Report to Consumer Protection, Department of Mines, Industry Regulation and Safety

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1. Introduction

Background

In October 2018, Consumer Credit Legal Service (WA) Inc. (**CCLSWA**) received funding from the Consumer Protection division of the Department of Mines, Industry Regulation and Safety (**DMIRS**) to commence a 12-month law reform project. The project focused on the following 4 areas of law and policy that affect Western Australian consumers (**The Initiatives**):

i. Retirement village schemes, with particular attention to possible elder abuse or vulnerability issues;
ii. The motor vehicle industry, with particular attention to the lack of a cooling off right in purchase contracts; the penalty nature of the 15% pre-estimated liquidated damages clause; and the necessity of retaining the statutory warranties for used vehicles;
iii. The challenges of enforcing rights provided under the Australian Consumer Law, with particular reference to "lemon" cars; and
iv. Emerging consumer issues, with particular attention to the prevalence and impact of debt vultures: predatory lenders or debt management or debt negotiation businesses that charge consumers extortionate service fees, in return for limited and inadequate assistance.

About CCLSWA

CCLSWA is a not-for-profit statewide specialist community legal centre with its office in the Perth metropolitan area.

CCLSWA advises and advocates for consumers on consumer credit issues and Australian Consumer Law related problems.

CCLSWA operates a free telephone advice line service which allows consumers to obtain information and legal advice in the areas of banking and finance and consumer law. CCLSWA provides ongoing legal assistance to consumers through casework, if the legal issues are complex, and CCLSWA has capacity to do so.

CCLSWA also provides:

- assistance to financial counsellors and other consumer advocates who work closely with disadvantaged and low-income individuals for the resolution of their credit and debt related problems;

- community legal education programmes relating to credit and debt issues, and the Australian Consumer Law, including financial literacy programmes to high school students and select target groups within the community;

- relevant policy and law reform initiatives; and

- a training and supervision programme for law students and graduate volunteer paralegals.

In providing these services, CCLSWA aims to create awareness, knowledge and understanding of consumer issues relating to financial services entities, and the Australian Consumer Law.

CCLSWA's mission is to strengthen the consumer voice in WA by advocating for, and educating people about, consumer and financial, rights and responsibilities. In this report, where appropriate, CCLSWA provides its experience and views, and makes recommendations towards dealing with issues pertaining to the Initiatives.

We include case studies as examples of our experience. In these case studies, we have not named the parties; we have made these entities anonymous, primarily to protect our clients' confidentiality. Also, some matters may be ongoing, and others may be subject to confidentiality agreements.

Summary of Recommendations

1. Retirement Villages

Enhance prudential supervision of RVs to protect residents' exit entitlements

We recommend the WA government bolster existing reporting obligations by installing an independent body to supervise the audited accounts of RV operators and to monitor their financial viability.

We recommend the introduction of a Refund Guarantee Scheme modelled on the Refundable Accommodation Deposit scheme in the Commonwealth regulated Aged Care Industry.

We recommend modifying the existing charge arrangements provided for under the *Retirement Villages Act 1992* (WA).

Improve the dispute resolution mechanisms in the RV sector

Introduce a good faith requirement into section 30(3)(b) of the *Retirement Villages Code* to resolve disputes.

Mandate compulsory mediation between the parties during the dispute resolution process.

Extend the State Administrative Tribunal's ambit to hear RV disputes and to make a variety of orders, similar to other Australian jurisdictions.

Establish a dedicated advocacy service to assist RV residents navigate the complex and lengthy dispute resolution processes.

2. Motor Vehicles

Improve consumer protections in the following areas:

Cooling Off Period

CCLSWA recommends the introduction of a 3 clear business day cooling off period for purchases of both new and used motor vehicles (except vehicles sold at auctions or through private sales). We oppose the inclusion of a waiver to the cooling off right.

We recommend the implementation of a prescriptive provision in the *Motor Vehicle Dealers Act 1973* (WA) detailing how consumers can exercise their cooling off right to ensure the effective operation of the right between the dealer and the consumer.

Pre-estimated Liquidated Damages

We recommend that the current 15% pre-estimated liquidated damages amount currently being charged by dealers as default, is reduced to 5% to more accurately reflect actual losses the dealer may incur where consumers terminate their purchase contracts outside the cooling off period.

Dealer Warranties

We advocate for the retention of dealer warranty provisions in the *Motor Vehicles Dealers Act 1973* (WA) and that they continue to operate concurrently with the consumer guarantee provisions under the Australian Consumer Law.

3. Australian Consumer Law

Lemon Laws

We propose the introduction of nationwide lemon laws to address the inequities that arise when consumers purchase defective vehicles (lemons), while drawing attention to the inadequacies of the ACL in protecting these consumers.

We recommend amending the legislation with respect to consumer guarantees, to allow consumers their choice of remedy where goods fail to meet consumer guarantees within a short period of time after purchase or delivery, i.e. repair, replacement or refund.

We recommend improving the effectiveness of the ACL by reversing the onus of proof to ease the evidentiary burden where consumers allege there has been a major failure by requiring suppliers to demonstrate there was no breach of consumer guarantees at the time of supply.

We recommend that any lemon laws should apply to both new and used motor vehicles particularly in WA with the proposed amendments to the *Motor Vehicle Dealers Act 1973* (WA) to phase out the statutory warranty provisions.

We recommend the introduction of a separate tribunal for disputes about faulty motor vehicles nationally, or in the alternative, set up a specialist division under the State Administrative Tribunal in WA.

We recommend the creation of an expert panel to test motor vehicles and write expert reports for a set fee. The panel is to be funded by industry and administered by the State and Territory consumer protection and fair trading bodies.

4. Emerging Consumer Issues

Debt Vultures

We recommend that Consumer Protection embark on an extensive awareness raising campaign to shed light on the nature of Debt Vultures (**DV**) and their impact. The campaign should also make consumers aware of free services such as community legal centres, financial counsellors and the Australian Financial Complaints Authority.

We recommend that there be a licensing requirement for DVs regulated by the State in the same manner that other services such as real estate agents and settlement agents are regulated in the property industry.

We recommend Consumer Protection consider using the general provisions of the ACL regarding particular types of conduct to address some of the issues with DVs which amount to contravening the ACL.

Regional Issues

We recommend that Consumer Protection maintain vigilance over the effect and the impact schemes such as 'Book-up' and income management schemes in the form of the cashless debit card have on vulnerable consumers.

We recommend a bigger presence by Consumer Protection in the regional areas to allow consumers the opportunity to make their complaints known and for Consumer Protection to gain a better understanding of the nature of the prevailing issues and to take the requisite remedial action where businesses cause consumer detriment.

We recommend that government increase action and funding for regional engagement without which the voice of regional consumers would otherwise be ignored due to distance and lack of technology

We recommend that Consumer Protection have a robust awareness raising campaign into the dealings of these businesses particularly in the regional areas in addition to ensuring that the recommendations we made under the Motor Vehicle and Debt Vulture sections of the report are implemented for the benefit of all consumers.

2. Retirement Villages

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2. Retirement Villages

Ambit

In this report, we focus on global concerns of residents' interactions with the retirement village (**RV**) regime: the prudential supervision of their financial investment; dispute resolution mechanisms; and potential unfair contract terms.

We limit our report to comments on RV accommodation falling within leasehold arrangements only, where a resident signs a contract that gives them the long-term right to occupy the premises. RV leases usually extend to the lifetime of the leaseholder.[1]

Throughout the report, we use the term "operator" generally to refer to either the operator or the owner of the RV. For the purposes of this report, we do not find it necessary to distinguish between an operator and an owner of the RV. For all intents and purposes, "operator" in this report simply refers to the other party of the RV arrangement, or of the dispute concerning the RV, that the resident is a party to.

Executive summary

Recommendations

We suggest that the WA government amend existing legislation to give effect to the 2 following recommendations:

- Recommendation 1: Enhance prudential supervision of RVs; and
- Recommendation 2: Improve the dispute resolution mechanisms in the RV sector.

Unfair contract terms

We also provide a limited analysis of RV contract clauses and their interaction with the unfair contract terms regime within the Australian Consumer Law (**ACL**).[2]

[1] https://www.commerce.wa.gov.au/sites/default/files/atoms/files/snrhsgguideretirementvillages.pdf.
[2] Competition and Consumer Act 2010 (Cth) Sch 2.

Key issues

We address below a number of key issues that form the background for our recommendations towards potential reform.

Termination risk

RV operators have strictly limited grounds under which they may terminate a RV contract, and in most jurisdictions, only if it is a lease or licence. These measures seem to be effective in protecting a resident's rights to remain in a RV.

Operator insolvency

A licence and a lease are lesser property rights than a right to a freehold estate.

An operator's insolvency could bring more drastic consequences to a resident who has a (mere) licence to occupy; and to a lesser extent, to a resident with a registered long-term lease.

Enforceability of charge

The statutory charge does not secure all the RV land, and there are some preconditions to enforcing the charge.

Premium as loan

There is no statutory right for residents to receive interest on their premium contributions held by the RV operator. A common approach taken by RV operators is to hold the premium on trust until the resident enters the RV, at which time the funds are released to the RV operator as an apparent unsecured loan.

Capital appreciation

While some residence contracts provide for capital gains to be shared, this is not universal and depends on the arrangement with the individual resident.[3]

Transparency and social perception

There is a perception in the community that the financial terms relating to the ingoing premium are not transparent, with many perceiving it to be an unsecured loan to the RV operator. There is also a perception that residents feel they cannot afford to leave because of the deferred

[3] Recently in 2017, Stockland provided new residents with contracts that apparently allow 50-50% split or 100% of capital gains. However, query if these arrangements are true RV schemes; if not, RV legislation does not apply.

management fees (**DMF**) that they are required to pay upon departure, or owing to difficulty selling the unit for a reasonable price.

Dispute resolution

The current system is not sufficiently sensitive to the particular vulnerabilities of residents and the pronounced power imbalance that exists between residents and operators. We further explore this issue in greater detail, in *Recommendation 2: Improve dispute resolution*, of this report.

Recommendation 1: Enhanced prudential supervision

Background: Holding premiums

A premium is generally a one-off payment that secures a resident's right to live in the RV. Upon the resident's exit from the RV, the operator refunds the premium to the resident, minus the various deductions subject to the terms of the relevant residence contract. We refer to the refund amount that the resident is entitled to as the "exit entitlement".

In every jurisdiction except for the Northern Territory, prior to a resident's move into the RV, the premium is held on trust. A statutory charge is created, securing the resident's right to their exit entitlement. The charge takes precedence over subsequently registered encumbrances, according to general property law.

In Victoria, Western Australia, Tasmania, and the Northern Territory, the resident's charge does not need to be registered to be effective. There are mandatory time frames to return the premium to the resident, once vacant possession has been delivered.

In WA, the RV has 45 days to refund the premium. However, if the property is re-leased before the mandatory premium refund timelines outlined above, then the time frame is 14 days only. However, s19(5) RV Act (WA) practically negates this 45-day refund limit, as RV operators can simply circumvent it by inserting a clause in the RV contract to allow residents to appoint a nominee/agent to sell the interest.

Exit entitlement

We submit that a key policy priority in the RV sector is to maximise the amount of the exit entitlement, and reduce the time frame within which to return it to the resident.

Residents can struggle to obtain repayment of the exit entitlement where:

- an insolvency event or village failure occurs; or
- a resident voluntarily leaves a RV, but cannot fully recover their exit entitlement because there is a dispute with the managing entity of the RV.

The problems faced by residents are accentuated in circumstances where the exit entitlement effectively functions as an unsecured interest-free loan (save for the statutory charge) to the RV operator.

Recommended best practice model

To protect the security of a resident's exit entitlement, we recommend the WA government consider reform focused on:

- an enhanced prudential supervision of RVs, to monitor their financial viability; and
- a charge and refund guarantee scheme.

Enhanced prudential supervision

The WA government has enacted regulations which mandate quarterly and yearly audits of a RV's financial statements. The RV must provide the financial statements to residents by certain times. The current requirements for 'enhanced' financial reporting are beneficial for the prudential security of the RV.

To bolster the protection afforded by the existing reporting obligations, we recommend installing an independent body to supervise the audited accounts of RV operators. This will provide additional prudential security of the RV. We suggest that this body could be akin to the model of the New Zealand statutory supervisor.

A statutory supervisor could monitor the financial viability of RVs and protect the rights of vulnerable clients, as the role allows for more proactive supervision and intervention to better advocate for residents' rights.

The WA Department of Commerce (as it then was) in its statutory review decided not to adopt the recommendation of a statutory supervisor, instead preferring to retain the current conciliation arrangements. Its reasons, which broadly state that existing dispute resolution processes are sufficient, are set out below:

> "Having considered a range of dispute resolution options for the retirement village industry in Western Australia, including establishing a statutory supervisor, a dedicated commissioner and an ombudsman, the Department proposes that the current conciliation arrangements established within the Department remain. The Department provides a conciliation service for retirement villages within its Industry and Consumer Services Directorate. If disputes are not able to be resolved at village level, then disputing parties are able to apply to the Department and the matter is taken up by the appropriate conciliation section of the Department.[4]

Adopting a similar supervisor model in WA may benefit residents. Although Consumer Protection does provide conciliation and mediation services, having a dedicated statutory supervisor would allow for more proactive supervision and intervention to better advocate for, and protect residents' rights. The introduction of a similar system ought to be considered.

[4] *Final Report, above n 1,* p108

Modifying the existing charge arrangements

We recommend that the existing charge arrangement be retained, subject to 3 modifications:

(a) The statutory charge under s20(1) RV Act should be expanded to allow the charge to secure a resident's right to occupy their unit and the right to use the communal and recreational facilities.

(b) Section 15 RV Act to clearly require that the charge be registered over both residential apartments as well as shared amenities of RV.

(c) Consider removing s19(5)(b) RV Act as it restricts a resident's right to receive the exit entitlement within a certain timeframe if that resident has been contractually granted the right to appoint their own agent to dispose of their interest in the RV.

Introduce a refund guarantee scheme

We recommend the WA government examine the benefits of setting up a refund guarantee scheme modelled on the Refundable Accommodation Deposit (**RAD**) scheme in the Commonwealth regulated aged care industry, to be funded by a modest impost on aged care Approved Providers (as opposed to taxpayers) in the event of payments becoming necessary.

Recommendation 2: Improve dispute resolution

Effective dispute resolution for seniors must:

- *be accessible and approachable;*
- *take into account the specific needs of seniors;*
- *be fair; and*
- *be well promoted amongst RV residents..*[5]

Background: vulnerabilities and costs

The current system is not sufficiently sensitive to the particular vulnerabilities of RV residents and the pronounced power imbalance that exists between RV residents and operators.

Dispute resolution mechanisms are used by WA residents and village operators to resolve a variety of issues arising in RVs. Common issues include: the management and maintenance of

[5] Final Report, above n 1, at 107.

the village, refurbishment units and communal areas, and fees associated with running the village.

WA residents often find dispute resolution mechanisms inaccessible because they are lengthy, costly and complex. Costs are a major deterrent for residents who cannot find free or affordable legal advice, and do not have the financial capacity to pay for mediation services. Further, a power imbalance frequently develops between the resident and the operator during mediation and State Administrative Tribunal (**SAT**) proceedings, because the operator can afford legal representation, while the resident cannot. In WA, there are no free or low-cost advocacy services available to residents.

As the ageing population grows, seniors' accommodation needs will continually increase, whether in RV schemes or similar, and in aged care. Dispute resolution will become increasingly prominent. It is important for WA to instigate planning and policies, to ensure that our dispute resolution mechanisms for seniors' accommodation issues are equipped to provide just and fair outcomes for our seniors, including for RV residents.

Best practice model

This section considers the following potential options for RV dispute resolution reform in WA, to:

(a) introduce a "good faith" requirement to resolve disputes;
(b) mandate compulsory mediation;
(c) extend SAT's ambit to hear RV disputes;
(d) install an industry-specific ombudsman; and
(e) provide a dedicated advocacy service for residents.

This report recommends the following changes:

(a) a "good faith" requirement be introduced into section 30(3)(b) of the RV Code;
(b) compulsory mediation be mandated in the dispute resolution process;
(c) SAT's ambit to hear RV disputes be extended; and
(d) a dedicated and affordable advocacy service be established to assist seniors, including RV residents, to navigate the respective dispute resolution processes.

We recommend against installing an industry-specific ombudsman.

Overview

Several issues can arise in an RV that might lead to a dispute or complaint. Common issues include:

(a) the management and maintenance of the village;
(b) fees and charges associated with running the village;
(c) refurbishment units and communal areas;
(d) provision or removal of promised facilities or services; and

(e) activities of other residents.[6]

In WA, the RV dispute resolution process begins with internal dispute resolution facilitated by the village operator.[7] If the internal dispute resolution process is unsuccessful, then the resident may apply to the Commissioner for Consumer Protection[8] to have the dispute referred to voluntary mediation.[9] If the dispute still remains unresolved then the resident can apply to have the matter heard by SAT,[10] provided the dispute is one over which SAT has jurisdiction.[11]

Key issues

Power imbalance

The dispute resolution process can be complex and lengthy. There is a definite power imbalance between the RV operator and residents. Residents are in their late 70s or in their 80s. They may be fit and of sound mind, but they face the challenges of their age (including declining health) and with minimal disposable income or assets.

As with most people, residents need to weigh up the costs of litigation, even if it is litigation at SAT and not the more formalised court system. Apart from CCLSWA, there are no affordable, dedicated services in WA which provide free legal advice to RV residents. Unlike other Australian jurisdictions, WA agencies who work with seniors primarily offer free advice or advocacy services in general law, aged care, or human rights areas.[12] This inevitably leads to unequal access to necessary resources for SAT proceedings against the RV operators on the other side. The RV operator would have some legal representation – or at the very least, some access to professional legal or financial advice - and the resident would be unlikely to be able to afford legal or other advice or representation.[13]

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[6] WAVRA – https://warvra.org.au/current-residents-2/disputes-and-complaints/

[7] Formal dispute resolution process outlined under Division 6 of the Code, *Fair Trading (Retirement Villages Interim Code) Regulations 2019* (Code).

[8] Consumer Protection is a division within WA's Department of Mines, Industry Regulation and Safety.

[9] *Fair Trading (Retirement Villages Interim Code) Regulations 2019* (Code) clause 31(3). But note that the Commissioner rarely exercises this power: Final Report n 1, p 105.

[10] The State Administrative Tribunal (SAT) reviews a range of administrative decisions made by government agencies, public officials, and local governments. SAT's jurisdiction span human rights, vocational regulation, commercial and civil disputes, and development and resources issues. RV disputes fall within the ambit of civil disputes.

[11] Part 4 of the *Retirement Villages Act* 1992 (WA).

[12] Advocare WA Elder Abuse Helpline, Northern Suburbs Community Legal Centre, and Legal Aid WA. Peel Community Legal Services, based in Mandurah, offers free legal advice and advocacy to the Mandurah community, which comprises a significant portion of seniors. Peel CLS assists in tenancy and civil legal issues, and advocates and negotiates on seniors' behalf. As is typical of community legal centres' service delivery, assistance is offered subject to very limited resources.

[13] For instance, SAT's home page advises that "Applicants to SAT need to know the relevant Act and section, and in some cases the regulation or town planning scheme, which together are known as *enabling laws*. Applicants may only bring a matter before SAT if an enabling law gives SAT the power to make a decision on that matter." Further, to

Costs

This issue is related to the above, and contributes to the power imbalance between the operator and the resident. Dispute resolution is costly to residents. They find it expensive, and often unaffordable to seek professional, legal or financial advice. Costs are therefore a major deterrent to accessing mediation services.[14] The RV regulations specify that the parties must share the mediation fees, as opposed to the government or village operators paying the entire cost.[15]

SAT's ambit: narrow

SAT can hear the following 5 main types of disputes, pertaining to:

1. a residence contract's compliance with a requirement of the regulations: s 55(1)
2. a service contract: s 56(1)
3. recurrent charges and levies: s 57A(1)
4. the transfer of a resident: s 57(1)
5. the termination of a resident's occupation: s 58(1), 59(1), 62(1) and 63(1).[16]

We are of the view that WA legislation provides for an unduly narrow scope for SAT to deal with, and resolve RV disputes. In contrast, most Australian states and territories have a general jurisdiction to hear disputes between residents and operators. Residents and operators in jurisdictions such as New South Wales, South Australia, the ACT and Queensland can bring an application to the relevant tribunal simply if they claim that there is a dispute between the parties. The dispute does not have to be about a particular issue. A broader jurisdiction would allow parties to bring disputes more freely to the tribunal without the legal intricacies of determining whether the tribunal has jurisdiction to hear their particular dispute.

