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Mr Garry Clements
Chair, Consumer Affairs Australia and New Zealand
Commissioner for Consumer Affairs
Northern Territory

Dear Mr Clements,

Submission to the Review of Australian Consumer Law

I refer to the Issues Paper released by you on the subject of this review. My senior officers have had the opportunity to meet with State and Commonwealth representatives as part of the consultation process. I have also had the opportunity to read the submission to this review prepared by Legal Aid New South Wales

The Legal Services Commission of South Australia ('the Commission') is the largest provider of legal assistance services in the State. Our Access Services Division provides general legal information and advice to South Australians who contact our advice line or make face to face appointments. In this capacity, we provide advice and referral on consumer matters and disputes but we do not provide a court representation service. We have a specialist consumer law officer who handles more complex matters, provides advice to other staff members and works closely with our Community Legal Education Service.

In responding to the Issues Paper, the Commission has focussed on areas directly relevant to its sphere of operation.

1.3 Australia's consumer policy framework objectives

Do the national consumer policy framework's overarching and operational objectives remain relevant? What changes could be made?

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

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 Australian Consumer Law contains extremely important protections for consumers. The overarching and operational objectives of the national consumer policy remain highly relevant. However, issues remain with providing accessible and timely redress for consumers particularly in South Australia. Apart from the powers of Consumer and Business Services Commissioner to compel a conciliation conference, the only redress for SA consumers who suffer detriment is the court system.

In addition, and despite the clear raft of regulation, predatory and unfair business practices persist, including:

- Unsolicited consumer agreements for products such as solar panels or photography services;
- Credit repair agencies whose business model falls outside other regulation
- Private colleges who rely on unfair contract terms and pressure sales techniques to sign up students vocational courses using inducements

Overseas Examples

The Retail Ombudsman service in the United Kingdom is based on similar models in Australian consumer credit and banking regulation area where there is no charge to the consumer for registering a complaint, retailers pay to be members and pay when a dispute against them is lodged. Importantly, the Retail Ombudsman website offers an automated triage system online for consumers who are able to settle their own disputes. (See <https://www.theretailombudsman.org.uk/>)

An alternative to establishing an ombudsman service would be to strengthen the powers of the state based fair trading bodies or establish a separate consumer tribunal with inquisitorial powers and the ability to appoint independent experts to determine faults with goods. The key to effective enforcement is information and it is impossible for regulators to be aware of everything. Advocates who deal with consumers on a daily basis are an important source of information about unfair business practices and other systemic issues and continued engagement between stakeholders remains essential.

2.1 Structure and clarity of the Australian Consumer Law

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

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

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

Is the ACL's treatment of 'consumer' appropriate?

Is \$40,000 still an appropriate threshold for consumer purchases?

While the language of the ACL is clear, the structure and placement of the ACL in a schedule at the very back of the Statute makes it difficult for consumers to navigate and to locate. Under the previous laws, a useful guide was available which summarised the key points, assisting both consumers and businesses. A simple separate website with the key elements of the ACL with click-throughs for common consumer problems and case studies to illustrate the application of those key points would be useful in empowering consumers.

The Commission considers that while the current threshold of \$40,000 for goods or services that are purchased for personal, domestic or household purposes is still relevant, it is probably now too low for business to business transactions.

2.2 General protections of the Australian Consumer Law

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?

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?

While the protections are generally working well, certain types of unfair or misleading business models persist. Often these business models rely on the lack of sophistication of consumers in areas of law that are usually complex and may even capture consumers who are generally not considered 'vulnerable'. Consumers may be misinformed about certain issues, for example, credit reporting, such that a business can take advantage of the notion of 'repairing' a credit report when

that generally is not possible. Consumers may also be presented with overwhelming amounts of information that they do not have time to properly consider or may seem to represent a good idea, but in fact have hidden traps that are not properly disclosed.

Businesses may also try to give an impression that they are offering a good deal or do not have to comply with certain laws, such goods or services as offered by businesses setting up 'pop-up' stores in shopping centres that may or may not meet the definitions in the Australian Consumer Law relating to unsolicited consumer agreements.

