Consumer, Building and Occupational Service

PO Box 56

Rosny Park TAS 7018

5th May 2020

Re: Consumer Rights and Protection under the Australian Consumer Law

To whom this may concern,

On the 28th of February 2020, my migration agency lodged a complaint letter to Engineers Australian in attempts to resolve my issue with their service.

Unfortunately, my complaint was rejected on the 19th of March 2020. I personally believe that my rights under the Australia Consumer Law have not been upheld.

As result, I am now lodging a complaint with you (the Consumer, Building and Occupational Service) in attempts that my issue is resolve.

I have attached their legal analysis below.

I look forward for your response regarding my complaint.

Kind Regards,

Jipal Pooja

Application of the Australian Consumer Law and Background

On the 3rd of October 2019, the applicant (Ms Pooja Jipal Shah, EA ID 5707881) received the result for her Migration Skills Assessment Competency Demonstration Report application (application ID: 253292). It was identified by Engineers Australia (EA) that the applicant *allegedly* plagiarised the submitted documents in support of her Migration Skill Assessment. As a result, the application was rejected, and a twelve-month ban was imposed.

Within this letter, we will address consumer protection with regards to the applicant. Since EA is an Australian company and provides its service in Australia, the jurisdiction applicable will be the law of Australia. The *Australian Consumer Law 2010* (Cth) ('the Act', embedded in schedule 2 of the *Competition and Consumer Act 2010* (Cth)) is the agreed Federal statute within Australian States and Territories for consumer protection.

For the Act to be applied to the applicant, certain thresholds that must be satisfied. The thresholds are; the applicant must be a '*consumer*', the '*consumer*' must have '*acquired*' the '*service*' and must be within the course of '*trade and commerce'*. Once these are all satisfied, the applicant is entitled to consumer protections under the Act. See below for a discussion of these thresholds.

Definition of a Consumer

The definition of a "*consumer*" is under section three of the Act. A "*consumer*" is an individual who has "*acquired*" a "*service*" with the "*amount paid or payable*" not exceeding forty thousand dollars ($40,000). To '*acquire*' a service is to '*accept'*. The individual must have also acquired the service "*ordinarily… for personal, domestic or household use or consumption*".

The term '*ordinarily use*' is discussed by Judge Young in the Federal Court case of *Bunnings Group Ltd v Laminex Group* [2006] 862 (2 June 2006) at [77]-[113]. Whilst it discusses *'ordinarily… for personal, domestic or household use or consumption'* from the *Trade Practice Act* 1974 (Cth), the same wording is used. Thus, its application is relevant here.

The case defines '*ordinarily*' and refers it to the terms of '*commonly*' or '*regularly*'. It distinguishes it from the terms of '*principally*', '*exclusively*' or '*predominately*'.

It also uses a reference from the Lindgren J in *Clean Investments,* at [92]-[23] with regards to "*personal, domestic or household use or consumption*":

> *For example, an architect's stool, an office chair and a kitchen stool or chair may be described as "stools" or "chairs" and their purpose as being "to provide seating". Yet it would be wrong to conclude that the architect's stool or the office chair is of a kind ordinarily used for household purposes for no other reason than that, like the kitchen chair, it is ordinarily used for the purpose of providing seating.'* [at 82].

Concerning the applicant, they sought a skill assessment from Engineers Australia on the 15th August 2019 and had paid $1,192.40. A migrant personally needs to undergo a skill

assessment if they wish to use the pathway of residency for skilled migration. It is one of the application requirements. Thus, the applicant used the service of Engineers Australia to fulfil this requirement. It is for the applicant's *personal* gain. Consequently, the service obtained by Engineers Australia would ordinarily be used for "*personal*" means.

Definition of a Service

Section two of the Act provides an inclusive definition of "*services*". It includes:

"*any rights (including rights in relation to, and interest in, real or personal property), benefits or facilities that are, or are to be, provided, granted or conferred in trade and commerce and without limiting paragraph (a), the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under:*

(i) a contract for or in relation to the performance of work (including work of a professional nature), whether with or without the supply of goods;"

The Macquarie Dictionary defines '*provided*' and refers to it as "*to supply*". Engineers Australia provided a service to the applicant to perform a skills assessment. Terms and conditions are presented to applicants when filling an online application form for the service. Thus, the definition of a '*service*' is satisfied.

