

# Australian Consumer Law Review

Submission by Legal Aid Queensland



# Australian Consumer Law Review

## Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to make a submission to the “Australian Consumer Law Review – Issues Paper.” LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of “giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way” and is required to give this “legal assistance at a reasonable cost to the community and on an equitable basis throughout the State”. Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ’s services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ’s lawyers in the day to day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ’s Consumer Protection Unit lawyers have extensive experience providing specialist advice and representation to vulnerable clients in consumer law matters. The unit provides advice to clients as well as lawyers and financial counsellors throughout Queensland in relation to:

- mortgage stress
- housing repossession
- debt
- contracts
- loans (including small amount loans and car loans)
- telecommunications and unsolicited consumer agreements (including door to door selling).

This submission is informed by that knowledge and experience.

The issues paper presents a number of questions and issues for discussion. LAQ proposes to respond to the questions in the areas in which it has relevant expertise and then raise other issues that it believes are relevant to the review.

## 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 Queensland is of the view that the national consumer policy framework's overarching and operational objectives remain relevant. However, the framework should recognise that the market place has evolved and changed since the ACL was enacted and address the specific technologies and business practices used by industry to engage and contract with consumers.

LAQ has observed issues for consumers involving the:

- use of social media and email for unsolicited sales;
- rise of the sharing economy such as Airbnb and Uber;
- sharp rise in consumer to consumer transactions through specialised websites such as used car sales websites;
- emergence of comparator websites and services;
- widespread retail use of third party, direct debit payment providers;
- increasing complexity of goods and services and consumer choice particularly in relation to mobile phone and internet services;
- lack of provision of information at the point of sale about how long a product could reasonably be expected to last.

**Submission:** That the existing national consumer policy framework's overarching and operational objectives remain relevant and should be maintained as part of the Australian Consumer Law.

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

LAQ supports the legal Aid New South Wales submission made in response to this question that the European Union Unfair Commercial Practice Directive 2005 provides a useful guide.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:EN:PDF>

### 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?

The existing consumer policy framework enables the Australian Consumer Law to strike a balance between the rights of industry and consumer participants by providing access to information and protection for all consumers.

**Submission:** An important part of ensuring continued stakeholder engagement on ACL issues would be ensuring continued and regular engagement between the regulator and consumer advocates.

# Australian Consumer Law — the legal framework

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

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

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

In LAQ's experience the language and structure of the ACL has been easy to navigate and understand. LAQ strongly supports the use of principle based legislation which is enhanced by more specific protections against unfair practices. The reasons for this are:

- (a) the principle based legislation provides a clear standard that all consumers can expect from industry when participating in the market; and
- (b) the specific prohibitions provide certainty to all participants in the market.

Legal Aid Queensland supports regulators providing guidance to inform all participants in the market about their interpretation and approach to the law.

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

The European Union Unfair Commercial Practices Directive 2005 provides protection for consumers in the European context and could inform and influence legislators in Australia. LAQ will address the relevance of particular Articles of this Directive in greater detail later in this submission.

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

### What is a consumer?

LAQ supports the use of specific protections for consumers in the ACL in relation to consumer guarantees and unsolicited consumer agreements but considers there should be an extension of the definition to include consumers using comparison websites in which personal or business information is provided.

The reasons for this are:

- (a) the provision of information has significant commercial value to the business to which it is disclosed and can be used for purposes not intended by the consumer.
- (b) the provision of information by a consumer to a comparator website is not dissimilar to the situation where a consumer provides personal information to a broker. As such similar protections for the consumer should apply.

**Submission:** That the definition of consumer be expanded to include consumers using comparison websites.

### Maximum Monetary Threshold?

The maximum monetary threshold under the ACL is currently \$40,000 for consumer purchases and has not increased since 1986 and needs to be reviewed.

**Submission:** That the maximum monetary threshold of \$40,000 contained in the ACL definition of consumer be reviewed and increased. Alternatively, that consideration should be given to removal of a maximum monetary threshold.

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

### 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?

LAQ supports the submission of Legal Aid New South Wales made in response to this question.

### 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?

Legal Aid Queensland supports the submission of Legal Aid New South Wales made in response to this question.

Legal Aid Queensland also supports that when determining what improvements and expansions should be made to the general protections regime under the ACL that consideration and guidance be gained from both the UK Consumer Protections from Unfair Trading Regulations 2008 and The Unfair Practices Directive 2005 (European Union).

Legal Aid Queensland supports bolstering the prohibitions on misleading and deceptive conduct and unconscionable conduct by importing concepts from the EU directive especially Articles 7, 8 and 9.

Article 7 (Misleading omissions) (at 1) states that a commercial practice shall be misleading if, in its factual context,.....it omits material information that the average consumer need, according to the context, to take an informed transaction decision and thereby causes or is likely to cause the average consumer to take a transaction decision that he would not have taken otherwise.

Article 8 (Aggressive commercial practices) prohibits commercial practice which significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes or is likely to cause the consumer to take a transactional decision which the consumer would otherwise not have taken.

Article 9 (use of harassment, coercion and undue influence) refers to the exploitation of any specific misfortune or circumstance of such gravity as to impair the consumer's judgment of which the trader is aware.

Submission: Legal Aid Queensland submits that when assessing what improvements and expansions should be made to the general protections regime under the ACL that consideration and guidance be gained from both the UK Consumer Protections from Unfair Trading Regulations 2008 and The Unfair Practices Directive 2005 (European Union).

