Civil Justice research group

MELBOURNE LAW SCHOOL

The Impact of Australian Consumer Law on Lawyers

The following is a transcript of proceedings of a roundtable held at Melbourne Law School on Monday 28 May 2012 to consider the impact of the Australian Consumer Law on Australian lawyers.

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Civil Justice Research Group, Melbourne Law School, University of Melbourne presents:

The Impact of Australian Consumer Law on Lawyers

Monday 28 May, 2012
6pm – 7.45

Melbourne Law School

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Welcome

[Gary Cazalet as Director of the Civil Justice Research Group, Melbourne Law School, welcomed those present. He acted as facilitator for the evening's proceedings.]

Linda Haller:

There are various schools of thoughts as to the degree to which the Australian Consumer Law does impact on lawyers and the extent of its impact. It seemed to be very timely to bring people together and a great opportunity to have regulators here as well as remind ourselves of the civil liability that can arise through the Australian Consumer Law. Sometimes when we're thinking about regulating lawyers it's easy to just think about one little corner of the regulatory landscape. This is a great chance to step back from that and think about civil liability under the Australian Consumer Law, the different remedies, and different regulators as well.

I also wanted to give the apologies of John Briton, the Queensland Legal Services Commissioner. He very much would like to have been here and sends his apologies. His office has really done some very important work in this area and has published a regulatory guide. Copies can be downloaded from:

http://www.lsc.qld.gov.au/publications/regulatory-guides
(Regulatory Guide 2)

Facilitator:

Okay, well thank you Linda. So I'd like to introduce our first speaker Michael McGarvie. Michael McGarvie was appointed to the position of Legal Services Commissioner in December 2009. Prior to this he was the CEO of the Supreme Court for three years. Between 1983 and 2006 he practises as a solicitor in a private firm where he specialised in civil litigation over consumer and workplace rights and dispute resolution. Michael's going to speak about regulatory overlap.

Michael McGarvie: Thank you very much. Delighted to be here. I've addressed four teaser questions contained in the flyer advertising tonight's proceedings: does the Australian Consumer Law (ACL) give regulators greater powers, will lawyers retain it and scrutinise it more closely, how do you enforce consumer guarantees, and what's the situation relating to advocates immunity. Of course the Legal Profession Act that I'm responsible for imposes an obligation on lawyers to provide consumer services and protects the interest of consumers in relation to the provision of legal services. Whereas the consumer law applies to any business or professional activity and applies to contracts for goods and services.

The Fair Trading Act here in Victoria carves out the role that the - or the actions, or the activities of the regulators between Consumer Affairs Victoria and the Legal Services Commissioner because it expects the consumer regulator to refer a dispute that's covered by a professional regulator or a professional association regulator, or a specialist regulator to a what's called a prescribed person or a prescribed body. In this case that would be to the Legal Services Commissioner. So as we do with the Office of Migration Agents Regulatory Authority (MARA) and we work the boundary together so that when we have combined activities involving conduct breaching one area of regulation or the other, we attempt to collaborate with each other. The Fair Trading Act of course expects Consumer Affairs Victoria to refer matters to the legal regulator.

In fact - as we've done with MARA, we're doing with Consumer Affairs Victoria. Developing a protocol for exchanging confidential information and working together on cases that are relevant to both of us. The commissioner of course can share information with Consumer Affairs Victoria under each Act - those confidential exchanges can take place. Especially where there is a systemic problem for consumers or where a referral has come to the Legal

Services Commissioner but the commissioner can't act for whatever reason.

The question is whether there'll be closer lawyer scrutiny. I don't think so. The lawyer dispute will usually go to the Legal Services Commissioner. There is a debate at the moment about the 7 day/21 day rule relating to providing a bill of costs - a detailed bill of costs. Under the consumer law the obligation on the practitioner is to do that in seven days, whereas under the Legal Profession Act at 21 days. The Fair Trading Act carves that out again, allowing lawyers to provide a bill within 21 days but it forgot to pick up the incorporated legal practices which of course are governed by Commonwealth law, not the Fair Trading Act. Therefore it has left an anomaly that most people in this room have recognised.

We haven't encountered that problem at this stage, but Consumer Affairs Victoria is expected, if it chooses, to enforce the seven day rule on incorporated legal practices. I've got no obligation to enforce the seven day rule on lawyers. I've only got power to enforce the 21 day rule. So from my point of view I see it as a minor problem that's easily surmountable. Especially with sensible collaborative action between the regulators.

Enforcement of consumer guarantees is a question. How might clients enforce consumer guarantees under the new law? The consumer laws creates these guarantees: services to be done with skill and care, services to be fit for the purpose, services supplied within a reasonable time. The breaches of those services are hardly any different to the sorts of breaches that a lawyer can be disciplined for under the Legal Profession Act. Falling short of the standard of competence is the definition of unsatisfactory professional conduct. Or a substantial and consistent failure to meet a standard is the definition of professional misconduct. So that breaches of those

various statutory guarantees would quite easily be managed by the legal regulator where that conduct came to our attention.

You've thrown in the question of advocates immunity and you've asked us at the outset to consider both the civil liability of a lawyer and their entitlement to advocates immunity, or the liabilities that lawyers are exposed to by complying or failing to comply with the consumer laws, as well as their regulatory responsibilities. A very recent judgement in Victoria is *Goddard Elliott v Fritsch*. It picks up on the classic advocates' immunity case, *Giannarelli v Wraith*, which people would be familiar with and is described to have extended it. It probably hasn't extended it, it's just rearticulated it by saying that the advocates immunity applies to a person responsible for the presentation of a case in court.

This case extends it to a solicitor where out of court work leads to decisions that affect the conduct of a trial. The unique case - in the unique facts of this case the judge extended - found civil liability against the law firm, including the solicitor, but applied the advocates immunity so as to give them a complete defence to the liability action in a case where they were guilty of negligence in the preparation of a case, and guilty of negligence in relation to judging the capacity of their client when they arrived at settling the case. If you want a fantastic summary of the judgement, go to a podcast of the Law Report where Linda Haller articulates this case so beautifully. I couldn't come close to doing something similar.

So the question is: where does the liability of a practitioner fall when they're breaching either the Australian Consumer Law or the Legal Profession Act? Well civil liability usually doesn't attach to a lawyer breaching the Legal Profession Act. But there's no reason why it couldn't. Usually the lawyers duties are easily articulated in pleading beyond proving that they failed to meet their obligations under the Act.

But I've got no doubt that - a bit like this current class action involving people who were infected with HIV where one of the parties sued is the medical regulator, presumably for its failure to meet its regulatory responsibilities under the Act.

I can anticipate that it would be very easy to identify conduct by a practitioner that breaches the Act that finds its way into pleadings in relation to civil liability. But of course, the advocates immunity only provides protection for a barrister or solicitor in relation to civil proceedings. It doesn't provide them with a level of immunity against the regulator. So that if they've breached the Act and acted negligently, it might have a defence to their negligence action but that wouldn't eliminate their potential for being prosecuted and disciplinary proceedings under the Legal Profession Act. I'll stop there.

Facilitator: Thank you. Opportunity for questions or comments?

Jeannie Paterson: I actually have a question which really - I guess it might be a comment in what I wanted to talk about. You commented that with the consumer guarantees probably the breaches are no different from those that could be disciplined under the Legal Profession Act. One of the reasons why the consumer guarantees were actually introduced was there was a general awareness that consumers didn't understand their legal rights. It was felt that the advantage of these rights here were that they put the consumers rights in clear language and that they expressed the remedies in clear language. So I just wondered if one of the advantages of the consumer guarantees in this legislation is actually just consumer access - that consumers can recognise what those obligations are and actually bring an action and seek a remedy in response to those obligations.

It's quite clear and accessible for them. I'm not sure consumers who've had a bad experience with a lawyer really…

Michael: Well go straight to the Legal Profession Act and say here's where they let me down.