Definition of Trade and Commerce

One of the main requirements for the Act is that the events must have occurred with the definition of *'trade and commerce'*. Defined under section two of the Act, it is the "*trade or commerce within Australia or between Australia and places outside Australia*". The applicant had sought EA to conduct an engineering skills assessment. EA is an Australian organisation. It operates its business in Australia. As a result, EA's service to the applicant fits within the definition of *'trade and commerce'*.

Definition of Supply

Supply is also utilised in the sections of Act. It is defined under section two of the Act. "*In relation to service…*" it is to "*provide, grant or confer*". As per the Act, the words 'supplied' and 'supplier' have the same meaning. In relation to the facts, EA had '*provided*' a service to the applicant in regards of conducting a skill assessment.

Since the requirements are met, the Act is applicable to the applicant. The applicant should be entitled to the rights and obligations of the Act.

Consumer Protection and Rights

Unconscionability Conduct in Connection with Services

Section 21 of the Act precludes "*unconscionable conduct…in trade and commerce in connection with the supply of... services*". It prevents a 'person'. A person under the Macquarie Dictionary is a '*human being, as distinguished from an animal or a thing'*. Since EA operates on *human* employees, this restriction applies to EA.

Section 22 of the Act provides examples of what is deemed to be *'unconscionable conduct'* under section 21. The related example to the applicant under subsection (a) is

'the relative strength of the bargaining position of the supplier and the customer.'

With the applicant's case, EA had provided its service towards the applicant for a skill assessment. EA is the sole, non-government run, skill assessment body for engineering in Australia. It has a monopoly over the skill assessment engineering market. Migrants that wish to seek their residency here through skilled migration, in particular, their engineering skills, are compelled to adhere to the required skill assessment body of EA. Thus, if they wish to seek their residency through skilled migration, migrants have no choice but to agree to any declarations, terms and/or conditions that EA imposes.

EA has a declaration that imposes a twelve-month ban for providing false or misleading documentation. There are numerous repercussions of a twelve-month ban. The consequences of the ban to the applicant include but are not excluded to:

- **Age increase**: The absolute cut off for General Skilled Migration visa (189, 190 and 491) is 45 years old. If an applicant applies at the age of 44 years old and receives a 12-month ban, their chances for a skilled migration outcome is lost. Additionally, each age group is awarded certain points. The closer the applicant's age to 45 years old, the fewer points the applicant will receive.
- **Employment Status**: Without a valid visa, the applicant is unable to work legally in Australia. The impact of this will not only be a loss of income or an inability to financially support themselves, but a loss of a key requirement of working in the position in Australia.
- **Forced to Leave Australia**: An applicant's visa may expire during the twelve-month ban and as a result, may be forced to leave. There are set requirements for a General Skilled Migration visa. Applicants must be working and living in a designated area and leaving may be detrimental their chances of receiving a skilled migration visa. It is for that reason that applying offshore rather than onshore is more difficult. Furthermore, an applicant would have to pack up their belongings and give up the life they had established. This can also impact the applicant emotionally.

As seen above, all of these factors can be severely detrimental to an applicant's eligibility by reducing their points for residency. Understandably, these declarations may be imposed to ensure adherence towards the requirements of EA. However, it is important to reiterate the fact that EA dominates the market. The disparity of power between EA and the applicant is fairly substantial. Thus, to enforce such a harsh penalty in a monopolised market, with EA having most of the bargaining power is unconscionable.

