



27 May 2016

ACL Review Secretariat
Market and Competition Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Submitted online: www.consumerlaw.gov.au/review-of-the-australian-consumer-law

Dear ACL Review Secretariat

Re: *Australian Consumer Law Review Issues Paper*

Thank you for the opportunity to comment on the *Australian Consumer Law Review Issues Paper* (the Paper).

As an industry-based external dispute resolution scheme, the Energy and Water Ombudsman (Victoria) (EWOV) provides alternative dispute resolution (ADR) services to Victorian energy and water customers by receiving, investigating and facilitating the resolution of complaints. In making this submission, EWOV's comments are based on our extensive experience handling over 585,000 cases¹ since the establishment of the scheme in 1995. This submission examines our experience handling cases that raise issues relevant to the *Australian Consumer Law (ACL)*, such as marketing and contract cases, and the development of new products and services in the energy industry.

EWOV's previous submissions

This submission draws on some of our previous comments on related topics and issues raised in other consultations:

- Australian Energy Market Commission *Retailer Price Variations in Market Retail Contracts* Consultation Paper².
- Council of Australian Governments Energy Market Reform Working Group's *New Products and Services in the Electricity Market – consultation of regulatory implications*³.

¹ The term 'cases' includes both Enquiries and Complaints. More detail about EWOV's case levels is available at: <https://www.ewov.com.au/complaints/process-for-complaints/cases,-enquiries,-complaints/ewovs-complaint-types>

² Submission available at: https://www.ewov.com.au/_data/assets/pdf_file/0014/13073/EWOV-Comments-on-the-Australian-Energy-Market-Commission-AEMC-Draft-Rule-Determination--National-Energy-Retail-Amendment-Retailer-price-variations-in-market-retail-contracts-Rule-2014..pdf

