

A LOAN IN LEASE CLOTHING

Problems identified with instalment based rent/purchase contracts for household goods

According to law, an instalment agreement is considered a “loan” if the consumer has a right to purchase the goods at the end, and the total instalments are greater than the cash price of the goods. Accordingly, the business must comply with laws applying to consumer loans^[1].



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^[1] See Consumer Credit Code, Section 10

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CM's Case Study

CM is 58 year old male from Broadmeadows. He receives a Centrelink Disability Support Pension. He has eyesight problems and difficulty reading. When CM's fridge broke down he could not afford the \$500 to 600 to buy a new one outright. He sought to purchase a fridge via an instalment payment arrangement.

CM telephoned Lease Company 1 ("LC1") to arrange the agreement over the phone. CM was told he could buy the fridge by making fortnightly payments under their "rent, try, buy" scheme, and that after 18 months he would own it.

LC1 delivered a pre used fridge in reasonably good condition, together with the contract documents to CM's home. CM advised the delivery man that he could not read, but the delivery man asked him to sign the contract in any case. CM signed, thinking it was only a delivery acceptance docket.

Several months later when defrosting the fridge, CM found the terms and conditions of the contract contained inside a plastic bag, taped to the inside of the freezer compartment. After 18 months of payments, CM was told by LC1 that to buy the fridge, he would have to pay a further \$532.00.

Action

CM sought help from a Financial Counsellor, who wrote to LC1 seeking to cancel the contract. After several unhelpful responses from LC1, a Solicitor wrote. LC1 immediately released CM from the contract and collected the fridge. CM later obtained a brand new fridge via a Capital Grant from the Department of Human Services.

Legal Issues

- Because the agreement was signed by CM in his home, LC1 was legally required to advise CM of his right to cancel the agreement within a cooling off period, but they did not do so.
- LC1 misled CM as to his purchase rights and to the cost. Namely, CM was told verbally that he had a right to purchase the goods which he did not have under the written contract, and there was an additional high cost to purchase the goods.

Cost

Standard 340litre fridge, pre used
Rent paid after 18 months: \$895.05
Purchase price (additional): \$532.60
True total to "Rent, Try, Buy": \$1427.65

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Forward

Consumer leases is an area not widely researched or litigated in Australia. This report is concerned with consumers who enter into rental and lease agreements for basic essential household appliances, electronic equipment and furniture.

In 2006 the Micah Law Centre submitted a research proposal to the *Consumer Credit Fund of Victoria* and obtained funding to complete undertake this research study. The study offers a critique of financial & retail sector marketing practices in addition a critical review of existing regulated consumer protection regimes. Research is based on the direct experience of consumers from 20 case studies sourced from community legal centres and financial counselling services.

The findings are the result of collaboration between the work of Project Officer & Solicitor Jennifer Zacks of the Micah Law Centre, Financial Counsellor Garry Rothman of Broadmeadows Uniting Care, together with policy and legal officers from the Consumer Action Law Centre.

About the Micah Law Centre

The Micah Law Centre, which opened in early 2006, is a not for profit outreach law firm established to provide advice and advocacy for disadvantaged individuals and groups. Micah aims to achieve social justice and change on a wider scale by undertaking casework and project work in identified areas of acute client need.

About the Consumer Action Law Centre

The Consumer Action Law Centre (CALC) is a campaign-focused consumer advocacy, litigation and policy organisation. It was formed in 2006 by the merger of the Consumer Law Centre Victoria and the Consumer Credit Legal Service and is funded jointly by Victoria Legal Aid and Consumer Affairs Victoria.

About Broadmeadows Uniting Care

Uniting Care in Broadmeadows has provided financial counselling and other community services for over 25 years. The service employs five financial counsellors and maintains a long standing and active participation in broad-based consumer advocacy and law reform of behalf of their client group.

Acknowledgments

We wish to acknowledge the assistance and practical support provided by following individuals and their organisations during the course of the researching, analysing and documenting of this study.

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Melanie Keenan, Paul Gillett, Nicole Rich, Neil Ashton, all Solicitors and Volunteers of Consumer Action Law Centre

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Esther Gregory, Financial Counsellor, Moreland Community Legal Centre

Denis Nelthorpe, Consumer Advocacy Consultant

Graeme Taylor, Senior Solicitor, The Micah Law Centre

PART 1

EXECUTIVE SUMMARY

This project was initiated in response to an increasing number of consumers presenting to financial counselling services because of problems experienced with instalment purchases of white goods and other household goods that are documented as leases. Problems include financial over-commitment and confusion about the leasing or rent-to-buy contracts they had entered into.

Based on actual case studies this research examines retailer practices and compliance issues and critically reviews the current legal framework pertaining to consumer lease agreements.

Key issues identified are:

- The use by financiers of lease agreements instead of loan agreements for the purpose of avoiding some of the consumer protection laws that apply to loan agreements;
- Complex, misleading clauses relating to final ownership of the goods in order to avoid these laws;
- Misleading and confusing marketing of lease agreements in stores;
- High cost of these agreements;
- Marketing of these contracts to low-income consumers;
- Unfair contract terms

Is it a Lease or Loan?

The intention of the consumer credit laws is to protect consumers who obtain a loan (including purchasing goods on credit) regardless of the type of documentation used for the transaction.

The laws offer different (and reduced) protection for consumers who have a genuine consumer lease – i.e. consumers who are renting goods for a set period and have no right to purchase those goods. For example, if the contract is a lease, the consumer does not have the right to obtain a copy of the agreement before it is signed^[2]. Also, unlike a loan contract, the consumer does not have a right to know the cash price of the goods, or the additional amount being paid under the finance agreement, and the consumer has less rights following repossession of the goods^[3]

The law specifically states that a contract to hire goods, where total instalments are greater than the cash price of the goods and the consumer has a right to purchase is to be regarded as a “sale of goods by instalments” and therefore regulated as a “loan” – not a “lease”.^[4]

^[2] S153 of the Uniform Consumer Credit Code “The Code”, which commences as of S2 of the Consumer Credit (Queensland) Act 1994, both available at www.austlii.edu.au

^[3] Ibid, see S15 and S156

^[4] For the purposes of this Code, a contract for the hire of goods under which the hirer has a right or obligation to purchase the goods, is to be regarded as a sale of the goods by instalments if the charge that is or may be made for hiring the goods, together with any other amount payable under the contract (including an amount to

However, a number of financiers have discovered some inventive methods of inferring a right to purchase (in some cases even giving a right to “keep”) while maintaining that there is no such right and that the agreement is a lease – not a loan.

The result essentially is an agreement where a consumer has in practice a right to purchase the goods, but that right is denied on paper - hence a loan in lease clothing.

The following provides an example of how one company offers consumers the right to “keep” the goods, without giving them the right to purchase – therefore documenting the agreement as a lease rather than a loan.

“EzyKeep” Option:

“You can “*keep*” the goods after the agreed term. Complete the full term of your agreement, make one additional month’s rental payment, and the goods are yours to “*keep*” forever, without any more rental payments...

(We) will continue to own the goods, but if you ever want to sell the goods to another person (but not yourself) you may do so as our agent for any price you see fit. You may “*keep*” the proceeds less one dollar as your reward for selling the goods on our behalf. Simply notify us that the goods have been sold and pay us one dollar.”^[5]

A typical hypothetical example of a lease agreement^[6]:

- A refrigerator retails new for \$1000
- Mary pays \$2374 in *lease* payments over 36 months for a used model
- After 36 months of payments, Mary is then allowed to *purchase* a “similar” refrigerator for \$1

Apart from the issue of high cost, is it any wonder that some consumers are very confused about the true nature of these agreements?

Leasing companies frequently claim that they provide a valuable niche service supplying essential household goods, such as fridges, washing machines, televisions, computers etc, at affordable prices to low income consumers.

Our findings however indicate that the agreements and the marketing practices of lessor companies are often misleading and exploitative. Consumers are often offered leasing as a better option to other forms of credit, when in fact, it is usually more expensive than other

purchase the goods or to exercise an option to do so) exceeds the cash price of the goods. Uniform Consumer Credit Code S.10(1)

^[5] Taken directly from lease company 2’s in store consumer catalogue

^[6] This scenario is based on an educated estimate of a typical lease scenario and comparative purchase price. It is not modelled on a particular individual consumer’s case

credit options. Major compliance issues included companies failing to provide to consumers their cooling off rights as required by law, and including unfair terms in their contracts.

Our research confirms that rent to buy leases are very expensive, yet targeted by some companies towards the lower income and vulnerable consumer groups. Cash poor consumers who cannot afford a lump sum are seduced by the benefit of making periodic payments.

The majority of cases examined in our study involved people whose sole income was derived from a Centrelink Pension or Benefit. This included public housing tenants, single parents and/or people suffering from serious health problems. In effect the study confirmed that consumers who are most in need of consumer protection, find that they have fewer rights than consumers who have signed up to a loan.

A series of recommendations based on research findings, have been developed which focus on specific amendments to the Uniform Consumer Credit Code and the Fair Trading Act (Victoria) 1999. These recommendations are directed to remedying anomalies which allow the lease industry to circumvent regulated loan contract consumer protection provisions. In addition a number of recommendations are directed towards the lease retail industry in relation their marketing and retailing practices.

However, this project illustrates part of a broader problem – that of widespread avoidance of consumer credit laws, and the failure of Government to act in a reasonable time to close loopholes. The aim of keeping state credit laws uniform has come at a high cost – the time taken for State Government to respond, and agree on reforms, has left many consumers with inadequate legal protection - particularly those consumers who are vulnerable and disadvantaged.

We believe this study advances Consumer Affairs Victoria's recent 'Report of the Consumer Credit Review'¹ in identifying a need for increased regulation of lease contracts.

We urge relevant Federal and State Government ministries and regulators to implement recommendations arising from this study.

¹ Published by Consumer Affairs Victoria, Melbourne, 2006

SUMMARY OF RECOMMENDATIONS

Note: This is a summary of the Recommendations. For the full recommendations please see Part 5.

1. The Victorian Government remove the exemption placed on contracts regulated by the UCCC in S32V(a) of the Fair Trading Act 1999 so that unfair contract terms laws apply to credit and lease contracts^[9].
2. When recommendation 1 is implemented, the Victorian Government prioritise acting on terms in both credit and lease contracts that attempt to avoid consumer protections in the Code.

Consumer Affairs Victoria monitor consumer lease agreements for unfair terms, particularly terms that indicate that the “lease” should be documented as a loan.

Note; priority should be given to terms that purport to deny a right to purchase while, in effect, giving the consumer the ability to purchase, retain or keep the goods. This should include, for example, contracts that give a right to “keep” or to purchase “similar goods”.

3. The Director of Consumer Affairs Victoria exercise the power under S32ZC(1)(c) to seek judicial declaration that the unfair terms outlined in this project in standard form lease contracts be declared prescribed unfair terms.
4. The Victorian Government amend Section 10 of the Code to bring “mock leases” (in substance loans) under the credit ambit of the Code.
5. The Victorian Government give power to the Regulator to declare a particular lease agreement to be a loan based on the content of the contract, advertising and the verbal representations made.
6. The Victorian Government review Part 10 of the Code to consider the implementation of greater lessee protection in the disclosure and termination provisions.
7. Consumer Affairs Victoria require lessor companies which failed to provide the required contact sales cooling off notices (S61 FTA) to offer a full refund or a no further obligation full release to consumers whose contracts are still in operation.
8. The Victorian Government review and monitor the consumer lease industry by taking a spot audit of lessor companies for compliance with the Fair Trading Act.

^[9] We note the Victorian Government has indicated its intention to do this in the 2007 working paper “Application of Unfair Terms to Consumer Credit”.

9. Credit providers offering leases be required to be part of an External Dispute Resolution Scheme.
10. The Victorian Government continue to respond to the need for affordable credit for low income consumers for purchasing essential items.

PART 2

BACKGROUND

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- 2.1 The need for this Project**
- 2.2 The lease agreement**
- 2.3 Methodology**
- 2.4 Terminology and Definitions**

2.1 The Need for this Project – previous research

In Australia at present, credit is a prevalent unavoidable factor in people's lives. In the wide landscape of financial products, making informed choices is difficult for consumers. This project was prompted by the observations of Victorian social workers & financial counsellors who noticed that an increasing number of clients in financial hardship had instalment purchase agreements that were documented as consumer leases.

Consumer leases are an issue not yet widely researched or litigated in Australia. Few agencies have explored general questions such as legislative compliance or even the general consumer usefulness of the use of consumer leases as opposed to credit agreements. Moreover, this is the first project in Australia exploring the further question of whether consumer leases are currently in essence a new form of credit loan.

David Niven and Tim Gough's research identified the trend toward consumer leases being utilised by trade intermediaries such as sales retailers to arrange finance for an item by way of lease rather than loan. Their report examined a case involving an agreement to purchase a car.^[13] This study foreshadowed an emerging trend in relation to the retailing of "Rent-to-buy" motor vehicle contracts being promoted by the car retail industry and residential houses within the real estate industry.

2.2 The Lease Agreement

Types of Leases

Consumer leases in cases where consumers expect to eventually own, or purchase, the goods are extremely common. The "straightforward" lease – where the consumer rents the item for a period then returns it – are less common. This project focuses on the former.

In the majority of case studies for this project, consumers intended to purchase or become the owner of the goods for which they signed contracts.

