

Australian Consumer Law Review

Submissions by

The Aged-care Rights Service Incorporated

Trading as SENIORS RIGHTS SERVICE

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Your Rights. Your Voice.

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Australian Consumer Law Review Submission

While Seniors Rights Service recognises that it is important that the Australian Consumer Law (ACL) and its review looks at the big picture of statutory intention and goals we would like to make submissions on behalf of the little person, the individual disadvantaged consumer.

Issue: Application of Australian Consumer Law to older vulnerable and frail members of our community and specifically to residents in Residential Aged Care Homes.

Seniors Rights Service Background

The Aged-care Rights Service Inc. (TARS) trading as Seniors Rights Service (SRS) is a not-for-profit community legal centre with specialist advocacy and legal services based in Sydney but providing assistance to all older people across NSW. Seniors Rights Service is a specialist service providing assistance to people over 60. There are 3 Divisions in the SRS:

- 1 A professional Advocacy service which advocates for people who are residents in aged care facilities or receive in home care assistance.
- 2 The Older Persons Legal Service, which provides free legal assistance to disadvantaged and vulnerable older persons living in NSW.
- 3 The Retirement Village Legal Advice Service, provides free legal assistance to residents of retirement villages who have issues with the village operator.

The majority of our clients are socially and economically disadvantaged and vulnerable in some way. Although many of our clients may own their own home¹ the age pension is usually their only source of income and they have limited savings. We also provide assistance to clients who live in Residential Parks or Department of Housing accommodation, or reside in a Retirement Village.

All three divisions of the SRS also conduct rights education to older people, their carers, professional carers and the community.

Submissions regarding the ACL relevance for older vulnerable residents

SRS provides legal advice and non legal advocacy to residents of aged-care facilities. These residents are generally quite frail and vulnerable. The *Aged Care Act* regulates the industry and sets standards of care and provides a procedure for resolving conflict (through the Complaints Commission). However our service finds that many residents who we have referred to the complaints process return to us not particularly satisfied with the outcome. The Principles set out in the *Aged Care Act* have, as the first principle:

The Charter of Residents' Rights and Responsibilities

A. Each resident of a residential care service has the right:

- to full and effective use of his or her personal, civil, legal and **consumer rights;**

¹ Indeed, possible loss of an older person's home is one of the key issues that we see in our daily work.

In our view use of the redress provisions of the Australian Consumer Law would be a good way to ensure that the service provided by aged home operators complied with the standards as set down in the legislation and regulations, except for one barrier. The circumstances of frail older people do not lend themselves to taking action to assert their consumer rights through the procedures established by the current Australian Consumer Law. Certainly making an application to a Court or even Tribunal is problematic for consumers in this category.

We believe that the ACL should contain provisions for expediting and making less onerous procedures for protecting the rights of particularly vulnerable and disadvantaged consumers. These would include residents of aged care facilities, recipients of in home care and also other disabled individuals who satisfy the disadvantaged criteria contained within such provisions. It may be that these provisions give enforcement agencies (such as Fair Trading Offices and the ACCC) the power to take action on behalf of this category of consumers.

Does Australian Consumer Law apply to residents of Aged Care homes?

Aged Care Act 1997

Division 53 – Introduction

53-1 What is this Chapter about

Approved Providers have responsibilities in relation to aged care they provide through their aged care services. These responsibilities relate to:

- *The quality of care they provide (see part 4.1);*
- *User rights for the people to whom the care is provided (see part 4.2);*
- *Accountability for the care that is provided, and the basic suitability of their key personnel (see Part 4.3).*

Sanctions may be imposed under Part 4.4 on approved providers who do not meet their responsibilities.

53-2 Failure to meet responsibilities does not have consequences apart from under this Act.

(1) If:

- (a) An approved provider fails to meet a responsibility under this Chapter; and*
- (b) The failure does not give rise to an offence;*

the failure has no consequences under any law other than this Act.

(2) However, if the act or omission that constitutes that failure also constitutes a breach of an obligation under another law, this section does not affect the operation of any law in relation to that breach of obligation.

It is submitted that the current provisions of the Aged Care Act are unclear as to whether the Australian Consumer Law would be applicable to residents receiving aged care from an aged care provider.