Jeannie: Or even understand what that concept of misconduct is.

Michael: I think that's absolutely right Jeannie.

Jeannie: Yes that's right.

Michael: I think that's absolutely right that it would articulate things, and it does tend to articulate things more clearly from a consumer point of view. It doesn't change the consequences for the practitioner. If they've breached that Act then they've probably breached the Legal Profession Act and breaches of either can attract disciplinary proceedings.

Amanda Whiting: My question is about sharing confidential information between regulatory agencies. I say this as a role of practitioner so it might be a stupid question but I just wonder if there's an issue of legal professional privilege in information that's given to the Legal Services Commissioner as part of an investigation or some kind of work that you do. What happens with that if it has to be shared with another agency?

Michael: Yes. Lawyer can't use legal professional privilege to fail to provide the commissioner in Victoria with information relating to an investigation.

Jeannie: Yes. That's the next step…

Michael: The professional privilege is lost in the next step when the commissioner who has obtained information that is relevant - let's say to the Office of Migration Agents Regulatory Authority - chooses to disclose that confidential information. So the Act provides me with an authority to disclose confidential information to another regulatory authority: police, another professional regulatory, another statutory regulator like Consumer Affairs Victoria, or MARA. Often we are doing it with police and we're often doing it with the medical

practitioners' regulator and sometimes with other regulators. So that it's lost - it hasn't had the protection of legal profession privilege coming to me, and has lost it by the time I choose to exchange it for example, with MARA.

Steve Mark: And the same thing is true in New South Wales.

Facilitator: Good. Thank you. Any further questions? Thank you Michael that was very interesting. We'll turn next to Steve Mark. He's also a Legal Services Commissioner but in New South Wales. He's a lawyer by profession and he's the New South Wales Legal Services Commissioner. He's also the chairman of the Australian section of the International Commission of Jurists and was president of the New South Wales Anti-Discrimination Board from 1988 to 1994. In his other role he's a director of Midnight Basketball which produces basketball competitions for at risk street kids. So we might have some questions about basketball as well. Steve was awarded an honorary doctorate of laws at Macquarie University in October 2000.

He's going to speak about different objects and purposes of the Australian Consumer Law and Legal Profession Acts, and of the regulators themselves. Thank you Steve.

Steve: Thank you for allowing me to be here to speak. There's so much to say. I couldn't possibly do it in ten minutes so I'm just going to try dot points. The first dot point is - and most of these are going to be about difference, not about similarity. I start out with the assumption that there are lots of similarity and lots of congruence but I need to talk about difference because that's my role. The first difference is that the disciplinary system that we - Michael and I- are in charge of in our various states, is a protective jurisdiction. The whole concept behind it is fundamentally different than a civil jurisdiction, and that pervades just about everything that we do.

So in our jurisdiction what we do is protect individuals from the action of unscrupulous lawyers by removing them from their role or otherwise dealing with them. It's after the fact the - in terms of any particular complaint. So the person who lodged the original complaint does not understand that and will never understand that. Consumer laws give consumer rights. The Legal Profession Act does not give consumer rights, that's not its intention. So we have a completely different philosophical starting point.

The next thing I want to say is - and this might sound trite but I think it's really important - the consumer laws deal with consumer rights. The Legal Profession Act deals with client protection. Clients and consumers are different beasts. They have different rights, they have different responsibilities, they have different definitions, they have different philosophical starting points and ending points. So that the legislation that we administer is not designed to give consumers virtually anything. That's not it's point. Its point - the point of the legislation is actually to protect society from unscrupulous lawyers who actually breach their ethical duties to such an extent that they should be struck off, fined, or otherwise dealt with. Again, this is just a skating over the top of so many areas.

The next point that I want to make is the point about purpose. I'm very, very focused on purpose in New South Wales. I have to understand what the purpose of my legislation is. As I've already stated, the purpose of the legislation, as established by the legislator, is somewhat different than the purpose that I apply to it, in that our purpose is not stated in the legislation. When I was president of the Anti-Discrimination Board, in the preamble to that Act, it said that my purpose as president of the Anti-discrimination Board was to reduce or eliminate discrimination. Simple. Whenever that - how to major that or determine when it's happened or not happened was another question entirely. But at least it was stated.

There is no such purpose in the Legal Profession Act. What we had to determine is what the purpose as we see it is of the Legal Profession Act. From the very beginning, in my very first speech 19 years ago, I stated what I considered the purpose of the legislation was. That was not to just prosecute more lawyers, not to be just purely a prosecutorial body, but to actually attempt to reduce complaints against lawyers. So we had to have an educational function, we had to actually work with the profession to actually work out how we could reduce complaints against lawyers. That also requires us to promote professionalism.

So my actual statement of purpose is to reduce complaints against lawyers, promote the rule of law, consumer protection, and increase professionalism. Those issues do find their way into the Legal Profession Act slightly in certain areas. From an educational standpoint it tells me I have an educational role here, there, and everywhere but it's not stated anywhere in the Act. The proposed national laws were going to go a little bit further and actually give a slightly better articulated purpose - if they're ever passed of course.

So the next thing I wanted to talk about is some definitional problems. Those two purposes are so simplistically stated by me in a very short period of time could give rise to weeks of discussion. It's really important that we engage in those weeks of discussion and I hope that one of the things that comes out of this is a desire to actually do a hell of a lot more research and a lot more exploration of those issues than we have time to do tonight. I was having a discussion with Rod Sims about six weeks ago about the decisions behind the ACCC, or what they considered their purpose to be. In part of our discussion he was making the statement that he felt that the ACCC was very good at civil prosecutions, but absolutely hopeless at criminal prosecution. They were really bad at dealing with anything to do with crime because they didn't understand it.

I thought that was a very honest and very brave statement, and probably very true. I would say the same thing about us. I mean we are not criminal prosecutors. We are prosecutors to the *Briginshaw* standard not the criminal standard, and there's a big difference. But what the really interesting thing was is they were defining unconscionable conduct, which is a term that's very familiar with regulators in the legal role, completely different than the way we would define it. They were using a criminal standard. Now if there are two bodies that are dealing with the same area of law with such fundamentally different definitions - approaches to something as simple as unconscionable conduct, we have problems.

I think that that's going to be one of the major issues here that need to be explored. It's for one of the reasons that - as Michael said - we have worked in New South Wales, and I know Victoria is doing that now and Queensland already has, got an memorandum of understanding (MOU) with the Department of Fair Trading so that all complaints against lawyers will be referred to us. Now is that good for consumers? Possibly not. Because at the end of the day what we deal with is disciplinary actions, not benefits to consumers. So we have these different philosophical approaches that are fundamental and they're not easily reconciled within our present legislation at all.

We have one decision in the District Court which basically says, under consumer laws, that are found no win no fee as an approach - which of course all lawyers that do personal injury work know very well - to be a statement of unconscionable conduct. Because of the fact that if you don't explain what the ramifications of it are if you settle the matter, or if you lose, or whatever, it can be unconscionable. Now I would agree with that. But does that fit within the Legal Profession Act? Questionable. We have a really interesting thing happening at the moment.

I had a complaint recently where - and this happens all the time and I'm sure with Michael as well and certainly with Queensland - where we get complaints about costs. Costs is the biggest area of complaint to our organisation. Indeed there are so many facets to that we could speak for hours just on that point alone. But the issue about cost is very interesting when we try to stick to the philosophy of it rather than the detail. Lawyers have a fiduciary duty. I mean the fiduciary duty means that costs, if it can ever result in discipline, only results in discipline because it is a breach of fiduciary duty and therefore determined to be grossly overcharged.

