



Australian Consumer Law Review

**Westjustice submission in response to the
'Australian Consumer Law Review' issues paper**

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1. Abbreviations

ACL	Australian Consumer Law
ACCC	Australian Competition and Consumer Commission
CALC	Consumer Action Law Centre
CAMVAP	Canadian Motor Vehicle Arbitration Plan
CAV	Consumer Affairs Victoria
CCAAC	Commonwealth Consumer Affairs Advisory Council
CGA	Consumer Guarantees Act 1993 (NZ)
CUAC	Consumer Utilities Advocacy Centre
EWOV	Energy and Water Ombudsman Victoria
FCLC	Footscray Community Legal Centre and Financial Counselling Service
FOS	Financial Ombudsman Service
MVDT	Motor Vehicle Disputes Tribunal (New Zealand)
NH	New Hope Settlement Workers
QCAT	Queensland Civil and Administrative Tribunal
TIO	Telecommunications Industry Ombudsman
Westjustice	Western Community Legal Centre
WCEC	Wyndham Community and Education Centre
VCAT	Victorian Civil and Administrative Tribunal

2. Introduction

2.1 About WEstjustice

WEstjustice was formed in July 2015 as a result of a merger between the Footscray Community Legal Centre, Western Suburbs Legal Service, and the Wyndham Legal Service. WEstjustice is a community organisation that provides free legal assistance and financial counselling to people who live, work or study in the Maribyrnong, Wyndham and Hobsons Bay areas.

We have offices in Werribee and Footscray as well as a youth legal branch in Sunshine and outreach across the West. WEstjustice provides a range of legal services including: legal information; outreach and casework; duty lawyer services; community legal education; law reform; advocacy; and community projects.

WEstjustice has a particular focus on working with newly arrived communities. More than 53% of our clients over the last five years spoke a language other than English as their first language. Approximately one quarter of our clients are newly arrived, having arrived in Australia in the last five years. Furthermore, our refugee service in Footscray alone has seen approximately 700 clients in the past five years.

2.2 About the WEstjustice Consumer Program

WEstjustice is funded to provide Consumer Assistance and VCAT Advocacy for disadvantaged consumers. In addition, we provide civil law services through a number of programs including employment, motor vehicle accidents, insurance and tenancy.

2.3 Newly Arrived

WEstjustice has a long history of working with newly arrived communities in Melbourne's West, including refugees and asylum seekers. We have developed specialist legal services and projects that address the cross-section of legal and socio-economic issues that newly arrived and refugee communities encounter during their settlement in Australia.¹

WEstjustice recognizes that circumstances specific to newly arrived communities mean that they are often more vulnerable to some types of legal problems and less able to navigate legal systems, a position that has received broad recognition.² Our casework indicates that a significant portion of the clients that we assist with consumer law issues are newly arrived

¹ For example, we have explored the experiences of newly arrived communities in relation to housing, the courts, employment and energy and telecommunications markets in recent years. Reports available at <http://www.footscrayclc.org.au/brochures-publications/>.

²Christine Coumarelos et al; Law and Justice Foundation of NSW, *Legal Australia-Wide Survey: Legal Need in Victoria* (August 2012); Australian Law Reform Commission, *Multiculturalism and the Law*, Report No 57 (1992); Hugh M McDonald et al; Law and Justice Foundation of NSW, *Reaching in by joining-up: Evaluation of the legal assistance partnership between Legal Aid NSW and Settlement Services International* (September 2014).

in Australia.³ The case studies outlined in this submission demonstrate that newly arrived communities are both highly vulnerable to sales practices in breach of the ACL and less able to enforce their rights under the ACL. Our work indicates that there are three intersecting reasons for this heightened vulnerability.

2.3.1 *Knowledge barriers*

Newly arrived communities have no knowledge of aspects of Australian law relevant to their daily lives, such as consumer law, when they arrive in Australia. Their ability to develop this knowledge is restricted by low-level English language skills, including illiteracy, social isolation and low-level education, as well as vastly different social, cultural, legal and political reference points.

“Many people don’t know about [their legal protections as they come] from refugee camps or countries of origin where there is no consumer protection” – Settlement Worker, WCEC.⁴

“Many clients can’t read the contracts” – Settlement worker, WCEC.

“In Burma, deals are verbal...here, new immigrants, despite being educated, do not know their rights” – Settlement worker, NH.

The ACL relies on the ability of consumers to understand their legal rights and identify breaches and this poses significant challenges to protecting the interests of consumers from newly arrived communities.

