



PO Box 4136  
East Richmond VIC 3121  
T 131 806  
F 1300 661 086  
W redenergy.com.au

PO Box 632  
Collins St West VIC 8007  
T 1300 115 866  
F 1300 136 891  
W lumoenergy.com.au



27 May 2016

Mr. Garry Clements  
Chair  
Consumer Affairs Australia and New Zealand

Submitted electronically

Dear Mr. Clements,

### **Re: Australian Consumer Law Review**

Red Energy (Red) and Lumo Energy (Lumo) welcome the opportunity to respond to Consumer Affairs Australia and New Zealand (CAANZ) on the Australian Consumer Law (ACL) Review Issues Paper (the Issues Paper).

Red and Lumo are 100% Australian owned subsidiaries of Snowy Hydro Limited. Collectively, we retail gas and electricity in Victoria and New South Wales and electricity in South Australia and Queensland to approximately 1 million customers.

We believe the ACL has functioned effectively over the past 5 years, and provided consumers in Australia adequate protections when engaging in purchases of goods and services. We have provided comments on specific aspects of the framework below to ensure it remains fit for purpose today, as well as some recommendations to improve the overall clarity of the framework and the obligations it places on suppliers.

#### **Definition of a consumer**

Red and Lumo believe the \$40,000 threshold currently included in the ACL remains appropriate. Whilst we understand this limit has not been increased in some time, we believe that the vast majority of ordinary consumer transactions continue to fall below this threshold, and unnecessarily increasing it may have unintended ramifications on other transactions, particularly business to business transactions.

#### **Unconscionable conduct**

Red and Lumo support retention of the current unconscionable conduct provisions, and believe they provide important protections for vulnerable consumers engaging in competitive markets. We do not however support extending the provisions for transactions between publically listed companies. We agree with the currently held view that these types of organisations must have the ability to protect their own interests, and those of their shareholders.

#### **Unsolicited sales and marketing**

Red and Lumo currently engage in unsolicited sales and marketing via telemarketing, door to door interactions, and the operation of kiosks. From our experience, a number of the provisions of the ACL relating to unsolicited consumer agreements do not

achieve the positive outcomes they sought to achieve, and can in some instances make relatively simple transactions more complicated than they need to be to adequately protect consumers. A number of these matters are discussed below.

The Issues Paper also raises the possibility of amending the requirement to offer consumers to unsolicited agreements a 10 day cooling off period, and replacing it with a requirement for a consumer to opt-in within a certain time. Red and Lumo strongly believe this amendment to be unnecessary and overly burdensome on consumers wishing to enter into such agreements.

### **Selling or marketing from kiosks**

The Issues Paper discusses the fact that when the ACL was first drafted, the concept of temporary stores and kiosks was not sufficiently defined, and as such the relevant nuances required to regulate this practice were not included. We strongly support this view, and believe the ACL must be made fit for purpose for today's market.

An example of this is the interpretation of section 69<sup>1</sup> that has determined a variation in treatment of two virtually identical circumstances. Should a salesperson operating out of a kiosk remain wholly inside the premises rather than standing outside inviting consumers in seems immaterial today given the prevalence of these types of arrangements in shopping centres and events across Australia. However this interpretation creates an uncertainty for suppliers in how they handle each type of transaction. We believe the determination that a sale is solicited or unsolicited should arise out of the type of non-business premises the sale occurs in, rather than based on the specific conduct of the salesperson in attracting the attention of the consumer.

Red and Lumo would like to see a distinction between the obligations for a seller operating from a very temporary stall (such as the sale of flowers from a trestle table outside a supermarket), compared to a seller operating out of a semi-permanent professionally constructed premises in a non-standard location (such as the marketing of subscription TV services at a major shopping centre or event). Sellers operating from a temporary makeshift premise should be required to comply with the unsolicited sales requirements, whereas we believe semi-permanent premises should be treated as a solicited sale as with any other consumer agreement.

This issue is particularly pertinent under the ACL, where a semi-permanent kiosk in which salespeople stand outside of a defined space is unable to operate outside of the permitted contact hours for face to face unsolicited sales in section 73, irrespective of the hours of operation for the premises in which it is located. It does not seem that community expectations would require disallowing this type of kiosk on a Sunday in a busy shopping centre, so as such this limitation may no longer be fit for purpose today. Other practical implications arise out of section 75(2) to which compliance in a busy location may be difficult to ensure.

### **Permitted hours of contact for unsolicited consumer agreements**

While section 73(2) allows a face to face salesperson to call on a person outside of the permitted hours of contact with consent, the practicalities of this process make provision of this consent overly difficult for consumers. A salesperson who calls on a customer between 9am and 6pm, and is requested to return after 6pm must leave the property, before calling the customer by telephone and setting the appointment. This

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<sup>1</sup> <https://www.accc.gov.au/consumers/sales-delivery/telemarketing-door-to-door-sales/unsolicited-consumer-agreements>

provision does not appear to provide a consumer any additional protection, rather increasing the burden on the customer in entering into the agreement. We consider that consent should be allowed to be given directly to the salesperson face to face, however the onus should be on the salesperson to prove that the contact was not unsolicited.

### **Information requirements for unsolicited consumer agreements**

We also believe there are a number of provisions that could be interpreted to not expressly allow some common forms of communication. For example, section 78 requires documentation to be given to the consumer immediately after signing the agreement, however does not discuss information emailed to the consumer in a practical manner. We suggest that a number of provisions in the ACL are amended to clarify where electronic communications and signatures are appropriate.

### **Interaction between the ACL and other consumer requirements**

As energy retailers, Red and Lumo are required to comply with both the Australian Consumer Law, and the National Energy Retail Law. In some areas, this creates an overlap in obligations placing a significant regulatory burden on energy retailers. Energy specific protections are warranted where the ACL is unable to adequately protect the needs of consumers in purchasing energy, however in areas such as energy marketing and contractual agreements, the ACL should be the sole source of regulation.

With the minor amendments discussed above, we consider that the ACL can continue to provide a fit for purpose, easily understandable protection for consumers engaging in trade or commerce with businesses today. Red and Lumo thank CAANZ for the opportunity to respond to this consultation. Should you have any further enquiries regarding this submission, please call Ben Barnes, Regulatory Manager on 03 9425 0530.

Yours sincerely

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end.

**Ramy Soussou**  
General Manager Regulatory Affairs & Stakeholder Relations  
**Red Energy Pty Ltd**  
**Lumo Energy Australia Pty Ltd**