A SUBMISSION TO THE REVIEW OF THE AUSTRALIAN CONSUMER LAW

MAKING THE ACL A REAL ALTERNATIVE FOR SERIOUS COMPLAINTS IN THE AGED CARE SYSTEM

1. **Aged Care residents are also consumers**
2. **The Aged Care Act & its complaints scheme**
3. **What is covered -– home care, hostel and nursing home?**
4. **Who can make a complaint?**
5. **Advocacy services**
6. **What happens if there is a problem about service?**
7. **What kind of service problems could there be?**
8. **Where else can a complainant go – what are the alternatives?**
9. **The Australian Consumer Law (ACL)**
10. **Service guarantees**
11. **The implied guarantees are mandatory**
12. **How do the implied consumer guarantees fit with the Aged Care system?**
13. **Consumer Claims – Limits on claims**
14. **The potential for remedial orders**
15. **Other potential remedies for breach of guarantee**
16. **Are claims for unlawful restraint available?**

Introduction

This submission is made in response to the invitation to address the following objectives which were identified as 'operational objectives' by the *Intergovernmental Agreement for the Australian Consumer Law* (IGA):

- to ensure that … services are safe and fit for the purposes for which they were sold
- to meet the needs of those consumers who are most vulnerable, or at greatest disadvantage
- to provide accessible and timely redress where consumer detriment has occurred

This submission approaches the issues which are the subject of the Review from the viewpoint of a resident who is either in a residential aged care facility [RACF] or is receiving or will receive home care services, provided under the auspices of the Aged Care Act 1997. Such persons are often "most vulnerable" or at greatest disadvantage. They are often frail, infirm, aged and have disabilities. They are in need of protection, and as consumers of services, need to be heard in the Review as to their special needs.

As this submission seeks to show, those in aged care who are seriously affected as an outcome of a shortfall in the quality of the services they receive in a RACF, need more than just access to a

complaints system which usually only offers relief for systemic issues affecting a group of residents or for less serious care delivery failures.

Compare for example, at the lower end, issues such as noise or poor food quality [although serious when it affects long term nutrition needs] with more serious situations such as a consumer who has suffered pressure sores and develops serious infection and long term disability of the affected limb. The latter is not easily susceptible to resolution by mediation or conciliation, yet that is all the Aged Care Complaints Commissioner can offer to the individual complainant.

This submission seeks to emphasise and urge upon the Review, the need for:

- a variety of remedies and offences in the *Australian Consumer Law* to ensure flexibility and proportionality in enforcement
- a range of consumer focussed non-punitive measures aimed at rectifying the harm caused to an individual
- effective access to remedies for aged consumers

and these are matters which it is submitted are desirable objectives [see page 36, Review discussion paper] not only for regulators, but also for private enforcement.

Aged Care residents are also consumers

Although significant resources are devoted to dealing with complaints by residents and their families and representatives under the aged care system in Australia, it is undeniable that very many of those complaints, even though a minority, are unable to be resolved under the Commonwealth scheme. That is because the Complaints Scheme deals with systemic failure and is not capable of dealing satisfactorily with serious claims of service failure affecting individuals and care shortfalls leading to trauma and injury. The present legal remedies for those kinds of issues are to be found in the ordinary common law courts around Australia. These are the Local and District courts and in very serious cases, the Supreme Courts of the States and Territories.

However, to bring a claim in a court of law is to take significant risks especially regarding the cost of prosecuting the claim against a defendant with "deep pockets", and the potential liability for legal costs in the event of an unsuccessful claim. There are almost no claims discoverable in the decided case databases which refer to claims by residents for serious harm arising from poor care delivery service in an Australian RACF. That may be due in part to the risk of taking the claim to a hearing with its consequent risk of liability for costs in the event of an adverse decision.

On the other hand, in New South Wales, there is the requirement for the just, quick and cheap resolution of disputes [s.36, *Civil and Administrative Tribunal Act* 2013] which gives some hope to potential litigants that they may avoid the formality which attends claims in the civil law courts, and the intimidation which liability for very significant costs orders presents. The award of costs in the New South Wales Civil and Administrative Tribunal [NCAT] is dealt with by s.60 of the Act and requires that the Tribunal be satisfied that there are special circumstances warranting an award for costs. For that reason, as consumers, aged care residents might reasonably expect the threshold for the awarding of adverse costs orders by the Tribunal to be higher than in the ordinary courts.

