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Submission on the Australian Consumer Law Review Issues Paper 2016

The Ethnic Communities Council of NSW (ECC NSW) welcomes the opportunity to provide input into the Australian Consumer Law Review Issues Paper 2016.¹

Since its formation 40 years ago the ECC NSW has been the peak body for culturally and linguistically diverse (CALD) community members and representative organisations in NSW. The Ethnic Communities' Council of NSW main activities are advocacy, education and community development. It is a member of the Federation of Ethnic Communities Councils of Australia (FECCA) and the Energy Advocacy role represents FECCA in the NEM.

The ECC NSW thanks Consumers Affairs Australia and New Zealand for the opportunity to contribute to the discussions on the review of ACL and to comment on the Issues Paper. The Issues Paper lists 43 questions on which they invite comment. Responses to some of those questions are given below, both in the broader context of CALD consumers generally and particularly in their position with respect to protections around current, new and emerging energy market products and services.

Australia's consumer policy framework objectives (1.3)

1. *Do the national consumer policy framework's overarching and operational objectives remain relevant? What changes could be made?*
2. *Are there any overseas consumer policy frameworks that provide a useful guide?*
3. ***Are there new approaches that could help support the objectives of the national consumer policy framework, for example, innovative ways to engage with stakeholders on ACL issues?***

Extrapolations from the 2011 census indicate that approximately 28% of Australian residents were born overseas, an increase of about 24% over the decade 2003 – 2013. Within NSW and Victoria, those States with the majority of the CALD population, 2011 census figures give approximately 29% of the population as born overseas and 25% speaking a first language other than English (FLOTE) at home. These figures represent increases of approximately 3 – 4% over the 2006 Census statistics.

¹ Australian Consumer Law Review, Issues Paper 2016

The figures for FLOTE speakers at home can be unreliable, as respondents asked what language is spoken at home often reply English while there remains a strong first language presence within the home, often with the older members of the extended family network. Additionally, older CALD community members can lose their English language proficiency as they age, reverting to their first language for routine communication.

Australia wide, within the five year changes in those figures, we find an over 250% increase in residents born in India and Sri Lanka, and a 22% increase in residents born in Asia.

Approximately 40% of small to medium enterprises within Australia are owned/operated by members of CALD communities.

Work done by ECC NSW over the course of the last 5 years has established a proven process for engaging CALD consumers effectively. Our recent publication, *Cultural Connections; Engaging CALD energy consumers*,² highlights a range of techniques which have worked and details several case studies of effective engagement processes. The use of trained bilingual educators to go out into their own communities and meet with consumers at venues and events where they gather has proven to be especially effective.

Structure and clarity of the Australian Consumer Law (2.1)

Meaning of 'consumer' (2.1.2)

4. Is the language of the ACL clear and simple to understand? Are there aspects that could be improved?

While there may have been attempts to make the language of the ACL as simple and clear as possible, it is not accessible to CALD community members generally. The content, scope and legal framework of the ACL are complex in English and challenging for first language English speakers/readers. There does not appear to be any provision in the documents or the website material for assistance with language, translated materials or an interpreter service.

The provision of material only translated into common languages can present issues which need to be addressed:

- Which languages should be used – possibly based on population size/location specific populations or other factors
- CALD communities, especially emerging, newly arrived and refugee communities are not necessarily literate and numerate in their first language
- Language translations specifically generated for helping consumers navigate a complex (English language) website, rather than full translations, often just leave a CALD consumer deeper (and often lost) in the website

5. Is the structure of the ACL easy to understand and navigate? Are there aspects that could be improved?

See above comments for Question 4.

6. Are there overseas consumer protection laws that provide a useful model?

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

² ECC NSW, *Cultural Connections; Engaging CALD energy consumers*, 2015, digital version at www.eccnsw.org.au/what-we-do/Advocacy/Guidelines.aspx

New and emerging products and services in the energy sector purchased or marketed by exempt sellers or unregulated businesses (and hence not covered by the National Energy Consumer Framework (NECF) provisions and regulatory environment) could quite easily exceed these limits – for example solar photo-voltaic/battery storage/energy management packages and solar power purchase agreements (PPAs).

