

# STRANGERS ARE CALLING!

The experience of door-to-door sales in  
Melbourne's refugee communities.



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## TABLE OF CONTENTS

ACKNOWLEDGEMENTS .....	2
KEY FINDINGS .....	3
KEY RECOMMENDATIONS .....	4
INTRODUCTION .....	5
WHO IS TARGETED?.....	8
WHAT MAKES DOOR-TO-DOOR SALES UNFAIR? .....	11
ILLEGAL DOOR-TO-DOOR SALES PRACTICES .....	15
WHAT IS THE IMPACT ON REFUGEE SETTLEMENT? .....	25
WHAT ARE THE POLICY IMPLICATIONS? .....	27
CONCLUSION .....	32
BIBLIOGRAPHY .....	33
APPENDIX: .....	36

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## KEY FINDINGS

- 1 Door-to-door energy sales practices disproportionately affect vulnerable consumers. For the purposes of this report, “vulnerable consumers” include:
  - (a) public housing residents;
  - (b) concession holders;
  - (c) non-English speakers including people of refugee background;
  - (d) women, particularly when home alone; and
  - (e) the elderly, and young people.
- 2 Vulnerable consumers are more susceptible to signing a new energy contract as a result of a door-to-door energy sale. They are more likely to ‘switch’ energy providers because they feel vulnerable and pressured; the practice of door-to-door sales often involves entering the protected, private space of a potential consumer (including single mothers, the elderly, and young people home alone).
- 3 Many vulnerable consumers receive misleading or false information about the nature and content of energy contracts. This can result in negative settlement outcomes for those consumers with a refugee background, who can suffer long-term effects, such as fear and distrust of strangers knocking on their door.
- 4 Our case studies demonstrate breaches of:
  - (a) contract law;
  - (b) laws regulating unsolicited consumer agreements (door-to-door sales);
  - (c) prohibitions on misrepresentations and misleading and deceptive conduct;
  - (d) prohibition against unconscionable conduct;
  - (e) unfair tactics, such as undue harassment or coercion; and
  - (f) energy-specific consumer protections.
- 5 Many vulnerable consumers are unable to provide “informed consent” in a door-to-door energy sales context. There is no evidence that post-sale telephone verification procedures overcome this problem.
- 6 Consumers of refugee background are commonly not able to utilize information provided by Consumer Affairs Victoria when responding to door-to-door sales, as this information makes a number of inappropriate assumptions about the skills and resources available to this group of consumers.
- 7 Self-regulated industry Codes of Practice are not an effective means of protecting consumers.
- 8 Independent enforcement against misleading or illegal door-to-door sales practices can be effective.
- 9 Beyond door-to-door energy sales. Alternative methods for providing direct energy sales to vulnerable consumers are available.

## KEY RECOMMENDATIONS

### **10 We call for inclusive energy policy.**

The Australian Government's social inclusion agenda as well as the Department of Immigration and Citizenship's settlement programs are being undermined by door-to-door energy sales practices. Migrants and refugees are telling us that door-to-door sales practices, in general, are harmful and unwelcome and have a negative impact on their social, emotional and physical well-being. The negative impacts are magnified when door-to-door energy sales are conducted in a misleading or illegal manner. We recommend that governments and service providers work together to ensure that issues of settlement, energy provision, and legal assistance is as consistent and inclusive as possible.

### **11 We call for support and expansion of the "Do Not Knock" campaign.**

We support the Consumer Utilities Advocacy Centre's recommendation that the Essential Services Commission develop an online tool to allow consumers to be added to retailers' "No Contact" lists via a central system. We recommend government funding be allocated to trialling "Do Not Knock" areas, which may include designated public housing flats with sufficient resident backing. We make this recommendation specifically in the context of energy door-to-door sales practices.

### **12 We support continued enforcement against illegal door-to-door sales practices.**

We commend the Australian Competition and Consumer Commission's (ACCC) current focus on enforcement of door-to-door sales misconduct and support measures to educate vulnerable consumers and encourage them to invoke their rights.

### **13 We call on energy retailers to provide an alternative to door-to-door sales.**

We argue that maintaining a competitive market can and should protect the most vulnerable consumers. We recommend alternative strategies, which could include "Energy Market" events in which consumers can attend an open forum in a public space with energy retailers offering competitive rates. This could be supported by interpreters, community leaders and other service providers as appropriate.

### **14 We support targeted and appropriate community education.**

We welcome and support the targeted community education already provided by Consumers Affairs Victoria (CAV) and call upon CAV and other service providers to expand the tools available for non-English speaking consumers with low literacy and numeracy rates and for those who may not have a computer. We suggest the models employed by Footscray Community Legal Centre and Victoria Legal Aid which use visual stimulants and community venues.

### **15 We call for an enhanced Code of Conduct from energy retailers.**

The industry Code of Conduct by Energy Assured Limited should include strategies to address systemic misconduct which can occur in door to door sales practices. Commission-based selling which encourages aggressive sales tactics must be addressed.

# 1 INTRODUCTION

## 1.1 Background and aims

This report examines the impact of door-to-door sales practices on vulnerable consumers, including refugee communities, low-income families and public housing residents. By using the real life experiences of our clients at the Footscray Community Legal Centre (**Footscray CLC**), this report examines the social and legal impact of door-to-door sales. This report finds that disadvantaged consumers are disproportionately affected by damaging and often illegal sales practices. Such practices have social and financial consequences for communities and individuals.

The research was inspired by the specialist “Bring your Bills” Clinics (**BYB Clinics**) run by Footscray CLC to meet the overwhelming demand for assistance with bills. Community members were invited to bring bills they were concerned about to obtain help from representatives from dispute resolution schemes,<sup>1</sup> financial counsellors, lawyers and other social service providers. A high proportion of people attending BYB Clinics experienced problems as a result of door-to-door sales practices by some energy companies.

Problems the our clients had as a result of a door-to-door energy sale included:

- confusion as to whether they had switched companies (and thus why they had received bills from a company that was not their own);
- debts incurred and legal action taken by energy companies trying to recover debts; and
- other disputes involving termination of contracts made through door-to-door sales.

For many Australians and particularly those who have recently arrived in the country with a refugee background, the process of selecting energy retailers can be confusing and financially stressful. This report focuses primarily on the methods that some energy companies use to encourage consumers to “switch” companies through door-to-door sales practices, and the social implications of these practices.

## 1.2 Methodology

This report is based on stories and evidence gathered from clients living in the western suburbs of Melbourne. It incorporates quantitative and qualitative data.

Data was gathered from BYB Clinic intake forms. BYB Clinic clients who identified that their problem related to door-to-door sales were invited to participate in a one-hour interview. Twenty-five clients from eight suburbs in Melbourne’s west participated in interviews and almost all clients interviewed for this report [ninety-two percent] were of refugee background. In addition, we conducted a focus group of five clients of refugee background who did not attend a BYB Clinic but are currently residing in public housing and have been affected by door-to-door energy sales practices.

The precise words of clients are used in this report. It is evident from their stories that clients occasionally contradicted themselves (for example, confusing the name of their provider or forgetting details regarding time and date). However, their personal experiences and responses to door-to-door sales are clear. We have allowed the clients to speak for themselves. Their stories reveal a narrative of confusion, anxiety and hardship.

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<sup>1</sup> Dispute resolution schemes that attended BYB Clinics included the Energy and Water Ombudsman Victoria, the Telecommunications Industry Ombudsman and the Financial Ombudsman Service

### 1.3 High cost of energy

Energy is an essential service in every Australian home. Energy provides light, keeps people warm in winter, is necessary to cook food and allows people to perform basic functions within their home. Affordable access to gas and electricity plays a significant role in the standard of living of Australian residents.

There has been a general trend towards increasing energy prices<sup>2</sup> and complex billing systems in Australia.<sup>3</sup> The impact of these cost increases is not experienced the same way across the community. The Australian Bureau of Statistics (**ABS**) classifies Australian households as belonging to one of five different income brackets. As might be expected, households in the lowest income bracket consume less energy on average than households in the highest income bracket. However, these same low-income households spend a greater proportion of their income to meet their energy needs.<sup>4</sup> As shown in Table 1 below, households with the lowest income spend almost twice as much on energy than households with the highest income (4 percent and 2.05 percent respectively).<sup>5</sup> This data suggests the burden of domestic energy costs increases relatively uniformly as the disposable income of a household decreases.

**Table 1:<sup>6</sup>**  
**Energy, fuel and water service costs for Australian households: ABS Household Expenditure Survey**

		Lowest 20%	Second 20%	Third 20%	Fourth 20%	Highest 20%	Average
Mean gross household income per week 2009 to 2010		367	785	1,327	2,024	3,937	1,688
<b>Total expenditure on goods and services (\$/week)</b>							
2009 to 2010	\$/week	559.04	814.94	1,169.47	1,479.45	2,159.74	1,236.28
2003 to 2004	\$/week	413.32	603.64	859.38	1,090.32	1,499.18	892.83
1988 to 1989	\$/week	342.85	482.58	648.04	851.03	1,171.40	698.97
<b>Energy supply – electricity and gas</b>							
2009 to 2010	\$/week	22.34	28.11	31.44	36.55	44.21	32.52
	% expenditure	4.00	3.45	2.69	2.47	2.05	2.63
2003 to 2004	\$/week	16.4	20	23.27	25.46	31.68	23.59
	% expenditure	3.97	3.31	2.71	2.34	2.11	2.64
1988 to 1989	\$/week	12.85	15.87	17.72	19.85	23.08	17.87
	% expenditure	3.75	3.29	2.73	2.33	1.97	2.56

<sup>2</sup> Possible Future Retail Electricity Price Movements: 1 July 2011 to 30 June 2014 by the Australian Energy Market Commission (25 November 2011)

<sup>3</sup> 2012 Annual Report by the Energy and Water Ombudsman of Victoria, 6-7, 16

<sup>4</sup> Household Expenditure Survey – Australia: 2009-10, Summary of Results by the Australian Bureau of Statistics (catalogue 6530.0), 5

<sup>5</sup> Ibid, 58

<sup>6</sup> The table is from ACOSS and Choice: *Energy at Home: Current Issues for Consumers* (Background Paper presented at Parliament House, Canberra, 13 September 2011), 8. See also: Data from the Australian Bureau of Statistics' *Household Expenditure Survey – Australia: 2009-10, Summary of Results*, (catalogue 6530.0), 58.



This data helps paint a picture of vulnerable populations and household income stress. Clients adapt with a variety of strategies to meet the challenges of managing a lower income household budget in circumstances where a greater proportion of that budget is required to maintain essential energy services. For low income households, successfully negotiating a fair and reasonable energy contract is critical.<sup>7</sup>

#### 1.4 Competition and “switching” in energy sales

The Energy Retailers Association of Australia (ERAA) argues that the volume of customers switching energy retailers is the product of an effective and competitive market. In a recent media release, ERAA states:

*Victoria is by far the most competitive market on a global scale – and has been for the past six consecutive years. It is leading the world in its price deregulation and has the most active market ever.*<sup>8</sup>

According to a recent VaasaETT report on switching levels worldwide, in Victoria nearly twenty-eight percent of customers changed energy retailers in the past year, which is the highest rate of switching in the world.<sup>9</sup> The report states that the drivers of these high switching rates include price increases, heavy marketing, high rates of door-to-door sales as well as consumer awareness.<sup>10</sup>

A recent report by Frost & Sullivan commissioned by the ACCC notes that door-to-door sales are regarded by the energy industry as the most effective channel for customer acquisition of energy contracts.<sup>11</sup> An important reason for this is that energy is a “low involvement product” which few consumers seek for themselves.

Furthermore, energy sales are generally made on the basis of lower costs which is a “*relatively simple message for sales agents to give, and for low involvement products can often be successful in driving the consumer to switch provider*”.<sup>12</sup> In other words, the majority of consumers are unlikely to take the initiative to switch energy providers and the best way for retailers to win customers is to seek customers out directly in their place of residence by offering a lower cost product.

Although Victoria’s high switching rate is often depicted as a sign of a healthy and competitive market, it may actually be more reflective of harmful sales practices of limited benefit to consumers. Figures compiled by the Energy and Water Ombudsman of Victoria revealed that in the 2011-2012 financial year, 7,445 complaints raised issues relating to switching from one electricity provider to another.

Our research confirms that door-to-door selling is a highly effective method of convincing customers to switch providers. This report seeks to build an understanding of who is switching, the conditions under which they make this decision and the impact of this decision.

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<sup>7</sup> See generally: ACOSS and Choice: *Energy at Home: Current Issues for Consumers* (Background Paper presented at Parliament House, Canberra, 13 September 2011)

<sup>8</sup> *Global Report Shows Australian Energy Markets are Leading the World* (Media Release, 14 June 2012) by the Energy Retailers Association of Australia. See also: Lewis, Dr Phillip E (ed and lead writer): *World Energy and Retail Market Rankings Report* (VAASAETT, 2012), 2

<sup>9</sup> Dr Phillip E Lewis (ed and lead writer): *World Energy and Retail Market Rankings Report* (VAASAETT, 2012). VaasaETT is an energy think-tank monitors customer switching rates and trends in 38 competitive, deregulated energy retail markets worldwide.

