9 December 2016

Consumer Affairs Australia and New Zealand
c/o Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir/Madam

2016 Australian Consumer Law Review: Interim Report

The Consumer Credit Legal Service (WA) Inc. (**CCLSWA**) welcomes the opportunity to comment on the consultation questions on the operation of the Australian Consumer Law **(ACL)** as outlined in the ACL Review Interim Report.

Our submission addresses select questions from the Interim Report only, and is structured as follows:

1. **About CCLSWA**
2. **Scope and Coverage of the ACL (1.2 of the Interim Report)**
   2.1. Should the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) be amended to explicitly apply its consumer protections to financial products, instead of just financial services? (Question 7 of the Interim Report)
3. **Consumer Guarantees (2.1 of the Interim Report)**
   3.1. Could the issues about durability of goods be addressed though further guidance and information (Question 10 of the Interim Report)
   3.2. Are there other areas of uncertainty raised by stakeholders that would benefit from further guidance, eg, the cost of returning rejected goods and what may constitute a ‘significant’ cost? (Question 11 of the Interim Report)
   3.3. Can issues raised in particular industries be adequately addressed by generic approaches to law reform, such as Option 1 below, in conjunction with industry-specific compliance, enforcement and education activities? What are the advantages and disadvantages of this approach? (Question 14 of the Interim Report)
   3.4. What kinds of industry-specific compliance and education activities should be prioritised in the context of finite resources? (Question 15 of the Interim Report)
   3.5. In what circumstances are repairs and replacement not considered appropriate remedies? Or put another way, are there circumstances that are inherently likely to involve, or point to, a ‘major’ failure? (Question 16 of the Interim Report)
   3.6. Is there a need for greater regulation of extended warranties? If so:
      - is enhanced disclosure adequate or is more required?
      - what are the costs of providing general and specific disclosure for businesses? Would disclosure change, in practice, outcomes for consumers?

Consumer Credit Legal Service (WA) Inc
Level 1, 231 Adelaide Terrace, Perth WA 6000
Phone (08) 9221 7066 Fax (08) 9221 7088
Email info@cclswa.org.au
www.cclswa.org.au ABN 43 262 474 001

- what has been the experience of consumers and traders in jurisdictions where enhanced disclosure applies (such as in New Zealand)? (Question 21 of the Interim Report)

4. Unconscionable conduct and unfair trading (2.3 of the Interim Report)

4.1. Is allowing the law on unconscionable conduct to develop an appropriate and proportionate response to the issues raised, and to future issues that may arise? (Question 37 of the Interim Report)

4.2. What are the consequences, risks and challenges of maintaining the status quo, compared with changing the law or codifying existing principles? Are there any better approaches that would address the issues raised while allowing concepts to develop in a flexible way? (Question 38 of the Interim Report)

4.3. Are there any other benefits and disadvantages to a general unfair trading prohibition that should be considered? (Question 41 of the Interim Report)

4.4. Is there further evidence of a gap in the current law that justifies an economy-wide approach? (Question 42 of the Interim Report)

5. Unfair Contract Terms (2.4 of the Interim Report)

5.1. Should the use of terms previously declared 'unfair' by a court be prohibited? (Question 44 of the Interim Report)

5.2. Should the grey list of examples of unfair terms be expanded? (Question 47 of the Interim Report)

5.3. Would empowering ACL regulators to compel evidence from a business to investigate whether a term is unfair be appropriate enforcement tool? If so, what should be the scope of this power? (Question 45 of the Interim Report)

6. Penalties and Remedies (3.2 of the Interim Report)

6.1. Are the current maximum financial penalties adequate to deter future breach of the ACL? (Question 63 of the Interim Report)

7. Purchasing Online (4.1 of the Interim Report)

7.1. Should the sale-by-auction exemption for consumer guarantees be amended with regard to sales by online auction sites? (Question 70 of the Interim Report)

1. Consumer Credit Legal Service (WA) Inc.

CCLSWA is a not-for-profit community legal centre based in metropolitan Perth that provides:

- legal advice and assistance to and advocacy on behalf of consumers with issues arising out of their credit and debt related problems, or out of the Australian Consumer Law disputes. CCLSWA also operates a daily telephone advice line service which consumers use to obtain free legal advice and information. In the period from May 2015 to May 2016, we provided advice to more than 1,300 clients and advocated on the consumer's behalf in more than 200 cases;
- a resource for financial counsellors and other advocates working with low-income people for the resolution of their credit-related problems, or out of the ACL disputes; and
- community education programmes in matters relating to consumer credit and debt law and the legal system.

CCLSWA also engages in relevant social policy and law reform initiatives, including contributing to such initiatives spearheaded by other organisations.

2. Scope and coverage of the ACL

2.1. Should the ASIC Act be amended to explicitly apply its consumer protections to financial products, instead of just financial services? (Question 7 of the Interim Report)

In its initial submission, CCLSWA recommended that the ACL be amended to apply to financial services or at least to financial services which are incidental to a sale of goods or services that attracts the application of the ACL. Whilst this is not an option that is being considered as part of this consultation we would support the amendment of the ASIC Act to clearly indicate that the protections under the ASIC Act for financial services also apply to financial products. This should reduce or remove the complexity surrounding these provisions as it would make it unnecessary to establish that a financial service has been provided in relation to a financial product in order to fall within the protections of the ASIC Act.

Section 3.6 of this paper also addresses the issues raised by the sale of financial services which are incidental to the sale of goods or services that attracts the application of the ACL in the context of the sale of extended warranties.

