



27<sup>th</sup> May 2016

Australian Consumer Law Review – Have Your Say

Submitted online: [www.consumerlaw.gov.au](http://www.consumerlaw.gov.au)

SUBMISSION IN RESPONSE TO THE AUSTRALIAN CONSUMER LAW REVIEW  
ISSUES PAPER March 2016

The Caravan, Camping & Touring Industry & Manufactured Housing Industry Association of NSW (including Caravan & Camping Industry Association, Manufactured Housing Industry Association and Land Lease Living Industry Association) is this State's peak industry body representing the interests of caravan and holiday parks, manufacturers and retailers of recreational vehicles (RVs) (motorhomes, campervans, caravans, camper trailers, tent trailers, 5th wheelers and slide-ons) and camping equipment, residential land lease communities and manufacturers of relocatable and manufactured homes.

We currently have, as members, over 700 businesses representing all aspects of our industry. More than 400 are operators of holiday parks and residential land lease communities (residential parks, including caravan parks and manufactured home estates) in New South Wales and over 200 are manufacturers, retailers and repairers of RVs and accessories.

The geographical breakdown of our association members is:

Region	Number of Businesses
Far North Coast & Tweed	60
North Coast	77
New England (North Western NSW)	21
Manning/Forster	27
Newcastle & Hunter	85
Central Coast	61
Sydney & Surrounds	96
Leisure Coast (Illawarra and Shoalhaven)	61
South Coast (Eurobodalla and Sapphire Coast)	76
Central NSW	28
Murray & Riverina	30
Canberra & Snowy Mountains	19
Outback NSW	7
Interstate	81

As an important stakeholder in this industry we welcome the opportunity to respond to the Australian Consumer Law Review Issues Paper of March 2016 (Issues Paper).

## 1 INTRODUCTION

To assist us in preparing a response to the Issues Paper we surveyed our members posing 40 questions distilled from the information provided in the Issues Paper. A spreadsheet with the questions and the responses received is attached as is the information bulletin given to our members.

The issues identified in the responses can be summarised as:

- A. Defining major failure and the impact of delays beyond the control of the trader. The questions posed What constitutes a major failure? What is a reasonable amount of time?<sup>1</sup>
- B. Costs of attendance and involvement in proceedings and the need for a triage system.
- C. Greater emphasis on enforcement of the consumer law to get better compliance. Swift decisive enforcement action could have minimised injuries, loss and inconvenience.
- D. Clear and concise language is important, not only in the legislation but in contracts.

From our member responses and our discussions it is our view that the Australian Consumer Law is an effective legislative program that is providing elements of certainty and professionalism in the marketplace. However, there remains a concern that some adjustments are required to take account of the experience since the legislation was introduced in 2010.

## 2 WHAT CONSTITUTES A MAJOR FAILURE?

This is an issue that was considered in the decision of NCAT referred to A. above and in footnote 1.

The state of the repair industry in New South Wales at least is that there will be at least 3-4 months lead in time to get repairs carried out on caravan and motorhome products. Without specific recognition that the failure to repair within a reasonable time is not caused by the trader but by the state of the repair industry's workload which causes delays in repairs, there will be the likelihood of unnecessary and unrealistic economic expectations placed on traders.

We recommend that to get the correct balance between consumers' reasonable expectations and the ability of the industry to respond there should be a clearer recognition in supporting information and direction from the regulators about the impact of this issue.

## 3 COMPLIANCE AND ENFORCEMENT OF THE LAW

This was a common theme in the responses we received. There is a constant call for a level playing field in relation to the requirements for Australian products against cheap non-complying imported products.

It is our view that there needs to be a national approach to ensuring that imported products comply with the required Australian Standards. These requirements are enforced against

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<sup>1</sup> See *Ingold v Coastal Caravans Pty Ltd* [2016] NSWCATCD 12 at p8, par 40 "Most repairers have a book in lead time between 3-4 months".

Australian products but there must be a more concerted approach to ensuring compliance at the time of entry to the Australian market.

#### 4 CLEAR AND CONCISE LANGUAGE

Our respondents supported our experience with the legislation, documentation surrounding contracts, product description and operational instructions by asking for a greater effort in providing clear, easy to understand and relevant information.

There appears to be a difficulty in securing the linkage between the legislation and how it is implemented in the marketplace. The explanatory information provided by the ACCC could be refined to meet these needs.

