

# Australian Consumer Law Review

Legal Aid NSW Submission to  
Consumer Affairs Australia  
and New Zealand

*May 2016*

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## About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the Legal Aid Commission Act 1979 (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners.

Legal Aid NSW also funds a number of services provided by non-government organisations, including thirty five community legal centres and twenty eight Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW welcomes the opportunity to provide a submission to the Australian Consumer Law Review that is being undertaken by Consumer Affairs Australia and New Zealand.

The Legal Aid NSW Civil Law Division focuses on legal problems that impact most on disadvantaged communities, such as credit, debt, housing, employment, social security and access to essential social services. Consumer issues constitute the largest category service for our Civil Law Division.

In 2014-2015 Legal Aid NSW provided 4,887 in house advice and 5,477 minor assistance services in consumer law matters. More than one quarter of these matters dealt with credit products, including consumer leases. This submission draws on the casework experience of civil law solicitors in providing these services.

Numeric references in this submission follow the topics identified in the Australian Law Review Issues Paper. The numbered questions we have addressed also correspond with the Issues Paper.

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## Consumer policy in Australia

### Australia's consumer policy framework objectives (1.3)

1. *Do the national consumer policy framework's overarching and operational objectives remain relevant? What changes could be made?*

Legal Aid NSW supports the overarching and operational objectives that underpin our solid national consumer policy framework. We consider that the objectives remain relevant in today's market. However, we think it is important to acknowledge that some predatory business models thrive in the market by taking advantage of the most vulnerable people in the community.

The national consumer policy framework has a role in addressing these unfair commercial practices. This role should be emphasised in the overarching objective, not just in the operational objectives. There is also scope for improvement in how the objectives are applied to the provisions of the Australian Consumer Law (ACL), specifically the consumer guarantees and the general protections.

#### Recommendation

Legal Aid NSW recommends that the role of the national consumer policy framework in addressing unfair commercial practices should be emphasised in the overarching objective.

2. *Are there any overseas consumer policy frameworks that provide a useful guide?*

The European Union Unfair Commercial Practices Directive (the Directive) provides a useful example of how the overarching objective could be amended to include a reference to unfair commercial practices. The purpose statement of the Directive provides:

'The purpose of this Directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests.'<sup>1</sup>

3. *Are there new approaches that could help support the objectives of the national consumer policy framework, for example, innovative ways to engage with stakeholders on ACL issues?*

#### Recommendations

Legal Aid NSW recommends that the objectives of the national consumer policy framework could be supported by:

- greater transparency about the regulator's actions in compliance and enforcement
- establishment of a national, publicly available, complaints register, and
- continued regular engagement between the regulator and consumer advocates.

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<sup>1</sup> Article 1, *European Union Unfair Commercial Practices Directive 2005*.

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## Australian Consumer Law – the legal framework

### Structure and clarity of the Australian Consumer Law (ACL) (2.1)

#### Structure and clarity of the ACL (2.1.1)

#### Meaning of ‘consumer’ (2.1.2)

- 4. Is the language of the ACL clear and simple to understand? Are there aspects that could be improved?*

The language used in the ACL is relatively clear and simple to understand. Legal Aid NSW is of the view that the plain language drafting means consumers would largely be able to read and understand the content of the ACL.

However, we consider that the structure and the formatting of the ACL makes it difficult for consumers to access and navigate the legislation.

- 5. Is the structure of the ACL easy to understand and navigate? Are there aspects that could be improved?*

The ACL is located in Schedule 2 to the *Competition and Consumer Act 2010* (Cth). As a result, it is not easy for consumers to find. We find that it is also difficult to navigate between headings, new parts and sections of the legislation.

The legislation is formatted as a schedule and is difficult to understand. The relevant sections are not formatted with bold font or different sizing. The sections are not hyperlinked and the ACL is extracted as a single block of the same sized font.

While the ACL and Australian Competition and Consumer Commission (ACCC) website provides useful guidance on relevant remedies, this does not overcome the practical difficulty of accessing and navigating the legislation. Legal Aid NSW believes consumers would benefit from a clearly formatted copy of the ACL which is easily accessible on the ACL website. This copy could include hyperlinks to relevant sections, as exists in other legislation. It could also include a link to Austlii should consumers wish to access that alternative version.

Additionally, a summary of the structure of the ACL would be useful for consumers to understand which chapter they need to consider. The ACL structure provided in the issues paper is a good example of what might be added to the ACL webpage along with a user friendly formatted version of the ACL.

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## Recommendations

Legal Aid NSW recommends:

- That the ACL should be reformatted to include bold and different sized font headings and hyperlinks to sections so that it is easier for consumers to access and navigate the legislation.
- That the ACL and ACCC websites should provide a clearly formatted copy of the ACL and an independent guide detailing the structure and summary of the legislation.

### *6. Are there overseas consumer protection laws that provide a useful model?*

Legal Aid NSW will reference various international models for both consumer protection law and other consumer initiatives in this submission.

In particular, New Zealand provides a useful model for providing clarity to consumers about complex consumer remedies. The New Zealand consumer website, 'Consumer Protection', has easily accessible information through the use of formatting, pictures and an accessible user interface. It also poses questions to consumers about their problem and helps them narrow down and identify the relevant section of the legislation, or the remedy that may apply to their situation.

We will also refer to other consumer protections laws such as Singapore's 'lemon laws' (question 12) and the European Union Unfair Commercial Practice Directive (question 2).

### *7. Is the ACL's treatment of 'consumer' appropriate? Is \$40,000 still an appropriate threshold for consumer purchases?*

Legal Aid NSW supports the increase of the threshold from \$40,000 for goods and services to reflect today's market more appropriately. Currently, there is no jurisdictional limit in relation to motor vehicles. Legal Aid NSW believes that there should be no jurisdictional limit on all consumer purchases. This will ensure all consumer purchases are captured by the ACL and reduce inconsistencies between motor vehicles and other consumer products.

We support the current definition of 'consumer' within the ACL. Legal Aid NSW believes it is broad and flexible, yet clear enough to allow consumers to understand their rights under consumer guarantees.

The definition should not be changed to limit the broader protections currently available to all persons for issues including unconscionable conduct, unfair contract terms and product safety. These are protections that should remain available to all people.

## Recommendation

Legal Aid NSW recommends that the current \$40,000 threshold limit on any consumer purchases should be replaced with no upper limit on the value of purchases.

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## General protections of the Australian Consumer Law (2.2)

### Misleading or deceptive conduct (2.2.1)

### Unconscionable conduct (2.2.2)

### Unfair contract terms (2.2.3)

8. *Are the ACL's general protections working effectively? Do they address the risks of consumer and business harm without imposing disproportionate or unnecessary costs on businesses?*

Legal Aid NSW recognises the importance of the general protections in creating fair standards of conduct in trade and commerce. Broadly speaking, we consider that the general protections are working effectively to achieve this.