We don't have that same issue in civil jurisdictions. In civil jurisdictions it's not about a fiduciary duty, it's about you know stick your finger in the air and decide whether or not a contract has been breached, or whether or not a cost is too such a thing. Maybe you've been a criminal standard gone so high above what the person should get that it's fault and misleading, or its deceptive. All the terms that used to be in the Fair Trading Act that have been now absorbed in the consumer laws. There are laws that are very useful. As a matter of fact we have actually straight in to that jurisdiction a couple of times, and run cases in those jurisdictions because sometimes it's much more beneficial to run our cases under Fair Trading, and false and misleading and deceptive conduct, than it is under our jurisdiction which is protected.

But we recently had a matter where a person received a bulk bill, or a lump sum bill at the end of a hearing. When that normally happens, clients almost always demand an itemised bill. They feel that it is their right to demand an itemised bill. I constantly tell them not to do it. Because if they ask for an itemised bill after they received a lump sum bill from a lawyer, the costs are going to almost always go up. It's not in their interest to ask for an itemised bill. Yet we talk about consumer rights and consumer protection. Because what happens is the lawyer

will say I gave you a discounted bill. If they go back to their file and if they're going to send it off to a costs consultant and spend a couple of thousand dollars getting a bill done, the cost is almost always going to go up. Then when it goes to assessment, which is the only other thing that the consumer can do - or client can do - to challenge the bill, to take it to the assessment process, they go to the assessment process, the assessment process also demands an itemised bill. So they've got that first step but then the lawyer has already gotten their case already prepared. The client, who feels that they have been overcharged, almost always has no say in the matter. What they're arguing is not, in my view, in the interest of consumers. So again, consumer versus client, really interesting philosophical distinction. Under the Australian Consumer Law there's a really interesting statement as well. It says that if you are asking for an itemised bill, you can. But the implication under the consumer law is that if you ask for an itemised bill it is nothing more than a rationalisation, or a statement of what was in the lump sum bill.

So there is an assumption that it cannot increase. That is not the case under a legal bill. I have a brief out to counsel right now to try to get some sense as to whether or not a bill that is given by a lawyer could be in breach of the credit laws if it increases on itemisation. We don't know. Because they always do under our Act, maybe they can't under the Australian Consumer Law. These are issues that are always going to be interesting.

Two final points. First. We do a lot of ethical seminars. Almost inevitably when we're at a College of Law or at law schools giving ethic lectures, we always talk about the billable hour in terms of ethics. It's really an interesting discussion. I won't go into it now because that will take another two hours.

However, almost inevitably somebody talks about well why are lawyers different? Why do lawyers have every - if I go to a plumber or if I get my car fixed and I get an estimate and it goes up, why shouldn't I be able to treat my service provider the same way as I would go against a lawyer for unconscionable conduct? Why is a lawyer more protected than a plumber or whatever? The reason is, again, fiduciary relationship. We are a profession. As a profession we have a responsibility. The primary responsibility of the profession is to provide a service to the community. That's why this concept of gross overcharging actually ends up being a disciplinary matter and not a matter of client rights.

It never has been and it never will be under present law. It might be under consumer credit law, it's not under Legal Profession Act. Maybe it should. But the issue - the final issue I want to say is that this is such an area of unknowns. It's one of the reasons we have sought and achieved an MOU in New South Wales that all complaints against lawyers will come to me. It's not necessarily going to benefit every consumer. But for years, the whole concept of cost had been carved out of the Fair Trading Act anyway. So it's not going to change anything and quite frankly, there's almost no cases before our Fair Trading jurisdiction about lawyers anyway.

If you try to do a search for them they just don't exist. Now whether or not that's a good thing, or a bad thing, or a statement of the problem I can't say. But what we really need to do is develop guidelines. John Briton's developed some. We need to go much further than that. We need to start working out a definitional harmonisation between regulators. I include the ACCC, ASIC, and all the other regulators. We need to be together on this and we're not. Regulators hardly ever even talk to one another, let alone try to harmonise their definition. Finished.

Facilitator: Thank you Steve. Thank you. That's wonderful. There's plenty for us to discuss in there, plenty of issues to investigate as well. Any questions and comments?

Michael McGarvie: Can I make one comment? The Victorian scheme proposes an obligation on the commissioner here to educate the community and the profession about the lessons learned from regulation. We have a statutorily embedded responsibility to educate the consumers and lawyers. It also embeds a system of mediating consumer disputes relating to costs. I've imposed a mediation system on conduct disputes as well even though the Act doesn't provide an opportunity to mediate conduct complaints.

The outcome produced by the regulator is almost more important than the principles embedded in the legislation from my point of view. That is we regard one of our primary obligations to ensure that a consumer understands the circumstances they found themselves in that led to the dispute, and has at least explained, and sometimes reversed, a decision or a problem created by a lawyer in their costing or in their conduct. I would take this issue with Steve in that I do see the legal regulators role also delivering enough feedback and enough comfort to consumers to maintain their confidence in the legal system.

Steve Mark: The same thing happens of course in New South Wales, it has for 20 years. I does in Queensland as well. We mediate thousands of complaints every year, that's absolutely true. The same - we've always done the same thing. The issue that I meant I think is not altered by that whatsoever, simply because what I'm saying is that if it's a consumer rights issue we mediate disputes probably because lawyers tend to be and often can be relatively sensible about these things and know that it's going to cost them more to actually pursue if we treat is as a complaint than if they going to settle the matter. So

we settle lots of these matters. But it's not a consumer right issue and it never has been.

Jeannie: Hi. I come to this - thank you so much, I mean you two are just a double act bringing out every issue that we could possibly want to discuss for the next five years. So thank you so much. Now I come to this conversation as a consumer lawyer, not as somebody who's involved in the regulation of lawyers. It seems to me that you're quite right. It is a very different perspective that is brought by consumer law to these issues, and perhaps with the service regulators in a number of ways. I'm surprised somewhat as a consumer lawyer by the statement where the consumer laws about consumer rights because I would actually say that a lot of this legislation - the Australian Consumer Law - is actually about giving regulators power to target rogue traders.

Because the learning in this area is that often consumers will not actually - it's about giving consumers rights but it's also about empowering regulators. Because of the imbalance in information, knowledge, expertise, resources, the learning is that consumers often won't pursue complaints because they don't have the capacity to do that. I would've thought that's particularly pertinent in the relationship of solicitor client. Because if a client comes to a solicitor or a lawyer seeking legal advice, by definition they don't have expertise in that area, so if their relationship with the lawyer goes wrong, they actually probably are unlikely to pursue legal remedies. Hence the role for the regulator.

As a consumer lawyer I'm surprised by your comments on itemised bills being against the interests of legal service consumers because one of the themes that underlies most consumer law is information, providing good quality information to consumers so they're in the position to make good decisions. That disclosure - truth in consumer

transaction is one of the biggest themes and considered consumers fears. So the fact that to ask for an itemised bill is against the interest of the consumer perhaps illustrates your point I think about the very different perspectives taken by regulation of profession, professional standards, and the consumer perspective which is actually information is fundamental.

Steve: Well it might be but if you use consumer law to actually seek an itemised bill - if you're applying under consumer law, you may well be right. You may end up - depending on how you interpret that law which is…

Jeannie: Yeah, sure.

Steve: …I'm not going to say I'm the best consumer lawyer in the room because it may - it suggests that the cost shouldn't go up. But as I've said, the history of itemised bills in the legal world has always been that they do.

Jeannie: But if the process is that all complaints against costs are referred to you, rather than dealt with through Consumer Affairs or its equivalent, then that issue - it's just the point you're making that that issue is never going to be dealt in…

Steve: Precisely and that's why I'm saying we need to do a lot more work. Because on the other hand it is unfair to lawyers to have to apply different standards to different places if those standards are completely at odds. Now so why don't we work on harmonising the standards, which is what we're suggesting. I think that would be a very, very good idea. I just need to articulate the fact that they're different. The other thing is that of course we, as legal services commissioners, can only administer our legislation. We can't administer anybody else's.

