

Australian Consumer Law Review – Interim Report

Legal Aid NSW submission to
Consumer Affairs Australia and New
Zealand

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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 private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 33 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW welcomes the opportunity to provide a further 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 of service for our Civil Law Division.

In 2014-15 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.

This submission addresses some of the questions raised in the Australian Consumer Law Review Interim Report. In responding to these questions, we also refer to our previous submission to the review in May 2016.

Should you require any further information or wish to discuss this submission, our contact officers are:

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List of recommendations

Scope and coverage of the ACL

1. Regulator guidance should be provided as to which transactions with charities attract the protections of the ACL.
2. Regulator guidance should be provided as to whether or not the ACL applies to volunteers or third party contractors undertaking fundraising activities.
3. The \$40,000 limit in the definition of 'consumer' should be abolished, so that the ACL applies to all consumer purchases.
4. Alternatively, there should be a limit of \$100,000 that is increased each year in accordance with the Consumer Price Index.
5. The *Australian Securities and Investments Commission Act 2001 (Cth)* (**ASIC Act**) should be amended to explicitly extend its consumer protections to financial products.
6. The ASIC Act should be amended to incorporate key ACL consumer protections, including consumer guarantees, unsolicited consumer agreements, product safety, single pricing and proof of transaction protections.
7. The ASIC Act should include provisions regarding anti-hawking, including consequences for breach and consumer access to compensation.

Consumer guarantees

8. The ACL website and publications should provide further guidance on the durability of certain goods, the reasonable cost for returning rejected goods, reasonable time frames within which repairs are to occur, and examples of major and minor failures in certain common household goods, including cars.
9. The ACL should require retailers to provide a one-page disclosure sheet to consumers, at the point of sale, that includes guidance about durability of certain household goods.
10. Specific education should be provided to the new and used car industry focusing on consumers' rights regarding consumer guarantees, dealer warranties and extended warranties.
11. The ACL should be amended to provide that 'major failure' includes where the failure is a safety issue, occurs within a very short time after receipt of the goods or services, or where there has been a series of minor failures.
12. Any changes to the mandatory notice should form part of an enhanced disclosure regime under the ACL. This could take the form of an information statement given to a consumer at the point of sale.

Unconscionable conduct and unfair trading

13. The ACL should be amended to include a prohibition on unfair trading.

Unfair contract terms

14. Amendments should be made to the ASIC Act and the *Insurance Contracts Act 1984* (Cth) to ensure that the unfair contract terms protections apply to insurance products.
15. The use of terms determined to be unfair by the courts should be prohibited. This prohibition should apply to identical and similar standard form contracts used in the same sector.
16. If the unfair term is used in another sector, there should be a presumption that the term is unfair unless the business in the other sector can show that its sector is materially different to the first sector.
17. The use of a term that has been determined to be unfair should attract monetary penalties, in addition to the unfair term being void.
18. The monetary penalties in the ACL should be of a sufficient size to both penalise and deter large and profitable businesses.
19. The unfair contract terms provisions should be expanded to allow a court to declare void a contract that is unfair as a whole.
20. The ACL should include a power for regulators to require businesses to provide documents for the purpose of investigating whether a term is unfair.
21. The ACL should include a provision allowing regulators to share information with consumer advocates.
22. The seven terms specified in the ACL Interim Report at 2.4.8 should be included in the 'grey list' of unfair contract terms.

Unsolicited consumer agreements

23. The ACL should prohibit all unsolicited sales.
24. In the alternative, an opt-in approach should apply to all unsolicited sales.
25. The opt-in period should begin 48 hours after the sale and signing of the contract and should end seven days after the signing of the contract.
26. The definition of business premises should be clarified to ensure that the unsolicited sales provisions apply to transactions that take place in public places.
27. The whole of an unsolicited telephone call should be recorded.

Implementing the ACL and its objectives

28. The ACL itself should be available as a hyperlinked document that can be downloaded in Word or PDF format.
29. The ACL website should include a 'question and answer' and letter-generating tool to assist consumers to exercise their consumer rights.
30. The ACL guidance material should be available in multiple languages, easy English and larger fonts.
31. The 'follow-on' provisions in the ACL should be expanded as proposed in the Interim Report.
32. A Retail Ombudsman should be established that is funded by industry.
33. In the alternative to an Ombudsman, state-based regulators should be given increased powers to issue binding decisions or require compulsory and enforceable conciliations.
34. State-based tribunal processes should include specialist motor vehicle divisions, independent expert panels of mechanics and amended consumer application forms that refer to specific ACL provisions.

Penalties and remedies

35. The maximum financial penalties under the ACL should be aligned with those under the *Competition and Consumer Act 2010* (Cth).
36. Traders should be allowed to use third parties to give effect to a community service order in limited circumstances.

Scope and coverage of the ACL

Fundraising activities and the ACL

Q 1: Regulator guidance on the activities of charities, not-for-profits and fundraisers

Legal Aid NSW is concerned about the activities of charities, not-for-profits and fundraisers in relation to vulnerable people. In particular, we are concerned about representatives of charities who go door-to-door in disadvantaged communities using high-pressure methods to persuade people to sign up to regular donations that they cannot afford. We have included the case studies of Gary, Bill and Jackie, below, to illustrate this problem.