Clause 53-2 would appear to state that if there is a failure to provide a service or quality of service, unless that failure gives rise to an offence, then only the provisions of the Aged Care Act may apply to that failure to provide a service or quality of service.

However, clause 53 -2 (2) states that if the aged care provider's failure to provide a service under the Aged Care Act or quality of service under the Aged Care Act also constitutes a breach under another law, clause 53-2 does not affect the operation of that other law. This provision would therefore appear to contemplate a prosecution or civil restitution under another law such as the Australian Consumer Law.

Charter of Care Recipients Rights and Responsibilities – Residential Care

Aged Care Act 1997, Schedule 1, User Rights Principles 2014.

1. Care recipients rights – residential care

Each care recipient has the following rights:

- (a) To full and effective use of his or her personal, civil, legal **and consumer rights**.*
- (b) To quality care appropriate to his or her needs;*
- (c) To full information about his or her own state of health and about available treatments;*
- (d) To be treated with dignity and respect, and to live without exploitation, abuse or neglect;*
- (e) To live without discrimination or victimization, and without being obligated to feel grateful to those providing his or her care and accommodation;*
- (f) To personal privacy;*
- (g) To live in a safe and secure and home like environment, and to move freely both within and outside the residential care service without undue restriction;*
- (h) To be treated and accepted as an individual, and to have his or her individual preferences taken into account and treated with respect;*
- (i) To continue his or her cultural and religious practices, and to keep the language of his or her choice, without discrimination;*
- (j) To select and maintain social and personal relationships with anyone else without fear, criticism or restriction;*
- (k) To freedom of speech;*
- (l) To maintain his or her personal independence;*
- (m) To accept personal responsibility for his or her own actions and choices, even though these may involve an element of risk, because the care recipient has the right to accept the risk and not to have the risk used as a ground for preventing or restricting his or her actions and choices;*

- (n) *To maintain control over, and to continue making decisions about, the personal aspects of his or her daily life, financial affairs and possessions;*
- (o) *To be involved in the activities, associations and friendships of his or her choice, both within and outside the residential care service;*
- (p) *To have access to services and activities available generally in the community;*
- (q) *To be consulted on, and to choose to have input into, decisions about the living arrangements of the residential care service;*
- (r) *To have access to information about his or her rights, care, accommodation and any other information that relates to the care recipient personally;*
- (s) *To complain and to take action to resolve disputes;*
- (t) *To have access to advocates and other avenues of redress;*
- (u) *To be free from reprisal, or a well-founded fear of reprisal, in any form for taking action to enforce his or her rights.*

The Charter of Care Recipients Rights and Responsibilities in relation to Residential Care under the Aged Care Act 1997, Schedule 1, User Rights Principles 2014 states that a resident is entitled to “(a) *To full and effective use of his or her personal, civil, legal **and consumer rights***”. This supports our contention that the resident should be entitled to the fullest extent possible to exercise their consumer rights under the Australian Consumer Law.

Australian Consumer Law

Section 3 Meaning of Consumer

Acquiring Services as a Consumer

(3) *A person is taken to have acquired particular services as a **consumer** if, and only if:*

(a) *the amount paid or payable for the services, as worked out under subsections (4) to (9), did not exceed:*

(i) *\$40,000; or*

(ii) *if a greater amount is prescribed for the purposes of subsection (1)(a)—that greater amount; or*

(b) *the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.*

Amounts paid or payable for purchases

(4) *For the purposes of subsection (1) or (3), the amount paid or payable for goods or services purchased by a person is taken to be the price paid or payable by the person for the goods or services, unless subsection (5) applies.*

Subsequent sections (5) to (9) are not quoted here as they related to mixed supplies of goods and services. In this case we analyse the definition of a consumer as a resident being a recipient of services from an aged care provider.

There are two types of fees that a resident or prospective resident of an aged care home might have to pay. The first is an entry fee (**or Bond in common parlance**) known technically as a Refundable Accommodation Deposit (RAD). This fee can be very high, up to one million dollars or a more moderate \$300,000.00 for accommodation in a shared **ward** dependent on the assets and income test. Residents without assets and only a pension income may not have to pay this fee. This fee is returned to the estate of the resident when the resident is no longer a resident. The size of this fee might suggest that a resident is not a consumer, though how two residents could be treated differently under the Consumer Law, just because one paid an accommodation bond and the other did not is difficult to reconcile.