It is submitted that the very last thing a person who is a resident in an RACF would want to do is to engage in litigation with their aged care provider, upon whom they are completely dependent for care. This is in addition to any risk of adverse costs decisions such litigation would bring.

If claims can be brought in the various consumer claims tribunals around the country, relying upon the service guarantees now found in the *Australian Consumer Law* [ACL], it may be that a new era of empowerment and restorative justice may arrive, to the advantage of aged care residents and others who receive aged care services at home.

The object of this submission is to highlight a more satisfactory pathway for the resolution of these complaints. However, there needs to be law reform with an outcome better tailored to meet the special needs of these vulnerable consumers.

Consumer claims tribunals are no 'El Dorado' for claimants because limits are placed on claims. However, the prospect of making claims could become far less daunting, and in addition it may provide some leverage in respect of the claims provisions which must be offered to all aged care consumers in their residential care contracts.

The Aged Care Act & its complaints scheme

The *Aged Care Act* 1997 contained from its commencement provisions relating to the establishment of an elaborate complaints system. The legislation has always emphasised the need for complaints first to be taken to the Provider. The Departmental pamphlets, brochures and other communications have always contained that message, and that is an obviously logical and proper approach to the resolution of complaints. However, if there is no agreement between the parties themselves, namely the resident [or more commonly, the resident's close family], then a complaint should be made externally to the Department of Health and Ageing. We submit that is the understanding that most people have - either those engaged by or receiving benefits under the *Aged Care Act* 1997.

The Complaints Scheme has had several iterations, evolving to its present form as the scheme administered by the Aged Care Complaints Commissioner.

The Complaints Scheme is established by the *Complaints Principles*, which are made as one of a number of such Principles as statutory instruments under the *Aged Care Act* 1997. The Scheme is pressed upon intending residents and imposed upon Providers by the *User Rights Principles*, which require that all residential care contracts must contain provision for the resolution of disputes.

It has been this writer's invariable experience over more than 15 years of legal practice in this area that the combined effect of this history and development, the deployment of departmental resources, and the provisions of the *Aged Care Act* itself, have produced a mindset among Providers and their staff as well as residents and their families, that if there is a problem with care delivery, the only and obvious way to solve it is to make a complaint. Once made, complaints are quickly put on the prescribed regulatory track, and it may be many months before a decision is produced by the system. Such a result may be suitable for a proportion of complainants, but not, it is submitted, for those with complaints at the serious end of the scale.

In the years before the Aged Care Commissioner became responsible [on 1 January 2016] for resolving them, thousands of complaints were handled by the Aged Care Complaints Scheme. Many thousands of hours were spent in information collection, enquiries, interview, assessment and decision-making by the people employed for the task of evaluation of complaints.

For those dissatisfied with the complaints process there are decision reviews in the first instance, and then an appeal lies to the Commonwealth Ombudsman. It is interesting to note that none of the literature published by the Secretary of the Department [of Social Security] makes any mention of the possible alternative of seeking legal advice from a qualified practitioner. Moreover, it appears that no appeals can be taken to the Commonwealth Administrative Appeals Tribunal from the Complaints Scheme (*Aged Care Act* - Section 85.1)

The manner in which the Department maintains control of Providers' conduct is to be found in the ways in which recourse or remedy may find expression in the complaints scheme. The "tools" for behaviour modification which can be deployed against an Aged Care Provider are sanctions which are applied under the *Sanctions Principles* 2014. The Secretary of the Department must consider certain issues [see Division 67 *Aged Care Act* 1997] including whether the non-compliance [for example, as reported by the Complaints Commissioner] is minor or serious, and whether the health, welfare or interests of the care recipient is threatened.