A further difference between the jurisdiction of the SAT and the tribunals of other jurisdictions is the SAT's limited powers to make orders.

The tribunals in New South Wales, South Australia, the ACT and Queensland have wider powers to make a variety of orders, which complements their wider jurisdiction to hear disputes.[17] This allows the tribunals to respond more flexibly to the dispute and provide a variety of possible solutions. These include the order of payment or compensation (or the refund of it), requiring a party to do something, restraining a party from doing something, varying a contract,

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start off with, a SAT application has to be made online through the SAT Application Wizard, which requires an applicant to browse and select the correct enabling laws. Then as the proceedings begin, the applicant would need to adduce evidence to substantiate their claim or defence.

[14] https://www.commerce.wa.gov.au/sites/default/files/atoms/files/statutoryreviewofretirementvillageslegislationfinalrep.pdf

[15] Fair Trading (Retirement Villages Interim Code) Regulations 2019 WA s 33.

[16] Retirement Villages Act 1992 (WA).

[17] Ibid.

cancelling a contract, determining exit entitlements and ordering the reversing of actions. The *Retirement Villages Act 1992* (WA) could be amended to give the SAT wider powers to make orders. This may result in better outcomes for the parties.[18]

Consideration of potential reforms

(a) "Good faith" requirement, plus…

To mitigate the power imbalance, it would be worthwhile to consider amending the legislation, as discussed below:

(i) Firstly, it would be helpful to include a requirement for the parties to act in "good faith" under section 30(3)(b) of the RV Code, in their attempt to resolve the dispute between them. Section 30(3)(b) specifies that the parties in dispute must "attempt to resolve the matters that are in dispute" after mutually agreeing to meet at an agreed place within 20 working days.

The element of good faith will place an obligation on the parties to approach the resolution of the dispute seriously, and they can be brought back to the negotiations if they fail to do so. The statutory review suggested requiring the use of 'good faith' or 'fair dealing' agreements in RVs, with the goal of "defining mutual objectives between residents and operators, setting out means of improved communication and the identification of likely problems".[19] This was never put into law.[20] Currently, it seems that the administering body could approach negotiations in bad faith for only one meeting to resolve the dispute and, in so doing, discharge their obligations under s30 of the Code.

(ii) Secondly, it would be helpful to require the parties to attend, if necessary, a further meeting within 10-20 days of the first meeting in addition to the requirement in section 3(a). This could promote further discussions to resolve the issue without escalating to adversarial methods of resolution; and

(iii) Thirdly, it would also be helpful to require further mandatory information on dispute resolution processes to be disclosed upfront in the resident contracts to reduce the complexity for residents navigating through the various avenues of dispute resolution processes.

[18] It appears that all jurisdictions are limited to hearing disputes between residents and operators, and that no tribunal seems to have jurisdiction to hear disputes between residents. Whether widening the scope of the SAT's jurisdiction in this way is a good idea is unknown. It may be that it is better to leave this type of dispute to other dispute resolution mechanisms such as mediation.

[19] Final Report, above n 1, p 109.

[20] The RV Code makes no reference to a good faith requirement in its dispute resolution processes. The only similar obligation, set out at s30(3)(b), is that parties "*attempt to resolve the matters that are in dispute.*" This does not rise to a good faith obligation.

(b) Compulsory mediation

Currently, the option of mediation is largely superfluous because residents often do not have the financial capacity to pay for mediation services; further, it is not a compulsory step in the dispute resolution process.[21] Compulsory free or low-cost mediation should be introduced into the WA dispute resolution process to facilitate a more efficient and cost effective mediation model.

The New South Wales Inquiry into the NSW RV Sector suggested alternative models for compulsory mediation. Such models could be considered for the WA dispute resolution process.[22] Firstly, the Inquiry recommended introducing mediation managed by NSW Fair Trading or the Department of Finance, Services and Innovation.[23]

However, it might be beneficial for WA to introduce compulsory mediation at the SAT level, rather than through our equivalent to NSW Fair Trading division, that is, Consumer Protection. Consumer Protection reported that doubts arose as to the appropriateness of the Commissioner having the power to refer matters to mediation, particularly where aspects of the case may be prosecuted at a later date.[24] Consumer Protection's role combines 3 functions in the one department: regulator, prosecutor and dispute resolution facilitator.[25]

Queensland currently provides mediation at the tribunal level through Queensland Civil and Administrative Tribunal (**QCAT**).[26] There are fees that the applicant must pay when making an application to QCAT for mediation; however, those fees can be waived if the applicant is experiencing financial hardship.[27] There are very limited circumstances where an application can be made to QCAT without undertaking mediation, and these circumstances are listed in the Act.[28]

WA should consider applying a similar mediation model and allow residents to apply directly to the SAT for compulsory mediation, as it will likely provide a more just, efficient and cost-effective outcome for both residents, and village operators.

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[21] Pnina Levine*, Security of Tenure for Retirement Village Residents in WA – Will the Law Walk the Walk or just Talk the Talk (2015).*
[22]The NSW Inquiry in the Retirement Village Sector 2017.
[23] In NSW, compulsory mediation services are provided to the strata sector, the Inquiry recommended expanding these services to the RV sector. This would build on the existing complaints management process of Fair Trading, where Fair Trading would provide an 'end-to-end' support service and maintain oversight of the dispute resolution process. Legal advice and mediation services would be outsourced, and Fair Trading would cover the cost of the mediation.
[24] Final Report, above n 1, p 105.
[25]Ibid.
[26] *Retirement Village Act* 1999 (QLD) s 55-165.
[27] https://queenslandlawhandbook.files.wordpress.com/2018/10/rv-fs-disputes-and-complaints-feb-20181.pdf.
[28] *Retirement Village Act* 1999 (QLD) s 169-171.

(c) Extend SAT's ambit to hear RV disputes

WA legislation provides for an unduly narrow ambit for the SAT to hear RV disputes. As outlined above, Part 4 of the RV Act sets out 5 main dispute types which can be heard by SAT. SAT is empowered to make specific orders with respect to each type of dispute and there is no broad power to make orders. For example, with regards to Dispute type 1, SAT may:

- vary or cancel any terms of the residence contract;
- order specific performance of the residence contract;
- order payment of money.[29]

In contrast, most other States and Territories have a broad jurisdiction to hear disputes between residents and operators.

The NSW Civil and Administrative Tribunal (**NCAT**) has a wide jurisdiction under the *Retirement Villages Act 1999* (NSW) to deal with RV matters, and is not limited to specific types of disputes between residents and operators. Section 122 states that if a resident(s) or the operator of a RV claim that a dispute has arisen between the resident and the operator or the operator and one or more residents, the resident or residents or operator may apply to the tribunal for an order in respect of the dispute.

A resident can also make an application under s 128 if he or she considers that the contract is harsh, oppressive, unconscionable or unjust.

The NCAT can also make a wide range of orders under s 128, such as:

- Directing the resident or operator to comply with the Act or Regulations
- Varying or setting aside a provision of a village contract if it conflicts with the Act or Regulations
- Restraining any action in breach of a village contract or rule, or requiring performance of any village contract or rule
- Ordering the resident or operator to perform work or take steps to remedy a breach of a village contract or rule
- Requiring payment of money or compensation.

In South Australia the *Retirement Villages Act* 2019 (SA) provides a similarly broad jurisdiction. The South Australian Civil and Administrative Tribunal (**SACAT**) has broad jurisdiction to hear disputes between an operator and a resident of a RV and make a number of orders under s 46(3), such as:[30]

- restraining a breach of contract
- ordering payment of an amount payable under the contract

[29] SAT Act s 55(3).
[30] *Retirement Villages Act 2019* (SA) s 46(3)

- ordering the payment of compensation
- ordering a party to refrain from future action of a specified type
- requiring the operators to vary or reverse a decision or the effect of an act of the operator
- modifying the terms or conditions of an agreement between the operator and resident
- determining the exit entitlement payable and make orders as to its payment.

Widening SAT's ambit to hear RV disputes could allow residents and operators to bring disputes without the legal intricacies of determining whether the SAT has jurisdiction to hear their particular dispute. One way to expand the SAT's jurisdiction could be achieved by removing some of the specific dispute types that are provided by the RV Act, and including a broad jurisdiction for the SAT to hear a dispute between parties to a RV dispute. This broader jurisdiction would allow parties to bring disputes more freely to SAT. The RV Act could also be amended to give the SAT wider powers to make orders. This may result in better outcomes for the parties.

It is important to note that most RV decisions can be subject to appeal. Appeals can be made on a question of law and the procedures are set out under s 105 SAT Act. For minor proceedings, as defined in the SAT Act, applicants can elect to waive their right of appeal. A minor proceeding is a matter that can be ascribed a monetary value of $10,000 or less.[31]

(d) Industry-specific ombudsman

An industry-specific ombudsman could potentially help alleviate the power imbalance between the resident and operator, and create a less formal, and more efficient process.

Support for an industry-specific ombudsman is not common in WA. In the statutory review, Consumer Protection rejected the idea of a dedicated ombudsman in each state because the pre-existing dispute resolution process already offered was sufficient.[32] Further, it is our view that while there is some potential benefit from installing an ombudsman, there is a greater need for a non-government voice to advocate for RV residents.

In contrast, Consumer Action Law Centre (**CALC**) advocates for an industry-specific ombudsman in Victoria.[33] However, the primary difference between Victoria and WA is the *Retirement Villages Act 1986* (Vic) does not make any provision for a tribunal process for resolving disputes. Consumer Affairs Victoria states that the Victorian Civil and Administrative Tribunal (**VCAT**) is an option for resolving a dispute; although it is unclear what disputes can be

[31] SAT Act s 93.
[32] Final Report, above n 1.
[33] https://www.parliament.vic.gov.au/file_uploads/LSIC_Inquiry_into_the_Retirement_Housing_Sector_Fz5nv2f3.pdf.

brought to VCAT and what orders VCAT can make, because the *Retirement Villages Act* 1986 (Vic) does not provide for VCAT's ambit in relation to RV matters. [34]

In our view, the SAT is a cost-effective process for residents to receive a binding decision, and RVs generally make up a small proportion of matters heard at SAT. The NSW Inquiry made similar observations of NCAT, and stated that the fundamental objectives of NCAT are to deliver tribunal services that "resolve real issues in proceedings justly, quickly, cheaply and with as little formality as possible" and is therefore best placed to provide a final resolution for RV disputes.[35]

Establishing an industry-specific ombudsman would draw on limited government resources, and it is unlikely that it would provide more effective outcomes for residents than the SAT.

(e) Advocacy service

RV dispute resolution is only effective if it is used, and used correctly.[36] Residents are often unaware of the dispute resolution mechanisms. Further, there are few dispute resolution services available to older people in WA. Private lawyers could advise, but there are barriers such as cost to residents, and a lack of specialist legal knowledge.[37]

In WA, as a first port of call, residents who have complaints against their village operators can seek help from the West Australian Retirement Villages Residents Association Inc. (**WARVRA**).[38] WARVRA provides a voice for residents in WA, linking with stakeholders such as the state government[39] and industry. WARVRA is a non-profit, incorporated body staffed by a committee of elected volunteers, who are themselves residents in villages. Whilst WARVRA delivers a laudable service for its members, it faces many limitations in its capacity, being an unfunded, voluntary organisation.

There is clearly a need for the establishment of an advocacy service for residents of RVs in WA to ensure residents can use dispute resolution processes effectively.[40] In interviews conducted for the purposes of the Council on the Ageing (**COTA**) WA study, residents complained that in situations where they sought assistance to resolve their disputes, they came to a "dead end," and it was unclear what their options are if the dispute remains unresolved.[41]

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[34] *Retirement Villages Act 1986* (Vic)
[35] Above n 12 .
[36] Above n 11.
[37] Ibid Also, operators are assisted by paid private practitioners, including well-resourced firms such as Minter Ellison (Australia-wide), and Jackson McDonald (WA).
[38] https://warvra.org.au/
[39] Consumer Protection division within the Department of Mines, Industry Regulation and Safety; as well as Seniors Housing Advisory Centre (SHAC) is an information service within Consumer Protection. SHAC provides sources of information, but does not directly offer housing, or provide legal and financial advice:https://www.commerce.wa.gov.au/consumer-protection/about-seniors-housing-advisory-centre
[40] Ibid.
[41] Ibid.

COTA WA,[42] Advocare,[43] WARVRA, and generalist legal services are a few advocacy services that focus on assisting seniors in WA. Apart from WARVRA, these services do not focus on advocacy or assistance to navigate the dispute resolution processes, although such assistance may occur ad-hoc, and where there is capacity.[44]

CCLSWA has provided legal services to some residents in the near collapse of a RV. The nature and scope of the services we provided were in the form of legal advice regarding the residents' rights, potential arguments and avenues of legal recourse (court or dispute resolution process). We provided legal representation during negotiations. CCLSWA provides free legal advice and representation on any consumer related dispute including RVs where the issue falls under the scope of the relevant legislation e.g. the ACL and the Retirement Villages Code.

There are some specialist seniors legal services in the various states which provide legal advice and representation to retirement village residents. These include but are not limited to:

- Seniors Legal and Support Service (**SLASS**) – Queensland;
- Aged Rights Advocacy Service (**ARAS**) – South Australia; and
- Seniors Rights Service (**SRS**) – New South Wales.

SLASS provides free legal advice, information and social work services for people over 60 years of age, through 5 community legal centres across Queensland.[45] Among other services, SLASS can assist RV residents with advocacy and negotiation for residents of a RV experiencing unfair contract terms and conditions.[46]

In comparison, ARAS is an advocacy service and does not provide legal advice. It offers a free and state wide service to older people, or their representatives, and delivers the RV Advocacy Program for South Australian RV residents. Specifically, they provide the following services through the delivery of advocacy, information and education:

- assist people to articulate and express their concerns to the RV operator.
- speak up on behalf of the resident and at their direction with a RV operator in order to resolve their concern or complaints.
- ensure that people are provided with adequate explanation and clarification in respect to queries about their contract/agreement with the operator.

[42] http://www.cotawa.org.au/ "COTA advances the rights, interests and futures of Australians as we age"
[43] https://www.advocare.org.au/ "Advocare's purpose is to support and protect the rights of Seniors in Western Australia." Advocare's advocates also work with seniors who experience elder abuse, offering advice and access to support services.
[44] CCLSWA notes, of course, that many other organisations (such as the Red Cross), and individuals (such as family members, carers, friends, social workers) in the WA community do intentionally or by default, assist in advocacy for seniors in disputes with the other parties of accommodation arrangements. However, our point is that WA does not have a ***dedicated*** advocacy service for seniors' accommodation issues.
[45] Claxton, Cairns Community Legal Centre, Hervey Bay Neighbourhood Centre, Toowoomba Seniors Legal Support Service, and Townsville Community Legal Service.
[46] https://www.qld.gov.au/seniors/legal-finance-concessions/legal-support/legal-services

- ensure that people are aware of their rights and entitlements according to the *Retirement Villages Act 2016* (SA) and *Retirement Villages Regulations 2017* (SA) and that those rights and entitlements are upheld and respected by the RV operator.
- provide representation and support in respect to any mediation process with the operator, in general meetings with the village operator and in tribunal hearings conducted by SACAT.
- assist people to explore the various options that may be available in respect to addressing and resolving any dispute with a village operator.[47]

SRS differs from both SLASS and ARAS in that it is a specialised community legal centre offering legal advice, advocacy and information to older people, including RV residents. SRS can specifically provide legal advice and advocacy for people living in RVs on matters including: debt management, certain contractual matters and unfair contracts, and provision of goods and services.[48]

WA should consider establishing an advocacy service similar to the services provided in the 3 states. Each model comes with its own benefits and disadvantages, which we consider in the following paragraphs.

The benefit of forming a service similar to SLASS is that it can be provided through existing community legal centres in WA; however the disadvantage is that specialist knowledge can become diluted and resources stretched within the legal service.

In comparison, the model provided by ARAS is beneficial because it can provide assistance to RV residents through each step of the dispute resolution process. They assist residents to articulate their concerns to the operator at the beginning of the process all the way through to providing representation and support in any mediation process with the operator, in general meetings with the operator and in tribunal hearings conducted by SACAT.[49] The main disadvantage is they do not have the resources to offer legal advice and representation.

SRS, on the other hand, provides both advocacy and legal advice to older people in New South Wales. It is the only specialised legal service in Australia offering advice and representation to RV residents. While WA would benefit greatly from a similar service, the resources required to establish a service is a significant barrier. It will require government funding, industry funding, or a combination of both funding types.

[47] https://www.sa.agedrights.asn.au/about-us/faq
[48] https://seniorsrightsservice.org.au/
[49] https://www.sa.agedrights.asn.au/

Recommendation 2: Summary

(a) "Good faith"

The WA government should consider introducing a "good faith" requirement into section 30(3)(b) of the RV Code. The element of good faith will place an obligation on the parties to approach the resolution of the dispute seriously, and they can be brought back to the negotiations if they fail to do so.

(b) Compulsory mediation

The WA government should consider introducing a new compulsory mediation model into the dispute resolution process at SAT. There should only be very limited circumstances where the resident can apply for a SAT hearing without attempting mediation, similar to the process in Queensland.

(c) Extend SAT's jurisdiction

The WA government should consider expanding SAT's remit to hear RV disputes and make orders. One way is through removing some of the specific dispute types and providing SAT with general jurisdiction to hear RV disputes. This is likely to be a more cost effective and just reform than establishing a state or national ombudsman.

(d) Affordable or free advocacy service

In CCLSWA's casework, and in our consultations with stakeholders, including WARVRA and a number of residents, a consistent remark about residents' challenges in dealing with disputes, and accessing SAT, was their sense of disempowerment stemming from their inferior bargaining position, age, frailty, lack of financial resources, and general lack of knowledge of the intricacies of the legal and dispute resolution mechanisms beyond the village, SHAC, and WARVRA.

We recommend the government consider funding an affordable or free specialised advocacy service for seniors, similar to the services provided in Queensland, South Australia and New South Wales. Such a service could provide much needed assistance to RV residents – and senior residents in other accommodation arrangements - regarding the dispute resolution process and options. Such a service would empower seniors, and would be separate and different from SHAC, and be independent of government and regulator altogether.

Challenges faced by seniors in handling legal or other RV issues

"*As an 85-year old, I find it hard to put together my case*"

"I want to take it to SAT, but at 84 years of age, I am not able to put forward a robust case to express my concerns"

"Please help me so that I know it is not my aging brain that is exaggerating the issues."

"I am worried. Do I have to find somewhere else to live, at 87 years of age, if I cannot afford to pay the maintenance fees?"

"I don't know what to do in this situation, I don't have the means to pay a $3000 bill, and cannot afford to pay $800 a month".

"At this age, I cannot afford to go anywhere else."

"I'm not on top of things because I've been ill. I am anxious, depressed, and have been having panic attacks."

"I have expenses of running a car (which is overdue for a service), a sick dog, physio fees, medication, food, insurance. I'm not sure what else I can afford at the moment."

1. *They do not understand their 60-plus page contract.*

2. *There are a lot of disclosure documents, and people don't know how these documents interact with one another.*

3. *People also do not understand the content or context of the documents.*

4. *Pre-contractual information is often lost in the delivery of a thick and inaccessible pile of documents, with the requisite information buried in a schedule or annexure. Sometimes the information is provided to prospective residents at the same time that they are expected to sign the RV contract*[50]

[50] Shelley Whitaker, Senior's Legal

Unfair Contract Terms in RV contracts

"Most disputes arise from residents not fully understanding their obligations under the RV contract"[51]

This section of the report focuses on the presence, prevalence and type of, unfair contract terms in RV contracts, as well as their impact on affected residents. Significant issues arise from the complexity of the RV contracts, unfair contract terms, and hidden costs, which can have risky financial implications.

