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26 May 2016

Australian Consumer Law Review

AUSTRALIAN CONSUMER LAW REVIEW ISSUES PAPER

This submission is made on behalf of Australian Finance Conference (AFC) and its affiliated associations, the Australian Equipment Lessors Association (AELA), the Australian Fleet Lessors Association (AFLA) and the Debtor and Invoice Finance Association (DIFA), which together comprise over 100 Members. AFC and AELA Members include finance companies, banks, specialist equipment financiers and general financiers providing consumer, commercial (including small business) and wholesale credit facilities, as well as banks, building societies and credit bureaux. AFLA Members provide vehicle fleet leasing and management services. DIFA Members provide cash flow finance facilities under which suppliers sell unpaid invoices in return for immediate payment.

Our Members provide financial services such as home and personal loans, credit cards, leases and other financial products to consumers and businesses. They hold Australian Credit Licences as required under the *National Consumer Credit Protection Act 2009* (NCCP) when providing credit facilities to consumers. From November this year, Members will be impacted by the extension of the unfair contract terms provisions in the Australian Consumer Law (ACL) (and equivalent provisions in the *Australian Securities and Investments Commission Act 2001* (ASIC Act)) to standard form small business contracts.

Our Members' particular interests in relation to the Australian Consumer Law Review relate to the scope of the definition of "consumer", the interaction between the ACL and the ASIC Act, the potential impact of any "lemon" laws and the regulation of "credit repair" businesses. The Appendix sets out our responses to those of the questions posed in the Issues Paper which relate to these issues. Our responses to these can be summarised as follows:

- (a) The different definitions of "consumer" in the *Competition and Consumer Act 2010*, the ACL, the ASIC Act and the NCCP should be aligned for clarity and regulatory consistency for the benefit of all stakeholders.
- (b) If any special class of persons, such as truck owners, requires specific protection under the ACL then this should be achieved outside the statutory definition of "consumer" and should align with the statutory protections for small businesses under the "unfair contracts terms" provisions which will come into effect later this year.
- (c) There is no proven need for special provisions in the ACL for motor vehicle "lemons". Any gaps in consumer guarantee laws should be addressed as a whole, not in relation to a specific class of goods.
- (d) The consumer guarantees provisions should not apply to "passive financiers" who lend to consumers to allow them to buy goods, but have no role in the manufacture or import of the goods or their selection by the consumer, do not regularly hire out the same goods to successive consumers and do not have any obligations for product safety.

(e) Consideration should be given to the how “credit repair” businesses should be regulated.

If you would like any further information, please contact me by email to ron@afc.asn.au or Catherine Shand our Associate Director - Legal by email to catherine@afc.asn.au.

Kind Regards,

Yours truly,

A handwritten signature in black ink, appearing to read "Ron Hardaker". The signature is fluid and cursive, with the first name "Ron" being more prominent than the last name "Hardaker".

Ron Hardaker
Executive Director



APPENDIX TO LETTER DATED 26 MAY 2016

RESPONSES TO SELECTED QUESTIONS IN THE AUSTRALIAN CONSUMER LAW REVIEW ISSUES PAPER

Australian Consumer Law - the legal framework

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

The definitions of “consumer” in Section 4B of the *Competition and Consumer Act* (CCA) and in Section 3 of the Australian Consumer Law are slightly different, but appear to be of similar effect. We submit that they should be identical, unless there is a clearly articulated policy reason for them to continue to differ in their wording.

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

We submit that the current definition of “consumer” in Section 3 of the ACL does not reflect an appropriate policy basis for determining who should be protected. The current definition and its antecedents (in particular the slightly different definition in the CCA) date back to the 1980s and rely on the goods or services that are being acquired:

- (a) being worth no more than \$40,000; or
- (b) being of a kind ordinarily acquired for personal domestic or household use or consumption; or
- (c) consisting of a vehicle or trailer acquired for use principally in the transport of goods on public roads.

In relation to Section 3(a), we are not aware of any policy reason to alter the amount of \$40,000.

Section 3(b) refers to goods or services being of a kind “**ordinarily acquired**” for personal domestic or household purposes. By contrast, the “Unfair Terms of Consumer Contracts” definition in Section 23 refers to the acquisition of goods or services “**wholly or predominantly**” for personal, domestic or household use or consumption. Consideration should be given to amending Section 3(b) to align with the definition in Section 23 so that both definitions refer to the “whole or predominant” purpose of acquisition rather than what an item is “ordinarily acquired” for. This would align with the National Consumer Credit Protection legislation which applies to credit provided “**wholly or predominantly**” for personal, domestic or household purposes.

In relation to Section 3(c), the special inclusion of “truck owners” (ie those who acquire vehicles or trailers, irrespective of cost, to use principally to transport goods on public roads) is, we suggest, not necessary at least in its current form. It does not reflect the type or size of road transport businesses operating in the Australian economy; or the type, size or price of trucks and trailers they may acquire. We submit that if there is a case for special classes of persons to be protected under the ACL, this should be done another way (for example by Regulation) and not by incorporating special classes into the core concept of who is a “consumer”.