3. Consumer guarantees

CCLSWA is of the opinion that there is scope for further clarity to be introduced in relation to the terminology currently used in the ACL. The current terminology used in the ACL is of a general nature. Whilst this does allow flexibility in its application to a variety of fact scenarios, it can also give rise to uncertainty about when certain rights are available to consumers. Our submission below, which is structured as a response to the various questions set out in the interim review, illustrates the uncertainty that exists due to the use of current terminology. As we are addressing each question individually, there is some repetition and overlap in the responses below.

3.1. Could the issues about durability of goods be addressed though further guidance and information? (Question 10 of the Interim Report)

CCLSWA is of the opinion that there is uncertainty concerning the meaning of acceptable quality under the ACL. The onus is currently on the consumer to show that a good is not of "acceptable quality" and that the defect was present at the time of purchase. The ACL defines acceptable quality to mean fit for the common purpose for which the goods are supplied; acceptable in appearance; free from defects; safe and durable.[1] This is assessed by reference to the nature of the product, the purchase price and other relevant factors.[2] The lack of clear definitions for terms such as "durable" leaves considerable scope for arguments as to whether the good is of acceptable quality in the circumstances.[3] In respect of this issue, CCLSWA tends to be contacted most often by consumers experiencing difficulties with new and used vehicles.

CCLSWA would welcome the issue of further guidance about the how to interpret the meaning of "durable" and case examples of how this guidance can be applied in a variety of fact scenarios. However, we are also keen for the ACL to maintain its current level of flexibility and for access to remedies for consumers not to be inadvertently limited by stricter guidelines.

3.2. Are there other areas of uncertainty raised by stakeholders that would benefit from further guidance, eg, the cost of returning rejected goods and what may constitute a 'significant' cost? (Question 11 of the Interim Report)

(a) "Significant cost"

Currently a consumer who rejects a good due to a major failure must return the good unless the good cannot be returned, removed or transported without significant cost because of the nature of the failure or the size, height, or method of attachment of the goods.[4] There is uncertainty around when the cost of returning the good becomes a "significant cost". This often results in consumers having to spend a long time negotiating with traders about where the responsibility for return lies or who will have to bear the cost of returning the good.

CCLSWA recently assisted two clients who claimed that it was too expensive for them to return goods which they had purchased but which did not meet the ACL consumer guarantees.

AA's story

AA was an elderly pensioner who saw an advertisement on TV for an exercise machine. The advertisement said the machine would rejuvenate the muscles, and AA's doctor confirmed it may help with her lower back issues. AA paid $50 for the exercise machine which included a 30 day free trial. At the time of purchasing the exercise machine AA was told by a customer service representative of the supplier

[1] ACL s 54(2).
[2] ACL s 54(3).
[3] Corones, above no 1, p641.
[4] ACL s263

that the supplier would pay for the shipping costs if she wanted to return the machine.

The machine did not help AA at all. In fact she ended up pulling a muscle in her shoulder. AA made contact with the supplier within the trial period to have it returned, but was told she would have to pay for shipping costs. The item was very large and heavy and AA could not lift or move it. She was unsure about how to return the exercise machine to the supplier.

CCLSWA advised AA that the terms and conditions of the sales contract required AA to pay for shipping but that the customer service representative had made a false or misleading representation about the supplier being obligated to pay for shipping costs. The false or misleading representation may entitle her to compensation if she could establish that such a representation was made. Furthermore AA was entitled to argue that the machine was not fit for the purpose advertised (ie rejuvenating her back muscles) and on that basis she was entitled to reject the machine. AA was also advised she could make a complaint to the Department of Commerce Consumer Protection Branch.

AA lodged a complaint with the Department of Commerce. After attempting to negotiate further with the supplier of the exercise machine AA resolved to send the exercise machine back. The postage cost to AA was $100 and AA required help to fit the exercise machine into the car and help from staff at the post office to remove the exercise machine from her car and bring it to the post office for shipping. AA also questioned why postage cost $100 when she had originally only paid $15 for shipping. The supplier reimbursed AA with $150 and a further $25 in good faith. Overall AA said she was still out of pocket by approximately $70 and experienced significant difficulties in enforcing her right to return the product during the 30 day free trial period.

BB's story

BB purchased a caravan in Busselton in January 2016, but within three weeks of purchase and on its first use the caravan roof peeled back and a window blew out. BB's insurance company towed the caravan to Perth for repairs. However, upon further inspection of the caravan the insurance company informed BB that the insurance would not cover the damages to the caravan as the roof had been repaired previously and the caravan was not fit for purpose. BB then contacted the supplier of the caravan to complain about the quality of the caravan. BB was then informed by the caravan supplier's lawyer that BB would have to pay for the caravan to be returned to Busselton for repair, which was more than 150km from Perth.

CCLSWA advised BB that the caravan was not of acceptable quality and that there had been a major failure to comply with this consumer guarantee. CCLSWA advised BB that she was entitled to return the caravan and request a refund and if she could not return the caravan without significant cost, due to the state of the caravan or because of its size, she had the right to ask the supplier to collect the caravan within a reasonable time at their expense.

These case studies suggest that further clarification of the term "significant cost" is required. CCLSWA would welcome the introduction of legislative criteria and other forms of guidance which clarify when a significant cost will be incurred.

(b) "Reasonable time" to repair:

If a product fails to comply with a consumer guarantee, and this failure amounts to a minor failure, then the supplier is entitled to a "reasonable time" to remedy any defect.[5] The ambiguity associated with this term leaves open the possibility that a consumer could be left without the product for an extended period of time.