The difficulty with unconscionable conduct is the lack of a consistent definition and the conflict between what is considered unconscionable by a court under the common law and equity, and the definition that is found in the ACL.

Motor vehicles present a special problem because of the significance and cost of the purchase of a new car.

To illustrate particular problems or gaps of which we are aware, the following case studies are set out below. Note: The names used in the case studies have been changed.

Tahlia's Story – Credit Repair Business

Tahlia lives in a regional area about 30kms outside a major town. She is separated from her partner with whom she has 3 young children. She does not work but relies on child support and government benefits.

Tahlia saw an advertisement for a credit repair business. She was aware that she had five defaults listed on her credit report and wanted to remove them because she was thinking about trying to get a loan to buy a home in her area. She believed that her credit report would be "fixed" by the business and that once that had happened she would be able to apply for a home loan.

She entered into a contract and direct debit arrangement with the business. After paying over \$4,000 she approached a financial counsellor for assistance with other unmanageable bills. Tahlia informed the financial counsellor that she was told that two of the credit providers had agreed to remove the reports. Five months later and notwithstanding numerous emails to the business, her credit report remained unchanged.

The financial counsellor sought legal advice. The terms of the contract stated that fees would only be charged on successful removal of the default. The client was being charged a significant amount even though Tahlia's credit report still contained five default listings. The business kept assuring Tahlia that her credit report would be "fixed" and the listings removed.

The business refused to refund Tahlia's money, and her only option to recover the money paid was legal action. Tahlia did not have easy access to legal assistance, and despite the significant amount of money involved, did not have the motivation to pursue the matter. In any event, her only option would have been a complex court action.

Simon's Story – Private Colleges

Simon lived in Port Lincoln and wanted to do a course in animal grooming and pet care. He signed up with Fast Learn Colleges (a registered training organisation offering solely on-line courses including TAFE courses) in New South Wales to do a course on-line. Simon said that he was not told about the practical component that was required to obtain the qualification prior to signing up. Simon agreed to pay for the course in instalments and paid the first 2 instalments. He then lost his job and soon found that he was unable to afford the fees.

He sought legal advice and was surprised to find out that the practical component of the course was only available in NSW. Simon was also told that the terms of the contract he signed stated that if he

cancelled the course more than 5 days after signing, he was liable to pay the entire course fee of \$3000.

Simon was prepared to forgo the amount of \$300 that he had paid to date, in exchange for being released from any further obligation to pay. He lodged a complaint with Fast Learn Colleges about his situation, including their failure to explain to him the requirement to do the practical component in NSW.

Fast Learn Colleges offered Simon a deferral of the commencement date of his course so that he could start studying again when he found another job, but in the meantime he simply could not afford to pay. The college did not address the issue of the failure to advise Simon about the requirements to complete the course. Simon also found out that he could do the same course at a local TAFE, under VET-Fee Help.

Simon was also being pursued by a debt collecting agency appointed by the college for the fees. Ultimately, the matter was resolved with Simon being released from his contract with the college, and a refund of \$100.

Tracey's Story – Kiosk Sales in Shopping Centres

Tracey was a young mother who was with her two young children in a shopping centre one weekday morning. She was approached by a lady from Hey Baby Photography who commented on how cute her children were, and who offered to take some 'no-obligation' photos then and there, at no charge, and that she could pick up a free print of a selected photo in 21 days time. Tracey agreed to have the photos taken, and when she went to collect the free print she was very impressed. Tracey was then offered a contract to buy a number of products with her selected photograph on them as a package for \$1300 that they could pay in instalments, and a separate selection of framed prints for another \$2,000 payable in instalments.

Tracey agreed to the package of products, and handed over her direct debit details after paying the first instalment as a deposit when she signed an agreement. The instalments were over a period of 4 months of \$260 per month.

