



31 May 2016

Mr Garry Clements
Chair
Consumer Affairs Australia and New Zealand

Dear Mr Clements

Australian Consumer Law Review

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

The Energy & Water Ombudsman NSW investigates and resolves complaints from customers of electricity and gas providers in NSW, and some water providers.

EWON believes that this review of the Australian Consumer law (ACL) is timely as it occurs at a point in time that significant change is occurring across the energy sector.

This submission seeks to provide feedback on three aspects for the Issues Paper. We make comment on the ACL's current operation, its current administration and finally on the ACL's ability to respond to new and emerging issues. Our views are drawn from the complaints we receive and deal with, combined with a view about the changing nature of the energy market. While not addressing every question posed by the issues paper, our response focuses on those questions which relate to our work.

EWON also endorses the content of the Australian and New Zealand Ombudsman Association (ANZOA) submission to this review.

The changing nature of the energy sector

There is a wave of technological change sweeping across the energy sector creating new markets in energy supply, demand management and energy information. New products and services arising in the supply area include the leasing of solar equipment, and the selling or leasing of generation and storage packages. Demand management products include home energy management systems, and the aggregation of load, generations and /or storage of energy. Finally the energy information market has seen the development of comparator websites and a range of energy efficiency advice services. Even the more traditional methods of energy supply through the grid are seeing the impact of change. Smart metering is opening up the possibilities for new retail products and much greater integration between traditional supply models and the range of new products and services.

The current consumer protection framework for energy consumers was developed under the assumption that purchasing energy was through a retail contract and that the energy was supplied from the source of generation via a regulated network. This mechanism is fully regulated through the National Electricity Law (NEL) and the National Gas Law (NGL) while consumer protections are

provided through the National Energy Customer Framework (NECF) in those states that have adopted the NECF, and through local jurisdictional instruments elsewhere.

In a major report¹ provided by the COAG Energy Council on new products and services in the electricity market, it was concluded that the ACL and the Privacy Act provided an appropriate level of consumer protection for many of these new markets. The report however also identified that the different levels of consumer protection between the NECF and the ACL could provide incentives to structure consumer offerings to avoid energy consumer protections.

The report identified the following issues:

- *“customers could see different protections in relation to their supply of these products and services, depending on who their supplier is;*
- *customers may have different protections for different products and services they receive from the same supplier; and*
- *businesses could face different paths to market entry, and different regulatory obligations, which could distort outcomes in the market”²*

The report went on to identify some key aspects of consumer protection provided by the NECF that were not currently available through the ACL provisions. The NECF framework requires a high level of information provision about energy contracts, with strong explicit informed consent provisions, that are not included in the ACL.

Dispute resolution procedures are another aspect of the NECF that provides stronger protections. Under the ACL, dispute resolution occurs through state and territory fair trading / consumer affairs offices where customers bear more of the costs and normally have to represent themselves. Under the NECF, energy consumers have access to free and independent, external dispute resolution through ombudsman schemes funded by energy market participants.

Finally the issue of service and product quality was considered in the context of distributed generation and storage. The question asked in this context was whether or not the general consumer guarantee provisions of the ACL manage the potential impacts of equipment failure, especially where consumers are off grid.

Currently the NECF has provisions under the Australian *Energy Regulator’s Exempt Retailer Guidelines* which enable consumers of some new business models to access many of the consumer protections available to customers of authorised retailers. The intersection of the NECF and the ACL could be strengthened by improvements in the consumer protections offered by the ACL, and through an updating of the NECF, ensuring adequate protection for all consumers of energy services both new and old. EWON considers that a useful guiding principle for the division of consumer protections between the ACL and energy specific legislation is the one proposed in a COAG Energy Council consultation paper:

“Energy-specific consumer protections are required when a product or service impacts on a customer’s access to a reliable, safe and high-quality supply of energy on fair and reasonable terms.”³

¹ *New Products and Services in the Electricity Market. Advice to the COAG Energy Council.* Energy Working Group July 2015, p3

² *Ibid*, p3

If this principle were applied, new products and services, which relate to the essential service aspect of energy supply, would be included under energy specific protections.

Is the law operating as intended?

Question 7 Is the ACL's treatment of 'consumer' appropriate? Is \$40,000 still an appropriate threshold for consumer purchases?

The ACL provides protections for consumers who acquire goods and services for personal, domestic or household use. It extends this coverage to small and medium businesses for goods and services which are purchased, up to a monetary limit of \$40,000. EWON would also have jurisdiction for many of these businesses in their engagement with energy retailers and distributors.