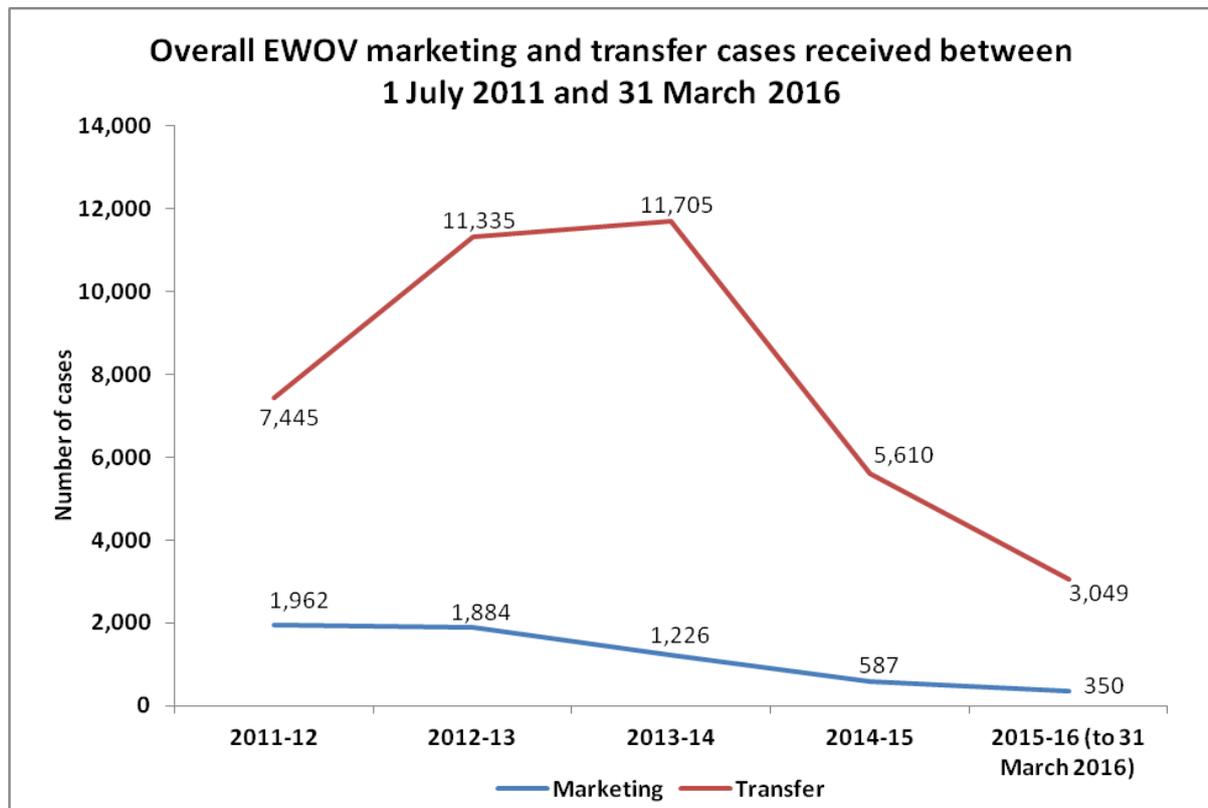




Overall EWOV marketing and transfer cases

EWOV receives energy marketing and transfer cases that can involve issues covered by provisions of the ACL and issues raised in the Paper. Some of these issues include:

- deceptive, misleading⁴ and/or unconscionable⁵ marketing conduct
- marketing information (including information provided by energy comparator services)
- contract price and term variations⁶
- contract cooling-off rights⁷.



The graph above shows the number of marketing and transfer cases EWOV received between 1 July 2011 and 31 March 2016. As illustrated, there has been a significant decrease in both marketing and transfer cases, which follows a similar trend with EWOV's overall case receipt where a 40% decrease occurred between 2013-14 and 2014-15.

³ Submission available at: https://www.ewov.com.au/_data/assets/pdf_file/0006/14496/EWOV-comments-on-COAG-EMRWG-New-Products-and-Services-in-the-Electricity-Market-consultation-of-regulatory-implications.pdf

⁴ Chapter 1 Part 2-1 and Part 3-1 Division 1 *Competition and Consumer Act 2010* Schedule 2

⁵ Chapter 2 Part 2-2 Clauses 20 and 21 *Competition and Consumer Act 2010* Schedule 2

⁶ Chapter 2 Part 2-3 *Competition and Consumer Act 2010* Schedule 2

⁷ Chapter 3 Part 3-2 Division 2 Subdivision D Clause 82 *Competition and Consumer Act 2010* Schedule 2



