26 May 2016

Garry Clements
Chair
Consumer Affairs Australia and NZ
Lodged electronically

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Dear Mr Clements

CAANZ, Australian Consumer Law Review, Submission to Issues Paper March 2016

EnergyAustralia welcomes the opportunity to make a submission to CAANZ's Australian Consumer Law (ACL) review.

As you would be aware, we are one of Australia's largest energy companies with over 2.5 million electricity and gas accounts in NSW, Victoria, Queensland, South Australia, and the Australian Capital Territory.

Our business is committed to providing our customers with the highest levels of service delivery and customer satisfaction. On a day-to-day basis we are guided by our corporate values to "put customers first" and "do the right thing", including by aiming to comply with the spirit and intent of all consumer protection laws.

We believe that the national consumer policy framework has been a substantial improvement on the various State-based regimes it replaced. However, we also maintain that there are further opportunities for harmonisation in the laws that apply to our day-to-day interactions with consumers.

In considering the effectiveness of the existing framework and any proposed changes it recommends, we urge CAANZ to test whether there is indeed a consumer issue that requires regulatory intervention or whether the issues are merely perceived and whether the law is ultimately in the best interests of consumers or will have unintended negative consequences in the market.

Given the breadth of the issues raised for discussion in the ACL review, we have limited our submission to the issues that could most directly impact EnergyAustralia. Our answers to these specific issues raised in the CAANZ's Australian Consumer Law Review Issues Paper (the Issues Paper) are attached.

In summary we note:

- Government intervention should only be necessary where there is an actual market failure and an identifiable gap in existing legislation. Regulatory proposals should be subject to rigorous impact assessment to ensure they are proportionate and directly targeted at actual market failures, rather than just perceived issues.
- Government should ensure that changes to consumer protections do not inadvertently have the effect of impeding competition by increasing regulatory burden or interfering with legitimate business activities. For example if businesses are discouraged from engaging in practices that promote competition or consumers are deterred from exploring competitive offerings because of increased barriers to switching.

- This is particularly important for the energy industry, where advances in technology mean energy retailing is rapidly evolving and consumers could benefit from these developments. Policy makers should ensure that regulatory change does not impede market developments while at the same time ensuring consumers are protected.
- As an authorised retailer, EA is subject to the National Energy Customer Framework (NECF) (including the National Energy Retail Law, National Energy Retail Rules and Regulations). EA is also subject to equivalent State arrangements that apply in Victoria (particularly the Energy Retail Code). Any changes to the ACL should also take into account existing consumer protections in the NECF and Victorian regulation so that regulatory duplication and inconsistency does not occur.

If you require further information about any aspect of our submission please feel free to contact me via the contact details below.

Yours sincerely

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Structure and clarity of the ACL (section 2.1)

Q7. Is the ACL's treatment of 'consumer' appropriate? Is $40,000 still an appropriate threshold for consumer purchases?

EnergyAustralia believes there is merit in excluding goods and services that are actually acquired for business purposes from the definition of consumer (in addition to, or instead of, the current exclusions). This would prevent applying additional protections to those unusual situations where goods or services acquired for business purposes could also be viewed as ordinarily acquired for personal, domestic or household use or consumption.

However, if the decision is made to retain the current definition of goods and services ordinarily acquired for personal, domestic or household use or consumption, then EA does not believe that further changes are required to expand the definition.

The current terms appropriately reflect a policy objective of limiting the extent of consumer protection under certain ACL provisions (such as consumer guarantees and unsolicited consumer agreements) to exclude most commercial transactions.

Even though it hasn't been increased in many years, we consider the $40,000 threshold for consumer purchases to still be a relatively high but appropriate proxy that captures lower value goods or services that are acquired for personal, domestic or household use/consumption, but would not be considered to be ordinarily acquired for those purposes.

Increasing this threshold would risk capturing more goods and services acquired for business or commercial use by medium to large businesses, without a clear policy basis for extending the relevant consumer protections to those transactions. The current threshold also broadly aligns with the consumption threshold below which additional consumer protections are applied through the National Energy Retail Law (NERL).