The process is therefore all about penalising the Providers [with the ultimate sanction of withdrawing approval as an Aged Care Provider] rather than remedial solutions for the resident consumers or focus upon a particular consumer and that person's problems and possible injuries. In particular the remedies for non-compliance make it clear that there are no circumstances in which a resident may receive compensation; only a reduction in fees by reason of a failure in service delivery on the part of the Provider are available.

In dealing with a complaint the Complaints Principles [section 7] require the decision maker to take one of three possible actions, namely –

- to take no further action;
- to quickly resolve the matter by giving assistance and advice to the complainant;
- to undertake a resolution process.

The Secretary can, by agreement with the Provider, refrain from revoking the Provider's approval if measures are taken such as the appointment of an adviser or administrator, or additional training for employees. In reality, these are quite useless or ineffective outcomes for the individual care recipient who may have suffered serious pain, injury and permanent discomfort.

The Aged Care Complaints Commissioner may give directions to a Provider which must be complied with [*Complaints Principles* section 15[8]]. However if the directions are not complied with the Commissioner may only notify the secretary, but not take further action directly, except to notify another organisation.

It is submitted that there is a good case for claiming that the Complaints system is inadequate for those whose complaints are serious and not amenable to settlement by mediation or the limited pathways which the system offers. That makes reform of the law relating to consumer claims vitally important to this vulnerable section of our community.

What is covered -– home care, hostel and nursing home?

The Aged Care complaints regime applies to Commonwealth funded and residential aged care. It has been estimated by the productivity Commission that by 2016-17 there will be 747,000 over 65 receiving supported home care and 208,000 in residential care (high and low care) [*Trends in Aged Care Services: Some implications*, Productivity Commission, Canberra, Sept 2008].

Advocacy services

There are Commonwealth funded advocacy services available for telephone advice and referral to other advice or advocacy service providers when necessary, in all States and Territories. As the Department puts it -

> An advocate can:
> - provide you with information about your rights and responsibilities
> - help you resolve your problem with the service provider, including speaking for you if you want them to
> - listen to your concerns about the complaints process.

So it is evident that there are limits on the extent to which the advocacy services can support a serious claim involving an impact on health, or injury.

What kind of service problems could there be?

Here is a list of just some of the service delivery problems which can arise in the course of caring for aged persons, which may in some cases be due to inadequate staffing, and which lead to poor quality care–

- Pressure sores
- Infected pressure sores
- Severe dehydration
- Severe malnutrition
- Aspiration pneumonia
- Medication error
- Falling & injury
- Scalding
- Toileting – delay and neglect
- Effective pain management

We submit that many problems which arise from service delivery are actually a function of lack of supervision which in turn arises from inadequate staffing. This is a chronic issue in aged care nursing and leads to problems, complaints and occasionally to injury and trauma. For further information we

suggest reference to the Australian website agedcarecrisis.com which has an extensive amount of information on many of these issues.

There is in addition another very important issue which arises in the course of service delivery, care and supervision. That is the issue of restraint, which in turn gives rise to the question when and whether the restraint is lawful or unlawful. We submit that in such cases, there is a remedy to be found in the *Australian Consumer Law* which is superior to that offered by the Aged Care Complaints Scheme and more 'user friendly' that the common law courts.

Where else can a complainant go – what are the alternatives?

There are at least four possible alternatives for taking action in the event of a claim for an injury or damage experienced or sustained by a resident of an RACF or during the course of delivering care and treatment under a funded home care scheme or package of home care services.

i. There is the possibility of a common law claim for negligence which arises from the failure to deliver an appropriate standard of care where there is a pre-existing [and non-delegable] duty of care to the care recipient.
ii. There is a potential common law claim for trespass to the person which may arise in the case of treatment or supervision involving physical handling of the resident but in circumstances where lawful consent has not been given. This can arise for example in cases involving persons who do not have full capacity for decision making and where lawful consent can only be given by their duly authorised delegate, such as an appointed guardian, but that consent has either not been sought or has not been given in the particular case. Moreover there can be misunderstanding as to the identity of the person who may lawfully give consent on behalf the disabled person.
iii. In cases where a residential care contract has actually been made at the time the service has commenced or the person has entered into residential care, and assuming that the contract includes promises to render care to a standard defined in the contract, it may be possible for a claim to be brought for breach of that contract.
iv. Finally, there is a cause of action which arises from consumer type transactions in which there are implied guarantees in respect of the quality of services provided. Even in cases where there is no written contract, when a contractual responsibility for delivery of care services is found to exist, the implied guarantees will also be present and will be enforceable by virtue of the *Australian Consumer Law*.