CCLSWA acknowledges that the benefit of utilising such wording is that it allows the ACL to maintain flexibility in how it applies to different fact scenarios. However, CCLSWA would support the issuance of further guidance on what constitutes a reasonable time to repair certain types of items in various commercial sectors. For example the *Electrical and Whitegoods: a guide for industry to the Australian Consumer Law* issued by the State and Territory consumer protection agencies deals briefly with the issue of what happens if a trader is unable to repair goods within a reasonable time,[6] but could provide further details or case examples to illustrate how this guarantee operates in practice. Similarly, the guide on *Consumer guarantees: A guide for businesses and legal practitioners* also briefly mentions what options are available to a consumer if a supplier refuses or takes too long to repair goods.[7] There is however no discussion about how a consumer can assess what is a reasonable time for a supplier to undertake a repair.

CC's story

CC purchased a new motor vehicle in 2010. CC had the accessory belt and timing belt repaired by a mechanic at a cost of $3000 in July 2015. In August 2015 the motor vehicle failed. The mechanic denied responsibility and the motor vehicle remained at the mechanic's premises for 10 months for repairs. CC could not afford to buy another motor vehicle and had to borrow vehicles from family and friends to get around, which caused CC significant inconvenience and stress.

CC eventually took the motor vehicle to another mechanic, who determined the problem was due to faulty installation of the timing belt. The faulty installation meant CC needed to have the entire engine replaced. CC also sent the timing belt to the manufacturer, who confirmed that the timing belt was not faulty and the failure was caused by faulty installation of the belt. The mechanic denied responsibility, and continued to argue that the timing belt itself was faulty despite CC presenting paperwork from the independent mechanic and manufacturer. The mechanic then suggested the fault had been caused by CC herself.

CC sought advice as to whether she could recover the costs of repairs (totalling $6000) as well as compensation for inconvenience caused by the mechanic holding the motor vehicle for repairs for 10 months. CC was referred to the

[5] ACL s 259.
[6] The *Electrical and Whitegoods: a guide for industry to the Australian Consumer Law* at page 6.
[7] *Consumer guarantees: A guide for businesses and legal practitioners* at page 22.

Department of Commerce, who were unable to resolve the problem for CC because the mechanic would not attend any conciliation meetings.

3.3. Can issues raised in particular industries be adequately addressed by generic approaches to law reform, such as Option 1 below, in conjunction with industry-specific compliance, enforcement and education activities? What are the advantages and disadvantages of this approach? (Question 14 of the Interim Report)

In its first submission paper CCLSWA recommended the introduction of "lemon laws" in relation to the motor vehicle industry. We remain of the opinion that some form of "lemon laws" would be beneficial in respect of high value purchases such as motor vehicles. However we understand the objective of trying to retain simplicity and clarity within the ACL and introducing a more generic version of "lemon laws".

(a) Major failure

CCLSWA is of the view that a generic approach to address lack of clarity in the ACL, including the meaning of "major failure", may be preferable to address the motor vehicle industry-specific issues we highlighted. This would have the advantage of maintaining simplicity and clarity in the ACL for consumers.

Lemon laws typically impose specific limits on how faulty a product can be before a consumer may return the good, but can take a number of different forms. Examples include the number of faults a good can have, the number of times a good can be repaired, how soon a defect can arise after purchase, and how long a good can spend in repairs.

The onus is currently on the consumer to show that a good is not of "acceptable quality" and that the defect was present at the time of purchase. The ACL defines acceptable quality to mean fit for the common purpose for which the goods are supplied; acceptable in appearance; free from defects; safe and durable.[8] This is assessed by reference to the nature of the product, the purchase price and other relevant factors.[9] The lack of clear definitions for terms such as "durable" leave considerable scope for arguments as to whether the good is of acceptable quality in the circumstances.[10] As discussed at section 3.1 above, CCLSWA welcomes further guidance in interpreting the meaning of "durable" in certain contexts, but not at the expense of maintaining flexibility for consumers under the ACL.

If the consumer seeks redress from the supplier, the remedies available also depend on whether the defect is a "major" or "minor" failure to meet the guarantee.[11] If a consumer can show a "major failure" they are entitled to decide their remedy: a repair, replacement, refund or compensation (for example,

---

[8] ACL s 54(2).
[9] ACL s 54(3).
[10] Stephen Corones, 'Why Australia needs a Motor Vehicle 'Lemon' law,' (2016) 39(2) UNSW Law Journal, 625-657, 641.
[11] ACL s 259-261.

compensation for any difference in value).[12] If it is a minor failure, the supplier is entitled to decide which of these remedies to offer.[13] A defect is defined as a major failure if a reasonable consumer would not have purchased the product had they known of it; or if the goods significantly depart from their description; or if they are "substantially unfit" for their usual purpose, or a purpose the consumer made known to the supplier.[14] This definition of "major failure" arguably remains too vague for the average consumers to enforce their rights. As discussed further at section 3.5 below, CCLSWA welcomes further guidance in the ACL for interpreting the meaning of "major failure" in difference contexts and at different price points. There also remains uncertainty in the community as to whether multiple non-major failures or multiple repair attempts constitute "major" failure. As discussed at section 3.5 below, CCLSWA recommends clarification in the ACL that multiple non-major failures can amount to a major failure in certain circumstances.