Further, goods or services exceeding the $40,000 threshold that are of a kind ordinarily acquired for personal, domestic or household use or consumption, would be covered by section 3(1)(b) of the ACL in any event.

General protections of the Australian Consumer Law (section 2.2)

Q9. 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?

Section 2.2.3 of the Issues Paper asks whether the current approach to determining if a term is 'unfair' and if a contract is a 'standard form contract' is sufficiently clear.

We are aware that there has already been significant public consultation around the unfair terms regime for consumers and the recent extension to small businesses. Accordingly, our comments in relation to these sections are more general in nature.

EnergyAustralia believes that any changes to the unfair contract term protections in the ACL (and the ACL generally) should take into account existing industry-specific regulation under the NERL and equivalent State arrangements that apply in Victoria.

As an authorised retailer, EnergyAustralia must comply with the requirements in the National Energy Retail Rules (the NERR) and other State based requirements, including prescriptive rules about retail contracts, in addition to the ACL.

For instance, an energy market retail contract condition that allows the retailer to vary the tariffs set out in a contract could be subject to the unfair contract term protections in the ACL, where additional safeguards already exist in the NERR. Specifically, section 46A of the

NERR provides that any term or condition that provides for variation of tariffs is a matter relevant to the required explicit informed consent of a small customer entering into a market retail contract with a retailer. This clearly contemplates the use of such terms in retail energy contracts (with explicit informed consent). We emphasise that any changes to the unfair contract terms protections in the ACL (or any other provisions of the ACL) should recognise the effect of existing consumer safeguards under the NERR and equivalent State regimes, and address only identifiable gaps in legislation.

The Australian Consumer Law's specific protections (2.3)

Q 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?

Section 2.3.5 discusses issues around unsolicited agreements including the following which are considered in turn below:

- whether the provisions are flexible enough to deal with emerging business models, including whether it is appropriate to maintain the distinction between 'solicited' and 'unsolicited' sales [see section 4.3];
- whether the provisions should also apply to business consumers; and
- whether a consumer should be required to 'opt in', within a certain time and without further contact from a supplier, to confirm their decision to enter into the agreement (rather than 'opt out' during the cooling off period).

Solicited vs unsolicited

In the absence of a clear policy reason and evidence of consumer vulnerability in the solicited sales context, we do not support removing the legal distinction between 'solicited' and 'unsolicited' sales. This is because, in practice, we think there is an observable difference between these transactions.

Where a consumer solicits a sale agreement, the consumer is more likely to be prepared to transact and less susceptible to any pressure selling. This is supported through our experience where only a relatively small fraction of residential and business consumers opt out of solicited sales (where they initiated contact with EnergyAustralia) compared to the numbers who exercise their cooling off rights for unsolicited sales (which also represents only a small proportion of unsolicited sales).

Removing this distinction and extending the consumer protections to all sales conducted away from business premises would:

- Increase regulatory burden and costs on businesses;
- Deter businesses from engaging in direct marketing away from their business or trade premises; and
- Result in greater inefficiencies for both businesses and consumers when completing solicited sales, for little or no actual benefit to consumers.

Business consumers

EnergyAustralia does not believe that the protections around unsolicited consumer agreements should be extended to apply to business consumers.

EnergyAustralia believes that direct marketing is a legitimate and important sales channel for both retailers and consumers.

Our experience suggests that business consumers are unlikely to be vulnerable to any high-pressure selling techniques that the unsolicited consumer agreement provisions protect against. Rather, it is our experience that business consumers are well informed and make considered decisions, sometimes over the course of several months.

We also consider that a significant proportion of small business consumers are likely to value the convenience of unsolicited sales people attending or calling their premises, as they are often time poor and cannot attend (or call) other business' premises during normal trading hours. Applying unsolicited agreement protections to business consumers could deter businesses or dealers such as EnergyAustralia from directly marketing to them at their premises and potentially restrict small business consumers' access to information about what offers are available to them.