Consumers generally signed "rent to buy" contracts on the belief that it was simply a different way to purchase the goods, being attracted by the freedom of not having to make a large payment up front, while being able to take the item home straightaway.

^[13] "The Operation of the Uniform Consumer Credit Code" Consumer Credit Legal Service Inc, Victoria, (2004), p12

By comparison, on lay-by arrangement, goods must be fully paid for before the consumer can take them home.

How are these lease agreements made?

A lease agreement is generally marketed as a better way for acquiring goods – either by reference of the ability to upgrade the goods, or by offering “finance” to those who may otherwise not qualify for a loan. The contract is usually signed either in a store or on delivery of goods to the home.

Lessor Companies advertise in a variety of ways through store pamphlets, catalogues, in newspapers, on television, and on their websites which typically invite consumers to phone a sales hotline.

Many smaller operators advertise themselves on the internet and local newspapers. An internet site often requires an online enquiry application form in which the customer is required to provide some details, and a representative will call the consumer back.

There are two key ways these leases are sold:

Directly by the lessor (from shopfront or by phone); and in a retail store, where the store arranges the lease between the lessor and the consumer.

Usually in the latter scenario the goods to be leased are displayed in third party retailer’s store, advertised for either outright purchase or lease.

The sales representative is an employee of the third party retailer, but the sales representative makes the initial “sales pitch” for the lessor’s lease agreement. It is assumed that the sales representative or the retailer receives a commission from the lessor.

Frequently a sales representative will telephone the lessor company direct from the store and ask them to speak to the consumer, in order for the lessor to run a credit check and to answer any questions. Usually in this case the consumer has already selected the goods, and the sales representative arranges for the consumer to complete and sign the application form.

Where the consumer is dealing directly with the lessor, the consumer may contact the company by phone, and, without seeing the goods or the agreement, arranges the deal. The lease agreement is usually handed to the consumer for signing as the goods are delivered.

2.3 Methodology

This project is qualitative research study based on the experience of consumers who have entered into lease agreements. This project utilises case studies of a sample of 14 individual clients. Case studies were collected from financial counsellors and community legal centres.

Analysis of case studies was combined with an examination of the contracts and practices of particular retailers.

An analysis of case studies and retailer practices is further informed by a critical review of the current regulated consumer protection provisions.

A request for lease agreement cases involving renting and rent-to-buy household goods was publicised amongst the Financial Counselling community. It is acknowledged that this project generally involved cases where consumers were experiencing hardships financially or otherwise.

- As most cases came through Financial Counsellors, it followed that most clients were experiencing financial hardship. This was often, but not always, due to the high amount payment demands of the lease agreements.
- Cases involving one or more legal issues were identified by Garry Rothman, from Broadmeadows Uniting Care, who collected cases from his own client base and from those of colleagues and other agencies.
- Agencies that referred cases included: Broadmeadows Uniting Care, Knox City Council, Melbourne City Council, Anglicare and Dignity Financial Counselling Service.

In disputed cases initial correspondence to lessor companies was initiated by Financial Counsellors on behalf of their clients.

The Micah Law Centre became actively involved in advocating for clients if a settlement could not be achieved through the financial counsellor, or if no response was given by a lessor company. The Micah Law Centre advocated for most of the client cases collected for this study which involved a solicitor.

Consent from all clients was obtained to use their case studies in this research report on the basis that client confidentiality would be maintained.

As 2-3 cases involved clients signing deeds of settlement which included confidentiality undertakings, no lessor companies have been directly identified.

In both the research and report writing phases of the project advice and guidance was provided by the Consumer Action Law Centre and Consumer Affairs Victoria.

The report writer and the financial counsellor both attended the retail outlets of lessor companies on several occasions and made enquiries with floor “sales staff” in order to ascertain the type of information that might typically be given to the customer before and at the point of transaction.

All leasing companies are identified by our system for example as “LC1” or “LC4” (see the code below).

Lessor company names have not been identified to protect their privacy and to honour confidentiality undertakings relevant to parties involved in some of the case studies. Therefore referencing includes listing of the clauses, but cannot identify company names.

The majority of case studies involved two lessor companies “LC1” and “LC2”. We attribute this to the fact that LC1 and LC2 currently dominate the consumer goods leasing market in Australia. They have a comparatively large number of retail outlets than the smaller operators. They operate in well known franchise type stores. They are also located more frequently in suburban and rural shopping areas. LC1’s outlets are located particularly where their target (lower income bracket) clientele shop.

This project makes the point that the general target clientele of the consumer leasing companies are those on lower incomes and social security benefits. This is the case in particular of LC1. Therefore, given that financial counsellors generally work with low income people, their client catchment area would be similar to that of many of the lease companies.

2.4 Terminology and Definitions

In this project the terms “renting” and “leasing” are often used interchangeably, as they are essentially the same thing as far as consumer contracts are concerned.^[14] The word “lease” is often used to describe the actual agreement, and the term “rent” is to describe the periodic payment.

Similarly, terms “debtor”, “consumer”, “lessee”, “customer” are used to describe the lessee party to the transaction and terms “creditor”, “lessor”, “retailer” describe the lessor party to the transaction.

Abbreviations

LC	Lease Company
FC	Financial Counsellor
Lessor	also referred to as “client” or “consumer”
Lessee	also referred to as “company”, “seller” or “retailer”
CAV	Consumer Affairs Victoria
UCCC	Uniform Consumer Credit Code (“the Code”)
FTA	Fair Trading Act

^[14] While there can be an assumption of a right to purchase under a business lease, this is not the case with a consumer lease.

PART 3 CONSUMER LEASES AND THE LAW

Written with assistance and advice from Paul Gillett, co-Director Legal Practice, CALC
Legislation is contained in Appendix B

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3.1 Introduction to the legal framework

Aside from the general principles of common law, the Uniform Consumer Credit Code (“The Code”) and the Fair Trading Act 1999 (Vic) are the two regimes most specific to consumer leases.

This part briefly outlines the main lease provisions of each regime particularly as they protect a lessee, and compares that to the provisions for protections to borrowers under loans.

For a brief overview of main differences between lessee / debtor Code protections, see the table at 3.3.

For those wondering what happened to the old hire purchase agreement, the Hire Purchase Act 1959 (Vic) provided significant protection to lessees who had intent to purchase the goods. A hirer’s rights equated to those of a borrower therefore a hire purchase was not a lease. The act was repealed in 1998 as hire purchases and consumer leases were intended to be regulated by different regimes in the Code.

A lease is a lease – a loan is a loan

The UCCC aims to ensure that consumers who purchase goods on instalments and pay a premium (i.e. more than the cash price) for the right to pay by instalments, should have the same legal protections – regardless of how the contract is drafted.

While the UCCC contains consumer protections for consumer leases, these relate to genuine rental type agreements – where there is no right for the consumer to purchase the goods. However, clever drafting of consumer leases has enabled financiers to argue that contracts that appear to be instalment purchases are a lease – not a loan.

3.2 Consumer Leases and the Code

The Consumer Credit Victoria Act (1995) under s5 incorporates the Uniform Consumer Credit Code “The Code” - Queensland legislation which, with minor differences, has been adopted in all Australian States. It establishes a regulatory regime primarily aimed at protecting consumers entering into consumer credit transactions.

The Code is the central instrument of credit law regulation in Australia. It has been noted by credit policy experts that as it is such a new instrument, significant attention should be paid to identifying how much the Code fulfils its objectives, as well as whether our regulation environment allows the Code to operate as it should².

This Part will show the substantial distinction between the regulation of credit contracts under the Code, and that for consumer leases. While leases share some of the protections offered to loans, lessees are not offered the same level of protection as borrowers who have loans.

3.2.1 Section 10 – LEASE or LOAN?

Whether or not a consumer lease agreement confers upon the hirer a right or obligation to purchase the hired goods is of **critical importance** to the treatment of that agreement at law. An agreement that includes a right to purchase may, by virtue of s 10 of the Code, have to comply with a significantly more onerous regulatory regime.

Under S10, goods leases under which the lessee has a right or obligation to purchase the goods may be regarded as a credit contract within the meaning of Part One of the Code. A “lease” which is captured under s 10 of the Code must comply with all requirements governing credit contracts under the Code, and lessees under such leases gain the protection conferred upon borrowers under regulated credit contracts. In other words, while such a contract may be drafted as a “lease”, it is regulated as a “loan”.

3.2.2 Code Protections to Borrowers - LOAN

In brief, **borrower** protection includes:

- requirement that the contract disclose the fifteen matters stipulated in s 15 such as total amount of credit, total interest, repayments, statements etc.
- pre-contractual disclosure of s15 matters under s14,

² Dr E. Lanyon of Consumer Affairs Victoria, “Changing Direction? A perspective on Australian consumer credit regulation”, keynote address paper for National Consumer Credit Conference, 2004, p2

- access to remedies under the civil penalty regime (Part Six)
- the ability to hold credit providers jointly liable for losses caused by suppliers under related sale contracts (Part Seven)
- limitations on the manner in which a credit provider may enforce a contract (Part Five).

3.2.3 Code Protections to Lessees - LEASE

Part Ten of the Code establishes a separate regime to regulate consumer goods leases that do not confer upon the hirer a right or obligation to purchase the goods. Under Part Ten, consumer leases need not conform to as rigorous a set of rules as those applicable to credit contracts under the Code.

Division One – Interpretation and application

‘Consumer lease’ is defined under s 147 as:

a contract for the hire of goods by a natural person or strata corporation under which that person or corporation does not have a right or obligation to purchase the goods.

Section 148 goes on to apply a filter which is essentially identical to that applied to the definition of ‘credit contract’ by s 6 of the Code.

Section 149 lists three categories of consumer leases which, despite falling within both ss 147 and 148, are explicitly exempt from regulation under the Code.

Section 150 replicates the provisions of s 11 by creating a presumption of Code-coverage that can be rebutted by the execution by a lessee of a declaration that the lease is for business purposes.

Division Two – Form of and information to be included in consumer leases

Section 151 requires a consumer lease to be in writing, and is a simplified version of ss 12 and 13.

Section 152 sets out the disclosure requirements to which a regulated consumer lease must conform.

The disclosure regime set out in s 152 differs from that applicable to credit contracts under s 15 in a number of important respects.

Firstly, it requires the disclosure of less information: eight, rather than fifteen, individual heads of disclosure.

Secondly, sub-section (2) of s 152 applies an additional test of misleading conduct, and consequent damage, which must be satisfied before a technical breach will be

deemed actual non-compliance. Section 15 and its related offence provision s 20, have no such requirement.

Thirdly, a breach of s 152 has no civil consequences – it leads only to the imposition of a penalty under s 152(3). In comparison, a breach of s 15 may be dealt with under the civil penalty provisions of Part Six.

Section 153 ensures that lessees are, within 14 days of entering into the lease, provided with a copy of the lease document (analogous to s 18), as well as an information statement in Form 11 of the Regulations (analogous to s 14(1)(b)).

Section 154 mirrors s 37 and ensures that, in certain circumstances, providing further goods under a consumer lease, or waiving or deferring a payment, will not create a new consumer lease or credit contract. This ensures that, in such circumstances, lessors will not again need to comply with obligations imposed in connection with creating new lease agreements.

3.2.4 Other Code provisions applicable to Consumer Leases

As well as the distinct regulation set out in Part Ten, s 155 ensures that lessees under consumer leases also gain the protection of a limited set of provisions which fall outside that part, being:

- a) Division 3 of Part 4 (relating to changes to contracts on the grounds of hardship and unjust transactions), other than section 72;
- b) sections 90 to 93 (relating to information as to mortgaged goods, entry to residential property to take possession of goods and orders by the Court for entry and possession);
- c) Part 11 (relating to miscellaneous matters).

The hardship, unjust contracting, and repossession provisions of the Code offer valuable protection to lessees. Matters under Part 11 are largely functional and do little to substantively modify the rights and obligations of parties under consumer leases.

Section 156 provides for written notice of 30 days to be granted to lessees before a lessor may take possession of goods subject to the lease. It is akin to the notice period set out under s 80 of the Code. Under s 156(2), the notice period may be waived in certain circumstances.

Section 157(1) of the Code allows a lessee to terminate a lease at any time by returning the goods to the lessor, but they have to pay whatever amount the lease says.

Section 157(2)(b) on termination payment by a lessee. The regulation could set out a lesser amount for termination of a lease, but in fact the Consumer Credit Regulation 1995 does not do so.

Other provisions applicable to Leases – Part 11 Miscellaneous.

3.3 Comparison table between consumer protections provided to credit contracts and consumer leases under the Uniform Credit Code

Disclosure	Credit contracts & leases to which credit contract provisions apply	Leases to which Part 10 applies	Comment
Timing of disclosure	Must be pre-contractual (s.14)	Within 14 days after entering contract (s. 153)	
Nature of disclosure	More extensive: interest rates, total interest payable, fees and charges, default rates and enforcement charges, mortgages and commissions, insurance	Less extensive: Amounts payable before deliver of goods, government charges, rental charges, charges on-top of rental, termination conditions	
Default and repossession			
Notice of default	30 days notice and opportunity for consumer to remedy default before enforcement action (s. 80 -81).	No such protection	Absence of requirement for lessors to notify lessees prior to enforcement allows lessors to unfairly initiate enforcement action
Entry to premises	No entry onto residential premises without consent of occupier or court order (s. 91)	No such protection	Lessees can be subject to unjustified invasion of privacy
Enforcement costs	Only reasonable costs of enforcement can be recovered (s. 94)	No such protection	Lessees may still have common-law rights
Conduct requirements			
Unjust transactions	Court can reopen unjust transactions (s. 70)	Court can reopen unjust transactions (s. 70)	
Unconscionable contracts	Court can review unconscionable interest or charges (s. 72)	Court can review unconscionable interest or charges (s. 72)	
Advertising			
Representations	Liability for false or misleading representations	No such protection	Lessee may have to rely on the general provisions in the Trade Practices Act and Fair Trading Act
Comparison rate	If advert states repayment amount it must state comparison rate	No such protection	
Annual interest rate	If advert states repayment amount it must also state annual interest rate	No such protection	
Unfair terms			
Unfair consumer contract terms legislation	Does not apply (Fair Trading Act s. 32X)	Does not apply (Fair Trading Act s. 32X)	Exclusion harmful to interests of consumers

3.4 Consumer Leases and the Fair Trading Act (Vic) 1999

3.4.1 Contact Sales

Under Section 60 if the agreement is signed in the purchaser's home it is almost always a contact sale.