#### 5 THE CASE FOR Triage IN PROCEEDINGS UNDER THE AUSTRALIAN CONSUMER LAW AND THE NSW CIVIL AND ADMINISTRATIVE TRIBUNAL

The Association argues that procedures need to be improved at the preliminary stage of the application process in the NSW Civil and Administrative Tribunal (NCAT). Many members have been required to respond to NCAT applications by consumers where there is no basis in law or fact for the claim.

There needs to be a screening process implemented that will minimise losses incurred by those appearing before the Tribunal to argue on lost causes that do not have any legal basis. This is especially so where applications by consumers do not fall within the jurisdiction of the Tribunal or the orders sought in the application form are not relevant to the law, application forms are filled out incorrectly, or sometimes the wrong application form is used.

These types of matters need to be addressed prior to the matter being listed for hearing in order to reduce the time wasting and costs incurred by many traders having to prepare responses for applications that are lacking in substance and are probably a legal nonsense.

Because our members are spread throughout NSW they are often required to travel long distances in remote areas to attend NCAT sittings. Even where there are delays beyond the control of NCAT and the parties they are required to attend on more than one occasion, only to be told at a subsequent sitting that the application must be dismissed because there is no substance in law and probably in fact for the claim.

Our members have to get advice about the matter and pay for those services. In some matters they employ an advocate to appear on their behalf. In responding to these applications they are required to expend time and money to attend, sometimes on multiple occasions. What this leads to is that after appearing before NCAT, the matter is dismissed and there is usually no effective recourse to costs orders against the applicant.

We urge the adoption and implementation of a 'triage system' in NCAT where a senior Registrar or Tribunal Member will review applications before they are listed for hearing to determine whether the claim has any legal substance or merit. Applications should be vetted for jurisdiction and other errors so that parties are not unnecessarily required to appear before NCAT. This would reduce unnecessary costs to appear before NCAT to respond to futile cases. NCAT could then allocate its time more effectively by dealing with

cases that actually do need to proceed to a hearing for determination in a timely manner.

If a NCAT Member allocated a triage role reviews an application that does not on its face seem legally sustainable, the Member should be able to contact the applicant and explain to the applicant why the application is not sufficiently complete to be set down for a hearing. It is not suggested that the Member advise the applicant about how to structure their argument, or what orders to ask for but rather suggest why the application is implausible at this stage and perhaps direct the applicant to contact Fair Trading NSW, an advocacy service or a legal adviser to assist the applicant redraft and re-submit an application. If the claim in the application has no jurisdiction under legislation the applicant could be told so by the triage Member and the application not listed for hearing until the defects are removed or remedied.

As well as the economic savings to respondents in not incurring costs by travelling to the NCAT venues, taking time off work and employing an advocate to appear, NCAT itself could benefit economically by removing cases early on that have no judicial standing. NCAT would also be able to better utilise valuable sitting time to attend to more matters, quicker and inexpensively.

One of the major concerns for our members is cutting down on the costs that can easily be imposed. Applicants who are pensioners can for a fee of \$5.00 apply to NCAT and without any suitable screening process can impose unnecessary cost and disruption. There is no real or effective costs disincentive for these applicants to ensure that they have an application that can lead to a resolution of the issue or issues.

There also needs to be more effective orders and directions about the provision of evidence with a costs impact if not provided. If there is an effective triage system sorting out these issues should minimise those cases that require a first, a second (and more) appearances at NCAT.

A triage function at NCAT needs to be run in conjunction with a regime where if a case is eventually dismissed and the applicant was advised by the other side that they believed the case was without substance and that they would seek costs, then NCAT should be bound to award reasonable costs to the respondent. This approach will encourage communication between the parties and the exchange of documentation before getting to NCAT so the parties have a better chance to understand the issues raised in the application and possibly result in a resolution before going to a formal hearing at NCAT.

In the past, the experience of our members has been that NCAT has described that a hearing is necessary to tease out the issues to see if there is a case, even if there does not seem to be one on the basis of the written application alone. But at whose time and expense does this occur? This is where the implementation of a vetting process comes into effect. We do not object to the applicant being contacted about the deficiencies of their case, but they should be contacted prior to any listing for hearing and be given the chance to clarify their case before any hearing takes place.