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

**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?**

and

**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 Queensland recognises that specific protections in the ACL are effective and not onerous or represent unnecessary costs for businesses. LAQ does, however, suggest the following improvements should be made.

### False or misleading representations

Legal Aid Queensland supports the view that the prohibitions on false or misleading representations and misleading and deceptive conduct are effective. LAQ supports an amendment to the ACL to ensure that the penalties applicable to false or misleading representations and misleading and deceptive conduct are the same. Please refer to our response and recommendations set out under Question 19.

### Unfair practices

Legal Aid Queensland supports the protections for consumers from unfair practices set out in Part 3.1, Divisions 2-5.

### Consumer Guarantees

Consumer guarantee provisions are one of the most important parts of the ACL. These guarantees provide some protections. Importantly these rights apply irrespective of whether a supplier has acted unfairly or fraudulently.

Legal Aid Queensland supports the ACL consumer remedies regarding safety and quality of goods based on the information provided by the business and the quality and price of goods supplied. Regarding areas for improvement and issues to be raised, LAQ considers the following to be relevant:

#### Product lifespan information should be provided.

Currently insufficient information regarding product lifespan is being provided. Price is an insufficient indicator of lifespan as it can be linked to high end features and does not correlate to the lifespan of a product. Product descriptions may list features but provide no guidance as to lifespan of a product subject to usual usage. Price and product description are not sufficient to enable the consumer to evaluate the cost benefit of the product. Lifespan information is critical to assessing price, environmental impact, and to allow a comparison with similar products. It is highly probable that high output manufacturers hold this information.

In a mature market, where information is disseminated and updated easily, this information ought to be accessible before purchase to enhance consumer confidence.

### Definitions of acceptable quality and fit for purpose

It would assist consumers if these definitions were even more prescriptive. Acceptable quality and fit for purpose definitions which are clearer and more prescriptive would assist consumers in assessing price, environmental impact, and to allow a comparison with similar products

To be able to prove a consumer guarantee, expert evidence is required to establish whether the product is of acceptable quality, or is fit for purpose. Consumers rarely have the financial resources to obtain expert evidence required to prove their claim that the product was not of acceptable quality or fit for purpose. This issue could be addressed by:

- the provision of lifespan information;
- prescriptive definitions of acceptable quality and fit purpose, and
- access to independent and cost-free expert funded by industry to assess claims.

In LAQ's experience, consumers find accessing a court or tribunal about consumer goods expensive, difficult and intimidating. Consumers are rarely able to afford legal representation to deal with ACL cases. There is limited free legal advice and assistance available on these issues.

In Queensland, not all actions against suppliers can be brought in the Queensland Civil and Administrative Tribunal (QCAT) because all suppliers do not fall within the definition of trader in the relevant legislation.

**Submission:** Legal Aid Queensland recommends that the ACL require that lifespan information and prescriptive definitions for acceptable quality and fit for purpose be provided.

**Submission:** Legal Aid Queensland recommends the establishment of a panel of independent experts to assist consumers in assessing and/or establishing their claims under the ACL for a breach of a consumer guarantee. LAQ further supports this assistance being funded by industry and provided at no cost to consumers.

**Submission:** Legal Aid Queensland recommends consideration of whether such expertise could be co-located with a Retail Ombudsman discussed below at question 25.

**Submission:** Legal Aid Queensland supports funding to Legal Aid Commissions and Community Legal Centres to provide advice and representation to consumers with claims under the ACL.

### Regulator's ability to take representative actions for consumers

As outlined above, LAQ recognises that consumers find it difficult to individually access the remedies available to them by using the consumer guarantee provisions of the ACL.

One option that could contribute to alleviating this difficulty faced by consumers is to allow the regulator to take representative actions on behalf of consumers.

The advantages of such an approach are:

- it alleviates the pressure of consumers in vulnerable circumstances to find the funds for the costs associated with engaging with and enforcing their consumer guarantee rights; and
- It potentially allows a large number of consumers to have their complaint dealt with at the same time, instead of each individual consumer or groups of consumers having to run their own individual smaller actions.

**Submission:** Legal Aid Queensland supports allowing regulators to take representative actions on behalf of consumers.

### Extended Warranties

In LAQ's experience extended warranties are products that provide little or no benefit to consumers, who are often unaware that they have even purchased the warranty products.

Generally, these products are in fact add-ons to the purchase of a car or other major consumer good but are presented as products that are standard parts of the purchase process. At point of sale these products should be clearly identified as add-ons and clients informed of their existing consumer guarantee rights under the ACL.

Without this information consumers are unable to assess the true value and need for these additional warranty products.

One way of addressing this imbalance would be to make extended warranties subject to the same cooling off periods as unsolicited sales. The products are comparable because they are both products that a consumer did not originally either approach a supplier about or enter into negotiations with a supplier with the intention of purchasing.

**Submission:** Legal Aid Queensland recommends that extended warranties should be subject to a cooling off period of 10 business days.

### Unsolicited Consumer Agreements

There is currently an exemption in the ACL that permits goods up to a value of \$500 to be supplied during the cooling off period of an unsolicited sale.

Legal Aid Queensland considers that the existing exemption protects consumers in vulnerable situations by providing an ability to avoid high pressure sales tactics that are characteristic of unsolicited sales and the sense of obligation to businesses that use these tactics. This break allows a consumer to make an informed and unpressured decision about whether the product or service that they have contracted to purchase is an appropriate one for their needs and circumstances.

The ACL prohibits businesses from accepting payments for goods and services during the cooling off period. Allowing payments during the cooling off period will lead to consumers experiencing difficulties obtaining refunds if a decision is made to not proceed with the purchase. LAQ supports this prohibition being maintained.