The first three alternatives involve bringing a claim in the common law courts. There is an hierarchy for these courts which is partly defined by the amount involved in the claim. In aged care claims the Local or Magistrates Courts, often geographically distributed throughout the States and Territories and mandated to deal quickly and efficiently with legal claims, is the most obviously suitable to seek any kind of compensation or damages at law.

The fourth alternative involves a consumer claim for which a special tribunal can normally be identified in every State or Territory, set up to enforce fair trading laws for the benefit of consumers.

Those tribunals are authorized to enforce the *Australian Consumer Law* which commenced in early 2011.

Service guarantees

For completeness, the four applicable guarantees in the ACL can be shortly summarised as follows:

1. *Section 60 Guarantee as to due care and skill*

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

2. *Section 61 Guarantees as to fitness for a particular purpose etc.*

   (1) If:

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

   (b) the consumer, expressly or by implication, makes known to the supplier any particular purpose for which the services are being acquired by the consumer;

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

3. *Section 61 Service to achieve reasonably expected result*

   There is a second part to the last guarantee (above) with a slightly different result, namely, If the consumer makes known to the supplier the result that the consumer wishes the services to achieve;

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

   The guarantee is not available if the circumstances show that the consumer did not rely on, or that it was unreasonable for the consumer to rely on, the skill or judgment of the supplier.

4. *Section 62 Guarantee as to reasonable time for supply*

   If:

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

   (b) the time within which the services are to be supplied:

   (i) is not fixed by the contract for the supply of the services; or

   (ii) is not to be determined in a manner agreed to by the consumer and supplier;

there is a guarantee that the services will be supplied within a reasonable time.

The implied guarantees are mandatory

Section 64 of the ACL provides that the guarantees cannot be excluded from a contract and a party cannot change them.

In a written contract it is possible for a provider of services to limit the impact of the guarantees by, for example, re-supplying the services, or paying for them to be supplied again. However that only applies where it is fair and reasonable (for the determination of which there are tests) AND where the services are not ordinarily for personal, domestic or household use or consumption. We submit that in the case of accommodation and care delivery services, it would be hard to argue that the services were not for personal use or consumption.

How do the implied consumer guarantees fit with the Aged Care system?

The following table suggests how the ACL's consumer guarantees might apply to some of the more serious issues arising in the delivery of aged care service:

Care delivery complaint	(1) Due care & skill	(2) Reasonably fit	(3) Achieve desired result	(4) Supplied in a reasonable time
Pressure sores	✓			
Infected pressure sores	✓	✓	✓	✓
Dehydration	✓		✓	✓
Malnutrition	✓		✓	✓
Aspiration pneumonia	✓			
Medication error	✓		✓	
Falls/ injury	✓			
Scalding	✓	✓		
Toileting – delay & neglect				✓
Restraint – without consent (see below)	✓			

Restraint – a special case?

The claim of restraint has historically been made under the common law as a trespass to the person. However it may be possible to present it as a consumer claim on the basis that there has been a failure

of care delivery in respect of supervision, staff training and adherence to the rights of residents under the common law, the *User Rights Principles* made under the *Aged Care Act* and the existing protocols for applying restraint which represent best practice in aged care service delivery. We do not suggest that there are not further and possibly novel issues which may allow restraint claims to be brought under the ACL.

Consumer Claims – Limits on claims

In New South Wales, the *Consumer Claims Act* limits claims to $40,000. The situation varies from each State and Territory so it is necessary to check on that limit in making a decision about whether or not to go down the pathway which the *Australian Consumer Law* allows.

