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Mr Garry Clements

Chair

Consumer Affairs Australia New Zealand

Australian Consumer Law Review 2016 Submission

The Australian Furniture Removers Association (AFRA) is the peak Industry Body for the furniture removal industry in Australia. The industry provides relocation services on a local, intrastate, interstate as well as international basis. The industry also provides both packing and storage services to both consumers and businesses. The primary activities are for the relocation of, a customer's personal belongings and domestic/household effects or the commercial furniture and equipment for a business.

The industry employs over 20,000 people within 8300 enterprises. The 4 Major companies comprise 25% market share and the balance of the market share is distributed across the rest of the enterprises.

AFRA has always and remains committed to ensuring that the rights of consumers are upheld and in this regard our members are signatories to an industry code of conduct. As part of the code of conduct, AFRA provides mediation for consumers in the event of a complaint against a member with a view to facilitating the fair resolution of the complaint. Consumers are open to pursue other legal rights available to them but AFRA aims to assist to mediate and to ensure all parties have appropriate facts and information to settle the dispute. AFRA has been awarded a Department of Fair Trading Award for Raising the Awareness of Consumer rights amongst the people of NSW.

AFRA continues to support the intent of the Australian Consumer Law (**ACL**) and this submission will put forward commentary where the idiosyncratic nature of the furniture removal industry has resulted in unanticipated issues and commercial disadvantages for small to medium sized removalist businesses. The terms and conditions of contract that the majority of our members provide to the consumer, support and make direct reference to the legislation under review.

Whilst AFRA may have views on many of the questions listed in the Australian Consumer Law Review Issues Paper (March 2016), we will restrict our submission to the more pertinent questions affecting our sector. We refer to the consolidated list of questions in the Appendix and use these as the structural basis for our submission below.

Australian Consumer Law (ACL) – The legal Framework

Q.4 Is the language of the ACL clear and simple to understand? Are there aspects that could be improved?

A. The ACL provides reasonable protection for consumers in relation to the supply of goods both new and used/second-hand as well as reasonable obligations for suppliers in the provisions of services where it is possible for the supplier to have control over the likely outcome of the provision of the services and the condition of the goods. In such cases, there is clarity in the end result (i.e. the goods must be fit for purpose) and where the outcome for the supply of the service is well defined.

Where the service is dependent upon elements which are outside of the provider's control, (such as the case in many instances in our industry), for example, where there are numerous suppliers involved in the chain of supply (some of which are contractors and others who have no relationship with the supplier) or where different events can cause the service to fail to meet the consumer guarantee or other expected standard, the ACL falls short with regard to cause and effect and fails to recognise the risk inherent in the supply of the services or other considerations such as proportionate liability to determine negligence or a failure of the supplier to provide their services with due care and skill. This is particularly difficult where the conditions of the items transported cannot be clearly ascertained prior to the supply of a removal service or where there is no certainty or knowledge of why or how the goods transported came to be damaged. In these cases where there are extenuating considerations there seems to be no ability for consumers to understand what their rights are under the ACL. This is the case even though these principles have been determined in the case law for tortious liability for negligence.

The Australian Consumer Law's Specific Protections

Q.10 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?

A. The furniture removal industry is a service industry that moves personal, second hand furniture and effects. The nature of these second hand goods being relocated add a greater element of financial and reputational risk when providing the service.

The legislation appropriately addresses the sale of new or second hand goods by a supplier as well as the provision of services. However, the furniture removal industry predominantly provides services to relocate second hand or pre-owned furniture and effects which brings with it an inherent problem with regard to the suitability and condition of these furniture and effects for transit or storage during the course of the provision of relocation services. The ACL creates an environment in which the consumer has access to rights and remedies for breach of consumer guarantees in respect of the services provided by removalists without taking account of the fact that the items which are relocated or stored are not new items yet consumers have an expectation that when they are moved and loss damage or occurs, they should be compensated as if those items were new.

