



27 May 2016

Consumer Affairs Australia and New Zealand
c/o Treasury
Langton Crescent
PARKES ACT 2600

Dear Sirs/Madam,

2016 Australian Consumer Law Review

The Consumer Credit Legal Service welcomes the opportunity to comment on the consultation questions on the operation of the Australian Consumer Law (**ACL**) as outlined in the ACL Review issues paper. We have also included the views of Gosnells Community Legal Centre, a partner Community legal centre (**CLC**).

Our submission addresses the several issues and questions raised in the issues paper and broken into the following sections. The relevant sections of the ACL Issues Paper are quoted in brackets for ease of reference.

1) About CCLSWA

2) Structure and Clarity of the ACL (2.1 of the issues paper)

2.1 Is the structure of the ACL easy to understand and navigate? Are there aspects that could be improved? (Question 5 of the Issues Paper)

3) General Protections of the Australian Consumer Law (2.2 of the issues paper)

3.1 Are the ACL's general protections working effectively? Do they address the risks of consumer and business harm without imposing disproportionate or unnecessary costs on businesses? (Question 8 of the Issues Paper)

3.2 Are there any changes that could be made to improve their effectiveness, or address any of the issues raised in section 2.2? Are there any gaps that need to be addressed? (Question 9 of the Issues Paper)

3.2.1 Should there be greater guidance as to the meaning of "unconscionable" conduct?

3.2.2 Should the regulator have powers to prosecute violators of the Unfair Contract Terms scheme?

4) The Australian Consumer Law's specific protections (2.3 of the issues paper)

- 4.1 Are there any changes that could be made to improve their effectiveness, or address any of the issues raised in section 2.3? Are there any gaps that need to be addressed, or overseas models that could provide a useful guide? (Question 11 of the Issues Paper)
 - 4.1.1 Disclosure of rights and cooling off period for sales of extended warranties and add-on insurance
 - 4.1.2 Should consumer guarantees be extended to include architects, engineers and financial services?
 - 4.1.3 The disclosed purpose test in consumer guarantees about goods and services
 - 4.1.4 What constitutes reasonable time to supply goods particularly when the goods are promised to be delivered by a certain date?
- 4.2 Does the ACL need a 'lemon' laws provision and, if so, what should it cover? (Question 12 of the Issues Paper)
- 4.3 Should the ACL prohibit certain commercial practices or business models that are considered unfair? (Question 15 of the Issues Paper)
- 5) Effectiveness of remedy and offence provisions (3.2 of the Issues Paper)**
 - 5.1 Are the remedy and offence provisions effective? (Question 19 of the Issues Paper)
 - 5.1.1 Lack of knowledge and awareness of the general process of how the remedies work
 - 5.1.2 To what extent can reasonably foreseeable damage be obtained?
- 6) Access to Remedies and Scope for Private Action (3.3 of the Issues Paper)**
 - 6.1 Are there any barriers to consumers and businesses enforcing their rights and seeking access to remedies under the ACL? Are there barriers to private action that need to be addressed? (Question 25 of the Issues Paper)
 - 6.1.1 The lack of a state or national tribunal
 - 6.1.2 Difficulty of navigating the courts and claiming costs
 - 6.2 What are the experiences of consumers and businesses in dealing with ACL regulators? Could they play a greater role in promoting private action or take action in other areas that would help consumers enforce their rights under the ACL? (Question 28 of the Issues Paper)
 - 6.2.1 Role of the regulator
- 7) Emerging Consumer Policy Issues (Selling away from Business Premises) (4.1 of the Issues Paper)**

7.1 Does the distinction between 'solicited' and 'unsolicited' sales remain valid? Should protections apply to all sales conducted away from business premises, or all sales involving 'pressure selling'? (Question 31 of the Issues Paper)

8) Acknowledgement

Our comments and observations of the functioning of the ACL are detailed more fully below.

1. Consumer Credit Legal Service (WA)

Consumer Credit Legal Service (WA) Inc. (**CCLSWA**) is a not-for-profit community legal centre based in metropolitan Perth that provides:

- Legal advice and assistance to and advocacy on behalf of consumers with issues arising out of their credit and debt related problems, or out of the Australian Consumer Law disputes. CCLSWA also operates a daily telephone advice line service which consumers use to obtain free legal advice and information. In the period from May 2015 to May 2016, we provided advice to more than 1,300 clients and advocated on the consumer's behalf in more than 200 cases;
- A resource for financial counsellors and other advocates working with low-income people for the resolution of their credit-related problems, or out of the ACL disputes; and
- Community education programmes in matters relating to consumer credit and debt law and the legal system.

CCLSWA also engages in relevant social policy and law reform initiatives, including contributing to such initiatives spearheaded by other organisations.

2. Structure and clarity of the ACL

2.1 Is the structure of the ACL easy to understand and navigate? Are there aspects that could be improved? (Question 5 of the Issues Paper)

The structure of the ACL has provided a good platform for stakeholders to navigate the various rights and remedies that the ACL affords. However, the sheer number of provisions has led to some duplication and difficulty in understanding the provisions and their operation.

For example, a person's conduct may both be a contravention of s29 (which prohibits false or misleading representations) and s151 (which makes false or misleading representations an offence) of the ACL. However, a contravention of s29 of the ACL attracts a pecuniary penalty in s224 of the ACL whereas an offence under s151 of the ACL attracts a criminal penalty in s151 of the ACL. Both penalties are of the same value but have different standards of proof, limitation

periods and different government bodies can commence actions relating to this. In addition, a civil penalty cannot be awarded where a criminal penalty has been awarded.

This has caused particular confusion for us in recent matters. CCLSWA had submitted a complaint to the WA Department of Commerce (**DOC**) on behalf of a client. The complaint was submitted on the basis that the 6 year limitation period had not expired and therefore our client was still entitled to seek a remedy for an alleged breach of the ACL. However, DOC advised us that the limitation period had expired and DOC could not take any action in respect of our client's claims. Further investigation on our part revealed that the 3 year limitation period which DOC was applying to our client's claims was in respect of criminal penalties under s151 of ACL, rather than the civil penalty provisions of the ACL.

Similarly, in another case (outlined below), we were advised by DOC that there was insufficient evidence to prosecute under s151 of the ACL without considering s29 of the ACL.

M's Story

M entered into a contract for the purchase of a motor vehicle from CB. M did not speak or read English well and was pressured by her ex-partner into purchasing the motor vehicle for the ex-partner's use. CB allegedly misled M into believing that she was only paying around \$15,000 for the car but included multiple add-on insurance and an extended warranty totalling more than \$8000. In total, M agreed to pay almost \$24,000 for the purchase of the motor vehicle.

CCLSWA asked DOC to investigate the motor vehicle dealer's behaviour on the basis that the car dealer might have engaged in misleading and deceptive conduct and unconscionable conduct, which attract civil penalties.

DOC focused their investigation on a possible contravention of false or misleading representations with respect to the price of goods and services (s151(1)(i) ACL) and concluded that there was insufficient evidence to discharge the onus for s151(1)(i) ACL. DOC did not consider the civil provisions under the ACL and whether they could be utilised against CB.

It may be useful to have a review of these provisions to determine if the added duplication has not merely made a provision otiose but have the capacity to cause confusion among legal practitioners and regulatory bodies.

Recommendation:

We recommend that further guidance should be given by regulators as to their regulatory approach to the use of both provisions.

3. General Protections of the Australian Consumer Law (2.2 of the issues paper)

3.1 Are the ACL's general protections working effectively? Do they address the risks of consumer and business harm without imposing disproportionate or unnecessary costs on businesses? (Question 8 of the Issues Paper)

The ACL's general protections are distinct from the specific protections in that they are wide and expansive and require a significant knowledge and research into the case law.¹

Due to its complexity, it is difficult for both consumers and businesses to understand their rights and responsibilities of the general protections fully. This prevents consumers from being able to rely on its protections easily as they might not be aware of their rights and businesses may dispute that there has been a contravention of the general protections.

