

20 June 2021

Submitted via email to: consumervulnerability@esc.vic.gov.au

Commissioners
Essential Services Commission
Level 37, 2 Lonsdale Street
Melbourne, VIC 3000

Dear Commissioners,

Regulating with consumer vulnerability in mind: response to the Essential Services Commission's draft strategy

Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the Essential Services Commission's (ESC) draft consumer access and equity strategy, *Getting to fair: Breaking down barriers to essential services*.

We commend the ESC for its work championing this strategy. Consumer Action strongly supports the intention behind it: to improve access to essential services for consumers experiencing vulnerability. As noted in the introduction to the draft, this strategy is not something that has typically been employed by economic regulators in Australia. We believe this strategy sets an important precedent for other regulators to ensure that people are treated fairly and equitably in essential service markets.

We have made a number of suggestions where proposals contained in draft could be strengthened in order to improve outcomes for Victorians experiencing vulnerability. These include:

- expanding the definition of consumer vulnerability to explicitly name barriers, including market factors;
- maximising the use of open and inclusive language in all communications, by all stakeholders;
- expanding the barriers named in the draft to recognise the specific barriers facing First Nations people;
- adding an initiative to address high levels of energy disconnections among First Nations people;
- including more discussion around the need for a culture change among regulated businesses.

Our comments, including several recommendations to strengthen the draft, are detailed below.

About Consumer Action

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

Response to consultation questions in the draft decision paper

Definition and terminology used in the draft strategy

How well does the definition on page 18 align with the contemporary understanding of consumer vulnerability and its causes and impacts?

As the strategy notes, an explicit definition of consumer vulnerability is highly important, both as a signal of the ESC's approach to stakeholders and to inform expectations of performance.

Overall, Consumer Action agrees with the definition contained in the draft strategy. We consider that the ESC's proposed definition, with its focus on vulnerability as an experience of 'barriers to participating in the essential services markets' aligns well with contemporary understanding of consumer vulnerability. We are also strongly supportive of the language around 'equitable access' to essential services for all consumers which features in the draft. This is an appropriate aim for the strategy and by including this language in the draft it serves as another important signal as to what this work hopes to achieve, the outcomes consumers should expect and the ways in which businesses are expected to operate.

We have previously suggested that definitions and practice around consumer vulnerability need to recognise that nearly anyone can become vulnerable, and that vulnerability results from barriers to access as opposed to being an inherent quality or characteristic of a person, so welcome language to this effect being included in the ESC's definition.

The United Kingdom and the European Union have been at the forefront of much of the contemporary understanding of consumer vulnerability and its causes and impacts. Our own thinking on consumer vulnerability has been informed by the definition developed as part of a large research project by the European Commission, which is as follows:

A consumer, who, as a result of socio-demographic characteristics, behavioural characteristics, personal situation, or market environment:

- *Is at higher risk of experiencing negative outcomes in the market;*
- *Has limited ability to maximise his/her well-being;*
- *Has difficulty in obtaining or assimilating information;*
- *Is less able to buy, choose or access suitable products; or*
- *Is more susceptible to certain marketing practices.¹*

In line with the above definition, we suggest that the ESC's proposed definition could be strengthened by expanding upon the term 'barriers' to include the combination of a person's characteristics or circumstances with reference to market-factors that can impact these, including the actions of individual businesses. While noting that these barriers are addressed in the explanatory text in the draft following the definition, we consider there to be value in them being included in the definition itself. While aware that any definition needs to be kept high-level in order to remain workable, we believe it is important for the definition to call out these barriers so they do not go overlooked, including the ways in which markets and essential service providers themselves can contribute to consumer vulnerability.

RECOMMENDATION 1. Expand the definition to include mention of the barriers involved in consumer vulnerability, including the role of market factors and the actions of individual businesses.

¹ https://ec.europa.eu/info/sites/default/files/consumers-approved-report_en.pdf, p.383

Given that 'vulnerability' is widely used and easily recognised by businesses, is the hybrid approach the best approach for the commission to take when communicating with stakeholders?

Consumer Action supports the hybrid approach being taken by the ESC, with the qualifier that there is scope for more inclusive language to be used in communication with all stakeholders, not just in public communications.