However, through our casework we have identified some areas where the general protections are not striking the appropriate balance between the interests of consumers and businesses. Some issues include:

- The general protections are complex and difficult for consumers to enforce. This is especially true of the prohibition on unconscionable conduct, as it lacks definition and changes over time.
- The general protections do not work to deter business models, which are specifically designed to unfairly prey upon the most vulnerable people in our community. Examples of these business models are found in complaints arising from Registered Training Organisations and credit repair businesses.
- The general protections do not adequately assist the regulator to address systemic unfair business practices. For example, the regulator does not have the power to take action against unfair contract terms, or to seek monetary penalties against businesses in breach of the unfair contract terms provisions or the prohibition against misleading and deceptive conduct.
- There are significant product safety issues in standard form contracts covered by the *Insurance Contracts Act 1984* (Cth). These contracts are not currently covered by protections against unfair contract terms under the ACL and *Australian Securities and Investment Commissions Act 2001* (ASIC Act).

9. *Are there any changes that could be made to improve their effectiveness, or address any of the issues raised in section 2.2.? Are there any gaps that need to be addressed?*

In our view, the general protections regime does not protect consumers against business models which unfairly take advantage of vulnerable people in our communities. This is the most significant gap that needs to be addressed by the general protections provisions.

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We recommend that the general protections regime be expanded to prohibit unfair commercial practices. The United Kingdom has enacted a prohibition to this effect through the *Consumer Protection from Unfair Trading Regulations 2008* (the Regulations). The Regulations introduce a general duty not to trade unfairly and seek to ensure that traders act honestly and fairly towards consumers. Expanding the general protections regime to include a similar duty benefits both consumers and businesses by increasing consumer confidence in markets and by clarifying the law. We provide further detail in our response to section 2.4 (post).

Legal Aid NSW would also support the harmonisation of penalties and consumer remedies for breaches of a similar nature, such as the general prohibition on misleading and deceptive conduct and false and misleading representations. Additionally, the civil and criminal consequences of particular conduct could be clearer in the legislation.

In the alternative or in addition to the establishment of an unfair commercial practices provision, Legal Aid NSW recommends some changes to improve the effectiveness of the general protections regime.

### **Recommendations**

Legal Aid NSW recommends the following changes to the prohibition on misleading and deceptive conduct:

- That a breach of the prohibition on misleading and deceptive conduct attract the same monetary penalties and criminal sanctions as those that apply to the making of false and misleading statements.
- That the monetary penalties be of a sufficient size to adequately penalise and deter misleading and deceptive conduct of very large and profitable businesses.
- That the prohibition on misleading and deceptive conduct be expanded to include a prohibition of omissions by businesses that hide material information or provide information in an ambiguous way, regardless of whether there is a 'reasonable expectation' that a consumer would be informed of the omitted fact.

Legal Aid NSW recommends the following changes to the prohibition on unconscionable business practices:

- That further guidance be provided about the interpretation of the term 'unconscionable'.
- That the monetary penalties for breach of this provision be of a sufficient size to penalise and deter the unconscionable business practices very large and profitable businesses.

Legal Aid NSW recommends the following changes to the unfair contract terms provisions:

- That standard form contracts covered by the *Insurance Contracts Act 1984* (Cth) be subject to similar protections against unfair terms as apply under the ACL and ASIC Act.



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- That a breach of the unfair contract terms provisions attract monetary penalties in addition to having the unfair term declared void.
  - That the monetary penalties be of a sufficient size to penalise and deter the very large and profitable businesses.
  - That the power of the regulator be expanded to take action against systemically unfair contract terms.
  - That the unfair contract terms provisions be expanded to void a contract that is unfair as a whole.

Legal Aid NSW also recommends that the general protections regime be expanded to prohibit unfair commercial practices.

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## The Australian Consumer Law's specific protections (2.3)

False or misleading representations (2.3.1)

Other unfair practices (unsolicited supplies, pyramid schemes, pricing, referral selling, and harassment and coercion) (2.3.2)

Consumer guarantees (including 'lemon' laws) (2.3.3, 2.3.4)

Unsolicited selling agreements (2.3.5)

Other consumer rights (lay-by agreements, proof of transaction, itemised bill, and warranty against defects) (2.3.6)

Product safety (2.3.7)

*10. Are the ACL's specific protections working effectively? Do they address the risks of consumer and business harm without imposing disproportionate or unnecessary costs on businesses?*

Overall the specific protections are working effectively but there remains room for improvement, particularly given the challenges for consumers in enforcing their ACL rights. Legal Aid NSW does not believe that any of the specific protections impose unnecessary or disproportionate costs on businesses.

### *Protecting consumers from being misled about goods and services*

We see a strong role for state and federal regulators in continuing to bring proceedings against businesses and suppliers for breaches of the specific protection against false or misleading representations. These regulators have greater resources than individual consumers and their actions can lead to systemic change of businesses' and suppliers' behaviours, which benefits consumers.

### *Protecting consumers from unfair practices*

We support the maintenance of strong legislation to protect consumers from unfair practices in relation to pyramid schemes, pricing, referral selling and harassment and coercion.

### *Unsolicited supplies of goods or services*

Legal Aid NSW suggests that there does not appear to be a need for section 39 of the ACL, which operates as a prohibition against sending out credit or debit cards that have not been requested or are not due for replacement. Consumer protection in relation to credit and credit facilities is governed by the ASIC Act and has been carved out of the *Competition and Consumer Act (CCA)*. We note section 131A of the CCA specifically states that section 39 of the ACL does not apply to credit cards that are linked to a credit facility.

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Consumers would be more effectively protected if section 12DL of the ASIC Act, (which states that a person must not send another person a credit or debit card except in certain circumstances) was strengthened.

For a further discussion of the specific protection in relation to unsolicited supplies of goods or services please see our response to questions 30 to 33.

### *Giving consumers rights where a product is not of acceptable quality, consumer guarantees*

Legal Aid NSW is in favour of national consumer guarantees as a replacement for the statutory implied conditions and warranties that existed in the old state and territory legislation. We believe that there is a difficulty with the lack of clarity surrounding the definition of minor and major failures. We acknowledge that by not being overly prescriptive consumers are guaranteed some flexibility of interpretation, but this presents difficulties for ordinary consumers when they seek to enforce a remedy. These difficulties include the frequent need to obtain expert evidence to substantiate the consumer's claim that there has been a major failure. Sourcing such reports can be costly and take considerable time.

An improvement in the definition and clarity of what constitutes a minor and major failure in relation to consumer guarantees would be mutually beneficial to consumers and business. It would enhance the function of the specific protections without imposing disproportionate or unnecessary costs on business.

### **Recommendations**

Legal Aid NSW recommends:

- That there should be a review of whether section 39 of the ACL is relevant.
- That there needs to be greater clarity surrounding the definition of what constitutes a minor and major failure in relation to consumer guarantees.