The requirements of S61 include that the agreement must:

- notify the purchaser of their right to cancel and
- provide a cancellation notice in the prescribed form of Schedule 2 advising the consumer that they can cancel and return the goods within 10 days.
- Set out the total consideration to be paid, and if that total is not ascertainable, the manner in which it is to be calculated.

Contact sales s61 also apply S163 which requires that the agreement must be clear, and set out with a minimum of point 10 font.

Under s62, the result of a supplier or lessor failing to comply with section 61 means that they cannot enforce the agreement.

3.4.2 Part 2B – Unfair Contract Terms

Part 2B of the FTA sets out a mechanism to protect consumers by rendering unfair contract terms in consumer contracts void either in part or entirely.

Section 3 of the FTA defines 'consumer contract' as:

an agreement, whether or not in writing and whether of specific or general use, to supply goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption, for the purposes of the ordinary personal, domestic or household use or consumption of those goods or services.

The following protections are available in Part 2B:

S32Y – unfair contract terms are void. They can be severed from the contract only if the contract can stand without them.

S32ZC - The Director of Consumer Affairs can apply to the Victorian Civil and Administrative Tribunal for a declaration that a term in a consumer contract is unfair, or under S32ZA, an injunction to prevent the further use of an unfair term.

However, Section 32V(a) currently provides that Part 2B does not apply to contractual terms contained in a contract to which the *Consumer Credit (Victoria) Act 1995 (the CCVA)* applies. This means that consumer leases and consumer loans are excluded from coverage.

The only exception under s32V is contracts of a *prescribed class* of contract. There are yet no contracts that have been declared prescribed contracts by credit regulations.

Recent Reforms for Unfair Terms

This matter has been high on the agenda of Consumer Affairs Victoria as requiring reform especially in relation to credit contracts. CAV has produced several papers in relation to unfair contract terms in consumer contracts and has been investigating various options for future regulation, including schemes that have been used in the UK. CAV also very recently introduced a working paper on Unfair Terms.^[17]

As discussed above, there are other provisions in the Code (such as Section 70) giving a mild level of protection to leases beyond the Code Part 10.

CAV have commendably taken the position that the Code section 70 does not adequately protect consumers², though credit providers have tried to argue that it does. Current protection under the Code, which allows an individual to have an unjust contract re-opened depends on the individual circumstances surrounding the transaction, and does not offer protection against unfair terms.

The Victorian Government has announced a plan to implement a timely reform which removes the exclusions set by Section 32V and will allow Code regulated contracts the protection of FTA Part 2B. It is understood that this will take effect in January 2008.

Recent Case Law on Unfair Terms

In the Director of CAV v AAPT^[18] Case, concerning the AAPT telecommunications service, confirmed that the meaning of unfair terms is that there is found a significant imbalance in the parties' rights.

Most of the AAPT contract terms were found void for unfairness under FTA s32W. Justice Morris, President of VCAT discussed what a significant imbalance meant.

Unfair terms included for example:

- Varying any term at any time for any cause
- Suspending the service if amount owing
- Allowing AAPT to terminate when a consumer breach was inconsequential
- AAPT could change the service provider without notice

3.4.3 Part 2 - Unfair Practices

^[17] Papers include "Preventing unfair terms in consumer contracts" and "Unfair contract terms in Victoria - research into their extent nature, cost and implications" Consumer Affairs Victoria, and a working consultation paper inviting public comment, released by CAV Sep-Oct 2007

² Ibid

^[18] Director of Consumer Affairs v AAPT Ltd (Civil Claims) [2006] VCAT 1493 (2 August 2006)

Part 2 contains important protections to lessees by addressing amongst other things unconscionable conduct, misleading and deceptive conduct, false representations, and circumstances where the cash price of goods must be given.

PART 4 CONSUMER EXPERIENCE

Contents:

- 4.1 Consumer confusion – lease or purchase?
- 4.2 Contact Sales and Cooling Off
- 4.3 Unfair Terms
- 4.4 Other Issues
- 4.5 The Typical Lessee

This section explores the experience of consumers, and their advisors with consumer lease agreements where there is some verbal, or written, indication or representation that the consumer is purchasing the goods.

While all cases in this project settled prior to a Court or Tribunal hearing, many issues were raised with the companies in relation to the consumers' disputes. Consumers mentioned in this project often had felt misled and many would have been willing to proceed to a hearing if the companies had not offered an acceptable settlement.

Settlements frequently involved consumers retaining possession of and being transferred the title to the goods.

Nearly all of the cases of this project in which a Solicitor advocated for the consumer resulted in a complete release to the consumer from the contract and the consumer retaining permanent possession of and title to the goods. Some lessors required a formal documentary transfer of title to the goods to the consumer, and some simply consented to title being transferred.

4.1 CONSUMER CONFUSION – LEASE OR PURCHASE?

Our case studies confirm in many instances that it is only after consumers had signed contracts that they discovered that they did not have the right to purchase/own the goods. Some consumers did not realise until the end of the initial rental term, typically 18 months after signing. As the intention of the companies is usually that the consumer purchase or retain the goods at the end, the problems were not that consumers found that goods were repossessed at the end of the term^[19], but that consumers were required to pay more to retain the goods or were confused about their rights and obligations.

For example, Radio Rentals advertise their agreements as a “Rent, Try, Buy” agreement, but the contract confers on the consumer a mere right to make an offer to buy, which Radio Rentals in it's discretion can accept or reject.

^[19] Although Consumer Action Law Centre has recently become involved with a large number of consumers who were convinced that they were purchasing vehicles on credit from a particular company, only to find at the end of the term the company demanded the vehicles back.

The issue of ownership of the goods in practice raises the question of whether these leases could better be termed “mock leases”.

Broadly speaking, the findings of this project show a type of belief in the consumer’s mind in relation to their ownership rights could be split into three groups;

- 1) consumer thought they had the right to purchase the goods for whatever sum after making the last payment
- 2) consumer thought they would own the goods upon making the last payment

It is shown here in case study **JL2** how the consumer can be misled to the point that it does not ever occur to them that the agreement is a lease. Hence a third group;

- 3) consumer believed it to be nothing other than a purchase by way of instalments.

“Mock” Lease Examples

Case example – the “lease purchase”

- **JS**, a consumer, went into a well known franchise electrical retailer intending to purchase a TV on a finance arrangement. The sales agents said they were selling “lease purchase” agreements with a company, and told the consumer she could purchase the TV on a “lease purchase” agreement, and after 2 years she would own it.

Case example – “rent to buy” agreement

- A consumer went into suburban franchise store seeking to rent to buy various items. He was advised by a salesperson that he could buy items by paying \$1 for them after three years.

Case example – the “flexirent” agreement

- A consumer wanted to purchase new computer parts (hard drive & software). He went to a Computer store. A sales agent of the store advised him he should purchase them on a “flexirent” arrangement. The sales agent clearly used the word “purchase” and did not mention “lease” or “rental” agreement. The sellers of the flexirent agreement said “you have been approved for \$(x amount) credit”.

The Genuine Lease

Considerably less common than a rent to buy or “mock” lease is the “genuine” lease.

It is generally advertised and documented in comparatively more straightforward terms as a lease or rent agreement. It may at best include a term giving the consumer a right to make an offer to purchase, but the suggestion of eventual ownership is not pushed and the consumer clearly understands their rights as lessee, not an owner.

Case Example – Genuine Lease

(See full case study “KS” for full details)

- KS leased a washing machine from LC6. She clearly understood from the advertising and information given that she was renting the item only.

It is noted that other issues such as high cost and onerous terms arose with the genuine lease as was also the case with mock leases. This is discussed further below.

Confusion about the nature of these agreements occurs due to a range of representations and conduct by the lessors and retailers, including advertising, marketing, and in-store conduct. While sales staff may not specifically say that there is a right to purchase the goods, consumers report that this is suggested by the conduct of sales staff.

There are a number of other factors – non verbal factors included, that suggest to the consumer that the agreement carries a purchase right and adds to the general confusion about the true nature of the lease agreement.

It is submitted that these practices as a whole are intended to pull a mask of confusion over the consumer and therefore could amount to unconscionable conduct within the meaning of the FTA.

4.1.1 Sold in a selling store

Some “mock” leases of the larger and most successful lessor companies are being sold in department stores which have been reputed for years as having the primary business of selling household goods.

Smaller lessor companies on the other hand, do make it reasonably clear to the consumer that their business is more leasing as opposed to selling. The business name of these companies also makes the matter clearer. However, use of a term such as “rent” or “lease” is not adequate to explain the nature of the agreement if other conduct or representations suggest that ownership can be “guaranteed”.

Goods sold in the well known retail stores are primarily sold for outright purchase and are of course displayed with a purchase price. If those items are also available on a “mock” lease, they typically display a weekly amount payment and the lease company name, but would rarely actually use the word “lease”.

Mock lease or rent to buy items are sold by a sales person in the same way that new retail goods are sold in a purchase transaction.

Case example;

- RW unwittingly signed up for his ”mock” lease for a computer with in a well known electrical department store, thinking he was purchasing the computer.

The retailer is one of the largest retail department stores in Australia which *sells* household furniture and appliances.

4.1.2 Misleading Marketing Slogans

The following slogans are examples advertising slogans that are arguably deceptive – most of which are currently being used – which impress upon the consumer that the agreement is a purchase as opposed to only a lease.

Lease Company 1 (LC1)

- “Option to buyout”, “\$1 Buyout”³
“no credit history checks”⁴

Lease Company 2 (LC2)

- “The best way to *finance technology*”⁵
“EzyKeep”⁶

“EzyKeep” Option:

“You can “*keep*” the goods after the agreed term. Complete the full term of your agreement, make one additional month’s rental payment, and the goods are yours to “*keep*” forever, without any more rental payments...

(We) will continue to own the goods, but if you ever want to sell the goods to another person (but not yourself) you may do so as our agent for any price you see fit. You may “*keep*” the proceeds less one dollar as your reward for selling the goods on our behalf. Simply notify us that the goods have been sold and pay us one dollar.”^[20]

4.1.3 Goods which are usually purchased, not rented

A number of the rent to buy or mock lease companies now offer all manner of small household items which are traditionally items which would be purchased not rented. It would be the exception to the norm that the average Australian consumer would acquire such items in the full and complete knowledge that a lessor company is the legal owner of them and therefore has the right to repossess them.

For example LC1 offers for “rent, try, buy” leasing not only major household items such as bed bases and fridges, but also an entire range of non essential items designed

³ Taken from LC1’s catalogue and website

⁴ Slogan appearing on a 2007 LC1 television advertisement

⁵ From LC2 in store brochure, note that the product’s Application Booklet 2007 reads “the best way to pay for technology”

⁶ LC2’s lease product option to keep goods at end of term, from in store Catalogue

^[20] Ibid

for ongoing ownership and every day use & entertainment including personal stereos, DVD players, set top boxes bedside and coffee tables.

Case study examples:

- **JL2** contracted for computer parts (memory, software) which cannot simply be removed from the computer and returned to the store.
- **RW** 's rent to buy lease involved a Sony play station game and a digital camera. RW understood that these were added to his finance *purchase* agreement on a discount rate and as a bonus.
- Amongst several items rented to **SH** were a bed frame and mattress which SH had always intended that she would own at the end of the agreement for everyday and ongoing use in her home.

4.1.4 Purchase Price - Deceptive Statements & Poor Explanations

A reoccurring trend arising from case studies was that of lessor sales representatives not adequately explaining the implications of lease agreement terms and conditions in their “sales pitch” to consumers. As a result consumers felt misled when they later discovered their rights were in fact less than as had been promised.

- E.g. **CM** was given the impression when he signed up that after 18 months he would own the goods. He later discovered that after 18 months an additional large payment to purchase the goods.

LC1's scheme “Make us an Offer” versus the “Similar Goods Purchase Price”

Consumers frequently were confused about their rights in relation to purchase under the Radio Rentals “rent try buy” lease agreement.

“Make us an Offer”

A number of consumers expected to be able to buy the goods at the end of the initial term (usually 18 months) as sales people from LC1 had said that they can make a price offer. After 36 months (2 x 18 month terms) LC1 would sell “similar” goods for \$1.

A number of consumers reported that it was clearly explained that Radio Rentals reserved the right to accept or reject a consumer's offer, and in a number of cases this was not explained.

“Similar Goods Purchase Price”

Findings show that LC1 rarely explained to consumers that the only offer they would accept had to be close enough to a price that LC1 itself sets.