<sup>10</sup> Ibid, 18

<sup>11</sup> Frost & Sullivan: *Research into the Door-to-Door Sales Industry in Australia: Report by Frost & Sullivan for the Australian Competition and Consumer Commission* (Australian Competition and Consumer Commission, August 2012), 26

<sup>12</sup> Ibid

<sup>13</sup> 2012 *Annual Report* by the Energy and Water Ombudsman of Victoria 18

## 2 WHO IS TARGETED?

### 2.1 Why are vulnerable communities targeted?

We have identified several groups of people as being more vulnerable to misleading or illegal door-to-door energy sales practices. These include non-English speakers (many of which have a refugee background); residents of public housing; concession holders; women, particularly when home alone; and elderly and young people. We argue that the vulnerability of these groups of people is related to their capacity to identify, respond to, and manage a confusing or illegal door-to-door energy sale.

In our experiences with clients, vulnerable consumers are more likely to switch energy providers because they are challenged to understand the nature and content of complex energy contracts and/or less able to avoid deceptive transactions.<sup>14</sup> Anecdotal evidence suggests that vulnerable consumers, and particular suburbs, have had a high number of door-to-door energy sales each month. In a recent report by Frost & Sullivan, the authors note that according to traders, “*targeting*” particular individuals or types of individuals is generally not feasible or practical.<sup>15</sup> However, three out of fifteen sales agents interviewed by Frost & Sullivan indicated that vulnerable consumers are in fact targeted. For example, one respondent stated:

*We had a target range. Older people, single parents and the young ones who were just in their first house – don’t ask me how they got the list because I have no idea – but I went to a lot of Centrelink people and young people who were all attracted to the bright lights of the offers and we had to feed them all a whole bunch of garbage but I didn’t find out it was a bunch of garbage until later... we preyed on the vulnerable... we were given a list of streets for the vulnerable such as housing commissions, older people.... They (employer) weren’t gonna write any of this down though because they aren’t stupid.*<sup>16</sup>

The Frost & Sullivan report noted that it was difficult to gauge the extent of these instances. Our research, although selective and focused on vulnerable consumers, provides detailed demonstrations of specific targeting. Whether targeting occurs as a result of the decisions of individual sellers or overarching tactics employed by marketing companies and energy retailers, the negative impact on vulnerable consumers is clear.

Through our research, we classify door-to-door sales practices as falling into the following categories:

- **truthful** transaction and the consumer **understands** the nature/content of the contract;
- **truthful** transaction and the consumer **does not understand** the contract;
- **deceptive** transaction and the consumer **understands** the contract (as explained by sales person); and
- **deceptive** transaction and the consumer **does not understand** the contract.

The majority of our clients fit into the second to fourth categories.

The barriers that vulnerable consumers face which affect their ability to engage in a door-to-door sale are explored at section 3.

The legal principles underpinning these transactions and determining whether they are **truthful** or **deceptive** are discussed at section 4.

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<sup>14</sup> Consumer Utility Advocacy Centre: Improving Energy Market Competition Through Consumer Participation: A CUAC Research Report (December 2011)

<sup>15</sup> Frost & Sullivan: Research into the Door-to-Door Sales Industry in Australia: Report by Frost & Sullivan for the Australian Competition and Consumer Commission (Australian Competition and Consumer Commission, August 2012), 39-40

<sup>16</sup> Ibid, 61

## 2.2 Characteristics of ‘targeted’ consumers

The profile of our clients suggests that high switching rates largely rely on sales practices targeting vulnerable consumers.

The following were common characteristics of our clients.

### **Public housing**

A large proportion of our clients live in public housing, including high-rise apartment buildings. Public housing residents felt that they were disproportionately targeted by energy companies and that door-to-door sales happened too often and too regularly in public housing.

Client P stated:

*I live in the housing commission. I can see the men knocking on other doors after me – all the time they are knocking. They come a lot.*

Client C noted that each door in public housing was knocked and commented:

*I thought maybe he come from [public] housing, because the man he went to all the houses.*

Client F similarly commented:

*When I saw, every door is being knocked – everyone I saw. The [energy salesperson] knocked on every door. People don’t understand what is happening.*

While it can be confronting to have any private space used as a site for a commercial transaction, it can be even more so when the layout of a typical public housing apartment is considered. The floor plans of many such residences allows for very little neutral space in which to receive guests (for example, the bedroom door is often merely a few metres from the threshold of the front door). Any financial interaction that requires a salesperson – a stranger - to enter a person’s home should be avoided.

In addition, public housing residents also receive visits from government service providers – thus, residents may mistake salespeople as Department of Human Services or other government representatives and sign contracts simply because of misunderstanding, or to avoid difficulty (see section 4).

### **Concession holders**

Each client we interviewed for this report was a concession holder. In each case, the clients were asked, during the door-to-door sale if they had concession, and in many instances clients demonstrated a familiarity with the benefits they were to receive as concession card holders.

Client N said:

*I’m a single mum and I work hard and I need help with the bills. An issue is for electricity. They come to my door and they say “Ah we are here and we will offer discount of fifty percent off of your bills. We are here to give you a good offer.” When I heard that I’m really happy because I have least amount of income supporting from the government.*

A quarter of clients interviewed reported that the energy representative knew they were a concession holder but failed to apply the benefit to the bill.

Client G stated:

*Actually, I tell them I am concession because I want to know when they offer me a discount. For example ten percent discount. I'm on Aged pension – do I have the normal concession? They say yes, you get normal concession. We [in public housing] are all low income, small income, and anything you can do to save some money, it is good. When the bill comes, they are very cheeky. When the account comes, you can't understand. There is no concession.*

### **Non-English speakers and refugees**

Ninety-two percent of clients interviewed were of non-English speaking background with many being from refugee backgrounds.

Client G felt that the reason his neighbourhood receives so many door-to-door sales is due to the number of residents from non-English speaking backgrounds:

*I'm fed up! People without strong English – these are the people who are being targeted. Most of the people who are living here, they are not good at English. It's the poor people who are paying the price. Instead of getting better [energy service], they are getting more problems.*

Before beginning a door-to-door energy sale, many clients described how they deliberately and clearly stated that they did not speak English. For many, this was not enough to deter the salesperson from continuing with the attempted sale.

For example, Client R said:

*I was all alone one day and someone knocked the door. I told him, I don't know English. But maybe he didn't understand what I say. He keep talking and want to come in. But lucky he didn't come in.*

### **Gender**

Eighty four percent of clients we interviewed were women, and many described being alone when the door-to-door energy sale was conducted. Many expressed feeling afraid or unable to refuse to engage with male door-to-door salespeople, particularly described anxiety and fear when they were home alone or with young children.

Client F recalls her most recent experience during a door-to-door energy sale:

*It's hard when they try to trick you, as a woman. It's not easy when a lot of people knock. I live by myself with my daughter. I get scared. I tell her –don't talk.*

Client P shared her experience:

*The men, they asked to come inside my house, they want to get in. I think it was such a mistake to let them in. I'm alone, they are two guys – I shouldn't have give permission for them to come in. I forget the ID – but I was busy. My baby was crying and it was late and I didn't think about it then.*

## Age

Forty-eight percent of clients we interviewed were elderly, aged over sixty. They typically expressed feeling unsafe and confused in during a door-to-door sale.

Client O said:

*For people our age [in their eighties], it's very frightening – especially when we are alone and they come in the evening time.*

On the other hand, clients spoke about their children been targeted.

Client D was away in Ethiopia receiving medical treatment when her door was knocked. As she was not home, her 17-year-old daughter answered the door and was persuaded to sign with an energy retailer in the daughter's name. After joining this new provider, the bills became increasingly more expensive and the family faced significant challenges in reinstating the original provider. Client D spoke of the impact this had on her daughter:

*I'm the mother! She is the child! How can they do this? How can they change the bill? Now my daughter is scared. Now for the future, she gets a big learning. She doesn't want to talk now.*

## 3 WHAT MAKES DOOR-TO-DOOR SALES UNFAIR?

### 3.1 Cultural literacy

"Cultural literacy" refers to the ability to respond and interact within a given culture or series of cultures.

Cultural literacy can include external manifestations of cultural norms such as selecting appropriate clothing, to subtle responses such as learning how to discern sincerity or humour in a person's face; or understanding broader concepts of "good" or "bad" common to a particular culture. Having a high level of cultural literacy enables people to better navigate complex systems and develop an understanding of processes and knowledge of their rights as consumers within a given society.

Previous reports by FCLC note that many Africans of refugee background who had spent prolonged periods in refugee camps have a very different form of cultural literacy. Many had not had access to energy services, nor had the need to pay an energy bill, or negotiate an energy contract with a series of suppliers.<sup>17</sup>

For some, their energy needs were met simply and basically in a refugee camp – by campfire or arranged through the United Nations.

Because of different life experiences, key concepts considered "commonsense" in Australia may sometimes be absent in the experiences of a new migrant. Difficulties are compounded if the person is not able to communicate confidently or fluently in English. Further challenges to negotiating an energy bill, could include numeracy challenges, including unfamiliarity with 'debt' and 'credit', as well as an understanding and ability to invoke and enforce complex consumer rights.

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<sup>17</sup> *The African Consumer Experience of the Contestable Energy Market in the West of Melbourne* by the Footscray Community Legal Centre (Research Report, November 2008); Fraser, Katie: *Out of Africa and Into Court: The Legal Problems of African Refugees* (Research Report, Footscray Community Legal Centre, June 2009); and Fraser, Katie: *Prevention is Better than Cure: Can Education Prevent Refugees' Legal Problems?* (Fellowship Report, Victoria Law Foundation, March 2011).



For example, Client D faced a problem during a door-to-door sale, when he was convinced that he was signing up for free light bulbs. He didn't understand why the light-bulbs were being given to him in this way, and he further observed that the concept of an energy bill was foreign:

*When you come from East Africa, you don't know [about energy bills]. You learn slow by slow, slow by slow. We can't work through the system by our self.*

As a fairly typical comment in regards to this, Client J said:

*We [new arrivals to Australia] don't know the rule in Australia. Some people they talking, writing, always talking but they talk lies. They talk lies. It's not good. Some people, new migrants coming from Africa, or Vietnam, they don't know what is going on.*

Further, complications arise when clients attempt to layer familiar cultural practices onto new circumstances in Australia. Several clients described the importance in their culture of welcoming strangers into their home and inviting them to have tea and something to eat. One client describes how it is considered rude to not answer a door that has been knocked and describes her dilemma in trying to decide how to respond to this Australian practice of door-to-door sales:

*It's frightening because we just don't want [energy representatives] to come and knock the door. Once they knock the door, we have to open the door and they have to talk to us, and what they say, we just don't understand. So I just don't want them to come to the door. It's our culture. If someone is at the door, you must open it. It would be a rude thing if someone knock the door and if you don't open, it is not good. In my culture it is kind to open the door.*

A sense of cultural obligation to strangers may potentially infringe on consumers' ability to defend their rights, which can compound problems related to door-to-door energy sales practices – by taking advantage of newly arrived residents unwillingness to refuse entry to their homes.

Thus, cultural barriers when combined with language and characteristics described at section 2, can contribute to significant power imbalances, misunderstandings, confusion, and vulnerability as a result of door-to-door sales practices.

### **3.2 Language of energy contracts**

The language of energy contracts can be confusing and comparing various energy contracts is often difficult. Even the most savvy of middle-class English-speaking consumers may find it difficult to fully understand the meaning of statements such as: "six percent discount off your electricity usage charges plus \$25 annual credit apportioned across your bills".<sup>18</sup> Only a small fraction of consumers will have the requisite knowledge of the structure of energy distribution and retailing, or the time and skills to engage in the necessary research to determine which provider's rates are preferable in their circumstances.

The ABS's Adult Literacy and Life Skills Survey contains significant findings about the level of document literacy across Australia.<sup>19</sup> The survey found that fifty-three percent of Australians aged 15-years to 74-years were assessed to have the document literacy skills needed to meet the complex demands of everyday life and work. Fifty-four percent were assessed as having high-level prose literacy skills and forty-seven percent strong numeracy literacy skills. These figures indicate a need to have safeguards in place in competitive markets.

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<sup>18</sup> sample text taken from an on-line Australian energy company's website

<sup>19</sup> *Adult Literacy and Life Skills Survey* by the Australian Bureau of Statistics 2006 (cat. no. 4228.0)

Low levels of general community awareness means consumers are at an inherent disadvantage when engaging in a door-to-door energy sale. Assuming that the door-to-door sale complies with relevant regulations, the customer is still unlikely to fully understand all aspects of the energy contract nor be well informed so as to skilfully compare rates with other retailers. Confusions are compounded where the consumer is newly arrived in Australia, has limited capacity in English language or where there is illegal or improper behaviour by the salesperson.