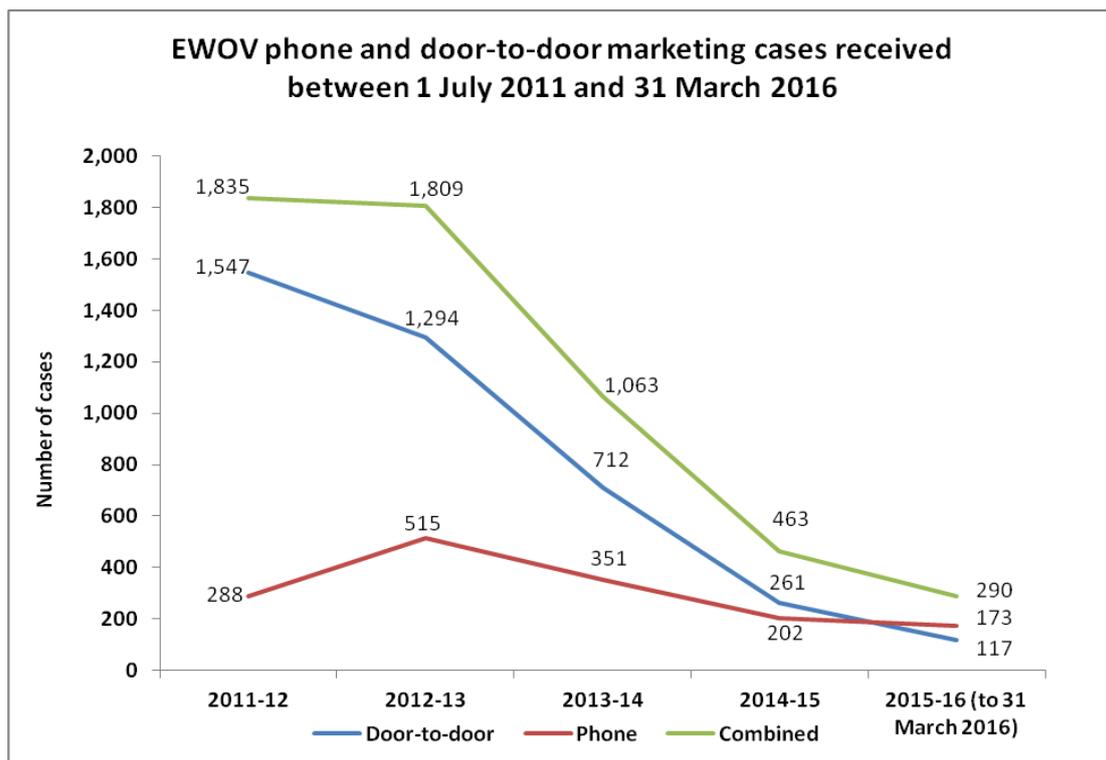


EWOV believes that the decrease in marketing and transfer cases can be attributed in part to the following:

- The ACL provisions about misleading and deceptive conduct and their impact on marketing practices.
- The enforcement action taken by the Australian Competition and Consumer Commission (ACCC) regarding marketing activity⁸.
- The increased use by households of the Australian Media and Communication Authority's Do Not Call Register⁹.
- More effective internal dispute resolution by energy retailers.
- Reduced door-to-door sales by energy retailers.

EWOV marketing cases

Up until April 2015, EWOV published a quarterly *Marketing and Transfer Report*¹⁰ which covered case trends and used case studies to demonstrate the main customer issues. As mentioned earlier, many of these marketing cases include issues that are covered by provisions of the ACL.



⁸ ACCC media release 21 November 2014 available at: <http://www.accc.gov.au/media-release/accc-takes-action-against-energyaustralia-and-bright-choice-australia>

⁹ Do Not Call Register – Statistics available at: <http://www.acma.gov.au/Industry/Marketers/Do-not-call-register/Telemarketing-standard/do-not-call-register-statistics>

¹⁰ All of EWOV's Marketing and Transfer Reports are available at: <https://www.ewov.com.au/reports/marketing-and-transfer-report-apr-2015/report-archive>





As illustrated in the previous graph, EWOV observed a substantial decrease in energy marketing cases following the cessation of door-to-door sales by three large energy retailers. Although cases are down considerably, customers still contact EWOV to complain about issues including:

- receiving door-to-door marketing despite having a Do Not Knock sign/sticker
- pressure sales, including for vulnerable consumers
- non-account holders receiving marketing and signing up to a new retailer
- being advised that the sales representative:
 - is not there to sell anything
 - is from the government to check bills and overcharging in the area
 - is from the customer's energy distributor or current energy retailer
 - is there to check if the customer is on the correct tariff.

Marketing case studies¹¹

Case study one (2015/6233: Assisted Referral)

In just one week, the customer said he had received around a dozen telemarketing calls from a single energy retailer. The telemarketing representatives were offering a 32% discount while misleadingly claiming that the customer would remain with his current retailer if he accepted the offer. Although the customer had said he was not interested and did not want to be contacted again, the calls continued.

Case study two (2015/7578 and 7563: Assisted Referrals)

The customer said that a door-to-door marketer had visited her home, even though she had a Do Not Knock sticker displayed. The customer, who had a mental health condition, felt pressured and agreed to switch her electricity and gas accounts to the new retailer. When the customer's representative contacted the retailer seeking a retrospective transfer, it said it could not help unless he provided a Power of Attorney.

Case study three (2014/47741: Investigation)

Even though he had a Do Not Knock sticker at his property, the customer was approached by a door-to-door marketer. The marketer initially told the customer that he was from the government and was there to provide energy-saving light globes. After entering the customer's home and counting the light bulbs in his house, the marketer asked to see the customer's energy bills. He then walked the customer through an electronic contract and prompted him through a confirmation phone call. It was only four days later that the customer realised that he had been misled, and that he had in fact signed up for electricity and gas accounts. The customer told us that he was in very poor health and that the matter was causing him a great deal of stress, exacerbating his health difficulties. The customer wanted his accounts retrospectively transferred back to his original retailer, which the energy retailer agreed to. The customer was satisfied with the retrospective transfer and the case was closed.