Obscurely listed in the fine print of the standard lease schedule lease, there is a “similar goods purchase price” in which LC1 insert a price which they consider acceptable. If a consumer makes a purchase offer that is too low, LC1 can refer them to the “similar goods purchase price” listed on the schedule which is intended to “guide” them as to a suitable amount.

The practice of suggesting that a consumer can make an offer, and then setting the price renders the consumer’s right to make an offer meaningless.

Also the freedom of LC1 to substitute rented goods for other goods “similar in age, dimension and feature” allows potential to short change the consumer by providing goods of a lesser quality.

Looks like a lease, smells like a loan...

On another level, the reference to purchasing “similar” goods relates, we assume, to LC1 avoiding giving the consumer a right to purchase the leased goods, which would risk an argument that the agreement is a loan rather than a lease.

4.2 CONTACT SALES AND THE COOLING OFF

Breaches of – Legislation - S60 FTA

Lessor companies who arranged for consumers to sign contracts upon delivery of the goods to the consumer’s home, in several cases did not comply with the contact sales provisions in the FTA.

LC1 and the cancellation notice

In particular, LC1 consistently failed to meet the S61 requirement to provide a notice advising the consumer of their right to cancel the agreement within the cooling off period.

Under FTA S62 a company that breaches Section 61 has no right to enforce the contract against the consumer.

In nearly every case where a Solicitor was involved, LC1 released the client from the contract and allowed title to the goods to transfer to them

For example see the following case studies; “CM”, “EV”, “JL1”, “SH”, “MI”

4.3 UNFAIR TERMS

FTA

While Victorian unfair contract terms legislation does not currently apply to consumer leases, we believe that consumer leases contain a number of terms that are unfair. According to case law, an unfair contract term involves a significant imbalance in parties rights^[21], and we believe that this is the case in many consumer lease contracts.

Generally leasing contracts shared a number of similar themes, and some common terms appeared in all the contracts of the case studies.

Included is a clause from LC6's contract as an example of an unfair term despite the fact that the case actually involved a business lease arrangement. This is justified because the terms and conditions of the standard contract were the same (with minor variations) for LC6's consumer leases.

Examples of terms that we believe could be "unfair terms" if consumer leases were covered by the legislation are given as follows:

4.3.1 Early Termination

Under the legislation, FTA S32X(b) deems the permitting of the supplier but not the consumer to terminate the contract, a factor in considering whether a term is unfair.

In every agreement encountered in this study, it has not been the case that a simple early termination fee applies if a consumer wishes to return goods and terminate the contract prior to the expiry of the initial term.

Most contracts required the consumer to pay the balance of the rental payments until the end of the term, regardless of whether they had possession and use of the goods. In some cases consumers would be required to pay additional "liquidated damages".

Conversely, a lessors rights to terminate the contract generally could be at any time without penalty, and sometimes without notice.

These termination penalty terms clearly show an imbalance of rights, and an unfair benefit of the lessor.

Example (LC1 and LC2)

LC1 charges an early termination fee which is also describes as liquidated damages. The consumer must pay the Early Termination Fee in order to exercise right to terminate. Early Termination fee is calculated by them by request, and is not provided in the lease schedule^[22].

LC2 has a condition that the balance of monthly payments must be paid in full plus an amount of liquidation damages.

^[21] Director of Consumer Affairs Victoria v AAPT Ltd [2006] VCAT 1493

^[22] "LC1" standard terms and conditions at clause 12.5, versions used in this project include 2004, 2006 and 2007 versions. (Please note lessor company names cannot be identified)

Both LC1 and LC2, termination clauses benefit them by receiving the entire balance of the contract payments, plus a “damages” payment, and profiting twofold. The consumer loses the right to possess the goods, and the penalty.

Further, in the case of LC2, the consumer has no way of knowing what a genuine pre estimate of loss is – see the following extract.

This is an extract from LC2’s standard contract ^[23]

“Consequences of early Termination”

- (a) if this rental agreement is terminated under clause 10 you must immediately (i) pay to us:
- (1) all overdue total monthly rental payments: plus
 - (2) the present value of all remaining total monthly rental payments for the balance of the agreed term discounted at monthly rests at the Reserve Bank of Australia’s cash rate current on the date this rental agreement is terminated, plus
 - (3) Any liquidated damages payable under clause 8 and any other amounts payable under this rental agreement, which amount you agree is a genuine pre-estimate of loss that we will suffer because of the early termination of this rental agreement: and
- (iii) return the equipment to us in accordance with clause 12 if you have not previously done so.
- (b) If you fail to comply with paragraph (a)(ii) you must pay to us on demand liquidated damages equal to the present value of the estimated fair market retail value of the equipment as at the end of the agreed term (assuming that the equipment will be in the condition required under clause 12(a) and (b)) discounted at monthly rest at the reserve Bank of Australia’s cash rate current on the date this rental agreement is terminated, which you agree is a genuine pre-estimate of the loss which we will suffer as a result of your failure to return the equipment to us in accordance with clause 12. We may make the demand for payment by debiting the amount owed under this paragraph from your nominated bank or credit card on any date of our election without notice to you.
- (c) If you have returned the equipment under paragraph (a)(ii) or if we have repossessed the equipment under clause 13, we will pay to you any amounts you have paid to us under paragraph (b) plus the amount by which the fair market wholesale value of the equipment as at the date the equipment is received by us exceeds the amount of liquidated damages calculated under paragraph (b). We will be entitled to set off any amount that we owe you under this paragraph against any amount that you owe us under this rental agreement, or under any other agreement between you and us.

4.3.2 Breach and Opportunity to Remedy

Under the legislation, FTA S32X(c) deems the penalising of consumer but not the supplier for breach a factor in considering whether a term is unfair. S32X(h) deems the permitting of the supplier to interpret/determine whether there has been a breach equally relevant.

It is an established principle of contract law that in the case of breach of any term except an essential term, an opportunity to remedy should be given. In the Code there is no such provision protecting a lessee, but on the other hand note that a credit provider must give a debtor opportunity to remedy⁷.

^[23] LC2 standard terms and conditions booklet 2007, clause 11, heading “consequences of early termination”

⁷ The Code S80, S81 and Part 10

On these bases the following example terms are arguably unfair because of a rights imbalance between the parties. LC1 provides an opportunity to compensate itself on a consumer's breach, but this does not operate vice versa to benefit the consumer if the supplier breaches. The AAPT case held that a similar term allowing AAPT (the supplier) to terminate for an inconsequential breach by a consumer was unfair.

Example (LC1)

"You should discuss with us if you think that we have breached the contract"^[25]

"We are in breach of the contract if we do not comply with any obligation we have in the contract, including any obligation implied by legislation into the contract"

*"If you are in breach of the contract, we may be entitled to compensation. We may also be entitled to terminate the contract."*⁸

If LC1 breaches, the consumer is required to give LC1 a notice in writing which allows it an opportunity to remedy. Conversely, LC1 says

"we are not obliged to give you an opportunity to remedy your breach".^[26]

4.3.3 Penalties for Uncontrollable Circumstances

In a term that can undoubtedly be deemed unfair, LC3 seeks the right to enforce a penalty on a consumer for dying or upon becoming mentally impaired.

For example LC3 says;

"If any of the following occurs: ...(e) you die, or become subject to any law or regulation relating to mental health or incapacity (physical or mental);it is a fundamental breach of this agreement and you will be deemed to have repudiated this agreement."^[27]

This condition (term) is oppressive towards the consumer because physical or mental incapacity are beyond a consumer's control, and because the lessor can then enforce a termination right and seek to recover;

(paraphrased) *"all rent payable, interest on unpaid rent, plus costs of any repairs, plus costs of repossession, plus any tax, plus the termination amount"*⁹ (the termination amount is not ascertainable by the consumer from the contract)

^[25] LC1 terms and conditions of standard contract, phrase taken from clause 15.4

⁸ Ibid, cl 14.2, and 14.3

^[26] LC1 standard terms and conditions, clauses 15.2, 15.3

^[27] LC3 standard terms and conditions clause 18 & 19

⁹ Ibid

4.3.4 Debiting bank accounts in arrears without notice

LC2's standard contract says "you agree to reimburse us for the amount our bank has charged us for your dishonoured payments", and gives LC2 the power to debit the amount to the bank account to pay themselves without notice to the consumer.

4.3.5 Insurance issues / powers of attorney

All lessor contracts require consumers to have insurance (or similar) to protect their interest in the goods.

Most lessor companies including LC2 require that the consumer keep the goods insured against loss and damage. There is often an option for consumers to pay extra funds to reduce their liability, usually via a lessor formed and named insurance type product.

There is some lack of clarity as to what the insurance actually covers. If the extra protection does not in fact amount to insurance, it may in turn raise issues about whether in a consumer would have access to the independent Insurance Ombudsman in the event that a dispute arose.

In any case, in relation to insurance LC3 appoints themselves as attorney to arrange insurance:

"You irrevocably appoint us, and each of our officers and managers, jointly and severally to be your attorneys to make and settle any insurance claims relating to the equipment¹⁰"

The latter term is in essence a power of attorney. The potentially unfair element is that firstly many consumers may not realise that such a power is embedded within the term. Also the consumer may much less grasp the potential implications which could be that they have no control against exploitation in an insurance transaction being carried out on their behalf.

3.4.6 Ending the Term

Terms related to the expiry of the initial lease period are designed to prevent the expiry of the lease in order to benefit the lessor.

The entire onus of ending the term can be placed upon the consumer often without their realisation. They must provide to the lessor one month's notice in writing and if not the lease rolls into a new term, called "rollover" period. Some companies require also that the consumer take responsibility to return the goods, which can be burdensome for the consumer.

¹⁰ LC3 Standard terms and conditions, clause 11

It often happens that because the consumer does not realise that under the contract it is their responsibility to terminate, and therefore the consumer ends up in an on-going rental and expecting the lessor to initiate contact with them about ending the term.

The lessor is likely to benefit by obtaining a longer payment period if the consumer doesn't understand their obligation to terminate, which is common.

4.3.7 Replacement of goods with “similar” goods

Consider the relevant FTA unfair terms provision S32X(g) - deems permitting the supplier unilaterally to vary the characteristics of the goods or services to be supplied under the contract relevant to whether a term is unfair.

Some companies reserve the right to, without notice to the consumer, substitute the goods for other goods usually termed as being “*similar in age, dimension and feature*”¹¹.

- LC1 says “If we considerate necessary to do so, we may replace the goods with goods which we believe are comparable in quality, features and performance.”^[29]

There is risk to the consumer that they end up with sub standard goods or not the goods they wished to contract for.

- “KS” encountered this issue as when her washer broke down LC6 replaced it with an older one in poorer condition – see case study.

This term could be argued to be unfair in light of the legislation. It is also comparable to the unfair term found in the AAPT case which stated that AAPT could change the service provider and without giving notice.

4.4 OTHER ISSUES

The following is a brief list of further issues associated with both mock and genuine leases;

- Readability of the contract
Possible falling short of relevant legislation FTA S163 – clarity in documents required. Some contracts - lease schedules in particular were difficult to understand even for the professionals (lawyers and financial counsellors) assisting clients.
- Signing of the Business Purpose Declaration
Legislation – Code, Part 11, S15X

¹¹ Phrase used in LC1 standard terms and conditions

^[29] LC1 standard terms and conditions clause 11.2

Lessor sales people encouraging customers to sign the business purpose declaration on the contract while fully aware that the product would not be used predominantly for a business purpose.

4.5 WHO IS THE TYPICAL LESSEE?

A trend in Lessee Social Demographic

Most clients were referred through financial counsellors and tended to come from the most socio economically disadvantaged backgrounds. Case study client profiles show that groups such as the elderly, single parents, mentally and visually impaired people, and pensioners in general strongly feature.

It is acknowledged that this research focuses on those consumers who have sought assistance – and may not accurately represent all consumers who enter into these leases. However, the cost of these leases, and the way they are marketed suggests that disadvantaged consumers are likely to comprise a significant proportion of lessees overall.

It is found that one of the larger lessor companies in particular has a history of targeting low income people, vulnerable people and pensioners. Spokespersons of the two larger lessor companies have been forthright in their communications particularly with investors about the fact that their agreements are geared towards cash poor welfare recipients.

One of the larger company's advertising campaign slogans are designed to attract those who are cash poor or have financial difficulty or even a bad credit rating. For example using the slogan, "no credit history checks", or a sign welcoming "pensioners".

As it has been shown that the main reason people rent is because they cannot afford their first preference which is to buy, consumers of "mock" leases are more likely to be on low incomes.

Lessor Company Movements

Those involved in this project do not profess to have great expertise in the economic trends of the consumer and credit leasing market. From the average consumer's perspective however, it does appear as though the consumer "mock" lease market may be expanding.

We have noticed that "mock" and rent to buy lease agreements are appearing in more electrical and department stores over the last 18 months. During the last 12 months in Victoria we noticed that lessor companies who offer "mock" or rent to buy leases for electrical goods were offering their agreements in large well known department and electrical stores who operate their business in most states of Australia. The lessor companies had presumably formed partnerships with the larger retailers.

What is significant, however, is the fact that the larger lessor companies in Australia are also moving into the personal loan finance industry. Considering the findings of this project this can be taken as a further indication that their true intention is to be a financier rather than a lessor.

PART 5 CONCLUSION

Existing law and regulation is inadequate and failing to protect lessee consumers.