Michael: Can I just add in Victoria I would never talk a person out of seeking an itemised bill. I think the understanding of how that bill is made up is terribly important and it's a breach of the Act if a lawyer failed to provide an itemised bill. That has its own disciplinary consequences for a practitioner.

Facilitator: Okay. Plenty to talk about there. Another one, yes, thank you.

Andrew: Andrew Conley, member of the Victorian Bar. Speaking only for myself and also interested because I am a volunteer at the Fitzroy Legal Service - night service. So I see a lot people who have a lot of trouble with their solicitors' costs. That's one reason why I'm here. You said plumbers and lawyers are different. That's clear. You said that that was because lawyers owed fiduciary duties to their clients. Though it seems to me to be - I was confused by the next step though that seemed to me - I hope I'm being fair here - that somehow that meant though that lawyers didn't owe more of an obligation when they're predicting their costs, or specifying them, or indeed working out how much they're going to charge once it's all done to their clients than a plumber would.

One would think that the fiduciary duty would require far greater attention to fairness and the duties owed than a plumber would. It's an arms lengths transaction and so forth. Did I misinterpret that?

Steve: No. You're absolutely right and I would totally agree with that statement. However, the ramifications of failure is what I was talking about. If you fail as a plumber to bill your client fairly and you overcharge them dramatically, what are the ramifications of it? You have potential civil lawsuits et cetera. In the legal jurisdiction what you have is the chance of either getting your bill assessed or going on a disciplinary case where you are not going to necessarily, unless we mediate as we do for the vast majority of these but just treating it as a

disciplinary matter for this discussion - you're not going to get anything out of it. You're not going to be compensated by this jurisdiction.

But in a civil jurisdiction you're going to get damages, or you're going to get the bill reduced, or something like that is going to happen. Not necessarily going to happen here at all. So the fiduciary relationship is the only thing that lifts it into a disciplinary matter. That's all I was trying to say. The issue about - I remember years ago when I was having work done on a house. I had an electrician come in that did extremely shoddy work. He had - and everybody has one of these stories - he'd quoted - and again the difference between quotes and estimates because in law we do estimates not quotes - he quoted $3000 let's say and he charged me $9000. The work was appalling.

I went to a really good friend of mine who's a barrister in this area and I said I want to take this guy apart. This guy is driving me nuts. He said you know better than that. It will cost you 10 times that to try to sue him, you're never going to get anything out of it. Just pay. That's probably really good advice in relation to dealing with that bill. But in a legal world you have the issue that you can get a bill assessed, we have an extra step, you can't do that with a plumber. You can do that but it costs - it may cost. What I'm saying is that they're such different fields. There are so many different aspects of it you have to look at that they're really not - there's a lot of overlap but they're certainly not congruent.

Jeannie: Do we have anyone here from VCAT? Because I think VCAT, just on your plumber example, if we had that issue I'd be straight into VCAT. I think that VCAT would deal with that.

Ian Lulham, Deputy President, VCAT Civil Claims List:

Yes - VCAT - without using these words - require the plumber to give an itemised bill. The other thing you can do in VCAT is as the consumer, rather than waiting for the plumber to sue you because you

haven't paid him, you can sue him in VCAT for an order that you don't owe him the money. Of course a lot of people do that so that they can be in a cost free jurisdiction rather than being the defendant in a cost jurisdiction.

Steve: Which is a much better system and I understand that. But, again, what I was talking about, the distinctions still exist.

Andrew Conley: I don't mean to hijack this in anyway, I'll just put it out there and someone else may see fit to comment. It's a different situation though, your plumber, you may be able to afford the $9000 but if you went into a legal dispute - as a client of mine at Fitzroy did a few weeks ago - with an estimate of $5000 to $10,000 and then $15,000 down and an outstanding bill for $10,000 sitting there and you still haven't' gotten to be where you were told you would be. You've got no money left and the thought of instructing other lawyers brings you to tears, you're in a very bad situation. It may be outside the scope of today but it's a great problem if going to the one body that's charged with really putting it up to the type of lawyers that do that, is fearful for your sake of doing something like saying "We should get this taxed. In fact, it's going to cost another few thousand. You should proceed with disciplinary sanctions but unfortunately you won't get any money out of that." That's a problem - at least in my opinion.

Michael McGarvie: Well there can be consequences in these proceedings including a compensation order being imposed on the lawyer for gross overcharging. The mediation process in Victoria invariably involves a production of a bill. VCAT has the power to impose an order on the practitioner to vary the fee or to pay compensation.

Facilitator: Well we might have an opportunity to come back to that. We're going to have some time for general discussion but we might just - and considering our next speaker is from the Consumer Action Law Centre he's probably bouncing up and down ready to say something. So I'll

introduce you and then you can take off. Gerard Brody is the director of policy and campaigns at Consumer Action Law Centre. He's a qualified lawyer who's worked as a consumer advocate for over eight years. He's worked in a number of consumer campaigns, including the fair fees campaign against the bank penalty fees. He's been involved in a range of law reform activities, including the creation of the Australian Consumer Law and has been a member of the ACCCs Consumer Consultative Committee. He previously worked with the Brotherhood of St Laurence here in Victoria where he led the financial inclusion program.

He's going to speak on misleading conduct and debt collection. If you wanted to say anything else on any of the other issues, you're most welcome.

Gerard Brody: Thank you. I'll just tell a little bit about the centre that I work for. Consumer Action Law Centre is a community legal centre and consumer organisation here in Melbourne. We offer a State wide legal advice service, a small litigation practice, and also a telephone financial counselling service which is another State wide service. I guess we're really interested in not just only resolving disputes between consumers and traders but having more systemic change in a market place. Hence we have a policy and campaigns function where we seek to take those issues that come up and seek change either in law or industry behaviour.

As was mentioned I'm going to talk about misleading and deceptive conduct in terms of the Australian Consumer Law and particularly in relation to debt collection. This is the type that most comes into our office, the matter of complaints about lawyers. It's not complaints between lawyers and clients. It's complaints from consumers who are often low income or vulnerable being harassed or contacted by

lawyers for payment of a debt - who's doing that on behalf of another client.

So just a bit about the provision in the ACL - obviously was section 52, it's now section 18 of the Australian Consumer Law. It's probably the strongest provision in the Australian Consumer Law. It prohibits misleading and deceptive conduct, as well as conduct that's likely to mislead and deceive. So it's a pretty broad prohibition. When it comes to looking at that prohibition, it's the overall impression that matters. So we've got to consider whether it's likely to lead a significant number of people into error or has a tendency to deceives such persons. So as long as it's got that flavour. Things like lying, false or inaccurate claims, creating a false impression, leading to a wrong conclusion, or even making an omission. Not saying something can be misleading and deceptive.

So in the context of lawyers, it's not only in debt collection - I'll talk more about debt collection but it can obviously - occurs more traditionally in advertising and promotion. Particularly advertising of lawyers, like advertising of any other service, it can apply. The one case that actually is referenced in the guide, though it's looked at from the Queensland Legal Service Commissioner, is in relation to an advertising practice of a lawyer. It was the case of Nixon v Slater and Gordon where Slater and Gordon published and distributed a booklet which used a photograph of the applicants conducting surgery on its cover. It was found to be misleading and deceptive because it seemed to suggest that those particular surgeons were involved in a medical malpractice claim when of course they weren't.

Obviously the misleading and deceptive conduct can also apply to retainers or billing practices. But my focus is going to be dealing with third parties, so in debt collection. It's also worth noting that lawyers do not need to be directly responsible for misleading and deceptive

conduct. But they can also be liable for damages when they are a person involved in a contravention. That's section 236 of the Australian Consumer Law. That includes when they've aided or abetted, counselled or procured a contravention, or has been in anyway directly or indirectly knowingly concerned in the contravention. So it's pretty broad. I just wanted to compare that before I get to the detail with the professional conduct rules.