General protections of the Australian Consumer Law (2.2)

Misleading or deceptive conduct (2.2.1)

Unconscionable conduct (2.2.2)

Unfair contract terms (2.2.3)

8. Are the ACL's general protections working effectively? Do they address the risks of consumer and business harm without imposing disproportionate or unnecessary costs on businesses?

9. Are there any changes that could be made to improve their effectiveness, or address any of the issues raised in section 2.2? Are there any gaps that need to be addressed?

There are problems with respect to 'unconscionable conduct' and the mechanisms for prosecution. Each case is heard individually and certain patterns of behaviour are not seen as a wider process that needs to be averted. This needs to be done, not through a one-by-one adversarial approach, but in a wider and more general way.

Considerations of social norms and concepts of fairness and honesty, while they have been somewhat clarified by recent cases still have to be argued on a case-by-case basis and are very open to interpretation and argument.

With respect to the unfair contract provisions, similar issues arise with a case-by-case, rather than general mechanism for determining the 'fairness' of a contract. Additionally, for CALD consumers, the concepts and challenges around whether a standard contract could be considered 'sufficiently clear' present considerable difficulty. A representative, rather than case-by-case process would be useful for regulators in the case of systemic unfair contract processes and repeat offenders.

Digital (and so possibly consumer rights untested) products such as those which are about to see significant growth (unregulated and potentially not subject to NECF) in the competitive energy market, for example energy management systems, battery and demand management programs, solar and storage PPAs as well as many others yet to be developed, will present challenges in the contract area. Any standard contract mechanism in this space will need to be explored carefully and appropriate checks and balances put in place so as not to stifle innovation while protecting the legitimate rights of consumers.

The Australian Consumer Law's specific protections (2.3)

False or misleading representations (2.3.1)

Other unfair practices (unsolicited supplies, pyramid schemes, pricing, referral selling, and harassment and coercion) (2.3.2)

Consumer guarantees (including 'lemon' laws) (2.3.3, 2.3.4)

Unsolicited selling agreements (2.3.5)

Other consumer rights (lay-by agreements, proof of transaction, itemised bill, and warranty against defects) (2.3.6)

Product safety (2.3.7)

10. Are the ACL's specific protections working effectively? Do they address the risks of consumer and business harm without imposing disproportionate or unnecessary costs on businesses?

There are disturbing trends developing in the new and emerging energy products sector of the energy market, largely in connection with the marketing of solar PV systems. False and misleading representations, suspect finance provision and installation of systems prior to sign-off by consumers have been documented by consumer organisations.³ With the expected rapid growth of storage and sophisticated energy and demand management systems marketed to domestic and small business consumers this can only grow as a source of consumer protection issues.

As was pointed out by Nicole Rich from Choice Victoria at the 2016 National Consumer Congress in March 2016, it would be simpler to ban outright door-to-door sales and unsolicited marketing than continually pursue major and minor players in this area for breaches. New and emerging energy products could easily become the replacement for door-to-door energy retailer sales.

CALD consumers experienced considerable impact during past energy retailer door-to-door sales pushes. Differences in cultural norms and expectations in CALD communities to do with perceived authority and trust can and did produce marked differences in the take-up of door-to-door and unsolicited offers compared to the wider population, particularly with newly arrived and refugee consumers unused to the Australian market.

11. 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?

12. Does the ACL need a 'lemon' laws provision and, if so, what should it cover?

We are unsure at this stage whether there is a need for a 'lemon' law but there are potential problems with the growth of new products and services in the energy sector. Any problems with these products and services could be exacerbated markedly if faults with the provision of those services or products had the potential to interrupt or disconnect the supply of energy to a consumer, widely considered an essential service. The appropriate regulation (or otherwise) of exempt sellers and the providers of new energy products and services and the mechanisms under which this would happen are subject to current review by the COAG Energy Council and the AEMC.

13. Do the ACL product safety provisions respond effectively to new product safety issues, and to the changing needs of businesses in today's marketplace?

New products and services in the energy market will certainly require mandatory and minimum standards legislation and protections. It will be very important that the ACL product safety regime is able to respond to this emerging and rapidly growing market and the legislation surrounding it effectively and quickly.