¹¹ Most marketing and transfer cases are resolved via the Assisted Referral process and as such EWOV only hears the 'customer's side of the story'.

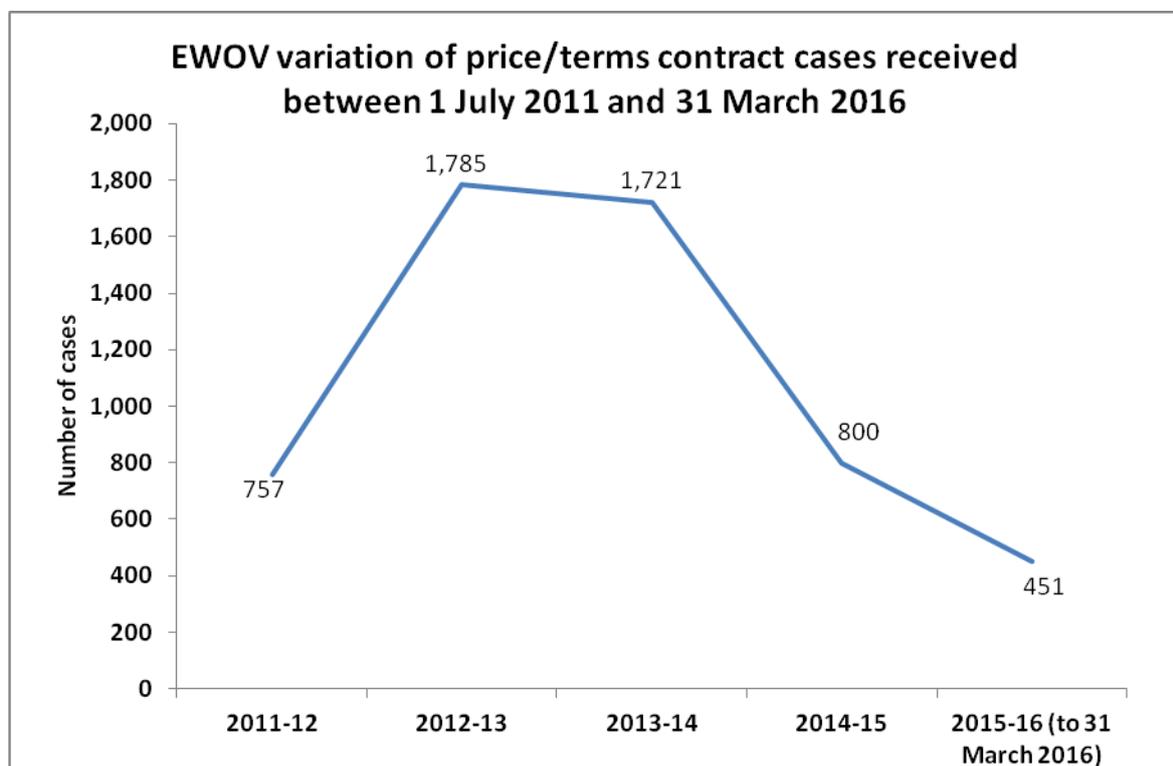




EWOV transfer cases

Price changes during fixed-term contracts

EWOV receives complaints from Victorian energy customers who have entered a market, or fixed-term, contract under the belief that the tariffs and charges quoted during the marketing contact would be fixed for the period of the contract. These customers typically make a complaint after receiving notification from their energy retailer about an upcoming price increase or when their bill reflects higher tariffs and/or charges than what they contracted for. Between 1 July 2011 and 31 March 2016, EWOV received 5,514 cases where variation of contract terms or price was the customer's primary concern. The following graph shows the number of cases received each financial year during that period and illustrates a sharp decline in these cases in recent years.



EWOV finds that customer confusion often arises from misleading information, miscommunication, or misunderstanding at the time of marketing. This marketing may be direct from an energy retailer, third-party marketing channel, or price comparator service. Most cases about these issues are handled via EWOV's Assisted Referral process. We often do not need to complete an Investigation into these issues as they can be straightforward to resolve. Generally, customers who raise complaints about energy retailers increasing tariffs during fixed-term contracts are seeking that the energy retailer either honour the prices quoted at the time of marketing or waive the termination fee and allow a transfer (or retrospective transfer) to a different energy retailer.





