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CIVIL JUSTICE IN NSW – CONSULTATION PAPER

Thank you for the opportunity to comment on *Justice for everyday problems: Civil Justice in NSW. A consultation paper*.

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

EWON believes that everyday problems require everyday solutions that are quick, simple and low cost. As well as delivering more complex dispute resolution, EWON provides this type of service for energy and water customers in NSW and our submission is based on this aspect of our service delivery experience.

EWON has responded only to those specific sections and questions that we feel able to answer, based on our experience and expertise.

EWON is a member of the Australian and New Zealand Ombudsman Association (ANZOA), which has separately provided a submission to this review. We also endorse that submission.

1. Avoiding common problems

There is a wide range of information for consumers about their rights and responsibilities in regard to the purchase of goods or services available on different government, community and ombudsman websites but there is no central coordination point. All websites are not user friendly and on some sites the links for consumers looking for a range of information are rudimentary. A central contact point that provides direct links to the extensive range of information that consumers may wish to access prior to, or following, entering into a purchase or contract would help address this problem.

2. Dealing with problems early

Question 5 – Issues with finding information

Credit repair agents

EWON receives many complaints from customers who have been credit listed due to an energy or water debt. Often these customers have first engaged a credit repair business to assist them.

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”¹

Credit repair agencies charge customers without informing them that ombudsman services provide the same services free of charge. These agencies then avail themselves of the ombudsman service by obtaining from their client an authority to act on their behalf. These agencies do not value add and in some instances have misrepresented to our offices the customers original circumstances which led to the credit listing, in an effort to get an adverse credit report changed. 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 a paid representative 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 sections of the Australian Consumer Law (ACL), this area of consumer detriment could be significantly reduced.

Comparison sites

When consumers are seeking independent advice about energy contracts, EWON provides information about the Australian Energy Regulator’s website “Energy Made Easy” for free, reliable and independent comparison of the range of offers available.

Commercial services continually use internet Search Engine Optimisation to ensure their services appear in the most prominent search results position by including in their address code the words “energy” “made” and “easy”. These actions result in consumers using comparison sites which may not be reliable and are not independent. Actions such as this are not illegal but detract from valuable

¹ Communique Experts Roundtable, February 2016, p2

initiatives to provide consumers independent and free information when making decisions about entering into contracts for essential services. A consolidated website of all government or government approved comparison sites which also continually monitors and updates its own prominence using Search Engine Optimisation would help to address this problem.

Question 6 – Awareness of advice sources

NSW Fair Trading has information about most issues that people encounter in their everyday lives, with links to specialist sites and organisations like EWON. Other points of contact, such as Law Access tend to focus on legal proceedings in court rather than consumer issues that can be dealt with by the NSW Civil and Administrative Tribunal (NCAT). More information about how to deal with general consumer issues and how to deal with disputes on a range of legal sites would be a considerable improvement on the current information available.

Work could be undertaken by a coordinating agency to develop a general purpose referral kit for public libraries, Parliamentary electoral offices and other places where consumers, particularly those who may experience vulnerability, commonly go to find information.

Questions 7 and 8 – New technology

Digital information and on-line solutions provide opportunities for expanding access to fair, fast and accessible justice. However it is also important to identify those who are excluded from digital processes and to develop an effective strategy that ensures ongoing, alternate non-digital access arrangements are also built in to service designs for the future.

As more and more services go online, it is important to know who is being excluded. The Australian Digital Inclusion Index² published by Swinburne University, developed a digital inclusion measure. This study measured access, affordability and digital ability, and combined them into a single index. The 2016 report shows an increasing rate of digital inclusion but also identified an increasing divide with particular regions and demographic groups falling behind. The two tables below illustrate this, with a higher number representing a higher level of digital inclusion.