In order to enforce their rights, consumers have the option to either make a complaint to the relevant regulator or institute legal proceedings. In WA, the ACL regulator (DOC) operates a free conciliation service, whereby it attempts to negotiate a resolution to any disputes between consumers and businesses. DOC states that it aims to resolve most complaints within 30 days. The conciliation service is voluntary and a business may elect not to participate in the conciliation service or resolution may not be reached. In such a situation, the only option available to the consumer to enforce their rights is to institute legal proceedings, which may involve significant time and financial costs for the consumer. These are time and financial costs the consumer will incur after already spending a lengthy period of time attempting to negotiate a settlement through the regulator.

A large number of consumers are also unfamiliar with the court process and may not feel comfortable commencing legal action. (See [6.1] and [6.2] generally).

The relevant state regulator for the ACL also has powers to take enforcement action against businesses, if the regulator is of the opinion that the business has breached the ACL. The regulator can also seek compensation orders on behalf of the consumers, if it elected to take enforcement action. However, our experience indicates that regulators only take enforcement action in very limited circumstances.

We are of the opinion that the general protections provide useful protection for consumers, without imposing an undue burden on businesses. However, it is difficult for consumers to enforce these protections in disputes with businesses.

3.2 Are there any changes that could be made to improve their effectiveness, or address any of the issues raised in section 2.2? Are there any gaps that need to be addressed? (Question 9 of the Issues Paper)

3.2.1 Should there be greater guidance as to the meaning of “unconscionable” conduct?

Some commentators have argued that a clear definition of unconscionable conduct remains elusive.² However, others have mentioned that the definition includes moral concepts³ and societal norms⁴ and it is difficult to provide precise guidance on these concepts.⁵

¹ For example, the ACL s21 defines misleading or deceptive conduct as conduct that is misleading or deceptive or is likely to mislead or deceive and requires further research into what misleading or deceptive means.

² Peter Strickland, 'Rethinking unconscionable conduct under the Trade Practices Act' (2009) 37 ABLR 19 at 20.

³ *Director of Consumer Affairs Victoria v Scully & Anor* [2013] VSCA 292.,

Given the difficulty of obtaining a precise definition, the general protection provisions are generally utilised by legal practitioners, rather than consumers.

Given that these provisions are mostly utilised by legal practitioners, it is uncertain that the lack of guidance is any impediment to the functioning of the law. Legal practitioners are required to research case law when advising clients and the lack of guidance in the legislation is no impediment to legal practitioners in understanding the law.⁶

In addition, there are several advantages to not providing guidance in the legislation. Firstly, the moral and societal norm concepts have the capacity to change over time and not introducing guidance into the legislation provides the flexibility and freedom that courts need to develop these concepts. Lack of guidance will also prevent business owners from distorting their practices to avoid the guidance examples and detracting from the intent of the legislation. Another advantage is to prevent a “misdiagnosis” by consumers that their claim falls within the provisions. This criticism was raised in an expert panel report in 2010.⁷

We would thus recommend that further guidance to the definition of “unconscionable conduct” is unnecessary.

3.2.2 Unfair Contract Terms prosecuting powers

In our practice, we routinely encounter cases where the consumer seeks to have a term declared void under the unfair contract terms provision and the business seeks to rely on that term. If the business does not agree with the consumer that the term is void under the unfair contract term provisions, the business may seek to enforce the term through court proceedings.

A consumer may elect to lodge a complaint with a regulator, who may be able to mediate a settlement. However, this is a voluntary process and the business may elect not to participate. The ACL also gives regulators the powers to apply to the court for a declaration, an injunction to restrain the business from including these terms and possible compensatory orders for the consumers affected. However, in our experience, the regulators have significant resource constraints and cannot commence as many enforcement actions as there are cases. The ACCC has stated that it takes regulatory action only where the subject of the complaint has the potential to harm the competitive process or result in widespread consumer detriment.⁸ Such a high bar for regulatory action potentially excludes a large number of low value disputes which can arise for consumers on a daily basis.

⁴ *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90.

⁵ Clarke, Julie “Unconscionable conduct: an evolving moral judgment” [2011] Precedent 30.

⁶ Rule 6(1)(c) of the Legal Profession Conduct Rules 2010 (WA) requires a practitioner to deliver legal services competently and diligently.

⁷ Department of Innovation, Science and Research, “Strengthening Statutory Unconscionable conduct and the Franchising Code of Conduct”, February 2010.

⁸ Australian Competition and Consumer Commission, *Compliance and Enforcement Policy* (16 May 2016) <<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy>>

Thus, if a business does not acknowledge that a term is unfair, a consumer will, in many cases, only be able to seek a remedy through the courts by applying for a declaration that the contract term is unfair and void. As discussed earlier, many consumers are uncomfortable with commencing legal proceedings as they are unfamiliar with the court process. Furthermore, commencing legal action will involve significant time and financial costs for a consumer.

The matters which a court will consider when determining whether a term is an unfair contract term are also complex and require an understanding of legal concepts. The court considers factors such as:

- Does the term cause a significant imbalance in the parties' rights and obligations arising under the contract;
- Is the term not reasonably necessary to protect the legitimate interests of the party who would be advantaged for the term; and
- Would the term cause detriment to a party if it were to be applied on or relied on.⁹

Therefore, it is not a simple matter for consumers to commence legal action to seek a declaration that a term in their standard form consumer contract is an unfair term.

Issues – high incentives for breach, low disincentive if discovered

From the business' perspective, the only potential loss suffered is the advantage forgone as opposed to an actual loss which penalises the business. Further, given both regulators' resource constraints, there is a low risk of enforcement action being taken and as a result the risk of forgoing this advantage is low. Hence, there is a large incentive to use unfair contract terms as the potential gain is much larger than the potential loss and there is a low risk of incurring that loss.

Given that the regulators have significant resource constraints, the ACL could be reformed to include greater powers for regulators to penalise and deter businesses from using unfair contract terms. These powers may include the power to apply for pecuniary penalties which could be used to penalise businesses when enforcement action is brought and reduce the incentive to rely on these unfair contract terms. This would also encourage businesses to be more proactive in removing these terms from their standard terms and conditions.

V's Story

V entered into a contract for 5 seminar services costing around \$15,000 with SR. V was unable to pay for the services and sought a payment arrangement with SR. SR agreed to a payment plan and V paid a total of \$7200 before being unable to continue with the payment plan. V had only attended one seminar and sought to have the contract terminated and for the debt to be cancelled. SR refused and cited a term of the contract that V was not entitled to a refund of any monies paid regardless of the reason for not wishing to receive the seminar services.

⁹ Australian Competition and Consumer Commission, *Unfair contract terms: A guide for businesses and legal practitioners* (March 2016) < <https://www.accc.gov.au/system/files/Unfair%20contract%20terms%20-%20A%20guide%20for%20businesses%20and%20legal%20practitioners.pdf>>.

V sought help from us as to her rights. We advised her that the “no refund” term may be an unfair term as there were other terms in the contract allowing SR to terminate the contract at any time and it was not necessary to protect SR’s legitimate interests and caused significant detriment to V. We further advised her that if SR refuses to acknowledge that, that she may wish to approach the Department of Commerce.

While V has not contacted us since and we do not know the outcome of her case, SR continues to include these terms in their terms and conditions found on their website and have done so for at least 3 years. Enforcement action has not been taken against SR and even if action was taken against SR, SR would only lose the advantage gained and is not penalised for recalcitrant behaviour.