This monetary limit for small or medium size businesses was introduced in 1986 and hasn't changed since that time. A package offer of solar generation, battery storage and energy efficiency services could easily cost more than \$40,000, and would therefore not fall under the protection of the ACL. Updating the current monetary limit with consideration to the Consumer Price Index changes since 1986 would seem to be an essential move to ensure that consumer protections are not weakened from the original intentions.

Question 9 Are there any changes that could be made to improve their effectiveness, or address any of the issues raised in section 2.3? Are there any gaps that need to be addressed, or overseas models that could provide a useful guide?

Misleading or deceptive conduct

On 18 February 2016 around forty representatives from consumer advocacy organisations, industry associations, ombudsman schemes, government agencies and regulators met in Melbourne. They discussed the social and industry impacts of debt management and credit repair businesses that provide quasi-financial service solutions to consumers with debt problems or who have concerns about their credit worthiness. This roundtable issued a communique at the end of their meeting which concluded:

*"Action is needed now to tackle the exploitation of financially stressed consumers, and to mitigate the unnecessary cost to business caused by the gaps in our financial services regulatory framework"*⁴

While much of the reform to address the issues raised at the roundtable relates to ASIC, there is an aspect of the ACL which, if addressed, could improve the protections for consumers of such services. Currently the ACL provisions around the prohibition against misleading or deceptive conduct do not have a strong provision regarding silences or omissions. One of the concerns that ombudsman schemes have identified with credit repair agencies is that they charge customers without informing them that ombudsman services provide the same services with no charge.

These agencies then avail themselves of the free service through gaining advocacy status from the consumer. These agencies do not value add and in some instances have misrepresented the customers original circumstances (which led to a credit listing) in an effort to gain a lifting of the

³ *New Products and Services in the Electricity Market: Consultation on Regulatory Implications* Energy Market Reform Working Group December 2014, p8

⁴ Communique Experts Roundtable, February 2016, p2

adverse credit report. Ombudsman schemes have responded to this activity with policies to inform customers that our services are free.

EWON provides the following advice to consumers:

“Where it appears the representative is charging the consumer in relation to any aspect of the matter referred to EWON, we will contact the consumer directly and advise them that our service is free. If the consumer chooses to continue to be represented by their agent for a fee, the consumer’s wishes will be respected and EWON will deal with their agent.

If the consumer advises that they wish to deal directly with EWON to avoid incurring any costs, we will confirm this in writing to the consumer and deal directly with them regarding their energy or water complaint. It is the consumer’s responsibility to advise the agent of their decision to deal directly with EWON.

This approach to paid representatives is consistent with other members of ANZEWON, the Australia and New Zealand Energy & Water Ombudsman Network.”

This information is available on our website, on the EWON Authority to Act form and in a letter that is sent to each customer who contacts us where the customer has an advocate such as a credit repair agent acting on their behalf.

Unfortunately in some cases customers have already signed a contract and paid the credit repair agent. By strengthening the provisions regarding silences and omissions in the misleading or deceptive conduct aspects of the ACL, this area of consumer detriment could be significantly reduced.

Unfair contract terms

The unfair contract terms section of the ACL is designed to provide protection for consumers signing a standard form contract where there is no capacity to negotiate terms and conditions. Standard retail contracts under NECF have a range of terms and conditions that aren’t applied to market retail contracts. It is assumed that the ACL provides the necessary protections for such market retail customers. This has enabled, for example, one retailer to impose a charge for paper bills on customers who have current market contracts but not for customers with a standard contract. This raises the question about whether or not clauses that allow new charges not originally in the contract should be seen as ‘unfair term’ and the difficulty that an individual customer would face seeking such an outcome. The issue of redress is discussed further below in our response to Question 25.

Transparency

The issues paper asks: should the ACL seek greater consumer protection by improving contractual transparency and clarity?

When the NECF was introduced there were provisions about explicit informed consent, and this concept was applied to contract renewal as well as new contracts. Retailers quickly established ongoing contracts with fixed benefits terms initially called evergreen contracts) which avoided the informed consent provisions around contract renewal. A strengthening of the ACL by improving contractual transparency and clarity could address a tendency to obscure consumer protections.

How effectively is the law being administered

Question 25 Are there any barriers to consumers and businesses enforcing their rights and seeking access to remedies under the ACL? Are there barriers to private action that need to be addressed?

If an individual consumer felt that the contract they had signed had an unfair term, such as a clause allowing a retailer to add new charges not in the original terms and conditions, the current processes of the ACL do not seem to provide a simple avenue for redress. For a contract term to be found to be unfair, proceedings need to be undertaken in a court.