Legal Aid NSW has not reached a final view about the best way of responding to this exploitative behaviour, or whether the ACL should be extended to apply to all fundraising activities. However regulator guidance regarding the ACL's application to fundraising, and whether or not the ACL applies to volunteers or third party contractors undertaking fundraising activities, would be beneficial.

Case Study – Gary

Gary is a 29 year old Aboriginal man from a remote community. He has an intellectual disability and is solely reliant on the Disability Support Pension. Someone came to his home seeking donations for a not-for-profit organization that provided a service relating to emergency medical evacuations. Gary signed up for a monthly direct debit of \$20, thinking he was paying for a service that would give him access to emergency medical evacuations. He also believed that he could transfer this benefit to a friend if his friend needed a medical evacuation. He did not know he had signed up to giving a charitable donation until he saw a solicitor from Legal Aid NSW in relation to financial hardship. Legal Aid NSW assisted Gary to cancel his payments, but he did not want to make a complaint.

Case Study – Bill

Bill is an Aboriginal man living in a remote community with a cognitive impairment on the Disability Support Pension. He agreed to a monthly direct debit to a charity because the representative was demanding and Bill felt intimidated by him. Bill asked Legal Aid NSW for help in stopping the payments and lodging a complaint.

Case Study – Jackie

Jackie is an Aboriginal woman living in a remote community on a Centrelink benefit. She signed up to a \$32 per fortnight donation to a conservation agency because she felt too embarrassed to say no and wanted the door-to-door representative to leave. Jackie asked Legal Aid NSW for help to cancel the payments and make a complaint.

Recommendations

- **Regulator guidance should be provided on what transactions with charities attract the protections of the ACL.**
- **Regulator guidance should be provided as to whether or not the ACL applies to volunteers or third party contractors undertaking fundraising activities.**

Who is protected under the ACL?

Q 4 and 5: \$40,000 threshold for the definition of ‘consumer’

All consumer purchases should be protected by the ACL, and there should be no arbitrary limit to protection for consumers. There are already exceptions to the \$40,000 limit for motor vehicles and for “goods of a kind ordinarily acquired for personal, domestic or household use” (section 3). Removing the limit would reduce uncertainty over what consumer purchases are covered by the ACL.

If there is to be a threshold, it should be \$100,000 and raised each year in accordance with the Consumer Price Index (CPI). The \$40,000 threshold has been in place since 1986 and does not correlate with current consumer purchasing behaviour.

An increase to \$100,000 would ensure that almost all goods and services purchased by consumers would be covered by the ACL. For example, products like elevators, stair assistance devices and ramps may be purchased by or for people with disabilities, but may not fall within the section 3 definition of goods ordinarily acquired for personal, domestic or household use. Contracts for services for people with disability (which will become more common with the roll out of the NDIS) will be covered. An increase in the threshold would also mean agricultural equipment would be covered for small business consumers in regional and remote areas.

Recommendations

- **The limit of \$40,000 in the definition of ‘consumer’ should be abolished, so that the ACL applies to all consumer purchases.**
- **Alternatively, there should be a limit of \$100,000 that is increased each year in accordance with the Consumer Price Index.**

Exemptions under the ACL

Q 6: Other priority exemptions

Exemptions to the ACL undermine the benefits of a nationally consistent approach. To ensure consistency and accessibility of the ACL to consumers, no further exemptions should be imposed. Current priority exemptions should be reviewed with the intent of making the ACL as consistent and uniform as possible.

Interaction between ACL and ASIC Act

Q 7-9: Amending the ASIC Act to explicitly apply its consumer protections to financial products

Legal Aid NSW supports the amendment of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) to apply consumer protections to financial products. This would ensure that the ASIC Act consumer protections regarding unfair terms, unconscionable conduct, misleading and deceptive conduct and false and misleading representations would clearly apply to financial products. The current ambiguity causes difficulty for both consumer advocates and the courts.

However, key ACL protections are not included in the ASIC Act, namely:

- consumer guarantees
- unsolicited consumer agreements
- product safety
- single pricing, and
- proof of transaction.

These consumer protections should be extended to financial services and products to ensure consistency between both Acts and better protection for consumers.

We acknowledge that reforms are occurring in relation to financial advisers, and there are industry-specific obligations for financial services and goods. However these protections do not cover the same ground as the consumer protections listed above. In particular, they do not import a requirement that the product is “fit for purpose”, nor a requirement that a product is safe.

Legal Aid NSW also supports changes to the ASIC Act in relation to unsolicited sales. These changes should combine the anti-hawking provisions of the *Corporations Act 2001* (Cth) with specific consequences for their breach and consumer access to compensation provisions, so that all financial products are dealt with consistently.

The proposed change to the ASIC Act would not deal with the specific exclusion of unfair contract terms under section 15 of the *Insurance Contracts Act 1984* (Cth) (**Insurance Contracts Act**). This issue will be dealt with further below.

The benefits to consumers of the above change would include:

- clarity regarding the application of consumer protections
- reduced disputes over whether the ASIC Act applies to financial products, and
- incentives for businesses providing financial products to ensure their conduct is not misleading, their contracts do not include unfair terms and they do not harass or coerce consumers into purchasing their products.

