

Consumer law and legal costs¹

The Australian Consumer Law (ACL) applies to all law practices, solicitors and barristers, whether they are incorporated legal practices, partnerships or sole practitioners. It applies to all stages of providing legal services, including:

- advertising, promotion and negotiations about providing legal services (including disclosure);
- the agreement or contract to provide legal services (costs agreement);
- provision of legal services; and
- billing.

The ACL is generic consumer protection legislation applicable Australia-wide. In addition, legal professionals are regulated by specific state legislation (for example, the *Legal Profession Uniform Law (LPUL)* in NSW and Victoria). The ACL generally complements and sits alongside the state-based legislation, both governing the conduct of legal professionals.

A person is a 'consumer' if they acquire services priced under \$40,000, or if the services are priced at more than \$40,000 but they are 'of a kind ordinarily acquired for personal, domestic or household use or consumption'. Legal services likely to fall within this category include: personal injury matters, family law matters, criminal law matters, conveyancing, wills and estates.

GUARANTEES RELATING TO THE SUPPLY OF SERVICES

Sections 60-62 of the ACL require that legal services are:

- provided with appropriate care and skill or technical knowledge, and taking all necessary steps to avoid loss and damage;
- fit for purpose or give the agreed results; and
- delivered within a reasonable time when there is no agreed end date.

These guarantees may form the basis of a complaint about a lawyer's competence and diligence, or quality of service.

If a law practice fails to deliver any of these guarantees, a client's consumer rights include:

- repair, replacement or refund;
- cancelling a service; and
- compensation for damages and loss.

Consumer guarantees do not apply if:

- the client misused a service in any way that contributed to the problem (for example, knowingly providing

incomplete or incorrect instructions);

- the client got what they asked for but changed their mind or saw it cheaper elsewhere;
- the client asked for a service to be done in a certain way against the advice of the law practice; and/or
- there was a problem with the service that was completely outside of the law practice's control.

COMPONENT PRICING

Section 48 of the ACL prohibits a 'person' (namely a service provider) from making a representation to a customer about a component of the price without also and at the same time specifying the total, single figure price payable to obtain the service (to the extent quantifiable). Lawyers must ensure that their advertising (including websites) and any other representations they make about costs – including written and verbal disclosure – include a single figure 'all up' GST-inclusive cost including any compulsory fees and charges.

MISLEADING AND DECEPTIVE CONDUCT

Section 18(1) of the ACL provides that 'A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive', and applies whether or not the client falls within the definition of a 'consumer'. The application to legal services is wide-ranging, and includes advertising or promotional material,² dealings between lawyers and third parties, and services provided on a pro bono basis.

The following circumstances have been held to be false and misleading or deceptive conduct:

- charging \$63,897.45 in legal costs for services which properly charged were worth only \$20,923.98;³
- charging legal costs under a 'no win no fee' costs agreement which exceeded the damages recovered;⁴ and
- debt collection notices in respect of legal costs, where there was no necessary entitlement to those costs.⁵

It is likely that the following circumstances would also be characterised as misleading and deceptive conduct:

- deliberate or reckless overcharging;⁶
- charging more than one client for the same work;⁷ and
- misrepresentations about a client's rights in the event of a costs dispute.

UNCONSCIONABLE CONDUCT

Part 2-2 of the ACL deals with unconscionable conduct, which is not defined in the ACL but according to case law is deliberate, and involves serious misconduct or conduct which is clearly unfair and unreasonable. Factors a court will consider when assessing whether conduct is unconscionable include:

- the relative bargaining strength of the parties (here, the law practice is the stronger party and the client the weaker party);
- whether any conditions were imposed that were not reasonably necessary to protect the legitimate interests of the law practice;
- whether the client could understand the documentation;
- the use of undue influence, pressure or unfair tactics by the law practice;
- the requirements of applicable industry codes (for example, the LPUL or applicable *Legal Profession Act*);
- the willingness of the law practice to negotiate; and
- the extent to which the parties acted in good faith.

Given the fiduciary relationship between lawyer and client – where the lawyer has a higher duty to protect a client's interests than in an ordinary commercial setting – a lawyer who acts unconscionably will also likely be in breach of their fiduciary duty to the client.