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

Legal Aid NSW believes that consideration should be given to shifting the burden of proof from the consumer to the business or supplier where minor or major failure is in issue.

A modification of this proposal could be that the burden of proof is reversed in limited circumstances. For example, any defects or failures that are discovered within a set period of time (perhaps 6 months or 12 months) from the date of delivery will be presumed to have been present at the time the goods were delivered. The business or supplier would be required to produce evidence to show the goods were free of defects at the time of delivery and the failure developed in the course of usage by the consumer. This is modelled on Singapore's *Consumer Protection (Fair Trading) Act*, Part III.

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As part of greater clarification of what constitutes a minor or major failure, consideration should be given to imposing specific time limits within which repairs are to occur and crucially, the number of allowable repairs. In addition, the point at which the costs to the consumer of returning the goods to the supplier becomes 'significant', could be defined. We suggest that this could be when the cost of return is greater than half the cost of the item itself.

We would support business being required to give consumers a one page summary at the point of sale detailing, in plain language with prominent headings, the consumer guarantees and remedies. This would also assist consumers in making a decision about the purchase of extended warranties as they would be better placed to calculate their actual value. We discuss this further in our response to question 43.

As previously stated, the frequent need for expert evidence to support a consumer's claim regarding a major failure presents financial and logistical challenges. This is most significant in disputes about a major failure in motor vehicles. Consumers find it difficult and often expensive to source qualified experts, for example, motor mechanics or auto electricians, who are prepared to write a report that meets the requisite standard for the tribunal or court proceedings.

Consideration should be given to the creation of expert panels that could be industry funded and administered by the state and territory fair trading bodies. The expert panel would need to include experts in the major cities as well as outer metropolitan and regional areas who could examine and test the motor vehicle and write a report for a set fee.

The expert panel could operate in combination with a specialised motor vehicle division of the state and territory consumer tribunals. The tribunal members in this particular division would be selected for their expertise in this area. We would recommend reviewing the Motor Vehicle Disputes Tribunal that exists in New Zealand for guidance.

#### **Case Study: Juliet**

Juliet took her car to a mechanic in Bourke, NSW for a routine service. There were no noticeable problems with the car. The mechanic replaced the alternator, charging Juliet \$600 (\$300 for the alternator and \$300 for labour). The mechanic advised Juliet that he had test driven the car before it was returned to her. After collecting the car Juliet started driving to Cobar, NSW when the car broke down.

Juliet took the car to a mechanic in Cobar who advised her that the heads were damaged and quoted \$3000 - \$4000 for the repair of the vehicle. Juliet wants the mechanic in Bourke to meet the cost of the repair of her car. She believes he did not adequately service the car as if he had done so, the car would not have broken down so extensively, and the subsequent repairs would not have been necessary.

Here, Juliet would need to provide comprehensive expert evidence to demonstrate that the mechanic in Bourke should have identified the problem with the heads in the first instance and that the failure to do so led to the subsequent and costly damage to the car. They would also need to offer an expert opinion as to quantum of damage.

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In this case if Juliet had access to an expert panel of independent qualified mechanics who were available in regional NSW, she could obtain a suitable report for a set fee, rely on this report to negotiate in the first instance with the mechanic and if necessary take the matter to NCAT. As the dispute would be quite technical in nature the benefits of a specialist division of NCAT would be significant for Juliet as the self-represented consumer as well as for the other party.

### **Case Study: Romeo**

Romeo took in his 1979 International Scout to Capulet Automotive Repairs as the car was misfiring. During the repair, the mechanic drove the car into a tree causing significant damage to the driver-side front end. The mechanic told Romeo that their insurance company refused their claim because the car was not roadworthy. They claimed that the brake booster on the car failed which caused him to veer into the tree. Romeo states that the car was fully registered and had been seen by another mechanic at Montague Car Repairs two months prior. Montague Car Repairs had checked the car, including the brakes and confirmed its roadworthiness, subject to the misfiring issue.

Capulet Automotive Repairs accused Romeo of building the brake booster himself, and demanded a receipt from Romeo proving that he purchased it. Romeo provided the receipt but Capulet Automotive Repairs continued to deny liability. Romeo spoke to the automotive technician from whom he purchased the booster, who advised that had the booster failed there would have been sufficient warning, and that if there was any damage to the booster it was from the impact.

However, the automotive technician was unwilling to provide an expert report. Both parties, Capulet Automotive Repairs and Montague Car Repairs were customers and he didn't want to jeopardise the business relationship with either side. The client was having difficulty obtaining independent reports.

In this example an independent expert panel would assist in resolving the difficulty for all the parties.

### **Recommendations**

Legal Aid NSW recommends that consideration should be given to:

- Shifting the burden of proof, in certain circumstances, from the consumer to the business or supplier in relation to disputes about minor or major failure.
- Imposing specific time limits within which repairs are to occur and the number of allowable repairs.
- The creation of an expert panel to assist consumers in obtaining reports for disputes in relation to a major failure of a motor vehicle.

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- The inclusion in state based consumer tribunals of specialist motor vehicle divisions with tribunal members having expertise in this area.
  - Businesses being required to give consumers a one page summary of the ACL consumer guarantees and remedies available at the point of sale.

*12. Does the ACL need a 'lemon laws' provision and, if so, what should it cover?*

Legal Aid NSW is of the view that the current consumer guarantees are not sufficient in relation to motor vehicles (including motor cycles). We see a role for specific 'lemon laws' which take into account the relative costs of motor vehicles and the costs of repairs for ordinary consumers, in particular for socially and financially vulnerable consumers.

Any lemon laws should apply to new as well as second hand motor vehicles, as they do in Singapore's *Consumer Protection (Fair Trading) Act*, Part III. We refer to the Official Report of Singapore Parliamentary Debates of 9 March 2012 where the then Minister of State for Trade and Industry said, "Second hand goods and vehicles are included in the proposed legislation as protection is likely to be most needed for such goods."

This would also have the advantage of providing more uniform consumer protection. There would need to be a limit on application of the lemon laws to second hand cars. For example, lemon laws would not apply to second hand cars over ten (10) years old or that have driven more than 160000 km.

Legal Aid NSW agrees that a definition of a 'lemon' is necessary. We support the 2009 Commonwealth Consumer Affairs Advisory Council report's definition of a 'lemon' as a product that 'simply will not function as intended, for reasons that are beyond the expertise of a reasonable repairer to remedy'.

The proposed reversal of the burden of proof (question 11) in certain circumstances would have relevant application to lemon laws and should be considered in that context.

As part of the lemon law provisions consideration could be given to specifying the number of professional repair attempts to occur before a car is declared a lemon. For example the model used in New York USA is a test of four repair attempts of the same problem, rather than multiple non-major failures, leading to a finding that the car is a lemon. This could have the advantage of removing the need for a consumer to obtain an expert report as they would only be required to provide evidence of the repair attempts.