For the purpose of this report, we reviewed 6 residence contracts for unfair terms; 5 were leasehold contracts, and 1 was a purple title scheme deed conferring ownership on the resident on signing the contract:

RV	DATE OF CONTRACT	TYPE OF PRODUCT
RV 1	2016	Leasehold
RV 2	2015	Freehold (Purple Title Scheme)
RV 3	2011	Leasehold
RV 4	2009	Leasehold
RV 5	2009	Leasehold
RV 6	2010	Leasehold

Many of the residence contracts reviewed are lengthy, complicated and contain allegedly unfair terms which in many cases may result in financial detriment to the resident if relied upon. While the onus is on the person signing up to the contract to read disclosure information, the residence contract, and any other relevant documents, as well as to obtain legal and financial advice prior to signing, it is arguable that the residents do not read and fully understand what it is they are signing up to, as the contracts are not consumer-friendly.

[51] Comment drawn from our engagement with stakeholders

Legislation

Using the framework of the applicable legislation and the ACL regime for unfair contract terms, we were able to identify a number of offending clauses in the residence contracts reviewed.

Australian Consumer Law [52]

The test for determining whether a contract term is unfair is in accordance with s24 ACL. The provisions define a term of a consumer contract as unfair if:

(a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract;

(b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and

(c) it would cause detriment whether financial or otherwise to a party if it were to be applied or relied on.[53]

There is a presumption that a term of a contract is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.[54]

In determining whether a term of a contract is unfair, the court is required to take into account:

(a) the extent to which the term is transparent; and
(b) the contract as a whole.[55]

A term is transparent if the term is:

(a) expressed in reasonably plain language; and
(b) legible;
(c) presented clearly; and
(d) readily available to any party affected by the term.[56]

A consumer contract is defined as a 'contract for the supply of goods or services or the sale or grant of an interest in land to an individual for personal, domestic or household use or consumption.[57]

Section 25 provides examples of unfair terms which we used as a basis for assessing the terms in the contracts.

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[52] Competition and Consumer Act 2010 (Cth) Sch 2, above n 3
[53] ACL s24(1)
[54] Ibid s24 (4)
[55] Ibid s24 (2)
[56] Ibid s24 (3)
[57] Ibid s23 (3)

RV legislation[58]

The Regulations establish requirements under section 4B that a residence contract must, *inter alia*, be written in plain English. The purpose of the legislation is to adequately protect the interests of senior consumers, in particular, RV residents such that they can be confident that they will get a "fair deal" when moving into, living in, and exiting, an RV. It is also important that the industry is able to operate in a dynamic and competitive environment.[59]

Key findings

The following are examples of clauses identified in the RV contracts. We have de-identified all parties, to protect privacy and confidentiality.

Contract 1

The document is a *prima facie* consumer contract as it grants an interest in land by way of a fixed term lease to retirees. The acquisition of the lease is for personal, domestic and household use.[60] The document appears to be in the form of a standard form contract as it has the following features:

(i) it appears to have been pre-prepared by one party without the opportunity for the other to negotiate the contract;

(ii) the bargaining power of the parties does not appear equal;

(iii) there is a rebuttable presumption that a contract is a standard form contract unless proven otherwise.[61]

On this basis, the document has met the threshold requirements to bring it under the scope of the unfair contract terms provisions.

[58] *Retirement Villages Act 1992* (WA); *Retirement Villages Regulations 1992* (WA); *Interim Code of Practice for Retirement Villages 2019 (*WA) in *Fair Trading (Retirement Villages Code) Regulations 2015* (WA)
[59] Final Report, above n 1.
[60] Competition and Consumer Act 2010 (Cth) Sch 2 s23(3)(b)
[61] Competition and Consumer Act 2010 (Cth) Sch 2 s27(1)

Operating costs and other charges

Resident to pay Operating Costs Charge

Clause 6.1 is linked to clause 4 of Form 1 which is an Information Statement for prospective residents and reads in part:

> You are required to pay to us the Operating Costs Charge as your contribution towards Operating Costs. The Operating Costs Charge equals 25% of the Single Aged Pension payable in a year for a single person, or 30% of the Single Aged Pension payable in a year for a couple. The Operating Costs Charge will vary as and when the Single Aged Pension is altered.

Clause 6.1 of the residency lease goes into further detail stating,

> You must pay to us the Operating Costs charge as a contribution to Operating Costs by monthly instalments payable in advance.
> The Monthly operating costs charge from commencement of the Term is, subject to variation as hereinafter provided, the amount stated in Item 6 of Schedule 1. This charge will be varied as and when the Single Aged pension is altered, PROVIDED ALSO THAT, if the Village's Operating Costs for a whole financial year exceed the total of the operating costs charges paid by the Village Residents for that financial year, we may in our discretion increase the Operating Costs Charge for the following financial year beyond the figure that is equal to 25% or 30% (as applicable) of the then Single Aged Pension BUT ONLY by an amount that we reasonably consider is necessary so as to make up the anticipated amount by which Operating Costs Charges if charged at the rate of 25% or 30% (as applicable) of the Single Aged Pension would fall short of fully paying the Village's Operating Costs in that following financial year and thereafter in subsequent financial years.

The clauses raise issues of transparency, uncertainty and unfairness.

Clause 4 of Form 1 sets the scene. While it is very transparent in terms of wording, it is unclear why the increase in the Operating Costs Charge is connected with the increase in the Age Pension. It is arguable that it is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term (the Lessor) as it has no bearing on what it actually costs to run the village. The term in effect says that the price variation will happen when there is an increase in the Single Aged Pension regardless of whether there is an actual increase in operating costs. It is arguable that if relied upon, this term would cause financial detriment to the retiree.

Clause 6.1 is anything but transparent. It uses legalese and is drafted as one rambling sentence that can only be deciphered by those with an understanding of legalese. The effect of the clause is such that it guarantees an increase in Operating Costs on the basis of an increase in the Age Pension but also permits the Operators to increase the Operating Costs (at their discretion) beyond the 25% / 30%, by an amount they reasonably consider necessary. The clause creates an imbalance in the rights and obligations of the parties as the Operators are able to charge amounts at will and by so doing, unfairly vary the terms of the contract without affording the

other party a say in the matter. If relied upon, the clause could cause financial detriment to the Residents. It is arguable that it is not reasonably necessary to base an increase in Operating Costs on the increase in the Age Pension. One has nothing to do with the other. To be considered a fair term, the clause should base any increase in Operating Costs purely on actual figures derived from costs accrued in the running of the village.

Contract 2

Clause 5.3 Basis For Final Repayment Date

> The Final Repayment Date has been fixed as the date which is **36months** after the date that vacant possession of premises has been returned to us to allow sufficient time for:
>
> - The performance of the maintenance and restorative works required for the Premises.

The provision contravenes the laws in WA as there is a mandatory timeframe for returning refund premiums to the Resident once the resident leaves their unit and vacant possession is delivered. The timeframe is 45 days in accordance with *Retirement Villages Act 1992* s19(3)(b). Not only is the clause illegal but if relied on or applied is likely to cause financial detriment to the resident.

Contract 3

Clause 22.10 Power of Attorney

> In the event that Tribunal terminates this Deed, you irrevocably appoint our Directors to be your full Power of Attorney, for the purpose of granting an exclusive right of occupation of the Villa to a new Resident who is a tenant in common in the Purple Title Scheme that applies to the Village, for and on behalf of, in the name of and as the act and deed of yourself to do all or any of the following for that purpose:
>
> (i) To enter and possess the Villa and exercise all of your rights in relation to it and, if we as your attorney so decide, to deliver possession of the Villa to another person to the exclusion of yourself;
>
> (ii) To sign the withdrawal of any caveat lodged by you in respect of the Estate, the Villa or the Village and lodge that withdrawal for registration at the Titles Office;
>
> (iii) To accept any new occupant of the Villa on the same terms and conditions as are contained in this Deed;
>
> (iv) To execute any documents including a transfer of the Estate to a new occupant in accordance with the terms of this Deed; and
>
> (v) Exercise powers contained in the 19th Schedule of the *Transfer of Land Act1893* (WA)
>
> (vi) Whatever the attorney lawfully does, purports to do or causes to be done as Attorney is by this Deed ratified and confirmed by you……

This clause creates a significant imbalance in the rights and obligations arising under the contract and more importantly, creates a conflict of interest by requiring the resident to appoint the directors of the RV as the resident's power of attorney (**PA**). The directors form part of the other party and therefore cannot, as a matter of fairness and practicality, act on behalf of the resident.

Significantly, the *Retirement Villages Regulations* prohibit the inclusion of such provisions in residence contracts. Regulation 7I prohibits a residence contract including provisions that require residents to give a PA to the administering body, (the RV Operators) as a condition of the resident being admitted to occupation of the residential premises.[62]

The inclusion of a provision allowing the RV operator to accept a PA given by the resident is acceptable under the conditions set out in sub regulation 4, that is,

> the power of attorney is a limited PA given to the administering body for the purpose of granting an exclusive right of occupation of particular residential premises to a new resident who is a tenant in common in a purple title scheme that applies to the village or in circumstances where the administering body is a natural person who is a relative of the resident.[63]

As this is a purple title scheme, the clause may be permissible if it can be established that the PA is a limited PA given to the directors of the RV for the purposes previously stated and on the condition that the resident is a tenant in common in the purple title scheme.

It is evident that the clause goes beyond what is permitted under the regulations particularly as it is not a limited PA as set out above.

Contract 4

Clause 4.3 Retention Sum

The clause addresses the retention sum payable by the Resident to the village operator for the occupation of the unit and use of the common facilities and common areas of the Village on the Repayment date.

The Retention Sum is calculated as follows:

Firstly:	Divide the amount of the Entry Loan by 480
Secondly:	Multiply the quotient by a number equal to the number of the whole calendar months that have elapsed since the commencement date of this Lease until Repayment Date PROVIDED THAT the multiplier shall in no case exceed 120.

The product is the Retention Sum.

[62] *Retirement Villages Regulations 1992* (WA) r. 7I subreg (2)
[63] Ibid r.7I (4)(a)(i)(ii)

While this is in accordance with the requirements[64] that RVs disclose the method/calculation used to determine DMF (Retention Sum as it is referred to in this contract) and when they are to be paid, it is clear in this instance that the wording used in this term would cause difficulty in understanding the complex calculation required.

There is no basis as to the use of the number 480 by which the Entry Loan is to be divided.

Additionally, the calculation requires knowledge of the number of months that the Lease will be in existence, in order to make a determination of the Retention Sum. At the time of entering into the contract, residents are unaware of the time for payment (how long the lease will be in existence) and the amount of the payment (even with the formula for the determination having been provided) as such matters remain to be determined upon termination of the contract.

DMF/exit fees: unfair term?

The terms in the residence contract referring to DMF could potentially be regarded as unfair in the way the clauses are being drafted and the financial impact they have on residents.

A departure fee/exit fee/DMF is the amount a RV operator charges a resident when they sell their home and vacate the village. It is pitched to potential buyers as a way to keep the initial purchase price down, with the buyer agreeing to pay the village operator a percentage of the sale cost when the home is sold.

The DMF model has been shown to have a huge financial impact, often to the detriment of the residents depending on how long they stay in the village of choice. The manner in which the fee structure is set out and calculated does not allow the resident to have full disclosure of the full costs beforehand which in turn does not afford the resident the opportunity to make an informed choice/ decision.

The current drafting of the RV legislation provides a loophole (in the form of very generalised wording of clauses requiring disclosure of financial matters to be included in residence contracts).[65] This continues to be exploited by the RV operators as DMFs are their primary source of profit whereby the resident buys a unit in a RV at full price, but when the time comes to sell they have to pay the village owner a large percentage of the sale price. This figure is on top of all the ongoing fees[66] the resident would have paid over the duration of their stay.

The impact is that many retirees/ residents do not have a full grasp on just how much the exit fees will cost them owing to the complex nature of the drafting of the clauses in the contracts.

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[64] *Retirement Villages Regulations 1992* (WA) r.7F(1) Item 2.(a)
[65] *Retirement Villages Regulations 1992* (WA) r.7F (1)
[66] The on-going costs include recurrent charges, usually payable monthly, that a resident pays while living in the village. Recurrent charges generally cover operating costs and expenses of running the village and providing services for the benefit of all residents. These might include village administration, maintenance of the communal property and grounds, amenities and resident services. Each village has its own terms for fees and charges. Depending on the type of legal structure and financial model used by the operator, recurrent charges might also include rent, or body corporate fees. Recurrent charges are not regulated and may increase while in residence.

Payment of such large fees out of their investment has meant that some residents have become anxious about being able to afford aged care when they need it, among other things. It is one thing to be required to read documents and contracts but quite another to be required to read and grasp lengthy, complex contracts with unfair contracts terms drafted to benefit the RV operators.

CALC in Victoria in their submission to the Parliamentary Inquiry into the Retirement Housing Sector[67] advocated for reforms to ensure that DMFs operate fairly and are less open to exploitation by retirement housing operators at the expense of older Victorians. Their recommended reforms included:

- requiring the DMF to be calculated on the basis of the purchase price, rather than the sale price of the property to help residents make an informed choice based on the real cost. This could be reversed in cases where the sale price is lower than the purchase price.
- capping the allowable DMF at a set percentage value of the purchase price and require that value be applied evenly over a 10-year period, rather than being "front-loaded" in the first few years of the lease, as occurred at Willow Lodge.[68]
- requiring choice to be offered as part of the DMF arrangement. As such, the DMF could be paid either as an exit fee or upfront. Alternatively, the consumer could choose to pay the DMF as a type of rent, throughout the term of the lease. A benefit of presenting DMFs in this manner would be to break down the current levels of confusion and misunderstanding that surround DMFs.
- sales and marketing materials should also be required to be clearer on the nature of DMFs, and actively advise the consumer that buying into a retirement living arrangement is not an investment in property, but a payment for services.

CCLSWA supports CALC's recommendations as the reforms would address the loophole in the legislation by requiring the legislation to be prescriptive rather than its current more generalised wording regarding disclosure requirements with respect to calculations.[69]

The New South Wales government implemented amendments to their RV laws following an independent inquiry into the RV sector between August and December 2017. The inquiry was ordered by the NSW government after a series of reports of alleged misconduct in the sector. The Greiner Review Report[70] outlines the Inquiry's findings and recommendations.

[67] https://consumeraction.org.au/parliamentary-inquiry-retirement-housing-sector-2/
[68] https://consumeraction.org.au/deferred-management-fees-case-settled-law-reform-now-desperately-needed/
[69] Above n13
[70] Inquiry into the NSW Retirement Village Sector Report (PDF, 3583.78 KB)

This Inquiry found that the operation of the RV sector could be improved in 3 key areas:

- increasing transparency of exit fees and contracts
- clarifying the funding arrangements for ongoing maintenance costs which are shared between residents and operators
- providing more support when disputes arise (and reducing the potential for disputes arise).

The *Retirement Villages Amendment Act (NSW)* 2018, commenced on 1 July in response to a number of recommendations. One recommendation is the 'Annual contracts check-ups meeting'. This recommendation gives residents the right to meet with their village operator once a year to discuss their contract and gain a better understanding of the process involved when leaving the village, including any fees and charges payable.

While we commend this amendment, we would argue that this recommendation is akin to locking the stable after the horse has bolted. This process does not resolve the problem of how much the residents are required to pay upfront and what they will ultimately be left with when leaving the village. It would be better to target any reforms to the pre-contractual phase where potential residents need to have all the relevant information available to them in plain English so as to be better equipped to make informed decisions about something that is so significant.[71]

[71] We recognise that stage two of the government's reform process is aimed at "improving Western Australian consumers' understanding of the RV product and its price": CRIS p 5; https://www.commerce.wa.gov.au/sites/default/files/atoms/files/rv_legistage2cris1.pdf

Example standard contract

The NSW government has developed a standard contract for RVs that is mandatory for village contracts.[72] The contract can be used as a one-size-fits-all that can be adapted for any tenure type and has the advantage of having the "Financial Terms" outlined in a manner that requires the village owners to disclose information about the various costs that residents need to know.

Historically, DMFs or departure fees allowed RV operators to:

- take responsibility for the depreciation and eventual replacement of capital items; and
- sell, lease or license homes for an entry price below the fair market value of the home.

Although this original intention of charging exit fees was to allow a discount in the cost of entry to a unit, now RV operators charge the full equivalent freehold price plus an exit fee.[73]

[72] https://www.fairtrading.nsw.gov.au/housing-and-property/retirement-villages/moving-into-a-retirement-village
[73] R Andrews, ***Don't Buy Your Retirement Home Without Me,*** (Wrightbooks, 2012) in P Levine, *Security of Tenure For Retirement Village Residents in WA, Will the Law Walk the Walk or Just Talk the Talk?* *http://www.law.uwa.edu.au/__data/assets/pdf_file/0004/2845183/18.-Pnina-Levine-Security-of-Tenure-for-Retirement-Villages-in-WA--Does-the-Law-Walk-the-Walk-or-just-Talk-the-Talk-.pdf*

Therefore, it would be prudent for potential residents to compare the entry price with similar homes in other RVs and similar property situations, such as strata title or community title developments that are not RVs.

In a few of the RV contracts reviewed, there was a requirement that the resident cover the cost of refurbishing the residence after termination of contract. This evidently goes against the original intention of DMF particularly as the RV operators are charging full equivalent freehold price, charging a DMF, sometimes excessive ongoing fees, and still expecting the exiting residents to cover the cost of refurbishing the residence.

Industry's response

We note that some RV operators have modified their DMF structure. One operator has introduced a payment option with no exit fees, which includes a choice of 4 financial models at 15 of its 71 RVs. The 4 models are:

- a pre-paid plan;
- a refundable contribution;
- pay-as-you-go; and
- existing DMF[74]

Another RV operator offers 2 contract options, one with a set exit fee and one that gives residents the right to share in capital gains and offset it against the DMF.

One other operator said that it would simplify its contracts and provide money-back guarantees and shortened buyback periods to its residents.[75]

It is arguable that industry can self-regulate out of the issues associated with DMFs by introducing choice. However, CCLSWA advocates for legislated change that should be applied across the industry at a rate that is uniform as opposed to waiting on RV operators to eventually come to a decision that they would like to reform their practices.

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[74] https://www.villages.com.au/info-centre/post/news/more-choice-with-four-payment-options-for-lendlease-retirement-village-residents ; https://www.thesenior.com.au/story/5417509/lendlease-to-offer-new-contract-options-for-retirement-villages/

[75] https://www.smh.com.au/money/super-and-retirement/lendlease-breaks-ranks-over-retirement-village-contracts-20180405-p4z7xz.html

3. Motor Vehicles

Consumer Credit Legal Service (WA) Inc
Level 1 | 231 Adelaide Terrace | Perth WA 6000
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Fax: 08 9221 7088

3. Motor Vehicles

Summary

Over many years, CCLSWA has argued that WA motor vehicle consumers need much better protection. We have argued tirelessly for a cooling off right, and for a reduction in the sky-high penalty fee that dealers charge when consumers change their minds about buying a vehicle.

At the commencement of this law reform project, the WA government was reviewing the *Motor Vehicle Dealers Act 1973* (**MVDA**) and *Motor Vehicle Repairers Act 2003* (**MVRA**). The Consultation Regulatory Impact Statement (**CRIS**) of November 2015 was then the latest public document.

The scope of this report is focused on CCLSWA's past (and current) efforts to agitate for changes to the existing law. We provide our views on the relevant amendments proposed to introduce a cooling off right for contracts with linked finance, and to reduce the pre-estimated liquidated damages amount from 15% to 5%. We welcome particularly the latter. We also provide some comment on the proposed phasing out of statutory warranties for used vehicles, leaving the Australian Consumer Law as the only option for consumers to see remediation against dealers.

Decision Regulatory Impact Statement

On 8 August 2019, the WA government released the long-awaited Decision Regulatory Impact Statement (**DRIS**). The DRIS sets out proposed changes to the MVDA and the MVRA. The proposed amendments in the DRIS include a 3-day cooling off period for vehicle sales linked to dealer finance, and a reduction of termination fees from a maximum 15% to a maximum 5%.

These proposed amendments to the purchase contracts affect a significant number of Western Australians, either as consumers or industry members. Western Australians are highly reliant on motor vehicles and spend a significant portion of their income on them. Purchasing a motor

vehicle is an expensive exercise that can exact impactful consequences on people's financial health. CCLSWA firmly believes that it is essential to ensure that the laws that regulate this industry are fair to consumers, rather than to leave them worse off.

Scope of the report

To progress reform in this important area, CCLSWA considered 4 key areas of reform:

1. include a cooling off right in the purchase contract;
2. ensure consumers cannot waive their cooling off rights;
3. reduce the amount of pre-estimated liquidated damages (**PELD**); and
4. retain the current dealers' statutory obligation to repair (**dealer warranties**).