However, Legal Aid NSW notes it would still not extend consumer guarantees or safety provisions to financial products or services.

Recommendations

- **The ASIC Act should be amended to explicitly extend its consumer protections to financial products.**
- **The ASIC Act should be amended to incorporate key ACL consumer protections, including consumer guarantees, unsolicited consumer agreements, product safety, single pricing and proof of transaction protections.**
- **The ASIC Act should include provisions regarding anti-hawking, including consequences for breach and consumer access to compensation.**

Consumer guarantees

'Acceptable quality' for goods

Q 10: Durability of goods

The experience of Legal Aid NSW lawyers is that consumers, the NSW Civil and Administrative Tribunal (**NCAT**), consumer advocates and industry have varying ideas of what constitutes acceptable durability for common goods and services.

There should be further guidance on the durability of goods in future ACL publications and on the website. Legislative change is not required and the legislation should remain flexible to apply to various goods of different quality, age and value.

Q 11-12: Other areas of uncertainty

There should be further guidance in respect of:

- what is a reasonable cost for returning rejected goods
- specific time limits within which repairs are to occur, and
- examples of major and minor failures in certain common household goods, including cars.

Where the cost to return is greater than half the cost of the item, this should be deemed to constitute a 'significant cost'.

Legal Aid NSW supports the current flexibility of the legislation and suggests that regulators provide further guidance on the ACL website and through education and training for specific industries, such as the car industry.

Q 13: Further guidance on durability

Legal Aid NSW supports the introduction of a one page disclosure sheet to be provided by the retailer at the point of sale. It should explain the specific rights consumers have under the consumer guarantees and examples of time frames for the durability of certain household goods. This information is already provided in ACL guidance documents and should be provided directly to the consumer.

Recommendations

- **The ACL website and publications should provide further guidance on the durability of certain goods, the reasonable cost for returning rejected goods, reasonable time frames within which repairs are to occur, and examples of major and minor failures in certain common household goods, including cars.**
- **The ACL should require retailers to provide a one-page disclosure sheet to consumers, at the point of sale, that includes guidance about durability of certain household goods.**

Major failures and industry-specific concerns

Q 14: Issues raised in particular industries

Legal Aid NSW supports “lemon laws” for cars, as outlined in our earlier submission. Cars are different to other consumer goods, because they:

- have unique negative impacts if faulty, particularly for families and consumers in remote, regional or rural areas where public transport is scarce
- are often purchased with finance, which whether linked or not, can contribute to increasing the consumer’s financial exposure should something go wrong with a vehicle, and
- are often the most expensive purchase a consumer will ever make.

The Interim Report includes ample evidence of stakeholder concerns about motor vehicles. Legal Aid NSW considers that the current system of consumer guarantees combined with the way NCAT functions is not sufficient to protect consumers of motor vehicles. The case study of ‘Muhammad’, below, illustrates the need for further protections.

In the absence of lemon laws, Legal Aid NSW would support generic law reform such as Option 1, that is, further clarification as to what constitutes a major failure.

We would also support industry-specific compliance and enforcement by regulators that would encourage not only increased awareness of the law but also improved understanding of what 'acceptable quality' means in relation to cars.

Q 15: Industry-specific compliance and education activities

There should be industry education regarding the meaning of 'acceptable quality' and the available remedies when there is major or minor failure. Currently consumers are not advised by the trader about their right to request a refund in certain circumstances, leading to unfair outcomes.

Regulators should initiate enforcement proceedings for failures to comply with consumer guarantees in relation to cars. In some industries, such as the second-hand car market, undertakings would be a useful method of encouraging compliance.

Q 16-18: Major failures

There are certain circumstances where the relationship between the consumer and the supplier is damaged to such an extent that the consumer should not be required to continue with the relationship, and should be able to seek a refund. These situations include where there has been:

- a safety issue, regardless of whether or not it is resolvable by a repair
- a failure that occurs within a very short time after delivery or receipt of the services, and
- a series of minor failures.

In each of these cases, repairs and replacement may not be appropriate and the consumer should not be required to keep the goods. These situations should be included within the ACL as major failures.

It should be made clear that the list of major failures in section 260 is not exhaustive.

Legal Aid NSW considers that the inclusion of the three situations described above does not extend the definition of 'major failure', but would clarify any confusion. In many cases a trader will not admit a problem is a major failure. There is a significant cost for consumers in enforcing their rights. Clarification should reduce the number of cases that have to be taken to NCAT.

Legal Aid NSW submits that the above reform would give rise to limited risks to business as the clarification would encourage traders to provide refunds in situations where refunds should already be provided under the existing ACL provisions. However, in practice, we find traders refusing to assist consumers, with only proactive consumers resorting to NCAT for a remedy, while many vulnerable consumers abandon their claim.

Case Study - Muhammed

Muhammed purchased a second-hand motor vehicle from a dealership, and signed up to a non-linked loan for approximately \$9,000 to finance the purchase. The loan included a commission for the supplier and an extended warranty.