Specific challenges for the industry include the following considerations:

- It is not always possible or practical to determine the suitability for transport of a used item of furniture or personal effects. It is not possible for either the owner or a removalist to have a comprehensive knowledge to be informed of that deficiency.
- Should there be a concern it may only be highlighted at the time of the removal, which then creates a difficult situation for both the removalist and consumer as there are usually time and date constraints where the relocation must occur in line with a settlement or vacant possession deadline.
- Items may develop inherent weaknesses through normal use, over time, that may subject them to further unavoidable damage in transit. Consumers rely on the resultant damage to claim negligence or a breach of the consumer guarantees where none may be proven or even exist (or where there is no evidence to support the consumer claim nor deny the damage was caused by the removalist). It is difficult and time consuming to rebut a consumer claim in these circumstances and the claims by the consumer are usually subjective and emotional. This inevitably results in some form of ex gratia payment from the removalist even though there may be no clear proof of wrongdoing by the removalist.

As an example of the financial imbalance of such claims, a local relocation of approximately 35 cubic metres may be priced at \$1,900 for the service. The value of the second hand furniture and effects may be in excess of \$70,000. It is apparent that even a small claim of \$400 would result in a loss situation on that service for the removalist business. Greater claims have a more financially debilitating effect as there is no financial cap on potential claims or resultant consequential losses despite no real evidence of negligence on the part of the supplier or a failure to exercise due care and skill.

Many consumers may wish to cover their shipments through insurance. Whilst insurance may be recommended in many cases, the consumer can choose not to take out insurance or to not claim on the policy and instead bring a claim through the consumer and administrative tribunal in their state/territory for a breach of the consumer guarantee.

In the event of an insurance claim, any exclusion or shortfall that may result in a lesser amount being paid, may then be directed to the business by the consumer seeking remedies under the ACL consumer guarantees. Further inequities occur in these situations as an insurer has the opportunity to limit their liability under the terms and conditions of the policy and the consumer, in full knowledge of this, may still bring a further claim against the removalist to recover an excess of uninsured loss. The insurer will not be liable to compensate the consumer for the full replacement of the items damaged on a 'new for old' basis and can discount the compensation to take account of fair wear and tear and depreciation. However a removalist cannot do this when faced with a claim for damage to used/second-hand goods which may have been caused in part by inherent faults/age of the goods and other causes which are outside their reasonable control.

With regard to the determination of a market value for used/second-hand furniture and effects, insurers are able to effect deductions for fair wear and tear and depreciation values, however this is not available to a supplier who provides the service of relocating and storing used/second-hand goods as under the ACL. There should be greater clarity on how such claims should be heard particularly for consumer and administrative tribunals who tend to ignore issues such as contributory negligence, proportionate liability and fair compensation regarding the value of these items and would seem to award consequential loss damages to

make up any deficiency in insurance payments or ensure the customer is restored to the position they would have been in prior to the loss/damage (almost on a new for old basis).

Q.11 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 to be addressed, or overseas models that could provide a useful guide?

A. The level of written information required to fully inform consumers of their ACL rights how this might intersect with the terms of a contract for the supply of the services become administratively difficult. This is particularly the case when handling consumer complaints.

The difference between the treatment of negligence claims which are asserted due to a breach of the duty of care and subject to proportionate liability and the fact that proportionate liability is effectively ignored for consumer claims needs to be reconciled. In some cases where the cause of the loss cannot be established there should not be an assumption that the supplier has failed to exercise due care and skill simply because the goods transported were damaged in transit. Despite best endeavours, consumers still are reluctant to read terms and conditions of contract and their expectations in terms of their rights and remedies for a failure to comply with the consumer guarantee exceed what is fair in the cases where the cause of loss cannot be clearly established.

We would be supportive of a consumer guide that would encompass the idiosyncrasies of the handling of used personal effects. AFRA can assist in this regard.

Administering and Enforcing the ACL

Q.18 Does the ACL promote a proportionate risk based enforcement?

A. The ACL does not provide any adjustment or consideration to allow for proportionate liability either in the transport of used/second-hand furniture and effects that may have undetectable weaknesses that render them more susceptible to damages in the normal course of transport. In many instances consumers chose to pack their own belongings.

