

ACL Comments  
Policy and Legislation Division  
Consumer Affairs Victoria  
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MELBOURNE VIC 3000

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13th October 2010

Dear Sir or Madam

## **Re: Response to Australian Consumer Law draft Guidelines**

### **Introduction**

National Legal Aid (NLA) represents the Directors of the eight State and Territory Legal Aid Commissions (Commissions) in Australia. The Commissions are independent statutory authorities established under respective State or Territory enabling legislation. They are funded by State or Territory and Commonwealth governments to provide legal assistance to disadvantaged people.

NLA aims to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

- Obtain access to independent legal advice;
- Afford the appropriate cost of legal representation;
- Obtain access to the Federal and State and Territory legal systems; or
- Obtain adequate information about access to the law and the legal system.

NLA welcomes the opportunity to comment on the draft Guides to the Australian Consumer Law.

### **Draft Guide – Introductory comments**

The draft Consumer Law Guides circulated for comment are useful, easy to read, well set out and informative documents.

Our response to the draft Guides is made in the context of our expertise in consumer matters, particularly representing disadvantaged consumers. Whilst we understand the target audience for the Guides to be businesses and legal practitioners, we believe the Guides would be equally beneficial to community caseworkers (eg financial counsellors) as well as consumers themselves. Many of our suggested

amendments, as set out below, focus on directing consumers towards outcomes to their consumer issues.

## **General comments**

We outline below some general comments which apply across the Guides. Some of these points are picked up in our specific suggested amendments to particular Guides.

### **Consumer complaints**

1. It is important that consumers are provided with the tools to lodge consumer complaints.

This includes clarifying the role of the regulator agencies that will investigate complaints. It also involves giving consumers the practical details to resolve their complaints, which includes relevant Courts, Tribunals and/or EDR schemes. The Guides are slightly inconsistent in their referencing to forums for the resolution of disputes. This could be improved.

Equally, consumers who need assistance with lodging complaints or advice on their rights should be provided in this Guide details of where they can obtain free legal advice and assistance. Such information could usefully be located in the Contacts section at the end of the Guides.

### **Referencing to legislation**

2. The Guides are slightly inconsistent in their use of references to specific provisions within the Australian Consumer Law (ACL). We believe that having references to key provisions within the ACL is a useful resource. We would encourage the use of referencing along the line set out in the Sales Practices Guide at paragraph 2.54.

### **Cross-referencing**

3. Cross referencing within a Guide or between Guides could be more consistent.

Where a reference is made to another Guide, it should be referred to by its title (rather than informally) and (if possible) given a unique identifier (eg ASIC gives its Regulatory Guides specific identifiers eg RG 139).

Where a reference is made within the same Guide to more complicated principles, cross-referencing can be of assistance. To give an example, the development of the notion of 'consequential loss' in the Consumer Guarantees Guide occurs in various aspects of that Guide (paragraphs 3.8, 6.6 to 6.8, 7.53 to 7.1 and we query also whether it should be referred to in 1.11). It would assist to cross-reference the later development of that concept in earlier sections of the Guide.

### **Case citations**

4. The use of case citations in the Guides is slightly inconsistent. We believe that having references to particular cases is a useful resource. Certainty about the manner in which laws have been applied benefits consumers and businesses. We would encourage the use of case citation along the line set out in the Consumer Guarantee Guide at paragraph 4.23.

## **Consumer protection agency intervention**

5. A key motivating factor for any business in adhering to the new law is the belief that consumer agencies are engaged and active in their enforcement of the law. The Guides could, in our view, give more examples of regulator intervention.

## **Insurance contracts**

6. We note in our response to the draft Consumer Guarantees Guide below (at point #6) that reference has been made in that draft Guide to insurance contracts being excluded from the operation of the ACL. For the reasons set out below, we do not consider that comment appropriate in the context of the Consumer Guarantees Guide - or any of the other Guides to the ACL.

Insurance contracts are not a "classic" example of the type of contract typically excluded by the ACL. The failure of the current legislative regime to apply to insurance contracts is based on a historical anomaly (s 15 Insurance Contracts Act). That provision is currently the subject of review. It may well be that within a short time of this Guide being published that the Australian Consumer Law will apply to insurance and this reference would be inaccurate.

## **General Law draft Guide**

### **Consumer complaints**

For the reasons set out above, we suggest the following amendments.

1. Insert in the Introduction, words to the effect:

"Consumer protection agencies may take action on behalf of affected consumers when a supplier or manufacturer fails to meet obligations under the Australian Consumer Law."

2. Insert in the Introduction, words to the effect:

"Consumers whose rights under the Australian Consumer Law have been adversely affected should lodge a complaint through their relevant consumer protection agency"

3. Insert in the Introduction a new heading "Forums for resolving consumer disputes".

Provide relevant information in relation to forums for resolving consumer disputes, including External Dispute Resolution schemes such as;

- a. Financial Ombudsman Service
- b. Credit Ombudsman Service
- c. Telecommunications Industry Ombudsman
- d. Energy and Water Ombudsman Services (State).