If expert evidence is to be required it would be of considerable benefit to consumers if an independent expert panel existed, which could undertake an examination of the car and prepare a report for the consumer. If the matter could not be resolved then the consumer could seek relief in a specialist division of the state based tribunal. The members of this division would have expertise in relation to motor vehicles.

Under any lemon laws a suggested remedy for consumers would be the choice of a replacement vehicle or a full refund.

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## **Recommendations**

Legal Aid NSW recommends that consideration should be given to:

- The creation of lemon laws which would apply to new cars and second hand cars with certain limitations.
- Shifting the burden of proof from the consumer to the business or supplier.
- Specifying the number of professional repair attempts before a car is declared a lemon.
- The remedy for consumers under a lemon laws being a choice of a replacement vehicle or a refund.

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## Other issues (2.4)

### Addressing ‘unfair’ commercial practices (2.4.1)

### Interaction between the ACL and ASIC Act (2.4.2)

*15. Should the ACL prohibit certain commercial practices or business models that are considered unfair?*

Legal Aid NSW recommends that the ACL should prohibit unfair trading in Australian markets. In our experience, predatory traders have unfairly profited in this country from significant gaps in regulation that do not prohibit business models designed to take advantage of particular markets or class of consumers.

It is crucial that consumer law in this country is sufficiently updated to account for unfair traders who do not ‘play by the rules’ and consistently target the most vulnerable in the community with unsafe and unsuitable products. Legal Aid NSW regularly has to assist vulnerable consumers who have been deceived by predatory traders. It is our casework experience that predatory traders consistently refine their business models and marketing to target and take advantage of vulnerable communities.

Legal Aid NSW submits there is a level of predictability in the conduct and tactics adopted by predatory traders that would make such traders identifiable to a regulator who could then focus on early intervention strategies. Legal Aid NSW is concerned that existing laws relating to unconscionable conduct endorse late intervention strategies. These laws are technical and litigious in nature, and do not impact in real time to influence the markets or profitability of businesses where unfair traders operate.

An overview of our casework analysis is set out in the table below. This shows consistent themes of sharp practices combined with unfair business models across vulnerable markets and communities.

<b>Community/Markets</b>	<b>Sales channel</b>	<b>Marketing strategy</b>	<b>Product type</b>
Aboriginal	<ul style="list-style-type: none"><li>• Door-to-door</li><li>• Peer review</li><li>• Shopfront</li><li>• Daytime TV</li><li>• Web</li></ul>	<ul style="list-style-type: none"><li>• Focus on necessity of product</li><li>• Connection to culture &amp; community</li><li>• Lifestyle</li></ul>	<ul style="list-style-type: none"><li>• Funeral insurance</li><li>• Training courses</li><li>• Family photographs</li><li>• Consumer leases</li></ul>
Elderly	<ul style="list-style-type: none"><li>• Door-to-door</li><li>• Daytime TV</li><li>• Shopping Centres</li></ul>	<ul style="list-style-type: none"><li>• Focus on necessity of product</li></ul>	<ul style="list-style-type: none"><li>• TV Funeral insurance</li><li>• Solar panels</li><li>• Household goods</li></ul>



Non-English speaking	<ul style="list-style-type: none"> <li>• Language specific advertising</li> <li>• Peer review</li> <li>• Web</li> </ul>	<ul style="list-style-type: none"> <li>• Bonus features e.g. iPad</li> <li>• Connection to culture and community</li> </ul>	<ul style="list-style-type: none"> <li>• Training courses</li> </ul>
Financially disadvantaged	<ul style="list-style-type: none"> <li>• Daytime TV</li> <li>• Web</li> </ul>	<ul style="list-style-type: none"> <li>• Focus on necessity of product</li> </ul>	<ul style="list-style-type: none"> <li>• Credit repair</li> <li>• Debt negotiation</li> </ul>

For far too long, vulnerable communities have been the target of predatory traders as exemplified in the case study of Pete (question 30). It is common in Aboriginal communities to see an individual or family's economic interests significantly harmed by predatory tactics, which take advantage of their vulnerability. Products sold are all too often unsuitable, unsafe or simply an unfair bargain.

Creating and enforcing laws aimed at the traders that unfairly target these communities with predatory business models is essential if we are to close the gap of disadvantage in particular communities, including Aboriginal communities.

### Recommendation

Legal Aid NSW recommends that the ACL should prohibit unfair trading practices and business models.

*16. Is introducing a general protection against unfair commercial practices warranted, and what types of practices or business models should be captured? What are the advantages or disadvantages of introducing such a prohibition?*

For the reasons outlined in our response to question 15, we submit that a general protections provision is needed in Australia today.

Our recommendation is that the unfair trading laws should be developed with the following enhancements.

First, a prohibition on unfair trading should be developed. The primary mischief of predatory traders is that the model is designed to distort and manipulate particular communities and markets into believing that the product sold is a good and fair bargain. Often it is not just one feature but the overall nature and effect of the bargain in the marketplace that makes it inherently unfair.

The EU Unfair Commercial Practices Directive correctly identified the overall economic impact on consumers and markets when it stated that unfair trading, 'directly harms the consumers' economic interests and thereby indirectly harms the economic interests of legitimate competitors'.<sup>2</sup>

<sup>2</sup> EU Unfair Commercial Practices Directive 2005 at [6]

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In our submission the UK Regulation is a reasonable starting point in assessing the law relevant to Australian markets and consumers. Legal Aid NSW seeks the development of a concept of unfair trading that involves a broader protection than the UK law and squarely responds to something more troubling than just a sharp sales tactic or marketing strategy.

In recent reforms to unfair terms legislation, Australia developed a refined version of the law that, in our view, represented an improvement on similar laws overseas. By anchoring unfair terms to whether the term of the contract is necessary to protect the legitimate business interests of the trader, the concept fairly and clearly identified the mischief as unfair terms so that no reasonable trader could fail to comply with the law.

Equally, we would suggest an opportunity exists in Australia to refine existing unfair trading laws to properly and fairly account for the inherent mischief in the predatory conduct of the trader. A key part of that mischief is that by not playing by the rules, the trader gains a competitive advantage over legitimate businesses that do not seek to take unfair advantage of consumers or markets. The laws must be sufficiently robust to respond quickly and effectively to the harm, or likely harm.

Second, a specific provision should be developed which focuses on aggressive marketing practice. As part of predatory business models, unfair traders consistently use such practices to materially distort the economic behaviour of the average consumer or significantly impair the average consumer's freedom of choice or conduct. Again, this refers to the theme of the trader's attempt to manipulate consumers or markets to their strategic advantage.