Less than three months after purchase, the car broke down with a blown head gasket requiring the entire engine to be replaced. Muhammed was informed by the supplier that he needed to contact the warranty company and have the car repaired. He was not offered a refund or a replacement. The warranty company covered a small proportion of the repairs and Muhammed had to contribute the remainder of the cost. A further three months later the car broke down again, requiring the entire engine to be replaced for a second time. Muhammed was no longer covered by his warranty and could not afford to fix the car. The cost of repairs would have represented approximately 70% of the value of the vehicle.

With Legal Aid NSW's assistance, Muhammed wrote to the supplier requesting a refund due to the major failure. The supplier refused. At NCAT, the car was found to be of acceptable quality. Legal Aid NSW has appealed this decision to the Appeal Panel.

It has been three years since the car was purchased and Muhammed has still not obtained a refund, nor has he been offered a repair or a replacement by the supplier. He remains locked into a car loan, which accrues interest daily, for a car which he cannot afford to fix.

Recommendations

- **Specific education should be provided to the new and used car industry focusing on consumers' rights regarding consumer guarantees, dealer warranties and extended warranties.**
- **The ACL should be amended to provide that 'major failure' includes where the failure is a safety issue, occurs within a very short time after receipt of the goods or services, or where there has been a series of minor failures.**

Disclosure of rights under the ACL

Q 19-20: Notifying consumers about their consumer guarantee rights

Current disclosure laws, including the mandatory notice for warranties against defects, do not effectively inform consumers about their statutory rights when purchasing goods or services. A large number of consumers, particularly vulnerable consumers, do not understand their rights under the ACL. Inadequate disclosure is likely to result in consumers purchasing extended warranties that provide no additional cover beyond what is already provided under the ACL.

Legal Aid NSW notes the concerns raised by some stakeholders that the mandatory notice may be an inaccurate reflection of the ACL consumer guarantee requirements. Legal Aid NSW would strongly oppose any changes to the mandatory notice that would result in reduced disclosure to consumers. If changes are to be made, they should enhance disclosure.

Q 21: Regulation of extended warranties

Legal Aid NSW agrees with the Consumer Action Law Centre that extended warranties, like junk insurance policies, offer little if any real value.

At a minimum, traders should be required to disclose the value of the extended warranty products beyond the consumer's rights and remedies under the ACL. Enhanced disclosure would place the onus on traders to ensure that their extended warranty products actually provide value to the consumer.

Recommendation

- **Any changes to the mandatory notice should form part of an enhanced disclosure regime under the ACL. This could take the form of an information statement given to a consumer at the point of sale.**

Unconscionable conduct and unfair trading

Are the unconscionable conduct provisions working effectively?

Q 37 – 38: The development of the law on unconscionable conduct

The Interim Report notes that the unconscionable conduct provisions are intended to address conduct that is not easily addressed by the more specific protections.

Legal Aid NSW acknowledges the benefit of a flexible provision that is allowed to develop through the courts and is applied on a case-by-case basis. However, this provision is not effective as an overarching provision to respond to unfair and predatory conduct that is not captured by specific provisions of the ACL. The threshold to prove that conduct is unconscionable is high¹ and the protection is of limited use. As the Interim Report notes, an act is not unconscionable if it is 'merely unfair, unjust, wrong or unreasonable'. As a creature of common law, it is difficult for both consumers and traders to understand what is prohibited by this provision. Litigation on this issue is inevitably complex, and disadvantaged consumers are unlikely to commence such proceedings.

A prohibition on unfair trading would be a more effective means of dealing with unconscionable conduct (see below).

If such a prohibition is not introduced, reform of the unconscionable conduct provision is necessary. Maintaining the status quo will mean that the most vulnerable members of our

¹ The Federal Court has described unconscionable conduct as "conduct against good conscience by reference to the norms of society that is in question": *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90.

community, including Aboriginal people, the elderly, people from non-English speaking backgrounds and the financially disadvantaged, will continue to fall prey to predatory business practices.

Unfair trading

Q 41 – 42: Considering a general unfair trading prohibition

Legal Aid NSW strongly supports a prohibition on unfair trading, as outlined in our initial submission at pages 15 to 19. Legal Aid NSW considers there is sufficient evidence to conclude that there are gaps in the current law and an overarching prohibition is justified. Legal Aid NSW and other stakeholders have identified countless examples of predatory business conduct that are not prohibited by the current framework. This conduct causes substantial cost and often irreparable harm to vulnerable consumers.

Predatory business models exist because they are able to exploit gaps in the current protection framework. For example, predatory traders will change a certain aspect of a contract, product or service so that it falls outside consumer protection laws. In respect of consumer leases, the creation of “Rent, Try, Buy for \$1” avoids the contract being characterised as a sale of goods by instalments and allows a trader to charge interest above the 48% interest rate cap provided under the *National Consumer Credit Protection Act 2009* (Cth).

Another example of unfair trading is unsolicited sales to vulnerable consumers on low incomes. Sellers of products including solar panels, mathematics software and training colleges have targeted vulnerable and low income consumers. Unsolicited sales contracts do not allow the client to cancel beyond the mandated cooling-off period and if the client does cancel they must pay the balance of the contract even if they do not use the product. An unfair trading provision would apply to the business model itself, taking away the opportunity for business to exploit regulatory gaps.

