

## Referral Service

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Consumer Affairs Australia and New Zealand

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## Submission to the Australian Consumer Law Review Issues Paper

Justice Connect's Referral Service is pleased to provide a submission in response to the Australian Consumer Law (ACL) Review Issues Paper (**Issues Paper**) with a focus on making recommendations to improve the experiences of vulnerable consumers in asserting their rights under the ACL.

We note that Not-for-profit Law, another service of Justice Connect has also made a submission specifically addressing the harmonisation of state laws related to fundraising activities and clarifying the application of the ACL to a broad range of activities undertaken by not-for-profits.

## About Justice Connect's Referral Service

An integral part of the legal landscape in Victoria and New South Wales, Justice Connect works with the corporate and community legal sectors to increase access to justice for those experiencing disadvantage and to provide free legal help to community organisations. Through our deep and strong connections with the legal community, we aim to respond to unmet legal need, grow pro bono culture, and advocate for policy reform where the law is ineffective in serving those most in need.

Justice Connect's Referral Service facilitates referrals of individuals to Justice Connect member law firms and through the administration of the Victorian Bar Pro Bono Scheme and the Law Institute of Victoria's Legal Assistance Service.

## About our submission

This submission brings together insights from Justice Connect's Referral Service in facilitating pro bono legal assistance for vulnerable consumers in Victoria and New South Wales who have entered into unfair rent to buy property agreements or have paid significant sums of money to secure employment opportunities.

Case stories and the experiences of vulnerable consumers are used to explore how the ACL can better achieve its operational objectives to:

- ensure that consumers are sufficiently well informed;
- prevent practices that are unfair to meet the needs of those consumers who are most vulnerable, or at greatest disadvantage; and
- provide accessible and timely redress where consumer detriment has occurred.

Justice Connect endorses the responses of the Consumer Action Law Centre of Victoria to the Issues Paper and agrees that effective enforcement of consumer protection legislation remains an ongoing challenge. In particular, Justice Connect's Referral Service encourages and sees a need for consumer regulators to continue their efforts to strategically engage in enforcement work that collectively benefits the interests of vulnerable consumers.

Our submission is divided as follows:

## 1. Consumer Policy in Australia

### 1.1 Addressing information gaps and barriers experienced by vulnerable consumers

Recommendation 1

Recommendation 2

## 2 Australian Consumer Law - The Legal Framework & Enforcement

### 2.1 Unfair advertising and business models that target vulnerable consumers

#### 2.1.1 Rent to buy schemes

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#### 2.1.2 Unfair practices in the context of employment

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## 1. Consumer Policy in Australia

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?

### 1.1 Addressing information gaps and barriers experienced by vulnerable consumers

Justice Connect's Referral Service has assisted a number of clients who have been unfairly targeted due to individual attributes or structural factors arising from the distribution of power in society, which adversely affect consumer decision making or the pursuit of redress for any detriment suffered.

A number of factors may contribute to disadvantage and power imbalance. A non-exhaustive list of factors include:

- age;
- gender;
- health status;
- educational attainment;
- mental capacity;
- physical capacity;
- race or ethnicity;
- employment status;
- income status; and
- geographical location

The factors noted above can often create barriers that prevent consumers from enforcing their rights and seeking access to remedies under the ACL when taking private legal action is required.

### Recommendation 1:

Justice Connect's Referral Service encourages the Australian Competition and Consumer Commission (ACCC) and state regulators to continue in their efforts to provide the general public with access to clear and simple information about consumer rights protected by the ACL.

We encourage regulators to facilitate an ongoing discussion about consumer rights by collaborating with stakeholders for the purpose of publishing relevant, simple and accessible early interventionist legal information. We recognise the value of plain language information and initiatives that are tailored to the needs of different vulnerable consumer groups. For example, YouTube videos published by the ACCC provide an effective medium for information about consumer rights to be disseminated widely.

### Recommendation 2:

Justice Connect's Referral Service endorses the suggestion of the Consumer Action Law Centre regarding the need for a well-funded National Consumer Policy Research Centre to undertake consumer policy research and advocacy. We believe that an evidence based approach to understanding the experiences and barriers faced by vulnerable consumers is critical for the ACL to achieve its operational objectives.

## 2. Australian Consumer Law - The Legal Framework & Enforcement

### The Legal Framework

- Are there overseas consumer protection laws that provide a useful model?
- Should the ACL prohibit certain commercial practices or business models that are considered unfair?
- Is introducing a general prohibition against unfair commercial practices warranted, and what types of practices and business models should be captured?