DD's story

DD bought a new caravan from L. The caravan was bought in January 2014. Between January and April 2014, DD used the caravan for 3 trips and the caravan consistently had problems with excessive dust and water damage from rain. The stove in the caravan also broke in April 2014. The caravan was returned to L for repairs after each trip but the problems did not cease. DD also put in a dust hatch at a cost of $600 on the recommendation of L but that did not solve the dust issues. When L examined the caravan in April 2014, L found further problems with the locks and light fittings and attributed this to the manufacturer's failure to seal the caravan properly. L refused to rectify all the problems. Later in 2014, DD filed a complaint with the Department of Commerce who facilitated conciliation. Conciliation was unsuccessful and the Department of Commerce advised DD to obtain an independent report prior to initiating court proceedings. DD obtained an independent report in October 2014 and contacted CCLSWA to obtain legal advice about proceeding with legal action. For DD, the conciliation process delayed any remedy for several months and resulted in DD incurring significant time and financial costs. This was extremely frustrating for DD.

CCLSWA reiterates that there are particular factors in the context of motor vehicle sales which ought to be addressed by generic law reform in the absence of industry specific legislation. However, in order to be effective, the law reform must also be accompanied by industry focused education activities.

(b) "Lemon" motor vehicles

In the context of motor vehicle sales, suppliers often appear reluctant to provide a refund to consumers experiencing major failures and may contest that the failure is major, that the failure existed at the time of purchase, or that there is a problem at all.

[12] ACL s 259.
[13] ACL s 261.
[14] ACL s 260.

There is a significant information asymmetry between the consumer and supplier (or manufacturer). As Corones observes "[m]otor vehicles have become increasingly computerised and complex over recent decades."[15] Consumers who own "lemons" often pay for an expert assessment to assist in negotiating a remedy. Should the matter go to court, the consumer often pays for an expert to be available for cross-examination and may incur additional costs in legal fees.

CCLSWA acknowledges that motor vehicles are not the only "computerised and complex" products in respect to which the consumer is at an information disadvantage and which are purchased at considerable expense to the consumer. White goods and electronics are examples of other such goods. However, motor vehicles continue to represent one of the most expensive purchases that a consumer makes.

There are also above average costs to the consumer associated with a dispute over whether a vehicle is of acceptable quality. Court proceedings are costly, time consuming and very stressful for consumers, as proceedings are protracted and include numerous intermediate steps.[16] In addition to their own costs, consumers may also be liable for the other party's costs should their action fail. Consequently, the average consumer might forgo his or her rights as the process could be too long, too risky and too inconvenient. If the consumer does choose to proceed, the loss of a motor vehicle in the interim can entail significant hardship and may affect their employment.

CCLSWA would support increased regulatory focus on the motor vehicle sales industry and specifically more education activities about any new lemon laws and how they would apply to common situations which occur in the motor vehicle industry. We would also support more regulatory enforcement action being taken to ensure that any new laws are being implemented appropriately.

EE's story

EE purchased a new from a motor vehicle dealership in 2012. EE initially experienced problems with the car's transmission in June 2016 and had the transmission replaced by the dealership. The dealership agreed to extend the warranty for 2 years. The client was told details regarding this extension would be posted to her, but this was never received.

In August 2016, EE's car had a major transmission malfunction while EE was driving on the freeway and EE narrowly avoided having an accident. EE contacted the dealership who offered to replace the transmission or to trade the car in for a brand new vehicle with EE being required to pay the difference in cost (estimated around $12, 000).

[15] Stephen Corones, 'Why Australia needs a Motor Vehicle 'Lemon' law,' (2016) 39(2) UNSW Law Journal, 625-657, 628.

[16] Stephen Corones, 'Why Australia needs a Motor Vehicle 'Lemon' law,' (2016) 39(2) UNSW Law Journal, 625-657, 647-8.

EE contacted CCLSWA after the transmission in EE's had been "shuddering" for several weeks and upon learning from watching the TV show "A Current Affair" that Cars from 2011-13 had known transmission defects. CCLSWA advised EE that the vehicle's faulty transmission may constitute a major failure, because the defective transmission made the vehicle unsafe to drive, entitling EE to a full refund. EE was advised to negotiate a refund with the motor vehicle dealership or Ford. If directly negotiations failed then EE was advised to contact the Department of Commerce to utilise their conciliation service.

At no point was EE advised by the motor vehicle dealership that the issues related to her motor vehicle may be linked to an ongoing issue with the transmission of vehicles manufactured between 2011 and 2013.

FF's Story

FF purchased a used 2011 from a motor vehicle dealership in early January 2016. The motor vehicle broke down every week from the time of purchase due to a transmission problem. On 15 January 2016 the motor vehicle was taken to the dealer to have the clutch replaced. The next day the motor vehicle broke down again and was returned to the dealer for repair who informed FF the motor vehicle had a transmission problem. The motor vehicle broke down again on 22 and 26 January 2016 respectively.

FF contacted the dealership to request a refund or replacement, but was told that the dealership needed to find out the defect first and make necessary repairs. FF contacted CCLSWA in early March 2016, at which point the dealership had not identified the problem, and was holding the car for repairs.

FF felt unsafe using the car because FF was concerned the car would breakdown on the freeway and that FF could be seriously injured.

CCLSWA advised FF that the broken transmission may amount to a major failure to comply with the consumer guarantee of acceptable quality. This was because the ongoing breakdowns arguably rendered the car substantially unfit for purpose and unsafe. We advised FF that she may wish to negotiate with the dealership for a refund, or contact the Department of Commerce to mediate the dispute. We also advised FF of the known problems with vehicles manufactured between 2011 and 2013 and the class action suit against Ford. FF had not been advised about this issue either at the time of purchase or subsequently when her motor vehicle broke down due to transmission problems.