Legal Aid Queensland submits that maintaining the status quo does not impose any disproportionate or unnecessary costs or disadvantages to business. Furthermore, any cost issue is outweighed by the strong benefits that are provided to consumers, particularly those in vulnerable circumstances.

**Submission:** Legal Aid Queensland does not support the expansion of the exemption to include:

- goods with a value greater than \$500; and
- services.

**Submission:** Legal Aid Queensland supports maintaining the current prohibition in the ACL preventing businesses from accepting payments for goods and services during the cooling off period.

### Importance of 10 day cooling off period given changes to Australia Post

In light of recent changes to Australia Post's mail delivery times, it would be detrimental to regional consumers to reduce the 10 day cooling off period for unsolicited sales. In LAQ's experience, many of our regional and rural clients rely on the postal system because they cannot afford continuous home internet service.

**Submission:** LAQ supports the maintenance of the existing 10 day cooling off period.

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

When a consumer purchases a major consumer good such as a car, boat, computer or phone, they have an expectation that the goods will work as advertised for the reasonable life of the product.

This expectation is reflected in Part 3.2 of the Australian Consumer Law (ACL) in sections 51-61. Of most relevance for consumers experiencing problems with lemon goods are:

- section 54 Guarantee as to acceptable quality
- section 55 Guarantee as to fitness for any disclosed purpose and
- section 56 Guarantee relating to the supply of goods by description.

These guarantees apply to all goods purchased by consumers in Qld by virtue of section 3(1) (c) of the ACL. Legal Aid Queensland proposes to focus its comments in this section on lemon cars, due to the number of clients who seek legal assistance about this issue.

In LAQ's submission, there are a number of issues that are important to address in any discussion concerning whether lemon laws are required for new cars:

- the consumer detriment created by lemon cars;
- definition of a lemon car; and
- the adequacy and availability of enforcement provisions available to consumers attempting to exercise their rights.

#### **a. The consumer detriment created by lemon cars**

The two most recent pieces of work in Australia on the issue of lemon cars are:

- "Lemon Laws – Inquiry into consumer protections and remedies for buyers of new motor vehicles – Report No. 17 55<sup>th</sup> parliament Legal Affairs and Community Safety Committee November 2015 – Qld Parliament; and
- Turning Lemons into Lemonade – Consumer Experiences in the New Car market – Choice – 15 March 2016.

Legal Aid Queensland acknowledges that the Queensland Parliamentary Inquiry in 2015 concluded that they had insufficient evidence to reach a conclusion on whether lemon cars are a prevalent issue<sup>1</sup>

In LAQ's view the important part of the Inquiry's finding is that those consumers who experience problems with a lemon car suffer significant health and financial costs as a result of their experience.

This is supported by the findings of Choice's Turning Lemons into Lemonade Report in 2016 which found that 66% of new car buyers experienced either major or minor problems with their new car within 5 years of purchasing it and that 15% of those people experiencing problems were unable to resolve it.<sup>2</sup>

While LAQ acknowledges that not all of the problems with cars referred to in the Choice report are likely to meet a legislative definition of a lemon car, the combined effect of the Qld Parliamentary Inquiry about the significant detriment suffered by people experiencing a lemon car when combined with the prevalence of

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<sup>1</sup> A view which was also supported by Commonwealth Consumer Affairs Advisory Council, *Consumer Rights – Reforming Statutory Implied Conditions and Warranties*, October 2009

<sup>2</sup> Turning Lemons into Lemonade – Consumer Experiences in the New Car market – Choice – 15 March 2016 at pages 4-5.

new car buyers experiencing a problem with their new car, mean it is appropriate that lemon laws for cars be introduced into the Australian Consumer Law.

**Submission:** Due to the significant consumer detriment experienced by consumers from lemon cars, it is appropriate to introduce protection from lemon products into the Australian Consumer Law.

## b. Definition of a Lemon Product

One of the concerns that have been previously discussed about the introduction of Lemon laws is the difficulty in creating a sufficiently clear definition of a lemon product.<sup>3</sup>

Legal Aid Queensland supports Recommendation 5 of the Queensland Parliamentary Inquiry's Report that:

*"The committee recommends the incorporation of clear and practical definitions and provisions into any nationally consistent laws applicable to new 'lemon' motor vehicles, including:*

- *mandatory time and repair limits, such as imposing limits on the number of times a supplier/manufacture can attempt to repair a defect in a motor vehicle and the number of days the vehicle can be 'off the road', before a buyer must be offered a refund or replacement;*
- *clarity as to when a supplier/manufacture must repair, refund or replace a motor vehicle;*
- *an adequate definition of what constitutes a 'lemon' motor vehicle, for example:*
  - *adequate definitions of 'acceptable quality' and 'fit for purpose'*
  - *clarity as to the distinction between major and minor defects*
  - *clarity as to the distinction between a 'lemon' and generic design manufacturing defects (requiring general recall) or serious design safety defects (requiring urgent attention)."*<sup>4</sup>

Legal Aid Queensland particularly supports the idea that any definitions of a lemon car must be practical. A useful starting point in the terms of reference to the Queensland Parliamentary Inquiry is to define lemon motor vehicles as "new motor vehicles with numerous, severe defects that reoccur despite multiple repair attempts or where the defects have caused a new motor vehicle to be out of service for a prolonged period of time." For reasons of certainty it is important to provide consumers, industry and manufacturers with more specifics to support this definition.