The findings indicate that in general retailers provide lease agreements that operate outside existing regulatory provisions. The Code Part 10 lease regime (shown by Part 3 to be a relaxed regime) had few non-compliance issues. On the other hand, the failure of lessors who sign up lessees in their homes to comply with FTA contact sales legislation and the frequent use of unfair contract terms (shown in Part 4) are serious legislative compliance issues which require immediate regulatory attention.

The further serious issue is that Section 10 of the Code – concerning the right to purchase – is being circumvented by lessors to mask a loan as a lease – the mock lease. A lease product entitled “flexirent” is an aptly named product which may be attempting to do this. The nature of the agreement is arguably designed to be “flexi”ble (flexible), i.e. to bend into the shape of a lease or a loan at the lessor/financier’s convenience.

- Companies looking at new ways to market their finance products such as LC2 have sought to capitalise upon the lack of Code protection to lessees by making their contracts appear to be a lease.
- Consumers are entering contracts on the pretext that they have a right of purchase or ownership, which S10 would catch as a credit contract. The Code would then require that full disclosure such as the interest rates be given on the contract.
- The table in Appendix C is inspired by a hypothesis that extremely high interest rates would be shown to be charged if typical rental goods were obtained through a comparative loan agreement.
- In order to retail lease agreements, financiers draft very complex terms relating to ownership of the goods, and therefore cause significant confusion for consumers. Consumers are discovering that like a loan or sale of goods by instalments, title to the goods exists in their experience but not on the face value of the documentation.
- Whilst on one level lessors could be accused of misleading consumers under the Fair Trading Act in relation to their purchase right, it can be said at a deeper level that they are in essence attempting to twist their way around the Code.
- In short, most rent to buy or “mock leases” can be deemed loans in lease clothing.
- If lessor companies are expanding their businesses into finance loans, it provides further support to this idea.

Findings also indicate that mock leases are being sold more so to consumers on low incomes – in some cases where those consumers may not otherwise qualify for main stream credit. This results in the most disadvantaged people paying up to 2-3 times the retail value of the goods, and being denied many rights that other borrowers have. The ultimate result is the ongoing reinforcement of their cycle of disadvantage.

Whilst it is acknowledged that there are limited options for low income citizens and pensioners to obtain credit for these items on an instalment payment basis, the answer is not to fill that gap by offering expensive loans documented as leases to avoid key consumer protections.

Consumer Affairs Victoria has recognised this need that all Victorians have access to moneys to purchase essential household items and have established additional NILS providers in Victoria¹². The recommendations ask the government to continue to pay attention to this issue.

The State of Victoria has commendably decided to lead Australia in tackling the issue of unfair terms by the government's recent decision to undertake reform, such that FTA Part 2B will be extended to apply to all Consumer Credit Code contracts including leases.

This is a major step in the empowering of consumers to question unfair terms and ask credit providers to account for having them in their contracts. In particular, exploited lessees will strongly benefit from being able to use Part 2B to challenge unfair lease terms.

The recommendations urge the Director of CAV to fully exercise the broad powers under Part 2B in obtaining declarations and injunctions against unfair terms in consumer leases.

There is an immediate need that the Director act to protect the interests of the large numbers of lessees in "mock" leases, which contain unfair terms concerning termination penalties such as those outlined above in Part 4.

The Parliament must consider the Code Section 10 and its potential for circumvention, to ensure that mock leases – loans in disguise - are brought under full credit regulation.

It is our view that should some of these contracts be tested in a Court or Tribunal, that it is likely they would be found to be loans under the UCCC, and to fail to comply with the requirements for a loan. This project has shown that lessors are more than prepared to avoid litigation – sometimes at great costs – and disputes are more likely to settle.

We hope to see a positive response by lessor companies in the self evaluation of their practices in the near future. In general, we also hope consumers can look forward to a more just and honest consumer leasing industry, where lease agreements are clearly distinct as such from loan agreements.

¹² Consumer Affairs Victoria's report "Government Response to the Report of the Consumer Credit Review", State of Victoria 2006, p17

RECOMMENDATIONS

Legislative Reform of Unfair Contract Terms

- 1) **The Victorian Government remove the exemption placed on contracts regulated by the UCCC in S32V(a) of the Fair Trading Act so that unfair contract terms laws apply to credit and lease contracts^[34].**

Enforcement of Unfair Contract Terms

- 2) **When recommendation 1 is implemented, the Victorian Government prioritise acting on terms in both credit and lease contracts that attempt to avoid consumer protections in the Code.**

Consumer Affairs Victoria monitor consumer lease agreements for unfair terms, particularly terms that indicate that the “lease” should be documented as a “loan”.

Note; priority should be given to terms that purport to deny a right to purchase while, in effect, giving the consumer the ability to purchase, retain or keep the goods. This should include, for example, contracts that give a right to “keep” or to purchase “similar goods”.

- 3) **The Director of Consumer Affairs Victoria exercise the power under S32ZC(1)(c) to seek judicial declaration that the unfair terms outlined in this project in standard form lease contracts be declared prescribed unfair terms.**

Legislative Reform of the Code

- 4) **The Victorian Government amend Section 10 of the Code to bring “mock leases” (in substance loans) under the credit ambit of the Code.**

Example Suggestion for Amending Section 10

S10 “For the purposes of this Code, a contract for the hire of goods under which the hirer has a right or obligation to purchase the goods, is to be regarded as a sale of the goods by instalments if the charge that is or may be made for hiring the goods, together with any other amount payable under the contract (including an amount to purchase the goods or to exercise an option to do so) exceeds the cash price of the goods.”

^[34] We note the Victorian Government has indicated its intention to do this. Ibid reference at footnote 17 to CAV working paper on issues of Application of Unfair Terms to Consumer Credit.

Amendment Suggestion:

“For the purposes of this Code, a contract for the hire of goods under which the hirer has a right or obligation to purchase the goods, or forms a belief based on a representation made by the supplier that the hirer has an option to purchase the goods, is to be regarded as a sale of the goods by instalments if the charge that is or may be made for hiring the goods, together with any other amount payable under the contract (including an amount to purchase the goods or to exercise an option to do so) exceeds the cash price of the goods.”

- 5) **The Victorian Government give power to the Regulator to declare a particular lease agreement to be a loan based on the content of the contract, advertising and the verbal representations made.**

- 6) **The Victorian Government review Part 10 of the Code to consider the implementation of greater lessee protection in the disclosure and termination provisions.**

Note in particular, pre-contractual disclosure should be provided for consumer leases as recommended by the Post-Implementation Review of the Credit Code.^[35]

Enforcement of the Contact Sales Provisions

- 7) **Consumer Affairs Victoria require lessor companies who failed to provide the required contact sales cooling off notices (S61 FTA) to contact the consumers whose contracts are still in operation and offer them either a full refund or a no further obligation release from their contracts.**

Industry Regulation

- 8) **The Victorian Government review and monitor the consumer lease industry.**

Specifically Consumer Affairs Victoria undertake a review of industry practices, and a compliance audit of this industry including:

1. **Compliance with contact sales provisions of the Fair Trading Act;**

2. **Accuracy of advertising and representations made by sales staff in relation to contract terms – particularly in relation to the right to purchase. A requirement**

^[35] 1999, Ministerial Council on Consumer Affairs, Consumer Credit Code Post Implementation Review, Recommendation [2.14](#)

should be implemented that in advertising material consumer leases must specifically state that it is a lease and that there is no right to purchase.¹³

3. Irresponsible lending practices - for example advertising “no credit history checks”. Companies should be asked to account for this.

Dispute Resolution

9) All credit providers including those offering leases be required to be part of an EDR scheme.

Answers to needs of Low Income Consumers

10) The Victorian Government continue to respond to the need for affordable credit for low income consumers for purchasing essential items.

¹³ In America, the Federal Trade Commission, which protects consumers, has specific requirements for the advertising of consumer leases including the requirement that the advertisement make it clear that the transaction is a lease. There are penalties listed for violations, including injunctions, fines, and even criminal penalties.

Appendix A - Case Studies

“CM”

Lessor: LC1

CM is 58 year old male from Broadmeadows. He receives a Centrelink Disability Support Pension. He has eyesight problems and difficulty reading. When CM's fridge broke down he could not afford the \$500 to 600 to buy a new one outright. He sought to purchase a fridge via an instalment payment arrangement.

CM telephoned Lease Company 1 (“LC1”) to arrange the agreement over the phone. CM was told he could buy the fridge by making fortnightly payments under their “rent, try, buy” scheme, and that after 18 months he would own it.

LC1 delivered a pre used fridge in reasonably good condition, together with the contract documents to CM's home. CM advised the delivery man that he could not read, but the delivery man asked him to sign the contract in any case. CM signed, thinking it was only a delivery acceptance docket.

Several months later when defrosting the fridge, CM found the terms and conditions of the contract contained inside a plastic bag, taped to the inside of the freezer compartment. After 18 months of payments, CM was told by LC1 that to buy the fridge, he would have to pay a further \$532.00.

Action

CM sought help from a Financial Counsellor, who wrote to LC1 seeking to cancel the contract. After several unhelpful responses from LC1, a Solicitor wrote. LC1 immediately released CM from the contract and collected the fridge. CM later obtained a brand new fridge via a Capital Grant from the Department of Human Services.

Legal Issues

- Because the agreement was signed by CM in his home, LC1 was legally required to advise CM of his right to cancel the agreement within a cooling off period, but they did not do so.
- LC1 misled CM as to his purchase rights and to the cost. Namely, CM was told verbally that he had a right to purchase the goods which he did not have under the written contract, and there was an additional high cost to purchase the goods.

CM - Breakdown of Cost

Goods

Second hand 340 litre fridge

Cost

\$22.95 per fortnight (incl. insurance)

\$47.95 delivery

\$25 Establishment Fee

After 18 months:

Rent \$895.05

Purchase price \$532.60

Total **\$1,427.65**

After 36 months:

Rent \$1,790.10

Purchase price \$1.00

Total **\$1,791.10**

“GP”

Lessor: LC2

Client Profile

GP is a 48 yr old single parent with 3 children. He resides in Fawkner. He is unemployed and receives a Centrelink payment. He sought help from financial counsellors, as he was in arrears for rent and utility bills.

The Agreement

GP went into a well known franchise electrical department store and asked the sales person for a finance agreement for a laptop. The sales person advised him that LC2 offered purchase options, and that he could return the laptop if there was a problem. Based on the sales person’s advice GP chose the LC2 agreement, thinking thought he was buying the laptop on credit. GP understood that there was a 3 year term and that the goods would be paid for after the 3 years of payments.

GP did not receive the terms and conditions until 2 months later after he signed the agreement in the store. He realised when going through his contract that there in fact was no option to purchase the goods at the end of the agreement. The agreement said he would then have to purchase the laptop at “market value.” GP sought help from an FC in relation to the contract, and to help manage his household bills.

Action

FC made a compliant to CAV. FC negotiated to release GP from contract. Laptop was returned to the store after GP had made 3 payments.

Key Issues

LC2 failure to meet obligations under S153(1) of the Code to provide documents
Misleading as to agreement, being a loan when it was documented as a lease

GP - Breakdown of Cost

Goods – Presario 2534A1 Notebook

Cost - \$138.39 p/m

After 36 months - Rental \$4982.04

Further purchase price – unspecified - “market value”

“JS”

Lessor: LC4

Client Profile

JS is on a Centrelink Parenting Payment. She resided in Knoxfield at the time she signed an agreement with LC4. JS also had previous agreements with LC1.

The Agreement

JS went into a well known retail franchise store seeking to purchase a TV on a finance arrangement. She could not afford to pay outright. The sales person advised her that if she signed a “rental purchase” agreement with LC4 she would own the TV after 2 years. He also said that if they added a surround sound system to go with the TV, she would get a substantial discount on the TV.

On the basis of the information provided and in particular the phrase “rental purchase”, JS thought that this was a hire purchase agreement.

The sales person initially told them that there were two separate contracts, and that they had the option to upgrade the TV or cancel the agreement at any time. After signing up, JS was told that there was only one contract, and she could neither upgrade nor cancel before the end of the term, which was 3 years.

Debtor Harassment

When JS’s financial situation changed after 12 months she fell behind in payments. LC4’s debt collector rang JS on several occasions and was abusive to her over the phone.

On one phone call JS advised him that she was driving and could not talk on the phone. The debt collector became angry and refused to hang up the phone.

Action/Outcome

JS found the repayments a strain and sought help from a FC. The FC realised that JS had no right to purchase and pointed out to JS that it was not in fact a hire purchase.

A solicitor then negotiated that JS be released. JS was to make no further payments, to retain possession of the goods, and title was transferred to her.

“SH”

Lessor: LC1

Profile

SH is 27 yr old, single parent of 2 children with high care illnesses. She receives Centrelink payments and lives in public housing. SH was previously bankrupt.

SH leased a fridge, washer, bed base and mattress from LC1. She thought that she was buying the goods over a 36 month period and did not see it as a rental agreement.

Agreement

SH signed contract in store. Terms and conditions were provided on delivery. Goods delivered were similar to, but not in fact the goods she had requested, and were damaged. No cooling off notice was provided.

Action

SH struggled to pay and fell behind in payments. LC1 wrote to SH saying she owed approximately \$1000.00 in early termination fees. After advocacy by a Solicitor, LC 1 released SH on the basis of no further payments and that she could retain the goods.