Generally industry specific codes and rules are designed to go a step above the general consumer law. I think you were making that point earlier related to fiduciary and that it should be a higher standard bringing across the generic law. I'd really question that when it comes to the rules in these circumstances. The current rule 28.2 of the Victorian professional conduct rules prohibits legal practitioners from making any statement in communication with another person on behalf of a client that is calculated to mislead or intimidate the other person and which grossly exceeds legitimate assertions of the rights or entitlement of the practitioners clients. I think you'll agree that second limb would be a significant impediment to making up that claim compared to the prohibition in the Australian Consumer Law. I'll come back to that.

I just want to talk particularly about one decision that was recently - a Federal Court decision that was recently handed down late last year in the Federal Court. That was the decision of ACCC and Sampson. The complaint - Sampson, Pippa Sampson, was a partner in a Melbourne law firm - Goddard Elliot. She acted as a mercantile agent on behalf of a number of video stores. The complaint was initially made to the ACCC by the Central Australian Aboriginal Legal Service. So the debt collection letters went out far and wide.

There was agreed facts of the decision that Goddard Elliot sent numerous letters and notices to debtors of video stores since at least

April 2002, including approximately 20,000 letters and notices each month in the 12 months preceding the ACCC action. The Federal Court declared that the lawyer had acted in breach of section 52 of the Trade Practices Act - this was under the old law - in a number of ways, including sending letters marked urgent notice which represented that a lawyers video rental client was necessarily entitled to recover lawyers costs of a certain amount; that if legal action was taken then this would necessarily result in additional costs associated with legal proceedings.

Even though obviously the lawyers are the client, the video rental agency business would have no entitlement to recover legal costs if they were unsuccessful for example. Even if they were successful, it's probably unlikely if it was in a small claims jurisdiction that costs would be ordered. There was other examples of misleading conduct by the law practice including that they had self-enforced a judgment by warrant, garnishee order, or attachment of earnings. They also had a number of notices that they distributed entitled notice to intention to commence legal proceedings which the court said was misleading because it was similar in format to a court document but of course wasn't a court document.

These sort of practices come up often in our service. We get lots of complaints about these sort of letters from lawyers. Demands for legal costs is one area that I particularly wanted to focus on. I do have some documents here, if people are interested, of some examples. So I can leave them there. But I guess I just wanted to uncover what does the prohibition of misleading and deceptive conduct mean for the way in which those letters are expressed. In some of the letters it seems that the lawyer is seeking payment of legal costs prior to any legal proceedings where there is probably no contractual obligation on an unwitting consumer to pay any recovery costs. I think that's the most clear example of pretty bad behaviour.

But even where a lawyer believes there's a lawful contractual entitlement to claim enforcement costs, the wording of the correspondence really does fail to state the basis of those claims. Particularly when we talk about our clients, many whom are not English speaking as a first language or are vulnerable in some other way they would be very confused by these letters. They're unaware of the amount that's claimed under contract or otherwise. I guess in my view that prohibition of misleading and deceptive conduct really requires lawyers to express the basis for their claim accurately. If an amount is payable under contract, it really should be described that way. Many of the letters refer to 'legal costs' or 'our costs' which really deprives the consumer the benefit of checking what it is this one payment is for.

In one example here the firm uses the word - they 'requested' legal costs. There is an argument there that they're not actually demanding that money, they're just requesting you to pay it. I guess I'd argue that that's still pretty misleading as an average consumer would not differentiate between a request and a demand in that situation. I guess if we compare that back to what I was talking earlier about, the legal profession conduct rule and the requirement to 'grossly exceed' the legitimate assertions of the rights or entitlement of the practitioners client. I guess there's a real question there whether these letters would in fact grossly exceed those legitimate assertions. So I think that's an interesting question.

I just wanted to make one last point around enforcement under the Australian Consumer Law and Jeannie talked about this before: the regulators under the Australian Consumer Law (whether it's the ACCC or the Consumers Affair Regulations in the State) have been given increased powers to resolve disputes and have a change of business practices. One of them, which was new in the Australian Consumer Law that wasn't in the Trade Practices Act prior to that was the

regulator can claim redress or refunds on behalf of non-party consumers. So that gives a real new role I think to the regulators and goes some way into reducing the imbalance between a consumer who won't necessarily know their rights to take that action, and the regulator whose role it is then to identify - potentially - those clients that might be deserving of some redress.

In the case of Pippa Sampson they didn't use that power because that was obviously prior to the Australian Consumer Law, I mentioned that before. But I think that now that that provision is there, it could really mean that if this sort of case was run again, eligible consumers could get money back. I think that would be a really important outcome. But I'll leave it there.

Facilitator: Thank you. Questions, comments? Can I ask you one? From your point of view do you think that there's a change on the ground for consumers in reality or whether it's just something that's in legislation. You know, legislation comes and goes and lawyers don't change those kinds of comments that have been around for a long time. I mean is there actually a change on the ground?

Gerard: Look, in some areas I think there is. I think the Australian Consumer Law has worked best where it's changed the behaviour of traders. I think particularly - I think Jeannie's going talk about the unfair contract terms prohibitions. What that's done is effectively required anyone that writes standard form contracts to read it again and make sure there's no unfair terms on there. The regulators then come in to play a role looking and negotiate looking at those standard form contracts and have change. So I think on that basis there's change out there. I'm not sure consumers know themselves much more than they used to. There are efforts to go some way with that, with signs in stores for example about when you might be entitled to a refund. But I still think most people don't know their rights around refunds that well.

Particularly, they're not necessarily going to think that those same rights would apply to lawyers.

Facilitator: Okay. Good. Any other questions?

Ian Lulham, VCAT: Can I just say one thing that troubles me about part of the consumer guarantee concept of giving information to consumers? It encourages certainly lawyers, but I think financial advisors and other professionals like that as well, in the name of disclosure to rely on 'weasel words' and to give their clients and customers 20 pages of documentation. I don't think really that ends up helping anybody. When I was practising it was my job to look at our guides to clients, and I was pretty guilty of using some good weasel words too. But if you didn't, you're just putting your head on the guillotine. I've certainly talked to people who've been on the receiving ends of those transactions and they get about 20 pages of information and they're no better off.

Michael: They need separate legal advice to interpret the disclosure.

Facilitator: Let's introduce our next speaker. Jeannie Paterson is going to speak next. She's a senior lecturer at Melbourne Law School. She's co-author of *Principles of Contract Law* and the author of *Unfair Contract Terms in Australia*, as well as a number of articles on consumer protection and contract law. She is going to speak on unfair contract terms.

Jeannie: Well as has been suggested I'm coming from a consumer protection perspective and I would fully agree that disclosure of information isn't enough to protect consumers. But I think it's the beginning. What the new legislation does is it provides as what I would see as a three pronged protection for consumers in respect to their dealings with people who are providing goods and services - in regards to the contracts that provide those goods and services. So first of all there's the consumer guarantees. The consumers guarantees provide minimum benchmark standards with which goods and services must

conform. Those minimum benchmark guarantees are mandatory - they can't be excluded. They're actually now under the legislation. They - importantly they apply statutory rights. They are no longer implied term, so they're no longer tied to a particular contract. They're actually statutory rights which gives them quite different status.

Now, I think it's entirely right the point that Michael made - that the content of those standards is no different from what's been around for years, and years, and years, and is in fact a standard sort of in applying in contracts in goods and services for years. What the consumer law has actually tried to do is make those standards able to be understood by consumers so that if consumers do go on to the Consumer Affairs Victoria website they can see in three easy sentences what their rights are and the types of remedies they might seek. So that's the first prong.