Disputing a claim of negligence when the basis of that claim is the resultant damage and not the effective cause is not only difficult and unjust but also costly and a direct impact in reputational damage. This was not the intention of the legislation however in view of the nature of the removal industry an unforeseen result.

Claims for compensation and the basis of an acceptable value placed on second hand items in the event of a claim based on consumer guarantees is not addressed in the legislation.

There is no discussion for fair reasonable wear and tear or depreciation that would permit an opportunity to provide a reasonable compensation in the event of damage to used furniture. In some instances the cost of repairing a piece of furniture far exceeds its actual value at that time.

We would support the introduction of some form of statutory depreciated table on furniture and effects to bring clarity to consumers and businesses. Then the consumer can determine if they wish to insure an item for above that value.

This is common practice in the insurance industry where market or agreed value policies are available for the consumer to effect an informed judgement.

The ACL should also provide some clarity with regard to the provision of services by a primary contractor and its delegated subcontractors.

The consumer is able to bypass the primary contractor and initiate a claim on a subcontractor irrespective of contractual arrangements between primary contractor and consumer and primary and subcontractors. This also raises issues of proportionate liabilities in such instances and may also negate contracts between a primary contractor and consumer that has been agreed in good faith.

Further clarification should be provided under this review and provide guidance on whether the ACL usurp such contractual arrangements and to what extent then is proportionate liability applied.

Access to Remedies and Scope for the Private Sector

Q.25 Are there any barriers to consumers and businesses enforcing their rights and seeking access to remedies under the ACL? Are there barriers to private action that need to be addressed?

A. With regard to the consumer's access to remedies, these seem to be well supported through both state and federal avenues. The general perception that various state tribunals are overly supportive of a consumer and the objective of these tribunals to reduce the burden on the legal system to small claims is accepted. There is still a tendency though, for tribunals to bring down a decision based on the resultant damage rather any proof of failure to exercise due care and skill by the supplier. In this regard the evidence which is required to establish negligence is not used and instead a lesser standard of proof seems to apply. As previously mentioned in many cases it is not possible to determine the risk of damage of a used/second-hand piece of furniture nor is it clear as to how the "depreciated value" of such items may be. The onus is on the removalist to prove their position.

The matter of consequential loss is acknowledged as a point of difficulty, further to that is the matter of emotional value attached to personal effects which may be deemed by a tribunal as a consequential loss. Claims for "emotional or sentimental value" may lead to further ambiguity and also expose removalists to financial claims that cannot be objectively determined or mitigated.

Administrative tribunals may open up a 'Pandora's Box' with regard to consequential and other loss claims and have brought inconsistent decisions and outcomes with respect to claims. Again, these decisions may be based on the resultant damage rather than a proof of negligence.

Q.26 What low cost actions could consumers and businesses more readily use to enforce their rights?

A. With regard to the furniture removal industry, AFRA provides a mediation and tribunal service for consumers who use a member of the Association. This mediation and tribunal service comes at no cost to the consumer.

Whilst the member is bound by the decision of the AFRA tribunal, the consumer can escalate the matter further if they are not satisfied with the determination. The tribunal is formed by the executive and comprises of independent parties. Further involvement with industry associations and governing bodies would be considered beneficial.

Proportionate liability should apply to consumer claims as a means of redressing the current imbalance between businesses position and the consumer's rights. This is not to avoid liability where the supply of the services fails to meet the required standard but to recognise there are legitimate cases where the conduct if the consumer may have contributed to the loss or the loss may have been caused someone else for whom the removalist is not liable.

A rewrite of the guides to better advise consumers of their rights and access to remedies based on proportionate liability would also be beneficial to ensure that the consumer is aware of the circumstances where a supplier should not be liable for damage caused and whether this is outside their reasonable control and how values for compensation can be calculated taking into account the age of the items and other considerations fair wear and tear especially where services are supplied in relation to used/second-hand goods.

A handwritten signature in black ink, appearing to read 'Joe Lopino', written in a cursive style.

Joe Lopino

Executive Director