When she got home she realised that she could not afford the repayments. She tried to ring the company, but it was late in the day and she could not get onto them. When she finally got a hold of them the next day, she was told it was too late, she had signed a legally binding agreement and there was no cooling off period available.

Tracey sought legal advice about her rights. She was informed that the agreement was covered by the unsolicited agreements provisions of the Australian Consumer Law, and that she potentially had a 6 month cooling off period. She also cancelled the direct debit and wrote to the business asking for a refund of the deposit.

After some unsuccessful correspondence with Hey Baby Photography, she has been referred to Consumer and Business Services.

Penalties sufficient to dissuade companies and individuals from resorting to unfair contract terms and provisions need to be introduced. In Simon's story, the agreement with the private college imposed an unfair term in the form of a penalty on students whose circumstances changed preventing them from studying. Although, the ACL provides that a court may declare a contract term unfair, and whilst many of the businesses who rely on these terms would not welcome a Court's scrutiny, it still requires the affected consumer to take the relevant action. In addition, the court should have the power to set aside the whole contract, so that a person in the position of Simon in the above story can be released from all his obligations, rather than simply from the obligation to pay the entire balance of the course fees.

The threat of a fine and the relevant administrative action that can be taken by the ACCC, including accepting enforceable undertakings in relation to unfair contract terms, may send a stronger message to business to ensure that contract terms do not cause an imbalance between the consumer's rights and that of the business. Otherwise, consumers are at a disadvantage because the business can simply put the consumer to proof on whether or not the term is unfair.

2.3 The Australian Consumer Law's Specific Protections

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?

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?

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

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

Could the handling of unsafe products that fall within the scope of the ACL and a specialist regulatory regime be more effective, and how?

Should protocols or other arrangements be established between ACL and specialist regulators?

Overall the Commission considers that the specific protections in the ACL are working effectively. The Commission supports the work done by ACCC in pursuing entities in specific areas, including misleading and deceptive conduct, unconscionable conduct and unsolicited consumer agreements. However, barriers remain for consumers in pursuing rights and redress under the ACL, which in South Australia is exacerbated by the fact that there is no consumer-specific tribunal.

Bigger businesses, in our experience, appear to have a better understanding of consumers' rights, although motor vehicle manufacturers and retailers remain an exception. Medium to small businesses seem to either resist or not understand their obligations, or are unable to afford to meet their statutory responsibilities regarding guarantees. This latter problem may point to a need for automatic rights of indemnity from manufacturers for these retailers in cases of faulty goods.

Consumer Guarantee

Consumer guarantee remains an area that is yet to be the subject of a court decision to guide those giving advice to clients. There is an increasing need for the law to clarify certain provisions, for example how the major/minor failure regime is intended to work and the length of time goods are expected to last (for example, the rejection period under S 261 (2)). One option to address the distinction between a major and minor failure to meet the statutory guarantee as to acceptable quality of goods may be to abolish the distinction altogether.

Unfortunately consumers may find themselves in the position where a supplier spends time trying to repair goods, but the goods are irreparable. In other cases, the sourcing of parts for repair from overseas can exacerbate the loss suffered. In either case, the consequence is that the consumers may not have the use of the goods for a lengthy period. This is an issue with certain essential household goods, for example the parts to repair a washing machine may take a month to be shipped, but of course a family will need to wash their clothes more frequently and may struggle to manage without a washing machine for that period of time. Determining how a failure is classified under the ACL can be the subject of dispute. In this example, if the washing machine could easily be fixed within a reasonable length of time it is considered a minor failure. But the length of time that it takes for the spare part to be shipped may turn it into a major failure.

Inappropriate referral of consumers to the manufacturer for guarantee issues continues to be a common problem, as does the persistence of manufacturer guarantees and 'extended warranties' which often offer nothing more than that which is already contained in the ACL.