Recommendation:

We recommend that regulators focus on increasing knowledge and understanding amongst businesses and consumers about the law around unfair terms in standard form consumer contracts. We acknowledge the regulators currently have issued fact sheets and guidance on this issue, which are available through their websites.

We are also of the opinion that the regulator should proactively conduct regular reviews of standard form consumer contracts for a variety of business sectors, especially those areas which it identifies through complaints as having low levels of compliance or presenting high risk of detriment to consumers. These reviews could be similar to the review the ACCC conducted in 2013 in relation to standard form contracts in the airline, telecommunications and vehicle rental industry.¹⁰

4. The Australian Consumer Law’s specific protections (2.3 of the issues paper)

4.1 Are there any changes that could be made to improve their effectiveness, or address any of the issues raised in section 2.3? Are there any gaps that need to be addressed, or overseas models that could provide a useful guide? (Question 11 of the Issues Paper)

4.1.1 Disclosure of rights and cooling off period for sales of extended warranties and add-on insurance

Currently, there are no requirements to disclose the consumer’s rights under the ACL when selling extended warranties or add-on insurance relating to motor vehicles. This creates a significant information deficit for consumers who are not adequately informed of their rights and consequently, the protections that may already be applicable under the law to their purchase. As a result, they may not be aware that their requirements may have already been met and that these products are not required for their purposes. The high instances of aggressive or high-

¹⁰ Australian Competition and Consumer Commissioner, *Unfair contract terms: Industry review outcomes* (March 2013) < <https://www.accc.gov.au/system/files/Unfair%20Contract%20Terms%20-%20Industry%20Report.pdf>>.

pressure sales techniques and the ease of adding the purchase price to the main motor vehicle loan makes consumers particularly vulnerable. This is not dissimilar from the harm that the unsolicited consumer agreements provisions seek to address.

Difficulties in reducing consumer harm in the law

Under the unsolicited consumer agreement provisions of the ACL, a contract is an unsolicited agreement if the negotiation was conducted outside of the business premises of the dealer. In the case of extended warranties add-on insurance, the negotiations are almost always on the business premises of the motor vehicle dealer and consequently fall outside of the unsolicited consumer agreements provisions.

Both add-on insurance and extended warranties are considered financial products or services¹¹ and therefore only the ASIC Act applies. Therefore, only the general protections which are replicated in the ASIC Act would apply. This creates a legal vacuum in respect of these products.

Consumer harm in the sale of add-on products

The proximity of the sale of these add-ons to the sale of the motor vehicle, which was the main purpose of their visit to the dealer, creates a situation where the consumer feels pressured to purchase the add-ons in order to purchase the car. In a survey by the Australian Securities and Investments Commission, when consumers approached a car dealership to purchase a car, consumers largely concentrated on the purchase of the vehicle and had little awareness or understanding of the insurance product.¹²

E's Story

Mr E went to a car dealer with his partner to buy a car. The dealer offered an extended warranty which Mr E indicated that he did not want. The dealer then began to convince Mr E's partner that the warranty was an essential purchase. Mr E felt pressured by the dealer's sales tactics and felt that he needed to purchase the insurance so as to be able to purchase the car.

Mr E purchased the extended warranty and regretted the purchase one month later. He attempted to cancel the warranty and claim a refund but was only offered a 50% refund from the car dealer.

Mr E does not have a right to a refund even though he was pressured into purchasing the extended warranty. There is no cooling off period available.

¹¹ *Australian Competition and Consumer Commission v Fisher & Paykel Customer Services Pty Ltd* [2014] FCA 1393, *Australian Securities and Investments Commissions Act 2001* (Cth) s12BAA(7)(d)

¹² Australian Securities and Investments Commission, *Report 470 Buying add-on insurance in car yards: why it can be hard to say no* (2016)

ASIC has found that it is difficult for consumers to reject add-on insurance when purchasing a motor vehicle¹³ and it is unlikely that the sale of extended warranties would be different.

Further, in our experience, vulnerable consumers with difficulties conversing in English have often felt coerced or misled into contracting into these add-on products. Often, they believed that the dealer was acting in their best interests and helping the consumer obtain the best and cheapest deal. They may only discover that they were misled when their family discovers it or when they seek legal help.

A's Story

Ms A entered into a contract with a motor vehicle dealer for a motor vehicle, an extended warranty and several add-on insurances. She paid for this using motor vehicle finance which charged 17% interest per annum. As Ms A had a limited understanding of English, she did not understand the contract that she had entered into. Ms A did not understand the purpose of the insurance, extended warranty and that she was being charged 17% interest. In total, Ms A incurred additional costs of more than \$10,000 which was added to her car loan.

It was only after her niece read her loan statements and alerted her to the fact that she had purchased the extended warranty and insurance that she realised that she had paid for something she did not want. Ms A's niece then advised her to contact CCLSWA for legal advice.

M's Story

Mr M negotiated with the dealer for the sale of a car for \$15,999. He asked to purchase a towbar for the car and the salesperson included an extended warranty and other accessories totalling \$7000. Mr M protested the inclusion of the other items but was told that these accessories were part of a package. Due to his limited understanding of English, Mr M did not understand this and believed that this meant that he had to sign the document to obtain finance. No documents were provided to Mr M regarding the extended warranty.

Mr M was then directed to sign a loan contract for the car. Mr M knew that he could get a loan at around 7% interest but he trusted the dealer to act in his best interest to obtain the best and cheapest loan for him. Unknown to Mr M, the loan had an interest rate of 17% and included the price of the accessories and several insurance policies. The total loan was \$30,487. Due to his limited command of English and trust in the dealer, he signed the loan contract.

While Mr M was given several documents relating to the loan, extended warranty and insurance policies, he was not given an explanation of the various documents. One day after signing the loan contract and reviewing the documents, Mr M was puzzled about the high loan amount and returned to the dealer. He was told that he had signed the contract and could not cancel it now.

He was only referred to CCLSWA after attempting to salary package his payments and the salary packaging company noticed that his repayments were too high.

¹³ Australian Securities and Investments Commission, *Report 470 Buying add-on insurance in car yards: why it can be hard to say no* (2016)

Recommendations:

We recommend that the distinction between the sale of the motor vehicle and sale of add-on insurance and extended warranties be made clearer. For example, there could be a requirement that the sale of the vehicle be concluded separately and that the sale of these add-on products be clearly stated as optional.

There could also be a further requirement to tell the consumers of their rights under the ACL when selling add-on products. Elements of the unsolicited consumer agreements provisions could also be included such as the requirement to cease to negotiate when a consumer explicitly declines the add-ons. This would raise awareness of the add-ons and balance the bargaining powers of the consumer and the dealer.

A cooling off period would also be useful for consumers to further consider their decision after the high pressured situation of purchasing a motor vehicle. This will be particularly useful as it would allow consumers to consider their rights under the insurance or extended warranty contract and to see if it meets their requirements. Some of our clients have sought legal services to terminate the contract only as a result of consulting family members and friends who alerted them to these unwanted add-on products. Cooling off periods may allow them to have added time for these consultations to take place. It may reduce the disadvantage suffered by culturally and linguistically diverse consumers

Adjudication of this matter may be included in the jurisdiction of the tribunal that we recommend to be set up at [4.2]

4.1.2 Should consumer guarantees be expanded to include architects, engineers and financial services?

The ACL does not regulate the supply or the possible supply of financial products or services.¹⁴ Depending on the possible breach, the regulation of financial services is governed by the Corporations Act 2001¹⁵ or Australian Securities and Investments Commission Act 2001¹⁶. However, a supply of financial products or services that is incidental to the provision of goods and services might be intricately linked to those goods and services that it would be useful to extend the application of the ACL to these financial products or services. For example, both add-on insurance and extended warranties are considered financial products or services¹⁷ but their sales are closely linked with the sale of motor vehicles and are often sold at the same place and paid for using the same loan. This may require a specific scheme under the ACL to address the issues which requires the ACL to be extended to financial products or services.