(c) Recommendations

Overall the key difficulties faced by consumers under the ACL in relation to vehicles and other purchases include:

- the onus on consumers to show a good was not of acceptable quality at time of purchase;
- vague terminology in the meaning of "durable", "major failure", and "reasonable time"; and

- information asymmetry between the consumer and supplier (or manufacturer).

We recommend that the following changes be introduced to the ACL:

- a major failure be considered to arise if a good has been remedied at least three times for a particular issue and the same issue persists. This will then entitle the consumer to obtain any of the remedies application upon a major failure;
- a major failure be considered to arise if a consumer is unable to use the goods for a specified number of days due to a defect. The specified number of days for various goods can be prescribed by regulations, which can be amended/updated as necessary; and
- reversal of the onus of proof where it is alleged there has been a defect within the first 3 or 6 months from the date of purchase. This means that the obligation will be on the supplier to demonstrate that there has been no breach of the consumer guarantees. By limiting the reversal of the onus of proof to the first 3 or 6 months after the purchase this obligation should not place an onerous obligation on the supplier or manufacturer. This is modelled from the approach taken in Singapore.

CCLSWA would prefer a generic approach to law reform. However, we are concerned that the above recommendations may not be readily applicable across all industries. There is a wide variation between low cost personal products and services in terms of when a problem is identified. It may also be unduly harsh to impose a 6 month period on suppliers during which the onus of proof is reversed in respect of low cost personal products and services. Conversely a 6 month period may also be inadequate in the context of purchasing a new motor vehicle, where it can sometimes take longer for problems to appear. There may be two possible ways to deal with this concern:

- introduce a sliding scale of monetary thresholds which regulates how long the reversal of the onus of proof stays in place. Therefore, smaller value items may have a small period where the reversed onus of proof is in place, and this period increases with the value of the product; or
- introduce a minimum monetary threshold which needs to be satisfied before the reversed onus of proof will apply to the sale of goods or services.

3.4. What kinds of industry-specific compliance and education activities should be prioritised in the context of finite resources? (Question 15 of the Interim Report)

CCLSWA receives numerous calls from consumers who are denied their consumer rights in dealings with sole traders running small businesses such as tiling services, plumbing services, gardening services, electricians etc. CCLSWA proposes that the addition of some ACL training as part of trade qualifications may be a way of ensuring a better understanding of the obligations imposed by the ACL upon traders. This would be an effective and economical way of educating the future providers of trade services.

3.5. In what circumstances are repairs and replacement not considered appropriate remedies? Or put another way, are there circumstances that are inherently likely to involve, or point to, a 'major' failure? If so:

- **What are these circumstances, and should they be defined, or deemed, to be major failures?**
- **For example, should there be discretion for courts to determine the number of 'non-major failures' or type of safety defect that would trigger a 'major failure'?**
- **Are there any relevant exceptions or qualifications?**

(Question 16 of the Interim Report)

Under the ACL there is a guarantee that purchased goods are of acceptable quality. If the goods are not of acceptable quality, the consumer has rights against the supplier and the extent of these rights depend on whether the defect is major or minor.

A failure of a good or service to comply with a consumer guarantee is currently defined as a major failure if:

- a reasonable consumer would not have purchased the product had they been fully aware of the failure;
- the product significantly departs from the description or model provided;
- the product is "substantially unfit" for its usual purpose, or a purpose the consumer made known to the supplier, and the defect cannot be easily remedied within a "reasonable time"; or
- the product is unsafe.

Currently, there is a lack of clarity surrounding the distinction around what constitutes a minor and major failure. There is also a lack of certainty around what constitutes "substantially unfit" and "reasonable time". If the consumer complaint relates to a major failure in terms of a product's "durability", the meaning of "durable" in all the circumstances also lacks clarity. We acknowledge that these current definitions give a degree of flexibility. However, these definitions also cause significant difficulties for consumers in enforcing their rights.

CCLSWA believes there are circumstances that are inherently likely to point to a 'major' failure' and that these should be addressed specifically by the consumer law. These include:

- where a consumer has experienced an alleged non-major failure in a good but the good has been repaired multiple times for the same issue and the same issue persists; or
- where the consumer has been unable to use the product for a significant period of time because of a defect or due to multiple non-major defects.

(a) Multiple non-major failures

There remains uncertainty as to whether multiple non-major failures or multiple repair attempts constitute a "major" failure. We currently advise clients who experience multiple non-major failures that there may have been a major failure if they would "not have purchased the product" had they been fully aware of the

extent to which the product failed to be of acceptable quality. CCLSWA is of the opinion that it would be preferable to clarify in the ACL that multiple non-major failures can amount to a major failure and entitle consumers to a refund if they are unable to use a good for a specified number of days due to repairs.

Court proceedings are associated with considerable stress, costs and inconvenience for consumers. We therefore recommend that the role of court discretion in determining the number of non-major failures that trigger a major failure should be minimised in favour of guidelines within the ACL that clarify the meaning of "major failure" for the ordinary consumer.

GG's story

GG was an elderly lady who purchased a used motor vehicle from a motor vehicle dealer for $5000 in early 2016.