This report does not consider issues relating to the MVRA.

Key findings

1. Cooling off right

CCLSWA strongly advocates for consumers to have a cooling off right in the purchase contract.

2. Behavioural Economics

Cooling off periods give consumers the opportunity to change their minds about purchasing motor vehicles, which are major assets. As with any other purchase, the decision to purchase a motor vehicle may be made impulsively, and without proper consideration of all the relevant factors. Behavioural economics shows it is not uncommon for consumers to get caught up in the excitement of buying a new vehicle. Consumers are powerfully influenced by their emotions and environmental cues, as well as by how options are presented to them.[76] In these circumstances, at the dealership with the dealer engaging high pressure sales tactics, it is not uncommon for consumers who might previously have given the idea of purchasing a vehicle some thought, to be subject to all sorts of influences as well as biases. In 2015, ASIC released two reports on

[76] https://www.psychologytoday.com/au/blog/science-choice/201712/10-factors-influence-your-purchase-decisions

behavioural economics experiments research conducted as part of its push to better understand market and consumer behaviour.[77] The ASIC chairman at the time said,

> "Undertaking evidence based studies about how people think and behave in the real world is going to be increasingly important to smarter regulation"

Consumer Affairs Victoria (**CAV**) conducted research into cooling off periods with respect to their use, nature, cost and implications.[78] The research surveyed 1,500 consumers and found that the reasons consumers gave for exercising their cooling off rights included:

- Finding out it was not a good deal (53%)
- Feeling misled by the salesperson or the company, or the product or the service was not adequately described at the time of purchase (35%); and
- Perceived sales pressure (12%)

The research found that cooling off periods play an important role in used car purchases[79] largely because of the pressure related to large financial commitments and that the pressure is compounded by factors such as:

- The fact that most people are unfamiliar with the purchase process as these are infrequent purchases; and
- Consumers may be driven by an emotional desire to own a particular car.

3. High pressure sales techniques

Cooling off periods also give consumers an opportunity to further consider their decision away from a high pressure sales environment. We receive many calls through our Telephone Advice Line (**TAL**) service from consumers seeking advice about contractual disputes arising from the purchase of a motor vehicle. These consumers invariably signed a contract for a motor vehicle as a result of the salesperson's high pressure sales tactics, the consumers' lack of knowledge and awareness about what they were signing, or a combination of both. Unfortunately, once the

[77] https://asic.gov.au/about-asic/news-centre/find-a-media-release/2015-releases/15-059mr-asic-increasing-use-of-behavioural-economics-across-its-regulatory-business/

[78] Consumer Affairs Victoria, *Cooling Off Periods in Victoria: their use, nature, cost and implications (Research paper No.15, 15 January 2009)* in Statutory Review: Consultation Regulatory Impact Statement *Motor Vehicle Dealers Act 1973* and *Motor Vehicle Repairers Act 2003 pg137.*

[79] Consumer Affairs Victoria, *Cooling Off Periods in Victoria:, their use, nature, cost and implications (Research Paper No. 15, 15January 2009) https://www.consumer.vic.gov.au/library/publications/resources-and-education/research/cooling off-periods-in-victoria-their-use-nature-cost-and-implications-2009.pdf* pg 66. CCLSWA believes that the cooling off periods play an equally important role in new car purchases, as the pressure related to financial commitments, and the compounding factors exist in new car purchases too.

contract is signed, these consumers are locked in to purchase a vehicle they do not want or cannot afford.

CCLSWA receives many calls from consumers from non-English speaking backgrounds or with low sources of income, who are particularly vulnerable to these high-pressure sales tactics. These consumers feel they have been coerced or misled into thinking they signed an expression of interest, and not a binding agreement. Some of our clients are alerted to the binding nature of the agreement only as a result of consulting family members and friends. They then seek to terminate the contract but sadly, in many of these cases, the dealer refuses to cancel the contract. The client is left with a debt they cannot repay, and the vehicle is often subsequently repossessed. A cooling off right would allow consumers additional time to consider their obligations under the contract and to see if it actually meets their requirements. This will reduce the disadvantage suffered by consumers from culturally and linguistically diverse backgrounds, and reduce the total number of motor vehicle sales complaints CCLSWA receives through our TAL service.

Below are 3 recent case studies that illustrate these problems. They are among many that we collected either through our advice and advocacy work, or from our colleagues at other community legal centres. The clients' names have been changed to protect their identities.

Case studies

Provided by Goldfields Community Legal Centre

Izu's story – September 2018

Izu lives in a regional town. She is a 55yo woman with **very limited English, and an income of $300 a week**. Izu attends the caravan and camping show in town. A salesperson invites Izu to have a look at his caravan stall. He talks Izu into buying a caravan, and asks her to pay a 10% deposit. Izu does not have any cash on her so the salesperson hands Izu his iPad and convinces Izu to log onto her online banking. Izu says she doesn't know how to use online banking and doesn't want to continue with the payment, but the salesperson pushes her to log on, anyway. He sees that Izu has $5,000 only in her account, so he asks for $4,000 for the 10% deposit. Given the limits on daily transactions, Izu cannot transfer $4,000 to the dealer's account. The salesperson then says he would accept $1,000. Under the salesman's watchful eyes, and with his help, Izu reluctantly pays the $1,000, and

The salesman then asks Izu to sign a document titled Contract to Buy a Caravan/Campervan/Tax Invoice. Izu says **she can't read or understand the document, as her English is very poor**. The salesperson tells Izu not to worry about understanding the document, because it is just "some government bull$#*%". Izu signs the document, thinking it is an expression of interest only.

Izu's husband James finds out about the contract when he returns from his FIFO work. He rings the dealer to cancel the expression of interest, but the dealer tells him that Izu signed a contract to buy a caravan, and that she would need to pay nearly $5,000 to cancel it.

Peter's story – March 2019

Peter is an **82yo man who has bipolar disorder**. As a result of his mental illness, his marriage broke down. Peter is on medication, and sees a psychiatrist. When Peter has heightened moods, he may experience a manic high episode, and make impulsive, ill-considered decisions.

Peter tells his psychiatrist that he'd like to buy a new car to travel around Australia, now that he is retired. The psychiatrist increases Peter's medication, to curb his heightened mood. Peter increases his dosage straight away, but it takes time to stabilise his mood.

Peter attends a local dealership and signs an agreement to buy a new car. He does not know that there was no cooling off right, or the 15% penalty to cancel the agreement.

Peter does not receive a copy of the agreement. He pays a $1,000 deposit, and then the dealer says that it takes a month for Peter's new car to arrive. During his wait, Peter becomes aware that the new car model has a dust sensor, which concerns him because he likes to drive off-road. Peter rings the dealer and the salesman says he has never heard of the dust sensor problem. Peter's son-in-law tells him of a second-hand vehicle better suited to Peter's needs, and is half the price of the new car.

Peter calls the dealer to cancel his contract for the new car. He gathers supporting documents from his psychiatrist and family regarding his bipolar disorder and heightened mood at around the time he signed the contract. The dealer refuses to cancel the contract unless Peter pays 15% of the contract price, or $9,225. Peter tries to negotiate with the dealer, who will not budge. **Peter's mental health declines rapidly.**

Cooling off rights in other Australian jurisdictions

5 out of 7 Australian jurisdictions provide consumers with cooling off rights for purchasing motor vehicles. It is evident through consultations with some of our Eastern States counterparts and other consumer protection agencies that the introduction of cooling off periods has substantially reduced the number of motor vehicle complaints they receive. A representative of the Legal Services Commission of South Australia, for example, noted that because South Australia did not extend the cooling off right to new vehicles, the Commission continues to receive a large number of complaints from consumers who express regret and frustration with not having cooling off rights for new vehicle purchases.

Victoria, on the other hand, provides cooling off rights to consumers of both new and used vehicles. According to a comprehensive research report by CAV, these rights have an important role in car purchases mainly because of the pressure related to large financial commitments.[80] The research also showed that cooling off rights appropriately reduce consumer detriment, which is why our colleagues at CALC were in favour of their inclusion in state motor vehicle legislation.

Recommendations

CCLSWA advocates for the introduction of a cooling off period of 3 business days for all motor vehicle purchases (except for motor vehicles sold at auction or through private sales). We propose that the cooling off period:

a) apply to all transactions, regardless of whether there is linked finance. This will be consistent with section 134 of the *National Credit Code* which provides for the termination of sale contracts which are conditional upon obtaining credit;
b) be for a period of at least 3 clear business days; and
c) exist with a condition that no payment be payable by the purchaser to the dealer should the purchaser elect to rescind the agreement within the cooling off period.

[80] Consumer Affairs Victoria, *Cooling off periods in Victoria: their use, nature, cost and* implications (15 January 2009) 66.

We acknowledge that the standard form "Contract to Buy a Motor Vehicle" allows parties to include "special conditions" that add to or override the standard conditions on the contracts to purchase motor vehicles. However, we maintain that it is unreasonable to expect most ordinary consumers to be savvy enough to insert special conditions such as a cooling off period into the contracts, and therefore cooling off provisions should legislated in the MVDA.

Waiver

CCLSWA opposes the inclusion of a waiver for cooling off rights. Waivers typically give consumers the option to waive their cooling off rights in the event they wish to take possession of the vehicle before the end of the cooling off period. Although most Australian jurisdictions have amended their respective motor vehicle legislation to include cooling off rights for motor vehicle purchases, a number of problems arise from the operation of the waiver.

Waivers undermine the intent of cooling off rights

In Victoria, for example, the *Motor Car Traders Act 1986* was amended to include an option for purchasers to waive their cooling off rights in a form prescribed by the regulations. CAV released a Regulatory Impact Statement (**RIS**) in July 2008 that showed this option undermined the intent of the cooling off provisions by creating "considerable confusion amongst consumers regarding the type of motor vehicle transactions that are subject to a cooling off period, cooling off rights and in particular the financial implications of exercising their rights to cool off."[81]

Industry surveys and CAV complaints data support these findings. The research revealed that a large number of consumers did not understand what they were signing when they were presented with a waiver form, nor did they understand what the consequences were of signing the form. The data showed that it was standard industry practice to get purchasers to waive their cooling off rights prior to signing the sales agreement, which raises concerns about the improper and inadequate disclosure of cooling off rights by dealers. The data further suggested that these practices contributed to an estimated $417 million consumer detriment and to the diversion of precious CAV resources to other enforcement issues.[82]

[81] Consumer Affairs Victoria, *Regulatory Impact Statement for the Proposed Motor Traders Regulations 2008* (July 2008) 34.
[82] IPSOS, Consumer Affairs Victoria, Department of Justice, *Consumer Detriment Survey* (August 2006).

Waiver as a barrier to asserting cooling off rights

CAV research into the effectiveness of cooling off periods showed that the main concern with waivers is that some dealers may put pressure on consumers to waive their cooling off rights. Just as high-pressure sales tactics are used to pressure consumers into signing contracts to purchase a vehicle, the same tactics may be used to pressure consumers into signing a waiver form. Similarly, if the waiver is simply included in the paperwork of the sale, consumers may disregard it and automatically sign it at the same time they sign all the other documents.[83] The research also indicated that some dealers try to obviate their obligations or create barriers to cooling off. Waivers are an example of one such barrier and pose significant risks to consumers. This is particularly the case in an industry in which high-pressure sales tactics are already a problem. It is for these reasons that CCLSWA opposes the inclusion of a waiver for cooling off rights.

Pre-estimated liquidated damages

The MVDA and *Motor Vehicle Dealers (Sales) Regulations 1974 (WA)* (**Regulations**) contain provisions that allow motor vehicle dealers to recover a sum of up to 15% of the cost of the contract as PELD in situations where a purchaser breaches their contractual obligations.

CCLSWA believes that the 15% PELD amount is a gross over-estimate, and does not represent the loss actually suffered by the dealer upon the purchaser's decision not to proceed with the contract. We previously submitted that while the standard contract term states that the dealer may charge *up to* 15% of the contract price, in almost all cases that CCLSWA hears of from clients, the dealers charge the full 15% upon termination of the contract, even if they have not actually suffered this amount of loss. Indeed, the dealers do not, as a matter of practice, justify the 15% amount to the consumers. We therefore believe that the 15% figure is extreme, arbitrary and over-compensates the dealer.

Current data reflects these problems. CCLSWA receives a large number of calls through our TAL service from clients who claim to have been automatically charged 15% of the contract price when they sought to terminate the sale contract. After reviewing client cases between

[83] Consumer Affairs Victoria, above n 1, 26.

2016 and 2019, we identified three problem areas when dealing with the termination of sales contracts:

a) Dealers use the 15% PELD figure as a default amount rather than a genuine pre-estimation of liquid damages;

b) Dealers inadequately explain - or in some clients' view, actively misrepresent - the nature of a sales contract, and seek to recover 15% of the contract price from consumers who were unaware that they were entering into a binding agreement;

c) Dealers seek to recover 15% of the purchase price in circumstances where the consumer (and not the dealer) may validly terminate the sales contract.

PELD 15% figure as a default

It is evident in many of our clients' cases that dealers charge consumers the full 15% of the purchase price when it does not reflect the genuine pre-estimate of the dealer's loss. To cite Kiefel J in *Paciocco v ANZ* [2016] HCA 28, the proper question to ask is "whether a provision for the payment of a sum of money on default is out of all proportion to the interests of the party which it is the purpose of the provision to protect."[84] It appears from her Honour's reasoning that a sum is held to be "extravagant and unconscionable" when it is "out of all proportion to the interests protected."

The case studies below have been collected through our TAL service and illustrate the above concerns. The names of our clients have been changed to protect their identities:

[84] *Paciocco & Anor v Australia and New Zealand Banking Group Limited* [2016] HCA 28, [29].

Case studies

Where the dealer seeks to recover 15% PELD from consumers who are unaware they had entered into a binding agreement:

Nayla's story - September 2017

Nayla is a Malaysian **migrant from a non-English speaking background**. She attends a car dealership to get a quote and information on what her repayments would be under a loan. The dealer says Nayla would need to sign a document as a formality to see if she was eligible for finance, and that the document could simply be "torn up" if she was unhappy with the finance arrangement.

This document turns out to be a sales contract to buy a car. Nayla finds out what her loan repayments would be, and does not want to proceed. The dealer demands that Nayla complete the purchase, or pay 15% of the purchase price.

C995097

Akeel's story - May 2018

Akeel is an Indian **migrant from a non-English speaking background**. He attends a dealership to test drive a $25,000 car. Akeel wants to know what his loan repayments would be. The dealer says that the only way to find out is for Akeel to sign a contract and pay a $500 deposit. Akeel subsequently receives approval for the finance from the dealership. At this time, Akeel has been unemployed following a redundancy for over a year, and he does not believe he could afford the repayments suggested by the dealer's financier. Akeel seeks finance approval from another lender, who rejects him because he could not even produce proof of income, such as payslips. Akeel tries to cancel the sales contract, but the dealer demands that he pay 15% of the purchase price, or $3,780.

C994028

We receive many complaints from consumers who instruct us that dealers are inadequately explaining the nature of the sales contract and then seeking to recover 15% PELD when the consumer wishes to terminate the contract. Many of these consumers instruct us that they were unaware that they had entered into a binding agreement, and instead were led to believe they were signing an expression of interest or a document to receive a quote, which the dealer claimed would give both the dealer and consumer an indication of the prospective repayments under a finance arrangement. In several instances, the consumer was from a non-English speaking background, and was told by the dealer that they would not be bound by the document if they signed it. The case studies above suggest that these consumers were targeted because they were less likely, and also less able, to read and understand the contract.

In accordance with clause 8.2 of Schedule 5 of the Regulations, a dealer may validly terminate the contract to recover an amount not exceeding 15% of the purchase price. CCLSWA has given advice to numerous consumers who signed sales contracts that were “subject to finance”.

As authoritatively stated by the majority of the High Court in *Meehan v Jones*, a contract that is subject to finance is a conditional contract that does not become binding on either party until the condition precedent is satisfied.[85] This can also be found in the Regulations at clauses 2.1 and 2.3 of Schedule 5. The majority of the High Court further stated that unless the contrary is proven, “subject to finance” means subject to the purchaser being able to obtain finance on terms that are reasonable to the purchaser. This can also be found in the Regulations at clauses 2.2(d) of Schedule 5.
As such, the dealer cannot, as a matter of legal substance, claim to invoke its right under clause 8.2 or under any general law of liquidated damages, because the contract does not create obligations for either party until the condition precedent is fulfilled. The obligation of the purchaser is only to take reasonable steps, in good faith, to fulfil the condition precedent.

[85] *Meehan v Jones* (1982) 149 CLR 571.

Notwithstanding the above, CCLSWA still receives many complaints from consumers about dealers who, without any legal basis, automatically claim the full 15% PELD when the consumers attempt to terminate the contract due to their inability to fulfil the condition precedent, i.e. to obtain finance on terms that are reasonable to them. In fact, motor vehicle contracts often do not include the special condition that the contract is “subject to finance”, even if it was openly discussed and agreed to by the parties before the purchaser signed the contract. Below are 2 case studies to illustrate these assertions. Our clients’ identities have been altered to maintain confidentiality.

Case studies

Where the dealer seeks to recover 15% PELD where the consumer (and not the dealer) is validly terminating the sales contract:

Irina's story - June 2018

Irina signs a sales contract "subject to finance" to purchase a vehicle for $26,000, and pays a $500 deposit. Irina cannot get finance on reasonable or affordable terms. Lenders reject Irina on 3 separate occasions. The dealer offers Irina finance, but the terms of the finance are neither reasonable nor affordable.

Irina seeks to terminate the contract on the basis that it is "subject to finance" and that she cannot obtain finance on suitable terms. The dealer demands that Irina take delivery of the car within 7 days, or pay 15% of the purchase price, or $3,900.

This is contrary to section 2 of Schedule 5 of the Regulations, which states (a) that a contract which is subject to finance is conditional on the purchaser obtaining finance on reasonable conditions; and (b) if the purchaser has taken all reasonable steps towards obtaining loan approval, but does not obtain approval, then the purchaser may terminate the contract and the dealer must immediately refund any deposit paid.

S36480

Hansika's story - January 2018

Hansika signs a contract to purchase a vehicle for $47,000. She could get finance for the purchase only if her fiancé was her co-borrower. Suddenly, before taking delivery, Hansika's employment security and certainty changes. Hansika tries to cancel the purchase contract.

The dealership demands Hansika pay $15% of the purchase price.

C995527

Jacob's story - March 2017

Jacob signs a sales contract to buy a $35,000 vehicle, and pays a $1,000 deposit. Jacob has an arrangement with his family, for them to split the cost of the vehicle. However, this arrangement falls through. Within 24 hours of signing the contract, Jacob calls the dealer to say he does not wish to proceed with the sale.

The dealer tells Jacob that he would only be released from the sales contract if he paid 15% of the purchase price, that is, in excess of $5,000.

Query what loss the dealer actually suffers, from Jacob's cancelling the contract within a 24-hour period.

C993870

Trent's story - May 2018

Trent signs a "subject to finance" contract for a $42,000 car. The dealer's finance business rejects Trent's application for finance. The dealer tells Trent that he would be approved for finance if they added his wife as co-borrower. Trent says no, and the dealer agrees to continue looking for finance for him.

The dealer tells Trent that finance is approved. However, Trent discovers that the dealer submitted his finance application with his wife's income included in the application. The dealer placates Trent, saying that the finance contract would be in Trent's name only, and that his wife's income in the application is to boost his borrowing capacity.

Trent says he wants to terminate the contract, as he cannot afford the loan repayments on his income only. The dealer tells Trent that he has the option of signing the finance agreement and take possession of the car, or pay 15% of the purchase price to cancel the contract. The dealer further threatens to sue Trent in court, if Trent does not pick either option.

C996061

It is evident from the above case studies that dealers frequently pursue or even threaten consumers with the enforcement of the PELD clause, even if the dealer has not incurred, or would not incur, any loss. In fact, dealers do so even if they have not been totally above-board with the facts in their dealing with the consumers. We believe that many dealers routinely abuse the contractual right to PELD, and in some cases, do so for the purpose of raising revenue and profits.