¹⁴ *Competition and Consumer Act 2010* (Cth) s131A

¹⁵ *Corporations Act 2001* (Cth) Chapter 7

¹⁶ *Australian Securities and Investments Commission Act 2001* (Cth) ss12BAA and 12BAB

¹⁷ *Australian Competition and Consumer Commission v Fisher & Paykel Customer Services Pty Ltd* [2014] FCA 1393, *Australian Securities and Investments Commission Act 2001* (Cth) s12BAA(7)

Further, where there are issues with the sales of these products as we have identified at [4.1.1] and there is a need to regulate the entire field as a system, it would be more expedient to regulate it under a single piece of legislation.

Therefore, in order to regulate or prescribe requirements before these products are sold as we have recommended earlier in this paper, it might be necessary for the ACL to be extended to financial products.

Recommendation:

We recommend that the ACL be amended to apply to financial services or at least to financial services which are sold incidental to a sale of goods or services that attracts the application of the ACL.

4.1.3 The disclosed purpose test in consumer guarantees about goods and services

Currently, there is a guarantee that services provided must achieve a purpose only if the consumer has disclosed that purpose. However, there is no guarantee that provides consumers with recourse if the supplier has promised a certain outcome but fails to deliver that outcome. While the consumer may be protected by the general provisions, this is hampered by the difficulty in accessing them as a remedy (see [3.1] and [6.1]).

In contrast, the counterpart provision in respect of goods provides the consumer with remedies if the supplier represents that the goods are reasonably fit for a particular purpose. In addition, the guarantee as to acceptable quality takes into account the representations made by the supplier or manufacturer of the goods¹⁸ and affords another avenue of obtaining a remedy.

Recommendation:

We recommend that the guarantee that services provided must achieve a disclosed purpose is extended to purposes which are disclosed by service providers.

4.1.4 What constitutes reasonable time to supply goods particularly when the goods are promised to be delivered by a certain date?

Under the ACL, there is a requirement that goods must be supplied on a specified date or within reasonable time where there is no specified date if a business accepts payment or other consideration for the goods.¹⁹ This does not adequately address the problem where businesses fail to meet deadlines.

In our practice we have come across many cases where a business has promised delivery of the goods by a specified date, but then failed to make the delivery. The business will then

¹⁸ *Competition and Consumer Act 2010 (Cth) Schedule 2 s54(3)(d)*

¹⁹ *Competition and Consumer Act 2010 (Cth) Schedule 2 s36*

specify a second future date for delivery, which will be accepted by the consumer. However, delivery will not be made by the second specified date as well. This may continue for several iterations and cause significant inconvenience to the consumer, who may have already paid for this good. The consumer is effectively waiting indefinitely for their goods, with little certainty of when the delivery will actually be made.. Some of our clients have waited up to a year before seeking legal advice.

L's Story

L purchased a custom guitar from B in March 2015. In April 2015, B informed L that due to a new method of making guitars, B would only be able to deliver the guitar in June 2015 but promised the guitar would be "far far superior". However, B failed to meet the July deadline and gave a further deadline in December 2015. B missed that deadline and gave another deadline in February 2016. When B missed that deadline again, L decided to demand a refund, at which point B shipped the guitar to L.

The guitar had many defects and L sought advice from us with regard to rejecting the goods and obtaining a refund. We advised him as to his rights under the consumer guarantees but there was no recourse available for the delay and the inconvenience caused.

K's Story

K purchased wallpapers from W's store in December 2015. W gave an estimate that the wallpapers would arrive in 4-6 weeks. K bought the wallpaper then as she was pregnant and was hoping to complete the installation of the wallpaper before she became too heavily pregnant. In February 2016, W contacted K to say that the wallpapers would be delayed and that the wallpapers would be delivered in March and April 2016. In April 2016, the wallpapers were not delivered and K decided to approach the Department of Commerce and CCLSWA.

K needed certainty and prompt delivery. If K had a right to a refund, she would have been able to purchase wallpaper from another supplier and complete the installation before she was too heavily pregnant.

The above cases illustrate that even where there is a delay of almost a year, as long as the goods are delivered, there is no recourse unless there are other provisions which the consumer can rely upon.

Recommendation:

We recommend the addition of a guarantee that goods will be delivered within the shorter of:

- a. A reasonable time; or
- b. 1 year from the date of the agreement to purchase,

and that "reasonable time" is to be measured by reference to the parties' conduct, any specified delivery dates and the cause for the delay.

4.2 Does the ACL need a 'lemon' laws provision and, if so, what should it cover? (Question 12 of the Issues Paper)

Under the ACL there is a guarantee that purchased goods are of acceptable quality. If the goods are not of acceptable quality, the consumer has rights against the supplier and the extent of these rights depend on whether the defect is major or minor.

Currently, there is a lack of clarity surrounding the distinction around what constitutes a minor and major failure. There is also a lack of certainty around what constitutes "reasonable time".²⁰ We acknowledge that these current definitions give a degree of flexibility. However, these definitions also cause significant difficulties for consumers in enforcing their rights.

If the defect is minor, the supplier would be able to remedy the defect by merely providing a free repair. In contrast, a major defect requires the supplier to refund the purchase price if the customer chooses to reject the goods. The significant difference in remedies provide an incentive to businesses to dispute that the failure was merely a minor failure, offer to repair the defect and refuse to pay a refund. In the context of motor vehicle purchases, consumers are forced to return their motor vehicles for repair and suffer the inconvenience and expense of not having a motor vehicle, while it is being repaired. This is exacerbated by additional repairs when the same defect recurs or another defect surfaces.

S's Story

Mr S purchased a car for \$3900. After driving the car for 2km, the car produced smoke which continued for several days. Within a week, the car started shaking while driving.

Mr S was told by the dealer that the car was producing smoke due to it being parked for a few weeks and that the car would stop producing smoke after being driven for 60km. Mr S drove the car for 120km and the car did not cease producing smoke.

When the car was examined by a mechanic, Mr S was told that the engine needed to be replaced. Mr S approached the dealer about this and was directed to another mechanic. The second mechanic said that it was an issue with a lack of engine oil. Dealer refused to fix the issue and referred the consumer back to the mechanic.

Mr S then approached CCLSWA for advice as he was unsure of whether he should seek recourse from the mechanic or dealer and what his rights were.

H's story

Mr H bought a second hand car in December 2015. The car began experiencing wheel problems and Mr H sought to have the problem remedied as part of his rights under the ACL. The car experienced similar problems after the repair and Mr H brought the car back for repairs. In total, Mr H visited the car dealer 6 times for repairs without resolving the issue. The car dealership then refused to provide further repairs even though Mr H was entitled to one. The dealer did not provide a refund but addressed the issue as if it was a 'minor' defect.

²⁰ *Competition and Consumer Act 2010 (Cth) Schedule 2 s259(2)(a)*

Mr H was left to report the breach to the Department of Commerce and to have the car repaired by another mechanic and claim the cost of the repairs from the car dealer through the courts.

Evidentiary burden

Uncertainty regarding the consumer's rights under the ACL imposes a heavy evidentiary burden on consumers. There is a frequent need for expert evidence to be obtained to substantiate the consumer's claim that there has been a major failure. Sourcing such reports can take a consumer considerable time and the costs can be significant. If the dispute results in court action, the consumer may have to make the expert witness available for cross-examination, resulting in further costs.