³ Consumer Action Legal Centre (CALC Victoria) 2016 discussions as part of their *Power Transformed* project, among others

Star ratings and minimum standards systems (along similar lines to the Greenhouse Energy Minimum Standards (GEMS) for appliances) are particularly useful to CALD consumers who value the easily understandable infographics.

The product recall process could present problems with new energy products, especially battery storage. Currently, it would appear that records of the specific purchasers/locations of installed battery storage are not centrally maintained or managed and so product recall or notification of product defects (potentially leading to serious consequences such as catastrophic fire/arcing) would not be easily undertaken.

In addition, current and future mechanisms for product recall and notification of defects need to address the specific needs of consumers whose first (or second or third) language may not be English, and who also may not utilise increasingly 'normal' channels of information retrieval such as the internet or social media.

14. Could the handling of unsafe products that fall within the scope of the ACL and a specialist regulatory regime be made more effective, and how? Should protocols or other arrangements be established between ACL and specialist regulators?

Energy specific regulations and provisions for existing, new and emerging energy products and services are a necessity. Specialist legislation and protections along with specialist teams will be increasingly required as the spread of these products and services widens.

Other issues (2.4)

Addressing 'unfair' commercial practices (2.4.1)

Interaction between the ACL and ASIC Act (2.4.2)

15. Should the ACL prohibit certain commercial practices or business models that are considered unfair?

Yes, because there are no specific prohibitions in current legislation about unfair commercial practices this opens the possibilities of considerable consumer harm. (first dot point in 2.4.1 spells out difficulties of required literacy skills etc)

16. Is introducing a general prohibition against unfair commercial practices warranted, and what types of practices or business models should be captured? What are the potential advantages, and disadvantages, of introducing such a prohibition?

The introduction of a general prohibition against unfair commercial practices is warranted. Overseas examples could provide models for such a prohibition, along with evidence of practice, success in implementation etc.

17. Does the current approach to defining a 'financial service' in the ASIC Act create unnecessary complexity in determining if certain conduct falls within the scope of the ACL or the ASIC Act? How could this be addressed?

Administering and enforcing the Australian Consumer Law

Proportionate, risk-based enforcement (3.1)

18. Does the ACL promote a proportionate, risk-based approach to enforcement?

ECC NSW believes that energy specific regulation as part of the ACL is required, as an adjunct to 'single law, multiple regulator model.'

Energy specific legislation and regulation, as an integral part of the ACL and not just policing regime based on general consumer law is an important step in protecting consumers in a rapidly changing energy environment. Energy specific legislation, possibly subsuming the NECF/Victorian protections and their derogations/adaptions in various jurisdictions would be required, and would necessitate a close connection and focus on the ongoing COAG EC review of NECF.

Effectiveness of remedy and offence provisions (3.2)

Distinction between civil and criminal penalties (3.2.1)

Types of ACL penalties and remedies (3.2.2)

Deterrent effect of financial penalties (3.2.3)

Setting and updating maximum financial penalties (3.2.4)

Role of non-punitive orders (3.2.5)

Jurisdictional differences in the enforcement 'toolkit' (3.2.6)

19. Are the remedy and offence provisions effective?
20. Are the current maximum financial penalties available under the ACL adequate to deter future breaches?
21. Is the current method for determining financial penalties appropriate?
22. Are the non-punitive orders available under the ACL sufficient for the court to apply an appropriate order to address the harm caused by a breach?
23. What could be done to improve the consistency in the approach to ACL penalties and remedies across jurisdictions?
24. Do you have views on any of the issues raised in section 3.2?

Access to remedies and scope for private action (3.3)

Effective dispute resolution (3.3.1)

Scope for private action (3.3.2)

Reach of the ACL — international private action and recognition of foreign judgments (3.3.3)

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?***

‘Access to remedies begins with a consumer’s ability to understand their problem, the rights and protections available under the law, the actions they can take and the services available to help them resolve their problem efficiently and effectively’⁴

The ‘ability to understand’ remains a problem for a number of CALD consumers for obvious reasons. In addition, ‘avoiding the issue in the first place’⁵ presupposes a level of understanding via education. Education measures would have to include guides for consumers and businesses that are accessible to CALD communities and consumers and distributed via methods that have been demonstrated to work in CALD communities.