Within several months of purchasing the vehicle, the vehicle exhibited a variety of problems. The air filter started hanging out of the motor vehicle, which GG was concerned would cause a "yellow sticker" to be issued for the vehicle. The lights stopped working, and had to be replaced by GG. The vehicle also made a "clunking" noise when the brakes were applied. Furthermore, the car tyres were not replaced as promised during negotiations, and the existing tyres did not grip the road properly.

GG was unsure of what her rights were in relation to these faults and also how she could enforce any claims against the motor vehicle dealer as the dealer was no longer in the location that she had purchased the motor vehicle from.

GG was advised to negotiate with the motor vehicle dealer on the basis that the totality of these non-major failures could amount to a major failure, entitling her to a refund and compensation. DD was also advised to contact the Department of Commerce, who may be able to advise her about how to contact the motor vehicle dealer as they licensed all motor vehicle dealers in Western Australia.

(b) Safety defects:

Under the ACL a good may fail to be of acceptable quality if it is unsafe. Section 260(e) of the ACL already states that a major failure exists where the goods are not of acceptable quality because they are unsafe. The meaning of unsafe can sometimes be unclear, however it appears unnecessary to further clarify that a safety issue will trigger a major failure. It may be worthwhile to provide further examples of when safety issues would be considered to give rise to a major failure and how a consumer can establish that a product is unsafe.

HA's story

HA purchased a new car from a motor vehicle dealership in February 2014. HA drove the car for a year after the purchase without any incidents. In March 2015 she took the vehicle in for a service and noted that there was an issue with one of the lights on the dashboard behind the steering wheel. In April 2015 HA started

having trouble with the car, such as the vehicle would frequently fail to start, the immobiliser would turn on without reason and the warning lights on the dashboard would flash without reason. In addition to these issues, on two occasions the car turned itself off while HA was driving the car. On one of these occasions HA was on a major highway and had her children in the car.

HA took the car back to the dealership and advised the mechanic about the trouble she was having. The mechanic advised that he could recode the key of the car and that should stop the problems. However, this did not resolve the problem. In the end between April 2015 and July 2015 HA took the car to the mechanic on six different occasions for the issues to be resolved. During this period HA only had access to her car for 5 days.

In July 2015 HA wrote to the dealership and advised them that she rejected the vehicle on the basis that it was not of an acceptable quality due to it being unsafe. The dealership ignored the letter from HA and continued to insist that they would repair the car. As the dealership was unable to resolve the issues, HA wrote a second a letter of rejection to the dealership and demanded a refund. The dealership refused to refund the purchase price to HA. In August 2015 the dealership returned the car to HA. HA was unhappy and not wanting to drive the same car again, as HA was concerned about the same problems arising in the future and causing an accident. Despite entering into negotiations with the dealership HA was unable to resolve the issue. HA attempted to obtain expert reports from other mechanics which would assist her establish that the car was not of unacceptable quality as it was unsafe. However, HA was unable to find a mechanic who would give an expert opinion in relation to the car.

(c) Recommendations

We recommend that the ACL contain a clear statement that multiple non-major failures can amount to a major failure. We would also recommend that additional guidance be issued as to what triggers a major failure.

3.6. Is there a need for greater regulation of extended warranties? If so

- **Is enhanced disclosure adequate or is more required?**
- **What are the costs of providing general and specific disclosure for businesses?**
- **Would disclosure change, in practice, outcomes for consumers?**
- **What has been the experience of consumers and traders in jurisdictions where enhanced disclosure applies (such as in New Zealand)?**

(Question 21 of the Interim Report)

Currently, there are no requirements to disclose the consumer's rights under the ACL when selling extended warranties relating to motor vehicles. This creates a significant information deficit for consumers who are not adequately informed of their rights and consequently the protections that may already be applicable under the law to their purchase. As a result, they may not be aware that their requirements may have already been met and that these products are not required for their purposes.

The high instances of aggressive or high-pressure sales techniques and the ease of adding the purchase price to the main motor vehicle loan makes consumers particularly vulnerable. This is not dissimilar from the harm that the unsolicited consumer agreements provisions seek to address. This indicates a need for greater regulation of extended warranties including enhanced disclosure requirements, a factsheet at point of sale, a cooling off period, and requiring salespeople to cease to negotiate when a consumer explicitly declines the add-ons.

(a) Difficulties in reducing consumer harm in the law

Under the unsolicited consumer agreement provisions of the ACL, a contract is an unsolicited agreement if the negotiation was conducted outside of the business premises of the dealer. In the case of extended warranties, the negotiations are almost always on the business premises of the motor vehicle dealer and consequently fall outside of the unsolicited consumer agreements provisions. Extended warranties are considered financial products or services[17] and therefore only the ASIC Act applies. Therefore, only the general protections which are replicated in the ASIC Act would apply. This creates a legal vacuum in respect of these products.

(b) Consumer harm in the sale of extended warranties

The proximity of the sale of these add-ons to the sale of the motor vehicle, which was the main purpose of their visit to the dealer, creates a situation where the consumer feels pressured to purchase the add-ons in order to purchase the car.

In a survey by the Australian Securities and Investments Commission (**ASIC**), ASIC found when consumers approached a car dealership to purchase a car, consumers largely concentrated on the purchase of the vehicle and had little awareness or understanding of the insurance product.[18] ASIC has found that it is difficult for consumers to reject add-on insurance when purchasing a motor vehicle[19] and it is unlikely that the sale of extended warranties would be different. Further, in our experience, vulnerable consumers with difficulties conversing in English have often felt coerced or misled into contracting into these add-on products. Often, they believed that the dealer was acting in their best interests and helping the consumer obtain the best and cheapest deal. They may only discover that they were misled when their family discovers it or when they seek legal help.