Lemon Laws

The Commission would support the introduction of “lemon laws” into the ACL. Cars and motorbikes are generally one of the largest single purchases that consumers will make in their lifetimes. As a result, any failure of the vehicle to meet the consumer guarantees as to acceptable quality or other guarantees is significant to the individual. The failure of the vehicle (particularly a new one that brings with it a high level of expectation) may cause *“its owner more grief than utility”* (Commonwealth Consumer Affairs Advisory Council, *Consumer Rights – Reforming Statutory Implied Conditions and Guarantees*, October 2009, p 91).

Unfortunately, in our experience, suppliers and manufacturers of motor vehicles are often not willing to comply with their obligations under the Australian Consumer Law. The case studies below demonstrate clearly the problems associated with suppliers and manufacturers failing to meet the guarantees or offering inappropriate solutions for consumers.

Charlie’s Story – Lemon laws #1

Charlie bought a brand new car in 2013 which had some additional modifications done to it by the manufacturer to make it a high performance vehicle. In early 2016, he was driving on the Southern Expressway and the car stopped completely. He was able to get it started again and took it to the supplier to check over. After one month, the supplier returned it to him saying there was nothing wrong. The same thing happened twice at about monthly intervals. Each time, the supplier said they could not find anything wrong.

Charlie is now waiting for a fourth time. An expert has been brought from interstate to look at the car, and in the meantime, Charlie is paying a loan at \$1,000 per month for a \$65,000 loan. He has been without the car for a total of 3 months, and although he had a loan car for a while, it is not the car he bought.

If Charlie’s problem involved a lap-top or whitegoods, by now the supplier or manufacturer is likely to have replaced the item. He would not have had the burden of significant loan repayments. He would not have been exposed to risk of failure and injury in such dangerous circumstances.

Andy’s Story – Lemon laws #2

Andy is barely literate and relies on his daughter to read his mail and help him with other tasks.

Andy was able to afford a new car in 2013 on his modest income, but about 6 months later the car’s transmission failed. The manufacturer replaced it, and he had the car a further 9 months when it failed again. It was replaced, but in early 2016 it needed another replacement transmission.

The manufacturer has offered him a new model which is slightly more expensive with a trade-in on the old car, but Andy cannot afford the loan repayments for the new car. In fact he is struggling with payments on the first loan.

The solution offered by the supplier and manufacturer was inappropriate for Andy and in breach of their obligations under the Australian Consumer Law. Andy has sought advice, but in order to enforce his rights, he may have to take legal action, which given his literacy problems seems an insurmountable task. He cannot access representation without considerable cost, and even if he is in a position to obtain pro-bono assistance, he will need to come up with filing fees and other disbursements to fund an action.

2.4 Other issues

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 or business models should be captured? What are the potential advantages, and disadvantages, of introducing such a prohibition?

Does the current approach to defining a 'financial service' in the ASIC Act create unnecessary complexity in determining if certain conduct falls within the scope of the ACL or the ASIC Act? How could this be addressed?

The Commission believes that there is scope in ACL to prohibit certain unfair business models by identifying the key components of the prohibited scheme. The prohibitions on pyramid selling in the ACL and on Star Bowkett societies in other legislation provide models for the formulation of appropriate provisions.

Online Gambling Sites

The Commission is particularly concerned about the way in which gambling services are promoted on-line and the terms of contracts offered to the consumers of gambling services. There are a number of unfair and inappropriate practices in this area which are well illustrated in a paper on on-line sports betting by Financial Counselling Australia, *Duds, Mugs and the A-List* which can be accessed here: <http://www.financialcounselingaustralia.org.au/getattachment/Corporate/Home/FINAL-PDF-Duds,-Mugs-and-the-A-List-The-Impact-of-Uncontrolled-Sports-Betting-low-res.pdf>

Financial Services

The Commission believes that there is unnecessary complexity in determining whether or not certain types of financial services or products fall under the ACL. This is particularly important in the area of consumer leases, where consumer goods are inextricably linked with financial products or services. Whilst there is likely to be an argument that a consumer who leases goods has the protections afforded by the consumer guarantees (because of the definition of 'acquire' and 'supply' in the ACL which include leasing or hiring), a closer look at the legislation casts doubt on this issue.