The second fee, called technically a Daily Accommodation Payment (DAP) is a better basis for determining that a resident of an aged care home is a consumer for the purposes of the Australian Consumer law. However the complex methods that can be applied to the payment of this fee together with the RAD could possibly put a resident above the \$40,000.00 threshold that defines a consumer. Moreover it is not clear whether the services (which includes the provision of some goods, such as meals) provided by an aged care home fall into the category of *a kind ordinarily acquired for personal, domestic or household use or consumption*.

We would argue that, at the least, the resident comes within the definition of a consumer on the basis that the resident pays a basic daily care fee to the provider for services on a daily basis. This basic daily care fee works out to be about **85%** of the current **aged pension** and is less than the threshold referred to in section 3(3)(i) of \$40,000, if calculated on a daily basis.

Seniors Rights Service is of the view that resorting to Consumer Law is potentially a very good way to ensure that residents of aged care homes do receive the quality of care and service that is warranted. We recognise that the consumer guarantees contained within the law are generic in nature but that industry specific regulation may be appropriate, particularly where the consumer of the service is in a vulnerable and often disadvantaged position, as is most often the case with residents of aged care homes.

Recommendation

That the Australian Consumer Law be amended, perhaps by way of a schedule, to clarify the categories of people who fall within the definition of consumer. This should specifically cover residents of aged care facilities, but could be expanded to include other categories of people such as residents of retirement villages.

Recommendation

An education campaign be funded and undertaken to provide information to targeted groups within society on the applicability of Consumer Law remedies to their circumstances. The targeted groups should include people receiving services where the Australian Consumer Law would not automatically come to mind as a source of remedy where the consumer is experiencing service difficulties.

SRS is also of the view that the limit of \$40,000.00 on consumer transactions is outdated and should no longer apply.

An omnibus Act like the Australian Consumer Law can be a minefield to navigate, even for legal professionals. SRS believes that Act could be made much more accessible for the ordinary consumer to be easily able to identify and locate their rights and to find out how they can achieve those rights.

Consumer Guarantees

Subdivision B—Guarantees relating to the supply of services

60 Guarantee as to due care and skill

If a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill.

61 Guarantees as to fitness for a particular purpose etc.

(1) *If:*

- (a) *a person (the supplier) supplies, in trade or commerce, services to a consumer; and*
- (b) *the consumer, expressly or by implication, makes known to the supplier any particular purpose for which the services are being acquired by the consumer;*

there is a guarantee that the services, and any product resulting from the services, will be reasonably fit for that purpose.

(2) *If:*

- (a) *a person (the supplier) supplies, in trade or commerce, services to a consumer; and*
- (b) *the consumer makes known, expressly or by implication, to:*
 - (i) *the supplier; or*
 - (ii) *a person by whom any prior negotiations or arrangements in relation to the acquisition of the services were conducted or made;*

the result that the consumer wishes the services to achieve;

there is a guarantee that the services, and any product resulting from the services, will be of such a nature, and quality, state or condition, that they might reasonably be expected to achieve that result.

(3) *This section does not apply if the circumstances show that the consumer did not rely on, or that it was unreasonable for the consumer to rely on, the skill or judgment of the supplier.*

(4) *This section does not apply to a supply of services of a professional nature by a qualified architect or engineer.*

SRS argues that clarification is needed under the Australian Consumer Law that section 61, Guarantee as to Fitness for a particular Purpose, applies to residents in aged care receiving a service from an aged care provider as a consumer.

The resident agreement and the Aged Care Act set out the User Rights Principles which provide a statement as to the standard of care expected of the provider by the consumer. This is a purpose or standard known to the provider as to the quality of care and services to be provided.