Client B recounts a typical scenario amongst our interviewees:

*[The energy provider] called me when I was in the shopping centre. It was a lady. I said I can't pay this bill. I said I was confused. When did I go gas with you? I was confused. You are [a new company] - but I have a card with Centrelink and a card with [another energy] and how? And they telling me that you are now with us and you have to pay the bill. But I said, how can I pay the bill? How can I be with you? Did I ring you? They said no. They said you signed the letter –and I said no, I didn't sign any letter. They said you signed a letter, so you pay the bill. How can I pay a bill?*

A common theme in many of our clients' stories was that they agreed to contracts even though they did not understand what they were signing. Further, it is clear in the following two case studies that the energy company was aware these clients did not understand the nature and content of the contract. In each case, the client expressed confusion and the energy company's salesperson "helped" them by instructing them to respond with answers controlled by the energy company.

Client Z said:

*The person came and he say many things but I don't understand. I tell him I don't understand. He say never mind. He called the phone and he say to me when I say yes, you say yes, when I say no, you say no!*

Client Q said:

*[The energy salesperson] called the other side and with those people from the other side, they spoke my husband. So before she make the phone call, she told my husband, they will ask you a question and for question number one you say yes and for question number two you say I don't know. She wrote it down on paper for my husband – what he should say. She didn't tell my husband who she called.*

### **3.3 Awareness and ability to invoke rights**

The experiences of clients interviewed demonstrate that many did not understand they have a right to say no to a contract, nor that they have the right to end a door-to-door sales upon request. The following story from Client E illustrates that often people are worn down by persistent energy sales practices. It is clear that she did not see any other way to make the representative leave her house but to sign the paper:

*I let him in my house to listen. And when he sit down, he doesn't want to leave. [After one hour] he doesn't want to leave. He just want me to sign. I feel tired and I want him to leave my house so I could have a rest ... He was in my house for more than one hour. And finally I said, okay, I will sign.*

Client G, who has strong English skills, spoke more broadly about his confusion. Although he understood he was signing an energy contract, he did not understand what he was signing and he describes the sense of pressure he felt during the energy sale:

*I talk to them about the contract, but it's confusing. Definitely for the contract, it's definitely not one hundred percent or fifty percent that I can understand. It's less than fifty percent that they explain – they just target the main points, but not everything. I don't have the chance to read it myself, they don't give you that chance. They are always pressing, pressing for you to sign.*

Even where a client was aware they had rights in relation to the door-to-door sale, their capacity to invoke their rights was limited. The stories that follow illustrate a lack of understanding of the content of the sale together with an inability of the client to stop the process.

Client I stated:

*[People at the Legal Clinic] told me I could take some steps about door knockers. I was trying to put things into practice. So when an Energy bloke came and knocked last week, I asked him to leave. But then I had to get my friend – he's twenty years older than me – to ask him to leave, but he wouldn't leave. But I still didn't feel like I could call the police. Do you know what I mean? I was told, call the police if they are harassing you. But for some reason I still don't feel like I can call the police. But [the traders] are working, that's their job, and I didn't want them to take it personally. I still feel even with those options, I can't do anything.*

Client K's story shows that she had an awareness that her inability to communicate constituted a reasonable barrier to signing the contract and she repeatedly attempted to express her frustration, confusion and desire to stop the contract. She was aware that the trader could have offered to provide an interpreter for her. She stated:

*She didn't explain. She just pointed to parts and say sign here. I didn't understand everything – there was no interpreter. After I sign, they made a phone call and I spoke. It was too many questions, and I told them it's too many questions! I don't understand, but she just say, say yes. There was a man then and he didn't ask me if I understand. Understanding English, that is the problem – they should ask me do you need an interpreter? How can I sign forms if I don't understand? I told them I don't understand. But they say it's okay, its better, just sign.*

### **3.4 Fear of authority**

Over one-third of clients reported that they had opened their doors because they were told the energy company was from “the government”, when in fact it was a door-to-door energy sale. Given the highly unstable civil circumstances which can lead to forced migration, our clients of refugee background have told us that many people have a negative perception of authority figures including government officials, lawyers and police. Reactions to authority figures can include mistrust and fear. Accordingly, the claim that an energy company is “from the government” is a highly effective tactic for convincing people to open their doors.

Client J's statement clearly conveys his sense of fear for the law and government officials. He stated:

*I believe the government has a rule. When someone comes, I can't break the law. I have to do what the government say. That man, he say we are the government. So I listen to him. I said why is the government sending the people to change the light? I tried to ask to the lady and man, why the government do that? They don't say why.*

Client B reported her confusion and expresses her understanding that anyone who comes to the door as a company representative, to her, is the same thing as the Australian Government:

*When they came first time to door, they said we are from [an energy company] and I said okay. I'm not Australian – I don't know the process. If anyone comes and shows me that they are Australian Government, I think it's true. It is a mistake that they are pushing us, because we trust they are government.*

## **4 ILLEGAL DOOR-TO-DOOR SALES PRACTICES**

### **4.1 Case studies**

This section provides an overview of the relevant legal principles and a summary of the recurrent issues revealed by the case studies. The discussion demonstrates that in most cases energy sales transactions lacked adequate and proper consent, meaning consumers often had rights to unwind or exit a contract. Despite these rights, vulnerable consumers often have a limited ability to exercise legal rights, meaning they are commonly stuck with unlawful contracts.

The stories of the twenty-five clients interviewed indicate an alarming number of potential breaches of contractual and consumer laws. A detailed legal analysis of each case study is contained in the Appendix and brief examples from the case studies have been extracted below.

### **4.2 Contract law**

Basic contractual principles apply to door-to-door sales. Where a consumer signs a contract for goods or services, it is generally accepted that they agree to all terms and conditions contained within that written contract regardless of whether they actually read or understood them.<sup>20</sup> However, legally binding contracts may be altered, rescinded (that is, undone) or terminated by courts where there is no proper consent (for example, due to unfair tactics, unconscionability or misrepresentation).

These factors are explored further below.

#### ***Issues***

Most case studies demonstrated that an agreement was reached in the form of a written contract signed by the clients. However, there remain strong arguments that consent was not adequately provided due to conduct engaged in by the energy representative, including:

- misrepresentations (see section 4.4);
- misleading or deceptive conduct (see section 4.4);
- unconscionable conduct (see section 4.5); and
- unfair tactics to procure the client's signature (see section 4.6).

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<sup>20</sup> *Toll (FGCT) Pty v Alphapharm Pty Ltd* [2004] HCA 52

Further, many of the case studies suggest that “explicit informed consent” (see section 4.7) was not given by the consumer.

#### **CLIENT B:**

##### **Misrepresentations/misleading or deceptive conduct**

The client identifies a number of potentially misleading representations made by the two AGL representatives, namely:

- the representatives were “checking all (of the) building for a problem”;
- the problem related to customers’ high bills;
- the representatives simply wanted to “check the meter”;
- the client had to sign papers (presumably the service transfer contract) simply to “allow (them) to check the meter”; and
- the representatives were “from the government”.

The client never intended to, nor realised she was transferring her utilities service:

*I didn't know AGL was a company ... otherwise I would say I'm happy with my company.*

It appears that it was the cumulative effect of the representative’s conduct which induced the client into signing the contract.

##### **Unconscionability**

The client was looking after her five children, including a “crying baby” at the time of the unsolicited visit. The client potentially suffered from a power imbalance as the lone female adult present, contracting with two experienced and “pushy” male sales representatives, whilst she also attended to her children. The client’s recollection of the unsolicited visit indicates she had no understanding of the true nature of the agreement.

##### **Unsolicited sales law**

The representatives appeared to breach section 74 of the ACL by failing to adequately disclose the true purpose of the transaction and their true identity.

##### **Unfair tactics**

The statements made by the AGL representatives – that they were in fact “government representatives” – may also give rise to a breach of section 50 of the ACL (that is, by using coercion to procure agreement).

The client suggests that her agreement only resulted from her induced belief that the representatives were from the government:

*We trust they (AGL) are (the) government ... I thought ... the government want(ed) to sue TRU energy.*

### **4.3 “Door-to-Door” consumer contracts**

The Australian Consumer Law (**ACL**) imposes a number of requirements on marketers engaging in unsolicited “Door-to-Door” sales.<sup>21</sup> A summary of these requirements are briefly described below:

- **Permitted hours of negotiation:**<sup>22</sup> Marketers must not conduct unsolicited sales on any Sunday or public holiday before 9am or after 6pm on any other day (or after 5pm if the day is a Saturday).

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<sup>21</sup> See generally: Competition and Consumer Act 2010 (Cth) Sch 2, Divn 2, ss 69-95

<sup>22</sup> Ibid, s.73(1)



- **Disclosing purpose and identity:**<sup>23</sup> Marketers must, as soon as practicable, clearly advise the person that:
  - the marketer's purpose is to seek the person's agreement to the supply of goods or services;
  - the marketer is obliged to leave the premises immediately upon request; and
  - the marketer must provide information relating to the marketer's identity as prescribed by the regulations.
- **Ceasing to negotiate on request:**<sup>24</sup> Marketers must leave the premises immediately upon the request of the occupier of the premises or the person with whom the marketer is negotiating with. If such a request is made, the marketer must not contact the prospective consumer for at least thirty days after the request.
- **Informing person of termination period etc:**<sup>25</sup> The marketer must, before the agreement is made, provide the prospective consumer with written information relating to their rights of termination and how to exercise same.
- **Give documents to consumers:**<sup>26</sup> A copy of agreements completed in person must be provided to the consumer.
- **Content requirements of unsolicited consumer agreements:**<sup>27</sup> The front page of any unsolicited consumer agreement must clearly state the consumer's right to terminate the agreement and the supplier's contact details.
- **Statutory termination periods:**<sup>28</sup> All unsolicited consumer agreements have a minimum ten business day cooling off period. This period is extended to three or six months upon breaches of the above statutory requirements by the dealer or supplier.

### **Issues**

The most common breach of unsolicited door-to-door sales provisions was the failure to disclose the true purpose and identity of the representative and their visit, which was present in the vast majority of case studies.

Three clients were visited by representatives outside the hours permitted by legislation and a similar number of clients experienced representatives who refused to leave their premises upon request and were not provided information in relation to termination as required by the ACL.

Rarely was information provided in relation to the representative's duty to provide documents, content requirements of unsolicited consumer agreements or breaches of statutory termination periods.

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<sup>23</sup> Ibid, s.74

<sup>24</sup> Ibid, s.75(1) and (2)

<sup>25</sup> Ibid, s 76

<sup>26</sup> Ibid, s 78(1)

<sup>27</sup> Ibid, s79, the Regulations also require this front page to be attached to the agreement, transparent and the text to be more prominent than anything on the page, other than a logo.

<sup>28</sup> Ibid, s 82(3)

#### CLIENT I:

Section 75 of the ACL was potentially breached by the Red Energy representative who refused to leave after the client's request. The client resorted to asking a neighbour to intervene and demand the representative leave.

#### CLIENT H:

Two potential breaches of unsolicited sales provisions have occurred, including:

- conducting unsolicited sales outside the permitted hours (the client recalls the visit occurred after 6pm); and
- failing to adequately disclose the true purpose and identity of the representative (instead claiming the representative was "from the government" and only "following accounts", not attempting to sell electricity).

### 4.4 Misrepresentation and misleading or deceptive conduct

A misrepresentation is:

*A false statement made expressly or impliedly by one party to another that acts as an inducement to the latter to enter into contract with the former.*<sup>29</sup>

The general position is that the representee must show that he or she was misled by the representor and relied on that misrepresentation of fact when deciding to enter the contract. Misleading or deceptive conduct is also regulated by the ACL. The ACL provides that:

*A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.*<sup>30</sup>

Misleading or deceptive conduct can include lying, making false or inaccurate claims and creating a false impression. Promises of "better deals" or predictions of "lower costs" can amount to misleading or deceptive conduct in some circumstances.<sup>31</sup> Where it is established that a party intended to mislead or deceive another party, courts may be more likely to find that the conduct complained of was misleading.<sup>32</sup>

#### Issues

Alarming, about sixty-six percent of clients interviewed did not understand they were entering into a contract with an energy provider. Clients were variously told that:

- they were completing a government survey;
- they were replacing electricity boxes;
- they were replacing light bulbs;
- they were updating their current account with a bigger discount; and
- the public housing authority had changed providers.

<sup>29</sup> J Paterson et al: *Principles of Contract Law* (4th ed), Thomson Reuters 2012, p. 615

<sup>30</sup> Ibid, s.18(1)

<sup>31</sup> *Competition and Consumer Act 2010* (Cth) sch2 s4. See also *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82; *Heydon v NRMA* [2000] NSWCA 374 and *Wheeler Grace & Pierucci Pty Ltd v Wright* (1989) ATPR

<sup>32</sup> *Campomar Sociedad Limitada v Nike International Ltd* [2000] HCA 12

Both misrepresentations and misleading or deceptive conduct were strong themes throughout the case studies, featuring in almost every client's story.<sup>33</sup> In particular, several false claims or representations were repeated throughout the case studies in relation to:

- **The identity of the representative's company:** Many representatives falsely claimed they were "from the government"<sup>34</sup> or from the client's current supplier.
- **The purpose of the representative's visit:** Explanations relating to "fixing problems or electricity boxes" or the compulsory transfer of electricity supply in all public housing units or "the area" were common.
- **Savings or reductions in electricity costs:** Most representatives claimed the consumer would receive significant savings in electricity costs. Claims of savings in the order of ten-to-twenty percent were common. One client reported that they were promised that their charges would reduce by as much as eighty percent. Generally, after transferring to the new supplier, the clients claimed that their bills increased.