2.3.2 *Obstacles to effective engagement*

In most cases, newly arrived communities will not have the necessary language, literacy and communication skills to effectively engage in the legal system to assert their rights under the ACL. The processes used in Australia to resolve consumer issues are also not intuitive or accessible for those with different social, cultural, legal and political reference points. This means that many people will not have the capacity to navigate the process or self-advocate.

“Even those who went to school in their home country have experienced a different education system and may lack the ability to adequately express themselves. Even those who are educated can confront these difficulties” – Settlement Worker, NH.

³At least 24% of our clients over the last three years, who sought advice in relation to consumer law issues, spoke a language other than English as their primary language and had arrived in Australia in the last five years. Clients seeking advice whose main language was not English made up over 55% of our consumer law matters over this period.

⁴Please note that quotes were taken from interviews conducted with settlement works from New Hope and Wyndham Community Education Centre.

Even with the support of free legal services such as WEstjustice, there are numerous obstacles to effective engagement. It is often a question of whether or not the legal service is able to build a relationship of trust with the client that alleviates fears about engaging in the legal system.

Newly arrived communities, in particular refugees and asylum seekers, have often experienced trauma in their lives and are at a greater risk of psychological and mental health conditions. The effects of trauma are extensive and can include anxiety, helplessness and loss of control, which can greatly impact on a person's ability and willingness to engage in legal processes.⁵

Furthermore, newly arrived communities often experience financial hardship because they are unable to find secure employment in Australia due to lack of skills and experience in a highly competitive job market. Their family units are also often much larger, with large numbers of children and extended family that raise difficulties in finding housing.⁶

The ACL is reactive, relying on individual consumers to assert their legal rights through legal processes. In light of the complex obstacles faced by newly arrived communities, this largely unmitigated burden means that the legal processes are often too onerous for newly arrived clients in terms of capability, time, energy and financial resources.

“[Newly arrived clients] don’t want to create a problem, or are afraid of going to court. They pay and then forget about it. They’d rather pay for it to go away, it’s really hard to convince them to continue” – Settlement worker, WCEC.

“They are afraid of court, of lawyers, of police. They’re also afraid of bad reputation and things like that. Once they attend court, they think that the court hearing will [lead to] their bad reputation [lasting] forever [and potentially] result in losing their job” – Settlement worker, WCEC.

“Dealing with authorities [in countries of origin] is totally different. They have no voice, no comment to make. The environment after 20 or 30 years will build up a lack of confidence to deal with things [and] mistrust [of the authorities]” – Settlement worker, WCEC.

⁵ Victoria Foundation for Survivors of Torture, *Rebuilding Shattered Lives* (1998) <http://www.foundationhouse.org.au/wp-content/uploads/2014/08/Rebuilding_Shattered_Lives_Complete.pdf>; Trauma and Grief Network, *Refugees and asylum seekers: Supporting recovery from trauma* <<http://earlytraumagriev.anu.edu.au/files/Refugee%20Tipsheet.pdf>>.

⁶See, eg, Refugee Council of Australia, *Housing Issues for Refugees and Asylum Seekers In Australia* (September 2013) <https://www.refugeecouncil.org.au/r/rpt/1309_HousingLitRev.pdf>; Andrew Beer and Paul Foley; Australian Housing and Urban Research Institute, *Housing Need and Provision for recently arrived refugees in Australia*, Final Report No 48 (2003) ss 4.5.1, 4.5.4 <<http://www.ahuri.edu.au/research/final-reports/48>>.

If a consumer is unable to resolve a dispute with a business in the first instance, the only option available to seek an individual remedy is to initiate proceedings at the Victorian Civil and Administrative Tribunal (VCAT). For many newly arrived communities, the mere requirement of attending a Tribunal is enough of a deterrent, particularly where there is a risk that the VCAT will not allow them to be represented in the small claims section of the civil claims list.

Furthermore, the ACL positions the onus of proof for breaches of the ACL with an individual consumer. In the event that a consumer elects to take a matter to the VCAT they must provide sufficient evidence of breaches, which can be a difficult task for newly arrived clients. In most cases, it is also desirable to have an expert report to support your claim, which is a costly exercise.

“Record keeping is very poor [in these clients]. They throw away receipts...[don’t] get the name of the person they spoke to...” – Settlement worker, WCEC.

“As the [sales] agreements [are] verbal...there [is] no evidence and [this] proves to be very hard for the client....[as] the system relies on the written documentation” – Settlement worker, NH.