The ACL as it currently operates does not enable a consumer to argue that the circumstances of the contract, as a whole, render it unfair. This means that consumers who cannot engage the specific protections under the ACL are left without any remedies.

The Interim Report notes concerns about the UK/EU three tiered approach, in particular the concerns raised regarding regulatory overlap. Legal Aid NSW respectfully disagrees that regulatory overlap is an issue with respect to an unfair trading prohibition. The whole purpose of an unfair trading prohibition is to capture predatory conduct that is not presently captured by our regulatory framework.

The QUT study noted that the UK Regulator relies more on Tier 2 conduct versus Tier 1 conduct. Legal Aid NSW submits that CAANZ should not draw any conclusions from this finding without further insight into why this might be occurring. Further, there is no evidence to suggest that the unfair trading prohibitions in other jurisdictions are not operating effectively. There may be a deterrent effect in merely having the unfair trading provisions in place.

As Legal Aid NSW noted in its original submission, when considering law reform there is often an underlying assumption that reform involves more regulation for traders or is inherently anti-competitive. Legal Aid NSW has consistently challenged this assumption.

In this regard, Legal Aid NSW submits that there are no disadvantages to a general prohibition on unfair trading. Any prohibition will only impact upon traders whose business models are unfair and target the most vulnerable members of our community. Prohibiting unfair trading can also have a positive impact on the economic interests of legitimate business.

Case Study - John

John is an Aboriginal man who lives in regional New South Wales. He could not get a bank loan because of his credit history. John entered into a “Rent to buy” scheme with A Pty Ltd, a company owned by Lucinda. Lucinda told John that he would pay a deposit and above-market rent for four years, and then Lucinda would help John obtain the finance to purchase the property. She said that all the money paid above market rent would be put towards the deposit. The house was owned by O Pty Ltd, also owned by Lucinda.

John did not get legal advice and did not fully understand the terms of the contract. After three years, John had difficulties making the payments. He could not exercise the option to buy the house, O Pty Ltd sold the house and John was evicted, having spent \$140,000 on trying to buy the house.

John sought legal advice but A Pty Ltd has been de-registered and assets held by O Pty Ltd were transferred to T Pty Ltd, also owned by Lucinda. Any action taken against Lucinda will have to be taken in the Supreme Court. If there was an action for unfair trading, it could be taken in NCAT and all the circumstances of the purchase could be taken into account.

Recommendation

- **The ACL should be amended to include a prohibition on unfair trading.**

Unfair contract terms

Unfair terms in insurance contracts

Q 43: Applying the ASIC Act’s unfair contract terms protections to contracts regulated under the Insurance Contracts Act

Legal Aid NSW submits that the unfair contract term protections should be applied to contracts regulated under the *Insurance Contracts Act*. Consumers of insurance products should be afforded the same consumer protections as consumers of other products. Unfair

contract terms protections are important given the nature of insurance and its complexity as a product.

Legal Aid NSW assists many clients with insurance claims when they have lost their homes in natural disasters, and/or where the refusal of a claim under a policy could result in financial ruin, for example a travel insurance exclusion which results in a hospital bill that could render the client bankrupt. Extending unfair contract terms protections to insurance would afford some protection from discriminatory practices of insurers in relation to travel insurance which has been the subject of both research² and the focus of the Federal Court in recent times.³

Amendments should be made to both the *ASIC Act* and the *Insurance Contracts Act* to ensure that the unfair contract terms protections clearly and explicitly apply to insurance products.

Recommendation

- **Amendments should be made to the *ASIC Act* and the *Insurance Contracts Act* to ensure that the unfair contract terms protections apply to insurance products.**

Monetary penalties

Q 44: Use of terms previously declared 'unfair' by a court

The ACL should prohibit the use of a term that has been declared unfair by the courts. Once a court has determined a term to be unfair, the uncertainty as to its use has been resolved.

Currently, those who continue to use those terms are unfairly protected by the barriers to accessing justice through the courts. The difficulties that vulnerable consumers face in undertaking litigation has been detailed both in this submission and our initial submission to CAANZ.

The unfair contract terms protection should be expanded to allow a contract, as a whole, to be declared unfair. It is often the interaction of terms, and the structure of the contract for the goods or service, which renders the contract unfair. This could also be addressed by the introduction of an unfair trading provision as detailed above in response to questions 41 and 42.

The prohibition should apply to identical and similar contracts in the sector in which that term has been declared unfair. If the unfair term is used in another sector, there should be a presumption that the term is unfair unless the business in the other sector can show that its sector is materially different to the first sector.

Legal Aid NSW is of the view that this would increase the deterrent effect of the unfair contract terms provisions. Prohibiting unfair terms would encourage businesses to review

² <http://www.mccabecentre.org/focus-areas/treatment-and-support/making-law-work-cancer/insurance-discrimination>

³ *QBE Travel Insurance v Bassanelli* [2004] FCA 396 (7 April 2004).

their contracts systematically and on a regular basis, rather than reacting ad hoc to individual cases taken against them by a consumer or the regulator.