#### CLIENT P:

The representatives made a number of statements, later proven to be false, including that:

- the representatives were from the government;
- the representatives were also from Centrelink;
- the representatives were to give the client a "discount";
- the government had a "program for single parents"; and
- the client had been "approved" for this program and its benefits.

If proven, a reasonable person would have a real chance of being induced into signing service transfer contracts by the cumulative effect of these statements. Such a cumulative effect would also create a strong case of the representative's intention to mislead or deceive the client. As these statements are all factually and fraudulently erroneous; they may also potentially amount to misrepresentations at common law.

#### 4.5 Unconscionable conduct

The doctrine of unconscionable conduct attempts to prevent parties from knowingly exploiting another party's disadvantage for their own benefit.

The ACL prohibits:<sup>35</sup>

- unconscionable conduct defined under the ACL; and
- unconscionable conduct under the "unwritten law" or "common law".

<sup>33</sup> *Consumers Utility Advocacy Centre: The Consumer Experience of Door-to-Door Energy Sales in Victoria: Findings from a CUAC Survey* (CUAC Policy Issue Paper, February 2012); and Clare Petre, Energy and Water Ombudsman NSW: *Current Issues for Consumers: What's happening and Why?* (Conference Paper, ACOSS Conference, 13 September 2011)

<sup>34</sup> It should be noted that the source of some confusion amongst clients was potentially the mistaken belief that unsolicited sales representatives were installing "Smart Meters" for the Victorian Government and thus, government representatives.

<sup>35</sup> *Competition and Consumer Act 2010* (Cth) sch 2, s.20(1)

To determine whether a person has engaged in unconscionable conduct under the ACL (which has a broader application), a court must consider a number factors, including:<sup>36</sup>

- the relative strengths of the bargaining positions of the parties;<sup>37</sup>
- whether the consumer was able to understand any documents relating to the supply of the goods or services;<sup>38</sup> and
- whether any undue influence or pressure was exerted or any unfair tactics were used against the consumer.<sup>39</sup>

The test under the “unwritten law” for unconscionability involves two stages.<sup>40</sup>

- one party to the contract is under a “special disability” which creates a significant degree of inequality between the contracting parties; and
- the stronger contracting party had actual or constructive knowledge of the weaker party’s “special disability” so as to make it unfair that he or she accept the weaker party’s consent to the contract.<sup>41</sup>

Factors creating a “special disability” include:<sup>42</sup>

*...poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary.*<sup>43</sup>

(Emphasis added)

Recent amendments to the ACL inserted a number of interpretative principles into the unconscionable conduct provisions.<sup>44</sup> There is significant potential for these amendments to address systemic unfair business practices, which may be relevant to door-to-door marketing.

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<sup>36</sup> Ibid, s21(2)

<sup>37</sup> Ibid, s21(2)(a): this includes taking into account the gender of the parties, whether or not the consumer was alone at the time of the transaction and whether or not the consumer felt threatened or fearful of the other party: ACCC v Lux Pty Ltd [2004] FCA 926 at [102], [104]

<sup>38</sup> *Competition and Consumer Act 2010* (Cth) Schedule 2, s.21(2)(c)

<sup>39</sup> Ibid, s21(2)(d)

<sup>40</sup> *Commercial Bank of Australia v Amadio* 151 CLR 447

<sup>41</sup> Ibid at [474] per Deane J

<sup>42</sup> *Blomley v Ryan* [1956] HCA 81 at [405] per Fullagar J

<sup>43</sup> Ibid at [9]

<sup>44</sup> The amendments include that:

- the statutory prohibition against unconscionable conduct (section 21) is not limited by the unwritten law relating to unconscionable conduct;
- the prohibition is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour;
- in considering whether conduct to which a contract relates is unconscionable, a court’s consideration of the contract may include consideration of:
  - the terms of the contract; and
  - the manner in which and the extent to which the contract is carried out; and
- is not limited to consideration of the circumstances relating to formation of the contract.

## Issues

Factors suggesting unconscionable conduct also featured prominently in the vast majority of case studies:

- **Insufficient English language proficiency:** Most clients were from a non-English speaking background, with some requiring the assistance of family members or neighbours simply to understand the purpose and identity of the energy representative. Such language difficulties would be obvious to any reasonable person attempting to engage in a negotiation with the client. A number of clients required the assistance of an interpreter to participate in this project, yet were not offered any translation services when entering the agreement.<sup>45</sup>
- **Failure of the client to understand the nature of the transaction and/or the contents of the contract documents:** Most clients only understood minimal details of the contractual documents with a significant number also failing to understand the nature of the agreement (that is, they were changing electricity retailers).
- **The nature of the parties and transaction:** Most clients were female and the sole adult at the residence, while most energy representatives were experienced male salespeople. On at least four occasions, more than one representative attended the client's residence. Such circumstances add to the significant power imbalance between the parties.
- **Unfair tactics and undue pressure:** Aimed at inducing or compel the client's agreement and removed the client's free consent. This is discussed at section 4.6.

### CLIENT H:

Client H was promised a twelve percent discount and (seemingly) significant savings on her electricity bill which induced her to enter the new supply contract with AGL. The client's bills in fact significantly increased after she changed retailers.

The client has an obvious limited grasp of the English language. Her participation in this project relied on an interpreter, whilst the client also relied on her 16-year-old son to interpret the explanations given by the AGL representative. When the client was requested to confirm her details by phone to AGL, presumably to confirm the acceptance of the contract, she explained to the operator "I don't understand", to which the operator relied "don't worry".

The client is at an obvious and significant "special disability" as she is unable to understand the contractual documents and telephone confirmation requirements and is relying on her 16-year-old son to interpret complex energy supply and financial information. Such circumstances possibly amount to unconscionable conduct on the part of the representative. Furthermore, it was also potentially overtly unconscionable for the representative to connect the client with the operator without the assistance of a translator despite her previous difficulties and for the operator to dismiss the client's concern that she didn't understand the contents of the telephone confirmation and proceed with the transaction.

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<sup>45</sup> Such an inability to communicate has been held to be a "special disability" under the first limb of the Amadio unconscionability doctrine



## 4.6 Unfair tactics

The ACL specifies and prohibits a number of practices deemed “unfair” in the course of trade or commerce. Section 29 of the ACL prohibits conduct which amounts to a “misrepresentation” in relation to specified matters. Relevant prohibitions are the making of misrepresentations with respect to the price or necessity of purchasing goods or services. The ACL also prohibits conduct amounting to undue harassment or coercion.<sup>46</sup>

“Undue harassment” means unnecessary or excessive contact or communication with a person, to the point where that person feels intimidated, tired or demoralised.

“Coercion” involves force (actual or threatened) that restricts another person’s choice or freedom to act.<sup>47</sup>

### **Issues**

Unfair tactics (namely, undue harassment or coercion) were common themes, although not prevalent throughout the case studies.

A number of clients felt harassed by energy representatives who:

- refused to leave the client’s premises when asked;<sup>48</sup>
- “pushed” the client to sign transfer contracts; or
- made statements which included that:
  - you “have to” sign the contract;
  - you “must sign to get the discount”;
  - the client’s current supplier was “no good”; or
  - the client “must show” the representative their electricity bill.

Such conduct often accompanied attempts to coerce clients into signing the transfer contracts by claiming the contracts were “government documents” or the representative was a “government employee”.

Clients often voiced the fact that they only ceded to the representative’s demands because of a feeling of compulsion.

It should be noted that, often, insufficient information was provided by the consumer to enable a proper determination of whether undue harassment or coercion took place.

<sup>46</sup> *Competition and Consumer Act 2010* (Cth) sch 2 s50

<sup>47</sup> Unlike harassment, there is no requirement for behaviour to be repetitive in order to amount to coercion: *ACCC v Maritime Union of Australia* [2001] FCA 1549

<sup>48</sup> Such conduct is also a breach of unsolicited agreement provisions of the ACL.

#### CLIENT C:

The client recalls rejecting the sales advances of the representative at least three times. This included telling the representative she did not speak English and wanted the representative to leave. The representative persisted after each rejection, eventually telling the client she must sign the papers because he was from the government.

Such conduct potentially amounts to coercion and/or undue harassment due to the representative's repeated persistence and the feeling of compulsion he subjected the client to by claiming she "must" sign the "government" papers.

#### CLIENT E:

The representative remained at the client's house for more than an hour, despite her insistence that she "didn't want to sign". She stated:

*He didn't want to leave. He just want(ed) me to sign.*

The client clearly states that she let the representative into her house and remained in her house as well as ultimately signing the contract because she believed his claim of representing "the government" and she "just wanted to rest". The representative's refusal to leave, continued persistence and ultimate success in creating a sense of compulsion in the client, potentially amounts to both undue harassment and coercion.

### 4.7 Energy-specific consumer protections

In Victoria there are two key codes made by the Energy Regulator that provide protections for consumers; the Energy Retail Code (**ERC**) and the Code of Conduct for Marketing Retail Energy in Victoria (**Marketing Code**). These regulations will be phased-out in favour of the National Energy Customer Framework, but it is not clear when that new national framework will take effect.<sup>49</sup> The Marketing Code requires retailers to have internal and external dispute resolution processes. The relevant external dispute resolution scheme in Victoria is the Energy and Water Ombudsman. The Marketing Code, in particular, requires a retailer to obtain the customer's "explicit informed consent" to transferring the customer away from their current retailer.<sup>50</sup> The Marketing Code also sets out standards and conditions establishing explicit informed consent, defined to be consent given:

(a) *by the consumer directly to the retailer or the retailer's marketing representative:*

(i) *in writing or by electronic communication signed by the consumer; or*

(ii) *orally; [and]*

(b) *only after the retailer or the retailer's marketing representative has clearly, fully and adequately disclosed in plain English all matters relevant to the consent of the consumer, including each specific purpose and use of the consent; and*

(c) *by a person competent to do so.*

While it is not required by the Marketing Code, energy retailers commonly use a post-sale verification telephone call to the retailer's call centre to confirm consent.

<sup>49</sup> Michael O'Brien MP, Press release: *Victorian Government defers National Energy Retail Law to safeguard consumer protections*, 13 July 2012

<sup>50</sup> Clause 8, Essential Services Commission: *Code of Conduct for Marketing Retail Energy in Victoria* (January 2009)

The Marketing Code also provides guidance on “competence”. A person is not considered competent to enter into a contract if they cannot understand information provided by the retailer (for example, for language or literacy reasons) or cannot consciously enter into a contract (through limited understanding due to age or disability). The Marketing Code also clarifies that a minor will generally be assumed not to be competent to provide consent to a contract unless the relevant retailer can establish that the preconditions to the validity of such a contract are satisfied.

### ***Issues***

Most of the cases demonstrate clients who, due to very limited English literacy levels, are not in a position to understand information provided by the retailer and thus would not be considered competent to enter into a contract. “Competence” is necessary to provide explicit informed consent pursuant to the Marketing Code and requires the customer to be capable of understanding issues, forming views based on reasoned judgment and communicating their decision. Very few of the case studies indicate that the consumers in question have such capability.

#### **CLIENT Q:**

In order to demonstrate explicit informed consent, the Marketing Code requires the representative to disclose in plain English all matters relevant to the consent of the consumer, including each specific purpose and use of the consent. Client Q describes how the representative “prepared” her husband for the telephone confirmation call, by writing down which questions he should reply “yes” and “no” to.

This conduct would suggest that the representative did not disclose all matters relevant to the consumer’s consent.

#### **CLIENT Z:**

Client Z was home with her children and describes herself as “not understanding who the representative was, why he attended her residence nor the contents of the documents the representative told her to sign”. She acknowledges significant issues with her English language skills and stated:

*...whatever the representative say I don’t understand ... I don’t understand why he was there.*

The client also explains how, during the telephone confirmation call, the representative told the client:

*When I say yes, you say yes, when I say no, you say no.*

## 5 WHAT IS THE IMPACT ON REFUGEE SETTLEMENT?

### 5.1 Settlement and social participation

Unfair or unlawful energy sales practices have a broad impact on our clients and other vulnerable consumers, which go beyond the legal and financial implications of the contract. Successful settlement of migrants and refugees provides important benefits for Australian society.<sup>51</sup>

A 2011 study by Hugo defined successful settlement to include economic, social and civic participation.<sup>52</sup> Importantly, the study distinguished social participation as a key outcome to long-term integration into Australian society. It noted that whilst levels of integration into local neighbourhoods are quite high; about 28.3% of respondents did not feel like they were a part of their local neighbourhood.<sup>53</sup> Thus, a feeling of “community” was noted as both important to new arrivals and yet was also elusive.