This submission explores these obstacles for newly arrived communities in more detail with reference to specific areas of the ACL. Our concerns about these obstacles for newly arrived communities underpin our proposals for reform including: the adoption of lemon laws in Australia; the establishment of a Retail Ombudsman as an ADR scheme for consumer disputes; the banning of door-to-door sales; and a clear indication that the employment schemes discussed fall under the provisions of the ACL and the VCAT and equivalent tribunals.

2.3.3 *Business models and practices*

The exposure of newly arrived communities to consumer law issues is further heightened by the existence of business models and sales practices developed to target and exploit the vulnerabilities of newly arrived communities. These businesses engage in profiling activities to allow the identification of vulnerable newly arrived communities.⁷

Our casework indicates that such business models and sales practices are rife. This submission paper focuses on the sale of faulty vehicles, door to door sales tactics employed by energy companies and private training colleges, employment schemes that require prospective employees to pay upfront fees or purchase equipment, as well as 'carnapping' scams.

⁷Frost and Sullivan; Australian Competition and Consumer Commission, *Research into the Door-to-Door Sales Industry in Australia* (August 2012) 61; Footscray Community Legal Centre, *Strangers are calling! The experiences of door-to-door sales in Melbourne’s refugee communities* (2013) 5-8 <[http://donotknock.org.au/wp-content/uploads/2013/05/Strangers are Calling.pdf](http://donotknock.org.au/wp-content/uploads/2013/05/Strangers_are Calling.pdf)>.

In light of the heightened vulnerability of newly arrived communities as consumers in Australia, it is our position that the ACL needs to be reviewed with a focus on the experiences of newly arrived communities and with a view to strengthening their protection.

3. Executive Summary

WEstjustice’s primary focus is on newly arrived and migrant clients. WEst justice recognises the specific circumstances of these communities that render them more vulnerable to some legal problems, and less able to navigate legal systems. They are likely to experience financial hardship, and do not possess the relevant knowledge to adequately enforce their rights. Our submission will explore these, and other, obstacles that face newly arrived communities in Australia.

“It’s really important to get these messages across...people are just taking advantage of the newly arrived. It’s easy to do. The more information that we get to them the better” – Settlement worker, WCEC.

WEstjustice has broken down issues relating to the Australian Consumer law into a number of different stages to assess the weaknesses of the current framework as well as to address the areas highlighted in the Issues Paper.

The purchase of a ‘lemon’ vehicle can be highly detrimental, given the significant reliance a newly arrived client may have on a car, and the serious consequences that can result from a major failure. The adoption of ‘lemon laws’ in Australia (**Part 5**) would help to address the chronic issues WEstjustice has seen in these communities. We are particularly concerned about the high cost of expert reports for cases in this area, as we have seen this to be a barrier to justice for newly arrived clients. Our submission is that national ‘lemon laws’ should be implemented to deal with this issue.

Door-to-door sales practices (**Part 6**) are often very confronting to clients from newly arrived communities. WEstjustice is particularly concerned about high pressure selling tactics that are used by sales representatives targeting newly arrived communities, as representatives appear to take advantage of the language difficulties and lack of knowledge present in these communities. Our submission is that a ban on door-to-door sales practices should be implemented.

We have chosen to highlight our experiences dealing with unfair contract terms (**Part 7**) in the retirement living sector, as is examined through case studies in our submission. WEstjustice seeks to raise awareness about standard form contracts and the requirement in the ACL that they must be fair and to call for additional support and powers in this area.

WEstjustice has seen a recent emergence of people claiming to be able to offer work in return for a vulnerable worker, in a newly arrived community, paying an initial upfront fee or expending money on vehicles and equipment (**Part 8**). Our submission examines this in light of case studies seen by our workers.

WEstjustice has experienced chronic ‘carnapping’ problems, and addresses this issue in some detail in our discussion of unfair commercial practices (**Part 9**). We support further

amendments to the ACL to deal with this issue, such as a prohibition on unfair commercial practices and misleading or deceptive conduct by omission.

We also address alternative dispute resolution (**Part 10**) and call for a Retail Ombudsman to be created in Australia.

We submit this paper to the current reform discussion, and hope to see positive changes made. Whilst we believe that the current state of the ACL presents many imbalances and inadequacies for newly arrived clients, we are optimistic that our recommendations below will see a true balancing of rights and responsibilities of all parties.