The second prong I think that provides protection for consumers in the contractual and otherwise dealings with providers of goods and services is the requirement that the contracts they enter into, insofar as they are standard form contracts - and let's face it, most consumer contracts are actually standard form contracts. They are not negotiator contractors. The fact that consumers might - and traders might tinker with a few terms of those contracts doesn't stop them being standard form contracts. Most consumer contracts are standard form contracts and what the Australian Consumer Law does is set it with a basic standard those terms have to reach. They have to not be unfair, they have to meet certain standards of fairness.

What fairness means is that terms can't go beyond what is reasonably necessary for the protection of the legitimate interests in providers of those services.

Finally, the third prong, is that there is an extensive new provision on unconscionable conduct. Steve pointed out earlier that

unconscionable conduct under the Australian Consumer Law is quite different than the concept of unconscionable conduct elsewhere. For example that would apply under equity, and that's quite right. It's actually a shame it's called unconscionable conduct under statute because it is a different concept. The legislation clearly says now that the unconscionable conduct under legislation is not the same as unconscionable conduct in equity and should not be omitted by equitable concepts – it can apply much more broadly.

My question really, that I don't know the answer to, but I think is an interesting question is that is it possible that consumers of length services would it better off proceeding under the Australian Consumer Law? Because the Australian Consumer Law gives consumers broad protections, it protects consumer rights, but it also provides for quite extensive enforcement counsel by regulators to promote good standards of trade in the industry. The example I've been thinking about is cost agreements. Solicitors and clients now will enter into a cost agreement. I'd suggest that often, not always, those cost agreements are standard form contracts.

If the legal service being provided is a legal service that's not for business services, it's probably going to be caught by the legislation which applies to services for personal, domestic, or household use or consumption. That means that, for example, the cost agreement and also possibly the very legal retainer are subject to those three protections that I've talked about. That means that the legal services have to comply with the consumer guarantees. Well that probably already existed. But what's also interesting is that those agreements can't contain unfair contract terms. Now I haven't' been able to survey a whole lot of costs agreements or legal retainers to work out the extent to which they contain unfair contract terms.

This is the point about the weasel words - disclosure might allow a whole lot of weasel words but unfair contract terms, one of the tests for whether a term is unfair is whether its disproportionate or not [unclear], is a set of protection … the provider of the service. But one of the factors that's to be considered in thinking about that is the transparency of the agreement. So the mere fact that the agreement is not transparent, that's not clear and accessible, is a ground for finding that agreement for finding that agreement is unfair. So that's a huge protection for consumers.

Now I've looked at one cost agreement that contains the clause that says you can terminate the retainer at any time, we can terminate on 14 days' notice, but if it's terminated you must pay us for any costs - for any work that we've done up until the point of termination and any legal costs we incur subsequent to the termination. Now I can tell you I suspect that is an unfair term because that goes way beyond common law contractual rights about what happens on termination. As you all know, if the contract is terminated because it's the solicitor in breach, the solicitors or the service providers' rights of recovery are much more limited than they can claim payment for any work done and any other costs incurred.

So it's not clear that there's not unfair contract terms in standard form agreements on consumer matters between solicitors and clients. Then come to unconscionable conducts extremely expanded notion. We don't know the parameters of that notion but we do know, to quote the New South Wales Court of Appeal in a very recent decision, it covers conduct that's highly unfair or goes beyond what is reasonable. Now one example of what may well be unconscionable conduct is entering into a retainer or a cost agreement with a client where the solicitor knows that the client doesn't understand that agreement. Now a cost agreement can set out all the basis on which the client might be charged.

It might use words like ‘disbursements’, it might use words like ‘estimate’, but if the client doesn't understand what those concepts mean, and the solicitor knows that - and the solicitor knows that because they've sat across the table from them and heard that client doesn't speak very good English or that the client is highly distressed and is in such a distressed state that they probably can't understand what's happening - then that can be unconscionable conduct. Because the heart of unconscionable conduct is dealing with someone who's unable to protect their own interests, and you know that. Well solicitors deal on one on one so they are going to know. It's been an issue in the financial services market, unconscionable conduct, because typically there's an intermediary between the client and the financial service provider.

So the financial service provider may not have knowledge of the vulnerability of the client but with solicitors they are sitting face to face with their client. I suggest in many of these circumstances they will know if the person doesn’t speak English or is otherwise emotionally distressed. So I think that there's really interesting questions about the extent to which it might be better to pop down to the Civil Law VCAT list rather than proceed under the Legal Practice List for clients who've had unfortunate experiences. That's all I have to say.

Facilitator: Okay, thank you. Questions or comments?

Michael: Can I say when there is a dispute over the reasonableness of a lawyer’s costs, the people who measure the reasonableness, for example VCAT or the Costs Court - depending on the amount of the costs, will look at things like circumstances, advertising, the complexity, time taken, facts of the case, and although it's not word for word, it is likely to involve the judger of the facts analysing the fairness of the process and the context in which the contract was arrived at. Therefore it might be a more laborious process for sorting out the fair

from the unfair contract. But I think it does provide a mechanism for an independent arbiter doing that early exercise.

Jeannie: I should probably clarify. Unfair contract terms rules under this legislation don't actually apply to the price. So they apply to the terms but not that core price. So you wouldn't challenge the price as an unfair term. The question is whether unconscionable conduct is an easier route into challenging an agreement where there's nothing wrong with the cost - the costs have all been properly incurred but the client didn't - and I hear this story again and again from Legal Services where the problem is not so much with the charging, but the client didn't understand the basis on which they would be charged.

They didn't understand that if they talked for five minutes to the solicitor on the phone that would be $60. They didn't understand that they would be charged for every page photocopied. They didn't understand that actually 'estimate' means not it will cost around this much, but it means well it may cost this much but actually it may cost that much. Which I think is actually a slightly different question. I don't know because I'm not an expert in your area but I think the focus is slightly different.

Michael: Certainly price can be rejected, analysed, crunched and destroyed even though the legal costing process - it's always the same problem. It's easy to say look I'll charge you this much money for this much unit of effort, time, activity. It's the devil in the detail that causes the grief.

Jeannie: And I'm sure that - I know that the Legal Services Board - if something smells in the transaction, it smells. I just wonder if the ACL is a more direct route sometimes to picking up that smell.

Michael: Well we've been fully in favour of consumer remedies and have worked with the Consumer Action Legal Centre on the debt recovery, lawyers, and publishing a guideline, writing to all of them personally telling them what their obligations are. I'm all for the opportunity that

consumers of legal services might achieve faster better remedies through the consumer laws.

Steve: Again, I don't think you'll get any disagreement on any of that. A couple of points. The first point is we've had unconscionable conduct for a long time and indeed we use it all the time. We just rarely use that terminology. I recently went to senior counsel in New South Wales to try to get a complaint of unconscionable conduct against a particular firm because of a whole range of overcharging. Because again, we're a disciplinary unit, not a compensatory one. The difficulty we often have, and VCAT probably has some of these difficulties too - we certainly have it big in New South Wales, I hope you don't have it as big here - and that is that you get what we call our frequent flyers - the practitioners that are very well known to us that are always doing a little bit wrong.

Often not enough in any one of those cases to be wrong enough for us to really get them. We negotiate a lot of complaints, we mediate a lot of complaints, but I'd like to see them depart from the legal profession. The only way that I'm going to be able to do that now is to use unconscionable conduct. I use it under the old Contracts Review Act.

Jeannie: Well actually yes, the NSW Contracts Review Act is broader again I think.

Steve: Exactly. Well that's what I use because again, as a regulator of the profession, I can do that. But again I have to stress, because this is not based on consumer rights. What you're talking about is a different thing and they can coexist. I don't think one has to take over from the other. The issue of coexistence is what's really important. Because as Michael said, we couldn't - I come from legal service. I couldn't agree morethat that sort of thing which we've all seen a billion times, and we as regulators see constantly and our staff get immensely

frustrated. But our job is to try to shift that whole regime, not get individual settlements for individual people necessarily.