A difficulty arises for consumers of services in facilities such as aged care homes where the consumer is a resident in the facility and in every way reliant on the provider and their staff for their daily needs. A resident cannot tell a provider/supplier that the service or the quality of the goods (such as meals) are deficient and then leave as other consumers are able to do. In these circumstances the law needs to support these frail and vulnerable consumers even more thoroughly than other consumers. The Aged Care Act plays its role in mandating the quality of service that is required but the complaints process is a toothless tiger in many instances.

Two points need to be made here:

Firstly in respect to Consumer Law the service guarantees need to be clearer and tighter to provide protection to frail older people. For example the division of remedies into “major” and “not major” classes of failure in service delivery leaves those people with little recourse. Who decides if a failure is major or not? Is it appropriate that the service provider make that decision? Are the circumstances of the consumer taken into account in determining whether a failure is major or not? This is relevant where the failure is judged to be not major and the resolution is then given to the provider/supplier to determine the appropriate course of action to rectify the position. As an example suppose the quality of service of meals is brought into question by a resident, where the meal and its service (say late and therefore cold) are thought to be deficient. A provider might be able to say that the meal is of a reasonable quality but taken together over a period of time the service of meals might lead to weight loss and under nourishment. One meal on its own would pass muster but a series of meals might not. But if each meal is judged to be a not major failure it is left to the provider to choose the remedy. This might not seem to be a big deal or even nitpicking but these are people’s lives we are talking about, lived on a daily basis and certainly worthy of protection in a cost cutting environment where some aged care providers are trying to maximize their profit.

Secondly, in respect of the procedure that consumers may follow in order to obtain redress for unsatisfactory service pathways for redress need to be accessible for all categories of consumers. In our view there is a need for special procedures for consumers who are vulnerable and frail, to enable ready access to resolve their consumer complaint.

Subdivision B—Action against suppliers of services

267 Action against suppliers of services

(1) A consumer may take action under this section if:

- (a) a person (the **supplier**) supplies, in trade or commerce, services to the consumer;*
- and*

- (b) *a guarantee that applies to the supply under Subdivision B of Division 1 of Part 3-2 is not complied with; and*
 - (c) *unless the guarantee is the guarantee under section 60—the failure to comply with the guarantee did not occur only because of:*
 - (i) *an act, default or omission of, or a representation made by, any person other than the supplier, or an agent or employee of the supplier; or*
 - (ii) *a cause independent of human control that occurred after the services were supplied.*
- (2) *If the failure to comply with the guarantee can be remedied and is not a major failure:*
- (a) *the consumer may require the supplier to remedy the failure within a reasonable time; or*
 - (b) *if such a requirement is made of the supplier but the supplier refuses or fails to comply with the requirement, or fails to comply with the requirement within a reasonable time—the consumer may:*
 - (i) *otherwise have the failure remedied and, by action against the supplier, recover all reasonable costs incurred by the consumer in having the failure so remedied; or*
 - (ii) *terminate the contract for the supply of the services.*
- (3) *If the failure to comply with the guarantee cannot be remedied or is a major failure, the consumer may:*
- (a) *terminate the contract for the supply of the services; or*
 - (b) *by action against the supplier, recover compensation for any reduction in the value of the services below the price paid or payable by the consumer for the services.*
- (4) *The consumer may, by action against the supplier, recover damages for any loss or damage suffered by the consumer because of the failure to comply with the guarantee if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure.*
- (5) *To avoid doubt, subsection (4) applies in addition to subsections (2) and (3).*

268 When a failure to comply with a guarantee is a major failure

*A failure to comply with a guarantee referred to in section 267(1)(b) that applies to a supply of services is a **major failure** if:*

- (a) *the services would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure; or*

- (c) *the services are substantially unfit for a purpose for which services of the same kind are commonly supplied and they cannot, easily and within a reasonable time, be remedied to make them fit for such a purpose; or*
- (c) *both of the following apply:*
 - (i) *the services, and any product resulting from the services, are unfit for a particular purpose for which the services were acquired by the consumer that was made known to the supplier of the services;*
 - (ii) *the services, and any of those products, cannot, easily and within a reasonable time, be remedied to make them fit for such a purpose; or*
- (d) *both of the following apply:*
 - (i) *the services, and any product resulting from the services, are not of such a nature, or quality, state or condition, that they might reasonably be expected to achieve a result desired by the consumer that was made known to the supplier;*
 - (ii) *the services, and any of those products, cannot, easily and within a reasonable time, be remedied to achieve such a result; or*
- (e) *the supply of the services creates an unsafe situation.*