4. Summary of Recommendations

Buying a car

Recommendation 1: Introduction of national ‘lemon laws’ under the ACL, covering all new cars within the first two years after sale and used cars, subject to mandatory protection under the relevant motorcar traders’ legislation.

Recommendation 2: Amend the ACL to reverse the onus of proof placing the obligation on the trader to demonstrate that there has not been a breach of the consumer guarantee where it is alleged that the vehicle has a major fault or the vehicle is a lemon.

Recommendation 3: Introduction of a compulsory industry-based external dispute resolution scheme for the motor vehicle industry, including expert opinions, without cost to consumers. Alternatively, provide experts free of charge to consumers at Tribunal hearings.

Door-to-door sales practices

Recommendation 4: To protect consumers in their homes, door-to-door sales should be banned outright, with the only exceptions applying to Charities and Government Initiatives e.g. free changeover to energy efficient light globes.

Recommendation 5: Sales representatives should be banned from discussing matters with clients who clearly cannot understand English or read English. This may involve a clear example of this conduct as falling within unconscionable.

Recommendation 6: Sales representatives should discuss and clearly mark cooling off periods with consumers (not just for door to door sales) and provide copies of all documents signed by clients before cooling off periods expire. Supply of goods up to \$500 should not be exempt.

Unfair contract terms

Recommendation 7: That the regulators complete a targeted review of standard site occupancy agreements in the retirement living sector to identify unfair contract terms.

Recommendation 8: That there be further campaigning and advertising to make clear that the provisions on unfair contract terms in standard form contracts cannot be contracted out of or superseded by reference to any other legislative framework.

Recommendation 9: That to fulfil the above recommendation, persons in contravention of the unfair contract term provisions be able to be ordered by the court, on application by the regulator, to cover the costs of campaigns or advertisements targeting their particular industry.

Recommendation 10: That collaborative compliance mechanism, such as reviews of particular industries or the publication of guides for industry, be complemented by giving regulators the power to seek monetary penalties against business in breach of unfair contract term provisions.

Recommendation 11: That the regulators be given the power to take representative action against systemic unfair contract terms.

Recommendation 12: That the regulators develop an innovative framework to encourage higher standards across the business community with regard to standard form contracts. Within this framework, targeted interventions should play a role, but not be solely relied on.

Purchasing employment

Recommendation 13: A clear statement to be included in the ACL that a claimant who pays money in response to a misleading statement about employment is prima facie entitled to recover that payment and any loss or damage suffered because of the conduct including wages.

Recommendation 14: A clear statement to be included on the website of each state or territory tribunal that they will accept claims under section 31 of the ACL.

Recommendation 15: That tribunal staff be trained on why matters under section 31 are within the tribunal’s jurisdiction.

Addressing unfair commercial practices

Recommendation 16: Amend the ACL to include a general prohibition against unfair commercial practices and that the legislation lists specific practices that are prohibited in all circumstances.

Recommendation 17: Amend the ACL to include an express prohibition on misleading or deceptive conduct by omission.

Recommendation 18: Launch an ACCC investigation into the car hire/repairer scam.

Alternative dispute resolution

Recommendation 19: Westjustice recommends the establishment of an Australian Retail Ombudsman based upon the existing UK model. In particular, we recommend that this Ombudsman scheme be an industry funded scheme with a “gold-tick” system or similar; free to consumers, have an Independent Standard’s Board that scrutinises the Retail Ombudsman’s decisions, be expected to comply with the *Benchmarks for Industry-Based Customer Dispute Resolution*; and have the ability to investigate complaints about non-member retailers.

5. Buying a car

5.1 Buying a car is essential for successfully establishing a life in a foreign country

The western suburbs of Melbourne are home to a diverse range of new and emerging communities. Arriving from a foreign country, many have experienced violence, torture or trauma and are now separated from family members and social connections. Many things are new – including language, public transport systems, schools and laws. Showing resilience and determination, community members seek to create a new life. A vital step for many is to be able to drive, as ‘the ability to drive significantly improves job prospects and empowers our participants to becoming confident and involved members of the community’.⁸ Buying a car is an important step at establishing themselves in a foreign country, and for many, it is a requirement so that they can travel to and from work. Further, most of our newly arrived clients reside in outer urban areas where a car is a necessity. Relevantly:

When settling in a new country, sustainable employment provides financial stability as well as social cohesion, self-esteem, independence, the ability to gain stable housing and more broadly, a greater sense of community belonging and well-being.⁹

5.2 Buying a car raises issues of safety and awareness in elderly consumers

As the elderly driver population is increasing, the risk of unsafe vehicles to aged consumers has grown.¹⁰ Research indicates that older people preference ‘improved...comfort or...ease of driving’ over safety features when purchasing a vehicle.¹¹ This raises concerns about awareness among this demographic about vehicle safety issues.¹² Elderly clients may require a vehicle to travel around, and many may have an attachment to their ability to drive.