We consider it positive that the draft strategy recognises that labelling people as 'vulnerable' can be unhelpful and ignores the contribution of systems and structures to vulnerability. People also rarely describe themselves as 'vulnerable', and to communicate with people in difficult circumstances it is preferable to use inclusive language that people would use themselves. In communications with the public, all specialist stakeholders must recognise the need to use inclusive and open language. We welcome the inclusion of terms such as equity, fairness, accessibility and inclusion in the list of suggested language in the draft strategy, which are terms Consumer Action frequently uses also.

While recognising that discussions about 'consumers experiencing vulnerability' is useful shorthand for specialist stakeholders, we suggest that the draft could be updated to encourage greater usage of inclusive language in communications with and between specialist stakeholders. Greater usage of terms such as 'equity' and 'fairness' in all communications, not just those with the public, can make a positive contribution to specialist discussions by keeping these conversations focused on the outcomes we want to see from a well-functioning market.

RECOMMENDATION 2. Update the draft to further encourage the use of inclusive language in all communications, and limit the use of the phrase 'vulnerable consumers'.

Themes, goals and possible initiatives

Overall, we welcome the themes, goal and possible initiatives in the draft strategy. Given the broad range of themes identified in the draft strategy, we have limited our comments to those where we consider there are clear opportunities to strengthen what is contained in the draft.

Theme one – Consumers require appropriate, consistent and accessible communications

While we consider the focus on communication, information and engagement to be important, we also caution that more communication alone is not a panacea for responding to consumer vulnerability. Other, more impactful regulatory interventions should not be forgotten in any focus on consumer information. In some instances, increased information can actually lead to unintended consumer harm, as outlined in a joint 2019 report by the Australian Securities and Investments Commission and the Dutch Authority for the Financial Markets, which discusses the shortcomings of financial services disclosure.²

Consumer Action considers that the final strategy would be strengthened by incorporating a greater focus on inclusive product and service design by businesses. We suggest that the draft be updated to include expectations for regulated business on how they design their products, services or consumer experiences (including financial hardship responses), so that they are accessible to, and usable by, as many people as possible.

While the draft currently focuses on improving ESC communications, improving the communications of businesses is critical to addressing consumer vulnerability as these are the entities people engage with. This is reflected in the recommendations from the community panel on page 14 of the draft strategy, several of which focus on making businesses processes and communications inclusive and accessible. To this end, we also suggest that the paragraph on page 26 which refers to the "operational capacities of businesses to deliver accessible communication" be amended. Ensuring that communications are inclusive and accessible for consumers should be a non-negotiable aspect of operation for businesses that deliver essential services.

² Available at: <https://asic.gov.au/media/5303322/rep632-published-14-october-2019.pdf>. Also see: <https://thehill.com/opinion/finance/460384-cpfb-head-misguided-in-reliance-on-consumer-education>

RECOMMENDATION 3. Under Theme 1 include a greater focus on inclusive and accessible product design, services and communications by regulated businesses, in addition to the current focus on improving ESC communications.

RECOMMENDATION 4. Update the draft to make clear that delivering accessible and inclusive communication must be standard practice for businesses delivering essential services.

Theme 2 – Consumer engagement is not always universal or inclusive, leading to less accessible services

Consumer Action welcomes the focus on consumer engagement in the draft strategy. In convening a community panel to inform the draft strategy the ESC has demonstrated the priority placed on this commitment, with the high quality of the recommendations produced by the panel underscoring the importance of embedding lived experience in all work seeking to address consumer vulnerability.

Much of the work undertaken by advocacy organisations (including Consumer Action) is directly informed by the communities we serve. It is extremely positive to see the ESC undertake engagement directly with affected people. Direct, ongoing engagement that goes beyond traditional market research, or simply speaking to consumer representatives, is essential to delivering on the intent behind this theme. Genuine engagement and hearing about lived experience directly from people in vulnerable circumstances is critical, as it is the depth and richness of insight gained from this type of engagement which will drive effective and meaningful action. We consider that the initiatives listed under this theme will help amplify the consumer voice and bring it closer to the work of the ESC and regulated businesses.

Theme 6 – First Nations consumers

We welcome the theme in the draft strategy about building partnerships with First Nations communities, particularly in order to address very high levels of energy disconnection. In line with theme two, we encourage the ESC to consider how immersive engagement fits into this work, including through engagement with First Nations communities and working with Aboriginal Community Controlled Organisations.