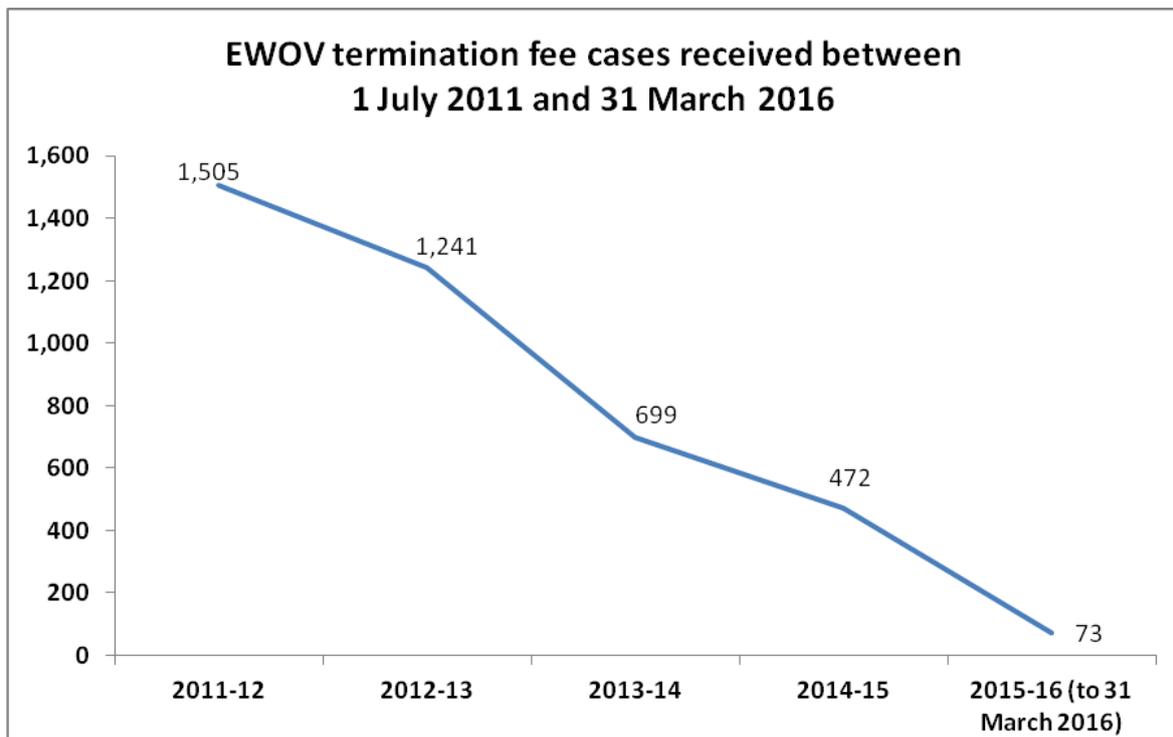
Another common scenario EWOV receives complaints about is where a customer enters a contract following marketing and then receives a welcome pack (contract documents) that specifies the tariffs discussed during the marketing contact. The customer then receives their first bill and finds that the prices have changed since they received the welcome pack. These customers often tell us they feel misled by the marketer and were not aware that tariffs and charges could vary.

Case study four (2015/35280: Investigation)

The customer received door-to-door marketing in August 2015 and was offered tariffs that he was happy with and decided to transfer his account based on this information. Shortly afterward, he received the welcome pack which matched the tariffs quoted during the marketing visit. However, when he received his first bill in December 2015, the rates had increased by about 15%. To resolve the complaint, the retailer credited the customer's account with the difference between the rates in the welcome pack and those on the bill. It also waived the termination fee and allowed the customer to transfer to a new retailer. The customer was satisfied and the case was closed.

Price changes and termination fees

An issue often associated with contract term/price variation cases is contract termination fees. EWOV receives complaints from customers who were charged a termination fee due to them leaving a fixed-term contract, often after they realise the tariffs are not the same as what they initially agreed to (sometimes during the unsolicited marketing contact). Between 1 July 2011 and 31 March 2016, 3,990 customers raised termination fees as their primary issue.