Door-to-door sales can present obstacles to positive settlement outcomes. Door-to-door sales can cause migrants to fear or distrust strangers who knock on their door, which has a harmful impact on the Australian Government’s efforts to promote and prioritize social inclusion.<sup>54</sup> Social participation and connection to local community are critical factors in ensuring successful long-term settlement.

### 5.2 Unintended consequences of the “Do Not Knock” campaign

The “Do Not Knock” campaign has been running in Victoria since 2007 in response to negative consumer feedback on door-to-door sales and other invasive, pushy retailing strategies. “Do Not Knock” stickers are distributed by the Consumer Action Law Centre and a host of other social service agents. The stickers aim to empower consumers to deal with door-to-door salespeople, including energy companies.

The campaign lists as its primary objectives to help consumers avoid:

- high pressure techniques which rely on a range of psychological techniques and social pressures, including manipulation of emotions, to increase the likelihood that certain consumers will sign up to contracts;
- misleading and deceptive conduct which can include overstating benefits or savings, retailers switching customers without consent and marketing to non-account holders; and
- targeting vulnerable groups who for any reason are not equipped to resist the hard sell.<sup>55</sup>

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<sup>51</sup> Graeme Hugo: *Economic, Social and Civic Contributions of First and Second Generation Humanitarian Entrants: Final Report to Department of Immigration and Citizenship* (Department of Immigration and Citizenship, May 2011)

<sup>52</sup> Ibid

<sup>53</sup> Ibid, 231

<sup>54</sup> See, for example, Australian Government: Social Inclusion Agenda: <<http://www.socialinclusion.gov.au/>>

<sup>55</sup> *Do Not Knock, History of the Do Not Knock Campaign*: <<http://donotknock.org.au/about-the-campaign/history-of-dnk/>>

Community legal centres and social services have adapted strategies and advice to provide to refugee-background communities. Amongst the advice given to new migrants is to “not answer the door” or “pretend you are not home”. This advice is practical. Clients who can avoid a door-to-door sale are far less likely to enter into a problematic energy contract and thus subsequently avoid further complications.

However, clients are now telling us that they are implementing this advice by “not answering the door” at all - in a comprehensive way. Many expressed their fear, anxiety and worry about door knocking and also shared stories of how their behaviour has changed as a result of their door-to-door sales experiences. Rather than opening the door to anyone who knocked, clients talk about hiding behind doors, feeling scared, and teaching their children not to open the door for anyone.

### 5.3 Fear and anxiety

Out of twenty-five clients interviewed, seventeen told us they no longer answer their door and are unable to discern between “good ones” (neighbours and social services providers) and “bad ones” (those involved in door-to-door energy sales).<sup>56</sup> Because they cannot easily discern between soliciting energy companies, many clients have decided not to open their door to anyone.

Client W:

*I cannot trust anyone. I feel scared and frightened when people knock on the door. I have depression, so I'm very scared. Sometimes I can't answer the door. I scared! When they knock, I scared. Sometimes I think it's my children, and I go to open the door. I feel tricked. So now when someone ring the door, I'm scared and I hide in the room.*

Client F:

*After they are knocking, now I just don't answer. That's what they [settlement agency] told me. You don't know what to answer. Some people say they are calling on behalf of the government to do surveys.*

Client H:

*Many other companies come, but I don't open the door to them. When someone came knocking on the door and they wanted to advertise. I don't open the door.*

On the other hand, Client I reported that she had adapted to door-to-door energy sales by agreeing to sign every offer made during a door-to-door sale and she would then cancel under the terms of the ‘cooling off’ period. She commented:

*Now I'm just up to the point where I sign it and then I ring them afterwards. I find that easier and quicker ... one thing I've gotten used to is signing papers and then calling them up during the 10 day cooling period. I know about the 10 day cooling off period, but when you ring to cancel, they make it so hard.*

It is clear that these experiences have a negative impact on social participation and personal wellbeing, which in turn has flow-on effects for broader settlement outcomes.

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<sup>56</sup> The language of “good ones” and “bad ones” was used by several clients to distinguish between door-to-door salespeople (bad ones) and social service providers like the Brotherhood of St. Laurence's light bulb replacement services (good ones)



## 5.4 Reinforcing fear of authority

As well as general feelings of fear and anxiety, there were suggestions that clients related their experience of door-to-door sales to negative experiences of authority in their past, particularly in relation to police and government officials.

For example, Client R stated:

*When they knock the door and my heart is beating already and I think what is going on? What is going to happen? When they knock the door I am so frightened. I am so frightened that I might have to ring 000. In Malaysia there is always trouble.*

Similarly, Client X stated:

*If they say from the government, I open the door because I have to talk to them.*

## 6 WHAT ARE THE POLICY IMPLICATIONS?

### 6.1 Informed consent and vulnerable consumers

Vulnerable consumers may not have the necessary commercial and cultural literacy needed to demonstrate informed consent. Without such consent, no complex contractual agreement could be considered transparent or fair. As noted in section 4.7, many energy retailers now use a post-sale recorded telephone call to confirm consent was obtained from the consumer. However, our case studies demonstrate that these are not effective because vulnerable consumers can be coached, pressured or misled into verifying their “consent”.

For example, Client Y reported:

*[The energy representative] called the phone and he said this is my company and you need to answer. [The energy representative said] say when I say yes you say yes, when I say no you say no. When we call the person, [the representative] say yes and I say yes! And then he showed me where to sign.*

To illustrate the broader systemic barriers that our clients face, we have analysed points of advice provided by Consumer Affairs Victoria to assist consumers deal with door-to-door sales.<sup>57</sup> Below the advice are our comments on any embedded assumptions of the skills required from the consumer in order to give the advice effect:

- **Do not feel pressured to decide on the spot. Read and understand documents before you sign them.**
  - > Assumes fluency in English and knowledge of contracts
- **Shop around. To help you make the right choice when choosing your energy supplier, see the YourChoice website.**
  - > Assumes access to a computer and computer literacy

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<sup>57</sup> Tips for Buying Energy Products and Services prepared by Consumer Affairs Victoria (18 November 2012): <<http://www.consumer.vic.gov.au/shopping/energy-products-and-services/tips-for-buying-energy-products-and-services>>

- **Make sure you have been provided with an offer summary, which explains everything you need to know about the energy plan being offered.**
  - > Assumes fluency in English, knowledge of contracts and sophisticated understanding of legal content
- **Ask questions. Ensure salespeople provide you with all the facts you need before signing up to a contract.**
  - > Assumes fluency in English, knowledge of factors relevant to the decision and that the power relationship allows the consumer to make inquiries (for example, that female consumers feel comfortable in asking questions of a male salesperson)
- **Watch out for energy salespeople who give the impression they are from government when they are not.**
  - > Assumes an ability to identify a “government official”

In the list above, countless assumptions are made that are inappropriate for our client group. The reality is that some consumers are simply not able to provide informed consent from their door step.

Consumer Affairs Victoria provides some targeted face-to-face community education to refugee communities to inform them of their rights in relation to door-to-door sales. We agree that this needs to be continued and expanded, and appropriate materials adapted, to overcome the limitations that these communities face in making sense of mainstream information. For example, Footscray CLC and other community legal centres conduct face-to-face community education in culturally appropriate settings, with the aid of visual materials. Digital storytelling resources, such as the *What’s the Law? Australian Law for New Arrivals* kit produced by Victoria Legal Aid,<sup>58</sup> provide excellent models for presenting information to refugee communities.

## 6.2 The door-to-door sales workforce and compliance

Deceptive sales tactics cannot be blamed on isolated cases by a small number of door-to-door sales representatives. Rather, it is the system of commission-based sales that is problematic and likely to result in aggressive, misleading and unconscionable sales tactics

A recent report by Frost & Sullivan prepared for the ACCC highlights the importance of door-to-door sales in energy marketing and the impact of the door-to-door sales workforce.<sup>59</sup> Importantly, the report notes that the bulk of the door-to-door sales workforce is comprised of young people and/or new migrants, with a significant proportion being international students.<sup>60</sup>

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<sup>58</sup> *What’s the Law? Australian Law for New Arrivals* by Victorian Legal Aid: <<http://www.legalaid.vic.gov.au/3641.htm>>

<sup>59</sup> Frost & Sullivan: *Research into the Door-to-Door Sales Industry in Australia: Report by Frost & Sullivan for the Australian Competition and Consumer Commission* (Australian Competition and Consumer Commission, August 2012)

<sup>60</sup> Ibid, 49

Another common characteristic is individuals who are between jobs or attempting to re-enter the workforce. Typically, sales representatives are engaged as independent contractors and are paid on a commission basis. The report noted the incidence of “sham contracting” as a serious issue, which occurs where an employer establishes an independent contractor relationship with the sales agent to avoid the costs of employee entitlements, where an employment relationship in fact exists.<sup>61</sup>

The Frost & Sullivan report concluded that although it is not possible to reliably measure the extent of compliance, breaches are occurring and sales representatives have a low level understanding of obligations under the ACL.

The report states that:

*[t]his may largely be driven by the structure of the industry – including factors such as the high turnover rate of agents and the fact that the majority of agents are on commission-only remuneration schemes which may drive more “aggressive” sales behaviour. Additionally, the fact that team leaders (who are themselves contractors) generally receive roll-up commissions (i.e. part of the commission is paid to the team leader) for sales made by members of their teams may at times encourage them to advise their team members to adopt tactics that are not fully compliant.*<sup>62</sup>

Any proposals for improving the regulation of door-to-door sales need to take the structure of the sales workforce into account, and the pressures of commission-based selling. We do not put responsibility on “bad apple” salespeople. We put the core responsibility for reform on the structure of door-to-door sales itself.

### **6.3 Voluntary Codes of Conduct are not effective**

In 2011, the ACCC authorised a Code of Conduct for door-to-door sales.<sup>63</sup> The Code of Conduct was developed by Energy Assured Limited, which is made up of major electricity and gas retailer representatives and marketing companies. The Code of Conduct aims to supplement existing state and federal laws with a “self-regulated industry scheme”,<sup>64</sup> largely aimed at the training and monitoring of door-to-door sales representatives.

It is doubtful whether an industry code that relies on industry self-regulation can be effective in improving compliance and protecting vulnerable consumers.<sup>65</sup> This is because the Code of Conduct focuses on monitoring and de-registering of sales representatives where there is poor behaviour, which is implemented by individual retailers or the contractors outsourced to undertake door-to-door work, but does nothing to challenge the structural impediments of the workforce that are most likely to encourage non-compliance. As stated in paragraph 6.3, we argue that the problem is not principally due to bad salespeople, but rather is due to a structure that rewards high-pressure sales tactics.

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<sup>61</sup> Ibid, 43

<sup>62</sup> Ibid, 78

<sup>63</sup> *ACCC Authorises Energy Door-to-Door Sales Code* by the Australian Competition and Consumer Commission (Media Release, 23 June 2011). See: *Competition and Consumer Act 2010* (Cth) Part VII, Division 2. It is worth noting that the ACCC has a mandate under the ACL to authorise certain arrangements that may otherwise constitute unlawful, anti-competitive behaviour where the public benefits of such conduct outweigh public detriments. However, this does not mean that the ACCC approve of the Code or that it represents best practice.

<sup>64</sup> Energy Assured Australia: Code of Practice (Edition 1, 2011), 3

<sup>65</sup> *New Energy Sales Self Regulation Scheme Fundamentally Flawed* by the Consumer Action Law Centre (Media Release, 24 June 2011)

In contrast to direct enforcement action, such as the example detailed below, there are little financial incentives for energy retailers to ensure they are not engaging in poor practices. Nor are we convinced that the Code of Conduct adequately addresses structural problems endemic to door-to-door energy sales.

#### **6.4 Independent enforcement action gets results**

In September 2012, the Federal Court held that an energy retailer and its marketing company had breached the ACL for ignoring visible “Do Not Knock” stickers. They were also found to have engaged in misleading and deceptive conduct (for example, for representations by salespeople that they were “not selling anything”). The companies agreed to pay a penalty of \$1 million dollars compensation as well as court costs.

The case has clarified the legal status of “Do Not Knock” stickers with the finding that ignoring a visible “Do Not Knock” sticker can result in a fine of up to \$50,000 per incident.

Importantly, the case, which was brought by the ACCC demonstrates the potential of taking direct and strategic enforcement action against a non-compliant retailer. It is likely that this case will have an impact on sales practices as it has a direct cost implication to non-compliant retailers.

The ACCC Chairman, Rod Sims, recently recognised concerns that “door-to-door marketers target vulnerable consumers, such as the elderly and those with a limited understanding of English” and put energy retailers on notice that “misleading consumers about retail energy products will attract severe penalties”.<sup>65</sup> This marks an important achievement for consumer rights. The challenge of making consumers aware of their rights and providing effective avenues for reporting breaches remains.