HH's story

HH went to a motor vehicle dealer with his partner to buy a car. The dealer offered an extended warranty which HH indicated that he did not want. The dealer then began to convince HH's partner that the warranty was an essential purchase. HH felt pressured by the dealer's sales tactics and felt that he needed to purchase the insurance so as to be able to purchase the car. HH purchased the extended

[17] Australian Competition and Consumer Commission v Fisher & Paykel Customer Services Pty Ltd [2014] FCA 1393, Australian Securities and Investments Commissions Act 2001 (Cth) s12BAA(7)(d).
[18] Australian Securities and Investments Commission, Report 470 Buying add-on insurance in car yards: why it can be hard to say no (2016).
[19] Australian Securities and Investments Commission, Report 470 Buying add-on insurance in car yards: why it can be hard to say no (2016).

warranty and regretted the purchase one month later. He attempted to cancel the warranty and claim a refund but was only offered a 50% refund from the car dealer. HH does not have a right to a refund even though he was pressured into purchasing the extended warranty. There is no cooling off period available.

II's story

II negotiated with the dealer for the sale of a car for $16,000. He asked to purchase a towbar for the car and the salesperson included an extended warranty and other accessories totalling $5,000. II protested the inclusion of the other items but was told that these accessories were part of a package. Due to his limited understanding of English, II did not understand this and believed that this meant that he had to sign the document to obtain finance. No documents were provided to II regarding the extended warranty. II was then directed to sign a loan contract for the car. II knew that he could get a loan at around 7% interest but he trusted the dealer to act in his best interest to obtain the best and cheapest loan for him. Unknown to II, the loan had an interest rate of 17% and included the price of the accessories and several insurance policies. The total loan was $25,000. Due to his limited command of English and trust in the dealer, he signed the loan contract. While II was given several documents relating to the loan, extended warranty and insurance policies, he was not given an explanation of the various documents. One day after signing the loan contract and reviewing the documents, II was puzzled about the high loan amount and returned to the dealer. He was told that he had signed the contract and could not cancel it now. He was only referred to CCLSWA after attempting to salary package his payments and the salary packaging company noticed that his repayments were too high.

(c) Recommendations:

We recommend the introduction of enhanced disclosure requirements when selling add-on products such as extended warranties to reduce the information deficit which faces consumers at the point of sale. We recommend that these changes be introduced in line with the New Zealand model and Part 4A of New Zealand's *Fair Trading Act 1986*, namely a requirement that the seller provide an agreement at the time of purchase that is in writing, legible, in plain language, presented clearly, includes all the terms and conditions (including total price, duration and expiry date) and the consumer's cooling-off rights. The front page must include:

- a summarised comparison between the relevant consumer guarantees under the ACL and the protections provided by the extended warranty agreement;
- a summary of the consumer's rights and remedies under the ACL; and
- the warrantor's name, street address, telephone number, and email address.

We further recommend that this agreement clearly state that the sale of extended warranties is optional.

Elements of the unsolicited consumer agreements provisions could also be included such as the requirement to cease to negotiate when a consumer explicitly declines

the add-ons. This would raise awareness of the add-ons and balance the bargaining powers of the consumer and the dealer in light of the high-pressure sales tactics to which consumers are often subject.

The introduction of a cooling-off period of a set number of days from the time the consumer receives the agreement, or for an extended period of time if the supplier has not met all its disclosure requirements, would also be beneficial for consumers. This would allow consumers time to further consider their decision after the high pressured situation of purchasing a motor vehicle. This will be particularly useful as it would allow consumers to consider their rights under the insurance or extended warranty contract and to see if it meets their requirements. Some of our clients have sought legal services to terminate the contract only as a result of consulting family members and friends who alerted them to these unwanted add-on products. Cooling off periods may allow them to have added time for these consultations to take place. It may also reduce the disadvantage suffered by culturally and linguistically diverse consumers.

4. Unconscionable conduct and unfair trading (2.3 of the Interim Report)

4.1. Is allowing the law on unconscionable conduct to develop an appropriate and proportionate response to the issues raised, and to future issues that may arise? (Question 37 of the Interim Report)

and

4.2. What are the consequences, risks and challenges of maintaining the status quo, compared with changing the law or codifying existing principles? Are there any better approaches that would address the issues raised while allowing concepts to develop in a flexible way? (Question 38 of the Interim Report)

Some commentators have argued that a clear definition of unconscionable conduct remains elusive.[20] However, as the definition includes moral concepts[21] and societal norms[22] it is difficult to provide precise guidance on these concepts. For example, section 21 of the ACL defines misleading or deceptive conduct as conduct that is misleading or deceptive or is likely to mislead or deceive and requires further research into what misleading or deceptive means.[23]

Given the difficulty of obtaining a precise definition, the general protection provisions tend to be utilised by legal practitioners, rather than consumers. Given that these provisions are mostly utilised by legal practitioners, it is unlikely that the lack of guidance is an impediment to the functioning of the law. Legal practitioners are required to research case law when advising clients and the lack of guidance in the legislation is no impediment to legal practitioners in understanding the law.

---

[20] Peter Strickland, 'Rethinking unconscionable conduct under the Trade Practices Act' (2009) 37 ABLR 19 at 20.
[21] Director of Consumer Affairs Victoria v Scully & Anor [2013] VSCA 292.
[22] Australian Competition and Consumer Commission v Lux Distributors Pty Ltd [2013] FCAFC 90.
[23] Julie Clarke "Unconscionable conduct: an evolving moral judgment" [2011] Precedent 30.