Door to door sales should be banned outright where unfair trading conduct exists. We also support banning certain types of business practice, as outlined in Schedule 1 of the *Consumer Protection from Unfair Trading Regulations*. However, as quickly as such practices are banned, new and inventive ways are developed by predatory traders to take advantage of unsuspecting consumers.

In our submission, it is more effective to develop laws which root out the mischief at its core. As we outline below, good unfair trading laws developed on sound legal principles combined with product intervention powers (PIP) are the most effective tools for influencing markets in real time.

Thirdly, a specific provision should be developed which focuses on misleading omissions. A key aspect of unfair trading business models involves not providing the consumer with a full understanding of the product purchased.

In a seminal paper by Consumer Action Law Centre in 2015,<sup>3</sup> an example was provided of a debt negotiation agreement signed by an indigent consumer who paid \$11,200 for a company to negotiate \$70,000 worth of debts. In its marketing, the company failed to disclose that the \$11,200 the consumer spent might not result in positive outcomes. The

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<sup>3</sup> *Discussion Paper: Unfair Trading and Australia's consumer protection laws*, June 2015, Consumer Action Law Centre

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fine print disclaimed any liability for not negotiating settlements or the fact that a financial counsellor could have assisted on the same work for free.

We submit that unfair trading practices which omit or hide material information, or provide it in an unclear, unintelligible, ambiguous or untimely manner should be unlawful.

Fourthly, we recommend that intervention powers become prospective and apply to likely harm. These should include PIP that can respond quickly and effectively. A key aspect to the success of operators who use unfair trading models in the marketplace is their ability to reach inside the heart of a vulnerable community and cause significant detrimental impact before any protection can be offered.

We are unaware of whether any specific research has been conducted into the full extent of the economic impact of such business practices in Aboriginal communities. However, Legal Aid NSW is often left dealing with the aftermath of that predatory conduct.

Early intervention strategies need to be developed that can protect vulnerable communities before the harm has occurred. PIP would be one tool which could assist in this regard (recommendation 22 of the Financial System Inquiry). Importantly, the power to use PIP would need to be available across whole markets and consumer segments. At present there are gaps for particular products, such as funeral expenses products, which are not subject to door to door selling bans because of a discrete exemption in the *Corporations Act 2001*.<sup>4</sup> This has led to one company targeting Aboriginal communities with door to door sales of an expenses only based funeral product.

The effect of a prospective power will allow regulation in real time in markets. Early intervention PIP powers which can prevent conduct before harm are immeasurably more effective than waiting for the harm to have occurred.

#### *Advantages and disadvantages of introducing prohibitions*

Very often when considering law reform, there is an underlying assumption that reform involves more regulation for traders or is inherently anti-competitive in nature. In other forums, we have challenged those assumptions as not necessarily reflecting how markets actually operate. A predatory trader who takes advantage by not playing by the rules has an unfair competitive advantage over traders who comply with existing Australian laws. This reckless or intentional disregard for the law allows such traders to sweep through communities and markets with little regard for consumer rights.

In our submission, good regulation in this area will improve competition in markets by levelling the playing field for legitimate traders. This was a key consideration in the development of unfair trading laws in the European Union.<sup>5</sup> No aspect of this proposed legislative reform will have a negative impact upon the business practices of the majority of traders, who operate fairly. In this sense, there is very little detriment or risk to the market of developing these laws, which are settled in the UK, EU and USA.

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<sup>4</sup> s 765A *Corporations Act 2001*]

<sup>5</sup> *EU Unfair Commercial Practices Directive 2005* at [3] & [6]

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## Recommendations

Legal Aid NSW recommends the following:

- That a prohibition for unfair and predatory trading be developed.
- That a specific related provision be developed which focuses on aggressive marketing practice.
- That a specific related provision be developed which focuses on misleading omissions.
- That intervention powers becoming prospective and applying to 'likely harm' including product intervention powers that can respond quickly and effectively.

*17. Does the current approach to defining a 'financial service' in the ASIC Act create unnecessary complexity in determining if certain conduct falls within the scope of the ACL or the ASIC Act? How could this complexity be addressed?*

It is often difficult for solicitors, let alone consumers, to determine which products and services are regulated by the ACL and which are regulated by the ASIC Act. This is because of the following factors:

- The 'carve out' of financial services sits in the *Competition and Consumer Act 2010* (CCA) rather than the ACL, so it is often not identified.
- To determine the definition of a financial product or service one must go to the ASIC Act and its regulations.
- The drafting of the ACL itself ambiguously suggests that some products are included within its ambit.

*Confusion about whether goods acquired by consumer leases are governed by the ACL or the ASIC Act*

Section 131A of the *Competition and Consumer Act 2010* (CCA) states that the ACL does not apply to financial services or products. Financial services and products are defined in the ACL by reference to the ASIC Act definition, which includes consumer leases by virtue of Regulation 2B(3)(b)(ii)-(iv) of the ASIC Act Regulations.

On this basis, it appears that the ACL does not apply to consumer leases and the goods acquired as part of these contracts. If this view is correct, consumer leases would continue to attract consumer protections contained in the ASIC Act and the *National Consumer Credit Protection Act 2009* (NCCPA) (including prohibitions against misleading and deceptive conduct, unconscionable conduct and misrepresentations) but not the consumer protections of the ACL.

However, contrary to that interpretation, the ACL includes definitions of 'acquire' and 'supply' which include acquiring and supplying by way of lease, hire or hire purchase and clearly contemplates that a consumer should be afforded consumer guarantees in relation to goods supplied by way of a consumer lease.

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While the ASIC Act clearly envisages that goods provided in connection with credit should be fit for purpose and that a lessor should be liable for any failure to provide such goods, this is a different standard to that provided by the ACL. The regulation of goods acquired by way of lease, hire and hire purchase needs to be clarified to ensure that goods acquired through these methods have the same acceptable quality and safety requirements as those acquired by purchase.

#### *Lack of consistency in protections based on the type of product or service*

The lack of consistency between the protections for financial products and services and other goods and services also causes confusion and produces inequitable results for consumers. This is particularly true in relation to unsolicited sales for the following reasons:

- There is no regulation of unsolicited selling in the ASIC Act beyond sections 12DL, 12DM and s12DMA which provide only limited protections in specific circumstances, such as when a consumer is sent a credit card.
- The unsolicited selling of financial services (not including credit or expenses only funeral products) is prohibited by the anti-hawking provisions of the *Corporations Act 2001* (section 992A). However where this section is breached there are limited remedies for the consumer, only allowing them to return the product and gain a refund within one month of the relevant cooling off period.
- Credit canvassing is prohibited by the *National Consumer Credit Protection Act 2009* (section 156(1)), but this is limited to the canvassing of credit at home and does not include consumer leases.
- The unsolicited selling of non-financial goods and services has specific and detailed regulation in the ACL.