#### **6.5 Taking Do Not Knock further**

There have been recent attempts to introduce a Do Not Knock register, similar to the Do Not Call Register in place since 2007.<sup>67</sup> The Do Not Knock Register Bill 2012 (Cth) sought to establish a framework for prohibiting unsolicited sales contact to addresses on a centralised register and included a complaints and enforcement process. The Bill was referred to a parliamentary committee who recommended against passing of the Bill.<sup>68</sup>

The Consumer Utilities Advocacy Centre notes the effectiveness of the Do Not Call register and strongly recommends further investigation into the Bill. CUAC observes that under the Energy Marketing Code retailers are already required to keep “No Contact” lists,<sup>69</sup> but this is largely inaccessible to consumers due to a lack of promotion and transparency around the process.<sup>70</sup> Consumers are required to register with each individual retailer, which further limits the effectiveness.

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<sup>65</sup> *ACCC puts Energy Retailers on Notice over Door-to-Door Practices* by the Australian Competition and Consumer Commission (Media Release, 13 September 2011)

<sup>67</sup> *Do Not Call Register* by the Australian Communications and Media Authority: <<https://www.donotcall.gov.au/>>

<sup>68</sup> *Inquiry into the Do Not Knock Register Bill 2012* by the House Standing Committee on Social Policy and Legal Affairs (17 September 2012)

<sup>69</sup> Clause 2.3, Essential Services Commission, *Code of Conduct for Marketing Retail Energy in Victoria* (January 2009)

<sup>70</sup> *Minimising Consumer Detriment Through Energy Door-to-Door Sales: A CUAC Research Report* by the Consumer Utilities Advocacy Centre (December 2012) 78-79

Our research supports the need for taking Do Not Knock further. Consumers should have the option of opting out of unsolicited sales contact definitively and, in particular, vulnerable consumers who are most adversely affected by door-to-door sales contact should have a simple method for giving effect to their wishes. CUAC recommends that, in the absence of a Do Not Knock Register, the Essential Services Commission (**ESC**) should develop an online tool that would allow consumers to be added to retailers' No Contact lists "via a single, centralised form".<sup>71</sup> We strongly support this recommendation.

A further idea to expand on the success of the Do Not Knock campaign is to harness community support for the establishment of geographical areas that entirely exclude marketing activity, such as the "No Cold Calling Zones" in the United Kingdom.<sup>72</sup>

Consumer Action Law Centre is exploring, with other agencies, the creation of "Do Not Knock" towns. This would require community consultation to reach the broad consensus from residents living in a defined geographical space, and resources to promote and signage that space as a "Do Not Knock" area.

Our research suggests that the high level of sales activity to which public housing residents are subjected would warrant community consultation into creating "Do Not Knock" public housing flats. Arguably, this could be particularly effective, due to the high density nature of public housing flats and the limited number of entry and exit points that could provide prominent opportunities for "Do Not Knock" signage. A focus group we conducted with five public housing residents was very supportive of the idea. We recommend that government resources be allocated to trial this in suitable locations.

## **6.6 Alternative methods for direct sales**

There are alternative methods for providing direct sales to disadvantaged consumers, which allow for informed consent to be given. A recent report by the Consumer Utilities Advocacy Centre, which focuses on alternatives to consumers of door-to-door sales, suggests that:

*The Energy Retailers Association of Australia take a leadership role encouraging and supporting its members to develop alternative, innovative sales and marketing approaches that are better aligned with consumer preferences.*<sup>73</sup>

For example, one option is for retailers to hold "Energy Market" events or information sessions at community locations, such as community or neighbourhood centres, which could be attended by interpreters, community leaders and other services as appropriate. Energy retailers would have the opportunity to market their products and provide consumers with accurate and honest information, encouraging competition without creating the danger of damaging and potentially unlawful sales practices.

<sup>71</sup> *Minimising Consumer Detriment Through Energy Door-to-Door Sales: A CUAC Research Report* by the Consumer Utilities Advocacy Centre (December 2012) 81. The CUAC recommends that this be hosted on the ESC's "Your Choice" website – see Victorian State Government: Your Choice: Victoria's Impartial Energy Comparator and Resource Tool: <<http://yourchoice.vic.gov.au/>>

<sup>72</sup> *Minimising Consumer Detriment Through Energy Door-to-Door Sales: A CUAC Research Report* by the Consumer Utilities Advocacy Centre (December 2012) 70-72

<sup>73</sup> *Minimising Consumer Detriment Through Energy Door-to-Door Sales: A CUAC Research Report* by the Consumer Utilities Advocacy Centre (December 2012) 100

## 6.7 Energy policy is relevant to settlement policy

Our research has shown that vulnerable groups in the community are often disproportionately affected by the door-to-door marketing practices of energy companies. Door-to-door sales practices can have a detrimental impact on refugee communities by instilling fear and distrust of strangers knocking at the door, which creates obstacles to positive settlement outcomes, including cultivating a sense of social inclusion and personal wellbeing. As demonstrated by our clients, the door-to-door sales practices employed by energy companies may also be perceived by consumers of refugee background as intrusive and threatening, reinforcing pre-existent fears of authority. Such outcomes are likely to have an adverse impact on the Australian Government's efforts to promote successful refugee settlement outcomes and are inconsistent with broader goals of social inclusion.

It is vital that any policy reform to such sales practices be responsive and accountable to the needs of the community, particularly to vulnerable groups that are most at risk of further social alienation. Governments need to work together to ensure that policy-making is as consistent as possible across all spheres.

## 7 CONCLUSION

This report has identified our client group as part of a growing class of energy consumers who are vulnerable to the door-to-door sales of energy companies. Our clients indicate that they have great difficulty avoiding door-to-door sales. Furthermore, they are vulnerable to unlawful sales practices, which include sales where energy companies refuse to leave a residence, or misrepresent the nature of a contract. Our research indicates that the misconduct is systemic and it is driven by the nature of the selling practice rather than the poor conduct of individual sellers.

We argue that the value of maintaining a competitive market should not overrule the need to protect vulnerable consumers.

The research has sought to give voice to the experience of our clients, who have a simple message for energy companies: door knocking is harmful and unwelcome.

Client J:

*Maybe life will be good. When people change – when energy companies can't come to knock the door, it's good. People can get big trouble to open the door.*

Client R:

*From TV we see advertisements, and from our letter box we see things for sale – so we are informed. I don't want people to knock the door to sell things. I really don't want those door knockers.*

Client Y:

*I want to say to those people who knock the door – I want to say, please don't knock the door.*



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<sup>74</sup> See: <<http://consumeraction.org.au/wp-content/uploads/2012/11/A-POLICY-TRILEMMA-Nov-2012.pdf>>

<sup>75</sup> See: <[http://www.footscrayclc.org.au/images/stories/docs/Out\\_of\\_Africa\\_and\\_Into\\_Court.pdf](http://www.footscrayclc.org.au/images/stories/docs/Out_of_Africa_and_Into_Court.pdf)>

<sup>76</sup> See: <[http://www.immi.gov.au/media/publications/research/\\_pdf/economic-social-civic-contributions-about-the-research2011.pdf](http://www.immi.gov.au/media/publications/research/_pdf/economic-social-civic-contributions-about-the-research2011.pdf)>

<sup>77</sup> See: <[http://www.choice.com.au/media-and-news/consumer-news/news/~link.aspx?\\_id= bd8602ec8f454 857b6887c90a232810b&\\_z=z%20 across >](http://www.choice.com.au/media-and-news/consumer-news/news/~link.aspx?_id= bd8602ec8f454 857b6887c90a232810b&_z=z%20 across >)>

<sup>78</sup> See: <[http://www.choice.com.au/media-and-news/consumer-news/news/~link.aspx?\\_id= bd8602ec8f454857 b6887c90a232810b&\\_z=z>](http://www.choice.com.au/media-and-news/consumer-news/news/~link.aspx?_id= bd8602ec8f454857 b6887c90a232810b&_z=z>)>

<sup>79</sup> See: <<http://www.theage.com.au/national/energy-salesmen-blasted-20111203-1ockz.html #ixzz1yDUPOJ00>> at 20 June 2012

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<sup>81</sup> See: <[http://www.accc.gov.au/content/item.phtml?itemId=1021485&nodeId=12ce112c9ab4f604e32df386ebf\\_cda8e&fn=State%20of%20the%20energy%20market%202011%20-%20complete%20report.pdf](http://www.accc.gov.au/content/item.phtml?itemId=1021485&nodeId=12ce112c9ab4f604e32df386ebf_cda8e&fn=State%20of%20the%20energy%20market%202011%20-%20complete%20report.pdf)>

<sup>82</sup> See: <[http://www.cuac.org.au/index.php?Itemid=30&option=com\\_docman](http://www.cuac.org.au/index.php?Itemid=30&option=com_docman)>

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<sup>84</sup> See: <<http://www.ewov.com.au/publications-and-media/res-online-new2/overall/transfer>>

<sup>85</sup> See: <[http://www.footscrayclc.org.au/images/stories/docs/African\\_Consumer\\_Experience.pdf](http://www.footscrayclc.org.au/images/stories/docs/African_Consumer_Experience.pdf)>

<sup>86</sup> See: <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=spla/bill%20do%20not%20knock/report.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=spla/bill%20do%20not%20knock/report.htm)>

<sup>87</sup> See: <<http://www.acoss.org.au/images/uploads/energy%20at%20home%20-%20background.pdf>>

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<sup>91</sup> See: <<http://www.consumer.vic.gov.au/shopping/energy-products-and-services/tips-for-buying-energy-products-and-services> >

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## APPENDIX:

### Case Study Analysis

A brief legal analysis has been completed for each of the 25 case studies of this project. Citing relevant facts, each legal analysis will identify possible breaches of consumer protection laws and the common law, where relevant.

#### CLIENT A:

##### **Misrepresentations/misleading or deceptive conduct**

The client identifies that the salesperson made three key representations. He:

- told the client that TRU Energy (client's current provider) and Australia Power and Gas (new supplier) were "the same company"; and
- that the forms she filled out would simply enable her to receive a ten percent discount on her bills; and
- she could change her mind at any time.

All representations were false. Such conduct, if proven, would amount to deceptive or misleading conduct and, potentially, fraudulent misrepresentations.

##### **Unconscionability<sup>97</sup>**

The client was alone at the time of the unsolicited visit. She describes her English as "not good" and her recollection of the unsolicited visit clearly indicates she had little to no understanding of the nature or effect of the agreement she was entering:

*I don't know the person, or who they are...I filled the form...I talked on the phone...the (representative) didn't tell me who he called.*

The client acknowledges she cannot remember many details of the transaction. However her obvious confusion surrounding the transaction, potential language and educational barriers and the fact did not seek nor was provided with any external assistance or explanation, would suggest that the client's agreement may have been procured unconscionably in breach of the ACL.

##### **Unsolicited sales law**

There are insufficient facts to discuss potential breaches of the ACL's unsolicited sales provisions. However, the client's inability to describe the purpose and nature of the transaction may indicate the representative's failure to sufficiently disclose the purpose of the transaction and his identity.

##### **Explicit informed consent**

There is some likelihood that the consumer did not have competence to enter the contract and thus could not provide explicit informed consent. The fact that she did not understand that she was choosing a new provider suggests that, due to language barriers, she was not competent to enter into the transaction.

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<sup>97</sup> No information is provided on the client's educational or career background.

## **CLIENT B:**

### **Misrepresentations/misleading or deceptive conduct**

The client identifies a number of potentially misleading representations made by the two AGL representatives; namely that:

- the representatives were “checking all (of the) building for a problem”;
- the problem related to customer’s high bills;
- the representatives simply wanted to “check the meter”;
- the client had to sign papers (presumably the service transfer contract) simply to “allow (them) to check the meter”; and
- the representatives were “from the government”.

The client never intended to, nor realised she was transferring her utilities service:

*I didn’t know AGL was a company...Otherwise I would say I’m happy with my company...*

It appears that it was the cumulative effect of the representative’s conduct which induced the client into signing the contract.

### **Unconscionability<sup>98</sup>**

The client was looking after her five children, including a “crying baby” at the time of the unsolicited visit.

The client potentially suffered from a power imbalance as the lone female adult present, contracting with two experienced and “pushy” male sales representatives, whilst she also attended to her children.

The client’s recollection of the unsolicited visit indicates she had no understanding of the true nature of the agreement.

### **Unsolicited sales law**

The representatives appeared to breach section 74 of the ACL by failing to adequately disclose the true purpose of the transaction and their true identity.

### **Unfair tactics**

The statements made by the AGL representatives—that they were in fact government representatives—may also give rise to a breach of section 50 of the ACL; that is, by using coercion to procure agreement. The client suggests that her agreement only resulted from her induced belief that the representatives were from the government:

*We trust they (AGL) are (the) government...I though...the government want(ed) to sue TRU Energy.*

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<sup>98</sup> No information is provided on the client’s command of the English language or career or educational background.

<sup>99</sup> TRU Energy was the client’s current provider.

## **CLIENT C:**

### **Misrepresentations/misleading or deceptive conduct**

There are two potential misrepresentations identified from the client's summary, which could also amount to misleading or deceptive conduct are claims that:

- the representative was from the government; and
- the client must sign the papers (presumably the service transfer agreement).

### **Unconscionability**

The client's recollection of events seems to demonstrate she experiences significant language difficulties, which is reflected by the client's failure to understand the nature of the transaction. The presence of unconscionability is made possible by the client's statement to the representative that she "didn't speak English" and that she didn't want him to remain at her residence, which the representative seemingly ignored, if proven.

