



9 December 2016

Mr Simon Cohen
Chair
Consumer Affairs Australia and New Zealand

Dear Mr Cohen

Re: Australian Consumer Law Review

Thank you for the opportunity to comment on the Australian Consumer Law Interim Report.

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

This review of the Australian Consumer Law (ACL) is timely, as indicated in our submission to the *Australian Consumer Law Review Issues Paper* (Issues Paper), the nature of the energy industry is changing and consumer protection needs to keep pace with this change.

In response to the interim report, EWON has chosen to respond to those specific questions that impact on energy consumers.

1.2.4 Who is protected under the ACL

Q4 Should the \$40,000 threshold for the definition of ‘consumer’ be amended? If so, what should the new threshold (if any) be and why?

In our submission to the Issues Paper EWON argued that the \$40,000 threshold should be increased aligned with Consumer Price Index changes since 1986¹. The arguments put by stakeholders in response to the issues paper have not changed our opinion. As the Interim Report notes:

“...maintaining the threshold would not impose any additional regulatory burden on businesses, but also that the threshold has remained unchanged while the cost of many goods and services has increased over time. Accordingly, goods or services that may have been captured in previous years may not fall within the \$40,000 threshold today.”²

EWON’s position on the need to increase the \$40,000 does not change the current Law’s jurisdiction, rather it supports the current definition of consumer protection while ensuring that the original level of protection that was recognised and responded to in 1986 is at least matched in 2016. The passage of time should not result in a diminishing level of consumer protection unless there is evidence that the protection is no longer required.

2.4.8 Legislative examples of unfair terms

Q47 Should the ‘grey list’ of examples of unfair contract terms be expanded?

¹ Submission from Energy and Water Ombudsman NSW, p3

² Australian Consumer Law Interim Report, p25

EWON supports the expansion of the 'grey list' of examples of unfair contract terms. EWON would especially highlight the issue of broad terms that allow the imposition of new or increased charges not originally in the contract. An example of such a term comes from the product disclosure statement of an energy retailer:

*"We may change your rates if the information we used to set the rates is incorrect, a new meter type is installed at your premises or your distributor changes the network tariff for your premises. We may also vary change [sic] your rates or charges, or apply a new charge to reflect actual or expected changes to any of the following costs: environment costs, market costs, metering costs, network costs, costs arising from changes in or under any law, wholesale costs, pass through charges and **other costs** we incur in connection with the purchase or sale of energy. We may also change your rates or charges, or apply a new charge **for any other reason**." (EWON emphasis added).*

While some of the circumstances of changing rates in this paragraph are valid, there is certainly a question mark about the fairness of the "other costs" and "for any other reason" mentioned which seem to give the retailer all of the power in this contract.

Terms that allow the pass through of external costs could be argued as being fair. However, terms that allow the imposition of new charges during the course of a contract (especially contracts that contain early termination fees) would seem to be unfair, particularly when the retailer's business processes may result in those costs being incurred.

2.5 Unsolicited consumer agreements

Q48 What are your views on maintaining the current unsolicited selling provisions? Is there another approach that would provide a more effective and proportionate response? If so, how?

In response to the original issues paper EWON stated that a complete ban on door to door marketing would provide significant consumer protection for vulnerable customers³. In the absence of such a ban then improvements to reduce exploitation of vulnerable customers should be introduced. The interim report discusses a number of options.

For energy customers the transfer of their account to a new retailer can take up to three months as transfers typically occur at the date of the next meter read. In some cases, vulnerable consumers are not even aware that they have consented to a transfer until it occurs. This means the ten day cooling off period is well and truly passed when customers realise that they have changed retailer.

EWON supports the proposal from the Telecommunications Industry Ombudsman for an 'opt in' mechanism⁴. A requirement for the current account holder to confirm with the supplier, within a set period of time, the consumers' willingness to engage in the transaction would assist in ensuring that all sales have the consumer's explicit informed consent.

Q53 What are your views on documenting telephone sales?

The interim report raises the question regarding documenting unsolicited telephone sales. Energy retailers are required by National Energy Retail Rule 68 to maintain a record of all (including telephone) marketing activities. In investigating complaints where customers have indicated to EWON that they did not provide explicit informed consent, EWON has a right to access such records.

³ Submission from Energy and Water Ombudsman NSW, p6

⁴ Australian Consumer Law Interim Report, p146

A common complaint about telephone marketing is that the customer was under the assumption that all they requested was more information upon which to make a decision. In many cases the records indicate that the customer has agreed to a contract. What is often missing from the record is the conversation that occurs prior to the recording of the consent. The recording of consent is often a series of questions where the consumer's only response is to answer 'yes'.

The issues paper raises the possibility of introducing a presumption that the customer's version of a telephone sale will stand unless the business could prove otherwise. EWON strongly endorses this approach as it will ensure that all such sales are clearly based on the customer's explicit informed consent.

Other matters

The EWON submission to the Issues Paper was strongly critical of debt management and credit repair businesses that provide quasi financial service solutions.⁵ The Melbourne meeting of the Experts Roundtable in February 2016 with around forty representatives from consumer advocacy organisations, industry associations, ombudsman schemes, government agencies and regulators identified that there were gaps in the financial services regulatory framework that allowed ongoing exploitation of financially stressed consumers.⁶

This issue was not addressed in the interim report. However I note that the Ramsey Review Panel's Interim Report into Financial Services EDR, published 6 December 2016, recommends that:

*"Debt management firms should be required to be a member of an industry ombudsman scheme. One mechanism to ensure access to EDR is a requirement for debt management firms to be licensed."*⁷

EWON urges the CAANZ to take this issue into account in this review. Strengthening the ASIC Act and the ACL, and an improvement of enforcement action, or a combination of all of these, provides an ideal opportunity to also address this issue. It is important to see an end to vulnerable consumers being exploited by unscrupulous business practices, which at the moment are slipping through the regulatory protection framework.

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

Yours sincerely



Janine Young
Ombudsman
Energy & Water Ombudsman NSW

⁵ Submission from Energy and Water Ombudsman NSW, p3

⁶ Ibid, p3

⁷ Review of the financial system external dispute resolution and complaints framework, Interim Report, p26