Rejection Letter

Furthermore, within the rejection letter, there was no mention to *exactly what* document was plagiarised. It mentioned that '*some of the submitted documents in support of Migration Skill Assessment are misleading*'. When conducting a review process, it is important the applicant receives all the information – receiving full information helps the applicant formulate their response and how to prepare or proceed with their review. The decision given to the applicant was vague and did not provide the applicant with the relevant information needed for her to conduct a response fairly. No exact document or career episodes were identified to the applicant as being plagiarised. As a result, the applicant's ability to adequately defend herself against the claims was impacted. From a reasonable person's point of view, the information provided is not substantial enough and as a result, close to impossible to address. Thus, EA not disclosing the extent of the '*misleading*' documents is unconscionable.

Private and Confidential

Along with the twelve-month ban imposed on the refusal letter, a warning was included:

> "*We advise that relevant information about your case may be passed on to the Department of Home Affairs for further investigation*."

It is conceivable that the applicant agreed to this declaration. However, as seen above, the applicant is left with no choice but to agree to the terms and declarations set by EA if they wish to be granted a skilled migration visa.

Concerning the applicant's case, there is no mention of what will be passed on or whether it will be passed on. In substance, it is a 'threat' to the applicant. It induces fear as the repercussions of the Department being informed of any information may cause:

- A reduction to the applicant's chances of receiving a skilled migration visa;
- A refusal of the applicant's visa application.

Without providing the full extent of information that may be potentially released to a third party is unconscionable. It is an abuse of power. It is for that reason, that the conduct of EA threatening the possibility of the information being disclosed to a third party is unconscionable.

Unfair Contract Terms

Declaration or Term

Under EA's declarations, it holds a twelve-month ban as a consequence of providing false or misleading documentation. Applicants must tick this declaration before proceeding to payment on the online application form. While it is listed as a declaration, it is a term in substance.

The '*declaration*' states:

> *I understand that providing false or misleading documentation is an offence that would lead to the rejection, notification to the DIBP and a 12 month ban from applying to Engineers Australia for any products or service (if appropriate).*

The Macquarie Dictionary demonstrates a clear distinction between a declaration and term through its definitions

A '*declaration*' is "*proclamation*". '*Terms*' are "*conditions or stipulations limiting what is proposed to be granted or done*".

Imposing a twelve-month ban is a condition derived from a consequence. It has a cause and effect. It is contingent on not complying with a requirement. It is not a declaration or a proclamation. It is analogous to a failure to comply with a requirement within a contract, for example, a gym membership, there are conditions and consequence.

Concerning the case, applicants must agree with the 'declaration' before proceeding. Thus, the twelve-month ban is, seen in this context, a term and not a declaration.

Unfair

Stipulated under section 23 of the Act, a term within a "*consumer contract will be void if the term is unfair and the contract is a standard form contract*". A "*consumer contract*" is a "*supply of service*". As seen above, EA had supplied a service to the applicant for a skill assessment. Thus, there is evidence of a consumer contract.

For a contract term to be deemed *unfair* under the Act, it must meet the requirements under section 24 of the Act. The term must;

- *Cause a significant imbalance in the parties' rights and obligations arising under contract; and*
- *Not be reasonably necessary in order to protect the legitimate interest of the party who would be advantaged by the term; and*
- *Cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.*

The Federal Court of Australia interpreted the meaning of *'significant imbalance'* in the case of *ACCC v CLA Trading Pty Ltd* [2016] FCA 377 [at 54].

> *"the "significant imbalance" is met if a term is so weighted in favour of the supplier as to title the parties' rights and obligations under the contract significantly in its favour – this may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of disadvantageous burden or risk or duty."*

As seen above, EA controls and operates the market for skill assessments of engineers. Applicants have no choice but to agree to the terms set by the body if they wish to seek skilled migration residency. Given that there are no alternatives, this causes a significant imbalance of power between EA and applicants.

Furthermore, EA is an established organisation. It holds knowledgeable employees who are educated. It is not reasonably necessary for its interest to be protected. Migrants who seek their service are reliant on organisations to not impose such harsh terms.

Lastly, the ramifications or consequences of imposing the twelve-month ban are immeasurable. As seen above, factors such as an applicant's age can change within twelve months. Age is a factor when assessing or determining points. If an applicant is banned for twelve months and on the verge of a cut-off age, the ban has severely impacted their overall eligibility for a visa application.