Potential Remedies

The potential remedies available to an applicant will include the following:

1. A reduction in fees, or refund of fees paid, to recover the reduction in value of services not provided in quantum meruit
2. Orders for restitution/reparation
3. Possible compensation
4. Possible damages

In New South Wales the *Fair Trading Act* Part 6A sets out the jurisdiction of the NCAT in relation to consumer claims and we set out those which are submitted as having the potential for meaningful outcomes and reparations in relation to a claim for the standard of services [*Fair Trading Act* 1987, s. 78N][a-d]:

> the Tribunal may, subject to this Division, make any one or more of the following orders that it considers appropriate:
>
> (a) an order that requires a respondent to pay to the claimant a specified amount of money,
>
> (b) an order that requires a respondent to perform specified work in order to rectify a defect in goods or services to which the claim relates,
>
> (c) an order that requires a respondent to supply to the claimant specified services other than work,
>
> (d) in the case of a claim for relief from payment of money-an order declaring that a specified amount of money is not due or owing by the claimant to a respondent,

The range of possible advantages for an aged and disabled resident or care recipient can be imagined if the orders which may be made [s 78N] are viewed together with the possible remedial services which are set out above.

Money Damages

The availability of remedies will depend on how certain legal questions are resolved by the tribunal. Obviously, the nature of the damage or damages is a critical question, particularly in light of the NSW *Civil Liability Act* limitation on personal injury damages.

It is submitted that the Consumer Trader and Tenancy Tribunal of NSW, the predecessor of NCAT had had a tendency to find that almost all damages which relate to distress or disappointment amount to impairment of a mental condition, thus being excluded by the *Civil Liability Act* unless the injury reaches the 15% threshold. If the Review finds this line of reasoning is maintained in the present decisions of NCAT and other tribunals, the Review might consider ways of ameliorating or avoiding that impediment to a consumer claim for the vulnerable aged.

An exception may arise when the conduct is excluded from the *Civil Liability Act* under section 3B of that Act. This exception applies to intentional conduct done with the intent to cause injury. It is arguable, although not yet resolved so far as we are aware, that recklessness could amount to the intent to cause injury.

Aggravated damages should be available where there has been intentional conduct, although section 21 of the *Civil Liability Act* restricts aggravated damages if negligence caused the injury. Because section 267(4) of the *Australian Consumer Law* allows for damages, aggravated damages could potentially be awarded for an intentional act where the damage was not caused by negligence, such as failure to provide services within a reasonable time or fit for purpose.

Are claims for unlawful restraint available?

a. Applicability of the Tribunal to nursing home restraint claims:

It is clear that the residents of nursing homes are consumers. All the definitions in the *Australian Consumer Law* (ACL) and the *Consumer Claims Act* support this interpretation, as discussed below. There are many examples in the aged care space of residents in facilities being designated as consumers, which further confirms these residents' status as consumers. One such example is the Federal Government's funding of "Consumer Directed Care" in community aged care programs.

Section 79A of the *Fair Trading Act* defines a "consumer claim" as follows:

> **"consumer claim"** means a claim by a consumer, for one or more of the following remedies, that arises from a supply of goods or services by a supplier to the consumer (whether or not under a contract) or that arises under a contract that is collateral to a contract for the supply of goods or services:
> (a) the payment of a specified sum of money,
> (b) the supply of specified services,
> (c) relief from payment of a specified sum of money,
> (d) the delivery, return or replacement of specified goods or goods of a specified description.

Based on this definition, claims for restraint in a nursing home environment could be brought either under subdivision (a) as a claim for the payment of a specified sum of money, or subd. (b) as a claim

for the supply of specified services. In addition, claims which relate to relief from payment could also be brought under subd. (c).

In considering a claim under subdivision (a), in order for a specified sum of money to be sought, it would seem that traditionally, a cause of action would need to be selected, for which payment of a specified sum of money would be an appropriate remedy. This may not always be the case in restraint matters unless general damages were put in issue.

A claim under subdivision (c) may arise in certain circumstances when payment has been made to the nursing home care facility by the plaintiff or the plaintiff's family, and there is a reasonable basis for asking to have part or all of the money refunded as a result of the restraint. While this initially looks to be more problematic, it may make sense in a number of scenarios.

The most obvious claim would be under subdivision (b), namely a claim for specific services. The limitations here may arise from the context of the transaction, namely that the definition of consumer claim requires that the claim itself “arises from a supply of… services by supplier to the consumer."