Key Issues

SH had little capacity to pay the instalments
Failure to advise of cancellation rights
Client thought she was purchasing

SH - Breakdown of Cost

Goods	Bed head, mattress & base Used fridge & washing machine
-------	--

Cost:

Bed items	\$65.20 per month
18 months Rental	\$1173.60
Purchase price 18 months	\$679.44
Total	\$1853.04
Total after 36 months rent plus \$1 purchase	\$2347.20

Cost:

Fridge & Washer	\$128.27 per month
18 months rental	\$2308.86
Purchase price 18 months	\$1589.77
Total Price	\$3898.63
Total after 36 months rent plus \$1 purchase	\$4617.72

“JL1”

Lessor: LC1

Client Profile

JL is 25 yr old male student on Centrelink. He had past drug addiction issues and lives in supported accommodation. JL approached FC because he was experiencing financial hardship under 2 rental agreements - one with LC1 and one with LC2.

The Agreement

JL had an existing TV rental with LC1 which was coming to an end. Over the phone JL arranged to upgrade to a new TV. Goods delivered to his home. Contract and delivery document were one document delivered by the driver. JL signed, not realizing he was signing a contract. No cooling off notice was provided. Terms and conditions were provided in a plastic bag with the TV.

Action/Outcome

JL had paid 32 months rent **\$3182.40** when a FC intervened. His parents were assisting him to make the payments. FC wrote seeking release and title to goods. LC1 agreed only to release, but return of the TV. A Solicitor then wrote. LC1 then offered to extend term and halve payments and purchase for \$1.00, giving a total saving of approximately \$100.00. Then later agreed to release and title on confidential settlement terms.

JL Breakdown of Cost

Goods	LG 76cm widescreen TV
Cost	\$99.45 per month x 18 or 30 or 36 months

After 18 months:
Rent \$1790.10
Purchase price \$1670.01
Total \$3460.11

After 30 months:
Rent \$2983.50
Purchase price \$545.01
Total \$3528.51

After 36 months:
Rent \$3580.20
Purchase price \$1.00
Total **\$3581.20**

“JL2”

Lessor: LC2

The Agreement

JL went into a computer store seeking to purchase parts to upgrade his computer. He did not have enough money to purchase all the items he sought and advised the store sales person, who suggested that he could buy the goods through LC2's scheme.

The sales person telephoned LC2 who asked JL his income and other details. Over the telephone LC2 advised JL “you have been approved for \$2500.00 credit”. JL then signed up for \$2100.00 worth of computer parts.

The goods were new components for a computer, which, if removed, would have been rendered inoperable if the contract was to continue; the components would not have been suitable for the computer.

One week later LC2 faxed JL the contract to sign but without the terms and conditions which he did not receive until much later. JL signed up for a 4 year term on the understanding that he would own the goods after 4 years. There was no mention of any further payment for purchase.

JL later realised after signing that the agreement stated he would have to pay a further “market price” which he had to offer in order to purchase the goods.

Action/Outcome

Part way through the contract a Solicitor became involved and negotiated to fully release JL from further liability, and title to the equipment was transferred to him.

"EV"

Lessor: LC1

Client Profile

EV is 60 and lives in Kensington. She receives a Centrelink Disability Support Pension. She has intellectual disability and also suffers from socio-phobia which is clear and apparent to strangers.

The Agreement

At least 7 contracts were signed over approximately 2 year period for items including a freezer, washing machine, TV, microwave, personal stereo, dvd player & home entertainment stand. EV had received a catalogue from LC1 in the mail and arranged the agreements by telephoning. EV did not see the goods but specified what she wanted. She noticed that the freezer delivered was much larger than what she had asked for. Terms were provided on delivery. EV was not made aware of her right to cancel the contracts.

Action

In total EV was paying \$132 per fortnight from her Centrelink pension (approximately 30% of her income). EV found the cost so high she went without medication and food to keep up the payments. She sought help of her Caseworker. The Caseworker arranged for EV to return all the items to LC1. LC1 charged early termination fees \$1153.00. EV did not pay, and LC1 did not pursue the matter.

Key Issues

No cooling off notice provided.

Irresponsible financing, i.e. no proper assessment of capacity to pay. Cost was an unrealistic proportion of the EV's income.

Lack of credit options – EV felt she had no other option and this was the only way to obtain the goods.

“MI”

Lessor: LC1

Client Profile

MI is 33 yr old single-parent. She is unemployed, receiving Centrelink payment and living in transitional housing.

The Agreement

MI had seen a television advertisement for LC1 offering a rent, try, then buy for \$1 agreements. She rang the phone number seeking to buy a fridge. She was provided very little information. It was not explained to her how many months she would need to pay before she could buy the item for \$1. MI was under the impression it was either 12 or 24 months. She thought this seemed a reasonable way to buy the fridge, and she selected the agreement because she had no access to other credit at the time.

A brand new fridge was delivered to her house. MI claims she never signed nor was given a copy of a contract, nor a cancellation notice. All she signed was the delivery docket.

MI later rang up LC1 wanting to know how many months she had left before she could buy the fridge for \$1. LC1 then advised her that the full term was 3 years of monthly payments. MI was shocked, and calculated the total cost to be approximately \$2,500.00.

MI complained to LC1 that she could have obtained a new fridge for a third of the price. She said she could not afford the payments under the contract and wanted to cancel. LC1 told her she was stuck with it and would have to pay out the 3 years.

Action

MI's FC made a complaint to CAV. MI was released from contract after a mediation session, with no liability. LC1 came and collected the fridge.

“GH”

Lessor: LC1

Client Profile

GH lives in Ballarat. Unemployed, single person receiving a Centrelink Disability Support Pension.

The Agreement

GH contracted to obtain a fridge from LC1. It broke down 12 months after he signed. GH had understood that LC1 would be responsible to undertake repairs as part of the contract. However, LC1 initially said the repairs were GH's responsibility. Later however, they agreed to replace the fridge, but when they delivered it to his home, signed GH up to begin a brand new contract. GH signed without realising at the time. He was not provided with a cancellation notice, nor with terms and conditions for either contract that he signed.

Action

An FC had initially contacted the local store to resolve the matter, but the staff threatened to repossess the fridge. Then the FC contacted LC1's national credit manager, who agreed to release GH straight away.

“ML”

Lessor: LC5

Profile

62 yr old man living in Coburg. Unemployed and receives Centrelink Disability Support Pension. ML is illiterate, and has an intellectual disability which is clear and apparent in his manner and speech.

The Agreement

ML went into LC5's suburban franchise store on several separate occasions over a period of approximately 2 years, seeking various items. He sought to own goods under their rent to buy scheme and over several visits contracted for a fridge, DVD player, TV, lawn mower & washing machine.

He had been advised by a salesperson that he could buy items by paying \$1 after three years, and also that that if he got three or more items he would receive a cheaper rate on all items. The sales person told him it was the most affordable way to obtain the goods.

When ML visited LC5's store seeking a lawn mower, the staff escorted ML in the car to Bunnings Warehouse, where ML selected the lawnmower. LC5 bought it and then signed ML up onto the rental agreement.

LC5 had advised ML of the amount of the monthly payments were. Because of his intellectual disability ML had been unable to calculate the total price, which was \$96 per fortnight at it's highest level, paid from his pension.

All goods were delivered to ML's house where he was asked to sign documents. ML had advised LC5 that he could not read. LC5 did not advise ML of his cancellation rights.

One contract bore the signature of ML's 17 year old son, who had been named on the contract as a second hirer.

Cost

This made up over 25% of his income. Each contract (beginning at different dates) was for 36 months. If ML had paid in full it is calculated that it would have cost him just under \$7000.00 to rent/buy the 5 items.

Action/Outcome

ML met the payments but ended up in such financial hardship he required emergency relief for food. The FC he sought involved a Solicitor. Confidential settlement terms were arranged to purchase all items for \$200.00, and title to the goods was transferred to ML.

Key Issues

Despite ML's clear disability intellectual disability no attempt was made to properly explain the agreement and ML's rights and obligations.
Extreme financial hardship. No proper assessment by LC5 of ML's capacity to pay.

“X1”

Lessor: LC2

X entered a type of rent/buy agreement with LC2. The cash purchase price for the goods in the store was \$2,662.00. After 3 days X decided not to continue and sought a payout figure to purchase. LC2 said that under the agreement X could only either return the goods and pay all the remaining rental payments of \$2,915.00 or pay \$4,212.00 to keep the goods.

Action

X sought CAV's assistance. The matter was settled on the basis that X would pay the advertised purchase price to keep the goods.

“RW”

Lessor: LC2

The Agreement

RW and his wife went into a well known franchise furniture & electrical department store seeking to purchase a new home computer on finance or interest free terms. RW's wife is in a wheelchair because she suffers from MS.

RW explained to the salesperson that they could not afford to buy outright and wanted an interest free option. RW also explained that the computer would be for his wife for home use to email her friends and family.

The sales person said that LC2's agreement was a great way to purchase equipment. and emphasized that it was better to get several items at once, and if they did so he would throw in a free Playstation game. Based on this they were under the impression they were purchasing the equipment.

RW was asked by the sales person to sign the contract in the store and the business purpose declaration, despite the sales person knowing that the goods were intended for personal use.

RW later realised that pushy sales tactics were used on them, as they had asked for a computer and had come out of the store with an LC2 agreement for a computer, printer/fax, camera and playstation game and some warranties.

A list of the items they had contracted for did not arrive until 12 months later. They read the terms and realised it was a rental agreement, they had no entitlement to keep the goods. The agreement was not what they had requested.

When operational issues occurred with the computer RW had thought that LC2 would undertake service and repairs given the high amount he was paying and that the agreement included 24/7 phone support. However Flexirent take no responsibility and RW had to pay separately for the electrical store to do this.

Action/Outcome

A FC wrote on several occasions to LC2 who didn't respond. A Solicitor later wrote and arranged that RW would be released and title to all the goods would pass to him.

Case Study of Business Lease with terms used for Consumer Lease

“SK”

Lessor: LC3

The Agreement

SK contracted for office equipment for his business because a salesperson had advised him it was tax deductible. SK thought that he was buying the equipment.

At one stage when SK fell into arrears in several payments, LC3 deducted approximately \$1500.00 in a lump sum from his bank account.

A solicitor negotiated that SK would pay nothing further and retain possession of and title to the goods at the end of the contract.

Case Study of Genuine Lease

“KS”

Lessor: LC6

The Agreement

KS is a migrant and lives in Broadmeadows. She has several young children and receives a Centrelink payment. KS's washing machine broke down just before she was due to have another baby. Unable to afford to buy a new one, she signed up to rent a washer from LC6.

KS saw an advertisement in the paper, and telephoned LC6 on their hotline. She arranged the agreement and was advised that it would cost \$25 per fortnight and that she had to rent it for a minimum number of months. KS arranged to pay through Centrelink which deducts the funds from her Centrelink payment.

She encountered several problems such as the washer breaking down on a number of occasions and LC6 being slow to repair it. LC6 later replaced it with an older model in worse condition. She also was not aware that the contract placed the responsibility on her to notify LC6 by the end of the initial term that she wished to end the term. As a result, the agreement rolled over into a new term and in the end she paid approximately \$900 over 18 months.

Despite these issues, KS clearly understood she was renting the goods, and that they belonged to LC6. Both parties intended the goods would be returned to LC6. Thus her agreement was a genuine lease.

Appendix B

Relevant Legislation from PART 3

Source: www.austlii.edu.au

3.3 Consumer Leases and the Code

10 Goods leases with option to purchase to be regarded as sale by instalments

(1) For the purposes of this Code, a contract for the hire of goods under which the hirer has a right or obligation to purchase the goods, is to be regarded as a sale of the goods by instalments if the charge that is or may be made for hiring the goods, together with any other amount payable under the contract (including an amount to purchase the goods or to exercise an option to do so) exceeds the cash price of the goods.

Note: A contract includes a series of contracts, or contracts and arrangements (see [Schedule 1](#)).

(2) A debt is to be regarded as having been incurred, and credit provided, in such circumstances.

(3) Accordingly, if because of section 6(1) the contract is a credit contract, this Code (including [Part 6](#)) applies as if the contract had always been a sale of goods by instalments, and for that purpose--

- (a) the amounts payable under the contract are the instalments; and
- (b) the credit provider is the person who is to receive those payments; and
- (c) the debtor is the person who is to make those payments; and
- (d) the property of the supplier in the goods passes under the contract to the person to whom the goods are hired on delivery of the goods or the making of the contract, whichever occurs last; and
- (e) the charge for providing the credit is the amount by which the charge that is or may be made for hiring the goods, together with any other amount payable under the contract (including an amount to purchase the goods or to exercise an option to do so), exceeds the cash price of the goods; and
- (f) a mortgage containing the terms and conditions set out in the regulations is taken to have been entered into in writing between the person to whom the goods are hired under the contract and the supplier as security for payment to the supplier of the amount payable to the supplier by the person to whom the goods are hired under the contract; and
- (g) any provision in the contract for hiring by virtue of which the supplier is empowered to take possession, or dispose of, the goods to which the contract relates is void.

(4) For the purposes of this section, the amount payable under the contract includes any agreed or residual value of the goods at the end of the hire period or on termination of the contract, but does not include the following amounts--

- (a) any amount payable in respect of services that are incidental to the hire of goods under the contract;
- (b) any amount that ceases to be payable on the termination of the contract following the exercise of a right of cancellation by the hirer at the earliest opportunity.

Note: [Part 10](#) (Consumer leases) applies to the contracts specified in that Part for the hire of goods under which the hirer does not have a right or obligation to purchase the goods.