### **Unsolicited sales law**

Two potential breaches are evident on the facts provided:

- the representative failed to clearly identify himself and the purpose for the unsolicited visit; and
- the representative failed to "leave the premises immediately upon the request of the occupier".

### **Unfair tactics**

The client recalls rejecting the sales advances of the representative at least three times. This included telling the representative that she didn't speak English and wanted the representative to leave. The representative persisted after each rejection, eventually telling the client that she must sign the papers because he was from the government. Such conduct potentially amounts to coercion and/or undue harassment due to the representative's repeated persistence and the feeling of compulsion he subjected the client to by claiming she "must" sign the "government" papers.

### **Explicit informed consent**

On the basis that the client explained to the representative that she did not speak English, it is unlikely that she had competence to enter the contract as she would not have been able to understand the contents of the contract.

If the client was not competent, she could not have provided explicit informed consent.

## **CLIENT D:**

### **Misrepresentations/misleading or deceptive conduct**

Whilst more information is necessary to confirm the misleading or deceptive conduct or misrepresentation, the client indicates that the LUMO representative promised a saving of seventeen percent off the client's current electricity bills. In reality, LUMO bills appear to have been significantly higher than the client's existing bills.



## **Unconscionability**

LUMO Energy did not contract with the client (the mother) who was overseas at the time of the unsolicited visit, but the client's 17-year-old daughter, who is also from a non-English speaking background.<sup>100</sup>

The daughter's age and language background places her in a position of severe disability vis-a-vis the presumably, mature and experienced LUMO representative. Whilst the daughter seemingly understood the nature of the transaction she was entering into, it is nonetheless possible that the circumstances of her age and migrant background could meet the requirements of unconscionability under the ACL.

## **Explicit informed consent**

The Marketing Code states that a minor, which includes 17-year-olds, are generally not to be competent to provide consent to a contract unless the relevant retailer can establish that the preconditions to the validity of such a contract are satisfied. If the client's daughter was not competent, the transaction may not be valid due to lack of explicit informed consent.

## **CLIENT E:**

### **Misrepresentations/misleading or deceptive conduct**

A number of potentially significant misrepresentations or alternatively, potentially misleading or deceptive conduct may have been engaged in by the Red Energy representative, including claims that the representative:

- was from the government;
- was employed to change "electricity boxes";
- was not attempting to change the client's electricity company;
- would make the client's bills lower;
- claimed the paper (presumably the service transfer agreement) needed to be signed so the government could see how many people were receiving a concession; and
- claimed the paper was "like a survey".

## **Unconscionability**

More information is required to make a clear assessment of the presence of unconscionable practices. However, given the client was from a non-English speaking background, was home alone during the transaction and described herself as "sick and very tired", it is possible that the client was cumulatively under a "special disability". From the client's explanation, it is clear she did not understand the nature of the transaction and that together with the use of potentially unfair tactics and deceptive conduct, the representative may have taken advantage of these circumstances to procure the client's agreement

## **Unsolicited sales law**

Two potential breaches are evident on the facts provided:

- the representative failed to clearly identify himself and the purpose for the unsolicited visit; and
- the representative failed to "leave the premises immediately upon the request of the occupier".

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<sup>100</sup> No information is provided in relation to the daughter's command of the English language.

## Unfair tactics

The representative remained at the client's house for more than an hour, despite her insistence that she "didn't want to sign". She described the representative:

*He didn't want to leave. He just want(ed) me to sign.*

The client clearly states that she let the representative into her house and remained in her house as well as ultimately signed the contract because she believed his claim of representing "the government" and that she "just wanted to rest". The representative's refusal to leave, continued persistence and ultimate success in creating a sense of compulsion in the client potentially amounts to both undue harassment and coercion.

## CLIENT F:

### Misrepresentations/misleading or deceptive conduct

A number of potentially significant misrepresentations or alternatively, potentially misleading or deceptive conduct was engaged in by the Red Energy representative, including claims that the representative:

- was from the government;
- was employed by the government to "look at" residences in specific suburbs in order to reduce residents' utility bills;
- could stop the client paying "unfairly";
- would give the client a discount on her current rate; and
- would enable the client to enter into a utilities agreement with the government.

### Unconscionability

The client clearly articulates, at what the law would consider, a "special disability"; namely her inability to understand complex written English.<sup>101</sup>

Such a disability may present a strong case of statutory unconscionability having regard to the relative strengths of the client's bargaining power and her inability to understand the contractual documents.

### Unsolicited sales law

The representative potentially failed to clearly identify himself and the purpose for the unsolicited visit, by claiming he was a government and not-for-profit representative.

## CLIENT G:

Client G describes two separate experiences of unsolicited energy representatives visiting his residence. These experiences will be dealt with cumulatively.

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<sup>101</sup> The client predicted she could understand only 60% of the written contract.

## **Misrepresentations/misleading or deceptive conduct**

The potential misrepresentations and misleading or deceptive conduct experienced by the client include:

- promises of lower bills;
- “convincing” the client that he would save \$300, \$400, \$500 off his bills; and
- Victoria Electricity representing they were from “the government”.

The client’s bills in fact increased substantially after changing energy retailers and Victorian Electricity<sup>102</sup> does not represent any government or statutory body. Such statements are both potentially misleading and deceptive and may amount to common law misrepresentations.

## **Unconscionability**

The client clearly describes that he did not understand the contents of the contract, estimating his comprehension level at less than fifty percent of its contents. The client felt “pressed” to sign the contract and was not given sufficient time to read its contents. The representative only explained “the main points” to the client. The client’s description of the contract “negotiation” appears to meet all three relevant factors under the statutory prohibition of unconscionable conduct.<sup>103</sup> Given the client’s English comprehension difficulties, the pressure exerted on the client to sign and the client’s relatively weak bargaining position, the presence of statutory unconscionability is likely.

## **Unsolicited sales law**

Two potential breaches of unsolicited sales provisions have occurred, including:

- conducting unsolicited sales outside the permitted hours (the client recalls the visit occurred after 6pm), and
- failing to adequately disclose the true purpose and identity of the representative (instead claiming the representative was ‘from the government’ and only ‘following accounts’, not attempting to sell electricity).

## **Unfair tactics**

As previously mentioned, this client describes on numerous occasions how, in his experience representatives:

*Are always pressing, pressing for you to sign...(they) push, push...they want to get you to sign the contract by any means...always they push.*

Whilst more information is required to make a clear determination, on face value such a description arguably raises the possibility of conduct amounting to harassment and/or coercion.

## **CLIENT H:**

### **Misrepresentations/misleading or deceptive conduct**

Client H was promised a twelve percent discount and, seemingly, significant savings on her electricity bill which induced her to enter the new supply contract with AGL. The client’s bills in fact significantly increased after she changed retailers.<sup>104</sup> Such circumstances potentially breach the ACL prohibitions on misleading or deceptive conduct and misrepresentations.

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<sup>102</sup> Victoria Energy also trades as “LUMO Energy”

<sup>103</sup> See section 21(2) of the ACL

<sup>104</sup> It should be noted that the client’s concession entitlement was not being applied to her AGL bill. If this was the cause of the higher bill or failure to achieve the promised discount, no misrepresentation or misleading or deceptive conduct would be found.

## **Unconscionability**

The client has an obvious limited grasp of the English language. Her participation in this project relied on an interpreter, whilst the client also relied on her 16-year-old son to interpret the explanations given by the AGL representative. When the client was requested to confirm her details by phone to AGL, presumably to confirm the acceptance of the contract, she explained to the operator “I don’t understand” to which the operator relied “don’t worry”. The client is at an obvious and significant “special disability” in that she is unable to understand the contractual documents and telephone confirmation requirements and is relying on her 16-year-old son to interpret complex energy supply and financial information. Such circumstances possibly amount to unconscionable conduct on the part of the representative. Furthermore, it was also potentially overtly unconscionable for the representative to connect the client with the operator without the assistance of a translator despite her previous difficulties and for the operator to then dismiss the client’s concern that she “didn’t understand” the contents of the telephone confirmation and proceed with the transaction.

## **Unsolicited sales law**

The client explains that at no time did the AGL representative explain that she could “change her mind” or end the agreement. If proven, such conduct may breach section 76 of the ACL which provides that representatives:

*must provide the prospective consumer with written information relating to their rights of termination...*

## **Explicit informed consent**

The client’s limited ability to speak English and reliance on her 16-year-old son for interpreting, suggests that she did not have competence to enter the contract, a requirement for explicit informed consent.

## **CLIENT I:**

Client I describes two separate experiences of unsolicited energy representatives visiting his residence. These experiences will be dealt with cumulatively.

## **Misrepresentations/misleading or deceptive conduct**

The client recalls a number of potentially significant misrepresentations and potentially misleading or deceptive conduct undertaken by the two Neighborhood Energy representatives, including that:

- provision of electricity for all public housing residents was being “switched to Neighbourhood Energy”;
- the client “had to sign papers”; and
- the representatives acted as if the client had “no choice”.

Such claims were false and, if proven, were seemingly calculated to deceive the client, inducing her to agree to the contract.

## **Unconscionability**

Client I emphasises in general terms, the vulnerability and negative power dynamic she experiences when (generally male) “door-knockers” attend her residence. Whilst no specific circumstances give rise to unconscionable conduct, Client I’s story emphasises the potential for unconscionable conduct to occur.

## **Unsolicited sales law**

Section 75 of the ACL was potentially breached by the Red Energy representative who refused to leave after the client’s request. The client resorted to asking a neighbour to intervene and demand the representative leave.

## **Unfair tactics**

The above conduct also potentially amounts to undue harassment in that it involved “applying repeated pressure” to the client who was under no pre-existing obligation to acquire the services of Red Energy.

### **CLIENT J:**

#### **Misrepresentations/misleading or deceptive conduct**

The Simple Energy representatives potentially engaged in a number of misrepresentations and misleading or deceptive conduct in that:

- they represented they were “the government”;
- the told him “Simple Energy is the same company as Origin”;
- “the government want(ed) to change the light (bulbs)”;
- and the client must sign the “form” (presumably the service transfer contract) to change the light bulbs.

In truth, the form appears to have been a service transfer contract in favour of Simple Energy. Such misrepresentations may breach the ACL as they would be likely to induce a reasonable person in the client’s position into believing they were compelled to sign forms in order to receive new light bulbs from the government.

#### **Unconscionability**

Client J also emphasises the vulnerability felt by himself and other migrants in his position, in that such people have limited ability to understand who these representatives are, whether or not they are being truthful and what the purpose was for their visit. It is likely that such factors were key in altering the power dynamic between the client and the representative and allowing the representative to dupe the client into signing a transfer agreement he was wholly unaware of. Together with such calculated malice, this conduct would possibly breach prohibitions on unconscionable conduct at common law and statute.

### **CLIENT K:**

#### **Misrepresentations/misleading or deceptive conduct**

Client K was induced into transferring her electricity supplier based on a promise eighty percent reduction in her electricity bills. No information is provided that would prima facie substantiate a claim of misrepresentation or misleading or deceptive conduct; however, the size of the promised discount does raise the potential of the representative embellishing, misrepresenting or deceiving the client by promising such a large discount.

#### **Unconscionability**

The client was alone with her children at the time of the visit. Her recollection of the events clearly illustrates the client’s limited grasp of written English. Both the representative’s and telephone operator’s failure to explain the contract and insistence to the client to simply “sign” or “say yes” to the contract may amount to unconscionable conduct. Language difficulties are considered a “special disability” which was overtly brought to the representative and the operator’s attention, to which they responded by taking advantage of the disability to procure the client’s agreement. If proven, unconscionability would likely be established.

## **Unfair tactics**

Client K recalls the representative stayed at her premises for two hours. It appears the client on numerous occasions unsuccessfully attempted to persuade the representative to leave. The client's recollection certainly gives the impression that she felt "tired out" or "worn down" by the representative's persistence. Such conduct, if proven would meet the undue harassment test under section 50 of the ACL.

## **Unsolicited sales law**

The client states she was unable to terminate the agreement when she called the Australian Power and Gas Company, with the company claiming she must wait "two years". Such claim, if it occurred within the statutory cooling-off period (ten days) is illegal; however no facts are provided to confirm the time of the client's attempt to terminate the agreement.

## **Explicit informed consent**

The client indicates that an interpreter should have been provided, suggesting that she may not have been competent to enter into the contract transacting in English, as she would be unlikely to understand the information provided by the retailer.

### **CLIENT L:**

## **Misrepresentations/misleading or deceptive conduct**

The client was promised a discount between ten percent and seventeen percent off her current electricity bills. Such a discount never eventuated; instead, the client experienced a significant increase in her bills. If substantiated such conduct would amount to a common law misrepresentation of fact and also potential misleading or deceptive conduct.

### **CLIENT M:**

## **Misrepresentations/misleading or deceptive conduct**

The client was promised a discount ten percent off his current electricity bills. In reality, the client experienced a significant increase in his bills (despite being overseas for large amounts of time). If substantiated such conduct would amount to a common law misrepresentation of fact and also potential misleading or deceptive conduct.