Our experiences suggest that many dealers use the 15% PELD clause to manipulate or pressure consumers to follow through with purchases even where the consumers' circumstances indicate that they should not do so. Many of the consumers who end up following through with such purchases experience financial hardship as a result. This is a major concern because many consumers who find out about the 15% PELD clause normally do not possess the necessary knowledge, time or financial means to challenge those dealerships wilfully for wrongfully relying on the clause. Moreover, most dealers are not held accountable until and unless Consumer Protection attends to a complaint.[86] However, even then, most cases are not even brought to the attention of Consumer Protection.

In our opinion, the complaints from our clients represent only a small percentage of the consumers who are actually impacted by the 15% liquidated damages clause. We believe that most consumers are unlikely to dispute their concerns with the clause because they lack credible information about their legal rights, or have limited access to legal advice, be it free or otherwise.

We believe that the proposed 5% PELD more accurately represents the dealer's true loss when the consumer decides not to proceed with the contract. This view is consistent with the positions held in other Australian jurisdictions, and suggests that the 15% amount available to dealers in Western Australia is arbitrary and punitive. We ***attach*** a table (**Appendix 1**) which collates the information from the different Australian jurisdictions, indicating whether there is a cooling off

[86] CCLSWA provides the legal advice to TAL consumers in such situations, but we do not have the resources to open case files to assist the consumers to the full extent of challenging the dealers, or negotiating a settlement of the disputes. We are aware that most consumers feel frustrated, frightened, or fatigued by the mere thought of disputing the dealers' aggressive claims for the 15% PELD, let alone have the energy and funds to face the prospect of defending a court claim.

period, and whether there is a termination fee or 'liquidated damages' fee for terminating the purchase contract.

Dealer warranties

The discussion paper released by Consumer Protection in August 2013 sought views about whether the current arrangements for statutory dealer warranties should be retained, or if they should be replaced by the consumer guarantees under the ACL. Consumer Protection's Consultation RIS released in November 2015 concluded that the retention of the dealer warranty provisions in the MVDA was the most viable option for delivering on the Government's consumer protection objectives. However, during our consultations in early 2019, we were alerted to discussions that the utility of dealer warranties may be questioned again, and the real risk of their removal from the MVDA.

Based on the outcome of our research to date, there appears to be very strong support from both consumer and industry members for retaining the current dealer warranty arrangements. In our view, to replace them with the consumer guarantee provisions provided under the ACL would be problematic for consumers. The general consensus among stakeholders is that for enforcement purposes, ACL provisions are nebulous, inadequate, and do not sufficiently protect the interests of either consumers or industry members; that they lack clarity and certainty, and create practical difficulties for consumers seeking to enforce their consumer guarantees under the ACL.

Victorian Automobile Chamber of Commerce, for example, stated that one of the key disadvantages of the ACL for dealing with motor vehicle disputes is the requirement to make a claim within a reasonable period of time.[87] The meaning of "reasonable time" is ambiguous, and this uncertainty creates confusion and misunderstanding among parties to a dispute. The lack of understanding is partly due to the other vague and broad terms in the ACL, such as "of acceptable quality" and "major failure". CCLSWA provides advice to many clients who struggle to understand and interpret these terms, and it is for this reason that CALC recommended

[87] Victorian Automobile Chambers of Commerce, *Red Tape Reduction Review: Motor Car Traders Act 1986* (November 2013), 12.

retaining the Victorian statutory dealer warranty regime as a complementary measure to provide clarity and certainty for both consumers and dealers.[88]

CCLSWA assists many consumers facing grave challenges accessing remedies in motor vehicle disputes. These consumers complain about the high costs associated with these disputes, mainly due to the high costs of litigation, the fact that the onus of proof usually falls on the consumer, and the costs and difficulty of obtaining expert reports. The dispute process is usually time-consuming and costly and therefore an unattractive option for consumers, especially when court action is the only option they have left.

Our research further revealed that industry members wanted to retain the current dealer warranty arrangements in the MVDA because they provide clear benchmarks for vehicle age and kilometres driven. The ACL, in contrast, makes only the following vague statement: "as a reasonable consumer fully acquainted with the state and condition of the goods would regard as acceptable having regard to the nature of the goods, price, any statement made about the goods and any other relevant circumstances."[89]

CCLSWA believes that dealer warranty provisions in the MVDA should be retained, and continue to operate concurrently with the consumer guarantee provisions under the ACL for the following reasons:

a) dealer warranties are easier to enforce;
b) dealer warranties specify a clear standard to be met; and
c) the MVDA allows for intervention by Consumer Protection in dealer warranty disputes.

[88] Consumer Action Law Centre, *Submission to the Regulatory Review of the Motor Car Traders Act (MTCA) 1986* (15 November 2013), 3.
[89] Victorian Automobile Chambers of Commerce, *VACC Submission to the Australian Consumer Law Review* (27 May 2016), 10.

Case study

Defective cars and statutory warranties

Dale's story: 2017

Dale is a 19yo Yamaji man from Meekatharra. He earns $200-299 a week. In 2017, Dale visits Geraldton often, and one day he walks into *MotorTown Dealers*. He decides to buy a $40,000 used car which comes with an 8-year warranty. To pay for the car, Dale takes out a $30,000 personal loan with *Big Bank*. He signs the purchase and loan documents, telling the salesman that he wants to drive back home as soon as possible.

15km into his drive back to Meekatharra, Dale notices that the car is leaking oil. Dale keeps driving, as he wants to get home quickly. The next morning, Dale takes the car to local mechanic, *RepairBros*. *RepairBros* fixes a damaged wheel hub, services the engine, and performs an investigation into the oil leak. *RepairBros* discovers a major oil leak, and tell Dale that it would cost $11,000 to repair. *RepairBros* gives Dale a $4,000 bill for the repairs and service. Dale pays $2,500, with the remainder paid out of the warranty. Dale does not have the money to repair the major oil leak, and *MotorTown Dealers* says they are not responsible for it. So Dale continues to make do with the car.

Dale continually struggles to meet the loan repayments to *Big Bank*. Soon, he starts to receive calls from *Dodgy Collectors*, a debt collector. Now, Dale owes $35,000 on the loan, and has a car with a major defect that he cannot afford to fix. He feels used by *MotorTown Dealers*, and is angry that they were allowed to sell him a defective car.

Comment

If Dale had been aware of the remedies available under section 34 MVDA, it is likely that he could have sought help from Consumer Protection to help him resolve the dispute with *MotorTown Dealers*.

Dale is a typical vulnerable consumer who would not be able to independently seek his rightful remedies under the ACL, especially if he had to enforce his rights in court. For Dale, who was not even aware of his rights under the MVDA, it would be unrealistic for him to pursue his rights under the ACL.

Industry, too, finds the ACL regime a minefield to navigate. We believe that the MVDA statutory warranty regime for used vehicles is simpler, and more economical for all parties to utilise, than the ACL.

Other Issues: DRIS

The DRIS contains 3 proposed amendments to the MVDA or the Regulations, that directly impact on the consumer's rights when they sign motor vehicle contracts:

- That there be a cooling off period of 3 clear days, for contracts that contain linked finance[90];
- That the termination fee for a linked finance contract is $100; and
- That the maximum 15% pre-estimated damages be reduced to 5%.

The consumer cannot waive their right to a cooling of period. CCLSWA supports a no-waiver cooling off right.

[90] Contracts that contain linked finance are contracts where the dealer arranges finance for the consumer, or supplies forms for, or a referral to, a lender. When consumers arrange their own finance independently of the dealer, the contract does not have linked finance.

CCLSWA maintains its advocacy position that there should be a cooling off right for all motor vehicle contracts, regardless of whether the consumer requires finance, or how the finance is arranged. Subject to this position, CCLSWA welcomes the proposed changes.

In this section, we discuss the appropriate length of the cooling off period, as well as the method by which consumers may exercise their cooling off right.

Length of cooling off period

The DRIS proposes a cooling off right of 3 days, for consumers who purchase vehicles using linked finance.

CCLSWA advocates for a cooling off period of ***3 clear business days that do not include Saturday, Sunday or public holidays***, as is the case in Victoria.[91]
While other jurisdictions such as Queensland include Saturday as a business day, we are of the opinion that this impacts on consumers' opportunity to seek affordable or free legal advice as most law practices, and cost-free legal practices such as community legal centres and Legal Aid operate during the work week, and not on the weekends. If the cooling off period is indeed about protecting the interests of consumers, it should be allowed to operate in the true spirit of its intent. It is in light of this that CCLSWA considers that a cooling off period of anything less than 3 days would not be sufficient for the legislation to achieve its objectives, that is, to redress an imbalance of bargaining power between consumers and motor vehicle dealers and to protect consumers against unfair practices and pressure.

As WA will be one of the last Australian jurisdictions to implement cooling off periods for motor vehicle purchases, we have the benefit of assessing other jurisdictions' cooling off regimes, and offer one that would work optimally for West Australian consumers and industry.

We say that the payment of $100 for cancelling during the cooling off period, and of up to 5% for terminating outside the cooling off period, are adequate measures to balance consumer protection with the interests of industry.

[91] *Motor Car Traders Act 1986* (VIC) s43(1)

Exercising cooling off rights

CCLSWA advocates the implementation of a prescriptive provision detailing the requirements for consumers to exercise their cooling off rights. This would include details such as

- What form the notice is to take, such as a written notice;
- What constitutes effective delivery of notice of cooling off:
    - Personal delivery to the dealership; or
    - Posting the notice by registered post (in which case notice is taken to be given at the time of posting); or
    - Delivery to the dealer's address for service; (in which case notice is taken to be given at the time of delivery); or
    - Fax or email transmission (in which case notice is taken to be given at the time of transmission)

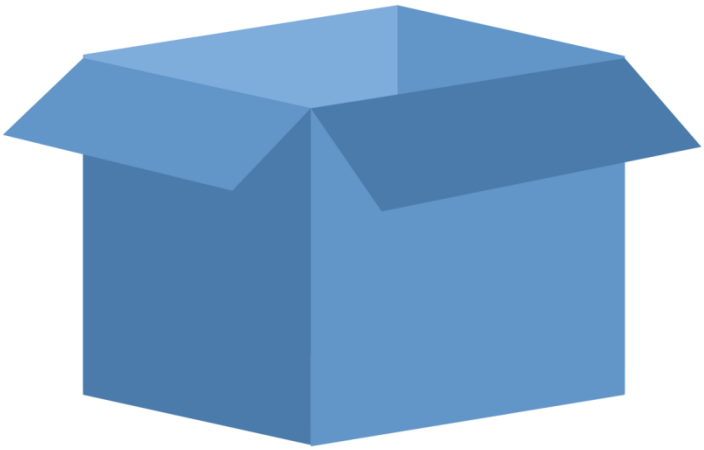
This would circumvent any misunderstanding or miscommunication between the consumer and the dealer. In most of the other jurisdictions, there is no such prescription for consumers to exercise their cooling off rights[92]. South Australia however, has a detailed section 18B on cooling off requirements.[93] CCLSWA advocates for the implementation of sufficiently detailed legislative provision, as occurs in South Australia, so as to avoid or limit ambiguity.

CCLSWA education material

In anticipation of the proposed cooling off right, and reduction of PELD, CCLSWA has prepared legible publicity material for WA consumers. Please find our mind map and case study in Appendix 2.

[92] *Motor Car Traders Regulations 2018* (VIC) Schedules 2 and 3; *Motor Dealers and Chattel Auctioneers Act 2014* (QLD) s105 (1)(2); *Motor Dealers Act 1974* (NSW) s29CA(3)
[93] *Second-Hand Vehicle Dealers Act 1995* (SA)

4. Australian Consumer Law (ACL)



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4. Australian Consumer Law (ACL)

From 2012, CCLSWA began assisting WA consumers on issues stemming from breaches of the ACL, when they purchase goods or services that fail in their quality or function.

Whilst the ACL is an excellent source of rights for consumers, its efficacy often stops there: at being rights on paper, but not in practice. It is especially so when consumers purchase high value assets such as motor vehicles, and find them to be defective, despite many unsuccessful attempts by the dealers to “repair” them. Colloquially, we call these defective vehicles “lemons”.

For consumers who are unlucky enough to end up with lemons, the journey to seek remediation from dealers or manufacturers is too often fraught with frustration and tension, at great cost to their health, time, and sanity. At first glance, it does seem easy enough to simply head to the Magistrates Court, to start legal action against the recalcitrant dealer who refuses to replace the lemon. However, it is the start of the consumer’s nightmarish journey, from finding:

1. the time and energy to pursue court action;
2. the funds to pay for mechanical reports (that is, if one manages to locate a mechanic willing to speak up against the dealer); and more funds to rebut the dealer’s rebuttal report; and
3. the right avenue to claim, including nailing the correct Magistrates Court forms, articulating the correct causes of action, defence to any cross-claim; and so on.

Lemon Laws Report

There are no specific lemon laws in Australia. Consumer protection for motor vehicle buyers can be found in the ACL, and the various pieces of State motor vehicle legislation.

The focus of this report will be on the effectiveness of the protection offered under the ACL. CCLSWA wishes to take this opportunity to draw attention to the inadequacies of the ACL in protecting consumers who have bought defective cars.

We propose introducing lemon laws Australia-wide to address the inequities that arise when consumers purchase defective vehicles, colloquially labelled ‘lemons’. Lemon laws would bring

clarity to consumers' rights in contrast with the status quo, where there is considerable uncertainty, as well as prohibitive costs to consumers who consider enforcing their rights.

Consumer guarantees

The consumer guarantees in the ACL set out:

- the standards for goods and services supplied to consumers;
- the remedies available to consumers when goods and services do not meet those standards; and
- the rights and obligations of both consumers and traders.[94]

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 those rights depends on whether the defect is major or minor.

Currently there is a lack of clarity surrounding the distinction around what constitutes a major or minor failure.

Legislative provisions

Acceptable quality

A good is of acceptable quality where a reasonable consumer, with full knowledge of the nature and extent of any issues (including latent issues), would find the good to be safe, durable, free from defects, acceptable in appearance and finish and fit for the purposes for which that kind of product is commonly supplied, taking into account:

- the nature and price of the goods;
- any statements on the packaging;
- representations from the supplier or manufacturer; and
- any other relevant circumstance relating to the supply of goods.[95]

[94] *Competition and Consumer Act 2010* (Cth) Schedule 2 Part 3-2, Div 1. These guarantees include that goods must: be of acceptable quality; be fit for purpose; match descriptions and samples; have spare parts and repair facilities available; come with full title and undisturbed possession; not carry any hidden debts or extra charges; and satisfy any express warranty.

Major failure vs non-major failure

Section 260 of the ACL outlines the test for a major failure. The test considers the severity of a failure by a supplier to comply with the consumer guarantees.

A **'major failure'** occurs if the goods:

- would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure (the reasonable consumer test); or
- depart in one or more significant respects from a description, sample or demonstration model; or
- are substantially unfit for purpose for which the goods of the same kind are commonly supplied and they cannot, easily and within a reasonable time, be remedied to make them fit for such a purpose; or
- are unfit for a purpose disclosed to the supplier; or
- are not of 'acceptable quality' because it is unsafe.[96]

A **minor** or **non-major failure** is not defined in the ACL, but by implication vis-a-vis a major failure, it is any failure which fails to comply with the consumer guarantees, but not to the level of severity set out above. For example, the goods may be substantially unfit for normal purpose but can be remedied to be made fit for purpose easily and within a reasonable time.

Issues

While we acknowledge that these current definitions give a degree of flexibility to allow the ACL to respond to the particular nature of issues that arise in each case, we note that the definitions also cause significant difficulties for consumers in enforcing their rights.

In order to enforce their rights, consumers have the option to either make a complaint to the relevant regulator or institute legal proceedings.

[95] ACL, Section 54(2) and (3).
[96] ACL, Part 5-4, Div 1 s260

In WA, the ACL regulator Consumer Protection operates a free conciliation service. The service is voluntary and as such, businesses may elect not to participate and even when they do, a resolution may not be reached.

In such a situation, the only option available to a consumer to enforce their rights is to initiate legal proceedings, which would inevitably involve significant time and financial costs for the consumer. These are time and financial costs the consumer will incur after already spending a usually lengthy period of time attempting to negotiate a settlement independently, and then through the regulator.

Major or minor disputes

There are often disputes over whether a defect is minor or major. If a defect is minor then the consumer is merely entitled to a free repair at the expense of the supplier.[97] Where the defect is major the consumer can reject the goods and is entitled to a refund.[98]

In CCLSWA's experience, the significant difference in remedies provides an incentive to some suppliers to dispute that the failure is indeed a major failure, often insisting that the failure is merely minor. Their solution is then to offer to repair the defect and refuse to pay a refund.

In the context of motor vehicle purchases, consumers are forced to return their 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.

[97] ACL, s259(2)(a)
[98] ACL, s261

Case studies

Hayley's story

Hayley saves money over a long time, to buy a new car from a dealer in cash. Within 12 months, Hayley experiences constant problems with the car. It often fails to start; the immobiliser turns on without reason; and the warning lights on the dashboard flash without reason. Twice, while Hayley drives the car, it turns itself off. Hayley has to wait for 15 minutes before the car will start again.

Hayley attempts to reject the car 3 times, but each time, the dealer refuses to refund any portion of the purchase price. **The dealer continually denies liability**, and tells Hayley that if she leaves the car with them, when she rejects it, she would be solely responsible for any damage, and they would not be.

Hayley considers taking the dealer to the Magistrates Court to claim breaches of the ACL, but that would require her spending a substantial amount of money, time, and effort, including locating expert evidence to support her court claim. She is a working single parent and simply cannot afford the time and expense that a court claim would further exact on her.

Comment: *Hayley has every right to reject the car, under s259(3) ACL. In this case, Hayley eventually gives up because after the continuous spate of bullying behaviour from the dealer, she chooses to "suck it up" and resigns to owning a lemon, rather than expend her funds and energy fighting Goliath.*

Hussain's story

In December 2015, Hussain buys a second hand car. He soon experiences wheel problems in the car. He exercises his rights under the ACL, and gets the car repaired. After repair, he experiences the same problems. Hussain takes the car back for more repairs. In total, **Hussain visits the car dealer 6 times for repairs, without resolving the wheel problems**.

Soon after, **the dealer refuses to perform further repairs**, even though Hussain is entitled to them, under the ACL. The dealer refuses to give Hussain a refund, but treats the wheel problems as a 'minor' defect. Hussain reports to the Department of Commerce and hopes to get the car to another mechanic to repair the car, and to claim the cost from the dealer, either through the Department's conciliation, or through the courts.

Comment: *Hussain would have to pay the costs of filing the court claim, and for relevant expert mechanical reports, even before the court hearing. He would also need to take time out of his usual routine to attend to the court matter.*

S's story

S buys a car for $3900**. After 2kms, the car produces smoke which continues for several days.** Within a week, the car starts to shake whenever S drives it.

The dealer tells S that the car produces smoke because it has been sitting idle for a few weeks, and that the car will stop producing smoke after 60kms. S continues to drive the car, and even after travelling 120kms, it still produces smoke.

S takes the car to a mechanic, who says the engine needs to be replaced. S approaches the dealer, who directs S to another mechanic. The second mechanic says that the car lacks engine oil. **The dealer refuses to fix the problem**, and refers S back to the mechanic.

Gai's story

Gai pays $7000 for a used car from a car dealership**. As she drives the car home from the dealership, it breaks down.**

Gai immediately calls the dealership, which denies that it is liable, and refuses to take the car back, or to fix it.

Gai spends another $4800 on the towage and repairs on the car.

Where a WA dealer refuses to conduct the necessary repairs or provide a refund for a lemon, the consumer is left with the option of pursuing the dealer for a remedy through the Magistrates' Court. The consumer will incur expenses, including the high cost of obtaining expert evidence (to substantiate the consumer's claim that there has been a major failure, and to rebut the other party's evidence), legal or other professional advice, as well as filing fees, time off, and other costs, in order to prosecute the claim.

CCLSWA has often referred complaints we receive about lemon cars to Consumer Protection to investigate and attempt to negotiate a resolution. Conversely, Consumer Protection regularly refers consumers to CCLSWA where there is no negotiated resolution between the parties.

The introduction of strong lemon laws would empower people to obtain a refund for faulty lemon products, without having to go to court to prove their case.

Introducing Lemon Laws

A number of consumer advocacy groups and associations like CCLSWA in the various states have been advocating the introduction of lemon laws.