Table 1 Geographic disadvantage across NSW

| Geography | Australia | NSW | Sydney | Hunter | North East NSW | South Coast NSW | North West NSW | South West NSW |
|-------------------------|-----------|------|--------|--------|----------------|-----------------|----------------|----------------|
| Digital Inclusion Index | 54.5 | 54.9 | 57.5 | 41.2 | 49.7 | 48.6 | 48.8 | 48.4 |

Table 2 Demographic disadvantage in NSW

| Demography | NSW | Low Income | Not in employment | Low Education | Age over 65 | With disability | Indigenous (small sample size) |
|-------------------------|------|------------|-------------------|---------------|-------------|-----------------|--------------------------------|
| Digital Inclusion Index | 54.9 | 45.4 | 47.4 | 43.8 | 41.4 | 40.8 | 49.7 |

It is clear that if you live in regional NSW, if you are old, poor or have a disability then you are less likely to have access to, or be able to afford or use, digital technology. This has significance for the

² <http://digitalinclusionindex.org.au/>

planning of service delivery and for ensuring that our most disadvantaged citizens have an opportunity to access their basic rights.

3. Getting help to solve a problem

Question 13 – Gaps in advice or assistance

There is a significant gap in the availability of basic information and advice on general consumer issues, although NSW Fair Trading is a significant source of information about these issues. Most other sources of legal information, such as Law Access, focus on matters that require court proceedings. Services such as EWON primarily provide industry specific information and referrals to all other ombudsman offices as well as other relevant agencies. At the very least, all sites that offer advice and assistance in resolving legal problems should have a prominent link on the NSW Fair Trading site.

Question 16 – No wrong door (warm referral) policy

EWON supports this concept and is committed to exploring ways to continually improve how referrals are managed. Via our website and through our interactions, we refer customers to a range of organisations on a daily basis³. We would be interested in working with Civil Justice to make this part of a wide ranging and more formal referral mechanism.

Question 19 – Gaps in cheap and easy dispute resolution

Electricity

The electricity market is, arguably, undergoing the most significant period of change in its history. The range of new products and services becoming available is significantly impacting how electricity is delivered and consumed by residential and business customers. While some new energy products and services fall under the National Energy Consumer Framework, others are outside energy specific protections. EWON's submission to the Australian Consumer Law Review identified as a fundamental principle for the regulation of new energy products and services that:

“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.”⁴

Of particular importance in this context is access to independent alternative dispute resolution. ACL protections may be sufficient for the straightforward purchase and installation of solar panels, for example. However, an energy specific service would be more appropriate for customers engaging in more complex purchases with long-term financial arrangements for the consumption and sale of electricity, which also includes solar panels and storage (battery) systems. It is confusing and unsatisfactory for customers with such arrangements that EWON can currently deal with only some aspects of an interrelated dispute – the electricity supply contract – while the installation aspect of the dispute must be dealt with by NSW Fair Trading and NCAT.

In NSW, customers who purchase their energy from within an exempt network or from an exempt retailer do not have the same access to EWON's dispute resolution services as customers connected to traditional networks and sold energy by licenced retailers. EWON is working closely with the Australian Energy Regulator, which grants network and retail exemptions, to address this inequity.

³ See <http://www.ewon.com.au/page/useful-links/complaint-agencies> for our full referral list.

⁴ *New Products and Services in the Electricity Market: Consultation on Regulatory Implications*, Energy Market Reform Working Group December 2014, p8

Gas

Customers using Liquefied Petroleum Gas cannot come to EWON with complaints, so must instead seek redress through NCAT in the event of a dispute.

Water

EWON has limited jurisdiction in relation to local government authority water providers⁵. Instead, a customer can make a complaint to the NSW Ombudsman. However, unlike EWON, the NSW Ombudsman does not have specialist expertise about billing and other issues particular to the provision of utilities and cannot make binding decisions in relation to resolving individual customer disputes.

Hardship

One of the critical roles of an industry dispute resolution scheme is to provide assistance to customers experiencing hardship. Schemes such as EWON provide support to customers in establishing reconnection, negotiating payment arrangements, referral to financial counselling services, and assisting customers to enter retailers' hardship programs. The lack of access to EWON for some energy and water customers in the situations described above can result in increased financial hardship.

Contracting out of government services

Care should be taken that contracting out government services does not lead to a reduction in access to dispute resolution and complaint handling services. For example, contracted out government services are generally not in the jurisdiction of the NSW Ombudsman's office, a concerning reduction in access to free, independent complaint handling.