It seems intuitive that in tribunals like NCAT, redress is given to a consumer based on a past wrong which can be clearly articulated and perhaps circumscribed. Thus, each individual instance of restraint which can be identified as the basis for a claim may need to be paired with a remedy which is available under the relevant legislation.

The basis of our submission is that future services be provided to the consumer in a manner which complies with guidelines (such as the *Quality of Care* principles) or legislation (such as the NSW *Mental Health Act*). This future care would be pleaded in the character of a remedy in the context of such a claim.

b. The Relevant Law:

In bringing an action in the NCAT, here appears to be no requirement for an applicant to disclose a specific cause of action or allegation of violation of a statutory provision in their application. Nor is there any requirement that the remedy they seek be specifically anchored to a common law cause of action or statutory violation.

However, in reviewing the decisions of the NCAT and its predecessor the CTTT, it seems fairly clear that common law principles are applied in the determination of claims. So it seems reasonable to infer that while the law allows a significant amount of latitude in the nature of the pleadings, there must still be a solid legal basis for the Tribunal to determine a claim and make an order.

c. Jurisdiction and Orders:

There seems little issue that the ACL definitions of consumer and supplier would apply to an RACF and its residents. It is important to consider the orders sought when determining the type or types of relief to be requested. For the purposes of a restraint claiman application would be a consumer claim if it is:

- for the payment of a specified sum of money; or
- for the supply of specified services; or
- for relief from payment of a specified sum of money.

It may be difficult for a Tribunal to award general damages in these types of cases [restraint] for two reasons: the limitations on personal injury damages in the *Civil Liability Act*, and the likely need for expert medical opinions to establish quanta of damages.

In a matter with different facts where general damages were claimed, *McAlary v The Hospital Contributions Fund of Australia Ltd (General)* [2008] NSWCTTT, the decision of the Tribunal included this statement: "In accordance with Section 16 of the *Civil Liability Act* 2002, no damages may be awarded for non-economic loss, including for pain and suffering, unless the severity of the non-economic loss is at least 15% of the most extreme case".

Claims under section 60 and 61 of the ACL in NSW would be limited by the *Civil Liability Act* to $594,000 at present (for the most extreme cases). Even if a restraint claim reached the threshold of 15% of the most extreme case, the monetary claim would exceed the monetary jurisdiction of the Tribunal.

d. Matters to be considered by the Tribunal:

For the purposes of an ACL restraint claim in the Tribunal, relevant considerations would include:

- material inequality in bargaining power between the parties,
- whether or not the plaintiff was able to protect their own interests because of their age or physical or mental capacity,
- the relative economic circumstances of the parties,
- whether any unfair tactics were exerted on or used against the plaintiff,
- the conduct of the defendant in relation to similar transactions, and
- the purpose and effect of the contract.

In addition, while there are no codes of practice prescribed under the NSW *Fair Trading Act* in relation to nursing homes or restraint, there are a number of industry and professional codes of practice and analogous guidelines which can be used as evidence of acceptable practice, and due care and skill. The fact that there is reference to such codes of practice in the Act should give weight to any non-binding yet authoritative codes or guidelines which can be cited in support of the remedy sought.

e. Specific Claims:

As discussed earlier, due care and skill will be a question which will be open to interpretation, but the numerous guidelines in place tend to recommend restraint as a last resort, and in any case, as minimally as possible. Furthermore, the circumstances in which restraint can be used are limited by the law in many circumstances. Some of the more compelling evidence here may be derived from guidelines and published studies and articles, as well as expert opinions.

All three heads under Part 3-2 of the ACL (due care and skill; fitness for purpose; reasonable time for supply) are all likely to apply to various factual scenarios where unlawful restraint can be alleged. In part, this will be dependent on the nature of the service being alleged as the basis for the claim. That in turn may flow from the contract between the parties, and may be modified by various laws.