This leaves the unsatisfactory situation of different protections for consumers depending on the type of product they have. Further inconsistencies arise in relation to:

- Consumer guarantees, which are strong and specific in relation to goods and services generally, but not financial products and services.
- Product safety law does not apply to financial products and services.
- Unfair terms law, which applies to all contracts except insurance contracts.

#### *Enforcing individual rights in relation to goods provided under consumer leases and linked credit contracts*

In New South Wales the state based NSW Civil and Administrative Tribunal (NCAT) does not have jurisdiction to deal with disputes under the NCCPA. This means that if a consumer wishes to raise a dispute about a linked credit arrangement and seek a remedy against both the financial service provider and the trader, they must do so in a court of relevant jurisdiction. This imposes an unnecessary hurdle for consumers, particularly in relation to low value claims.

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Similarly, in relation to consumer leases we have found that the ASIC approved external dispute resolution (EDR) schemes are reluctant to entertain disputes that relate only to the quality of the goods.

### **Recommendations**

Working on the assumption that financial products will continue to be regulated under the ASIC Act, Legal Aid NSW recommends that:

- Reference be made in the ACL itself to the ‘carve out’ of financial products and services.
- In relation to unsolicited sales, a provision be included in the ASIC Act that combines the anti-hawking provisions of the *Corporation Act 2001* with specific consequences for breach and consumer access to compensation provisions so that all financial products are dealt with consistently.
- Consumer guarantee provisions be included in the ASIC Act to ensure the same standards apply to goods acquired under a lease, hire and hire purchase arrangements.
- The definition of ‘supply’ and ‘acquire’ be clarified to be consistent with the ‘carve out’ of financial products and services.
- The exemption of insurance contracts be removed from unfair terms provisions.

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# Administering and enforcing the Australian Consumer Law

## Access to remedies and scope for private action (3.3)

### Effective dispute resolution (3.3.1)

### Scope for private action (3.3.2)

### Reach of the ACL — international private action and recognition of foreign judgments (3.3.3)

*25. Are there any barriers to consumers and businesses enforcing their rights and seeking access to remedies under the ACL? Are there barriers to private action that need to be addressed?*

As discussed in our response to question 5, Legal Aid NSW has submitted that the ACL legislation itself is difficult to access. This does not make for a consumer-friendly or accessible document and we submit that this affects ordinary consumers' access to justice.

In our response to question 10, Legal Aid NSW submitted that there are difficulties for consumers to adequately identify the difference between a minor and a major failure in relation to consumer guarantees for goods and services. The costs and difficulties associated with obtaining suitable expert evidence is also a barrier for consumers when exercising remedies under the ACL.

There is a lack of judicial interpretation of the ACL and its definitions. Judicial interpretation could be a means of identifying and clarifying the distinction between minor and major failure. There would be some benefit in guideline judgements from superior courts that could to inform the consumers', suppliers' and lower courts' understanding of the application of the ACL to particular circumstances, for example, in relation to consumer guarantees.

Legal Aid NSW wishes again to highlight a specific barrier for consumers in enforcing a remedy which exists when a consumer has purchased goods with a linked credit contract. A common example is the purchase of a motor vehicle via a credit contract. The consumer is unable to deal with issues in relation to the credit contract and the quality of the goods in the one forum.

In New South Wales credit disputes are excluded from NCAT and the relevant financial ombudsman services are reluctant to deal with issues relating to the ACL and the quality of the goods. Consumers are encouraged to take their ACL disputes with businesses and suppliers to NCAT. There are comparable consumer tribunals across Australia. This can present the following barriers for consumers:

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- It is an adversarial model of dispute resolution and consumers are not entitled to legal representation except in limited circumstances. Consumers represent themselves against the business or supplier, which can be intimidating and challenging, particularly for vulnerable consumers. In some situations this could deter consumers from taking their dispute further.
  - The consumer is generally required to attend the Tribunal in person, although sometimes telephone hearings can be arranged.
  - A filing fee is payable to commence the proceedings and although the fee is modest in NSW, it is higher in other jurisdictions.
  - The time and cost to the consumer in pursuing a claim through the Tribunal can outweigh the benefit.

*26. What low cost actions could consumers and businesses more readily use to enforce their rights?*

Legal Aid NSW recommends consideration be given to the establishment of a retail ombudsman. This could be an alternative means of resolving disputes, particularly disputes of small economic value.

The aim would be for the ombudsman to resolve matters quickly and at minimal cost to the consumer. It would be an inquisitorial rather than adversarial model and consumers could access the retail ombudsman via an online application form, similar to that used by the Financial Ombudsman Service. The current UK model of retail ombudsman could be referenced for guidance. Consideration could be given to making membership of the ombudsman a condition of those suppliers who require a license to operate. The scope of the retail ombudsman could be broad, as is the case in the UK, and in order to be effective the decisions would need to be binding on businesses and suppliers.

**Case Study: Olivia**

Olivia, who lives in Western Australia, engaged a mechanic to replace the water pump on her motor vehicle. Olivia paid the mechanic a deposit of \$250 to commence the work. The mechanic then advised Olivia that his business had been broken into and his tools together with the water pump for Olivia's car had been stolen. Olivia sought to recover the sum of \$250 from the mechanic. She sought the assistance of WA Consumer Protection however they were unable to conciliate the matter. For Olivia to resolve her dispute she would need to commence proceedings in the Magistrates Court. The challenges faced by Olivia were:

- She would be need to pay a filing fee, and even if successful, she would need to enforce the judgement which can be a drawn out and difficult process.
- The time and money in pursuing the matter through Court could outweigh the value of her claim of \$250 plus a motor vehicle worth less than \$1500.

In this example, it could be advantageous for a consumer in Olivia's position to be able to take her dispute, without cost, to a retail ombudsman.



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An alternative to a retail ombudsman could be a strengthening of the powers and role of the state based fair trading bodies. The law could require fair trading bodies to be more inquisitorial and proactive in resolving disputes that are brought to them by consumers. It should be possible to lodge claims on-line and decisions of fair trading bodies should be binding and enforceable. A retail ombudsman or an enhanced fair trading body would create another means of dispute resolution but it would not replace the state based tribunals, such as NCAT.

Legal Aid NSW submits that consumers would better understand their rights if tribunals amended the initiating application forms to include a simplified list of specific relevant sections of the ACL. This would include the consumer guarantees, with the section number and a brief summary and would assist consumers to adequately frame their claim in the first instance. One example of a current form with these features is that currently used in NCAT for applications under the *Residential Tenancies Act 2010*.

This would be in addition to a requirement that businesses provide consumers with a one page summary detailing consumer guarantees in plain language with prominent headings. This is discussed in our responses to questions 11 and 43.