Initiating such proceedings, or even seeking a regulator to undertake such proceedings, is a difficult process for an individual consumer. It would also be a costly process, especially if the amount the consumer is concerned about was small, such as the imposition of a fee for a paper bill.

When an essential service being sought is dependent on signing a contract which has no provision for negotiating terms, then a customer is at a disadvantage. While changing retailers remains an option, many customers would prefer not to have to undertake such a process.

The ACL could be improved by simplifying access to a process which would allow consumers to challenge catch-all terms such as the right to impose new fees and charges through the course of a contract.

Question 26 What low-cost actions could consumers and businesses more readily use to enforce their rights?

At the moment, enforcement of the ACL is vested in the ACCC, the Federal courts, State consumer departments such as Fair Trading NSW and their associated consumer tribunals. All of these processes seem to be formal and there is no clear dispute resolution focus for individual consumers. Dispute resolution is essential for intersection of new products and services in the energy market especially where there is a contract linked to the supply of standard energy supply.

EWON notes that the NSW Department of Justice currently has a Civil Justice Collaboration Working Group which is considering how to introduce informal effective resolution dispute resolution into the formal regimes which currently exist.⁵

Question 27 Are there any overseas initiatives that could be adopted in Australia?

EWON agrees with the ANZOA submission on this issue. Australia leads the world in industry-based dispute resolution. The CDR Benchmarks and the six Ombudsman principles it contains of accessibility, independence, fairness, accountability, efficiency and effectiveness represent best practice.⁶ Should the ACL identify the need for a new Ombudsman, this best practice should be followed.

⁵ Maureen Tangney is able to provide further information on this Working Group Maureen.Tangney@justice.nsw.gov.au

⁶ <http://www.treasury.gov.au/PublicationsAndMedia/Publications/2015/key-pract-ind-cust-dis-reso>

Is the framework sufficiently flexible to respond to new and emerging issues in the marketplace

Question 30 Does the ACL adequately address consumer harm from unsolicited sales? Are there areas of the law that need to be amended?

The issues paper points out that one in five sales agents interviewed for a 2012 ACCC report described sales practices specifically targeted at elderly, low income, or other vulnerable consumers⁷. EWON has seen a dramatic reduction in marketing cases since the major retailers stopped door to door marketing. This has been assisted by the actions taken by the ACCC in addressing systemic breaches of the ACL by energy retailers. The new products and services in the energy industry have the potential to reopen the worst of predatory marketing behaviour. A complete ban on door to door marketing would provide significant consumer protection in this area.

If, however, the consumer benefits in accessing such new products and services are felt to outweigh the consumer detriment that often arises from door to door sales, then stronger consumer protections will be needed. In particular stronger penalties are needed for individual marketers and companies where inadequate information is provided, where exaggerated claims are made, or where vulnerable consumers are exploited.

Individual consumers need access to free external dispute resolution, and quick and timely remedies. Such a strengthening of the compliance regime is needed to complement the effective enforcement which is currently undertaken by the ACCC when widespread breaches are identified.

Question 37 Do the existing ACL provisions (including provisions on false or misleading representations) adequately address issues regarding the transparency of comparator websites and online reviews? How could this be improved?

Services such as comparator web sites are covered by the ACL in that they have a legal obligation not to engage in conduct that is misleading or deceptive. After a review of the comparator website industry in 2014, the ACCC identified a number of concerns about the industry's compliance with the ACL. Based upon this review the ACCC has developed guidelines which were published in 2015. These guidelines are comprehensive and provide a good base for improving conduct in this industry.

A strengthening of the misleading or deceptive provisions of the ACL around silences and omissions would be a significant improvement for dealing with poor conduct in this industry and could then further strengthen the current ACCC guidelines.

Question 38 Does the ACL provide consumers with adequate protections when engaging in the 'sharing' economy, without inhibiting innovation and entrepreneurial opportunities?

The current coverage of the ACL is about transactions focused on good and services. Increasingly, transactions are occurring in the 'sharing' economy and are more focused on information and data rather than a particular supply of a product. This is also true in areas such as demand management products in the energy space. Such commercial activities should be explicitly covered by the ACL and standard consumer protections should apply.

⁷ *New Products and Services in the Electricity Market. Advice to the COAG Energy Council. Energy Working Group July 2015, p27*

If you would like to discuss this matter further, please contact me or Rory Campbell, Manager Policy, on (02) 8218 5266.

Yours sincerely

A handwritten signature in blue ink that reads "Janine Young". The signature is written in a cursive style with a large initial 'J' and 'Y'.

Janine Young
Ombudsman
Energy & Water Ombudsman NSW