In addition, there are several advantages to not providing guidance in the legislation. Firstly, the moral and societal norm concepts have the capacity to change over time and not introducing guidance into the legislation provides the flexibility and freedom that courts need to develop these concepts. Lack of guidance will also prevent business owners from distorting their practices to avoid the guidance examples and detracting from the intent of the legislation. Another advantage is to prevent a "misdiagnosis" by consumers that their claim falls within the provisions. This criticism was raised in an expert panel report in 2010. [24] We would thus recommend that further guidance to the definition of "unconscionable conduct" is unnecessary.

4.3. Are there any other benefits and disadvantages to a general unfair trading prohibition that should be considered? (Question 41 of the Interim Report)

and

4.4. Is there further evidence of a gap in the current law that justifies an economy-wide approach? (Question 42 of the Interim Report)

CCLSWA would support the introduction of a general unfair trading prohibition. One potential application of this prohibition could exist in relation to the business models adopted by "for profit" financial counselling companies, who claim they can assist customers by:

- developing and managing budgets;
- negotiating with creditors;
- advising and arranging formal debt agreements under Bankruptcy Act; and
- 'cleaning', 'fixing' 'repairing', 'removing' or 'washing away' default listings or other information on credit reports.

These businesses often increase the financial burden on clients in exchange for services of no or little value (for example offering to remove default listings from credit reports where this may not be possible) or services which could be undertaken for free by clients themselves or by not for profit financial counsellors.

5. Unfair contracts

5.1. Should the grey list of examples of unfair terms be expanded? (Question 47 of the Interim Report)

CCLSWA would support an expanded grey list of example of unfair terms. Further clarity and guidance in interpreting the unfair terms provisions would be a useful addition to the current information that has been issued.

5.2. Would empowering ACL regulators to compel evidence from a business to investigate whether a term is unfair be appropriate enforcement tool? If so, what should be the scope of this power? (Question 45 of the Interim Report)

CCLSWA would support an expansion of ACL regulator powers which would enable regulators to compel evidence from businesses to investigate whether a

[24] Department of Innovation, Science and Research, "Strengthening Statutory Unconscionable conduct and the Franchising Code of Conduct", February 2010.

term is unfair. We are of the view that this would provide the ACL regulators with greater authority to seek information from businesses during investigations.

6. Penalties and remedies

6.1. Are the current maximum financial penalties adequate to deter future breaches of the ACL? (Question 63 of the Interim Report)

CCLSWA would support an increase in the current maximum financial penalties applicable to body corporates. In particular, CCLSWA would support the imposition of maximum pecuniary penalties which are determined by reference to the greater of either the total value of the benefits obtained as a result of the breach or the annual turnover of the body corporate during the financial year in which the breach occurred. These new provisions would be comparable to the current penalty provisions which apply under the *Competition and Consumer Act 2010 (Cth*) in relation to breaches of competition law,[25] and would provide a greater deterrence against breaching the ACL.

7. Purchasing online

7.1. Should the sale-by-auction exemption for consumer guarantees be amended with regard to sales by online auction sites? If so:

• How should this be designed? For example, should the exemption be clarified, narrowed or removed altogether?

• Would it require online auction sites to change their existing processes and policies substantially, and if so, what are the costs of doing so and any transitional arrangements that may be required? What are the impacts for consumers?

• Are there any unintended consequences, and how could these be addressed?

(Question 71 of the Interim Report)

The consumer guarantees outlined in the ACL as to acceptable quality,[26] fitness for disclosed purpose,[27] supply of goods by description,[28] supply of goods by example,[29] repairs and spare parts,[30] and express warranties[31] do not currently apply to sales by auction.

Section 2 of the ACL defines “sale by auction” to mean “in relation to the supply of goods by a person, means a sale by auction that is conducted by an agent of the person (whether the agent acts in person or by electronic means).”[32] Popular online auction websites like eBay do not qualify as agents within this definition however, and are considered to merely act as a conduit, facilitating relationships between

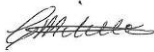
[25] Competition and Consumer Act 2010 (Cth) s 76(1)-(1A).
[26] ACL s 54(1)(b).
[27] ACL s 55(1)(b).
[28] ACL s 56(1)(b).
[29] ACL s 57(1)(b).
[30] ACL s 58 (1)(b).
[31] ACL s 59(1)(b).
[32] ACL s 2.

consumers and the supply of goods.[33] This interpretation of section 2 of the ACL means online transactions (including online auctions such as eBay) should currently be covered by consumer guarantees.

CCLSWA is of the view that all consumers who purchase items by auction online should continue to be protected by the consumer guarantees under the ACL. Consumers who engage in online auctions do not have the same opportunity to inspect the product they are buying and adjust their bid in turn as they would for a traditional auction. The “sale by auction” exemption for consumer guarantees should apply to traditional style auctions only.

We hope that our submission will be useful in elucidating the current issues in the ACL and that the proposed recommendations aid in making the ACL more robust and relevant in the future. Please contact Gemma Mitchell if you have any questions about this submission.

Yours faithfully
Consumer Credit Legal Service (WA) Inc.



Gemma Mitchell
Principal Solicitor

[33] *Malam v Graysonline, Rumbles Removals and Storage (General)* [2012] NSWCTTT 197 (18 May 2012).