### Enforcement

- Are there any barriers to consumer and businesses enforcing their rights and seeking access to remedies under the ACL?
- What low-cost actions could consumers and businesses more readily use to enforce their rights?

### 2.1 Unfair advertising and business models that target vulnerable consumers

#### 2.1.1 Rent to buy schemes

Vulnerable consumers who enter into unfair rent to buy agreements with the hope to purchase a property can find it difficult to enforce their rights and seek access to remedies under the ACL. Justice Connect's Referral Service has coordinated pro bono legal assistance for a number of vulnerable consumers that have been targeted because they are unable to get a traditional mortgage or loan to purchase their own property.

Rent to buy schemes often involve a purchaser entering into a rental agreement with a vendor to pay above market rental rates to secure an option to purchase a property by a specified date. Usually, an agreement involves a home owner, renter/potential home purchaser and a broker. The broker advertises properties to potential consumers with slogans like, 'rent-to-buy' or 'buy for a weekly rent'.

Rent-to-buy agreements can involve unfair contractual terms including:

- above market rental rates;
- broker fees;
- default interest and fees;

- option fees; and
- other costs and conditions that may be unfair to a purchaser (some contracts generally require you to pay for repairs and maintenance, council rates other outgoings.)

Unfair terms can ultimately cause vulnerable consumers financial distress and make it impossible for them to own a property. Vulnerable consumers often have limited legal rights if something goes wrong. Rent to buy schemes constitute a relatively new market option that is fundamentally different from a credit transaction but should be held to comply with the constraints of the ACL.

## Case Study

### Unfair rent to buy agreement advertised to low income earner

Karl\* was a casual labourer who desperately wanted to buy a home for his family. Having moved between three different rental properties in 18 months and received four home loan rejections Karl was desperate to find a way to buy a property.

After a long day of work he saw an advertisement from a broker in his Local Newspaper, “Buy for a weekly rent with no fuss”.

Karl responded to the advert believing that it would be easy to secure a loan in the future to purchase the property. Karl struggled to pay \$620 per week in rent. He was excited about the prospect of having the option to purchase the property but eventually defaulted on his weekly repayments. Under the contract, as a result of the default, Karl lost any chance of home ownership and forfeited payments made to secure the right to purchase the property. When Justice Connect was first contacted by Karl he said, “I’m really confused about what to do in a legal way. I know that it’s all unfair but it’s confusing to understand where I need to go for help”.

Karl was referred to Justice Connect by a financial counsellor when he received a letter from the broker indicating that he had lost his rights to purchase the property and was \$2000 in rental arrears. A law firm acting pro bono was able to assist Karl to write a letter of demand for money that he paid over the market rental rate to be refunded.

The lawyer who provided pro bono legal help to Karl indicated, “It’s very difficult for people to privately assert their rights under the ACL in relation to unfair contractual terms. The work of the ACCC and consumer protection agencies that share responsibility for the enforcement of unfair contract terms protections is important to prevent practices that affect vulnerable consumers”.

\*Client’s personal details have been changed to preserve anonymity.

### Recommendation 3:

Justice Connect’s Referral Service recommends that consumer protection agencies and regulators should continue to play a role in ensuring that individuals and businesses who misrepresent and promote rent to buy schemes are required to provide greater disclosure regarding their roles and the terms of agreements.

Consumer protection agencies and regulators should continue to run strategic litigation in the public interest where groups of vulnerable consumers are targeted. The intervention of consumer protection agencies will help to prevent unnecessary hardship and the imbalance of power experienced by vulnerable consumers who have no other option but to pursue private legal action to assert their rights under the ACL.

### Recommendation 4:

The ACL should include an extension of prohibition for unfair commercial practices with specified references to examples of unfair commercial practices similar to the United States. Section 5 of the United States, *Federal Trade Commission Act* prohibits ‘unfair or deceptive acts or practices in or affecting commerce’.

An extension of the statutory language in Australia that captures unfair business practices and models will allow wider scope for Courts to provide a forum for the resolution of practices that cause substantial injury and countervail benefits to vulnerable consumers.

## 2.1.2 Unfair practices in the context of employment

Justice Connect has assisted a number of vulnerable consumers who have paid to secure their employment. In a recent employment law pilot Justice Connect assisted 6 workers from culturally and linguistically diverse backgrounds who paid sums of \$5,000 to \$25,000 to secure their employment.