E's Story

E experienced problems with her car and replaced the timing belt for \$3000. E used a mechanic called Z to install the new timing belt. About a year later, the engine failed to start and when another mechanic examined it, it was found that the engine was damaged by a faulty timing belt installation.

Z disputed that the fault was due to the installation of the timing belt. I claimed that the fault was due to the way E drove the car. This could not be ascertained without an independent assessment. E had difficulties seeking an independent assessment and did not pursue the matter further.

KS's Story

KS bought a new caravan from L. The caravan was bought in June 2015. Between July and October 2015, KS used the caravan for 3 trips and the caravan consistently had problems with excessive dust and water damage from rain. The stove in the caravan also broke in October 2015. The caravan was returned to L for repairs after each trip but the problems did not cease.

KS also put in a dust hatch for \$600 on the recommendation of L but that did not solve the dust issues. When L examined the caravan in October 2015, L found further problems with the locks and light fittings and attributed this to the manufacturer's failure to seal the caravan properly. L refused to rectify all the problems.

In February 2016, KS filed a complaint with DOC who facilitated conciliation. Conciliation was unsuccessful and DOC advised KS to obtain an independent report prior to initiating court proceedings. KS obtained an independent report in May 2016 and contacted CCLSWA to obtain legal advice about proceeding with legal action.

For KS, the conciliation process merely delayed any remedy for 3 months and incurred significant time and financial costs to KS. This was extremely frustrating for KS.

In order to reduce the risks posed to consumers by this uncertainty without reducing the flexibility afforded by the ACL, we recommend that the burden of proof is reversed in limited

circumstances. For example any defects or failures that are discovered within a set period of time (eg 3 months or 6 months) from the date of delivery will be taken as having been present at the time the goods were delivered. The onus would then be on the business to demonstrate that the goods were free of defects at the point of delivery. This is modelled on Singapore legislation.²¹

Further, a lemon law which provides for refunds based on more concrete and quantitative criteria may reduce the uncertainty surrounding the major/minor distinction and consequently, the evidentiary burden.

Court Actions

Where a motor vehicle dealer still refuses to conduct the repairs or provide a refund which the customer is entitled to, the consumer is only able to enforce their entitlements through the courts. There may be high costs incurred in obtaining evidence and legal advice. The uncertainty surrounding the major/minor defect issue and whether “reasonable” time has been provided for the remedy makes court enforcement risky. Consequently, the average consumer might forgo her rights as the process could be too long, too risky and too inconvenient.

Consumer exhaustion

The various barriers that the consumer must overcome causes significant inconvenience to the consumer and constitute a real barrier to justice. Consumers often feel isolated and exhausted from attempting to fix the defect and negotiate the dispute without any meaningful outcome. The high costs associated with court actions and uncertainty regarding the outcome may prevent the consumer from accessing an appropriate remedy.

Comparisons

In the United Kingdom, some of these disputes are handled by a trade association if the dealer is a member of the trade association.²² This includes negotiation and conciliation at first instance and escalating to arbitration if conciliation is not successful. The trade associations are subscription based and funded by their members.

Similarly, in New Zealand, there is a Motor Vehicles Disputes Tribunal which provides dispute resolution for motor vehicle disputes and includes the use of an “assessor” with specialist knowledge of motor vehicles. The tribunal decisions are published and set precedents for future matters.²³

²¹ *Consumer Protection (Fair Trading) Act* (Singapore, Chapter 52A, 2009, rev ed) s18A

²² See for example, the Retail Motor Industry Federation Ltd: <http://www.rmif.co.uk/consumers/why-use-an-rmi-member/>.

²³ Consumer Protection, *Motor Vehicle Disputes Tribunal* (16 May 2016) <http://www.consumerprotection.govt.nz/for-consumers/motor-vehicles/got-a-problem/motor-vehicle-disputes-tribunal-mvdt#decisions>.

Introducing lemon laws

The Queensland Parliament's Legal Affairs and Community Safety Committee has inquired into the implementation of a "lemon" law scheme in 2015 and concluded that the appropriate forum for implementation of lemon laws was in the ACL.²⁴ Similarly in 2009, the Victorian government decided that a national law was the appropriate forum and declined to enact a law at state level.²⁵

While lemon laws are typically enacted with vehicles as the paradigm example, as a general national law, there is scope for the principles to be applied to the general provision of goods and services. However, given the relatively new concept in Australia and that most research and comparable laws are in relation to motor vehicles, it might be prudent to limit the lemon law scheme to motor vehicles with a view to expanding it in future.

Any "lemon laws" should apply to new as well as second hand motor vehicles as second hand vehicles are more likely to require protection.²⁶ Indeed, almost all cases that we have provided legal advice on have been in relation to second hand motor vehicles.

We would recommend that the following changes be made:

- The consumer shall be entitled to a refund if the good has been remedied at least three times for a particular issue and the same issue persists;
- The consumer shall be entitled to a refund if they are unable to use the goods for a specified number of days due to a defect. The specified number of days for various goods can be prescribed by regulations, which can be amended/updated as necessary;
- Reverse the onus of proof where it is alleged there has been a defect. This means the obligation is on the supplier to demonstrate that there has been no breach of the consumer guarantees. This will be limited to the first 3 or 6 months after the purchase to limit the onerous responsibilities on the supplier or manufacturer;
- The introduction of a separate tribunal for disputes about faulty motor vehicles nationally or alternatively, to set up a specialist division under the State Administrative Tribunal in Western Australia;
- A database of tribunal decisions or court decisions with respect to motor vehicle cases would be set up. This would be beneficial for setting precedents;
- The creation of an Expert Panel that is industry funded and administered by the State and Territory based Consumer Protection bodies. These Expert Panels will test the motor vehicle and write an expert report for a set fee. The consumer will bear the cost of expert opinions but the dealer is to reimburse the consumer if there is a decision against

²⁴ Legal Affairs and Community Safety Committee, Parliament of Queensland, *"lemon Laws" – Inquiry into consumer protections and remedies for buyers of new motor vehicles* (2015).

²⁵ David Rood, 'Government goes sour on 'lemon laws' for dud cars', *News, The Age* (Melbourne) 16 February 2009.

²⁶ See speech of the Minister of Trade and Industry in Official Report of Singapore Parliamentary Debates of 9 March 2012.

the dealer. The consumer will be more willing to pay the cost if there is a fixed cost and the dealer can be compelled to pay if the report is found in the consumer's favour.

These changes seek to reduce:

- 1) The uncertainty surrounding when a consumer may obtain a refund;
- 2) The costs of providing evidence of the defect and asserting rights under the ACL; and
- 3) Inconvenience to the consumer and barriers to justice.

Economic efficiency

Another benefit of these changes is greater economic efficiency.

One of the aims of the ACL was to achieve effective competition through consumer empowerment and knowledge and to increase consumer confidence. The phenomenon of lemon cars exist where there is information asymmetry between consumers and car dealers and this can lead to a reduction in quality of goods in the market.²⁷ It may also place pressure on consumers to purchase inefficient products such as extended warranties to overcome the inconvenience of seeking a remedy that they are already entitled to. The lemon laws proposed seek to bridge this asymmetry and to discourage unfair practices in two ways.

Firstly, it seeks to ensure that there is a minimum standard. By streamlining dispute resolution services and enabling the enforcement of standards by ensuring that a remedy is easily obtained by the consumer. This reduces costs of dispute resolution in the longer term.

Secondly, the ease of seeking a remedy will reduce the need for warranty products and allow consumers to be more confident in declining warranty products. It empowers the consumer and allows greater reliance on and awareness of the ACL as a national law that protects them.