37 Deferrals, waivers and changes under contracts

(1) The provision of credit as a result of a change to an [existing credit contract](#), or a deferral or waiver of an amount under an [existing credit contract](#) or a postponement relating to an [existing credit contract](#),

is not to be treated as creating a new credit contract for the purposes of this Code, if the change, deferral, waiver or postponement is made in accordance with this Code or the [existing credit contract](#).

(2) In this section--

"existing credit contract" includes existing consumer lease.

Note: This Division applies to a mortgage (under which the mortgagor is a natural person or a strata corporation) which secures obligations under a credit contract or related guarantee, whether or not it also secures other obligations (see section 8).

90 Information as to location of mortgaged goods

(1) A credit provider may, by written notice to a mortgagor under a goods mortgage, require the mortgagor to inform the credit provider within 7 days where the mortgaged goods are and, if the mortgaged goods are not in the mortgagor's possession, to give the credit provider all information in the mortgagor's possession that might assist the credit provider to trace the goods.

(2) A mortgagor who contravenes a notice under this section is guilty of an offence.

Maximum penalty--50 penalty units.

91 Entry to residential property to take possession of goods

(1) A credit provider, or an agent of a credit provider, must not enter any part of premises used for residential purposes for the purpose of taking possession of mortgaged goods under a goods mortgage unless--

- (a) the Court has authorised the entry; or
- (b) the occupier of the premises has, after being informed in writing of the provisions of this section, consented in writing to the entry.

(2) The regulations may provide for procedures for the obtaining and giving of consent for the purposes of this section and may set out the circumstances in which consent is or is not taken to have been given.

(3) If premises are entered in contravention of this section by a credit provider or an agent of a credit provider, the credit provider is guilty of an offence.

Maximum penalty (subsection (3))--50 penalty units.

92 Court may order entry

The Court may, on the application of a credit provider that is entitled to take possession of mortgaged goods, authorise the credit provider to enter residential premises for the purpose of taking possession of mortgaged goods.

93 Order for possession

(1) The Court may, on the application of a credit provider that is entitled to take possession of mortgaged goods, order a person who has possession of the goods to deliver them to the credit provider at a specified time or place or within a specified period.

(2) The Court may, on the application of a credit provider or other person required to deliver goods to a credit provider, by order vary the place at which or time or period within which goods must be delivered to the credit provider.

(3) A person who contravenes an order under this section is guilty of an offence.

Maximum penalty (subsection (3))--30 penalty units.

147 Meaning of consumer lease

For the purposes of this Code, a "consumer lease" is a contract for the hire of goods by a natural person or strata corporation under which that person or corporation does not have a right or obligation to purchase the goods.

148 Consumer leases to which this Part applies

(1) This Part applies to a consumer lease if, when the lease is entered into--

(a) the lessee is ordinarily resident in this jurisdiction or a strata corporation formed in this jurisdiction; and

(b) the goods are hired wholly or predominantly for personal, domestic or household purposes; and

(c) a charge is or may be made for hiring the goods and the charge together with any other amount payable under the consumer lease exceeds the cash price of the goods; and

(d) the lessor hires the goods in the course of a business of hiring goods or as part of or incidentally to any other business of the lessor.

(2) If not all the lessees under a consumer lease ordinarily reside, or are strata corporations formed, in this jurisdiction, this Code applies only if goods are first hired under the lease in this jurisdiction.

(3) If this Part applies to a consumer lease--

(a) this Part applies to all transactions or acts under the lease whether or not they take place in this jurisdiction; and

(b) this Part continues to apply even though the lessee ceases to be ordinarily resident in this jurisdiction.

(4) For the purposes of this section, the amount payable under a consumer lease includes any agreed or residual value of the goods at the end of the lease or on termination of the lease by the lessor or lessee, but does not include--

(a) any amount payable for services that are incidental to the hire of the goods under the lease; or

(b) any amount that ceases to be payable on the termination of the contract following the exercise of a right of cancellation by the lessee at the earliest opportunity.

(5) For the purposes of this section, the predominant purpose for which goods are hired is--

(a) the purpose for which more than one half of the goods are intended to be used; or

(b) if the same goods are intended to be used for different purposes, the purpose for which the goods are intended to be most used.

149 Consumer leases to which this Part does not apply

(1) Short term or indefinite leases. This Part does not apply to a consumer lease for a fixed period of 4 months or less or for an indefinite period.

(2) Employment-related leases. This Part does not apply to a consumer lease under which goods are hired by an employee in connection with the employee's remuneration or other employment benefits.

(3) Regulations. The regulations may exclude from the application of all or any provisions of this Part consumer leases of a class specified in the regulations.

150 Presumptions relating to application of this Part

(1) In any proceedings (whether brought under this Code or not) in which a party claims that a lease is a consumer lease to which this Part applies, it will be presumed to be such unless the contrary is established.

(2) Goods hired under a lease are presumed conclusively for the purposes of this Part not to be hired wholly or predominantly for personal, domestic or household purposes if the lessee declares, before hiring the goods, that the goods are hired wholly or predominantly for business purposes.

(3) However, such a declaration is ineffective for the purposes of this section if the lessor (or any other person who obtained the declaration from the lessee) knew, or had reason to believe, at the time the declaration was made that the goods were in fact hired wholly or predominantly for personal, domestic or household purposes.

Note: See section 176 for the circumstances in which a credit provider is taken to have knowledge of or reason to believe something for the purposes of this Code.

(4) A declaration under this section is to be substantially in the form (if any) required by the regulations and is ineffective for the purposes of this section if it is not.

151 Form of consumer lease

(1) A consumer lease must be in the form of a written lease document signed by the lessee and containing the information required by this Division.

(2) The regulations may make provision for or with respect to the form of consumer leases and the way they are expressed.

(3) A lessor must not enter into a consumer lease that contravenes a requirement of this section or regulations made under this section.

Maximum penalty (subsection (3))--100 penalty units.

152 Disclosures in consumer leases

(1) A consumer lease must contain the following matters, if ascertainable--

- (a) a description or identification of the goods hired under the lease;
- (b) the amount or value of any consideration to be paid or provided by the lessee before the delivery of those goods;
- (c) the amount of any stamp duty or other government charge (other than on receipts or withdrawals) payable by the lessee in respect of the lease;
- (d) the amount of any other charges not included in the rental payable under the lease, and a description of those charges;
- (e) the amount of each rental payment to be made by the lessee under the lease, the date on which the first rental payment is due and either the dates on which subsequent rental payments are due or the interval between rental payments;
- (f) the number of rental payments to be made by the lessee, and the total amount of rental payable under the lease;
- (g) a statement of the conditions on which the lessee may terminate the lease;
- (h) a statement of the liabilities (if any) of the lessee on termination of the lease.

(2) A consumer lease is taken to comply with this section despite any omission or other error if the Court is satisfied that the omission or error is not of such a nature as to mislead the lessee to his or her disadvantage.

(3) A lessor must not enter into a consumer lease that contravenes a requirement of this section.

Maximum penalty (subsection (3))--100 penalty units.

153 Copy of lease etc. for lessee

(1) A lessor must, within 14 days after entering into a consumer lease, give to the lessee a copy of the consumer lease, together with a statement in the form prescribed by the regulations explaining the rights and obligations of a lessee.

Maximum penalty--50 penalty units.

(2) Subsection (1) does not apply if the lessor has previously given the lessee a copy of the consumer lease to keep.

(3) Section 171 applies to this section as if references in that section to the credit provider were references to the lessor or a lease broker and as if references in that section to the debtor were references to the lessee.

154 Further goods and deferrals or waivers under consumer leases

The provision of further goods under a consumer lease or a change in a consumer lease as a result of a deferral or waiver of payment of an amount payable under a consumer lease is not to be treated as creating a new consumer lease for the purposes of this Part or as creating a credit contract, if the provision of the further goods or the deferral or waiver is permitted by this Code or the consumer lease.

155 Application of certain Code provisions to consumer leases

(1) The following provisions of this Code apply in relation to a consumer lease in the same way as they apply in relation to credit contracts--

- (a) Division 3 of [Part 4](#) (relating to changes to contracts on the grounds of hardship and unjust transactions), other than section 72;
- (b) sections 90 to 93 (relating to information as to mortgaged goods, entry to residential property to take possession of goods and orders by the Court for entry and possession);
- (c) [Part 11](#) (relating to miscellaneous matters).

(2) For the purposes of the application of those provisions--

- (a) references to a credit provider are to be read as references to a lessor; and
- (b) references to a debtor are to be read as references to a lessee; and
- (c) references to a credit contract or contract are to be read as references to a consumer lease; and
- (d) references to mortgaged goods are to be read as references to goods hired under a consumer lease.

(3) For the purposes of the application of Division 3 of [Part 4](#), the words '(without a change being made to the annual percentage rate or rates)' are taken to be omitted from section 66 wherever occurring

157 Termination of lease

(1) A lessee may, at any time before the end of a consumer lease, end the lease by returning the goods hired under the lease to the lessor during ordinary business hours or at such other time as may be agreed with the lessor or fixed by the Court on the application of the lessee.

176 Conduct of agents and related matters

(1) The conduct of an officer, agent or employee of a credit provider acting within his or her actual or ostensible authority will be imputed to the credit provider and taken to be conduct of the credit provider.

(2) A person cannot authorise a credit provider, or a person associated with a credit provider, to enter into a credit contract, mortgage or guarantee on the person's behalf. This subsection does not prevent a credit provider from authorising a person associated with the credit provider to enter into a credit contract on behalf of the credit provider.

(3) A credit provider or person associated with a credit provider that purports to act as agent of a debtor, mortgagor or a guarantor in entering into a credit contract or a mortgage or guarantee is guilty of an offence.

Maximum penalty--50 penalty units.

3.4 Consumer Leases and the Fair Trading Act

3.4.1 FTA Requirements for a Contact Sale – Part 4

S60

60. What is a contact sales agreement?

- (1) An agreement is a contact sales agreement if –
 - (a) it is an agreement for the supply in trade or commerce of goods or services of a kind ordinarily used for personal, household or domestic use; and
 - (b) the agreement is made or entered into in the presence of the purchaser (or a person acting on behalf of the purchaser) and the supplier (or a person acting on behalf of the supplier) at-
 - (i) a private residence other than a private residence which is the business premises of the supplier; or
 - (ii) the workplace of the purchaser ;or
 - (iii) any other premises (including the business of the supplier), if the purchaser is relying on the supplier (or a person acting on behalf of the supplier) for transport from the premises; and
 - (c) the total consideration payable by the purchaser under the agreement-
 - (i) is not ascertainable at the time of making the agreement; or
 - (ii) is ascertainable at the time of making the agreement and exceeds \$50.
- (2) If-
 - (a) 2 or more agreements relate substantially to the same transaction; and
 - (b) The transaction could have been effected by a single agreement which would have constituted a contact sale agreement –
Then-
 - (c) each of the agreements that would not, if it stood alone, constitute a contact sales agreement becomes a contact sales agreement; and
 - (d) For the purpose of ascertaining the cooling-off period in relation to each of the agreements, each agreement is deemed to have been made when the last of the agreement was made.
- (3) Despite subsection (1), the following are not contact sales agreements-
 - (a) an agreement solely for the provision of credit;
 - (b) a contact of guarantee;

(c) a mortgage.

(4) Sections 62A to 62E do not apply to a contact sales agreement referred to in subsection (1) (b) (iii).

S61 Requirements for contact sales agreements

(1) The following requirements must be complied with in relation to a contact sales agreement-

(a) the agreement must set out in full all the terms of the agreement, including-

(i) the total consideration to be paid or provided by the purchaser under the agreement or, if the total consideration is not ascertainable at the time the agreement is entered into, the manner in which it is to be calculated;

(ii) any postal or delivery charges to be paid by the purchaser;

(b) the agreement must include on the front page of the agreement a notice which-

(i) must in accordance with Part 1 of [Schedule 2](#) advise the purchaser of the right to cancel the agreement; and

(ii) must be signed by the purchaser;

(c) the agreement must be accompanied by a notice completed in accordance with Part 2 of [Schedule 2](#) which may be used by the purchaser to cancel the agreement;

(d) the agreement must set out in full the name and business address (not being a post box) of the supplier;

(e) the agreement must be printed clearly or typewritten (apart from any amendments to the printed or typewritten form which may be handwritten) and otherwise must comply with section 163;

(f) the agreement must be signed by the purchaser;

(g) any amendments to the agreement must be signed by both parties to the agreement;

(h) if the agreement is signed by a person on behalf of the supplier, the agreement must-

(i) state that the person is acting on behalf of the supplier; and

(ii) set out in full the name of that person and the business address (not being a post box) of that person, or, if that person does not have a business address, the residential address of that person;

(i) the purchaser must be given a copy of the agreement immediately after the purchaser signs the agreement.

(2) The information required under subsections (1)(a)(i) and (ii) and (1)(b) must be conspicuous and prominent in the agreement or notice (as the case may be).

(3) The Director may approve an agreement or class of agreements which do not comply with the requirements of subsection (1) or (2) if the Director is satisfied that the agreements provide a level of disclosure substantially equivalent to the requirements of that subsection.

(4) An agreement approved or in a class approved under subsection (3) is not required to comply with subsection (1) or (2).