Furthermore, embedded in section 25 of the Act are examples of unfair contract terms within consumer contracts. In particular, subsection (c) states that:

> *"A term that penalises, or has the effect or penalising, one party (but not another party) for a breach or termination of the contract."*

As seen numerous times above, the twelve-month ban impacts an applicant's chances of residency in Australia. Given that the twelve-month ban solely penalises one party (the applicant) for breach of the term, it clearly fits within one of the examples listed in section 25 of the Act. Thus, the term is an "*unfair contract term*".

<u>Summary</u>

As seen above, the applicant satisfies the requirements under the ACL. Thus, the applicant is entitled to consumer protections under the Act. A summary outlining the protection rights as a consumer are as follows:

- **Unconscionable Conduct:** EA is the sole, non-government run, skill assessment body for engineering in Australia. It has a monopoly over the skill assessment engineering market. Migrants that wish to seek their residency here through skilled migration, in particular, their engineering skill, are compelled to adhere to the relevant skill assessment body being EA. If they wish to seek their residency through skilled migration, migrants have no choice but to agree to any declarations, terms and/or conditions that EA imposes. The skill assessment is a requirement for skilled migration, and Engineers Australia is the sole organisation providing their service for Engineers.

Engineers Australia imposes a twelve-month ban for providing false or misleading documentation. The disparity of power between the EA and the applicant is fairly substantial. Thus, to cause such a harsh penalty in a monopolised market, with EA having most of the bargaining power is unconscionable. As seen in the consequences above, a twelve-month ban has the power to impede on an applicant's migration outcome. It is not proportional. Thus, imposing such a ban in a monopolised market is unconscionable.

Furthermore, EA did not provide any specific details as to what was *allegedly plagiarised* to the applicant. This made it difficult for the applicant to prepare an adequate response to the allegations. Not providing vital and crucial information is unconscionable.

Finally, a threat of the potential release of information to the Department without knowing the full extent is unconscionable. An applicant has a right to know exactly what details are to be passed on, so a fair and equal right of response can be prepared.

- **Unfair Contract Terms:** While it is a declaration in form, the twelve-month ban is a term in substance. As a result, EA is restricted from imposing unfair contract terms under section 23 of the Act.

  Section 24 of Act underlines what is meant by an '*unfair*' term:

  - *It would cause a significant imbalance in the parties' rights and obligations arising under contract; and*
  - *It is not reasonably necessary in order to protect the legitimate interest of the party who would be advantaged by the term; and*
  - *It would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.*

  The Federal Court of Australia interpreted the meaning of *'significant imbalance'* in the case of *ACCC v CLA Trading Pty Ltd* [2016] FCA 377 [at 54]:

  > *"the "significant imbalance" is met if a term is so weighted in favour of the supplier as to title the parties' rights and obligations under the contract significantly in its favour – this may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of disadvantageous burden or risk or duty."*

As seen above, EA controls and operates the skill assessments for engineers. Given that there are no alternatives, this causes a significant power imbalance between EA and applicants. Furthermore, EA is an established organisation. It holds knowledgeable employees who are educated. It is not reasonably necessary for its interest to be protected. Migrants who seek their service are reliant on organisations to not impose such harsh terms.

Section 25 of the Act holds an example of what are "*unfair contract terms*". It is a

> *"A term that penalises, or has the effect or penalising, one party (but not another party) for a breach or termination of the contract."*

As seen in numerous times above, the twelve-month ban impacts an applicant's chances of residency. Given that the twelve-month ban solely penalises one party (the applicant) for a breach of the term, it clearly fits within one of the examples listed in section 25 of the Act. Thus, the term is an "*unfair contract term*".

Thus, EA has breached and impeded the rights of applicants under the Act. Furthermore, our office has received evidence that EA only issued a warning to another male applicant of the CDR skill assessment process that a 12-month ban may be applied, but was not applied. This demonstrates a discrimination process towards our client, a female applicant. Please outline what guidelines are in place that determines whether an assessor issues a warning rather than issuing a 12-month ban.