 of the ESC Act;
- (b) information obtained by CAV under sections 125 and 126 of the ACLFTA as limited by section 133(2) of that Act;
- (c) any other information concerning investigations, law enforcement, assessment of complaints, licensing or disciplinary matters;
- (d) any other information affecting the interests of consumers of goods and services in regulated industries; and
- (e) any other information of a prescribed kind (as described in section 60E(2) of the ESC Act and/or section 133(2)(d) of the ACLFTA (as the case may be)).

16.2 The parties recognise that the commission must not share the types of information set out in section 60E(7) of the ESC Act under the ISA, including:

- (a) any confidential or commercially sensitive information which must not be shared by the commission under section 60C of the ESC Act; and
- (b) any information that is obtained by the commission under section 36(1) or 39K of the ESC Act.

16.3 The parties recognise that, under the ISA:

- (a) CAV must only share information with the commission that is reasonably necessary to assist in the exercise of CAV's functions under the ACLFTA or a Consumer Act or the functions of the commission; and
- (b) the commission must only share information with CAV that is reasonably necessary to assist in the exercise of the commission's functions under the ESC Act or relevant legislation or the functions of CAV.

17. Referrals and joint investigations

17.1 Subject to this MoU and any relevant law:

- (a) the commission may issue a written request to CAV to refer a matter that raises a potential breach of the ACL;
- (b) the CAV may issue a written request to the commission to refer a matter that raises a potential breach of a commission instrument; and
- (c) either party may issue a written request to the other party to conduct a joint investigation of a matter that raises potential breaches of both the ACL and a commission instrument.

17.2 A party (**referring party**) that issues a written request to the other party (**receiving party**) under clause 17.1 will ensure that the request specifies:

- (a) details of the person engaged in the conduct;
- (b) the number of affected consumers (insofar as this is known);
- (c) details of the potential breach(es); and
- (d) any other information that would assist the receiving party to determine whether to accept the written request.

17.3 The receiving party:

- (a) has the discretion to accept or refuse a written request issued under clause 17.1; and
- (b) will provide a written response to the referring party, as to whether the receiving party accepts the written request, within 10 business days of the date of the written request (or such other timeframe as agreed between the parties).

17.4 For the avoidance of doubt, the parties recognise that:

- (a) this clause 17 does not prevent either party from taking any action on its own initiative (subject to this MoU and any law) based on information provided to it by the other party;
- (b) consumers who contact CAV or the commission about the conduct of regulated persons may be referred to the Energy and Water Ombudsman (Victoria), but this does not prevent either CAV or the commission from investigating those same matters where they relate to the ACL or a commission instrument respectively; and
- (c) CAV will accept enquiries and may conciliate complaints where the trader is an independent intermediary (for example, an energy broker).

18. Reporting on referrals

If the receiving party accepts a referral under clause 17, the receiving party will, in writing:

- (a) report to the referring party within 30 business days of the date of acceptance (or such other timeframe as agreed between the parties) on what, if any, further relevant information it considers the referring party may be able to provide in respect of the referral;
- (b) provide quarterly reports to the referring party that identify what, if any, action has been taken in relation to the referral; and
- (c) report to the referring party on the outcome of the referral within five business days (or such other timeframe as agreed between the parties) of a final decision being made (whether administrative or judicial) and the reasons for the decision.

F. Management of MoU

19. General liaison

- 19.1 The Contact Officers are responsible for general liaison in relation to the subject matters of this MoU.
- 19.2 Each party will ensure that its Contact Officer:
 - (a) addresses any questions or concerns arising out of the operation of this MoU, which may be raised by the Contact Officer of the other party, within a reasonable timeframe;
 - (b) together with the other party's Contact Officer, instigates the review of this MoU in accordance with clause 21 below; and
 - (c) together with the other party's Contact Officer, arrange the meetings specified in clause 10.1.

20. Dispute resolution

- 20.1 If there is a dispute between the parties arising out of the operation of this MoU, each party will ensure that its Contact Officer uses all reasonable endeavours to resolve that dispute with the other party's Contact Officer.
- 20.2 If a dispute cannot be resolved by the Contact Officers under clause 20.1 within two months, or such other timeframe as agreed between the parties, the ESC Chairperson (or an ESC Commissioner) and the CAV Director will use all reasonable endeavours to resolve that dispute.
- 20.3 This MoU remains in effect notwithstanding the existence of a dispute.

21. Review of MoU

The parties will:

- (a) review this MoU once every three years, or at such other time as agreed between the parties; and
- (b) in reviewing this MoU, consider:
 - (i) the potential for improving the MoU's terms, operation and effectiveness;
 - (ii) the effect (if any) of regulatory change on the MoU's terms, operation or effectiveness; and
 - (iii) any other matter as agreed between the parties.

22. Variation of MoU

22.1 This MoU may be varied by written agreement between the parties or replaced by another MoU in writing that is duly signed by the parties.

22.2 If any legislative provision is amended or repealed such that any provision of this MoU is no longer operational or consistent with legislation, that provision of this MOU will be deemed to be deleted and the remaining provisions of this MoU will remain in effect (subject to clause 23).

23. Termination of MoU

23.1 Either party may terminate this MoU by giving at least two months' written notice to the party.

23.2 This MoU may be terminated at any time by written agreement between the parties.

G. General

24. Publication

This MoU may be published on the parties' respective websites.

25. Counterparts

This MoU may be executed in any number of counterparts, all of which together shall constitute one instrument.

EXECUTED AS A MEMORANDUM OF UNDERSTANDING

THE COMMON SEAL of the **ESSENTIAL SERVICES COMMISSION** was affixed pursuant to the authority of)
the commission on the 10th day of November 2022)



A handwritten signature in blue ink, appearing to read "Kate Symons".

Kate Symons
Chairperson

**SIGNED BY THE DIRECTOR OF
CONSUMER AFFAIRS VICTORIA**

On the 8 day of November 2022)

A handwritten signature in black ink, appearing to read "Nicole Rich".

Nicole Rich
Director