To explore the problems resident consumers may face let us take as an example the case suggested above where meals of a less than satisfactory quality are provided to residents of aged care facilities. This is a situation where a service and a good is being supplied at the same time. For the purpose of this example let's assume that the meal is just adequate on a daily basis but over a longer period of time might fall short of the quality required for the resident to maintain weight or healthy nutritional essentials. Is this a major or not major failure? Why should a resident have to wait for an extended period of time to press their consumer rights? How might a frail resident judge a meal to be lacking in nutritional value, which over a period of time and multiple meals served, have an adverse health effect? How might a frail resident ensure that their consumer rights are redressed? How can residents ensure that the culture of the service supplier is positive where the supplier stands behind their product? Why should residents have to take steps to bring service providers to this understanding.²

Some clarity in the application of consumer law is required in these situations.

While, theoretically, a resident consumer can terminate a service in an aged care home and move to another home in practical terms this is not often possible.

² SRS are well aware that most aged care service providers do meet their responsibilities but with increasing competition, even for religious based service providers, cost cutting is a reality and the loss of quality of service is the result in many instances.

In **SRS** view readily accessible and practical remedies are essential to ensure that services meet the standards of quality prescribed.

269 Termination of contracts for the supply of services

- (1) *This section applies if, under section 267, a consumer terminates a contract for the supply of services.*
- (2) *The termination takes effect:*
 - (a) *at the time the termination is made known to the supplier of the services (whether by words or by conduct indicating the consumer's intention to terminate the contract); or*
 - (b) *if it is not reasonably practicable to communicate with the supplier of the services—at the time the consumer indicates, by means which are reasonable in the circumstances, his or her intention to terminate the contract.*
- (3) *The consumer is entitled to recover, by action against the supplier of the services, a refund of:*
 - (a) *any money paid by the consumer for the services; and*
 - (b) *an amount that is equal to the value of any other consideration provided by the consumer for the services;**to the extent that the consumer has not already consumed the services at the time the termination takes effect.*

Recommendation

We would suggest that compensation for lost amenity and a penalty loading should be part of the range of remedies available to the aged care service recipient or resident consumer.

Three points in relation to the effectiveness of remedies and offence provision.

Firstly remedies are only potentially effective if the consumer is aware of their rights and the procedure for implementing them.

Second remedies are only effective if the barriers to accessing the restitution process are removed. For vulnerable and frail residents of aged care homes or receiving in home assistance and services accessing the current range of consumer procedures for resolving their problem can be insurmountable. It is important to make accessing the pathways easy.

Thirdly remedies and penalties are only effective if they change the behaviour of the supplier. In aged care homes with a high staff turnover and low wages the staff need regular training in consumer rights and the supplier's obligations to ensure that the quality of service is maintained at the required standard.

The delegate of the Complaints Commission or the delegate at the State Office of Fair Trading should be empowered to act on complaints as consumer complaints and be able to impose and enforce remedies suited to the situation.

Failure to comply with orders from the delegate could then have the issue escalate to a Court where additional and more onerous penalties could be applied.

Recommendation

Jurisdictional conflicts and contradictions be addressed by developing a chart of hierarchical Officers, Tribunals and Courts to determine outcomes of consumer complaints. Currently regulators can ask Courts to impose non-punitive penalties. Designated Officers of Regulators should have “On the Spot” authority to order redress procedures.

Better guidance should be given to officer, Tribunals and Courts for implementing the ACL, perhaps through Regulations or attached schedules including flow charts and practice notes, so that a more consistent application of the law is achieved across all jurisdictions.

Other Considerations for the Australian Consumer Law Generally

Recommendation

There ought to be 10 day cooling off period applicable across the board for consumer purchases. In the case of goods the goods should be in new condition if the cooling off period is triggered, unless otherwise reasonably provided for in the agreement. Where services have been provided and an agreement entered into for service provision extending over a period of time a daily charge may be applied for that 10 day period but the agreement can be cancelled up to the ten day period without any further penalty.