The *Competition and Consumer Act 2010* (CCA) specifically excludes financial products from the application of the Australian Consumer Law. The CCA relies on the definition of financial products contained in the *Australian Securities and Investments Commission Act 2001* (Cth) and associated regulations. The protections contained within the ASIC Act include misleading and deceptive conduct, unconscionable conduct and misrepresentation, but consumers who lease goods that turn out to be faulty from licensed credit providers under a consumer lease should not be excluded from the significant protections afforded under the ACL. We would recommend that a provision be included within the ASIC Act or regulations to ensure that the goods that are the subject of a consumer lease are not excluded from the protections under the ACL.

3.3 Access to remedies and scope for private action

Are there any barriers to consumers and businesses enforcing their rights and seeking access to remedies under the ACL? Are there barriers to private actions that need to be addressed?

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

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

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?

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?

In 2014, the Productivity Commission Report on access to civil justice revealed the extent to which Australians are unable to enforce their civil rights as a result of lack of access to effective legal advice and the high cost of going to court. Unlike other states, South Australia does not have a dedicated consumer tribunal. Consumers who wish to take a dispute with a supplier must either approach Consumer and Business Services for a compulsory conciliation conference with the supplier under S8A of *Fair Trading Act 1987* (SA) or if that fails, or is too complex, the consumers then must take action in the South Australian courts.

This immediately puts consumers into an adversarial model and may put a supplier off-side. Whilst, for example the Minor Civil action jurisdiction, with an upper limit of \$12,000, is intended to be run in an inquisitorial manner, it still requires consumers to follow the Court rules and procedure, and present their case in the best light. Consumers are required to pay a filing fee of \$138, and attend court during business hours. Consumers may be intimidated by going to court to 'present' a case, and may find the notion of a "win or lose" outcome too daunting and risky.

As alternative to a court process, a Retail Ombudsman with the power to make decisions based on the papers would allow consumers to use out of hours time to prepare and a centralised service would not require attendance in person. A system which allowed a complaint to be dealt with online would offer conveniences for all those involved in the dispute. The current Australian Credit Ombudsman services are free to consumers, although to off-set costs, a retail ombudsman may consider a modest charge which could be waived in certain circumstances. Consumers dissatisfied with an outcome, could decline to accept the determination, and have the option to take the matter to court. The trader or retailer on the other hand should be required to accept the outcome of the determination.

Need for More Resources

Whilst Consumer and Business Services (SA) is doing its best, it appears that this Agency is under-resourced. If the problem involves complex legal issues, consumers are often referred to other agencies, including the Legal Services Commission. The Commission can only give advice and minor assistance to consumers who wish to pursue their options through the South Australian court system. Often consumers may be intimidated by court process and rules. The filing fees for a minor civil claim may exceed the amount that is in dispute. Further a business may delay responding and adopt an adversarial approach in a court which could have been avoided if the issue was dealt with sooner.

Educational Tools Online

Online tools can be of great benefit in providing legal advice services. The Legal Services Commission has been at the forefront of on-line legal advice services for some time, making use of Web Pages, Twitter, YouTube and Facebook to reach our clients. The South Australian community makes extensive use of the Commission's on-line resources, with over 2 million website page views in the 2014-15 financial year. As at 30 June 2015, the Commission's Twitter account had 1,957 followers and almost 2 million Twitter pages had received Commission Twitter content. The Commission's Facebook pages are particularly popular with rural and remote communities.

The Commission's *Legal Chat* information website window has proved to be very popular. We have had 1,820 genuine Legal Chats to date since launching to the public on 25 September 2015, of these 22% concerned criminal matters (including traffic offences). Of the other contacts, 57% of chats concerned civil law and 21% concerned family law. Our post chat survey has shown that between the launch in September 2015 and March 2016, 75% of chat clients prefer online chat to telephone help and 69% said they would use the chat service again

Thank you for the opportunity to comment on the Issues Paper.

Yours sincerely,


G Gabrielle Canny
Director