As part of NCAT's current case management system, applications should be vetted for jurisdiction and other errors prior to being listed for conciliation and hearing. At present NCAT's registry role is to provide information to the parties and the public about the practices and procedures of the Tribunal to support the dispute resolution functions and to

manage the resources of the Tribunal. These roles must be exercised to ensure the integrity of the NCAT system is maintained. The resources of NCAT would be better maintained if a triage system were in place to assess the suitability of applications for hearing.

The implementation of a triage system would not be for the triage Member to provide an opinion or tell the applicant what the final decision might or will be. Registry staff should be offered training to assess the whether there are any merits of a case and to detect errors early on, the use of incorrect forms, jurisdictional issues or clear lack of evidence. The implementation of a triage system is not to defeat the purpose of keeping the role of the Registry separate from the independent decision making role of the Tribunal.

Triage would greatly improve the current deficiencies that impact on the ability of the Australian Consumer Law to provide a ready and effective mechanism for traders and consumers.

### Triage and the Australian Perspective

In 2009, the then Attorney General (Commonwealth) said that an effective accessible civil justice system should be a system where people are able to resolve their disputes quickly, effectively and fairly, using the most appropriate method for their particular circumstances. Access to information and increasing the opportunities to resolve disputes early, either in or outside court, are important drivers for access to justice. Like a hospital, an effective justice system should have an inbuilt triage function, enabling matters to be directed to the most appropriate destination for resolution, irrespective of how people make contact with the system.

An effective and affordable civil justice system has even greater importance in the current economic climate. More than ever before it is imperative we have a well-functioning justice system better equipped to assist people when they most need assistance, advice and guidance.

### Conclusion

What the parties using NCAT and exercising their rights under the ACL need is an integrated system focusing on reasonable outcomes for parties within a reasonable time frame at reasonable cost. Documented case management procedures (e.g. triage) assist with management of caseloads and cost and enable the effective use of limited resources.

### Recommendations with respect to triage in NCAT

1. NCAT should adopt a policy to support a process to check applications ("the triage process") prior to listing matters for hearing.
2. NCAT should ensure a dedicated resource (Member or Deputy Registrar) is engaged to manage and oversee this process.
3. Only after triage and confirmation from the Member should a matter be listed requiring the appearances of parties.

4. NCAT should communicate as soon as possible the new processes, policies and procedures to all relevant stakeholders.

## CONCLUSION

As an important stakeholder in relation to the application of the Australian Consumer Law in New South Wales we are keen to continue to participate in any further discussions on the issues we have raised or any other relevant issues raised by others. We request we be noted as a stakeholder and continue to be included in all future communications and meetings on this important review of the law and practice.

Thank you for your consideration of the issues we have raised.

Should you wish to meet and/or discuss any aspect of this submission please contact Bob Browne, General Counsel on (02) 9615 9920 or email [bob.browne@cciansw.com.au](mailto:bob.browne@cciansw.com.au).

Yours sincerely



Lyndel Gray  
Chief Executive Officer



## May Trade Meeting

Date: 4th May 2016  
Location: CCIA Offices  
Time: 8am - 10am

### More Information:

Jason Beckford - 02 9615 9999 or  
[jason.beckford@cciansw.com.au](mailto:jason.beckford@cciansw.com.au)

## Motor Dealer & Repairer Workshops

Conducted by Fair Trading NSW.

- 3rd May - Wagga Wagga
- 10th May - Dubbo
- 7th June - Epping
- 26th July - Revesby

More information at [Fair Trading NSW](#)

## HAVE YOUR SAY



The Australian Consumer Law is being reviewed by the Australian Government to determine whether it is operating as intended, how effectively the law is being administered and whether the framework is sufficiently flexible to respond to new and emerging issues in the marketplace.

The Association is preparing an industry response to the Issues Paper however, we want to hear from you about your experiences and your views about the ACL and how it could better serve our industry.

We have prepared an online survey summarising the information and questions in the Issues Paper for you to have your say. Your input is vital and we would be very grateful for your time.

[Click here to undertake the survey](#) before 13th May 2016.

**NOTE: you don't have to complete every section of the survey, just those important to you. For example, RV manufacturers may just want to complete the sections about consumer guarantees, lemon laws and product safety.**

If you would like to review the Issues Paper [click here](#).

If you have any questions please contact the Association's General Counsel, Bob Browne, on (02) 9615 9920 or email [bob.browne@cciansw.com.au](mailto:bob.browne@cciansw.com.au).



# eALERT

FOR CCIA/LLLIA/MHIA MEMBERS

## LAST CHANCE :: HAVE YOUR SAY

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