Financial penalties should be large enough to deter businesses from keeping the unfair terms in their contracts. The issue of the amount of penalties is dealt with further in our response to question 65. Furthermore, any prohibited term should be void.

Transitional arrangements could allow 12 months for businesses to review their standard contracts. Relevant business associations could be advised of contract terms that have been declared unfair. These business associations could in turn advise their members. A schedule of unfair terms could be added to the *Fair Trading Act 1987* (NSW) and equivalent Acts in other states and territories. Lastly, Fair Trading NSW and equivalent bodies in other states and territories could conduct consumer and business education.

The key challenge of the above reform would be to enforce the redrafting of standard form contracts and to educate businesses in relevant sectors to discourage the use of unfair contract terms from the outset.

Recommendations

- **The use of terms determined to be unfair by the courts should be prohibited. This prohibition should apply to identical and similar standard form contracts used in the same sector.**
- **If the unfair term is used in another sector, there should be a presumption that the term is unfair unless the business in the other sector can show that its sector is materially different to the first sector.**
- **The use of a term that has been determined to be unfair should attract monetary penalties, in addition to the unfair term being void.**
- **The monetary penalties in the ACL should be of a sufficient size to both penalise and deter large and profitable businesses.**
- **The unfair contract terms provisions should be expanded to allow a court to declare void a contract that is unfair as a whole.**

Representative actions by regulators

Q 45 and 46: Empowering ACL regulators to compel evidence from a business to investigate whether a term is unfair

Legal Aid NSW supports empowering regulators to compel businesses to produce documents for the purpose of investigating breaches of the ACL. As stated, we often advise vulnerable consumers who enter into unfair contracts with serious financial consequences (please see the above case study of “John”). Often, these consumers have little to no documentation evidencing payments made pursuant to a contract.

Providing greater powers to regulators to compel documents would assist in the enforcement of the unfair contract term provisions. Legal Aid NSW would also support any mechanism which would allow regulators to share information with consumer advocates.

Recommendations

- **The ACL should include a power for regulators to require businesses to provide documents for the purpose of investigating whether a term is unfair.**
- **The ACL should include a provision allowing regulators to share information with consumer advocates.**

Legislative examples of unfair terms

Q 47: Expanding the 'grey list' of examples of unfair contract terms

The 'grey list' should be expanded to include all seven of the terms mentioned at 2.4.8 in the Interim Report. Each of these terms produces unfair and imbalanced outcomes in favour of the business and is against the public interest.

In particular, we make the following observations:

- Consumers should be aware of what charges they will face upon entering the contract. Giving one party the unilateral power to impose or increase fees is inherently unfair and against the public interest.
- Requiring non-disclosure agreements disadvantages other consumers who are entitled to know how disputes with a business were resolved.
- Making the contract the 'entire agreement' cannot exclude other consumer protections under the ACL.
- There is already case law to suggest that the imposition of large cancellation fees, not proportionate to actual loss may be deemed a penalty.⁴ Adding this to the grey list merely reflects this position.

There should be clarification that the list is not exhaustive.

Recommendation

- **The seven terms specified in the ACL Interim Report at 2.4.8 should be included in the 'grey list' of unfair contract terms.**

Unsolicited consumer agreements

Current regulation and vulnerable and disadvantaged consumers

Q 48-49: The current unsolicited selling provisions

Current unsolicited selling provisions are inadequate to protect consumers against the high-pressure sales tactics used by unsolicited salespeople. As demonstrated by case studies "Pete" and "Annie" (in our previous submission at pages 26 to 28), unsolicited

⁴ *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205; cf *Paciocco & Anor v Australia and New Zealand Banking Group Limited* [2016] HCA 28.

door-to-door salespeople often target vulnerable consumers. They are signed up for expensive goods and services that are wholly unsuitable, expensive and often difficult to cancel (see Liam's case study below).

Legal Aid NSW has assisted hundreds of clients who have been signed up to a range of different products through unsolicited sales including private training colleges, solar panels, telecom providers and educational software programs. Many clients state that they would never have purchased the product had it not been for the unsolicited sale, and further, that they signed up for the goods or services merely to end the interaction with the salesperson.

Unsolicited door-to-door sales were used extensively by the VET FEE-HELP private training colleges sector to target vulnerable consumers (see case study "Pete" from Legal Aid NSW's previous submission at page 26 to 27). Training providers went door-to-door in remote Aboriginal communities and approached consumers outside local Centrelink branches. Training providers and their agents are now prohibited from approaching people to sell VET FEE-HELP loans.⁵ There is also a period of 48 hours after the student has enrolled in a course during which the student may not submit an application for a loan. This ensure that the student has time to consider the course and understand the loan obligations.

With the introduction of the NDIS scheme, people with disability will have control over funds for support services for the first time. People with disability are more likely to be home and to be the target of door-to-door sales people. Some of them will be new to money management and not familiar with consumer protection laws. There is a real risk of these people being exploited by unsolicited sellers of support services. We therefore stress the importance of strengthening unsolicited sales provisions in order to prevent the exploitation that occurred in the private training sector.

In light of the ongoing risk that unsolicited sales pose to consumers, particularly those who are vulnerable, Legal Aid NSW favours a prohibition on all unsolicited sales. A prohibition is the only way to ensure that vulnerable consumers are not the subject of high-pressure and unscrupulous sales tactics.