Information about how dispute resolution processes are organised, accessed and undertaken is very important in the CALD context. Mechanisms for the dissemination of this information should be undertaken in a culturally sensitive manner, again taking in to account proven processes effective for CALD communities.

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

Embedded energy networks as well as new energy products and services are generally not included in the scope of energy ombudsman schemes (except to a limited extent in NSW through EWON). Energy ombudsmen schemes are funded by the regulated energy industry through levies based on complaints numbers and so could provide a relatively low-cost and effective mechanism and model for enforcing consumer rights.

27. Are there any overseas initiatives that could be adopted in Australia?
28. What are the experiences of consumers and businesses in dealing with ACL regulators? Could they play a greater role in promoting private action or take action in other areas that would help consumers enforce their rights under the ACL?
29. How could the ACL or other Australian laws be improved to provide Australians with better protection when engaging in cross-border transactions with overseas traders?

Emerging consumer policy issues

Selling away from business premises (4.1)

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

See response to Question 10.

31. Does the distinction between ‘solicited’ and ‘unsolicited’ sales remain valid? Should protections apply to all sales conducted away from business premises, or all sales involving ‘pressure selling’?
32. Do the unsolicited selling provisions require clarification with regard to sales made away from business premises, for example, ‘pop-up’ stores?
33. How could these issues be addressed?

⁴ ACL Review, Issues Paper 2016, op cit, page 46

⁵ loc cit

Online shopping (4.2)

Price transparency (4.2.1)

Transparent safety information for products sold online (4.2.2)

Comparator (comparison shopping) website (4.2.3)

Online reviews and testimonials (4.2.4)

34. Is it sufficient for a business to disclose the total minimum price before making a payment, or should optional fees and charges also be disclosed upfront?
35. Are there any changes that could be made to the ACL to improve pricing transparency?
36. Does the ACL adequately ensure that online sellers provide safety information about products and services at the point of sale?
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?

Emerging business models and the Australian Consumer Law (4.3)

38. Does the ACL provide consumers with adequate protections when engaging in the 'sharing' economy, without inhibiting innovation and entrepreneurial opportunities?
39. Does the ACL provide adequate clarity and certainty for consumers when engaging in the 'sharing' economy? What areas need to be addressed, and what types of personal transactions should be excluded?

Promoting competition through empowering consumers (4.4)

Consumer access to data (4.4.1)

Disclosure requirements (4.4.2)

40. Do consumers want greater access to their consumption and transactional data held by businesses?

Data collection is a growth area for energy businesses, particularly with respect to emerging energy products and services and the changes associated with advanced metering and the new contestable metering market.

There are emerging issues around the access and use of data by third parties in the energy market. There is an emerging data collection and aggregation industry developing in the energy sector to collect value from big data and it is most important to provide appropriate protections for consumers whose data it is, and to ensure consumers are rewarded for its value. The advent of contestable metering services, advanced metering and complex energy management systems will add a number of additional layers to an already complex data collection, utilisation and value extraction process.

Consumer ownership and access to their own data, and the gifting, sale or unseen utilisation of that data to third parties raises a range of privacy issues, complicated by split incentives within a growing rental property market and the growth of distributed energy and storage options available.

CALD consumers will obviously also have ongoing difficulties with the 'informed consent' process, for all of the reasons canvassed in earlier questions.

41. What is the role of the ACL and the regulators in supporting consumers' access to data? Is there anything in the ACL that would constrain efforts to facilitate access?

42. Does the provision of data, or the emergence of an 'infomediary' market create, or increase, any risks of consumer harm not adequately addressed by the ACL? If so, how could the ACL mitigate these risks as the market evolves?

See Question 40 above.

43. Are the disclosure requirements effective? Do they need to be refined, or is there evidence to indicate that further disclosure would improve consumer empowerment?

If you require additional information please contact Iain Maitland, Energy Advocate on 02 9319 0288 or email iain.maitland@eccnsw.org.au .

Sincerely yours,

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