As the previous graph illustrates, EWOV has seen a steady reduction in the number of cases where termination fees are the primary issue. However, it is also raised as a secondary issue to contract term/price variation cases.

Price variations in Victoria

Put simply, an energy retailer may change a tariff in a market contract if a customer has agreed to this, as a term of the contract. Retailers are required to notify customers of the tariff change; however, this notification can occur on the customer's next bill¹² meaning that customers are billed at a different (often higher) tariff and are effectively advised after the change occurs. When entering a new contract, some energy retailers ask customers if they provide their explicit informed consent for the energy retailer to vary the tariffs. However, a clause in the retailer's contract is also sufficient for it to vary the contract terms in line with the *Energy Retail Code*¹³ and some retailers rely solely on this clause. Price increases typically occur on 1 January and/or 1 July each year, dependent on the energy retailer¹⁴.

Changes to Victorian energy legislation

The Victorian Government's *Energy Legislation Amendment (Consumer Protection) Act 2015* changed the *Electricity Industry Act 2000* and *Gas Industry Act 2001* from 1 January 2016¹⁵ to prohibit energy companies from charging a termination fee if the price and/or terms of a customer's contract changed during a fixed-term period¹⁶. EWOV expects complaints about termination fees to continue to remain at similar levels as a result of these legislative changes as less customers are charged these for exiting contracts early. However, customers still complain about termination fees for other reasons, such as non-disclosure, calculation, or where cooling-off rights were not actioned in a timely manner and they were charged a termination fee.

Rollover or 'evergreen' contracts

Some customers complain to EWOV that their energy contract has been rolled over to a new fixed-term period. This often occurs without the customer's knowledge and they therefore feel like they have not consented to this, even though it may be a clause in their contract. This issue is often associated with the customer being charged a termination fee when they transfer to a new retailer or having their contract discounts varied following the contract rollover.

Case study five (2015/948: Assisted Referral)

The customer told us that after several years with one retailer she had transferred her electricity account to a new retailer. Although her original retailer had advised her that it would not apply a termination fee since her contract with it had already rolled over a number of times, the customer received a final bill including a \$40.00 termination fee.

¹² Clause 46(4) of the *Energy Retail Code (version 11)*

¹³ Clause 46 and 46A of the *Energy Retail Code (version 11)*

¹⁴ Retail energy prices are not regulated in Victoria.

¹⁵ Revised Acts available at: http://www.austlii.edu.au/au/legis/vic/num_act/elapa201549o2015552/

¹⁶ Victorian Government announcement available at: <http://www.premier.vic.gov.au/strengthening-victorias-energy-consumer-protections/>