So when we're talking about what we're trying to do - that's why I talked a bit about purpose. The concept of purpose is to actually make the profession understand this. We have an education role to try to do that and to try to achieve change in the profession to make it more professional and better for consumers. So it's working together that we need to do, it's not one or the other. I think that once we get in the national laws, I'm a big fan of moving to principle base regulation rather than prescriptive. I love unconscionable conduct. I'd love to have just that because that gives me so much more leverage to deal with practitioners but ultimately you're going to have a real problem with proof.

In all of your matters - in all the matters when you talk about unconscionable conduct, it is so common to us that you have one person's word against another. The extraneous evidence in the consumer jurisdiction, you might have much more ability to get that evidence in. We don't. So there's, again, congruency here that would be useful, but for us when we get somebody who says I was bullied into signing this contract, then the lawyer comes back and brings forward the interpreter, and brings forward the signed agreement and everything else, that's the end of it for us. We can't pursue it any further. Even though there might be a smell there.

So there are real issues there around proof that are difficult in a disciplinary term. That's why we try to settle - as Michael said - we try to resolve so many of these complaints before we get to discipline because disciplines the last gasp and it doesn't give the consumer usually anything.

Jeannie: Can I just make a comment there then. It seems then that it's important for regulators to talk to each other a lot.

Steve: We do.

Jeannie: Because your comment about the repeat offenders - the Australian Consumer Law provisions on unconscionable conduct say - actually specify that engaging in a course of conduct can be unconscionable. So that repeat offender who you're saying is offending again, and again, and again, might not be unconscionable conduct in a one off situation but it might be again, and again, and again. It's quite possible that it would actually be caught under this legislation.

Steve: If it's one of the things that your legislation covers then it…

Jeannie: And this legislation may not have the ability to discipline a lawyer, but there is provision to impose pecuniary penalties. Now that's a form of - it might not be saying you can't practice as a lawyer but if you impose a pecuniary penalty on someone, that's a pretty big discipline. This legislation also has the ability to require corrective advertising and various forms of publicity. So there are other ways of dealing with it.

Steve: No I understand that but there's also a lot of clashes between them.

Jeannie: Yeah, sure, and that's the need for the conversation.

Steve: Because we don't have harmonisation and that's why it's dangerous. Until we can get harmonisation these are just philosophical discussions. The reality is that we need to actually work towards how we can do these things either together, change our legislation, absorb different things, but at the moment it's really difficult.

Michael: In Victoria we ramp up the penalty that a practitioner will endure depending on whether it's a one off or whether it's a consistent failure to make a standard. So if it's a consistent series of misdemeanours, then it becomes professional misconduct. Whereas on their own, they remain unsatisfactory professional conduct. So that there is a trigger there for identifying that in an individual. There's also an obligation

under the Legal Profession Act for me to identify systemic problems relating to the provision of legal services, and deal with them as a regulator. Either a systemic problem performed by the conduct of an individual firm or a series of practitioners in one firm, or throughout a group in the industry such as the debt collection mercantile agent dilemma that you talked about before Gerard.

Adrian: My name is Adrian Snodgrass. I'm from Fitzroy Legal Service and Moonee Valley Legal Service. I just had a question for Deputy President Ian Lulham: How many VCAT cases do we have against lawyers…Individual cases in the consumer jurisdiction, how many matters do you see?

Ian Lulham, VCAT: Not many. We do have some lawyers who sue in VCAT for fee recovery. As with any tradesperson who does that, a lot of them end up with a counter claim style defence. But it wouldn't be in the hundreds.

Jeannie: But until recently there was debate about whether VCAT similarly had jurisdiction over lawyers because of the wording of the Fair Trading Act. It wasn't clear under the Fair Trading Act in Victoria, though it was clear in New South Wales, whether lawyers could be caught under the legislation. It wasn't clear whether lawyers were engaged in a trade as lawyers. The legislation - the Australian Consumer Law, which is now replicated in Victoria, picks up wording from the New South Wales Fair Trading Act. I think Linda's going to speak a bit more on this. But until recently - you know more about this than me - there was a real uncertainty about whether Fair Trading Act consumer matters could be pursued against lawyers.

Male: But since the introduction of the consumer law, you haven't seen this picked up?

Ian Lulham: No. Even if the consumer law is about advising the publics of their rights, I think there's a lot of the public who have rarely heard of the law.

Jeannie: Yeah.

Steve Mark: That's right.

Facilitator: Let's move to our next speaker. Linda Haller is a senior lecturer at Melbourne Law School. She's published and spoken widely in Australia and overseas on professional discipline and the civil liability and regulation of lawyers more generally. She's going to speak about the Australian Consumer Law and litigation. Thank you Linda.

Linda: Thank you. I'll be quite brief actually. As Michael mentioned I was full of enthusiasm when we were planning this. I thought it was an open question as to the relationship between advocates of unity and the Trade Practices Act, for instance the High Court. A few of the members of the High Court, way back with *Boland v Yates*, toyed with the idea of how did the statute interplay with this common law principle. It is amazing to me that we don't have more clarity on the law in that case. I thought well now's the opportunity, the Australian Consumer Law, maybe it will in some way limit advocates immunity. Yes, law 101 we learnt how statute trumps common law principles such as advocates immunity, and yes, advocates immunity does mean that consumers are denied a redress.

That's largely why the House of Lords abolished advocates immunity. We still have advocates immunity in Australia and I think everyone agreed that after the High Court's decision in *D'Orta Ekenaike*, if anything, our High Court has entrenched it much further. It's an important common law principle in Australia. As I started to do my research I realised there wasn't perhaps a lot to say on this. Perhaps I shouldn't give up so quickly but the Australian Consumer Law isn't trying to change the world. It says quite clearly in section 131C of the

enabling legislation that the ACL does not intend to change principles of the law but to add to the options available to protect consumers.

We know in many efforts of legislation - or arguments that legislation is narrowing common law rights. A good example would be in relation to legal professional privilege. The High Court in cases such as *Baker v Campbell* has said well no, unless the legislation is explicit or unless it's by necessary implication, we will not as a court read legislation to be intended to abolish important common law principles. So there's a nice little irony here that the advocates immunity limits the remedies available to consumers. Here we have a piece of legislation designed to protect consumers more, but that same legislation I think would be interpreted to say that it does nothing in relation to advocates immunity.

So I think it's business as usual in relation to advocates immunity. But that's where I stand - what I think is the interpretation at the moment because the legislation quite explicitly preserves current principles and doesn't intend to derogate from existing law. Secondly because there is no explicit reference to this common law principle of advocates immunity I think the immunity stands. So I suppose I thought well I don't want to stop speaking after three minutes. Although I had always said I would speak only for five but I'd just like to throw it out to those of you who've perhaps studied this area for longer than I have, and I was thinking well yes, the legislation now is clear.

The Australian Consumer Law makes it clear that trade or commerce includes any business or professional activity. But my understanding in the New South Wales Fair Trading Act that that for some time has had that made very clear - that it extends to business or professional activity. Yet my understanding is in New South Wales is that the case law is still undecided as to the view of that. Whether lawyers can still

say oh but look at the particular conduct that's being challenged. I was appearing in court, I was making a submission to His Honour Justice so and so. That could not possibly be in trade or commerce. Surely when I'm in court making submissions to the bench, that is not in trade or commerce.

As against cases that - someone mentioned earlier the Slater and Gordon situation - that is clearly conduct in trade or commerce. So I guess I'm just wanting to throw it out there what people's views are. Can we simply be complacent and say well if we wanted lawyers to be caught by the consumer legislation then our job has been done because the definition expressly includes professional activity. Or do people anticipate that lawyers, particularly when challenged and allegations are made that they're in breach of the Australian Consumer Law will want to argue the point about what particular conduct is it that you're calling me to account for.