By way of illustration, the result of the current wording of Section 3(c) is that the ACL provides protection to large national road transport businesses which acquire vehicles and trailers. If there is a policy reason to continue to include truck owners as a special case, we suggest that

this be confined to the acquisition of trucks by “small businesses” of the type covered by the new unfair contracts terms provisions in Part 2-3 of the ACL.

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?

The consumer guarantees provisions in Part 3-2 of the ACL potentially impose an inappropriate liability and, therefore, cost on lenders when financing the acquisition of goods. These provisions are intended to assist consumers obtain redress where products break too easily, do not work or do not perform as expected. They apply to the “supply” of goods, including by way of lease and hire-purchase. “Supplier” has a corresponding meaning. Many of our financier members “supply” goods by way of finance lease or hire-purchase to consumers (including to business that may be deemed to be “consumers” because they are “truckies” or because the goods are worth \$40,000 or less) and may therefore be liable under the consumer guarantees provisions. This appears to be an unintended outcome of the definitions of “supply” and “supplier”.

A “passive financier” who has no role in the manufacture or import of goods or their choice by the consumer, does not regularly hire out the same goods to successive consumers and does not have any obligations for product safety should not be liable under the consumer guarantee provisions. A “passive financier” exception applies under workplace health and safety laws, for example under section 6 of the Model Work Health and Safety Act (available at http://www.austlii.edu.au/au/legis/cth/consol_act/whasa2011218/s6.html). We submit that the consumer guarantees provisions should not apply to a person who carries on the business of financing the acquisition or use of goods by consumers and who has acquired an interest in or possession of goods solely for the purpose of financing their acquisition from a third person.

The Australian Consumer Law’s specific protections (2.3)

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

We submit that special “lemon” laws are not needed.

Box 5 in Section 2.3.4 of the Paper refers to the consideration of “lemon” law proposals in 2009 by the Commonwealth Consumer Affairs Advisory Council and in 2007-08 by Consumer Affairs Victoria. Neither of these resulted in a recommendation for specific statutory rights in relation to motor vehicles that cannot be repaired within a reasonable period. The 2015 inquiry by the Queensland Parliament’s Legal Affairs and Community Safety Committee found insufficient evidence to conclude that “lemon” motor vehicles are a prevalent issue, however, it supported consideration of a national approach to the issue as part of the ACL review.

The AFC has previously opposed “lemon” law proposals on the basis that current laws provide adequate rights for consumers, in particular under the consumer guarantee provisions of the ACL. If these provisions are inadequate to protect the buyers of any type of faulty goods that cannot be repaired (whether motor vehicles or items such computers, mobile phones, boat motors, jet-skis or large household appliances) then amendments should be made to address the inadequacy. This could include taking up the Queensland Committee’s suggestion for clear definitions of what constitutes a “lemon” item, mandatory time and repair limits, and clarity as to when a supplier or manufacturer should repair, refund or replace the item.

Any lemon laws will need to provide protection for the financiers of items that turn out to be lemons. In particular:

- (a) they should recognise a financier’s interests as a secured party or lessor under any credit or lease contract related to the purchase of the item;
- (b) the consumer should be obliged to notify their financier of any claim they make under lemon laws and should not make any settlement without the financier’s consent;

- (c) if an item is declared a lemon, then prior to a refund or replacement being provided, the declaring entity (eg a manufacturer or supplier) should be responsible for ascertaining whether there is a security interest registered on the Personal Property Securities Register and notifying the secured party of the declaration;
- (d) a mechanism will be needed to ensure that a PPS registration is placed against any replacement item; and that the proceeds of any refund are applied firstly to repay the secured party under any PPS registered security interest;
- (e) replacement insurance and insurance refunds will need to be addressed; and
- (f) consideration will need to be given to the impact on the linked credit contract provisions in Part 5-5 of the ACL.

In summary, we do not see that there is a case for special motor vehicle lemon laws. Any inadequacies in the current law should be addressed via the consumer guarantees provisions in Part 3-2 of the ACL; and could apply to any faulty goods purchased by consumers that cannot be adequately repaired in a reasonable time.

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

See Question 17 below in relation to credit repairers.

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 be addressed?

The interaction between the ASIC Act and the ACL while complex to analyse is, overall, satisfactory. The only provisions of the ACL which apply to credit are the linked credit contract provisions in Part 5-5.

There are concerns about “credit repair” businesses which charge fees to challenge incorrect credit report listings and/or have them removed and the regulation of these businesses by the ACCC under the ACL (for some types of debts) and/or ASIC under the ASIC Act (for credit-related debts). We suggest that the ACL Review consider the appropriate model for regulation and enforcement of the applicable laws in relation to credit repair businesses. If there are any consumer protection gaps, this should be rectified as an outcome of the Review.

Promoting competition through empowering consumers (4.4)

Consumer access to data (4.4.1)

40. Do consumers want greater access to their consumption and transactional data held by businesses?

It is not clear whether this question relates to general information about consumer data or to consumer-specific data about individuals. If the latter, then an individual has the right under the Australian Privacy Principles to ask a business for all personal information held about them. If there are any concerns about this, a consumer awareness campaign could be implemented to inform consumers about their right to access their personal data.

41. What is the role of the ACL and the regulators in supporting consumers’ access to data? Is there anything in the ACL that would constrain efforts to facilitate access?

See our response to Question 40.