4. Insert a reference in the Contacts section to;

- a. EDR schemes
- b. Legal Aid Commissions, specialist Community Legal Centres (including CALC and CCLC) and financial counselling services.

## **Consumer Guarantees draft Guide**

### **Consumer complaints**

For the reasons set out above, we suggest the following amendments.

1. Insert in the Introduction, words to the effect:

"Consumer protection agencies may take action on behalf of affected consumers when a supplier or manufacturer fails to meet obligations under the Australian Consumer Law".

2. Insert in the Introduction, words to the effect:

"Consumers whose rights under the Australian Consumer Law have been adversely affected should lodge a complaint through their relevant consumer protection agency."

3. Insert a new heading "Forums for resolving consumer disputes".

Provide relevant information in relation to forums for resolving consumer disputes, including External Dispute Resolution schemes such as;

- a. Financial Ombudsman Service
- b. Credit Ombudsman Service
- c. Telecommunications Industry Ombudsman
- d. Energy and Water Ombudsman Services (State)

4. Insert a reference in the Contacts section to;

- a. EDR schemes
- b. Legal Aid Commissions and specialist Community Legal Centres (including CALC and CCLC).

### **Insurance contracts**

5. Delete the reference in Part 2.7 to insurance contracts as a type of contract excluded from operation of Australian Consumer Law.

### **Undisclosed securities**

Charges over motor vehicles including issues relating to undischarged security over vehicles is a common problem for consumers. Many consumers are unaware of the need to check security over vehicles.

6. Consider whether an example should be provided as to how the new laws affect charges over motor vehicles.

## **Sale Practices draft Guide**

### **Consumer complaints**

For the reasons set out above, we suggest the following amendments.

1. Insert in the Introduction, words to the effect:

"Consumer protection agencies may take action on behalf of affected consumers when a supplier or manufacturer fails to meet obligations under the Australian Consumer Law."

2. Insert in the Introduction, words to the effect:

"Consumers whose rights under the Australian Consumer Law have been adversely affected should lodge a complaint through their relevant consumer protection agency."

3. Insert a new heading "Forums for resolving consumer disputes".

Provide relevant information in relation to forums for resolving consumer disputes, including External Dispute Resolution schemes such as;

- a. Financial Ombudsman Service
- b. Credit Ombudsman Service
- c. Telecommunications Industry Ombudsman
- d. Energy and Water Ombudsman Services (State).

4. Insert a reference in the Contacts section to;

- a. EDR schemes
- b. Legal Aid Commissions and specialist Community Legal Centres (including CALC and CCLC).

### **Requesting payment for unauthorised entries or advertisements**

As an example of the comments outlined in our introductory comments on case citation, the reference in paragraph 1.19 to a 2007 Federal Court case does not contain the case citation. It would assist businesses and consumer caseworkers to have particular details of the case cited.

5. Insert at paragraph 1.19 to the case citation reference to the 2007 Federal Court decision against the three men.

### **Harassment and Coercion**

This section is surprisingly slim on detail. Questionable debt collection practices, including harassment and coercion, are well-documented as widespread and systemic across Australia. Casework experience is that disadvantaged consumers are the most vulnerable to questionable debt collection practices.

6. In these circumstances, we suggest that the Guide could include:
  - Examples of reported cases on debt collection breaches (of equivalent state laws)
  - Examples of investigated breaches of equivalent state laws
  - Cross-reference to the ASIC/ACCC debt-collection guidelines
  - Reference to forums for resolution of disputes, including EDR.

## Product Safety draft Guide

### Consumer complaints

For the reasons set out above, we suggest the following amendments.

1. Insert in the Introduction, words to the effect:

"Consumer protection agencies may take action on behalf of affected consumers when a supplier or manufacturer fails to meet obligations under the Australian Consumer Law."

2. Insert in the Introduction, words to the effect:

"Consumers whose rights under the Australian Consumer Law have been adversely affected should lodge a complaint through their relevant consumer protection agency."

3. Insert a new heading "Forums for resolving consumer disputes".

Provide relevant information in relation to forums for resolving consumer disputes.

- a. Financial Ombudsman Service
- b. Credit Ombudsman Service
- c. Telecommunications Industry Ombudsman
- d. Energy and Water Ombudsman Services (State).

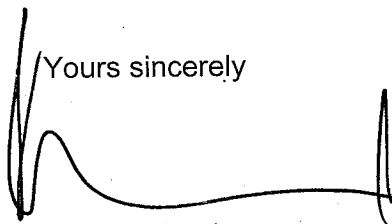
4. Insert a reference in the Contacts section to;

- a. Product Safety Australia website and contact details - [productsafety.gov.au](http://productsafety.gov.au)
- b. Product Safety Australia recalls website - [recalls.gov.au](http://recalls.gov.au)
- c. SAI Global website
- d. Legal Aid Commissions and specialist Community Legal Centres (including CHOICE, CALC and CCLC).

### Conclusion

Thank you for the opportunity to provide these comments. Please do not hesitate to contact us if you have any questions about them.

Yours sincerely



Alan Kirkland  
Chair  
National Legal Aid