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<sup>3</sup> See Commonwealth Consumer Affairs Advisory Council, *Consumer Rights – Reforming Statutory Implied Conditions and Warranties*, October 2009, p 91-92.

<sup>4</sup> Lemon Laws – Inquiry into consumer protections and remedies for buyers of new motor vehicles – Report No. 17 55<sup>th</sup> parliament Legal Affairs and Community Safety Committee November 2015 – Qld Parliament at page 63. Supported in Principle by the Qld Government response to lemon Laws Inquiry at page 4.

If any of the conditions are met then the consumer is entitled to a replacement of the car or a refund of the purchase price.

**Submission:** That the ACL be amended to include a definition that defines a new car as a lemon and not of acceptable quality in the following circumstances:

- (i) It has been off the road and in repair for a total of five weeks across a two year period; or
- (ii) A total of five non-scheduled repairs required across the two year period; or
- (iii) A total of two safety related non-scheduled repairs in the two year period.

### c. The availability and adequacy of enforcement provisions

As highlighted by *Choice* in its report *Turning Lemons into Lemonade*, 15% of consumers who experience a problem with their new car find that they are unable to get their car fixed.<sup>5</sup>

In these circumstances that means the consumer's only remedy is usually to bring Court action in the Magistrates Court as many new cars falls outside the monetary limit of the Queensland Civil and Administrative Tribunal (QCAT) of \$25,000.

The prospect of starting court action as a self –represented litigant in Court or the fact that they are unable to afford a lawyer risks consumers not pursuing their rights under the ACL as the availability of free legal advice and assistance to help with this type of court action is limited.

Legal Aid Queensland welcomes the Queensland Government's in-principle support for examining whether the jurisdictional limit of QCAT should be raised to allow cases of lemon cars to be heard before QCAT.

Where a consumer is able to proceed with court or QCAT action under the current consumer guarantees or proceeds under an amended definition of when a car is not of acceptable quality, it then becomes a matter of expert evidence whether the car is an acceptable quality.

This places a high evidentiary and cost burden on consumers in vulnerable circumstances as they are often unable to afford costly expert reports that assess the level of defects in a car.

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<sup>5</sup> *Turning Lemons into Lemonade – Consumer Experiences in the New Car market – Choice – 15 March 2016*

**Submission:** That a sub-panel within the panel of independent experts proposed in relation to Questions 10 and 11 be established to assist consumers in assessing and/or establishing their claims under the ACL regarding lemon products.

**13. Do the ACL product safety provisions respond effectively to new product safety issues, and to the changing needs of businesses in today's marketplace?**

Legal Aid Queensland has no relevant experience with respect to this question.

**14. Could the handling of unsafe products that fall within the scope of the ACL and a specialist regulatory regime be made more effective, and how? Should protocols or other arrangements be established between ACL and specialist regulators?**

Legal Aid Queensland has no relevant experience with respect to this question.

## Other issues (2.4)

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

and

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

The ACL should prohibit commercial practices or business models that are unfair. Predatory practices cause significant harm to consumers in vulnerable circumstances who have limited capacity and resources to pursue their individual cases through a tribunal or court in order to access their ACL rights.

Systemic unfair commercial practices that need to be addressed by the ACL fall into three broad groups:

- business models that take advantage of the consumer being unable or failing to appreciate the unexpected consequences of a contract;
- business models that exploit consumers in vulnerable circumstances by charging fees or costs which far exceed the cost of providing the service. Inherent in this business model is that profitability is derived from excessive fees and costs being charged to the consumer; business models that take advantage of consumers in vulnerable circumstances who cannot access alternative products or are unaware of alternatives available to them. Consumers in vulnerable circumstances may be unable to access the alternate products because:
  - they have existing bad credit ratings; they cannot afford the upfront fees for alternate products; or
  - they experience difficulties with financial literacy which prevents their meaningful involvement in the market.

When faced with these obstacles, many consumers in vulnerable circumstances feel that they have no alternative but to engage with the business using predatory tactics and which has the effect of perpetuating the harm outlined above.

Consumers in vulnerable circumstances have limited capacity and resources to seek remedies through courts, tribunals or Ombudsman scheme for the harm caused by predatory practices. This is partly because the existing remedies in the ACL, relies on individual pursuing their own claims. There is no mechanism within the ACL to address systemic issues and effect change.

**Submission:** Legal Aid Queensland submits that consideration should be given to the introduction of a general prohibition against unfair commercial practices and business models in the ACL.

**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?**

Legal Aid Queensland has not encountered any unnecessary complexity in determining whether conduct falls with the ASIC Act or the ACL. The important consideration from LAQ’s perspective is that the consumer protections available under both acts remain consistent.

## Administering and enforcing the Australian Consumer Law

### Proportionate, risk-based enforcement (3.1)

**18. Does the ACL promote a proportionate, risk-based approach to enforcement?**

In LAQ’s view the ACL achieves its intent to provide a proportionate, risk based approach to enforcement. LAQ sets out in its responses to Questions 19-23; potential improvements to the legislation that LAQ believes would further enhance the proportionate risk based enforcement.