While supportive of the current initiatives in the draft, we note that these are focused largely on the actions of the ESC. Given the disproportionately high level of energy disconnections among First Nations people mentioned in the report, we believe additional support for energy retailer focused initiatives to reduce instances of energy disconnection is warranted. This initiative could closely follow the language in the proposed water-related initiative in the draft.³

We also note that the discussion on barriers to access under the section on definitions and terminology does not include mention of the ongoing impacts of systemic racism and colonisation. Including language to this effect in the final document would support the intention of Theme 6 in better recognising the specific structural barriers to access faced by First Nations Consumers and the need to address these.

RECOMMENDATION 5. Include an additional energy retailer focused initiative aiming to address the disproportionately high levels of energy disconnection experienced by First Nations consumers.

RECOMMENDATION 6. Add language around the ongoing impacts of racism and/or colonisation to the systemic barriers noted in order to better reflect the specific barriers faced by First Nations consumers.

Are the possible initiatives identified appropriate for the period of the strategy?

We consider the majority of initiatives on pages 10-13 to be appropriate for the period of the strategy and welcome their inclusion in the draft. Aside from the inclusion of a sector-focused initiative aiming to reduce instances of

³ Proposed initiative 6.2, page 47

energy disconnection among First Nations people mentioned earlier, we also note two further initiatives which should be included to strengthen the final document.

Firstly, as part of Goal 5, an initiative around proactive compliance and enforcement measures should be added in order to address the ESC's stated commitment to investigate and mitigate inconsistency in the marketplace. For example, this could involve an audit of a sample of regulated businesses' customer service calls each month, in order to understand whether consumers are receiving consistent support and if businesses are applying the Payment Difficulty Framework correctly. Continuing to focus on compliance and enforcement amidst the rollout of this strategy is a vital way to protect consumers and ensure businesses are meeting their obligations to customers, and deter misconduct. Further to this, increasing the visibility of compliance and enforcement actions will help satisfy community expectations of regulators to ensure businesses are appropriately supporting customers, as noted in the recommendations from the community panel.

Secondly, as part of the initiatives under Goal 8 (also related to Goal 3) we suggest that the ESC continue with the data gathering on customer support to publish more regular data on customer support and hardship, which commenced during the coronavirus pandemic. This regular data has been incredibly important in understanding changes in consumer hardship and retailer support since March 2020. Continuing to collect this type of data on an ongoing basis will allow the ESC, EWOV, industry, and consumer advocates to proactively track and respond to challenges which are impacting on consumers experiencing vulnerability.

RECOMMENDATION 7. Add an extra initiative under Goal 5 to undertake proactive compliance and enforcement measures.

RECOMMENDATION 8. As part of the Goal 8 initiatives make regular retailer reporting of customer support data ongoing in order to better track the number of customers facing payment difficulty and what support they receive.

What other considerations should we include in our strategy?

Culture change among regulated businesses

As a final point, we would like this strategy to trigger genuine culture change around improving responses to consumer vulnerability. To this end, we welcome the quote in the Consultation Paper from Commissioner Kate Symons that the ESC, "...want the delivery of the strategy to be part of a cultural shift – for us and the sectors we regulate."⁴ This cultural shift is crucial to delivering on the strategy's aim of ensuring all consumers have equitable access to essential services. Given this, we consider that the final document would be strengthened by including further mention of the importance of this cultural shift throughout the final document, with particular mention of the need for change among regulated businesses.

Consumer Action encourages businesses to look at this need for a cultural shift as an opportunity to develop better relationships with their customers, build trust and develop their own strategies and initiatives to address consumer vulnerability. One example of this is work via the Energy Charter, wherein energy retailers and distributors have worked together on a "knock before you disconnect" trial. This trial involved field crews visiting customers' homes to hand-deliver Notices of Intent to disconnect as an extra step to engage with customers before disconnecting them for overdue gas bills. As a result of this visit 80% of disconnections were cancelled and these customers stayed connected. This type of outcome shows the benefits of businesses taking the lead and embracing new initiatives to better support consumers and reinforces why language around this should feature more prominently in the final strategy.

⁴ Essential Services Commission, *Getting to Fair*, page iii

RECOMMENDATION 9. That the updated draft expand on the need for a cultural shift in essential services markets, including among regulated businesses.

We thank you again for the opportunity to comment on the draft strategy. Please contact Luke Lovell at **Consumer Action Law Centre** on (03) 9670 5088 or at luke@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,

CONSUMER ACTION LAW CENTRE



Gerard Brody | Chief Executive Officer