In the current legislative setting, a significant overlap exists between employment and consumer rights, which creates circumstances where a person who is unsure about their employment status at law may be required to file proceedings in multiple jurisdictions to address a single issue. Consequently, a claim in this area is likely to lead to lengthy litigation and uncertainty on how to most effectively and efficiently pursue a claim for misleading conduct relating to employment.

A consequence of an employee having to enforce their rights in multiple jurisdictions is burdensome on a number of parties. The employee is burdened by having to file in, and therefore pursue their claim in, a multiplicity of jurisdictions. Employers are also equally burdened by the need to defend multiple claims.

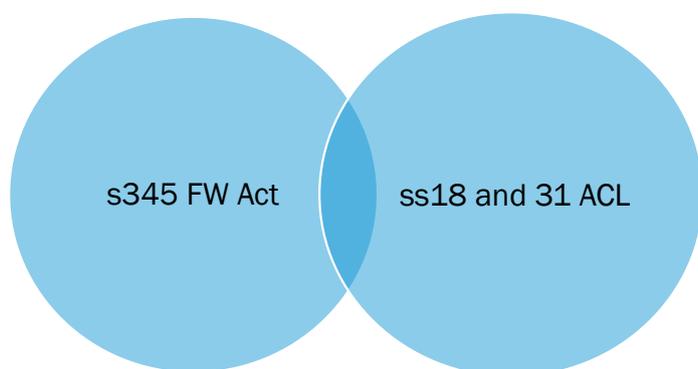
### Overlap between ACL and Fair Work Act 2009 (FW Act)

#### ACL

- Section 31 specifically prohibits conduct that is misleading towards a person seeking employment as to the availability, nature, terms or conditions of the employment, or any other matter relating to employment. This is the primary section of the ACL which outlaws misleading or deceptive advertisements relating to employment.
- Section 18 contains wide-ranging prohibitions against misleading or deceptive conduct.

#### FW Act

- Section 345 of the FW Act provides that a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person, or the exercise, or the effect of the exercise of a workplace right by another person.
- Pursuant to s 545 of the FW Act an employee may recover compensation for proved loss that he or she has suffered because of the contravention.



#### Issues and overlap between consumer and employment rights

- Unfair terms
- Unpaid entitlements
- Sham contracting (employee vs independent contractor)
- Misleading advertising
- Representations about wages
- Offers of employment

## Case Study

### Migrant factory worker pays for employment under misleading and deceptive business contract.

Htian\* is a young male refugee who was desperate to secure work and start a new life in Australia. Htian was referred by a friend of a friend to a business man who said that he would offer him work if he paid \$15,000. The business man made representations that it was common to pay for employment opportunities in Australia and promised Htian that after he completed training there would be lots of work for him

The business man promised Htian a rate of \$200.00 per day if he paid a further \$3,000 for training.

Htian was desperate so he took out an \$18,000 loan to secure the business/employment opportunity and training.

Htian attended training and was directed to work a 7 day week delivering fruit with the business man's van. After three months Htian was not paid properly and when he asked for this money back his employment opportunity ended.

Htian found it difficult to understand whether he should file a claim with the Fair Work Ombudsman or VCAT. VCAT could not hear the matter because the dispute was categorised as one between an employer and employee that did not concern services.

\*Client's personal details have been changed to preserve anonymity.

#### Recommendation 5:

As the situation stands, there is considerable uncertainty as to how section 31 of the ACL should be enforced by an employee. It is recommended that guidance be provided as to how an applicant should pursue a claim under section 31 with the operation of the FW Act in mind. Harmonisation between the applications of the two Acts, and any other Acts that result in an overlap in operation is recommended.

#### Recommendation 6:

It is difficult for vulnerable consumers who are misled about the availability, nature, terms or conditions of the employment, or any other matters relating to employment to assert their legal rights.

Justice Connect's Referral Service recommends that there should be an ongoing dialogue between major regulators (Consumer protection agencies and Fair Work Ombudsman) to empower vulnerable consumers/employees with early interventionist information about their legal rights. For example, the Australian Competition and Consumer Commission and State Consumer protection agencies can play a significant role in ensuring that individuals and businesses who misrepresent employment opportunities and advertise agreements that are based on ongoing fees that are disproportionate to the cost of services are held accountable.

### 3. Conclusion

Justice Connect's Referral Service welcomes the Consumer Affairs Australia and New Zealand Review of the ACL in light of our work in connecting vulnerable consumers with pro bono legal help. We look forward to providing further information and evidence to support our recommendations.

Yours sincerely



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