Failing to prohibit unsolicited sales risks vulnerable consumers being continually exploited by unscrupulous door-to-door salespeople. The harm caused by unsolicited sales has been demonstrated extensively by the consumer advocate sector over the years. There has been little evidence of the benefits of these high pressure sales techniques.

A ban on unsolicited sales would not mean consumers are unable to purchase these goods or services. Rather, it would mean that consumers would be able to approach that purchase on their own terms, and further have the opportunity of considering their need for that product or service in a pressure-free environment.

⁵ Luke Hartsuyker MP, Minister for Vocational Education and Skills, Media Release, "Stronger protections for VET students commence" 1 January 2016.

Case Study - Liam

A maths tutoring company came to Liam's home and persuaded him to sign up for a maths tutoring program.

During the cooling-off period, Liam made repeated attempts to withdraw from the contract but all his attempts were ignored by the trader. Liam was unable to make the required payments and the company eventually filed a Statement of Claim for approximately \$8,400 against Liam in the Local Court of NSW. Legal Aid NSW assisted Liam and successfully argued that Liam had attempted to cancel the contract within the cooling-off period and further that the contract was unjust. The Court found wholly in Liam's favour.

Liam's experience shows that even proactive consumers have difficulty in exercising their rights under the current cooling-off provisions and it often takes intervention from an advocate for consumers to be afforded their rights under the current framework.

Q 50: Replacing the cooling-off period with an opt-in mechanism

In the absence of an outright ban against unsolicited sales, Legal Aid NSW supports the introduction of an opt-in mechanism. Consumers, particularly vulnerable ones, find it difficult to exercise their rights under cooling-off periods. They find it difficult to contact the provider, and if they do make contact, the trader may ignore attempts to withdraw from the sale or pressure the consumer to proceed with the sale. An opt-in mechanism would ensure that only consumers who genuinely wish to proceed with the sale are obliged to do so.

The opt-in mechanism should apply to all sales, as all unsolicited selling poses risks for vulnerable consumers. A uniform opt-in provision is easier to understand for consumers and would prevent traders from finding ways to avoid the provision.

The opt-in provision should be modelled on the approach now taken with regard to VET FEE-HELP loans, where students who have enrolled in a course are not permitted to apply for a loan for two days after enrolling. The opt-in provision should allow the consumer two days to consider the purchase. There should then be a five day period during which the consumer can opt in to the sale. The trader should not be permitted to contact the purchaser during the seven day period.

The opt-in approach would allow consumers to obtain products and services that they genuinely want. It would strengthen the consumer's ability to discontinue a contract where they do not wish to purchase that product or service. The introduction of cooling-off provisions was an attempt to achieve this outcome.

We do not support a 'risk-based' approach as all unsolicited sales involve risk to the consumer.

Recommendations

- **The ACL should prohibit all unsolicited sales.**
- **In the alternative, an opt-in approach should apply to all unsolicited sales.**
- **The opt-in period should begin 48 hours after the sale and signing of the contract and should end seven days after the signing of the contract.**

Q 53 Definition of business premises, documenting telephone sales

The meaning of 'business premises' should be clarified to ensure that the unsolicited sales provisions apply to transactions that take place in public places. The recent decision of *Australian Competition and Consumer Commission v A.C.N. 099 814 749 Pty Ltd* [2016] FCA 403 has created some confusion as to the definition of 'business premises'.

Legal Aid NSW submits that the whole of an unsolicited telephone call should be recorded.

Recommendations

- **The definition of business premises should be clarified to ensure that the unsolicited sales provisions apply to transactions that take place in public places.**
- **The whole of an unsolicited telephone call should be recorded.**

Implementing the ACL and its objectives

Barriers to accessing information

Q 55: Enhancements to existing communication channels

A question and answer type tool, as found on the New Zealand Consumer Protection website, would be useful for disadvantaged consumers or those with limited literacy. The responses to the questions should lead consumers to the relevant section of the ACL and the relevant remedy. This would encourage and empower consumers who may feel intimidated at the prospect of reading through complex legal guides. Further information about this tool is provided in our initial submission at page 5.

Simple self-help resources, such as draft letters of complaint or draft letters for the rejection of goods, should also be available. The self-help tools could have fields which the consumer could input themselves (similar to Consumer Action Legal Centre's – Demand a Refund Tool) that would then generate a letter. More capable consumers could edit the draft letter.

Q 56: A standalone version of the ACL

A standalone PDF and Word version of the ACL should be publicly available. The document should be hyperlinked so that a consumer can easily jump between sections of

the ACL from a beginning main menu. The document should also contain links to ACL guidance papers.

Q 57: Other ways to enhance the accessibility of the ACL and related guidance material

Guidance material should be available in multiple languages, in easy English and in easy-to-read larger font editions.