### Effectiveness of remedy and offence provisions (3.2)

**19. Are the remedy and offence provisions effective?**

In LAQ’s submission the effectiveness of the remedy and offence provisions have been demonstrated through:

- the enforcement of the law on unsolicited agreements (door to door sales) including the “Do Not Knock Sticker”;<sup>6</sup>

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<sup>6</sup> ACCC v Origin Energy Electricity Limited [2015] FCA 278; ACCC v Energy Australia Pty Ltd [2014] FCA 336; ACCC v AGL Sales [2013] FCA 1030; ACCC v Australian Power and Gas Company Ltd [ 2013] FCA

- the enforcement of misleading advertising provisions;<sup>7</sup>
- the unfair contract terms prohibitions in Part 2.3 which have largely been self-enforcing.<sup>8</sup> Where this has not been the case, the regulator has taken matters to court as appropriate;<sup>9</sup> and
- Wujal Wujal becoming the country's 1<sup>st</sup> Do Not Knock town.<sup>10</sup>

However, LAQ also notes the inconsistency between the remedies available for breaches of section 18 of the ACL which provides a general prohibition against misleading or deceptive conduct<sup>11</sup> and section 29 which prohibits for specific types of false or misleading representations.<sup>12</sup> The inconsistency is that the pecuniary penalties set out in Part 5.2 apply to section 29 but do not also apply to section 18.

In LAQ's view section 18 and section 29 are both important parts of the enforcement of misleading or deceptive conduct including representations. Section 18 provides a rule about general conduct that is made more specific in certain specified circumstances by section 29. It is not logical that representations about quality or origin are subject to financial penalties and representations not covered by section 29, which are equally damaging to consumers and the effective functioning of markets are not also subject to the same financial penalties.

**Submission:** That the pecuniary applying under Part 5.2 of the ACL for a breach of the ACL be extended to apply to a breach of section 18 of the ACL concerning misleading and deceptive conduct.

## 20. Are the current maximum financial penalties available under the ACL adequate to deter future breaches? and

## 21. Is the current method for determining financial penalties appropriate?

### Consistency of maximum penalties between industries

Section 224 of the ACL contains the maximum pecuniary penalties that apply for breaches. These penalties are \$1.1 million per contravention for a body corporate and \$220,000 per contravention for individuals. The penalties apply to breaches of false or misleading representations, unconscionable conduct, pyramid selling and product safety.<sup>13</sup>

1358; *Australian Competition and Consumer Commission v Neighbourhood Energy Pty Ltd* [2012] ATPR 42-426.

<sup>7</sup> See Optus regarding broadband advertising - <https://www.accc.gov.au/media-release/optus-pays-51000-in-penalties-for-alleged-false-or-misleading-representations-about-cable-broadband-internet-speeds> and *Australian Competition and Consumer Commission v Harvey Norman Holdings Limited* [2011] FCA 1407.

<sup>8</sup> Part 2.3 of the Australian Consumer Law- Schedule 2 to the Competition and Consumer Act 2010.

<sup>9</sup> For example see *Australian Competition and Consumer Commission v Chrisco Hampers Australia Limited* [2015] FCA 1204.

<sup>10</sup> <http://www.abc.net.au/news/2016-04-22/door-to-door-salespeople-warned-off-remote-indigenous-community/7347512>

<sup>11</sup> That applies to all business conduct across all sectors of the economy.

<sup>12</sup> This includes representations as to quality.

<sup>13</sup> Section 224 of the Australian Consumer Law – Schedule 2 to the Competition and Consumer Act 2010.

In contrast the maximum penalties available under the Australian Securities and Investment Commission Act 2001 (ASIC Act) which governs similar conduct in financial services are \$1.8 million for a body corporate and \$360,000 for an individual.<sup>14</sup>

The only apparent difference between the conduct is that under the ASIC Act conduct occurs in the financial services area and under the ACL conduct applies to all other industries. The conduct is equally serious and has equally profound impacts on consumers and the market.

**Submission:** That the current maximum pecuniary penalties applying under the ACL be increased to mirror the penalties which apply to prohibited conduct under the ASIC Act.

### Penalty Units vs Monetary Units

Legal Aid Queensland notes that a major reason for the discrepancy between the penalties under the ASIC Act and the ACL is that the penalties in the ASIC Act are expressed in penalty units whereas the penalties under the ACL are not. The consequence of this is that the maximum penalty under the ASIC Act has increased as the penalty unit has been indexed<sup>15</sup> but the penalty under the ACL has remained static.

In LAQ's submission a simple way to correct this inconsistency would be to express the pecuniary penalties under the ACL in penalty units instead of monetary terms. This change would ensure consistency between the ASIC Act and the ACL which regulate the similar conduct across different industries.

**Submission:** That the pecuniary penalties expressed in section 224 of the ACL be expressed in penalty units and not monetary terms.

## 22. Are the non-punitive orders available under the ACL sufficient for the court to apply an appropriate order to address the harm caused by a breach?

There is an important role for non-punitive orders as part of the enforcement regime for a breach of the ACL. These include:

- the repair of harm and reduction in future harm to consumers;
- improving the conduct of industry in the market.

Corrective advertising orders, community service orders and compliance orders improve consumer and industry awareness of what constitutes acceptable industry conduct.

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<sup>14</sup> Section 12GBA of the ASIC Act expressed as 10,000 penalty units for Body Corporates and 2000 penalty units for individuals.

<sup>15</sup> See Section 4AA of Crimes Act 1914. (Currently \$180 per unit).

**Submission:** Legal Aid Queensland supports the continued use of non-punitive orders as part of ACL enforcement.

### 23. What could be done to improve the consistency in the approach to ACL penalties and remedies across jurisdictions?

Legal Aid Queensland supports the multi-regulator approach and structure that is established under the ACL. In LAQ's experience giving an over-arching power to the ACCC and powers to State and Territory regulators has allowed national issues to be tackled effectively at the same time as allowing state based issues to be appropriately responded to.