S 163 Copies of contracts and other documents

(1) A credit provider must in accordance with this section, at the written request of a debtor, mortgagor or guarantor, provide to the debtor, mortgagor or guarantor a copy of--

- (a) the credit contract, mortgage or guarantee; or
- (b) any credit-related insurance contract in the credit provider's possession; or
- (c) a notice previously given to the debtor, mortgagor or guarantor under this Code.

(2) The copy must be provided--

- (a) within 14 days, if the original came into existence 1 year or less before the request is given; or
- (b) within 30 days, if the original came into existence more than 1 year before the request is given.

Note: Section 173 provides for the date on which notice is taken to be given.

(3) A copy under this section may instead be provided in the form of a computer generated facsimile containing the same information as was contained in the original document, or in any other manner prescribed by the regulations. Until the contrary is proved, any such facsimile or copy is taken to contain the same information as the original document.

(4) A credit provider must provide a copy of a notice which requires a debtor, mortgagor or guarantor to take action if requested in accordance with subsection (1) even though the contract has been discharged or terminated but only if the request is made within 2 years of the discharge or termination.

Maximum penalty--30 penalty units.

S62 Changes to credit limits etc. in continuing credit contracts

(1) If a credit provider decides not to provide any further credit under a continuing credit contract, the credit contract continues in force in relation to any credit previously provided under the contract. However, this subsection does not prevent the termination of the contract if otherwise permitted by this Code or the contract.

(2) A credit provider must, unless the debtor is in default under the contract, as soon as practicable after deciding not to provide any further credit or to reduce the credit limit, give to the debtor a written notice to that effect if such notice has not previously been given.

Maximum penalty--100 penalty units.

(3) A credit provider may increase the credit limit under a continuing credit contract only at the request of the debtor or with the written consent of the debtor.

3.4.2 FTA Unfair Contract Terms – Part 2B

Consumer Protections

32V Application of Part

This Part does not apply to contractual terms-

- (a) contained in a contract (other than a contract in a prescribed class of contract) to which the [Consumer Credit \(Victoria\) Act 1995](#) applies;
- (b) that are required or expressly permitted by law, but only to the extent required or permitted.

32X. Assessment of unfair terms

Without limiting section 32W, in determining whether a term of a consumer contract is unfair, a court or the Tribunal may take into account, among other matters, whether the term was individually negotiated, whether the term is a prescribed unfair term and whether the term has the object or effect of-

- (a) permitting the supplier but not the consumer to avoid or limit performance of the contract;
- (b) permitting the supplier but not the consumer to terminate the contract;
- (c) penalising the consumer but not the supplier for a breach or termination of the contract;
- (d) permitting the supplier but not the consumer to vary the terms of the contract;
- (e) permitting the supplier but not the consumer to renew or not renew the contract;
- (f) permitting the supplier to determine the price without the right of the consumer to terminate the contract;
- (g) permitting the supplier unilaterally to vary the characteristics of the goods or services to be supplied under the contract;
- (h) permitting the supplier unilaterally to determine whether the contract had been breached or to interpret its meaning;
 - (i) limiting the supplier's vicarious liability for its agents;
- (j) permitting the supplier to assign the contract to the consumer's detriment without the consumer's consent;
- (k) limiting the consumer's right to sue the supplier;
- (l) limiting the evidence the consumer can lead in proceedings on the contract;
- (m) imposing the evidential burden on the consumer in proceedings on the contract.

32Y. Effect of unfair term

- (1) An unfair term in a consumer contract is void.
- (2) A prescribed unfair term in a standard form contract is void.

(3) The contract will continue to bind the parties if it is capable of existing without the unfair term or the prescribed unfair term.

(4) Subsection (1) applies to any consumer contract entered into on or after the commencement of section 12 of the Fair Trading (Amendment) Act 2003.

(5) Subsection (2) applies to any standard form contract whether entered into before or after the term is prescribed.

32ZA. Injunctions to prevent continued use of unfair terms

(1) The Director may apply to the Tribunal for an injunction against any person who, in the Director's opinion, is using, or recommending the use of-

- (a) an unfair term in consumer contracts; or
- (b) a prescribed unfair term in standard form contracts.

(2) The Tribunal, if it is satisfied that, in all the circumstances, it is just and convenient to do so, may by order grant an injunction under this section on such terms as it considers appropriate.

(3) Section 123(2) to (7) of the [Victorian Civil and Administrative Tribunal Act 1998](#) applies as if an injunction under this section were an injunction under that section.

(4) An injunction may relate not only to the use of a particular term in a consumer contract or standard form contract, but to any similar term or to a term having like effect, used or recommended for use by any person.

32ZC. Declaration by the Tribunal

(1) The Director may apply to the Tribunal for an order declaring that-

- (a) a contract is a consumer contract or standard form contract;
- (b) a term of a consumer contract is an unfair term;
- (c) a term of a standard form contract is a prescribed unfair term.

(2) The Tribunal may make a declaration in relation to a matter under subsection (1) or any related matter.

(3) The Tribunal's power to make a declaration under this section is exercisable only by a presidential member.

3.4.3 FTA Unfair Practices Part 2

7 Unconscionable conduct within the meaning of the unwritten law

- (1) A person must not, in trade or commerce, engage in conduct which is unconscionable, within the meaning of the unwritten law, from time to time.
- (2) This section does not apply to conduct that is prohibited by section 8 or 8A.

8 Unconscionable conduct

- (1) A person must not, in trade or commerce, in connection with the supply or possible of goods or services of a kind ordinarily used for personal, household or domestic purposes to a purchaser, engage in conduct that is, in all the circumstances, unconscionable.

- (2) Without in any way limiting the matters to which a court or the Tribunal may have regard for the purpose of determining whether a person has contravened subsection (1), a court or the Tribunal may have regard to—
 - (a) the relative strengths of the bargaining positions of the supplier and the purchaser; and
 - (b) whether, as a result of conduct engaged in by the supplier, the purchaser was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and
 - (c) whether the purchaser was able to understand any documents relating to the supply or possible supply of the goods or services; and
 - (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against the purchaser or a person acting on behalf of the purchaser by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and
 - (e) the amount for which, and the circumstances under which, the purchaser could have been supplied with identical or equivalent goods or services from a person other than the supplier.
- (3) A person must not be taken to have contravened subsection (1) by reason only that the person institutes legal proceedings in relation to the supply or possible supply of goods or services to a purchaser.
- (4) For the purpose of determining whether a supplier has contravened subsection (1)—
 - (a) the court or the Tribunal must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
 - (b) the court or the Tribunal may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.
- (5) This section does not apply to the supply or possible supply of goods if the supply or the possible supply of the goods is for the purpose of re-supply, in trade or commerce, or for the purpose of using the goods up or transforming the goods in trade or commerce.

9 Misleading or deceptive conduct

- (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
- (2) Nothing in the succeeding provisions of this Part is to be taken as limiting by implication the generality of subsection (1).

10 Misleading conduct in relation to goods

A person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods.

Penalty: 600 penalty units, in the case of a natural person.
1200 penalty units, in the case of a body corporate.

11 Misleading conduct in relation to services

A person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any services.

Penalty: 600 penalty units, in the case of a natural person.
1200 penalty units, in the case of a body corporate.

12 False representations in relation to goods and services

A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion or advertising by any means of the supply or use of goods or services—

- (a) falsely represent that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use; or
- (b) falsely represent that services are of a particular standard, quality, value or grade or have had a particular previous use; or
- (c) falsely represent that goods are new; or
- (d) falsely represent that a particular person has agreed to acquire goods or services; or
- (e) represent that goods or services have a sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have; or
- (f) represent that any person has a sponsorship, approval or affiliation that the person does not have; or
- (g) make a false or misleading representation with respect to the price of goods or services; or
- (h) make a false or misleading representation concerning the availability of facilities for the repair of goods or of spare parts for goods; or
- (i) make a false or misleading representation concerning the place of origin of goods; or
- (j) make a false or misleading representation concerning the need for any goods or services; or
- (k) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy; or
- (l) make a false or misleading representation about the production, manufacture, preparation or supply of any goods; or
- (m) make a representation which is unnecessary for the reasonable care and maintenance of any goods; or
- (n) make a representation that is false, misleading or deceptive in any material particular.

Penalty: 600 penalty units, in the case of a natural person.

1200 penalty units, in the case of a body corporate.

15 Cash price to be stated in certain circumstances

A person must not, in trade or commerce, in connection with—

- (a) the supply or possible supply of goods or services; or
- (b) the promotion by any means of the supply or use of goods or services—

make a representation with respect to an amount that, if paid, would constitute a part of the consideration for the supply of the goods or services unless the person also specifies the cash price for the goods or services.

Penalty: 240 penalty units, in the case of a natural person.

600 penalty units, in the case of a body corporate.

Appendix C

Table provided by Broadmeadows Uniting Care Financial Counsellors

Cash price compared to the would be interest rate on a lease agreement for typically rented goods

Product	LC1		LC2		LC3		Retail
	Over 36 months	% daily rate	Over 36 months	% daily rate	Over 36 months	% daily rate	Cash
NEC 81cm LCD TV	\$17.95 pw = \$2800 + fees + DLR + \$1	On a sale price of \$1,600, the interest charge would be in excess of 41%. Not including fees & Charges	\$15.29 pw = \$2385 + end purchase & ins	On a sale price of \$1,600, the interest charge would be around 28%. Not including fees & Charges	\$17.94 pw = \$2800 + end purchase & ins	On a sale price of \$1,600, the interest charge would be in excess of 41%. Not including fees & Charges	\$1600 HV*
NEC Plasma 106cm TV	\$19.95 pw = \$3112 + fees + DLR + \$1	On a sale price of \$1,799, the interest charge would be close to 40%. Not including fees & Charges	\$17.19 pw = \$2682 + end purchase & ins	On a sale price of \$1,799, the interest charge would be in excess of 28%. Not including fees & Charges	\$20.18 pw = \$3148 + end purchase & ins	On a sale price of \$1,799, the interest charge would be in excess of 41%. Not including fees & Charges	\$1799 HV
Mitsubishi 260L fridge	\$9.95 pw = \$1552 + fees + DLR + \$1	On a sale price of \$700, the interest charge would be in excess of 62%. Not including fees & Charges	\$6.69 pw = \$1044 + end purchase + ins	On a sale price of \$700, the interest charge would be in excess of 28%. Not including fees & Charges	N/A	N/A	\$700 HV*
Simpson washing mach. Eziset 605	\$12.95 pw = \$2020 + fees + DLR + \$1	On a sale price of \$598, the interest charge would be in excess of 109%. Not including fees & Charges	\$5.71 pw = \$891 + end purchase + Ins	On a sale price of \$598, the interest charge would be in excess of 28%. Not including fees & Charges	N/A	N/A	\$598 HV
Simpson Dryer Eziset 455	\$7.55 pw = \$1178 + fees + DLR + \$1	On a sale price of \$300, the interest charge would be in excess of 129%. Not including fees & Charges	N/A not large enough purchase	N/A	N/A	N/A	\$300 HV**
LG DVD VCR recorder/player	\$7.95 pw = \$1240 + fees + DLR + \$1	On a sale price of \$399, the interest charge would be in excess of 97%. Not including fees & Charges	N/A not large enough purchase price		N/A	N/A	\$399 HV \$179 DS
X Box 360 Game system	\$15.95pw = \$2488 + fees	On a sale price of \$575, the interest charge	\$5.49 pw = \$856 + end purchase + ins	On a sale price of \$575, the interest	\$6.93 pw = \$1081 + end purchase & ins	On a sale price of \$575, the interest	\$575 HV \$599 DS

	+ DLR + \$1	would be in excess of 142%. Not including fees & Charges		charge would be in excess of 25%. Not including fees & Charges		charge would be in excess of 40%. Not including fees & Charges	
Playstation Portable	\$10.95 pw = \$1708 + fees + DLR + \$1	On a sale price of \$299, the interest charge would be in excess of 190%. Not including fees & Charges	N/A	N/A	N/A		\$299 at HV \$280 DS
Playstation Starter	N/A	N/A	\$11.46 pw = \$1788 plus end purchase + ins	On a sale price of \$1200, the interest charge would be in excess of 28%. Not including fees & Charges	\$13.89 pw = \$2166 + end purchase & ins	On a sale price of \$1200, the interest charge would be in excess of 47%. Not including fees & Charges	\$1200 HV
Apple iMac Core2 Duo 24" screen	N/A	N/A	N/A	N/A	\$31.90 pw = \$4976 + end purchase & ins	On a sale price of \$2999, the interest charge would be in excess of 36%. Not including fees & Charges	\$2999 Myer & DS
HP Pavilion 1024Mb	N/A	N/A	\$39 pw = \$6084 plus end purchase + ins	On a sale price of \$2795, the interest charge would be in excess of 60%. Not including fees & Charges	\$29.73 pw = \$4638 + end purchase & ins	On a sale price of \$2795, the interest charge would be in excess of 37%. Not including fees & Charges	\$2795 Myer \$2999 HV
Panasonic Camcorder	\$9.95 pw = \$1552 + fees + DLR + \$1	On a sale price of \$497, the interest charge would be in excess of 98%. Not including fees & Charges	N/A	N/A	\$6.37 pw = \$994 + end purchase & ins	On a sale price of \$497, the interest charge would be in excess of 52%. Not including fees & Charges	\$497 JB

- *similar model
- ** newer model
- HV = Harvey Norman
- DS = Dick Smith
- JB = JB HiFi
- DLR = Damage Liability Reduction Fee
- The survey of prices and rental arrangements was current as of July 2007