Recommendations

- **The ACL should be available as a hyperlinked document that can be downloaded in Word or PDF format.**
- **The ACL website should include a ‘question and answer’ and letter-generating tool to assist consumers to exercise their consumer rights.**
- **The ACL guidance material should be available in multiple languages, easy English and larger fonts.**

Access to remedies

Q 58: An expanded ‘follow-on’ provision

Legal Aid NSW supports the expansion of follow-on provisions. Allowing private litigants to rely on findings or admissions of fact in previous proceedings would significantly assist those litigants and reduce the length of proceedings. Many matters would only need to address compensation. This would be an efficient use of the resources of both the regulator and the courts.

Q 60: Other ways ACL regulators can support private litigants

In our initial submission, at pages 22 to 25, we highlighted the difficulties consumers often face in obtaining remedies for their consumer disputes. The 2016 Australia Consumer Survey demonstrates that the hassle and effort of obtaining a remedy creates a large barrier for many people.⁶

Legal Aid NSW considers this barrier would be significantly reduced with the introduction of a Retail Ombudsman. This would empower consumers to deal with disputes in an efficient, more informal way than the current tribunal and court model. We believe a Retail Ombudsman is crucial to improving access to justice in the consumer sphere.

In lieu of a Retail Ombudsman, Legal Aid NSW would support strengthened powers of the regulators to improve the number of matters which resolve through the dispute resolution process. Currently, NSW Fair Trading cannot issue binding decisions or compel action through this process. We would broadly support powers to allow for binding decisions and to call a voluntary or compulsory conciliation conference, similar to Consumer Affairs SA. We would further support a power for the NSW Fair Trading Commissioner to seek enforcement of the agreement in court, if it is breached. We also believe consideration

⁶ As published in Box 28 of the Interim Report.

should be given to state-based regulators having capacity to take proceedings in the Federal Court to obtain orders under the ACL that would restrain the misconduct of businesses nationally.

Lastly, processes within the state-based tribunals should improve. Legal Aid NSW would support the following changes:

- The establishment of a specific motor vehicles division with members that hold expertise in that area of law.
- The creation of an independent panel of mechanics that can be used by consumers and businesses alike to report on the cause of a car failure. The hurdle of obtaining this expert evidence for consumers discourages many people from taking their disputes to NCAT. The use of such a panel would reduce the incidence of conflicting or poor expert evidence being used and we believe would significantly reduce delays in motor vehicle disputes in NCAT.
- The review and re-drafting of the application forms for consumers in state-based tribunals so that specific sections and protections are referred to, in particular, consumer guarantees.

Recommendations

- **The ‘follow-on’ provisions in the ACL should be expanded as proposed in the Interim Report.**
- **A Retail Ombudsman should be established that is funded by industry.**
- **In the alternative to an Ombudsman, state-based regulators should be given increased powers to issue binding decisions or require compulsory and enforceable conciliations.**
- **State-based tribunal processes should include specialist motor vehicles divisions, independent expert panels of mechanics and amended consumer application forms that refer to specific ACL provisions.**

Penalties and remedies

Maximum financial penalties

Q 64: Current maximum financial penalties

Legal Aid NSW would support increasing the maximum financial penalties under the ACL by aligning them with the maximum penalties under the *Competition and Consumer Act 2010* (Cth) (**CCA Act**), rather than the penalty units in the *ASIC Act*. We consider that the current financial penalties are inadequate to deter breaches of the ACL. It is clear that the benefits to very large businesses from a breach of the ACL can be greater than the value of the fine imposed. In these cases the deterrent effect is likely to be undermined. The

current maximum penalty does not allow regulators and courts to seek and impose penalties that effectively penalise and deter breaches of the ACL.

The Interim Report refers to submissions suggesting that the penalty should be proportionate to the offence, rather than to the size of the business or the benefit obtained. However, we note that the CCA specifically refers the size of the penalty to a multiple of the benefit obtained by that business, or a percentage of annual income of the business. As these provisions already apply to businesses in the competition sphere, we consider that replicating them in the consumer world is necessary to bring the ACL into line with the larger goals that this legislation is attempting to achieve.

Q 65: Alternative approaches

Alternative approaches to deterrence, such as requiring a party to establish a compliance program, have some advantages. However, these schemes can still operate in addition to effective financial penalties. None of the alternative approaches proposed in the discussion paper address the fundamental problem that if the potential profit from breach the ACL outweighs the penalty, the deterrent effect is undermined.

Recommendation

- **The maximum financial penalties under the ACL should be aligned with those under the CCA.**

Effectiveness of non-punitive orders

Q 67: Giving effect to community service orders

Legal Aid NSW supports allowing traders to use third parties to give effect to community service orders in certain circumstances. These circumstances may include where the neutrality of a third party is necessary to prevent further contact between the aggrieved consumer and the trader, where the trader does not have the required skills, qualifications or capabilities to carry out the relevant community service or if the trader cannot be trusted to carry out the order in good faith or to completion.

A key benefit of the use of third parties is the potential for involvement of service providers who are more experienced or better equipped to carry out the order than the contravening trader and are thus able to deliver a superior service to the community.

The use of third parties should be limited to circumstances where their involvement provides a genuine benefit to the consumer or community or is justified by some demonstrable need of the contravening trader.

The unfettered use of third parties without justification risks undermining the deterrent impact of the community service order.

Recommendation

- **Traders should be allowed to use third parties to give effect to a community service order in limited circumstances.**