This combined approach is important as it encourages co-ordination between regulators while at the same time allowing a flexibility of response to issues when they arise.

In LAQ's submission what would further improve this co-ordination is providing all ACL regulators with the power to issue infringement notices under the ACL and enforce ACL civil remedy orders. Such a power would improve flexibility by allowing state and territory based regulators to address issues that are unique to their own jurisdictions without the need for the ACCC's involvement. It will also allow resources of all regulators to be more effectively managed.

**Submission:** That all ACL regulators be given the power to issue infringement notices and enforce ACL civil remedy orders.

Legal Aid Queensland supports the proposal that all state and territory regulators be given the capacity to start proceedings in the Federal Court to obtain orders to restrain conduct nationally. In LAQ's view, it is important for consumer protection that if conduct is discovered in one state and there is a risk that it is occurring in all states that orders can be obtained stopping the conduct across Australia. This power would save resources for the regulator, improve co-ordination between State regulators and greatly improve consumer protection.

**Submission:** Legal Aid Queensland supports giving state and territory regulators the capacity to bring proceedings in the Federal Court to obtain orders nationally.

### 24. Do you have views on any of the issues raised in section 3.2?

The issues have been covered in the response to Questions 19-23.

## Access to remedies and scope for private action (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?

In LAQ's experience there are a number of barriers that prevent consumers and particularly consumers in vulnerable circumstances from enforcing their rights and seeking access to remedies under the ACL.

These include:

- consumers are often not aware that they have a legal problem or that they have legal rights that might assist them to resolve their problem;
- consumers may not be aware of how to contact and/or choose appropriately experienced lawyer when seeking assistance;
- many consumers are unable to afford a lawyer, particularly for small amount consumer disputes;
- free legal advice and assistance provided by Legal Aid Commissions and Community Legal Centres is limited in this area of law.
- consumers in vulnerable circumstances view courts and tribunals as unfamiliar and intimidating places where they cannot easily tell their story.
- consumers in vulnerable circumstances do not feel comfortable in taking on a company in a direct adversarial environment such as a court or tribunal.

Legal Aid Queensland submits that some of these barriers to private action can be addressed by:

- Continuing education of all consumers and especially vulnerable consumers both by the publication of guides such as be Smart – Buy Smart and through the education of consumers directly. LAQ undertakes extensive community legal education. For example LAQ has conducted education sessions for TAFE students undertaking English courses about their consumer rights;
- greater funding to Legal Aid Commissions and Community Legal Centres to expand their advice and casework services in consumer disputes under the ACL and ASIC Act; and
- the establishment of a Retail and Consumer Ombudsman similar to that in the United Kingdom as a low cost mechanism for addressing consumer disputes under the ACL (refer to further submissions in answer to Question 27).

**Submission:** Legal Aid Queensland submits that the expansion of education programs to inform consumers about the existence of their rights under the ACL should be continued.

**Submission:** Legal Aid Queensland submits that greater funding of legal aid commissions and community legal centres to expand their advice and casework services in consumer disputes under the ACL and ASIC Act is required.

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

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

Legal Aid Queensland deals extensively with the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO), the Telecommunications Industry Ombudsman (TIO) and the Energy and Water Ombudsman Queensland (EWOQ).

In LAQ's experience, consumers are more likely to engage with an Ombudsman's service rather than the courts for the following reasons:

- they are not at risk of a costs order;
- the process is less adversarial than court;
- there is no expectation that a consumer will have to travel and attend a hearing;

- lodging a dispute with an Ombudsman creates a space for resolution as there is an immediate stay on both sides attempting to enforce their legal rights;
- ombudsman processes are aimed at finding resolutions that are fair and reasonable in the circumstances in light of the law and good industry practice;
- consumers in vulnerable circumstances feel more empowered telling their story to non-adversarial 3<sup>rd</sup> party;
- consumers do not necessarily need a lawyer to assist them through the Ombudsman process;
- the decision makers at the Ombudsman are specialists in the area of law and industry;
- ombudsman schemes are more likely to identify systemic issues within an industry or about a company;
- the Ombudsman schemes improve access to justice for consumers in vulnerable circumstances without placing them at further risk of worsening their financial circumstances as could happen with court proceedings.

Consequently, LAQ supports the introduction of a Consumer and Retail Ombudsman similar to that which was introduced by the UK Government in 2015 to provide a low cost alternative to tribunals and courts. In LAQ's view Ombudsman schemes already provide effective and no cost access to justice and dispute resolution for consumers and particularly consumers in vulnerable circumstances.

It is submitted that there is no substantive difference between these markets where ombudsman schemes already successfully operate and the retail and consumer markets which are the subject of the ACL.

**Submission:** Legal Aid Queensland recommends the establishment of a Retail and Consumer Ombudsman to provide a low cost, alternative dispute resolution mechanism for the ACL.

## 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 Queensland considers that there are two consistent experiences that consumers have with ACL regulators and these are:

- regulators are slow at resolving disputes. In LAQ's submission, this concern could be addressed through the implementation of a Retail and Consumer Ombudsman<sup>16</sup>; and
- regulators are ineffective at providing feedback to consumers who have lodged complaints.

**Submission:** That the ACL regulators provide consumers in timely manner with an acknowledgement of complaint and information regarding what action they intend to take.

### 29. How could the ACL or other Australian laws be improved to provide Australians with better protection when engaging in cross-border transactions with overseas traders?

Legal Aid Queensland agrees that the *Competition and Consumer Act 2010* extends the ACL's reach to conduct that occurs outside of Australia.