There are a number of helpful Government studies which relate to the potentially improper use of restraint in aged care facilities, including a Senate report in 1995 and an ensuing ministerial taskforce report. In addition, a 2008 NSW Department of Health report noted claims have been made that the use of restraints continues to be a major problem in nursing homes in NSW due to:

- difficulties in managing residents with dementia, particularly where facilities have a diverse mix of residents and are not physically set up to provide care to people with dementia. Nearly half of the people with moderate to severe dementia live in a residential care facility
- staff shortages, particularly in qualified nursing staff
- an inappropriate mix of staff and the use of unqualified staff who are not trained to manage difficult behaviour or qualified to administer medication
- inadequate regulatory and monitoring arrangements
- a focus on improving the efficiency of the sector, 'profits' and cost cutting, rather than meeting the needs of consumers.

f. The ACL and unconscionable conduct:

It is worthy of note that several of the relevant considerations in section 13(2) above comport very closely with those considerations which are relevant to a finding of unconscionable conduct in the cases under the old section 51AB of the *Trade Practices Act*, which has been succeeded by section 21 of the ACL.

Unconscionability is proscribed in two sections of the ACL. The first is section 20, which addresses common law unconscionability (i.e. the *Amadio* line of cases). It states that a person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time. Subsection 2 goes on to qualify or limit the application of section 20 as follows: This section does not apply to conduct that is prohibited by section 21.

Section 21(1) of the ACL states that a person must not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable.

Section 22 of the ACL provides an extensive list of factors which can be considered in determining whether conduct was in fact unconscionable under section 21. A number of these factors would be applicable to claims of unlawful restraint in a nursing home, and industry codes can be considered by the Court or Tribunal.

It is important to note that section 21 contains an express statement of intent to guide courts and tribunals in their application of this section:

(4) It is the intention of the Parliament that:

(a) this section is not limited by the unwritten law relating to unconscionable conduct; and

(b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and

(c) in considering whether conduct to which a contract relates is unconscionable, a court's consideration of the contract may include consideration of:

(i) the terms of the contract; and
(ii) the manner in which and the extent to which the contract is carried out; and is not limited to consideration of the circumstances relating to formation of the contract.

It is for this reason that claims to restraint would be more likely to succeed under section 21 than under section 20. The common law typically requires "serious misconduct or something clearly unfair or unreasonable" for a finding of unconscionability, and the Macquarie dictionary defines unconscionable as "not in accordance with what is just or reasonable". It seems the burden of proof under s.21 may be a little more easily discharged.

g. ACL and the Use of Force

Section 50 of the ACL covers harassment and coercion, and states that a person must not use physical force in connection with the supply or possible supply of goods or services. This section may not always be the most appropriate cause of action, but it may serve a purpose in specific factual scenarios.

Although section 74 of the *Fair Trading Act* precludes the remedies for damages and compensation orders (under ss.236 and 237 of the ACL) in cases of personal injury arising from violations of section 50, that bar does not appear to cover consumer claims. Firstly, an NCAT claim in relation to unlawful restraint would not prima facie be a claim for damages or a compensation order under ACL 236 or 237; and secondly the ACL gives NCAT jurisdiction to make orders which require a respondent to supply to the claimant specified services other than work, which is the actual remedy sought. While this is a complicated analysis, it appears to be a possible remedy for consumers.

Another relevant consideration here is section 30 of the NSW *Fair Trading Act*, which states that compensation orders under ACL section 237 are only available in the Supreme Court.

h. Claims in contract:

In addition to consumer claims under the ACL, the Tribunal may entertain contractual claims. If individual plaintiffs have contracts with the facilities providing for their care, then contractual remedies could also be pursued. While Part 3-2 of the ACL codifies the old common law implied

guarantees in any consumer contract (due care and skill; fitness for purpose; reasonable time for supply), there may be specific contractual claims which arise from representations made in the marketing, sale, promotion or contracting of certain aged care facilities.

SUMMARY

This submission seeks to highlight possible improvements in legal recourse for persons who have suffered from adverse incidents while a care recipient under the aged care system. We submit that it is open to the Review to consider and develop better and more effective alternatives, suited to the application of the ACL, for those whose lives have been so affected. We have sought to show that there are also remedial measures which are available which may offer a better alternative than an award of an amount of money. The vulnerable people who are part of our community deserve that the attention of the Review be focussed on their situation.

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