Recommendation:

We recommend that:

- Consumers be entitled to refunds if the good has had to be fixed at least three times for a particular issue and the same issue persists or if they are unable to use the goods for a specified number of days due to a defect;
- The onus of proof be reversed where it is alleged there has been a defect within the first 3 to 6 months of the purchase;
- A separate tribunal be introduced for disputes about faulty motor vehicles nationally or alternatively, to set up a specialist division under the State Administrative Tribunal in Western Australia;
- Tribunal decisions are published; and
- Expert panels that provide checks and reports for a set fee are created.

²⁷ Akerlof, George, "The Market for "Lemons": Quality Uncertainty and the Market Mechanism" (1970) 84(3) *The Quarterly Journal of Economics* 488

4.3 Should the ACL prohibit certain commercial practices or business models that are considered unfair? (Question 15 of the Issues Paper)

Unfair commercial practices are usually caught by the ACL's general provisions which can act as a "safety net" that prohibits undesirable commercial practices.²⁸ However, in certain instances it can be difficult to regulate certain commercial practices, which cause widespread and significant consumer harm through the general provisions of the ACL. In respect of these practices, examples of which are outlined below, it may be useful to set up specific schemes to regulate unfair commercial practices.

An example of this is the pressure selling of add-on insurance and extended warranties within the motor vehicle sales industry. This is further elaborated above at [4.1.1]. Specific schemes would allow consumers and businesses to understand their rights and responsibilities better and make it easier for unfair commercial practices to be addressed and curbed.

One of the issues that our partner community legal centre ('CLC'), Gosnells CLC has raised is the issue of funeral insurance. Vulnerable clients and their cultural beliefs are preyed upon in the selling of funeral insurance and the vendors often do not adequately display the total cost of the insurance. Often, consumers are made to feel guilty and the cost is advertised as a small fortnightly cost (usually deducted from welfare payments). As the cost of insurance increases with age, the consumer is often unable to make payments later in life, resulting in the insurance being cancelled. At this point, the consumer would have paid more in insurance premiums than the cost of an average funeral (around \$8500). However, the consumer would not have received a refund or any benefit. We believe that there should be further monitoring and regulation of the selling practices involved.

Recommendation 8:

Specific regimes with specific processes may be appropriate for unfair commercial practices which are widespread and cause significant consumer harm. Further monitoring and regulation may be necessary for specific issues.

5. Effectiveness of remedy and offence provisions (3.2 of the Issues Paper)

5.1 Are the remedy and offence provisions effective? (Question 19 of the Issues Paper)

Generally, the remedies provided under the ACL cover most ACL issues and regulators have a range of powers to enforce the rights under the ACL. However, studies have shown that it is the likelihood of complaints by consumers and the likelihood of prosecution by regulators that

²⁸ Paterson, Jean Marie and Brody, Gerard, ""Safety Net" Consumer Protection: Using Prohibitions on Unfair and Unconscionable Conduct to Respond to Predatory Business Models" (2015) 38(3) *Journal of Consumer Policy* 331

increases deterrence and consequently compliance with the rights under the ACL.²⁹ Simply increasing penalties or creating new penalties may not be as effective as increasing the likelihood of enforcement action being taken.³⁰

From our experience and as detailed in the case studies, many businesses do not appear to appreciate that they have a duty under the law to provide a remedy and this lack of compliance may be a result of insufficient enforcement activity.

5.1.1 Lack of knowledge and awareness of the general process of how the remedies work

There is a general lack of knowledge of the protection afforded by the ACL. Many of our clients have attempted self-help remedies without a full understanding of their rights under the ACL and this has resulted in increased costs for them which may not be recoverable under the ACL.

We understand that there has been a significant investment in informing the Australian public about the ACL. However, from our experience, a lack of knowledge of the ACL still presents a large hurdle in the implementation of the ACL and prevents both consumers and businesses alike from adhering to the rights under the ACL as the standard. Gosnells CLC has recommended that further television advertising be invested in because many of the most vulnerable only have access to that medium and it would be the most effective.

In addition, additional enforcement may aid in increased visibility and knowledge on the part of businesses.

A significant portion of the clients that suffer from a lack of knowledge and suffer losses as a result come from culturally and linguistically diverse background. We believe that further consultation to better understand and overcome the communication barriers with this group is necessary to raise awareness of the ACL among groups who would benefit most.

Recommendation:

We recommend that additional enforcement action be conducted to increase visibility of the ACL. In addition, further television advertising should be considered. Further consultation to understand and implement ideas to overcome communication barriers with culturally and linguistically diverse consumers should also be considered.

5.1.2 To what extent can foreseeable damages be obtained?

We also have concerns about the extent to which foreseeable loss can be claimed. Under s 259(4) of the ACL, consumers are entitled to recover damages which are reasonably foreseeable and arise from a failure to comply with a consumer guarantee. However, while the law is reasonably clear, there has been some opposition from suppliers to comply with this.

²⁹ Christine Parker and Vibeke Lehmann Nielsen, 'Deterrence and the Impact of Calculative Thinking on Business Compliance with Competition and Consumer Regulation' (2011) 56(2) *Antitrust Bulletin* 377

³⁰ Christine Parker and Vibeke Lehmann Nielsen, 'Deterrence and the Impact of Calculative Thinking on Business Compliance with Competition and Consumer Regulation' (2011) 56(2) *Antitrust Bulletin* 377, 407

H's Story

Ms H had bought a necklace from a jeweller for \$300 and attached a diamond pendant to the necklace estimated to be worth \$5000. While Ms H was wearing the necklace, the necklace broke and the pendant was lost. Ms H sought to obtain refund from the jeweller, alleging that the necklace was not of acceptable quality. She also sought recover the value of the pendant as foreseeable loss.

The necklace was sent for testing to identify the cause of the fault. This additional costs had to be met by Ms H. Subsequently, the jeweller offered to settle the matter with Ms H by providing her with \$300 store credit. Ms H provided a counter offer of \$1000 cash comprising \$300 for the cost of the necklace and \$700 for the pendant. The jeweller resisted providing any compensation for the pendant and counter offered \$500 cash comprising \$300 for the necklace and \$200 for the inconvenience caused.

This offer was accepted by Ms H as the dispute had been ongoing for nearly 10 months and Ms H was drained by the negotiations.

Further, it is not merely the suppliers who have resisted making any compensation for foreseeable losses. Courts have also failed to consider and apply that provision to award damages for foreseeable loss.

S's Story

Ms S bought a Hyundai from a motor vehicle dealer for \$8500. The Hyundai had problems with its gearbox and there were noises when the Hyundai was parking on full lock. Ms S brought the Hyundai back to the motor vehicle dealer who offered to replace the Hyundai with a Kia.

Within a week, Ms S discovered that the Kia's airconditioning was malfunctioning and Ms S brought it to a mechanic to have it checked and service for \$110. The check revealed that there was a faulty harmonic balancer and the fault was so severe that the mechanic could not repair it. On the way home from the mechanic, the Kia broke down. Ms S incurred costs to tow the Kia to her parent's place which was closer to the break down site. As a result of the breakdown, Ms S had no vehicle and incurred further costs for travel and her husband lost time at work.

About 2 weeks later, the motor vehicle yard offered a Jeep to replace the Kia and Ms S accepted as she needed a vehicle. Within a week the Jeep experienced various problems including failing to start, misfiring and emitting smoke. The Jeep was taken to a mechanic to be checked and it was found that it had faulty fuel injectors.

Ms S sought to reject the Jeep and obtain a refund of \$8500 through legal proceedings in the Magistrates Court. Ms S also sought compensation in respect of other reasonably foreseeable costs. In it's judgment, the Magistrates Court only ordered that \$8500 be refunded and did not consider or make orders about reasonably foreseeable losses.

