

Residential tenancies and the Australian Consumer Law

Background

Residential tenancies are primarily regulated by the *Residential Tenancies Act 1997* (the RTA).

However, most of the relationships characterized by the RTA can also be described as consumer-trader relationships and are therefore subject to the *Australian Consumer Law and Fair Trading Act 2012* (ACLFTA). The significance of the ACLFTA is that it replaces the *Fair Trading Act 1999* (the FTA) and invokes the Australian Consumer Law (ACL). The ACL was introduced to harmonize both State and Commonwealth consumer legislation and enhance consumer protections.

It is important that advocates are familiar with the ACL. By invoking the ACLFTA legislation, VCAT is empowered to hear and make a substantially wider range of orders under both the ACLFTA and the ACL. It also means that claims ordinarily dealt with in the Civil List of VCAT may be listed and heard much more quickly in the RTA list of VCAT providing it relates to the tenancy.

It is important to note that many of the causes of action and remedies found in the ACL and ACLFTA are legally complex and legal advice should be sought.

What is the Australian Consumer Law and Fair Trading Act 2012?

The ACLFTA came into operation on 1 July 2012. This act repealed the FTA, as well as several other acts including the Landlord and Tenant Act 1958.

The ACLFTA mirrors many of provisions of the FTA, but it is important for the purposes of interpretation, that parties observe the specific wording of each provision in context of the new Act itself.

While there is currently limited precedent regarding the ACLFTA, persuasive reference can be made to the decisions from similar or equivalent provisions in the FTA or the *Trade Practices Act 1974* (TPA).

According to ss 8 and 12 of the ACLFTA, the ACL is generally incorporated into jurisdiction of the ACLFTA. Thus, parties subject to the ACLFTA shall also be subject to the ACL, and VCAT shall be entitled to make Orders described in ss 184 and 185 of the ACLFTA, with reference to the ACL and associated precedents.

Other Notable Provision of ACLFTA include:

- Chapter 3 – Conditions and Warranties in contract and frustrated contracts
- Chapter 4 – Prohibited Debt Collection Practices
- Section 185 – Additional power – unjust contract terms
- Section 188 – More appropriate forum for the dispute

The Australian Consumer Law

The Australian Consumer Law can be found in Schedule 2 of the *Competition and Consumer Act 2010* (CAC). This legislation includes a wide variety provisions, prohibitions, remedies and penalties.

The most relevant part of the ACL for tenancy disputes are Chapter 2 – General Protections and Chapter 3 – Specific provisions.

Chapter 2 includes:

- > Misleading and deceptive conduct (ss18 & 19)
- > Unconscionable conduct (s20-22A)
- > Unfair contract terms (s23-28)

Chapter 3 includes:

- > Unfair practices which may include:
 - False and misleading representations about goods and services (s29-30)
 - False and misleading representations as to the nature of goods and services (ss33-34)
 - Bait advertising (s35)
 - Wrongly accepting payment for goods and services not supplied (s36)
 - Harassment and coercion (s50)
- > Guarantee as to the supply of services will be rendered with due care and skill (s 60)
- > Guarantee as to fitness for a particular purpose (s61)

Jurisdiction of the Australian Consumer Law Fair Trading Act

The economic jurisdictional limit for claims under the ACLFTA is generally unlimited. However, the amount claimed will affect the required fee payable. Fee waiver applications may be made for any application.

In order to determine that the ACLFTA applies, the applicant must establish that there is a consumer trader relationship. Section 182 of the ACLFTA defines a consumer trader dispute as:

A consumer trader dispute is a dispute arising between a purchaser or possible purchaser of goods or services and a supplier or possible supplier of goods or services in relation to a supply or possible supply of goods or services.

If this jurisdiction is established it extends to include possible claims for negligence, nuisance and trespass.

According to Part 2.4 of the ACLFTA, the crown will not be bound unless it can be shown to be carrying on a business.

At common law, a business is usually viewed as requiring the carrying on (more than a once off transaction) with parties acting in common, and having with view to make profit.

However, s182 of the ACLFTA appears to have lowered the threshold to establish jurisdiction and it may therefore still apply to one off private transactions and Not-For-Profit organizations. Each matter will turn on its own merits. Most importantly, it is yet to be determined whether the ACLFTA applies to the Director of Housing with respect to ordinary public tenancies and whether the management of these tenancies constitutes the Crown operating a business under s16 of the ACLFTA.