However, successfully holding companies to account that do not have a physical presence in Australia is difficult. This is particularly the case with the on-going growth of internet based businesses which are not set up in Australia but still sell to Australia consumers.

In LAQ's experience is that consumers are less willing to pursue their legal rights under the ACL where the seller is based overseas because of the difficulties in enforcing a judgement obtained in Australia.

**Recommendation:** Legal Aid Queensland supports the project to develop a global judgements convention. The reason for this is that it will provide greater access to Australian consumers to mechanisms for successfully enforcing ACL judgements obtained from Australian Courts and tribunals against companies with no physical presence in Australia.

## 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 sales generally affect consumers in vulnerable circumstances disproportionately to other members of the community. People in these vulnerable circumstances have less disposable income and as a result are proportionately more affected by any unsolicited consumer agreement.

Due to their circumstances, vulnerable consumers are less likely to be able to immediately protect themselves when approached by unsolicited salespeople. As a result it is important that extra protections such as a 10 day cooling off period (with the current prohibition on businesses excepting payment during this period discussed in relation to question 11) remain to protect consumers in vulnerable circumstances. This extra time allows them to properly consider their purchases away from the pressure of an unsolicited salesperson and access legal advice and assistance.

In LAQ's experience, the ACL has been very successful in addressing the potential harm to consumers in vulnerable circumstances that can be caused from unsolicited sales. This is highlighted by the case law

concerning unsolicited selling of electricity and the confirmation of the legal status of the “Do Not Knock Sticker” in Court<sup>17</sup>.

**Submission:** That the unsolicited consumer sales agreement provisions of the ACL<sup>18</sup> be maintained.

**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’?**

Legal Aid Queensland considers that the distinction between “solicited” and “unsolicited sales” has been blurred by the expansion of internet and social media marketing. We would welcome any proposal that would see the current protections applicable to unsolicited consumer agreements and unsolicited sales being expanded to apply to all sales which are conducted away from business premises.

**Submission:** Legal Aid Queensland supports existing protections for unsolicited sales agreements being expanded to all sales conducted away from business premises.

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

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

Legal Aid Queensland is aware that there is currently some uncertainty between the views of consumer advocates and the views of industry as to whether the ACL unsolicited consumer agreement provisions apply to pop up stores in shopping centres.

In reviewing LAQ’s casework, our clients have seen no material difference in their experience between sales made directly at “pop up stores” in a shopping centre<sup>19</sup> where consumers approach the pop up store to make an enquiry and sales made when the consumer is directly approached by a salesperson in the common area of the shopping centre<sup>20</sup>.

Consumers, including consumers in vulnerable circumstances, feel subject to the same high pressure sales tactics and “fear” that there won’t be another opportunity to buy from that business regardless of how the initial approach was made.

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<sup>17</sup> ACCC v Origin Energy Electricity Limited [2015] FCA 278; ACCC v Energy Australia Pty Ltd [2014] FCA 336; ACCC v AGL Sales [2013] FCA 1030; ACCC v Australian Power and Gas Company Ltd [2013] FCA 1358; *Australian Competition and Consumer Commission v Neighbourhood Energy Pty Ltd* [2012] ATPR 42-426

<sup>18</sup> See Part 3.2, Division 2 of the Australian Consumer Law, Schedule 2 to the Competition and Consumer Act 2010.

<sup>19</sup> Not caught by the ACL provisions

<sup>20</sup> Caught by the ACL provisions.

In LAQ's view the ACL should be amended to clarify that both sales made where a consumer is approached in the common areas of a shopping centre and when a consumer directly approaches a pop up store in a shopping centre are subject to the consumer protections set out in the ACL's provisions about unsolicited consumer agreements. The issues are highlighted the case studies below:

**Case Study 1:** Ms Jones was approached in the common area of her local shopping centre by a company that offered to take photographs of her and her family. When Ms Jones informed the salesman that she could not afford the photos, she was offered a photo shoot and a set number of photographs at a greatly reduced price.

Mrs Jones returned a week later for the photo shoot. It was not until the end of the photoshoot that she was made aware that she had an obligation to purchase far beyond initial package she had agreed to purchase. She was told that she could not purchase the photographs in the initial package without agreeing to the additional items. She felt obliged to proceed with the expanded contract on the day.

The next day, after considering what had happened at the photoshoot; Ms Jones attempted to cancel her contract using the unsolicited sales sections of the ACL. The company informed her and that she had no cooling off period rights and that the agreement was not covered by the unsolicited sales area of the ACL.

After seeking advice and assistance from Legal Aid Queensland, Ms Jones successfully exercised her cooling off period rights and the company has not pursued her for payment.

**Case Study 2:** Ms Smith was shopping with her young child and she approached a salesman working at a pop up store. He offered her a free photo of her child if she agreed to allow her child to participate in a photo shoot for the company. The photo shoot was completed and Ms Smith was encouraged to come back in three weeks to pick up her free photo. When she returned to the pop up store three weeks later, Ms Smith was given the impression that in order to receive her free photograph she had to purchase a photo package worth several thousand dollars. As she thought she was obligated to do so, Ms Smith agreed to the package and left with her free photograph. However, she subsequently realised that she could not afford package and sought to exercise her cooling off period rights under the ACL. The company disputed Ms Smith's ability to rely on a cooling off period because they argued that the cooling off period under the ACL did not apply. Ms Smith has not been successful in challenging her debt to the company.