Queensland

The Queensland government is leading the way in implementing laws with respect to lemon cars. As part of its statutory review of the *Queensland Civil and Administrative Tribunal Act 2009* (**QCAT Act)** the Queensland government analysed QCAT's jurisdiction to hear and decide disputes about consumer guarantees under the ACL for goods and services, including new and

used motor vehicles and caravans.[99]

On 15 July 2015, the Legislative Assembly directed a Committee to inquire into and report on whether there is a need to improve the consumer protections and remedies for buyers of new motor vehicles with numerous, severe defects that re-occur despite multiple repair attempts or where defects have caused a new motor vehicle to be out of service for a prolonged period of time.

On 30 November 2015, the Committee tabled the Lemon Laws Inquiry Report. Recommendation 7 of the Lemon Laws Inquiry Report states:

> *The committee recommends the government change the Queensland Civil and Administrative Tribunal **(QCAT)** jurisdictional limit of $25,000 for matters involving new motor vehicles with major defects.*
>
> *Government committee members recommend the limit be removed, so no cap applies. Non-government committee members recommend the limit be increased to $40,000*.

On 1 March 2016 the Queensland Government tabled its response to the Lemon Laws Inquiry Report. The Queensland Government's response to recommendation 7 was:

> *The Queensland Government supports recommendation 7 in principle and will work with QCAT to determine how this recommendation can be appropriately implemented, having regard to financial and resource implications and the differing views regarding the setting of a jurisdictional limit for matters involving new motor vehicles with major defects.*

In 2017, the Government committed to improving fairness and providing greater rights for Queenslanders buying a vehicle by:

a) lifting QCAT's jurisdictional limit on motor vehicles from $25,000 to $100,000;
b) redefining the term 'vehicle' to include motorhomes and caravans;
c) reinstating the statutory warranty for 'class B' older second-hand vehicles sold by motor dealers and chattel auctioneers; and

[99] https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2018-081 Queensland Civil and Administrative Tribunal and Other Legislation Amendment Bill 2018 Explanatory Notes

d) continuing to advocate for national laws to specifically protect new car buyers, including purchases of 'lemon' vehicles.

To implement elements of the Government's commitment to improve fairness and provide greater rights for Queenslanders buying a vehicle and address recommendation 7 of the Lemon Laws Inquiry Report, the Bill will provide QCAT with express powers as follows:

- QCAT can conduct **expedited hearings** for motor vehicle proceedings if the amount or value of other relief sought is not more than $25,000, or the president considers it appropriate, having regard to a number of factors including the complexity of the issues relating to the proceeding.
- **Adjudicators** will also be able to hear and decide matters if the amount or other relief sought is not more than $25,000 or if the matter is conducted as an expedited hearing.
- Finally the only **costs** order QCAT can make for motor vehicle proceedings is to order a party who is a respondent to pay to the applicant an amount of the prescribed application fee paid by the applicant.

Legislation changes

In April 2019, Queensland passed legislation to this effect, making it easier for consumers who have purchased new and used defective vehicles (including cars, motorhomes and caravans) to recover their losses from dealers and manufacturers through QCAT. The new laws lift the jurisdictional limit of QCAT from $25,000 to $100,000. The laws came into effect on 1 September 2019.

It is worth noting that Queensland has not introduced 'lemon laws' *per se*. Instead, Queensland has achieved enhanced consumer protection for new and used motor vehicle consumers, by lifting QCAT's jurisdictional limit.

Victoria

As far back as 2007, Consumer Action Law Centre, Victoria, (**CALC**) submitted its views regarding the proposed introduction of motor vehicle lemon laws in Victoria. At the time, they submitted to CAV that:

Consumer Action agrees that the easiest way to implement lemon laws is through amending part 2A of the Fair Trading Act 1999 (Vic) (FTA).[100]

In June 2018, CALC produced a report that proposed a world-leading Australian lemon law within our national consumer law framework. The key feature of this lemon law would entitle a purchaser to a refund or replacement if a defect appeared within 6 months of purchase, without the purchaser needing to prove a 'major' failure had occurred.

The report reviewed the approach taken overseas by jurisdictions that have introduced lemon laws.

The recommendations of their report were based on a review of the ACL Review Final Report[101] which proposed *inter alia*, the introduction of strong 'lemon laws' for all recently purchased goods by way of the following legislative proposal:

Proposal 1

Specify that where a good fails to meet the consumer guarantees (for example, it is faulty) within a short specified period of time, the consumer is entitled to the remedies of a refund or replacement without needing to prove the technical legal test of 'major failure'.

CALC found that the proposed legislation did not go far enough, and advocated for a stronger lemon law with 3 key elements:

i. Where a good fails to meet the consumer guarantees within 6 months of purchase, the buyer should be entitled to a refund or replacement without needing to prove a 'major failure', with consideration of an extended time period for higher value goods.
ii. Where a good fails to meet the consumer guarantees within 6 months of purchase, there should be a presumption that the failure was present at the point of purchase.
iii. For goods that fail outside the 6-month window, a presumption that 3 failed repair attempts means a good is subject to a 'major failure'.[102]

[100] https://consumeraction.org.au/wp-content/uploads/2012/11/Submission-to-CAV-lemon-law-inquiry-22-November-2007.pdf
[101] http://consumerlaw.gov.au/sites/consumer/files/2017/04/ACL_Review_Final_Report.pdf
[102] https://consumeraction.org.au/wp-content/uploads/2018/06/LemonLaws_ConsumerActionLawCentreJune2018.pdf

New South Wales

In New South Wales, new powers have been provided to the Fair Trading Commissioner to resolve consumer guarantee disputes through the *Fair Trading Legislation Amendment (Consumer Guarantee Directions) Bill 2018.*

Among its aims is to enable the Commissioner for Fair Trading to resolve certain small consumer claims disputes by way of a direction to repair, replace or refund in relation to a consumer good, that is, a consumer guarantee direction. This new power offers a cheaper and quicker alternative to resolving disputes via a court or tribunal.

However, while seemingly promising, as its application could potentially make it easier to resolve disputes about lemon cars, a consumer guarantee direction cannot be made in relation to a motor vehicle, second hand good or solar battery.

Decision Regulatory Impact Statement (DRIS):

Australian Consumer Law Review: Clarification, simplification and modernisation of the consumer guarantee framework[103]

Following the meeting of the Ministers of Consumer Affairs in October 2018, a number of decisions were made regarding 5 legislative proposals that had been assessed after the Consultation Regulatory Impact Statement (**CRIS**). The DRIS outlined 2 recommendations in particular that impact lemon cars.

Proposal 1

> Specify that where a good fails to meet the consumer guarantees (for example, it is faulty) within a short specified period of time, the consumer is entitled to the remedies of a refund or replacement without needing to prove the technical legal test of 'major failure'.

This proposal entitles consumers to their choice of remedy (refund, replacement or repair) where a good fails to meet the consumer guarantees within a short period of time after purchase or delivery. This would create a time-limited right for a consumer to choose a refund or replacement or opt for a repair without the need to demonstrate a major failure. To apply, the good must have failed to comply in some way with one or more of the consumer guarantees. Outside of the short specified time period, the existing distinction between major and non-major failures applies.

The DRIS recommended maintaining the status quo as the preferred option to address a single consumer guarantee failure arising within a short period of time after purchase. This decision was made on the basis that amending the law to allow consumers the right to choose their preferred remedy in a greater number of cases, is outweighed by the significant costs that would be imposed on businesses.

The DRIS highlighted the fact that the proposed amendments would result in a non-major failure in the short period triggering a refund or replacement right. This could produce unreasonable outcomes where very minor faults in high-value goods trigger refund rights (even if easily repairable).

[103] https://ris.pmc.gov.au/2018/11/29/consumer-guarantees

Proposal 2

Clarify that multiple non-major failures can amount to a major failure.

This proposal clarifies that multiple non-major failures can amount to a major failure to comply with the consumer guarantees. The failures do not need to occur in a similar period of time, relate to the same issue or result in the same problem. The test for major failure would remain the same in the sense that it will still be necessary to determine whether a reasonable consumer would have bought the good had they known about the faults at the time of purchase.

Ministers agreed at the meeting on 26 October 2018 to clarify existing provisions of the ACL that multiple non-major consumer guarantee failures can amount to a major failure. Ministers noted that clarification would enable consumers to obtain a refund if there are multiple non-major failures. In doing so, it would assist consumers who can get stuck in cycles of failed repairs for 'lemon' goods. This would not be a change to the intended operation of the law, but a clarification.

The DRIS recommended clarification that multiple non-major failures can amount to a major failure, entitling the consumer to a refund or replacement, without specifying the number.

CCLSWA's views

We welcome the proposed amendment to the ACL with respect to clarifying that multiple non-major failures can amount to a major failure as this addresses the culture of repair and warranties in which consumers find themselves, that is, a recurring cycle of multiple repairs, particularly where the vehicle is covered by a contractual manufacturer's warranty[104].

The decision to maintain the status quo with respect to amending the legislation in accordance with Proposal 1 does not resolve the issue consumers face in their interactions with dealers about whether or not a major failure has occurred.

While the clarification that multiple non-major failures can amount to a major failure does in some way address the issue that results in consumers being caught up in a cycle of repairs

[104] As opposed to a warranty under statute.

where the dealer refuses to acknowledge a major failure, CCLSWA is of the opinion that this is simply not enough.

We respectfully disagree with the finding at 2.56 on page 50 of the DRIS that,

> *the status quo would maintain the balance between the interests of consumers and suppliers that the current distinction between major and non-major failures strikes. The right of a trader to choose whether a good is repaired or replaced when there is a non-major failure gives suppliers flexibility and is often more economical.*

It is evident from the experiences of consumers who have purchased lemon cars that their interests are not being protected and therefore it cannot be said that the legislation strikes a balance between the interests of both suppliers and consumers. The status quo does not protect consumers and choosing this option only serves to protect the interests of businesses.

There still remain issues that gravely affect consumers, and that are interlinked: the financial impact on them, the heavy evidentiary burden, their limited access to justice, and consumer exhaustion.

Consumers still experience a financial impact due to the steep evidentiary burden to establish that their vehicle is subject to a major failure. Consumers need to acquire expert evidence to substantiate the claim that the defect amounts to a major failure of the consumer guarantees in order to enforce their entitlements through the courts.

There may be high costs incurred in obtaining expert evidence as well as legal advice. The costs of filing fees at the courts, the time required to have the issue resolved and the impact of this all has on the consumer's mental wellbeing will in all likelihood amount to a barrier to justice to most consumers.

We continue to advocate for the implementation of lemon laws that will adequately protect consumers who have purchased lemon vehicles, which the ACL has not been able to address.

Used vehicles: statutory warranties

Any lemon laws should apply to both new and used motor vehicles as used vehicles are just as likely to require protection.

We would add that the requirement that lemon laws apply to used vehicles is all the more pertinent in light of the proposed amendments to the MVDA which will see the sun-setting of statutory warranties[105] in 5 years[106] . At present, these statutory warranties afford used vehicle owners some protection against defects, where certain conditions are met.

The sun-setting and phasing out of statutory warranties would leave used vehicle purchasers in WA in a more vulnerable position compared to the same consumers in other states, who enjoy the protections of statutory warranty provisions in their jurisdictions: see Appendix 9 for a comparison of the provisions across the Australian jurisdictions.

Were lemon laws to apply to new vehicles only, and in the absence of the statutory warranty provisions in WA, owners of used vehicles will be left to rely on the ambiguities of the ACL.

This leads to an anomalous scenario: purchasers of new vehicles will be better off than those of used vehicles!

Recommendations

We propose the following changes to the law concerning lemon cars in order to improve consumer protection.

- The consumer shall be entitled to a refund if their vehicle is out of service for 20 or more days in total, due to a defect.
- The consumer shall be entitled to a refund if their vehicle was repaired once before for a defect that posed a danger to the personal safety of the driver or other road users.
- Reverse the onus of proof to ease the evidentiary burden where it is alleged by consumers there has been a major failure, by requiring suppliers to demonstrate that at the time of supply, there was no breach of the consumer guarantees. This will be limited to the first 6 months after the purchase, to limit the onus on the supplier.
- The introduction of a separate tribunal for disputes about faulty motor cars nationally or, in the alternative, set up a specialist division under the SAT in WA.
- Set up a database of tribunal decisions or court decisions with respect to the motor vehicle cases. This would be beneficial for setting precedents.

[105] *Motor Vehicle Dealers Act 1973* (WA) s34
[106] See Decision Regulatory Impact Statement: Review of the Motor Vehicle Dealers Act 1973 and the Motor Vehicle Repairers Act 2003: https://www.commerce.wa.gov.au/sites/default/files/atoms/files/mvindreview_drisjuly2019.pdf

- The creation of an expert panel that is funded by industry, and administered by the state and territory consumer protection and fair trading 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 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.
- Any lemon laws implemented should apply to both new and used vehicles.

These recommended changes seek to reduce:

1) the uncertainty surrounding when a consumer can obtain a refund;
2) the costs of providing evidence of the defect, and asserting rights under the ACL; and
3) the inconvenience to the consumer and barriers to justice.

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 confidence. Thus far, this has not been achieved as far as lemon cars are concerned.

Curtin Law School initiative

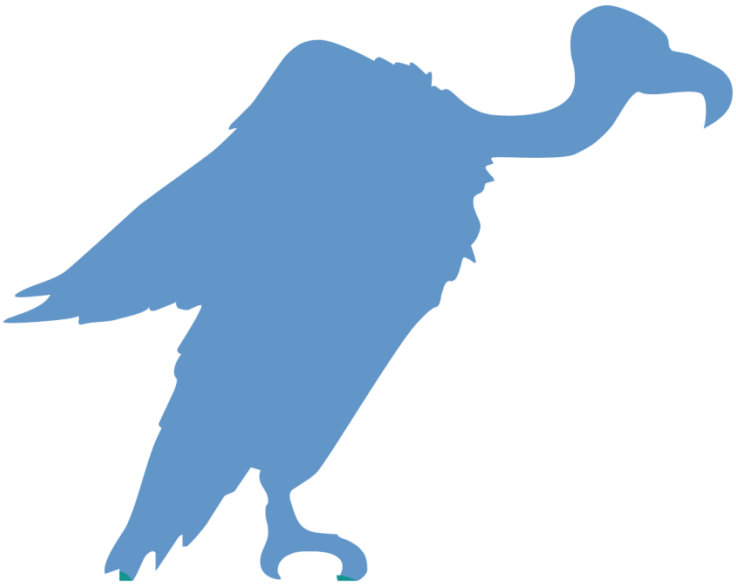
At the commencement of this project, we entered into discussions with Curtin Law School, [107] who were keen to utilise their law students and alumni in an initiative. The initiative aims to identify potential challenges in the ACL remediation process, particularly for unrepresented litigants who file claims through the minor case consumer trader claim stream at the Magistrates Court.

We understand that this initiative is still in its infancy, and Curtin Law School intends to continue working on it with the assistance of volunteer students, and alumni.

We wish Curtin Law School all the best. We envisage that the initiative will go a long way in identifying some of the multiple obstacles for WA consumers who attempt to navigate their legal redress through their ACL rights, including their attempts to negotiate with the suppliers when the goods they purchase turn out to be lemons.

[107] Our contact is Ms Rosaline Tan, Principal Lawyer, John Curtin Law Clinic, Curtin Law School.

5. Emerging consumer issues



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5. Emerging consumer issues: Debt Vultures

Ambit

Within this section of the report, we highlight a number of emerging consumer issues. We discuss the prevalence of debt vultures and their impact on people's lives. Consumer advocates attach the negative, graphic description of ***debt vultures*** to the predatory providers of expensive but useless debt management firms and credit services, who target vulnerable consumers.

We discuss the following debt vultures in this section:

(a) Debt negotiation service (**DV 1**);
(b) Short term lending model (**DV 2**);[108] and
(c) Buy Now Pay Later providers (**DV 3**).

We do not propose to discuss payday lenders (also known as high cost fast loans), or consumer leases in this report as they are regulated [109] and have also been the subject of much reporting, inquiry, and more relevantly, their own review[110]. CCLSWA stands with our consumer advocacy colleagues across Australia, and urge the Federal government to act urgently on reforming the law further, to hold payday lenders into account.[111]

Debt Vultures

Predatory debt management firms and credit services are colloquially known as "debt vultures" to consumer advocates. Debt vultures target consumers who face financial hardship, such as those risking home repossession, credit payment defaults, or those who struggle to feed their families. Debt vultures approach consumers during their vulnerable moments, and misleadingly promise unrealistic solutions.

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[108] Such a model is utilised by Teleloans Pty Ltd, Finance & Loans Direct Pty Ltd, Cigno Pty Ltd and its associate Gold-Silver Standard Finance Pty Ltd, MYFI Australia Pty Ltd and BHF Solutions Pty Ltd.

[109] Chapter 3, National Consumer Credit Protection Act 2009 (Cth) (NCCPA) ss 115-117, 128-130.
[110] The review culminated in a report to the Australian Government on 3 March 2016: https://treasury.gov.au/sites/default/files/2019-03/C2016-016_SACC-Final-Report.pdf
[111] ASIC report into payday lending 17 March 2015: https://download.asic.gov.au/media/3038267/rep-426-published-17-march-2015.pdf; ASIC report into consumer leases September 2015: https://download.asic.gov.au/media/3350956/rep-447-published-11-september-2015.pdf

Debt vultures promise simple and quick solutions to consumers' debt problems. They charge exorbitant fees, but they either do not provide the contracted services that consumers expect, or, in the case of the short term lenders, their fees cause a crippling debt spiral for consumers they purport to help. Debt vultures mislead consumers into believing their financial situation will improve, when in fact, consumers end up with higher debts and more stress.[112]

Some debt vultures operate through a business structure that includes different entities. They funnel consumers through to different services, with the same, or other related businesses at high or hidden fees and interest rates. [113]

When consumers are unable to pay the extortionate fees under the debt vulture's service contracts, the debt vulture either adds on more crippling fees, and/or harasses and threatens them, thereby adding to consumers' stress, vulnerability, and debt.

Debt vultures operate in a regulatory black hole. Unlike other financial services, debt relief companies are not required to hold a licence or meet even the most basic competency and ethical standards.[114] This often leaves consumers in a deplorable situation as they are unable to access justice when things go wrong.

We note that Consumer Action Law Centre, Victoria (**CALC)** currently represents a couple against a similarly described debt vulture, and issued proceedings in the Federal Circuit Court of Australia.[115]

[112] See https://consumeraction.org.au/debt-vultures-to-go-under-the-microscope-of-senate-inquiry-media-release/
[113] See joint submission to ASIC Consultation: Product Intervention Power (CP313) at https://cclswa.org.au/wp-content/uploads/2019/08/190807-Joint-Consumer-Submission-ASIC-CP-313.pdf
[114] Above, n 97.
[115] https://consumeraction.org.au/victorian-couple-sues-debt-management-firm-j-daniels-associates-and-nationwide-debt-collection-over-family-home/

DV models

Debt Vulture 1

Debt Vulture 1 (**DV1**) is a so-called debt management business, operating across Australia. It presents itself as a specialised advocacy service in home loan, bankruptcy and credit rating issues. DV1 operates in association with a web of different businesses, and different fronts.

DV1 frequently offers unsolicited services to consumers who have defaulted on their home loan payments and face home repossession proceedings. DV1's predatory activity includes multiple telephone calls, multiple personalised telephone text messages, and even handwritten letters to consumers. Such ferocious contact exploits consumers' vulnerabilities during their difficult financial times as DV1 makes constant references to imminent or ongoing court repossession proceedings against them. In their dealings with consumers, DV1 hold themselves out as having the expertise to provide legal and financial services through the language they use and the approach they take.

If consumers do not immediately sign up for DV1's services, they are inundated with more telephone calls and text messages. And after signing up for 'buy more time agreements', debt negotiations and credit repair services, consumers quickly realise that DV1 does not provide the contracted services, or that they provide them at a superficial level. It becomes apparent that DV1 has not in fact helped them in any way, and that DV1 may have further jeopardised the consumers' already dire financial circumstances by adding to their debts. To top it off DV1 then charges consumers for these alleged services.

It is worth noting that DV1 charges consumers for services that consumers could freely access at no cost. Options available to consumers include, seeking assistance from financial

counsellors or the services of community lawyers to compile, lodge and administer formal complaints with lenders and the financial ombudsman scheme[116].