In addition and separate to the above matters, we also note the current requirements around unsolicited consumer agreements may create operational inefficiencies due to the way unsolicited consumer agreements are defined (section 69 of the ACL).

Take, for example, a scenario where a consumer has invited a business to their premises for the purposes of negotiating supply of goods (solicited negotiation), and the dealer then seeks to negotiate supply of different goods (such as an upsell). This second negotiation could trigger the requirements around unsolicited consumer agreements. If the dealer was there on a Sunday, or outside the permitted hours, under a strict interpretation of the law they would have to leave and return to the premises during the permitted hours under section 73 of the ACL (whether or not this is convenient for the consumer). The consumer cannot negate this by consenting to the dealer's attendance at their residence while the dealer is present (section 73(2) of the ACL).

This would create inconvenience and inefficiencies for both the dealer and consumer, with no real benefit to the consumer. That is, the position of the consumer and readiness to transact is likely to be the same for both negotiations, yet the consumer will be forced to wait to complete the sale and only receive their goods or services after the end of the cooling off period for the unsolicited sale. It is also likely that the costs of needing to attend the same customer's premises again for the purposes of the second sale would ultimately be borne by consumers.

Double opt in (rather than 'opt out')

EnergyAustralia considers that the current provision allowing consumers to opt out during the termination period (cooling off period) is an adequate protection should consumers reconsider an unsolicited agreement and change their mind. Any consideration of a new double 'opt in' requirement should be subject to a regulatory impact assessment to ensure that it is proportionate to any perceived consumer harm.

EnergyAustralia's experience is that a small but significant percentage of consumers do exercise their right to opt out from unsolicited energy sales. This suggests that there is a high awareness of the existing termination right among retail energy consumers, and that it is operating effectively.

Requiring a consumer to 'opt in' again within a certain time (and without contact from a supplier) to re-confirm their decision to enter into an agreement would create inconvenience for consumers, raise barriers to customers switching resulting in less vigorous competition, and could lead to agreements lapsing where the consumer intended to continue their agreement. It also sends a message to consumers that their ability to make an informed choice about buying goods or services is impaired or cannot be trusted. We think this unfairly underestimates our customers' capacity to enter agreements.

Businesses would also face significant compliance costs in implementing business processes around a double 'opt in' requirement via call centre costs or alternative communication modes which ultimately could be borne by customers.

Lastly, in respect of retail energy, a change to a double 'opt in' requirement under the ACL would also create inconsistencies between the ACL and the NERR requirement of a right of withdrawal within a 10 day cooling off period (Rule 47). Without separate amendments to the NERR there would be uncertainty for authorised retailers that are subject to both the ACL and the Rules.

Conflicting requirements – NERR

We submit that this Review may be an opportunity to harmonise the existing ACL and NERR in relation to the commencement of their respective cooling off periods.

The 10 day cooling off period under the NERR (Rule 47) begins *the date* the small customer receives the required information under Rule 64 (required information does not include a copy of the contract, but in certain circumstances, a copy of the contract must be provided with required information).

In contrast, under the ACL, the sub-sections 82(3)(a) and (b) 10 day cooling off period commences:

- where the agreement was not negotiated by telephone, at the start of *the first business day after* the day on which the agreement was made (the day on which the agreement is made is effectively the day on which the consumer is given a copy of the agreement due to the effect of section 78(1)), or
- where the agreement is negotiated by telephone, the start of *the first business day after* the day on which the consumer was given the agreement document.

This inconsistency creates regulatory uncertainty for businesses that need to operate in accordance with both sets of regulation.

Q16. 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?

EnergyAustralia submits that introducing a general prohibition against unfair commercial practices is unnecessary. There is no clear evidence of market failure or that the existing protections in the ACL are not adequate.