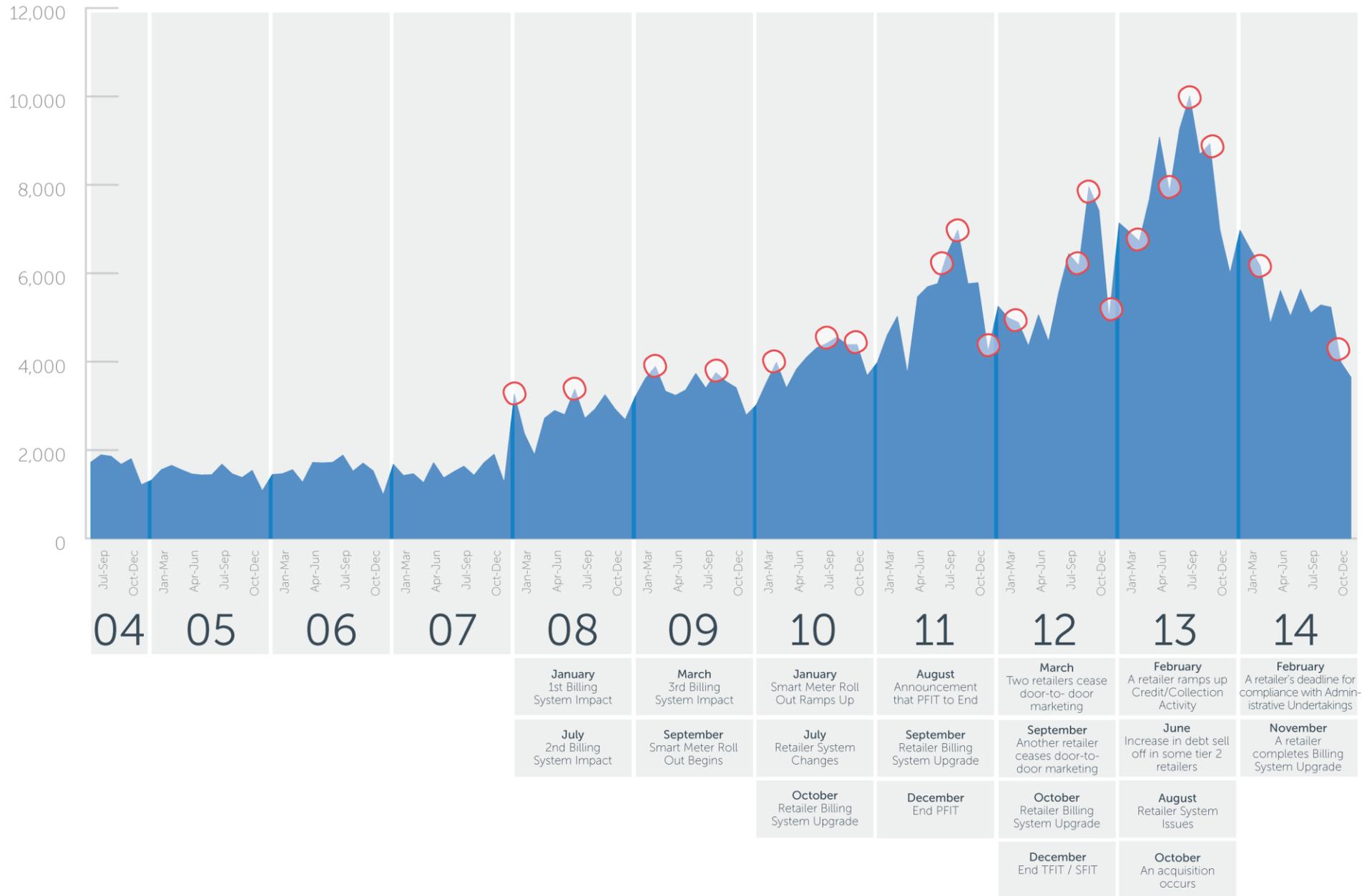
New energy business models

While section 4.3 of the Paper does not specifically raise emerging energy business models and their intersection with the *ACL*, we believe that it is important to consider whether there are appropriate regulatory and legislative protections in place for consumers in this area.

As illustrated in the following graph, EWOV case numbers have historically been significantly impacted by industry, policy, regulatory and billing system changes. Given our knowledge and experience of complaints arising from industry changes, EWOV expects complaints to electricity retailers, distributors, EWOV, and other regulators and dispute resolution bodies to increase as new products and services in the areas of electricity supply and storage, demand management and energy information services are more widely implemented in the market.



EWOV Quarterly Case Receipt (1 July 2004 - 31 December 2014)





New products and services and EWOV's jurisdiction

EWOV's jurisdiction only extends to energy companies that have been issued with a full electricity or gas licence by the Essential Services Commission (ESC)¹⁷. In recent years, EWOV has seen an increasing number of business models emerging in the energy market. Many of these new business models – including renewable energy technology companies and embedded electricity networks in new apartment buildings, caravan parks, retirement villages and shopping centres – are currently exempt under their licence conditions from several of the requirements placed on 'traditional energy companies', including membership of EWOV. The result is that there is a growing number of Victorian energy customers who are unable to access EWOV's service to resolve complaints, particularly electricity complaints.