When consumers wish to opt out of the service agreements, DV1 quickly assumes a peremptory stance often becoming abrupt and unhelpful. In a number of instances, DV1 lodged caveats against consumers' properties as a way of sabotaging property sales and threatening consumers into paying their fees. DV1 operates on the very edge of the law, and as consumers are at a desperate juncture of their financial hardship (such as selling their homes), it is difficult for the consumers to challenge DV1's claims. Often, the consumers have no option but to give in and pay DV1 to remove the caveats.

[116] The Australian Financial Complaints Authority (AFCA) from 1 November 2018. Previously, disputes would have been lodged with the Financial Ombudsman Service (FOS), and the Credit and Investments Ombudsman (CIO).

Minjarra's story

Minjarra, an Aboriginal man, loses his job and struggles to pay his home loan. Red Bank commences court action to repossess Minjarra's home. Soon, Minjarra receives 4 letters in one day: one from DV1 and three from businesses associated with DV1. All the letters appear to be generated by the same group and contain frightening and urgent threats, such as:

"Have you received a statement of claim from Red Bank yet because they have lodged it in the Supreme Court on …. You must call us before…. because Red Bank will be able to get a judgment and then take possession of your property any day now and you need to act urgently to stop it before they can.

Warning! Do not make a common mistake and wait until it is too late to take action!"

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Chris' story

Chris defaults on his home loan and informs ABC Bank that he intends to sell his home to pay out the debt he owes to ABC Bank. Soon after, Chris receives DV1's offer of service in the letterbox. Chris assumes from DV1's letter that ABC Bank has commenced legal action to repossess his home. Chris feels trapped, and desperate. Thinking he ought to help himself with the debt situation, he decides to take up the offer to sign up with DV1. Chris signs a costs agreement with DV1, for the service of compiling, lodging and administering formal complaints with the lender and regulatory bodies to cease all legal action for the repossession of the property. The fee for this service is **$3,850**, payable at the completion of the service in 60 days.

Shortly after that, Chris receives a letter from Landgate informing him that DV1 has lodged a caveat against his property.

DV1 issues an invoice to Chris for services that DV1 did not in fact perform. DV1 ignores Chris' request for a breakdown of their service.

Chris signs a contract for sale of his property, to pay out ABC Bank. However, DV1's caveat prevents the property settlement. DV1 demands that Chris pay $5,000 before they would remove the caveat.

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Debt Vulture 2

Debt Vulture 2 (**DV2**) operates as a short term lender, but structures its business in a way that avoids regulation, therefore allowing it to operate outside credit protection laws such as the *National Consumer Credit Protection Act 2009* (**NCCP Act**).

DV2 markets itself as a quick, easy and quality 'emergency cash specialist' by providing 'cash advance/short-term emergency' loans.

The fees and charges for DV2's services are very difficult to calculate in advance of applying for a loan, as their website lists service fees as a percentage of the loan amount proportional to the number of repayments, leaving consumers unable to ascertain all the individual fees and total cost of the loan.

The model enables it to charge exorbitant fees and interest rates that are far beyond what is allowed to payday lenders. DV2 does not comply with responsible lending obligations, making it easy for consumers to obtain a loan without fully realising all their legal and financial obligations.

After having their loans approved, consumers are then provided with the funds, but face exorbitant administrative fees for dishonour, accounting keeping, changes, and interest. When combined, these fees can add up to almost **1000%** of the loan amount. [117]

Such short term lenders target consumers with low levels of financially literacy such as, vulnerable Aboriginal communities, people with mental impairment, and teenagers.

[117] See ASIC's media release 19-250MR dated 12 September 2019: https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-250mr-asic-makes-product-intervention-order-banning-short-term-lending-model-to-protect-consumers-from-predatory-lending/

Case study

Mikela's story

Mikela, a single mum with 2 mentally impaired dependant children, escapes a domestic violence relationship. She signs up with DV2, an unregulated short term credit lender, for a loan of $250.

As Mikela wishes to pay the loan in 4 repayments, DV2 adds a 'financial supply fee' of 75%. DV2 also adds a 'same day deposit fee' and a 'lender fee', bringing Mikela's loan from $250 to $466. DV2 also charges Mikela a 'weekly account keeping fee' of $5.95.

To pay the debt over 4 instalments, Mikela has to a pay $128.40 per instalment.

Very soon after, Mikela contacts DV2 twice to postpone the repayment date, and DV2 charges her $20 twice for a 'change of payment date and amount fee'.

Mikela then makes her first payment with a new minimum of $145.90.

Subsequently, DV2 charges Mikela $20 on 3 different occasions, for a 'change of payment date and amount fee'.

Mikela is unable to call DV2 to request a further repayment postponement, so DV2 charges a 'dishonour fee' of $49. On the same day, DV2 charges Mikela another $30 for a '1st dishonour letter fee', therefore charging Mikela a total of $79 over one missed payment.

In the next month, DV2 charges Mikela a 'dishonour fee' of $49 and $50 for a 2nd dishonour letter. DV2 also adds a 'collections tracking fee' of $50.

A week later, Mikela agrees with DV2 to pay $30 per fortnight, with the 'weekly fee' $18.10 deducted from that, to maintain the account.

Soon again, Mikela misses a payment and DV2 once again charges her a $49 dishonour fee and $30 for a 1st dishonour letter fee. The total amount of the default fees ($79) nearly exceeds the total amount Mikela has actually paid off her DV2 debt ($72.40) since the start of the new agreement.

Mikela faces a downward spiral of financial hardship. She will likely default again, making it difficult for her to renegotiate with DV2.

At this stage Mikela's total debt has reached $1069.43, for an original loan of $250.

Debt Vulture 3

Buy Now Pay Later providers

Buy now pay later (**BNPL**) is a lending model with arrangements that allow consumers to buy and receive goods and services immediately, and pay for their purchases over a specified period of time. These arrangements often involve 3 contracts between any 2 parties of the consumer, the merchant and the provider. BNPL arrangements have grown exponentially, representing during the 2017-2018 financial year, around 10% of the adult population in Australia.[118] BNPL products are particularly attractive to younger consumers and students (between 18 and 34 years of age), who typically have insufficient or irregular income.[119]

These arrangements are available to both high and low-value purchases. Average transaction values fell from $1,098 in April 2016 to $178 by June 2018.[120]

The industry has seen growing revenue from missed payment fees, rising from 2% of the total revenue in the quarter ending June 2016 to 12% in the quarter ending in June 2018. [121]

These figures may be explained according to a matrix of circumstances which include:

- the increasing number of new providers charging multiple missed payment fees;
- the increasing number of lower-value purchases; and
- the high number of 'first-time' users accessing these services. [122]

Such agreements are not regulated under the NCCP Act and this legal loophole adversely impacts consumers. [123]

BNPL agreements lack transparency, and diminish consumers' bargaining power by increasing the price of products and services. This practice is unacceptable, especially as the information is not disclosed prior.

[118] https://download.asic.gov.au/media/4947835/rep600-published-28-11-2018.pdf
[119] Ibid
[120] Ibid
[121] Ibid
[122] Ibid
[123] Ibid

BNPL agreements require merchants to actively promote these services, sugar-coating its terms and conditions and not disclosing charges additional to the final price of products and services.

BNPL providers are not subject to responsible lending obligations and it is within their discretion whether or not to make inquiries to verify a consumer's financial situation. As such, BNPL arrangements can increase a consumer's overall debt and financial over-commitment.

When consumers default on payments, few make hardship application requests. This might be a result of the lack of information on hardship assistance.

Furthermore, BNPL arrangements often have unfair terms and conditions, which accentuate power imbalances between consumers and providers, causing consumer detriment.

BNPL providers should not get special treatment under the national credit laws, as they are substantively providing credit services. ASIC has very limited jurisdiction over BNPL providers and it is only allowed to take action in terms of misleading, deceptive or unconscionable conduct. ASIC can use its latest tool, the Product Intervention Power to mandate responsible lending obligations as these providers do not comply with paramount consumer protection rules.[124]

What can the regulator do? ASIC & PIP

In its final report[125], the Financial Services Inquiry (**FSI**) recommended that ASIC be provided with a Product Intervention Power (**PIP**) to enhance its regulatory toolkit in order to address the risk of significant consumer detriment. In response, the Australian Government introduced the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018 (Product Regulation Bill)* into Parliament. It noted that ASIC's existing toolkit had limitations, as follows:

(a) ASIC could only take action post-breach by a financial services firm;
(b) ASIC could only take enforcement action on a case-by-case basis, even if it is an industry-wide issue;
(c) ASIC might exhaust its toolkit, and still have no clear basis to take enforcement action;

[124] Above, n 98, Appendix B.
[125] http://fsi.gov.au/publications/final-report/ November 2014

(d) ASIC lacked a broad toolkit to respond effectively and in a timely way to an emerging risk of significant consumer detriment; and
(e) Even if a firm were disclosure and advice compliant, consumers might fail to understand a product, and suffer detriment.[126]

In a joint submission by consumer advocates in response to ASIC's consultation process, we argue that ASIC should use its PIP to target a "hit list" of prime culprits which include debt vultures such as the likes of DV1, DV2, and DV3.

A particular use of PIP would involve imposing some professional standards on DV1 types, including a duty to act in the best interests of the debtor, a ban on unsolicited selling and client money obligations."[127]

ASIC uses PIP against short term lenders

On 12 September 2019, ASIC deployed its PIP to ban a model of short term lending, across the industry. [128] The ban order is effective for 18 months from 14 September 2019, with the potential for an extension or permanency, subject to Ministerial approval. The deterrent against a breach of the PIP order is civil and criminal penalties, up to 5 years imprisonment and $1.2M fine per offence.

ASIC says that it will take action where it identifies products that can or do cause significant consumer detriment. In deploying its PIP in this instance, ASIC aims to protect consumers who are already vulnerable from incurring extremely high costs that add to their financial burden.[129]

CCLSWA looks forward to ASIC's use of its PIP in other debt vulture practices.

Impact on Consumers

It is evident from the above analysis that the consequences of signing up with a DV are, more often than not, detrimental to consumers already in a financially precarious situation. It is for this reason that we have included them in this report.

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[126] See also ASIC Consultation Paper 313 on Product intervention power: https://download.asic.gov.au/media/5165186/cp313-published-26-june-2019.pdf
[127] Above, n 98, Appendix B.
[128] Above, n 113.
[129] Ibid, per ASIC Commissioner Sean Hughes.

Indebted people grasp at any prospect of being helped out of their debt and often do not understand the services being offered or the charges they will incur. The charges and fees increase their debt as the DVs charge large fees for minimal services which often do not resolve the consumers' problems.[130]

DVs do not act in the interests of the consumer and many consumers are unaware that they are dealing with a for-profit entity. ASIC's view is that the business models of debt management firms create a risk of abuse or exploitative conduct particularly where consumers are charged fees irrespective of the quality of the services provided and where customers do not need these services because of the availability of free alternatives.[131]

The nature and inadequacy of the current regulatory arrangements where there is no code of conduct and there are no requirements to be licensed on the part of the DVs means that more and more customers are at risk of their predatory behaviour.

Recommendations

In light of the above, as a minimum we recommend that Consumer Protection embark on an extensive and rigorous awareness raising campaign to shed some light into the nature of DVs and their impact. The campaign should also make consumers aware of free services such as community legal centres, financial counsellors and the Australian Financial Complaints Authority.

We recommend that there be some form of licensing requirement for DVs regulated by the State in the same manner that other services such as real estate agents and settlement agents are regulated in the property industry. The present situation makes the DVs an exception in the financial industry and allows for the perpetuation of their bad practices.

We recommend Consumer Protection consider using the general provisions of the ACL regarding particular types of conduct to address some of the issues with DVs which amount to contravening the ACL. These include unduly harassing consumers by means of unnecessary and excessive contact in situations where they bombard consumers with text messages, phone calls and letters for the consumers to accept their services.

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130 https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Creditfinancialservices/Report/c04

131 ASIC, *Submission 21*, p. 27.

False and misleading conduct could be argued as the DVs, through this means of contact, make false/misleading representations about the consumers' need for their services.

DVs may similarly breach the ACL provisions in what can arguably be described as unsolicited consumer agreements in situations where DVs are contacting consumers offering to stop repossession of the consumers' homes.

A case could be made for misleading and deceptive conduct as the consumers find that the DV does not prevent the repossession of their homes because the DV will have done nothing at all to ameliorate their situation. It can be argued that the DVs conduct, the representation they make to consumers that they will prevent the repossession of their homes, which they fail to do repeatedly constitutes misleading and deceptive conduct. The marketing and advertising of DVs could also be assessed/ reviewed for breaches relating to misleading and deceptive conduct.

Consumer issues in the regions

To better represent a broader perspective on consumer issues across WA, we decided from the beginning of this project that we would make concerted efforts to gauge the current consumer issues that plague our regional communities. We relied on a variety of ways to source relevant information:

- Extensive consultation through face-to-face meetings with legal and advocacy services, as well as individuals, who serve regional communities. For instance, Faith Cheok (Senior Solicitor, Policy and Law Reform) attended the quarterly meetings of regional WA community legal centres that are organised by the state body, Community Legal WA. Faith publicised the project to colleagues, and collected information and case studies from them.

- Extensive discussions through telephone meetings and conferences with services and individuals, for the same purpose.

- Outreach trips to 3 regions: Gascoyne Murchison region, Peel region, and Kalgoorlie Boulder region. We expand below on our findings for our outreach trips.

Outreach trips to the regions

During this project, CCLSWA undertook 3 outreach trips to the following regions. In this report, to draw attention to the prevalent consumer issues for these 3 regions, we present select case studies within each section.

Gascoyne Murchison region

During the week of 25 – 29 March 2019, CCLSWA's Faith Cheok and Storm Viall (Paralegal) accompanied colleagues from Regional Alliance West (**RAW**), and Street Law Centre on a trip to the Gascoyne Murchison region. Our 2-person CCLSWA team members were there as fact finders and observers firstly, and then as legal advice and information providers secondly. We learnt and collected useful information.

The area is almost the backyard for RAW's work. RAW's team consisted of Chris Gabelish (Operations Manager), Alison Muller (Principal Solicitor), Derek Ware (Outreach Coordinator) and Gillian Kelly (Paralegal). Street Law Centre's team consisted of Rachael Doraisamy (Solicitor, CLE Coordinator), and Stacey Price (Solicitor). Samantha Hayes of WANILS joined us for the sessions too.

Over the week, our group met with the community and leaders of the following locations:

Mullewa	• Women's Art Centre
Meekatharra	• Yulella Aboriginal Corporation; • Mission Australia; • Aboriginal businessman Andrew Binsair
Mount Magnet	• Yulella Community Development Program
Yalgoo	• Meedac

At the different venues, Street Law presented legal information on crime, the criminal process, and the obstacles for communities who navigate the legal minefield. They presented in interactive ways, including using games to highlight and reinforce legal concepts. Samantha Hayes of WANILS actively promoted to the attendees the benefits and process of WANILS.

CCLSWA's team spoke about our project, and collected "intelligence" from community members and their leaders about issues, and the current practices and products that prevail:

- Shared equity home loans
- Debt negotiators
- Store credit cards
- Consumer leases
- Rent-to-buy schemes
- Unsolicited sales (door-knocking)
- Photography packages
- Unregulated short term loans
- Payday loans
- Debt collectors
- Perceived discrimination by stores and police
- Charity collections that target vulnerable people
- Mental illnesses, and their impact on credit and consumer issues

Stories from Geraldton and Meekatharra

Household appliance rental providers

*One client had to pay **fortnightly deductions of $350** over a period of 2 years.*

*Another client, with a **mental disability, had so many contracts with a household appliance rental provider that the financial counsellor could not work out which contract was current**, and which contract was being deducted from CentrePay. Upon contacting the company, the financial counsellor was told, **"Well, he's an adult." It was evident that there was no consideration for the client's mental disability.***

*One client who a single person living alone was sold a 7kg capacity washing machine. **The client rarely has money left over at the end of the month** because of the operational costs associated with a 7kg washing machine (water, electricity bill etc. skyrocketed).*

Payday Loans

*One person had **taken out a $50 payday loan**. They **ended up having to pay back over $300 + interest**. The money was direct debited from the person's account, and as a result, **the person went without food or any money for about 2 months.***

*Service providers **insist on having your bank details and passwords** before they are prepared to do business with you.*

*They **insist on having a look at people's bank account online.** They do this over the phone or in person.*

Rent-to-buy

*It's very obvious that **Rent-to-buy schemes target Aboriginal people.***

*One client **signed a contract for a rent-to-buy TV**. She had to pay $186 a fortnight. This was unaffordable because she was a young mother with two children. **She fell behind in repayments and now she owes over $4,000** for the TV. She still has approximately $1,300 left to pay. She can't keep up and keeps falling into more debt. **Paying over $4,000 for a TV is ridiculous!***

Peel region

On 15 May 2019, CCLSWA's Faith Cheok, Georgia Turco (Solicitor), Allison Sampson (Office Manager and CLE Coordinator), and Storm Viall attended at Peel Community Legal Service Inc., to speak with their staff and their stakeholders. Georgia provided information on CCLSWA's specialist services, and Allison spoke about CCLSWA's community legal education programmes. Faith and Storm spoke about CCLSWA's law reform project, highlighting particular prevalent credit services, such as *Buy Now Pay Later,* debt management businesses, consumer leases (rent-to-buy schemes), and unsolicited consumer agreements. Faith and Storm gathered case studies and information from the several advocates afterwards, on:

- Shared equity home loans
- Rent-to-buy schemes
- Consumer leases
- Regulated payday loans
- Buy Now Pay Later
- Mental illnesses, and their impact on credit and consumer issues

Stories from Peel region: DV 3 - Buy Now Pay Later (BNPL)

Keeping up with the Joneses, at Christmas time

Tara is a young mother to boys, Ethan and Ben, living in Mandurah. Both boys are now in school, and Tara starts to feel some pressure of keeping up with the Joneses. As Christmas approaches, the boys keep coming home with stories about all the exciting presents their classmates will be getting.

There are no credit checks and approval can be granted within minutes.

BNPL DV3 comes to the rescue!

Tara starts to feel guilty about not being able to afford transformers, a PlayStation and video games for Ethan and Ben. Luckily, she's browsing through some online shops when she notices that DV3 provides BNPL services at all of the shops where she could buy the presents. She has to pay a little now and then, and the payments will be spread out for the next couple of months. Most importantly, the boys' presents will be here by Christmas. Tara goes on a bit of a shopping spree; there's no way she could afford all this if she had to pay it upfront.

A happy Christmas but…

Christmas comes and the boys have a fantastic time opening their presents. Tara thinks about how they will head back to school in the New Year, and proudly show off their toys to match all their friends' presents. Tara is happy, but now she has a little trouble making a decent Christmas dinner, as the second round of DV3 bills are due.

Troubles for the New Year

In the New Year, all the bills start mounting up and Tara is having trouble paying rent, and buying healthy food for her boys.

Kalgoorlie Boulder region

During 10 – 14 June 2019, CCLSWA's Faith Cheok, Georgina Molloy (Solicitor), and Allison Sampson visited the Kalgoorlie Boulder region. Over the week, our group met with the community and service providers, and conducted the following activities:

1. Eastern Goldfields Community Centre:

   Bingo game with seniors, highlighting consumer and debt issues

2. Legal Aid:

   An exchange of our respective specialist knowledge, and a commitment to better referral channels

3. William Grundt Library:

   CCLSWA, Goldfields CLC, Centrecare financial counsellors, WANILS, and Consumer Protection's Mark Ing participated in a game of modified Snakes & Ladders that highlighted consumer and debt legal issues.

Stakeholder consultation

After the game and education exchange at the library, Faith Cheok took the opportunity to hold a number of one-on-one stakeholder consultation sessions with Centrecare and Consumer Protection. We discussed the following issues faced by the community:

1. Consumer leases;
2. Rent-to-buy schemes;
3. WANILS process;
4. Major banks' refusal to provide bank statements to financial counsellors, though presented with consumers' signed authorities (barrier to WANILS process); and
5. Scams.

Kalgoorlie Boulder Prison

On 13 June 2019, Faith and Georgina visited Kalgoorlie Boulder Prison's personnel.

Centrecare

On 13 June 2019, Faith and Georgina attempted to meet with Centrecare's Cashless Debit Card (**CDC**) programme team, but unfortunately, the team was overwhelmed with unexpected demand, and we then arranged to conduct a telephone discussion with them on a later date.

Department of Human Services (Centrelink)

On the morning of 14 June 2019, Faith and Georgina met with Centrelink's personnel to discuss CDC matters.