More broadly, the section 21 prohibition on unconscionable conduct in respect of the supply or acquisition of goods or services effectively applies to conduct that is unfair. Section 22(1) and (2) (supply and acquisition of goods or services, respectively) provides that the court may have regard to whether any unfair tactics were used against the consumer as a matter when determining whether the prohibition has been contravened.

Consistent with this, the case law on section 21 (and its predecessors) has broadened the concept of unconscionable conduct to clearly incorporate values such as unfairness and has, in our view, set an appropriate standard as to the seriousness of unfair conduct that will contravene section 21.

For example, the full Federal Court in *ACCC v Lux Distributors Pty Ltd*[1] provided guidance on unconscionable conduct: "The task of the Court is the evaluation of the facts by reference to a normative standard of conscience… which is permeated with… community values. Here… [those values] can be seen to be honestly and fairness in the dealing with consumers".[2] Given section 21 and its interpretation by the courts, and other specific protections directed at unfair transactions, introducing a general prohibition would be duplicative and unnecessary. It would also create significant uncertainty for businesses regarding their compliance obligations.

Administering and enforcing the ACL

Proportionate, risk-based enforcement (section 3.1)

Q18. Does the ACL promote a proportionate, risk-based approach to enforcement?

EnergyAustralia notes that there will be an independent assessment of the enforcement and administration arrangements of the ACL. As such, we don't propose to comment on these provisions in detail at this time.

[1] [2013] FCAFC 90

[2] *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90 at [23]

However, we emphasise the importance of consistency in enforcement approaches for breaches of the ACL – that focus more on the actual or potential consumer harm suffered, rather than the size or financial position of the company.

Effectiveness of remedy and offence provisions (3.2)

20. Are the current maximum financial penalties available under the ACL adequate to deter future breaches?

EnergyAustralia considers the current maximum financial penalties are adequate to deter future breaches of the ACL. For EnergyAustralia, with a well-known brand and a focus on improving customer experience, financial penalties are only part of the relevant considerations when it comes to deterrence. Reputational or brand damage from contraventions of the ACL among current and potential customers and other stakeholders, for example, shareholders, has a significant deterrent effect against potential breaches.

We also note that civil pecuniary penalties were only introduced for breaches of consumer protection provisions from 2010 and prior to that they were not available. Reconsidering the maximum amount at this early stage of these penalties being in place would not provide an indication of their full effect.

Q 21. Is the current method for determining financial penalties appropriate?

As noted above, EnergyAustralia considers that the current maximum financial penalties available under the ACL are appropriate. However, if changes to the determination of financial penalties were to be considered:

- Determining financial penalty by reference to the value of the benefit of the breach in the consumer law context may be difficult in practice and lack a clear basis.
- Any changes to how penalties are calculated for breaches of the consumer law should reflect the current approach where breaches of competition law provisions attract a greater penalty compared to ACL breaches. This would appropriately reflect that breaches of the competition law provisions are likely to pose greater and more widespread harm to the competitive process compared to breaches of consumer law.

Q24. Do you have any views on any of the issues raised in section 3.2?

Section 3.2.2 raises the issue of whether the same penalties and remedies should be available for both misleading or deceptive conduct, and false or misleading representations.

EnergyAustralia supports the current remedies that apply to the section 18 prohibition against misleading or deceptive conduct (namely, damages, injunctions and compensatory orders). Punitive measures such as pecuniary penalties should not apply to contraventions of section 18.

While punitive measures are appropriate for specific prohibitions such as those against false or misleading representations, they are not appropriate for section 18. Section 18 is very broad by design – as its purpose was never to create liability but rather to establish a norm of conduct. EnergyAustralia believes that this is still the appropriate intent for section 18 and would be concerned that applying pecuniary penalties to section 18 would create uncertainty in commercial transactions.

Also, regulators often undertake concurrent actions for both breaches of section 18 and the specific prohibitions for the same conduct demonstrating that in practice the provisions supplement rather than substitute for each other. This also means that pecuniary penalties are available to the regulator should they wish to seek court orders for them.