It is important to note that jurisdictional issues can become complex when EWOV's scheme participants offer products and services – such as solar PV systems and/or batteries – to consumers which are considered to be outside of EWOV's jurisdiction¹⁸. Often these customers are complaining about faulty solar systems and are dissatisfied to discover that EWOV usually cannot assist them with their complaint. These complaints are referred to another body such as Consumer Affairs Victoria, the ACCC or the Victorian Civil and Administrative Tribunal. To add to this complexity, sometimes scheme participants' products or services that usually fall outside our jurisdiction are actually within EWOV's jurisdiction by virtue of the billing arrangements for the product or service. For example, EWOV may complete a jurisdictional assessment and find that the scheme participant has billed the customer for a solar PV system on their standard electricity retail bill, thereby bringing the matter within jurisdiction. This is an issue with enormous potential to increase in complexity as more new products and services enter the market and are offered by EWOV's scheme participants.

Out of jurisdiction case studies¹⁹

Case study six (2016/3474: Referred to CAV)

The customer had a solar system installed by an EWOV scheme participant. The solar system stopped working and the customer had issues trying to get it fixed under warranty.

Case study seven (2016/600: Referred to CAV)

The customer ordered and paid for a solar system through an EWOV scheme participant but experienced delays and issues with having the system installed and connected. They also had several customer service issues while trying to resolve the matter.

Case study eight (2016/5781: Referred to CAV)

The customer received a quote from an EWOV scheme participant for a solar system to be installed. They paid 'thousands of dollars as an upfront payment' but then 'new and unexpected travel charges' were added to the cost.

¹⁷ ESC website: <http://www.esc.vic.gov.au/Energy/Licensing>

¹⁸ Clause 4.2(b) of EWOV's Charter: http://ewov.com.au/_data/assets/pdf_file/0017/4517/EWOV-Charter.pdf

¹⁹ As these cases were out of EWOV's jurisdiction, we only heard the customer's 'side of the story' and customers were referred to the appropriate regulator and/or tribunal





Case study nine (2015/26091: Referred to CAV)

The customer – and other elderly residents in a retirement village – received unsolicited phone marketing from an EWOV scheme participant offering to complete solar system inspections for \$100.

Case study ten (2015/6843: Assisted Referral and Referred to CAV)

The customer received unsolicited door-to-door marketing from an EWOV scheme participant offering to install solar panels and advising that the customer will ‘never have to pay for electricity again’. Based on this information, the customer proceeded and installed the solar system, however, after a billing delay he continued to receive bills with amounts owing.

Consumer protections and access to dispute resolution

Given the potential impact that energy industry innovations are likely to have on customers, industry and EWOV, we believe that changes to the ways customers access electricity, manage their usage, and seek energy information could have significant implications in a number of key areas, which include:

- the relationships between customers, energy retailers, energy distributors, alternative energy sellers and other types of energy management services
- customer access to external dispute resolution
- the jurisdiction of energy ombudsmen and other statutory bodies
- privacy of customer data and information
- existing regulatory and legislative consumer protections²⁰ and how these do and do not fit with changes emerging in the electricity market.

While EWOV acknowledges that it is important to allow industry to innovate new products and services, these developments need to be considered together with crucial customer protections to ensure that customers still have fair and equitable access to an essential service, regardless of whether a traditional retailer or an alternative energy seller is providing the supply.

We also acknowledge that the *ACL* and state-based trade practices laws do have the capacity to regulate some energy-specific issues, but we believe that they do not adequately cover all alternative energy selling and currently exempt products and services, such as when customers:

- buy and install solar systems and/or batteries
- are customers of exempt retailers such as embedded networks
- are supplied by an off-grid electricity system
- are primarily supplied with electricity by an alternative energy seller or by a product or service offered by an EWOV scheme participant that is classified as out of jurisdiction
- accept direct load control or supply capacity control products, and other types of new energy management systems.

²⁰ Including energy-specific protections under the *National Energy Customer Framework* and state-based equivalents, and non-energy specific protections such as those under the *ACL*





Although there are consumer protections under the *ACL*, EWOV believes that it is necessary to consider these new business models and whether the existing protections adequately cover these new products and services.

We trust the above comments are helpful. Should you require further information or have any queries, please contact Christopher Stuart-Walker, Senior Research and Communications Officer, on (03) 8672 4252 or chris.stuart-walker@ewov.com.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Cynthia Gebert', followed by a long horizontal flourish.

Cynthia Gebert
Energy and Water Ombudsman (Victoria)