Recommendations

The issues facing consumers in regional areas are in some ways similar to those experienced in metropolitan area, for example, with DVs and motor vehicle dealers. We recommend that Consumer Protection have a robust awareness campaign into the dealings of these businesses particularly in the regional areas in addition to ensuring that the recommendations we made under the Motor Vehicle and DV sections of the report are implemented for the benefit of all consumers.

The issues relating to the particularly vulnerable communities in regional areas, such as income management, in the form of the CDC and credit schemes such as 'Book-up' which arguably is a predatory and exploitative practice, are much bigger issues that possibly require vigilance on the impact they have on vulnerable consumers.

We recommend a bigger presence by Consumer Protection in the regional areas to allow consumers the opportunity to make their complaints known and for Consumer Protection to gain a better understanding of the nature of the prevailing issues and to take the requisite remedial action where businesses cause consumer detriment.

Through our interactions with the various groups in the regional areas, it became evident that the most crucial aspect of regional work is engagement. There is insufficient funding to allow workers to do their work effectively and to train new people to carry out the necessary work. Organisations such as RAW in the Gascoyne Murchison Region and Centrecare Kalgoorlie are exemplary regional operators epitomising what engagement is, but lack funding. We recommend that government increase action and funding for regional engagement without which the voice of regional consumers would otherwise be ignored due to distance and lack of technology.

Stories from Kalgoorlie

Indue cards and rent-to-buy

There is a disconnect between Centrelink and the management of CDCs

The Cashless Debit Card

35yo Adam lives in the Goldfields region of WA. At 27, Adam had an accident, and lost his job. He has been **on Centrelink benefits** ever since. In April 2018, the government brought in the *Cashless Debit Card* (**CDC**) scheme. **Adam can only get out 20% of his Centrelink money as cash**; the rest is on his Indue card. He can use his Indue card at stores that don't sell alcohol or promote gambling. He cannot withdraw any cash from his Indue card.

The most concerning aspect of CDCs is their disempowering effects: people are stripped of the freedom to manage their own affairs.

Indue card and Adam's life

Adam feels he has lost control of his money. There are certain places where he can, and can't go, to buy his things. Earlier this year, Adam moves to a place just out of Kalgoorlie. The landlord is a private real estate company. When his next rent is due, Adam has a problem. The landlord does not accept payment from Adam's Indue card. Adam does not know what to do. He doesn't own a computer, and doesn't know how to get to his online banking information. He calls Centrelink, and after holding for one hour on the phone, Centrelink tells him that they don't deal with CDC complaints. They tell him to call another department, but after waiting more on the phone, Adam gives up.

Where can Adam go for help?

Adam is afraid and frustrated. He worries about being evicted because he cannot find a way to his rent. He knows he has some money left for it, but he can't get to it.

Adam goes to Kalgoorlie to get help from the Centrecare office. The queue is long, but he sees lots of people like him in the office, so he thinks it could be a good idea. Centrecare tells Adam that his problem is pretty common, and they'll help him make arrangements to pay his new landlord with his Indue card.

What options to furnish his house?

Adam's new rental is not the best. It is missing furniture. Adam doesn't have enough money to buy anything outright. He knows about WA NILS[132], who could give out free loans to people like him. A nice lady offers to help sort this out for him, but some friends tell him that it takes ages for these loans to come through; one took 3 months!

Adam's cousin tells him about the rent-to-buy van that comes around town every month. Adam sees the van out on the oval, and goes for a visit. All he does is sign some paperwork. The nice ***rent-to-buy*** man says it's no hassle, as it'll all go through Centrepay. Adam ends up with a 3-seater couch, a washing machine, a spring-coil mattress, and a microwave oven. He is very pleased.

Rent-to-buy schemes often target Aboriginal people with limited literacy. They sign forms that they may not understand and end up owing and paying far more than they should.

The Centrecare Kalgoorlie office was packed with drop-in clients with problems similar to Adam's.

A typical story

Adam's story is a recurring theme in Kalgoorlie[133] However, there are differing views about Indue cards[134]. The CDC trial in the Goldfields has been extended. Some people who are Centrelink recipients, but who are not within the target group (for the purpose of curbing substance abuse and domestic violence), are caught up in the CDC programme, for instance, a carer[135]

[132] WA No Interest Loans Scheme, a community lender.
[133] https://thewest.com.au/news/kalgoorlie-miner/end-cashless-card-trial-mp-ng-b88890175z End cashless card trial: MP; 10 July 2018.
[134] https://thewest.com.au/news/kalgoorlie-miner/indue-card-trial-handballed-again-ng-b88940988z 28 August 2018
[135] https://www.abc.net.au/news/2019-04-04/cashless-debit-card-trials-extended-but-do-they-even-work/10966900 24 April 2019

Summary & Conclusion of Project

The Law Reform Initiative project sought to identify, address and make recommendations regarding some issues affecting WA consumers in retirement villages, under motor vehicle legislation, the ACL with a focus on lemon laws and new and emerging issues with a focus on debt vultures. Our findings and recommendations were informed by engaging with stakeholders, consumers, interstate colleagues and through extensive research.

It is evident from the findings of this report that a significant amount of consumer detriment exists in WA. Legislation in many circumstances has not caught up with many of the practices that exploit and cause detriment to consumers. From our analyses on the dealings of motor vehicle dealers and debt vultures in particular, it is clear that more robust regulation is required to protect consumers against the detriment that is currently being caused.

Industry has the money and often political backing through their lobbying activities to persuade government to make laws that advantage them. Consumers, by and large, are in a far more disadvantageous position to advocate for the changes required to protect them as Industry does for itself.

CCLSWA believes that Consumer Protection is in a good position as a regulator to advocate for the implementation of the recommendations proposed in this report as means of addressing the power imbalance that exists between consumers and industry.

We thank Consumer Protection for the opportunity to take on this Law Reform Initiative project and by so doing, having the opportunity to advocate for the interests of WA consumers in both regional and metropolitan areas. We hope that our recommendations will be well received and that they will contribute to an improvement in the condition of consumers.

6. Appendices

Appendix 1

Cooling off period and pre-estimated liquidated damages (across Australian jurisdictions)

JURISDICTION	COOLING OFF PERIOD	COOLING-OFF PERIOD APPLIES TO WHAT TYPE OF VEHICLE?	TERMINATING THE CONTRACT DURING THE COOLING OFF PERIOD	TERMINATING THE CONTRACT AFTER THE COOLING OFF PERIOD EXPIRES	SOURCE
QLD	✓	Used	$100	"… term included in a standard contract provides that a pre-estimate of a car dealer's loss when a binding contract is cancelled is 10-15% of the purchase price of the vehicle." (click link)	S 10 - Motor Dealers and Chattel Auctioneers Regulation 2014 Form 12 – see this link
NSW	✓	New and used, but with linked finance	$250 or 2% of the purchase price, whichever is the lesser		Form 20 – Motor Dealers Amendment (Cooling Off Periods) Regulation 2002
VIC	✓	New and used	For ***used*** cars - $100 or 1% of the purchase price whichever is the greater; For ***new*** cars - $400 or 2% of the purchase price, whichever is the greater		S43(4) - Motor Car Traders Act 1986
SA	✓	Used	$100 or 2% of the purchase price, whichever is the lesser		S 18B(7) – Second-hand Vehicle Dealers Act 1995
WA	X	---	---	up to 15% of purchase price	Schedule 5 (8.2) – Motor Vehicle Dealers (Sales) Regulations 1974
NT	X	---	---	10% of purchase price	
ACT	✓	New and used	$100 or 1% of the purchase price whichever is the lesser		S 25B(4) – Sale of Motor Vehicles Act 1977
TAS	X	---	---		

Appendix 2

BUYING A CAR?

STOP!

YOU'RE SIGNING A CONTRACT.

GETTING OUT OF IT CAN COST YOU $$$$$$$.

Izu's story

Izu is a 55yo woman with very limited English. She earns $300pw as a casual cleaner. Izu went to a caravan show in town. The salesman talked Izu into buying a $80,000 caravan. He got Izu to log onto her online banking to pay a 10% deposit. Izu had $5,000 in her account, so he asked for $4,000. Due to daily transfer limits, he agreed to accept $1,000. Izu found it hard to do the electronic transfer, so the salesman helped her with it. Then he asked her to sign the contract to buy the caravan. Izu said she could not read or understand the document, so he said "No worries, it's just some government bulls#@t!" Izu signed as directed, thinking she signed an expression of interest.

Izu's husband James found out about the contract when he returned from his FIFO work. He rang the dealer to cancel the expression of interest, only to be told that Izu signed a contract, and she'd need to pay nearly $5,000 to cancel it.

YOU'RE SIGNING A CONTRACT, NOT JUST AN EXPRESSION OF INTEREST.
CAN YOU *REALLY* AFFORD THE CAR OR CARAVAN?
BEFORE YOU SIGN, CALL CCLSWA ON (08) 9221 7066

Consumer Credit Legal Service (WA) Inc.
CCLSWA@CCLSWA.org.au
www.cclswa.org.au
Advice Line: (08) 9221 7066

cclswa

Appendix 3

Case study on linked finance: Sam

The sale

Sam is in the market for a new family car. She visits *Wheelin' Dealin' Cars* in Osborne Park. Salesman Dexter takes Sam on a long walk around the caryard, showing her many cars. Sam finally settles on a new, blue Nissan, which cost $30,000. Dexter talks her into a new tow bar, leather seats, and extra dark window tinting, telling her that her family needs these extras. Dexter also offers Sam a $5,000 discount for trading in her trusty, old Toyota.

The **total cost is $32,000**, after adding the extras and her trade-in discount. Dexter tells her that he is giving her an "uber generous deal", as part of the end of financial year sale.

linked finance

Sam has no savings to pay the $32,000. So Dexter offers to **arrange a loan** for her through *Wheelin' Dealin' Cars*. Later that day Dexter calls to let Sam know the lender has **approved her finance application**, so the deal is done.

Having doubts

That night, Sam starts having doubts about her purchase. The nice, new Nissan is at the high end of her price range, even without all the added extras. She also is not really clear about the details of the loan. She feels that Dexter pressured her into it; she had felt dumb in not accepting the "uber generous deal".

Sam worries about how she would pay for the car loan, as she has many upcoming expenses. She has a new hot water system to pay for, her children's sport club fees, and physiotherapy costs for herself and her children. Sam realises that she needs to get out of the car contract.

Q: Can Sam cancel the car contract?

Under proposed laws: Yes, and pay $100 or max. 5% of contract price

As the dealer *Wheelin' Dealin' Cars* arranged the loan, Sam has a **cooling off right of 3 business days**. If she cancels the contract within the 3 business days, Sam has to **pay a $100 fee** to *Wheelin' Dealin' Cars*.

If 3 business days have passed, and Sam still wants to cancel the contract, she may do so, but must pay more than $100 to do so. Sam would have to pay a **fee of up to 5%** of the contract price, being a **maximum of $1,600**. Once the contract has been cancelled, *Wheelin' Dealin' Cars* must return to Sam her trusty Toyota and any deposit she paid.

Under the proposed new laws, the fee for cancelling car contracts outside of a cooling off period will be up to 5% of the contract

Cooling off right of 3 business days to cancel contract, but must pay $100

What if Sam does not need finance?

If Sam pays for her new car in full, in cash or by card, Sam would have **no cooling off rights** at all. To cancel the contract, she would have to pay up to $1,600 (5% of the contract price).

no cooling off right = contract is final

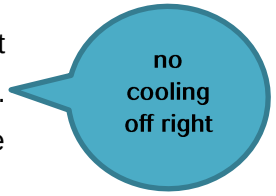
Up to 5%

In all cases where the dealer may charge up to 5% of the contract price, remember that it is a **maximum of 5%.** The buyer has a right to ask the dealer to justify charging whatever % amount the dealer demands.

Sam has a right to ask *Wheelin' Dealin' Cars* for a breakdown of the % amount that they demand she pays.

What if Sam arranges her own finance?

If Sam does not go through *Wheelin' Dealin' Cars* to arrange finance, but does it herself, her rights would be different. Sam would have **no cooling off rights** at all. If Sam wants to cancel the contract, she would have to pay up to $1,600 (5% of the contract price).



Under the current law

There is **no cooling off right** under the current law.

Without the proposed new laws, Sam's situation is much worse. If she wants to cancel the contract, she has no cooling off right. If she decides to cancel the contract, she must **pay a penalty of up to 15%** of the contract price. 15% is the highest amount that the dealer may charge, but it is common practice among dealers to demand this flat 15%, without explanation.

For Sam, *Wheelin' Dealin' Cars* would likely demand that she pay $4,800 when she wishes to cancel the contract. Sam would probably pay very dearly for an impulsive decision made under Dexter's pressuring sales tactics.

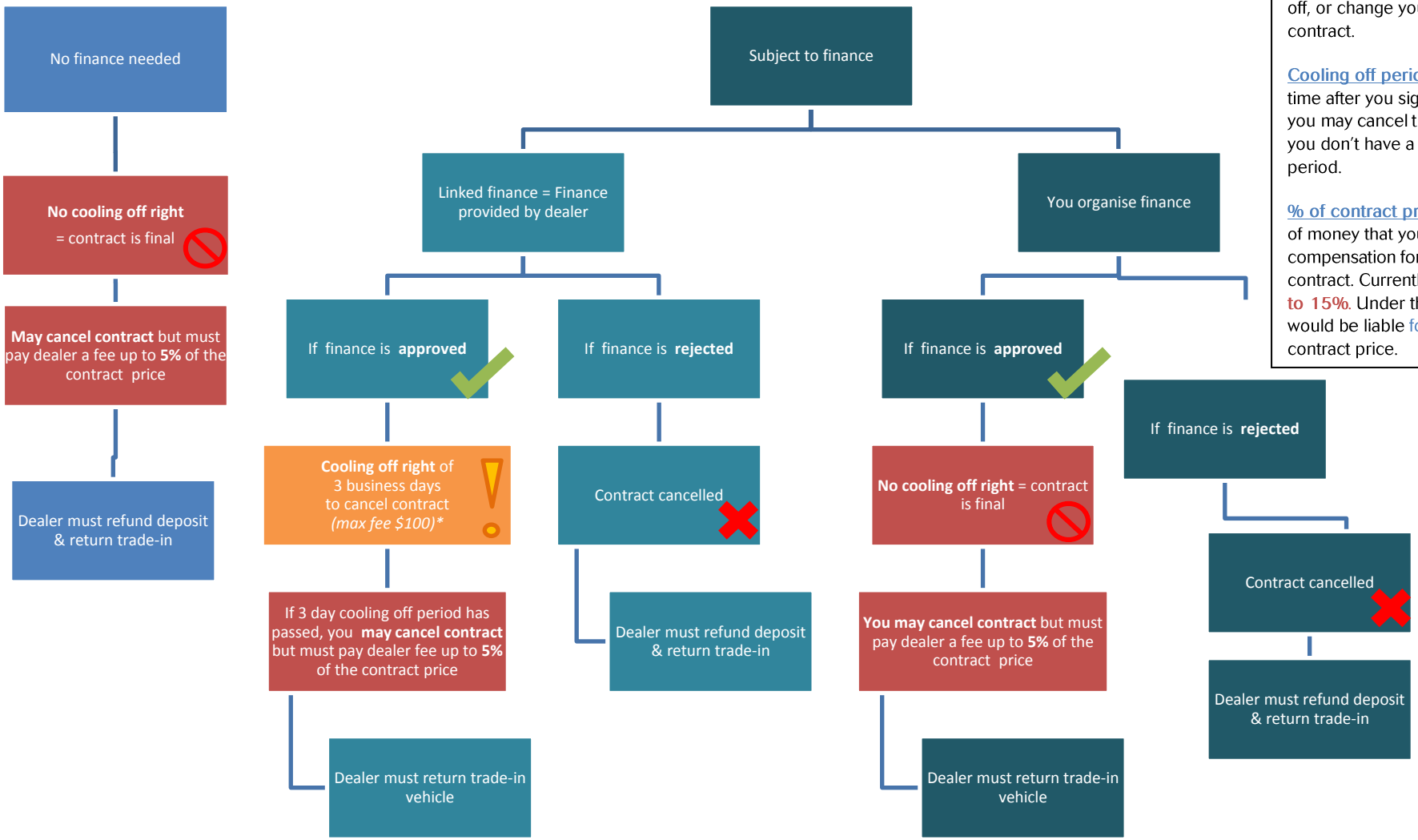
Under the current law, **Sam would lose nearly $5,000, rather than $100 or at most $1,600 under the proposed laws.**

Proposed new laws for car

Appendix 4

Buying a car: Can you get out of the contract?

	Current law	Proposed law
If you organise your own finance	**No cooling off right**	**No cooling off right**
If dealer organises your finance	**No cooling off right**	3 business day cooling off period *(Max. $100 fee for cancelling)**
If you cancel the contract, you pay	Max. **15%** of contract price	Max**. 5%** of contract price



Cooling off right: This is a right to cool off, or change your mind, about the contract.

Cooling off period: This is a period of time after you signed the contract, when you may cancel the contract. Currently, you don't have a right to a cooling off period.

% of contract price: This is an amount of money that you pay the dealer as compensation for cancelling the contract. Currently, you are liable for up to 15%. Under the proposed law, you would be liable for up to 5% of the contract price.

Appendix 5

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Did you know

CCLSWA provides advice on:

- home repossessions
- home loans
- credit cards
- hardship
- credit reports
- debt collector conduct
- and more

Struggling with debt? You can also get free, confidential advice by calling the National Debt Helpline on 1800 007 007.

For free assistance, call Consumer Credit Legal Service (WA) Inc.

Advice line:
(08) 9221 7066

(Mon - Fri: 9am to 4pm)

E: info@cclswa.org.au

W: www.cclswa.org.au

Alternatively, you can call a Financial Counselor on the National Debt Helpline: 1800 007 007

NATIONAL DEBT HELPLINE
1800 007 007
ndh.org.au

Debt vultures

Debt management businesses that get you into more debt

Don't sign up with a debt vulture! Call CCLSWA on (08) 9221 7066 instead.

cclswa
Consumer Credit Legal Service (WA) Inc.

Free. Legal Advice

Appendix 6

Debt vultures

Scare tactics: text and letters sent from real debt vultures:

Do you have money worries? Have you seen ads for businesses that say they'll help you manage your budget and bills?

Be careful of these businesses. They often swoop in & harass you with scare tactics.

"Please call me back ASAP … because if you do not call me back before the end of the day, you may lose this opportunity."

"IS ABC BANK TRYING TO REPOSSESS YOUR PROPERTY? IF THEY ARE, WE CAN HELP TODAY!"

We call them debt vultures. You pay excessive fees before they do any work. They hold you hostage and sabotage the sale of your house by lodging a caveat on it.

Letters (extracts):

HAVE YOU RECEIVED A STATEMENT OF CLAIM FROM RED BANK YET BECAUSE THEY HAVE LODGED IT IN THE SUPREME COURT ON ####2018?

YOU MUST CALL US BEFORE ####2019 BECAUSE RED BANK WILL BE ABLE TO GET A JUDGMENT AND THEN TAKE POSSESSION OF YOUR PROPERTY ANY DAY NOW AND YOU NEED TO ACT URGENTLY TO STOP IT BEFORE THEY CAN.

WARNING! DO NOT MAKE A COMMON MISTAKE AND WAIT UNTIL IT IS TOO LATE TO TAKE ACTION!

Don't sign up with a debt vulture!

Call CCLSWA first:

(08) 9221 7066

More Debt vultures

The promise

Debt vultures promise to rescue you from money troubles. They promise a debt-free, stress-free life by managing your debts for you.

The reality

- They charge excessive fees for services that you can often get for free.
- They prey on your desperation & fear about your money troubles.
- They leave you with more debt & more stress.
- They pay themselves before they pay your debts.

Aysha's story

"Worst choice I ever made!"

Aysha felt confused by her debts. She signed up with Bad Budget, hoping life would get easier. 18 months on, and after paying $5,900 to Bad Budget, Aysha is far worse off. Bad Budget paid her creditors LESS THAN $10 each. The worst bit: Aysha is left with $6,000 more debt than before!

For free assistance call Consumer Credit Legal Service (WA) Inc.

Advice Line : (08) 9221 7066
CCLSWA@CCLSWA.org.au
www.cclswa.org.au

Or a Financial Counselor on the national debt helpline 1800 007 007

NATIONAL DEBT HELPLINE ndh.org.au

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