**Submission:** The ACL should be amended to make clear that the unsolicited consumer agreement provisions apply to both sales made from a pop up store in a shopping centre and when a consumer is approached directly in the common area of the shopping centre away from the pop up store.

## Online shopping (4.2)

### 34. Is it sufficient for a business to disclose the total minimum price before making a payment, or should optional fees and charges also be disclosed upfront?

The issue of price transparency is one of fairness and honesty in how a business interacts and deals with consumers.

In LAQ's experience, one of the primary considerations that a consumer has in their mind when engaging with the market is price. Consumers differentiate not only between different suppliers of goods on price but also between different products offered by the same provider on the basis of price, fees and charges.

This differentiation between products is much harder for consumers in the on-line market if optional fees and charges are not disclosed up front.

Legal Aid Queensland supports the view that in the on-line environment businesses' should be required to disclose the total minimum price plus all optional fees and charges.

**Submission:** That businesses' operating on-line should be required to disclose the total minimum price plus all optional fees and charges upfront.

### 35. Are there any changes that could be made to the ACL to improve pricing transparency?

Price transparency could be improved by the ACL requiring a key price screen to all on-line sales. Similar to the *Key Mortgage Fact Sheet* that was introduced as part of the National Consumer Credit Reforms, the key price screen could be made a mandatory first screen in any on-line sales process.

The key price screen should include:

- the total minimum price payable;
- all optional fees and charges that could be charged as part of the product being purchased.

**Submission:** Legal Aid Queensland recommends the introduction of a key price screen, similar to mortgage key fact sheets, to improve the transparency in on-line transactions.

### 36. Does the ACL adequately ensure that online sellers provide safety information about products and services at the point of sale?

Legal Aid Queensland has no experience in product safety issues.

### 37. Do the existing ACL provisions (including provisions on false or misleading representations) adequately address issues regarding the transparency of comparator websites and online reviews? How could this be improved?

#### Comparator websites

In LAQ's experience, the issues commonly faced by consumers in dealing with comparator websites are:

- consumers believe that the sole purpose of the website is to act for the benefit of the consumer;
- consumers are not aware that a comparator websites examine only some products available in a market; and

- consumers are not aware that comparator websites are not independent and that there a commercial relationship between service providers and the comparator website.

Legal Aid Queensland welcomes the ACCC guide issued in August 2015 for comparator websites and suppliers which sets out three key principles that comparator website operators should comply with. They are:

- facilitate honest like for like comparisons;
- be transparent about commercial relationships; and
- clearly disclose who and what is being compared.

However, in LAQ's submission this guide does not go far enough as there is no significant consequence to a comparison website for failing to comply with this guide. Comparator websites should be regulated similarly to brokers in order to ensure a fair market.

**Submission:** That the ACL should be amended to include a specific new division in Chapter 3, Part 3.2 that deals specifically with comparator websites that mandate specific disclosure about areas such as a comparator website's independence and relationships with industry, and product coverage.

## Emerging business models and the Australian Consumer Law (4.3)

### 38. Does the ACL provide consumers with adequate protections when engaging in the 'sharing' economy, without inhibiting innovation and entrepreneurial opportunities?

Legal Aid Queensland has no relevant experience with consumer issues in relation to the sharing economy.

However, Legal Aid Queensland is of the view that another emerging business model that should be examined is third party direct debit providers.

#### Third Party Direct Debit Providers

A popular payment method in the market for both goods and services is payment by instalments via automatic direct debit from a customer's account. LAQ has witnessed the emergence of outsourced payment collectors who are exempt from the protections in the National Consumer Credit Code because they do not charge fees and interest over and above administrative fees.

Increasingly these providers are assisting small retail businesses such as jewellery stores, childcare centres, fitness clubs, and large franchised business to attract and make sales and manage billing.

Typically consumers enter into a direct debit agreement with the provider at the time they purchase goods or services.

Legal Aid Queensland clients report the enforcement of direct debit agreements in circumstances where the goods or services contracts are unenforceable.

For example, where a contract is cancelled during a cooling off period there is no easily enforceable mechanism to ensure that the associated payment plan is terminated.

Another example is where the payment provider attempts to enforce a contract despite the cessation of services from the retailer because of its insolvency.

Consumers are obliged to resolve disputes on two fronts, with the retailer and the payment provider.

Whereas if the payment method was credit, consumers would have access to external dispute resolution, there is no obligation for these providers to hold membership of the financial services sector ombudsman schemes.

Legal Aid Queensland recommends that these third party payment providers be regulated and their status as linked credit providers legitimised in the ACL. Mechanisms for terminating these contracts should be made explicit, equivalent to other linked credit contracts.

Consumers would benefit from access to external dispute resolution such as provided by the financial services ombudsman when disputes arise with these providers.

**Submission:** That Third Party Direct Debit Providers be regulated by the ACL and membership of external dispute resolution mandated for such businesses.

**39. Does the ACL provide adequate clarity and certainty for consumers when engaging in the ‘sharing’ economy? What areas need to be addressed, and what types of personal transactions should be excluded?**

Legal Aid Queensland has no relevant experience with respect to this question.

## **Promoting competition through empowering consumers (4.4)**

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

Legal Aid Queensland has no relevant experience with respect to this question.

**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?**

Legal Aid Queensland has no relevant experience with respect to this question.

**42. Does the provision of data, or the emergence of an ‘infomediary’ market create, or increase, any risks of consumer harm not adequately addressed by the ACL? If so, how could the ACL mitigate these risks as the market evolves?**

Legal Aid Queensland has no relevant experience with respect to this question.

**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 Queensland has no relevant experience with respect to this question.