## **Unconscionability**

Client M is in his seventies and required a translator to participate in this project. He describes both he and his partner as "scared" to be alone and a shared distaste "when companies knock on the door". Despite the client's limited grasp of written and spoken English, he signed the contract for a new electricity retailer after his adult son translated the representative's explanation.

Unlike client D, the use of an adult son as a translator in these circumstances may not be unconscionable and may even be seen as an effort to address to "special disability" relating to the client's language difficulties. However, significant weight should be attached to the fact that the client had:

*No idea what [the contract] says...[the client] couldn't read anything...[and that] the [representative] didn't really explain.*

It is doubtful that such a significant disability would be negated by the client's son interpreting presumably not the contractual terms, but the representative's "sales pitch".

Given the special disability, the significant power imbalance between the client and the representative and the client's complete inability to comprehend the agreement; the representative's conduct is potentially unconscionable.



## **Explicit informed consent**

There is some question as to whether, because the fact that the client could not speak English, he was competent to enter the transaction. Although his son interpreted, the client's statement that he had "no idea what (the contract) says" suggests that he may have lacked competence and could not provide explicit informed consent.

### **CLIENT N:**

Client N describes two separate experiences of unsolicited energy representatives visiting his residence. These experiences will be dealt with cumulatively.

## **Misrepresentations/misleading or deceptive conduct**

Potential misrepresentations or misleading or deceptive conduct includes statements which:

- purported to offer a fifty percent discount of the client's current electricity bills; and
- claimed the representative was "from the government".

Both statements were misrepresentations of the true factual circumstances. The client has indicated that it was the promised fifty percent "discount" which induced her into signing the contract, a clearly reasonable course of action to take. It is likely, therefore, that such statements may also amount to misleading or deceptive conduct.

## **Unconscionability**

Client N's command of the English language is unclear from the summary provided. It is noted, however, that she was unable to understand the questions being asked by the telephone operator during the confirmation process:

*I just say yes, yes even because questions are not clear...*

If the client's inability to understand English was overtly obvious, as in previous cases, it may have been unconscionable for the representative to continue the transaction without giving the client the opportunity to seek third party assistance, such as an interpreter to understand the contents of the agreement. Arguably, the inequality of bargaining power (alone, migrant from a non-English speaking background) and a failure to comprehend the contract documents would potentially nonetheless establish unconscionable conduct.

## **Unsolicited sales law**

The client is adamant that no termination information was provided to her. If proven, such a failure is a breach of the ACL (duty to inform the person of termination periods, etc). If proven, misrepresenting that the representative was from "the government" is also a breach of the ACL (duty to disclose purpose and identity).

### **CLIENT O:**

Client O's summary provides limited information to which a legal analysis can be applied.

It appears Client O's interaction was in relation to the possible installation of a "Smart Meter" and did not involve any attempted sale or contractual negotiation.

Client O does note, however, that she generally experiences "door-knockers" at night. Should this occur after 6pm, such representatives will be in contravention of the ACL (permitted hours of negotiation).

## **CLIENT P:**

### **Misrepresentations/misleading or deceptive conduct**

The representatives made a number of statements later proven to be false, including that:

- the representatives were from the government;
- the representatives were also from Centrelink;
- the representatives were to give the client a discount;
- the government had a “program for single parents”; and
- the client had been “approved” for this program and its benefits.

If proven, a reasonable person would have a real chance of being induced into signing service transfer contracts by the cumulative effect of these statements. Such a cumulative effect would also create a strong case of the representative’s intention to mislead or deceive the client. As these statements are factually and fraudulently erroneous, they may also potentially amount to misrepresentations at common law.

### **Unconscionability**

Client P emphasises her feeling of vulnerability as a lone woman who was approached late at night by two male representatives. She describes being preoccupied with her “crying baby” and alludes to feelings of tiredness. Such factors combined with the client’s migrant and non-English speaking background and the tactics used to procure her agreement (that being the misrepresentations and misleading or deceptive conduct described above) may give rise to a claim of unconscionable conduct subject to confirming the client’s English language ability and level of comprehension of the contract.

### **Unsolicited sales law**

Client P recalls the representatives visited her residence at 8pm. If proven, this is a clear contravention of the ACL (permitted hours of negotiation). If it is substantiated that the representative failed to accurately describe his purpose or identity, such conduct would breach the ACL.

## **CLIENT Q:**

Client Q recalls her husband’s experience of dealing with an unsolicited energy representative while she was present.

### **Misrepresentations/misleading or deceptive conduct**

Client Q’s husband was seemingly induced into signing the contract and confirming his agreement by telephone to an operator based on:

- a promise given by the representative of a twenty percent reduction in electricity bills; and
- that the representative was from AGL (Client Q’s current electricity provider).

It is unclear which company the representative was from, although it is established that a transfer of service agreement was completed by the client in favour of a third party.<sup>105</sup> Notwithstanding this fact, the promised reduction was never forthcoming, arguably a common law misrepresentation and potentially also misleading or deceive conduct have occurred.

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<sup>105</sup> It is possible that such a company could be a subsidiary of AGL

## **Unconscionability**

The case study indicates that the client did not understand the nature of the contractual documents and that he relied on the advice of the representative in completing the transaction, as described above. Unconscionable conduct could therefore be potentially established.

## **Unsolicited sales law**

Failing to accurately describe the purpose or identity of the representative and her visit, if proven would breach the ACL.

## **Explicit informed consent**

In order to demonstrate explicit informed consent, the Marketing Code requires the sales representative to disclose in plain English all matters relevant to the consent of the consumer, including each specific purpose and use of the consent. Client Q describes how the representative “prepared” her husband for the telephone confirmation call, by writing down which questions he should reply yes and no to. This conduct, if proven, would suggest that the representative did not disclose all matters relevant to the consumer’s consent.

## **CLIENT R:**

Client R recalls generally a number of door-knocking experiences. The client is very self-aware and describes himself as “never signing forms”.

## **Misrepresentations/misleading or deceptive conduct**

Client R describes that the main reason provided by representatives for visiting residences is to “fix” the electricity box in his house, despite the client not having any issues with electricity supply or requesting any assistance. The representatives’ conduct in such circumstances is likely to “induce” a reasonable person into erroneous belief that they are bound by reason of personal safety, concern or company requirements agree to the representative’s demands.

If such visits were in fact, for the purpose of unsolicited sales, such conduct could be contrary to the ACL.

## **Unsolicited sales law**

Client R also states that it is common for representatives to fail in adequately describing their purpose for visiting and employer. Failing to accurately describe the purpose or identity of the representative and his visit, if established, would breach the ACL.

## **Explicit informed consent**

Client R states that he “doesn’t speak English” and “it’s (contracting) is so hard to understand”. These matters would indicate that he lacks the competence necessary to provide explicit informed consent.

## **CLIENT S:**

## **General analysis**

Client S describes an occurrence of door-knocking experienced by his wife. He does not provide sufficient detail to provide a legal analysis of potential breaches of law. However, the client does make clear that his wife understood she was changing electricity suppliers and did so based on a promised “cheaper” rate. After changing suppliers, the client’s bills in fact increased. More information is required to assess whether such conduct amounts to a misrepresentation or deceptive or misleading conduct.

Subject to more information regarding the client’s wife’s literacy, unconscionability and explicit informed consent may also be relevant legal issues.

**CLIENT T:**

No summary was provided.

**CLIENT U:**

Client U describes a “typical” door-knocking experience.

**General analysis**

Client U states that some representatives say they are “from the government” with many promising large or greater discounts than the client is currently receiving. Such claims have been canvassed in previous analyses and, if proven false, breach misrepresentation, misleading or deceptive conduct and unsolicited sales provisions (failure to disclose identity).

In general terms, the client describes the persistence of some representatives in the face of her refusal to accept their requests to show bills or sign the contract:

*They won't take no for an answer.*

Such conduct, if confirmed by subsequent information, could amount to undue harassment if the conduct amounted to “repeated pressure”.

**CLIENT V:**

Client V describes, in general terms, a disturbing encounter with an electricity supplier.<sup>106</sup>

**General analysis**

After being approached by two representatives attempting to solicit the client’s electricity supply contract, the client explained she would not be interested in changing service providers. However, she soon began receiving bills, in the name of her 14-year-old child, with the company who attempted to solicit her business. Both the client’s original provider and subsequent provider told the client that she “had changed” providers. It is unclear as to whether the representatives falsely completed the transfer documents themselves or in fact, contracted with the client’s 14-year-old child. In any event, under these circumstances it is unlikely the client would be under any contractual obligations, either by reason of:

- explicit informed consent – as a minor, it is unlikely that the child will have the competence to enter into an agreement; or
- unconscionability – it is potentially unconscionable to contract with a 14-year-old child for non-necessitous goods or services where the child’s guardian has specifically rejected those services.

**CLIENT W:**

Client W describes three door knocking experiences. These will be analysed cumulatively.

**Unsolicited sales law**

Client W states that she explained to the representative that she didn’t speak English “well enough to talk to them ... that she didn’t want to change energy companies” and felt “that the energy representative was not listening to her and wouldn’t leave”. If the client explicitly told the representative to leave and he failed to do so immediately, the representative would potentially have breached the ACL.

On a separate occasion, the client explains that she was visited by energy representatives at 8pm. If proven, this visit falls outside the permitted hours under the ACL.

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<sup>106</sup> The client is unsure whether the supplier was Australia Energy or Australia Power and Gas

## **Unfair tactics**

The conduct described above could also amount to undue harassment, that being “repeated pressure” applied to the client who was under no obligation or desire to change energy companies.

### **CLIENT X:**

Client X was approached by One Energy and signed transfer papers in favour of One Energy. She was subsequently visited by her original provider, TRU Energy.

#### **Misrepresentations/misleading or deceptive conduct**

The client was induced into signing the original transfer agreement by promises of discounts of twenty percent. No information is provided as to whether such discounts were forthcoming. If the discounts never eventuated, a potential claim of misleading or deceptive conduct or a common law misrepresentation is likely, due to the client’s inducement.

The TRU Energy Representative also potentially mislead and attempted to deceive the client by stating that the client “ha(d) to change back (to TRU Energy)...you must (change back)”. Such claims are false and, if proven, may contravene the ACL. With further clarifying information, this conduct may potentially also amount to undue harassment under the ACL, being “repeated pressure” to a person who under no pre-existing obligation.

#### **Unconscionability**

The client’s English language skills are not strong. She stated that “I only understand a few things”. It is likely that the client would be held to be under a “special disability”. Furthermore, the client did not understand the nature of the transaction:

*I thought (the representative) must be from the government.*

It is likely that in these circumstances a court would find it was unconscionable for the representative to pursue contractual negotiations in light of the client’s obvious language difficulties and failure to comprehend the nature of the transaction.

#### **Explicit informed consent**

Client X describes that, due to her limited English comprehension, she did not understand the nature of the transaction or the nature of the form that she signed. Given she was not capable of understanding there is a likelihood that she did not have competence to provide explicit informed consent.

### **CLIENT Y:**

#### **Misrepresentation/misleading or deceptive conduct**

The representative told the client he was “from the government”. If substantiated, such a claim is a fraudulent misrepresentation and potentially an attempt to mislead or deceive the client contrary to the ACL.

#### **Unconscionability**

The client’s case presents a potential example of unconscionable conduct. He had only been in Australia for a matter of weeks, after arriving from a refugee camp. The client describes himself as “not knowing any English at all” and “not knowing anything (about Australia or energy arrangements)”.

Client Y relied on the advice of a neighbour in signing the documents. At no stage did he understand the content of the documents or, seemingly, the nature of the transaction:

*(The representative) did say he was from the government.*

The client explains how, during the telephone confirmation call, the representative told the client:

*When I say yes, you say yes, when I say no, you say no.*

Such conduct potentially amounts to unconscionability due to the client's:

- inability to demonstrate any reasonable grasp of the English language;
- complete lack of understanding of the contractual documents and transaction and;
- the tactics of "instructing" the client's agreement during the telephone confirmation.

### **Explicit informed consent**

Given the client has no understanding of English, he will not be in a position to understand information provided by the retailer and thus would not be considered competent to enter into a contract.

### **CLIENT Z:**

### **Unconscionability and explicit informed consent**

Client Z's experience with the TRU Energy representative mirrors the experience of Client Y.

Client Z was home with her children and describes herself as not understanding who the representative was, why he was attending her residence or the contents of the documents the representative "told" her to sign. The client acknowledges significant issues with her English language skills:

*Whatever (the representative say) I don't understand...I don't understand why he was there.*

The client also explains how, during the telephone confirmation call, the representative told the client:

*When I say yes, you say yes, when I say no, you say no.*

Such conduct, if substantiated, is potentially unconscionable, due to the client's:

- inability to demonstrate any reasonable grasp of the English language;
- complete lack of understanding of the contractual documents and transaction and her specific statement to the representative that "I don't want...(to sign the papers)"; and
- the tactics of 'instructing' the client's agreement during the telephone confirmation.

It also demonstrates that the client would not be considered competent to enter into a contract.