## **Recommendations**

Legal Aid NSW recommends:

- That consideration be given to the establishment of a retail ombudsman.
- That as an alternative to a retail ombudsman consideration be given to strengthening the powers and the role of the state based fair trading bodies.
- That a retail ombudsman or strengthened state based fair trading bodies, would not replace the current state based consumer tribunals such as NCAT.
- That state based consumer tribunals amend the initiating application forms used by consumers to refer to specific sections of the ACL, in particular the consumer guarantees.
- That businesses be required to give consumers, at the point of sale, a one page summary detailing the consumer guarantees under the ACL.

### *27. Are there any overseas initiatives that could be adopted in Australia?*

As discussed above, consideration should be given to the creation of a retail ombudsman and the current UK model could provide guidance.

Legal Aid NSW would also support a reform of the current tribunal system to provide for a specialist division to hear and determine motor vehicle disputes, including decisions around lemon laws. The tribunal members in this division would be required to have technical expertise in relation to motor vehicles. The current model in New Zealand, the Motor Dealer Division is a good example of this system of dispute resolution.

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## Recommendations

Legal Aid NSW recommends:

- That we should look to the current UK model of a retail ombudsman for guidance.
- That consideration be given to the formation of a specialist division within consumer tribunals to hear and determine motor vehicle disputes with the members of this division having technical expertise in this area.

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

Legal Aid NSW has concerns about a lack of consistency in the application and enforcement of the ACL due to the multi-regulator model that currently exists. Our experience is that consumers identify strongly with their state based fair trading bodies and often seek their assistance with consumer disputes. However, we see very little enforcement action taken by state based regulators, despite the large number of complaints.

Conversely, the ACCC is an active regulator but is not in a position to resolve individual consumer disputes. A single entry point to the state and federal regulators would reduce confusion amongst consumers and promote the active sharing of intelligence between agencies.

While we agree there are significant advantages and benefits for consumers in having national consumer protection legislation as it provides uniformity, this system can also pose challenges for consumers seeking individual remedies. The process is usually undertaken in state based tribunals which are all subtly different and there is a lack of consistency in approach and outcomes for consumers across Australia.

Legal Aid NSW would support consideration being given to state based regulators having the capacity to bring proceedings in the Federal Court and to obtain orders under the ACL to restrain the misconduct of businesses nationally, not just in their own state jurisdiction.

## Recommendations

Legal Aid NSW recommends:

- That consideration be given to a single entry point for consumers to the state and federal regulators.
- That consideration be given to state based regulators having capacity to bring proceedings in the Federal Court to obtain orders under the ACL that would restrain the misconduct of businesses nationally.

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## Emerging consumer policy issues

### Selling away from business premises (4.1)

*30. Does the ACL adequately address consumer harm from unsolicited sales? Are there areas of the law that need to be amended?*

Unsolicited selling continues to be a significant issue for Legal Aid NSW's client base. In our experience consumers are more vulnerable when they are approached outside a business premises and their ability to properly consider and choose a product, without pressure, is significantly diminished.

Unsolicited sales often result in consumers being pressured into purchasing products that are wholly unsuitable for them. Further, unsolicited sales provide little benefit to the consumer, even when such sales comply with the provisions in the ACL. In our experience it is rare that consumers obtain an unsolicited product that they genuinely want and could not obtain elsewhere by approaching a business and making their own enquiries.

Unsolicited sales also disadvantage the consumer because they limit their ability to compare the goods with other products. In these circumstances, unsolicited agreements are anti-competitive and do not afford consumers the opportunity to make enquires with other sellers.

Legal Aid NSW therefore submits that unsolicited sales are rarely of benefit to the consumer and instead often result in consumers purchasing unsuitable or unwanted products. In view of the lack of benefit of unsolicited sales and the considerable risk they pose to consumers, Legal Aid NSW submits that the ACL should be amended to prohibit all unsolicited sales.

In the alternative, Legal Aid NSW proposes that the ten day cooling off period should be amended to an 'opt in' approach for the consumer, rather than the present 'opt out'. This approach protects the consumer from having to engage with the sales representative a second time, where they often experience considerable pressure if they want to withdraw from a purchase. It also requires the consumer to choose to keep the purchase and encourages business owners to adhere to their duty to advise consumers of the cooling off period.

#### **Case Study: Pete**

Pete is a middle aged Aboriginal man with limited literacy who lives in a remote town in NSW. Pete was approached at his home by sales representatives of various private training colleges selling training products. The representatives told Pete they were signing people up for free laptops. Under the impression that the laptops were free, Pete and his partner invited the representatives into their home. They were then subjected to over an hour of high pressure selling during which they were told that all they needed to do was sign up to an online course in order to receive a free laptop.

When Pete said that he didn't have the capacity to complete an online course, he was told that he did not need to attempt the course to receive the laptop. Pete and his partner ultimately agreed to sign up to the course and were then prompted through a series of phone calls by the sales representatives to confirm their enrolment. Pete was never told he could ask the sales representatives to leave at any time or advised about the cooling off period and was not given proper documentation of the agreement.

As a result of the unsolicited sale, Pete and his partner incurred over \$100,000 in VET FEE-HELP debts. Legal Aid NSW provided advice and legal assistance to assist Pete and his partner un-enroll from the courses and have the debt re-credited.

In this example, the unsolicited sale resulted in the consumers being signed up to a product they never wanted and otherwise would have never signed up to. Had the unsolicited sales been prohibited, Pete and his partner would never have to endure this experience and the potential debt.

## Recommendations

Legal Aid NSW recommends that:

- Unsolicited selling should be banned.
- Alternatively the cooling off period should operate on an opt-in basis.

*31. Does the distinction between 'solicited' and 'unsolicited' sales remain valid? Should protections apply to all sales conducted away from business premises, or all sales involving 'pressure selling'?*

In our view, the distinction between solicited and unsolicited sales is still valid as it provides express circumstances where sales will be considered 'unsolicited', for example, where an agreement is reached by the supplier contacting the consumer via telephone.

Legal Aid NSW also believes that the unsolicited sales protections should be extended to all conduct that occurs away from the business premises. This includes any approach of a consumer by a sales representative that is not confined to the physical business premises.

Legal Aid NSW has seen instances where consumers were approached in shopping centres or at their home and invited to attend a presentation about a service, for example, for holiday time shares. Consumers are then signed up to products at the presentation. Legal Aid NSW considers the initial approach to be outside of the usual business premises and should thus be considered an unsolicited sale.

### **Case Study: Annie**

Annie is an Aboriginal woman with disabilities and is the sole parent of two children. She received a cold call from an Energy company telling her she would receive a 15% discount on the rates provided by her current provider if she switched energy companies. She was also told she would receive free solar panels from the Energy company if she switched providers. The Energy company signed Annie up to an unjust contract over the phone and posted her an extensive two hundred page contract which she did not read.

Tradesman attended Annie's home and installed the solar panels whilst she was away from her property and without her consent. Annie then received the bills from the Energy company for the cost of installing the solar panels which she could not pay. The Energy company commenced proceedings against her in the Small Claims Division of the Local Court. Legal Aid NSW assisted Annie and she was successful in having the matter struck out.