Because there's the full range from negotiating on behalf of clients - yes that might be clearly in trade or commerce - promoting the firm itself in trade or commerce, or pure advice given to clients compared to work in court. So I'm just sort of throwing that out there. That's all I have to say. I'll be interested in your comments on that.

Gerard: Linda my understanding was the definition of the ACL so trade and commerce then includes business or professional activity.

Linda: Yes.

Gerard: Wouldn't in a common sense that work - lawyers are one of the classic professions. So it would include a professional activity whatever the conduct was.

Linda: But all conduct? New South Wales have worked with that definition and even there there's the broader view and the narrow view. I gather that the case law is not settled in New South Wales.

Jeannie: Except Linda there is a fairly strong decision by the New South Wales Court of Appeal in *Kowalczuk v Accom Finance* that says yes, it applies to at least giving of advice. The problem is there's a few cases before that - as Linda has said - which ummed and ahhed a bit more. So there's still some grey areas on the outskirts I think.

Linda: What are the views from NSW?

Deborah Radjenovic, MARA : We're very much focused on the migration agents, so as far as lawyer agents we only look at their conduct in the context of immigration application assistance work, and the legal aspect of it sits with the Legal Services Commission. It's not something that I come across in my role so I'm not in a position to comment on the arguments.

Steve: I mean I think that the history of this, which is consistent with what Deborah says, is to try to hive off anything lawyers do and leave it in one box called lawyer regulation, and try not to muddy those waters. I think that's been some - it's what the decisions have kind of dealt with. Whether or not that's right or wrong is another thing entirely but that seems to be what's happened. I suspect that that will continue. However there are pressures around the world that are now being exerted on the legal profession and on all of the service delivery areas that are so huge. I don't know how long it will last but I'm just not exactly sure where the first attack will come.

In the UK for example, the real issue has been ostensibly making legal services available to just anybody by Co Op law and a whole range of other types of legal processes. But one of the probably unintended consequences of that is to equate legal service delivery with nothing but cost. So you only look for the cheapest service, not the best, and certainly not the one that's going to look after you the most important way. So there's so many pressures that are now happening that a lot of what we're talking about here, coming from

different perspectives, need really to be thought very carefully through. I mean we really need to make sure that whatever we're doing about giving consumers rights, which I think everybody in the room would totally agree is a very important thing to do, has to be carefully thought through.

Because without some of that thinking some of this overlap that I'm presently seeing in lots of regulation, which is why we strike MOUs, just to hold our breath for a while as we try to look around and see what the consequences might be. This is where we need research to jump in and a lot of this work needs to be done. Because it's presently a big gap and a big hole. A lot of these questions I don't think have answers. I'd love to be involved in all the discussions about where they might go.

Jeannie: Great. I can sign you up.

Steve: Please. I'd be happy to. Because we find that it's absolutely essential to continue to do that.

Jeannie: And you too.

Michael: No I don't want to be signed up. I'm not a Trade Practices lawyer so I'm probably putting my neck on the line and I'm sitting opposite senior counsel so she might contradict me but I'd be astonished if a barrister in accepting a retainer to be contracted to or retained by a law firm to do a piece of work could say she was acting in trade or commerce at the clerking end in the retainer end of the transaction, but wasn't acting in trade or commerce at the delivery end of the transaction.

Could I just make a couple of points just in addition to that? First point is that I saw some research recently which showed that since 1980 in the western world, not in Australia alone but in all of the world, England, Canada, America et cetera, the number of matters that actually go to a determination by court have dropped by 80 per cent.

Second thing I'll mention is most lawyers never do litigation. Most of our discussion is about litigation. The issue is that a lot of these cost issues, and particularly consumer pricing issues, tend to end up talking about litigation which is so difficult. But yet in so many areas of legal work it's not that difficult. It's much easier to have controls. It's much easier to have discussions. It's much easier to have different mechanisms of costing than the billable hour.

There's a whole range of things that we can do. I think that part of this discussion is picking our target. Because it's really important to realise that most consumers that go to the lawyers don't end up in court. Some of them do. Some of them do really badly because of it but a lot of them have problems around estates, and wills, and conveyancing, and minor contract issues, and building, and matrimonial issues, and all those sorts of things that hopefully will never end up in court. Most lawyers try to keep people out of court than in. So there's a lot to be said about segmenting the market a little bit too when we're talking about these issues.

Jeannie: I don't think that's any different in most trade and commerce though because most traders actually don't want to rip off their clients either. Generally most people in trade or commerce actually value their reputations and want to do a good job. So I would hate to see … suggesting that most lawyers are sharks. They're not. Most lawyers are trying to do a good job. Most lawyers I know do do a lot of pro bono work. But it's - I guess - I think you're entirely right - but there are on the fringes people who are clearly not doing a good job and are exploiting vulnerable people. I don't think that's even in just litigation.

Jeannie: That is an interesting issue because the legislation actually says including professions where - and I agree with you. I think that is an interesting question.

Jeannie: Getting it wrong is not negligent. Just as a doctor who has a bad outcome is not negligent.

Mary Ann Noone, Latrobe University:

I just had a bit of a follow up to what Steve has been saying but also to probably add another layer of complication. I think we need to remember that much of those mediations are actually done by lawyers who are acting as mediators. So there's a whole other potential area of liability in terms of is that work actually legal work? Are they performing legal services? As I understand it currently, they are actually funded to be mediators - their insurance covers them as mediators. But that clearly is quite a different type of service to anything else that lawyers have done in the past. There's a whole issue about the immunity and issues that go with that because as we know lawyers cannot contract out of liability. But mediators contract out of liability all the time.

Jeannie: They probably can't under this legislation actually.

Mary Ann: So lawyers who are acting as mediators - who get their party to sign a mediation agreement where they are contracting out of liability - I would have thought are breaching the various legal professional codes.

Facilitator: Well we're getting to the end of our time. Is there anybody else that's got a burning thing to say because I'm going to ask Linda to speak in a moment about where to from here which is lots of places by the sounds of it.

Andrew Conley: Just to play devil's advocate to Linda just for a second - in regards to ACL section 131C, concurrent operation. Query whether advocates immunity can exist concurrently with liability under the ACL. Second, query whether or not the principle of legality - which I gathered you were referring to - whether or not the lack of any duty of care or at

least ability to be sued as an advocate, fits into the principle of legality or whether it's a different thing altogether.

Linda: Justice Bell in *Goddard Elliot* v *Fristch* just basically said his hands were tied because of the principle of legality. I would have thought with Bell J's background in the consumer legal movement he would have tried if he could to find some way through the immunity. Thank you on that point, and that concurrent point – it's an interesting one.

Michael: Of course the good news is that case was mediated in favour of the person who got the raw deal through the immunity principle.

Concluding comments:

Linda: Sometimes we come along to these things and it's all very interesting and then nothing happens so I just suppose I'm interested in where people feel they would have liked to have more discussion and in what sort of forum. I would like at least to make sure that we've got everyone's email addresses and maybe put together some mailing list. We do have a legal ethic network and we've got the civil justice research group of course when things are coming up. But did anyone have any particular issues arising out of the Australian Consumer Law and its impact on lawyers that you perhaps feel that we haven't canvassed tonight? A bit of a blind spot amongst us?

Michael McGarvie: What would probably be good from your point of view is to have a report back from regulators in six months or a year to let you know what sort of cases are coming across from Consumer Affairs Victoria or ACCC or the other consumer regulator, and how they're being dealt with by the legal regulator.

Linda: But I think certainly on some of these issues, say around costs and around the mediator, there's some potential topics that we could explore. So we'll put together some sort of mailing list and keep you in touch through that.

Facilitator: If you've got any other areas that you think we should have covered, there's lots more, for another session or a similar kind of session, there's certainly many things that we could be exploring in this area. Thank you for coming along. Thank you very much and thank you to all of the speakers.

End of Transcript