As mentioned in the issues paper, there is a desire for disputes to be resolved early and negotiation between the consumer and supplier is a fundamental to achieving this. However,

negotiation with suppliers for recovering damages for reasonably foreseeable loss is hampered if suppliers do not acknowledge the right of the consumer to recover reasonably foreseeable loss. Further, if courts do not enforce or consider these claims, it strengthens the bargaining power of the supplier and justifies the suppliers' stance. Consequently, there is a risk that s259 (4) of the ACL could be rendered otiose.

Recommendation:

We recommend that s259 (4) ACL be made mandatory for courts to consider.

6. Access to Remedies and Scope for Private Action (3.3 of the Issues Paper)

6.1 Are there any barriers to consumers and businesses enforcing their rights and seeking access to remedies under the ACL? Are there barriers to private action that need to be addressed? (Question 25 of the Issues Paper)

6.1.1 Difficulty of navigating the courts and claiming costs.

Many of our clients have been unable to seek redress except through the court system. Consumers usually contact the business directly to resolve the issues in the first instance. It is only after the business provides a negative response that consumers seek other avenues of redress such as approaching DOC to initiate conciliation. Where conciliation fails, court action is the only option for consumers.

This process is highly inefficient and causes significant consumer inconvenience. A significant amount of time is incurred in seeking redress and the consumer would bear the burden of the loss in that period. The possibility of a negative outcome acts as a further disincentive to pursue their claim.

Further, where court action is the only form of redress, there is a heavy financial cost as court processes are expensive. In addition, court processes are risky and there is no guarantee that the consumer will be successful, particularly where less defined legislation is involved such as the general protections under the ACL. It is no surprise that many consumers abandon their claim because of the time and financial costs involved.

Z's Story

Mrs Z bought a mattress which was marketed as having cooling properties and Mrs Z was looking for a cool mattress to aid her husband's deep vein thrombosis for \$1000. However, the mattress was very hot and lumpy and caused Mrs Z's husband's legs to swell up due to his deep vein thrombosis. Mrs Z also found out that the warranty attached to the mattress was voided because Mrs Z used her own base. The sales representative had failed to mention this.

When Mrs Z filed a complaint with DOC, the seller refused to reply to enquiries from DOC. TDOC then recommended that Mrs Z take the matter to the Magistrate's Court.

Mrs Z filed a minor case claim in the Magistrate's court. However, at the hearing, she was confused when the magistrate told her to file a statement of claim within 14 days. To Mrs Z, the application was the statement of claim. It was at this juncture that Z sought advice from CCLSWA.

The inability of the regulatory body and the inaccessibility of the courts created a large hurdle for Mrs Z in seeking a remedy.

6.1.2 The lack of a state or national tribunal

The inconsistency of dispute resolution bodies across states causes confusion among consumers and prevents the ACL from truly becoming a national law. In addition, the cost of seeking redress varies significantly across states and creates a further impediment for creating a national law with equal rights under ACL for all Australians.

Generally, across all states and territories, consumers are first encouraged to resolve the dispute with the business. If consumers are still unable to resolve their complaint, they may request conciliation assistance from their state or territory regulatory body (except Tasmania³¹ and ACT³²). All regulatory bodies have signed a Memorandum of Understanding regarding enforcement which strives to harmonise enforcement strategies. However, regulatory bodies cannot force a business or consumer to settle a dispute and where conciliation fails, the consumer would need to seek redress through the appropriate court or tribunal.

As detailed in the table below the court fees vary significantly across states and territories³³

Value of State/ Claim Territory	Less than \$500	Between \$501 and \$1000	Between \$1001 and \$2000	Between \$2001 and \$5000	Between \$5001 and \$10000	\$10000 and above
ACT	\$68	\$68	\$68	\$140	\$140	\$499
Northern Territory	\$121	\$121	\$121	\$121	\$121	\$408
Queensland	\$23.80	\$61.00	\$108.70	\$108.70	\$108.70	\$305
South Australia	\$138	\$138	\$138	\$138	\$138	\$138
New South Wales	\$47 Concessio	\$47 Concessio	\$47 Concessio	\$47 Concessio	\$47 Concession	\$97 Concession ³

³¹ The steps outlined on the Tasmanian Consumer affairs and fair trading website does not state that it engages in conciliation processes although the regulatory body might do so in practice.
http://www.consumer.tas.gov.au/making_consumer_complaint

³² The steps outlined on the Access Canberra website do not state that it engages in conciliation processes although the regulatory body might do so in practice.
https://www.accesscanberra.act.gov.au/app/answers/detail/a_id/1598

³³ These fees assume the consumer is an individual

	n ³⁴ : \$5	n ³² : \$5	n ³² : \$5	n ³² : \$5	³² : \$5	² : \$5
Victoria	\$59.80	\$174.10	\$174.10	\$174.10	\$174.10	\$575.30
Tasmania	\$111	\$111	\$111	\$111	\$214.60	\$214.60
Western Australia	\$106	\$106	\$106	\$106	\$106	\$269

Lack of uniformity in fees

As these fees vary significantly, consumers' access to justice is made dependent on their postcode. For example, if a consumer wishes to reject a car worth \$8,500 and seek redress through the courts or tribunal, the consumer would incur between \$5 and \$214.60 depending on their state of residence or where the consumer bought the car. The cost of obtaining redress may affect a consumer's access to their rights under the ACL and as these costs are state/territory specific, it prevents the rights to be truly national in nature.

Lack of uniformity in dispute resolution body and procedure

Across Australia, there are significant differences in accessing judicial remedies. For a consumer that may have relocated across states, this may be extremely confusing to navigate and understand. This is detailed in the table below and assumes an ACL claim not exceeding \$10,000.

Type of Court State/ Territory	Magistrates/ Local Courts	Civil and Administrative Tribunal
ACT		✓
Northern Territory	✓	
Queensland		✓
New South Wales		✓
Victoria		✓
Tasmania	✓	
South Australia	✓	
Western Australia	✓	

Lack of uniformity in procedure

A result of the difference in dispute resolution bodies is the difference in procedure to commence a claim. A minor case claim in the Magistrates Court in WA is very different from an application in the Victorian Civil and Administrative Tribunal. A court claim is very formal and is

³⁴ This is defined as a person who receives a pension, benefit or allowance under Chapter 2 of the *Social Security Act 1991*; a person who receives a service pension under Part III of the *Veterans Entitlements Act 1986*; or a person in receipt of a grant of legal aid or assistance from a community legal centre.

intimidating for consumers, particularly with the need to navigate court forms and formalities. A tribunal might be better suited for consumers who are seeking redress as there is scope for less formality.

Recommendation:

We recommend:

- 1) that a national tribunal be created to hear cases relating to the ACL;
- 2) in the alternative, that harmonisation between states and territories be undertaken to provide a uniform system of adjudication (e.g. the State Administrative Tribunal in WA be extended to include ACL disputes)

6.2 What are the experiences of consumers and businesses in dealing with ACL regulators? Could they play a greater role in promoting private action or take action in other areas that would help consumers enforce their rights under the ACL? (Question 28 of the Issues Paper)

6.2.1 Role of the regulator

We see a strong role for State and Federal regulators to bring proceedings against businesses for breaches of the ACL. They have greater resources than consumers and their actions can lead to greater systemic change in businesses' behaviour. (See [6.1])

A consistent pattern that we have seen in our work is that some consumers are unable to have their disputes resolved even with the help of the regulatory authorities. DOC has assisted many consumers in conciliation but some of these cases fail to result in a resolution. Due to funding constraints, DOC has also been unable to take enforcement action in these cases. These consumers are then left with little choice but to commence a court claim.