Through an unsolicited sale, Annie was signed up to an unaffordable and unsuitable product that ultimately resulted in her being a defendant in the Local Court. The conduct was clearly defined as an unsolicited sale through the ACL and so Annie was able to more easily rely on the unsolicited sale protections under the ACL.

### **Recommendations**

Legal Aid NSW recommends that:

- The distinction between solicited and unsolicited sales be maintained.
- All sales conducted away from the business premises be defined as 'unsolicited'.

*32. Do the unsolicited selling provisions require clarification with regard to sales made away from business premises, for example, 'pop-up' stores?*

Further clarification is needed as to what constitutes a sale 'away from the business premises'. An exhaustive list of what is considered within the business premises would be particularly helpful which specifically excludes all other conduct that does not take place within business premises.

Legal Aid NSW has found that pop-up stores can be particularly problematic and further clarification is needed on whether such stores (or stalls) are considered to be a 'business premises'. Legal Aid NSW is of the opinion that where the sales representative leaves their stall and approaches a consumer, this conduct should be considered an unsolicited sale.

Legal Aid NSW is also concerned with the location that some pop-up stores appear, particularly where stores are established in close proximity to services for vulnerable people. Legal Aid NSW has seen instances where pop-up stalls have been set up outside Centrelink offices in order to target vulnerable communities. We recommend there be regulation of locations at which pop-up stalls are allowed to operate.

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### **Case Study: Lucinda**

Lucinda and her daughter were walking through her local shopping centre when she was approached by an employee of a photography company who had set up a pop-up stall. The employee asked if they could take photographs of Lucinda's daughter that would be used to enter a competition. Lucinda was told that the photo shoot was free and entry into the competition was \$7. She was told to return to the shopping centre in two weeks to select a photograph for entry into the competition.

Lucinda returned to the shopping centre two weeks later and selected a photograph for entry in the competition. Lucinda then asked what would happen to the remaining photographs, the photography company said they would destroy them if they were not purchased. Lucinda then agreed to purchase the photographs and additional items including glass tiles and large canvass prints. Lucinda was signed up to a direct debit fortnightly payment to pay for the goods, of which the total contract working out to over \$4,000.

Lucinda was not informed of any cooling off rights, nor was she given proper documentation about the agreement.

### **Recommendation**

Legal Aid NSW recommends that:

- Further clarification of what conduct is considered, 'away from a business premises' by providing an exhaustive list of what conduct is considered 'within a business premises'.
- There be regulation on the location of pop-up stores so as to protect vulnerable communities.

#### *33. How could these issues be addressed?*

Legal Aid NSW recommends that the issues identified around unsolicited selling would best be addressed by placing a total prohibition on any form of unsolicited selling.

In the alternative, Legal Aid NSW believes the cooling off period should be restructured to an 'opt-in' structure, rather than the present 'opt-out' model and we believe that this would more adequately protect consumers.

Legal Aid NSW has experience with sellers who deliberately ignore consumer rights around provisions relating to unsolicited agreements, for example, by not advising consumers about the mandatory ten (10) day cooling off period. Consequently, stricter anti-avoidance provisions should be included in the ACL to further deter sellers who engage in such conduct.

Finally, the protections provided to consumers of financial products around unsolicited selling are less comprehensive than those afforded under the ACL. Sections 12DL, 12DM and s12DMA of the ASIC Act provide some protections in relation to unsolicited

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financial products, including credit cards. However, these sections are not as comprehensive as the provisions set out in the ACL.

Legal Aid NSW therefore recommends that the ASIC Act imposes similar standards as the ACL for unsolicited sales so that consumers of financial products are afforded the same protections as consumers of non-financial products.

### **Recommendations**

Legal Aid NSW recommends that:

- All forms of unsolicited selling should be prohibited.
- Stricter anti-avoidance provisions for sellers who ignore unsolicited selling provisions should be enacted.
- The ASIC Act should be amended to impose the same level of protections as the ACL for unsolicited sales of financial products.

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## Promoting competition through empowering consumers (4.4)

### Consumer access to data (4.4.1)

### Disclosure requirements (4.4.2)

43. *Are the disclosure requirements effective? Do they need to be refined, or is there evidence to indicate that further disclosure would improve consumer empowerment?*

Legal Aid NSW submits that the disclosure requirements are not effective in informing consumers about their statutory rights when purchasing goods or services.

Our casework experience shows that:

- Consumers are paying for extended warranties that do not give them extra protection beyond the protection afforded by the consumer guarantees. This is especially true of consumers purchasing expensive goods, such as a motor vehicles.
- Sales people mispresent consumer rights by claiming that the trader has no responsibility to repair, replace or refund a purchase where the manufacturer or extended warranty has lapsed.

While it is difficult to say if disclosure would improve consumer power, we note that other consumer protection legislation within Australia and New Zealand places greater disclosure obligations on traders than the ACL.

For example, New Zealand's *Fair Trading Act 1986* (NZ) provides that a trader must ensure that an extended warranty:

- Is in writing, expressed in plain language, is legible and presented clearly.
- Provides a summary of the comparison between the relevant *Consumer Guarantees Act 1993* (NZ) guarantees and the protections provided by the extended warranty.
- Notes the consumer's rights to cancel the agreement within five working days.<sup>6</sup>

Australia's *National Credit Code* (Schedule 1 of the *National Consumer Credit Protection Act 2009* (Cth)) places an obligation on the credit provider to give the debtor a copy of an information statement in a prescribed form setting out the debtor's statutory rights.<sup>7</sup> This form could be used as a model for an information statement for consumers of goods and services.

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<sup>6</sup> Section 36U, *Fair Trading Act 1986* (NZ).

<sup>7</sup> Paragraph 16(1)(b) of the National Credit Code; Regulation 70 of the *National Consumer Credit Protection Act Regulations 2010* (Cth).



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Legal Aid NSW recommends that greater disclosure obligations about consumer rights under the ACL are placed on traders at the point of sale. This could take the form of an information statement provided to each consumer and displayed in the trader's store and on their website. In our view, this would reflect the ACL's operational objective to ensure that consumers are sufficiently well-informed to benefit from effective competition.

The information statement should:

- Be eye-catching, prominent and user-friendly.
- Be in colour and include an example using graphics, diagrams or pictures to illustrate the consumer's rights.
- Provide a summary of the comparison between the consumer guarantees and the protections provided by the extended warranty, if applicable.
- Include information about seeking assistance from Fair Trading or LawAccess (for NSW sales).
- Be displayed prominently and consistently by traders.

### **Recommendation**

Legal Aid NSW recommends that greater disclosure obligations about consumer rights under the ACL be placed on traders at the point of sale. This could take the form of an information statement.