Question 20 – Improving awareness

EWON is an active participant in the Good Service Mob which delivers coordinated outreach services to indigenous communities. We are also a member of the Joint Outreach Initiatives Network (JOIN), sharing resources and planning outreach activities across NSW. Improving awareness in regional and rural NSW is costly but essential, and combining resources is an effective way of reducing costs. A higher level of commitment to shared outreach activity in regional and rural NSW would improve awareness of, and access to, essential services.

EWON also works with other ombudsman services and consumer advocacy bodies across the telecommunications, finance and energy and water industries to develop a strategic, shared approach to affordability issues for vulnerable consumers. The shared knowledge and joint outreach and awareness initiatives all of our organisations achieve through these partnerships helps to deliver the range of services required by consumers, especially those who are experiencing financial hardship.

We would welcome the opportunity to expand our approach to developing more strategic and collaborative outreach/awareness via Civil Justice initiatives.

Question 21 – Need for new Ombudsman schemes

The consultation paper asks about the possibilities of expanding the availability of industry ombudsman or similar schemes, and uses a case study exploring the role that a consumer ombudsman for general consumer complaints could play in dispute resolution. Such an expansion of informal dispute resolution would benefit consumers where there is a demonstrated gap, the

⁵ Shoalhaven Council is the exception as it has chosen to become a voluntary member so that its customers have access to independent dispute resolution.

scheme is operated in a cost-effective manner and in accordance with the existing standards for complaint management⁶ and the Benchmarks for Industry Based Customer Dispute Resolution⁷. However, it is essential to take into account ANZOA's long-standing concern with the inappropriate use of the term 'ombudsman' in Australia, rather than applying it to describe bodies that do not conform with, or show an understanding of, the accepted ombudsman model and its history. ANZOA's policy statement on this issue sets out six essential criteria that members of the public are entitled to expect of any office described as an ombudsman (independence, jurisdiction, powers, accessibility, procedural fairness and accountability)⁸. Examples of concern include bodies with regulatory functions and/or advocacy roles. A particular concerning example is where organisations appoint an 'internal ombudsman'. Such a position can never meet the essential criteria of independence.

Question 24 – Gaps in information and support to self represent

It can be challenging for individual consumers to initiate action in NCAT. There are some useful resources available for individuals, particularly the network of Tenants Advice Services which provide advice and support to consumers appearing before NCAT on tenancy matters. The regional presence of this service is an especially important aspect of this model.

Most community legal services are primarily focused on formal court proceedings and do not provide information or assistance on NCAT proceedings. An advice and advocacy service with a regional presence for individuals considering taking a general consumer issue to NCAT would be a valuable addition to the range of available services. EWON would then be able to refer a number of customers to such a service, for example people who need to take action on faulty solar or battery installations by individual contractors.

4. Enforcing judgements and orders

The Ombudsman has the power of determination where a consumer has a dispute with a member of our scheme and a conciliated outcome cannot be achieved. This power is used rarely as the dispute resolution process is generally an effective resolution mechanism.

Our case work has identified problems with NCAT decisions, including reports from residents of residential parks where residential park managers have ignored NCAT decisions. These consumers rightly question the effectiveness of taking their issues to NCAT.

EWON has also referred customers of an energy company to NCAT over the defective installation of solar panels as this falls outside EWON jurisdiction. Some of those customers returned to EWON after obtaining a successful NCAT outcome because the company was refusing to comply with the tribunal decision. Eventually NSW Fair Trading suspended the operating licence of the installation arm of that company until the NCAT decisions were acted upon. This process took a considerable amount of time and left customers frustrated and without solar power for the whole of that time.

⁶ Standard AS/NZS 10002:2014

⁷ <http://www.treasury.gov.au/PublicationsAndMedia/Publications/2015/benchmarks-ind-cust-dispute-reso>

⁸ <http://www.anzoa.com.au/about-ombudsmen.html>

In closing, I welcome the work of the Civil Justice Project Team and thank it for directly involving me in this project. I also appreciate the opportunity to respond to the consultation. When implemented, this work will significantly improve access to justice for many NSW consumers.

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

Yours sincerely

A handwritten signature in black ink that reads "Janine Young". The signature is written in a cursive, flowing style.

Janine Young
Ombudsman
Energy & Water Ombudsman NSW