To illustrate this, in 2014-2015, of the 965 conciliation attempts by DOC in relation to motor vehicle disputes, less than half (428) reached an agreement and more than one in three (344) were referred to the magistrates court to seek redress.³⁵ The DOC annual report does not include conciliation involving motor vehicle disputes relating to ACL matters only or other ACL matters involving goods and services other than motor vehicles. In addition, of 130 matters involving motor vehicle disputes, only 10 were approved for prosecution.

We understand the regulators have constraints and will not be able to take enforcement action in every situation. Therefore, we are of the opinion that changes should be formulated which will reduce the reliance on the regulators.

Recommendation:

We recommend that where changes are made to the ACL, remedies which are self-help in nature be preferred to remedies that are dependent on the regulators.

³⁵ Western Australia Department of Commerce, *Annual Report 2014-2015* (21 September 2015) Page 157

7. Emerging Consumer Policy Issues (Selling away from Business Premises) (4.1 of the Issues Paper)

7.1 Does the distinction between ‘solicited’ and ‘unsolicited’ sales remain valid? Should protections apply to all sales conducted away from business premises, or all sales involving ‘pressure selling’? (Question 31 of the Issues Paper)

The thrust of the unsolicited consumer agreements provisions are to protect vulnerable consumers who might not be well informed of their rights and be subject to high pressure sales tactics in a place other than the business premises of the supplier. The consumer must not have invited the supplier to contact them about the provision of goods or services for the agreement to fall within the provisions.

Dispute areas

In many instances, there are disputes about whether the consumer invited the supplier to contact them about the provision of goods or services and whether an agreement is an unsolicited consumer agreement.

Many businesses attempt to get around the provisions by having other suppliers include generic terms in unrelated contracts authorising contact generally. By signing those contracts, the consumer agrees to be contacted by unrelated third parties even though they may not be aware that they have consented to that. This “agreement” to be contacted to be contacted allows businesses to avoid the unsolicited consumer agreements provisions entirely.

R’s Story

R registered for a seminar that was promoted as a property investment seminar that will provide tips about the investing in property. As part of the registration process, R had to consent to the statement that he was “aware that [he] has the opportunity to purchase further educational products and services at the event”.

At the seminar, R was sold by another promoter a “wealth education” package that focused primarily on share trading. In the contract that R signed, no cooling off period was stated and there was a clause that “no refund of the subscription or enrolment will be made for any reason after the client receives the course materials.”

Effectively, the business was attempting to circumvent the unsolicited consumer contracts provisions.

We are of the opinion that this situation should be caught by the unsolicited consumer agreements provisions. Often, consumers may not be aware that they have asked to be contacted. Hence, when they are contacted, they suffer the same disadvantages as consumers who have been offered unsolicited consumer agreements. They are not well informed and have not had time to assess their requirements and costs involved. In addition, they feel pressured to obtain the products or services sold.

M's Story

M completed a survey online in order to receive a free sample meal from EM, a business which provided prepacked meals. M agreed to receive a call from EM about the free sample. EM called M to discuss the free sample and subsequently, M entered into a contract with EM for prepacked meals totalling more than \$800.

M had originally believed that he had agreed to be called about a free meal. M felt pressured throughout the call to provide his debit card details. M also believed the transaction was for a free trial and not \$800 worth of meals. Under these circumstances, M inadvertently bought \$800 worth of meals. When M contacted CCLSWA, \$80 had already been debited from M's debit card.

We advised that M had entered into an unsolicited consumer agreement as M had expected a call about the free sample not the sale of meals. We requested that EM acknowledge this and refund the \$80 debited and to cease any further deductions. EM refused and claimed that they were entitled to rely on their terms and conditions and only provide a refund once M had returned the meals at M's cost. EM then ceased replying to our correspondence.

At no time was M informed of his rights to a cooling off period or provided an opportunity to consider the purchase without the high pressured environment of a telephone call.

Another variation is the use of advertising which does not disclose of the sales that would take place at the supposed "free" event. A business would invite the consumer for a free seminar about personal or business development at a neutral location away from the business' premises. However, once the consumer attends the seminar, the business would attempt to sell their products to consumers, occasionally using high pressure sales tactics even though the sale of the products or services were not mentioned when the free seminar was offered.

K's story

K attended a congress and was invited to attend a free information seminar by AGI. The invitation did not state that the seminar would involve the selling of products and services by AGI.

When K attended the seminar, K was sold several products offered by AGI and payment was taken from K at the same time. The seminar was held in a conference room at a hotel.

Given that K was not expecting to be sold products, she was not well informed of the products and the location of the seminar made K feel pressured to make purchases of the goods sold. At no point was K informed of her right to a cooling off period and ability to obtain a refund.

K subsequently terminated the agreement to purchase the products but failed to obtain a refund. K obtained a chargeback after contacting her bank directly and disputing the transaction.

This is a common occurrence for vulnerable clients who often do not read or understand the implications of consenting to terms and condition that includes consent to be contacted by businesses.

There are 2 issues that arise from these practices. Firstly, the consumer has a lack of knowledge of the proposed contact even if they “agreed” to the contact in a legal sense. This would create the same conditions that underpin the unsolicited consumer contracts provisions. Secondly, these clauses can be unspecific and it can be difficult for consumers to have the same understanding about what they have agreed to be contacted about as businesses have.

Thus, we believe that the requirement that consumers did not invite the dealer to come to a place or make a telephone call for the purposes entering into negotiations for the supply of goods and services can cause significant consumer harm and renders the law uncertain.

Therefore, we would recommend that this requirement be removed to increase certainty and protect vulnerable consumers.

We do not believe that this would cause significant detriment to businesses. Firstly, where there is a product or service that a well-informed consumer believes is valuable and intends to purchase it, it is unlikely that they would request a cancellation and refund. An extension of the provisions to goods and services where consumers have agreed to be contacted about is unlikely to cause significant detriment to businesses. In the EU and the UK, the rights to a cooling off period extend to contracts for goods concluded online and it does not unduly hamper businesses and it has been suggested that it increases the competitiveness of businesses.³⁶

Secondly, the removal of the requirement does not mean that businesses are prevented from contacting prospective buyers but removes the incentive to include terms that authorise contact. However, as in the example of the UK where this is the position, businesses continue to include terms in contracts authorising contact and this does not prevent sales from being completed.³⁷

Thirdly, while the information requirements might impose a cost on businesses in the short term, this is a one-off cost and likely to be offset by the recurring benefit of reduced risk of consumer detriment.

Hence, while there may be some business detriment, the long term gain of reduced consumer detriment and the reduced uncertainty around the provisions outweigh the detriment suffered.

Recommendation:

We recommend that the requirement that the consumer must not have invited the supplier to contact them about the provision of goods or services for the agreement be removed from the unsolicited consumer agreements.

³⁶ Department of Business, Innovation & Skills (UK), *Impact Assessment, Implementation of the EU Consumer Rights Directive (2011/83/EU)* (2013)

³⁷ For example, the Nectar loyalty program in the UK continues to require members to consent to receive “offers for products and services”: <https://www.nectar.com/about/privacy-and-legal/privacy-policy>

8. Acknowledgement

We would like to thank our colleagues at Gosnells CLC for contributing to this submission. We would also like to thank Legal Aid New South Wales for assisting us with our submissions.

We hope that our submission would be useful in elucidating the current issues in the ACL and that the proposed recommendations aid in making the ACL more robust and relevant in the future. Please contact Faith Cheok if you have any questions about this submission.

Yours faithfully

CONSUMER CREDIT LEGAL SERVICE WA INC.

A handwritten signature in black ink, appearing to read 'Faith Cheok', written over a thin horizontal line.

Per

Faith Cheok

Principal Solicitor