Jurisdiction of the RTA

S 447 of the RTA provides for a jurisdictional limit of compensation claims up to \$10,000 (\$100,000 for Part 4A of the RTA). It may direct repairs or similar works to be done in excess of these amounts. Further, the Tribunal may determine disputes of greater amounts if parties consent in writing. Once this consent has been given to the Registrar it cannot be revoked.

Orders made under the RTA cannot be made with respect to death, physical injury or pain and suffering. However, this does not preclude the Tribunal from hearing this evidence, but it must be relevant to the substance of the application.

Jurisdiction of the FTA

The ACLFTA has repealed FTA. However, depending on the nature of the application, it may still be appropriate to make an application pursuant to the FTA depending on the cause of action, the time of the relevant conduct in question and when the contract was entered into.

For example, an applicant seeking to declare a contractual term unfair for an agreement which was entered into in 2008 may need to be filed pursuant to the FTA rather than the ACLFTA. Whereas harassment and debt collection engaged in by a landlord under the same 2008 agreement, may be still subject to the ACLFTA because the offence is being commissioned after the ACLFTA has commenced.

Remedies under the Australian Consumer Law Fair Trading Act

Orders that may be made under ACLFTA

S 184 of the ACLFTA provides that VCAT may make any of following orders:

- > refer a dispute to a mediator
- > order a debt or refund
- > damages (including exemplary damages or interest)
- > restitution
- > vary any term of a contract
- > declare that a term of a contract is, or is not, void;
- > order the refund of any money paid under a contract or under a void contract;
- > specific performance of a contract;
- > rescission of a contract;
- > rectification of a contract;
- > declaratory relief that a debt is, or is not, owing

- > order a party to do or refrain from doing something
- > make an order for the possession of land

Exemplary Damages

While VCAT is generally not punitive in nature, it may see fit in certain circumstances to award exemplary damages as a deterrent for the commissioning of future offences. This is rare, but there is no harm in making submissions, especially where the conduct is the subject of an offence and can be shown to be part of a series of repetitive conduct.

Complaints

Consumers may make complaints to the Director without fear of reprisal. Under section 229 of the ACLFTA, parties are protected from any civil litigation or liability for making a complaint to CAV. This includes the provision of documents to the Director, the Director's appointed inspectors or to VCAT for the purposes of making a complaint regarding a consumer complaint.

Enforcements

The Director of CAV has jurisdiction to prosecute under the ACLFTA. Part 6 of the ACLFTA establishes CAV and the powers of the Director to investigate and administer parts of the Act as the responsible authority.

The ACCC also has jurisdiction if an offence or prohibited conduct has been committed under the ACL as it is Commonwealth legislation. Notably, unlike CAV enforcement of the ACL cannot be done through the state Magistrates' Court.

Part 8.1 of the ACLFTA identifies that CAV may prosecute offences under the ACLFTA. Prosecution must commence not more than 3 years after the offence.

Personal Injuries – Death, Physical Injury, Pain and Suffering

According to section 182 of the ACLFTA, parties may make a claim related to personal injury as a result of the supply or possible supply of goods and services if the claim is under \$10,000.

TUV does not have expertise with respect to personal injuries.

Thus, while the Act provides for personal injuries claims under \$10,000, it is highly recommended that parties attend to seek personal injuries advice from a qualified solicitor before determining whether they wish to have the matter adjudicated by VCAT in preference to another forum. Such advice can be found via www.liv.asn.au/referral

As a general rule, it is best to consider using the ACLFTA to make a personal injuries claim, where the party is not likely to attempt to recover in any other forum.



What should you do?

1. When considering a tenancy dispute and the tenants potential remedies under the RTA consideration should also be given to invoking the ACLFTA to open up other options for remedies that may be available
2. To invoke the ACLFTA, parties should cite the relevant provisions of both the ACLFTA including ss8 and 12, and ensure the correct application fee is paid in relation to the compensation claim sought.

This Practice Note is a guide only and should not be used as a substitute for professional legal advice. If you have a question about this Practice Note or a specific case you want advice about then you should contact us on **(03) 9411 1444**

Regards,
Tenants Union Legal Service