UNFAIR TERMS

Sections 23-28 of the ACL protect consumers against unfair terms in standard form contracts. The price for services is not covered by these provisions; however, administrative fees or penalty fees may be subject to a claim that they are unfair.

UNDER HARASSMENT AND COERCION

Section 50(1) of the ACL provides that a person must not use physical force, or undue harassment or coercion, in connection with (a) the supply or possible supply of goods or services; or (b) the payment for goods or services. This clearly applies to law practices seeking to recover outstanding fees, and may also apply during the course of proceedings (for example, pressuring a client to settle a claim, or enter into a new costs agreement).

ITEMISED BILLS

Section 101 of the ACL provides that a consumer may request an itemised bill within 30 days after the services have been supplied or an invoice is received from the supplier (whichever is later), and the supplier must provide it within seven days of the request. This is significantly less time than the 21-28 days provided for under state-based legislation.

RESOURCES FOR A CLIENT

A client may prefer to exercise rights under the ACL instead of state-based legislation where, as happened in *Liu v Barakat & Ors*,⁸ the time for assessment of costs had expired. The protections against misleading or deceptive conduct and representations contained in the ACL are an alternative to actions in contract or tort, and can sometimes provide relief in circumstances where none would otherwise exist. A client

may also consider that exercising rights under the ACL will lead to a more transparent outcome than a complaint to the applicable disciplinary body.

Section 236 of the ACL provides for recovery for any loss or damage suffered because of conduct prohibited by Chapters 2 or 3 of the ACL. When pursuing a claim for damages under the ACL, a client must be able to prove the loss suffered – failure to do so can result in a client not recovering any damages, despite having proved that the conduct was misleading or deceptive and was relied upon.⁹

CONCLUSION

A lawyer could potentially have to answer to both the ACL monitoring agency (for example, the ACCC or Fair Trading) and the disciplinary body for the same conduct. The extent to which these bodies will co-operate and cross-refer lawyers subject to complaints is not clear; however, there are agreements in place – for example, the Legal Services Commission in Queensland and the Queensland Office of Fair Trading have a memorandum of understanding for information-sharing and referral of complaints.

While the lawyer's obligations under the ACL do not necessarily enlarge upon their obligations under state-based regulatory legislation, the ACL may provide an alternative remedy for clients. The requirements of the ACL cannot be disregarded by law practices in the supply of legal services. ■

Notes: **1** Material has been drawn from Australian Competition & Consumer Commission (www.accc.gov.au) and Legal Services Commission (Qld), Regulatory Guide 7, The Application of the Australian Consumer Law to Lawyers Version 3, 16 September 2013. **2** See *Nixon v Slater & Gordon* [2000] FCA 531. **3** *Liu v Barakat & Ors* (unreported District Court judgment of Curtis J, 8 November 2011); the judgment is based in part on a finding that the solicitors failed to properly contract out of regulated fees. **4** *Baker Johnson Lawyers v Jorgensen* [2002] QDC 205. **5** *ACCC v Sampson* [2011] FCA 1165. **6** See, for example, *Council of Queensland Law Society v Roche* [2003] QCA 469 for circumstances including entering into a second costs agreement for significantly higher costs shortly prior to mediation, charging significantly higher than market rates for paralegal staff and charging for work including attempted telephone calls and searching for file documents; costs of \$620,000 were charged, subsequently agreed at \$240,000. **7** See, for example, *Bechara v Legal Services Commissioner* [2010] NSWCA 369 for circumstances where the solicitor charged each of three related clients for the total time spent at court hearings over six days. The court's concise conclusion was that 'One unit of time cannot be charged more than once' per McClellan CJ at [138]. **8** (unreported District Court judgment of Curtis J, 8 November 2011). **9** See, for example, *Reavill Farm Pty Ltd v Burrell Solicitors Pty Ltd* [2017] NSWCA 156. The court found that the initial estimate of costs provided to the clients was misleading, as was the ongoing failure to provide an accurate estimate. However, the clients were unable to establish the quantum of any loss or damage suffered as a result of the misleading or deceptive conduct.

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