5.3 Significant barriers to purchasing a ‘good’ car

There are many factors contributing to the significant barriers experienced by newly arrived migrant and refugee and other vulnerable consumers when trying to purchase a vehicle.

⁸ Victoria Police, ‘Young refugee driver education a success’ (Media Release, 1 August 2009) <http://www.police.vic.gov.au/content.asp?Document_ID=7711>.

⁹ Federation of Ethnic Communities’ Councils of Australia, ‘Latest unemployment figures hide harsh realities for CALD workers’ (Media Release, 16 August 2013); see also Deng Tor Deng and Fodia Andreou; Migrant Resource Centre North West Region, *Settlement Needs of Newly Arrived Migrant and Refugee Men: Brimbank&Maribyrnong* (March 2006).

¹⁰ Monash University Accident Research Centre, Royal Automotive Club of Victoria, *Safer Vehicle Choices for Older Adults*, Report No 02/01 (July 2002) v.

¹¹ Ibid.

¹² Ibid.

These include:

- **Communication and language barriers:** Many newly arrived migrant and refugee consumers have varying degrees of English skills, and many are illiterate, or functionally illiterate. WEstjustice has seen several clients who required an interpreter, yet had been signed up to contracts without any interpreting assistance or clear explanation of the terms and conditions prior. (See, for example, in a different context Case Studies for Izaak, Nouri and Mahnoosh, Jashar and Fila, Desta, Shein and Iffah, where illiterate consumers or consumers with low level English signed up to contracts, without explanation, and Case Studies for Mislán and Gamila) As many of these clients are illiterate, they cannot read or understand the contractual documents that they have signed, nor can they understand communications such as letters of demand sent to them by traders. This results in the migrant consumer being in a very vulnerable and weaker bargaining position vis-à-vis the trader.
- **Low understanding of rights and services/cultural barriers:** In addition to the communication barriers discussed above, culture barriers are a contributing factor to vulnerability of newly arrived migrants. Often, these clients may not know of services available to them until a late date in the process, making it difficult to seek to resolve the dispute with the trader.
- **Low income:** Many newly arrived migrants and refugees are engaged in precarious work, defined as ‘work for remuneration characterised by uncertainty, low income, and limited social benefits and statutory entitlements’.¹³ This places newly arrived migrant and refugee consumers in a vulnerable position. When purchased items, such as cars, fail, these consumers are often in a position of financial stress, contributing to their weaker bargaining position vis-à-vis the trader.
- **Reliance on sales representations:** Due to the communication barriers discussed above and the general vulnerability of newly arrived migrants and refugees, many fully rely on the representations made to them by sale representatives. WEstjustice has seen many clients who rely solely on what is told to them on the day, particularly given the reliance these consumers place on having a car as discussed above (see Case Study: Mislán and Case Study Gamila).
- **High-pressure selling tactics:** Many newly arrived migrants and refugees are targeted by sales representatives using high-pressure sales tactics. These representatives ‘[take] advantage of language difficulties and an understandable lack

¹³Leah Vosko, ‘Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment’ (Oxford University Press, 2010) 3.

of knowledge about the legal system'.¹⁴ This is further enhanced by the great reliance many of these consumers place on cars discussed above.

- **Lack of experience/technical knowledge:** Many newly arrived migrants and refugees lack the required experience and knowledge to accurately assess whether a car is safe, and a 'good' purchase. Forcing them to rely heavily on the representations of sales people. This is an area that requires a high level of expert knowledge (as shown by expert reports required by the VCAT) and is therefore not easily accessible or understandable for these consumers.

Case Study: Min-jung*

Min-jung was a newly arrived refugee who could not speak English and was illiterate. She received only a low income. She purchased a second-hand vehicle, but was not provided with a certificate of roadworthiness. It was the first time that she had ever purchased a vehicle in Australia and she could not understand any of the specifics of the transaction as it unfolded. She has no knowledge of cars in general. A few weeks after purchase, the vehicle was overheating and had other technical issues. Min-jung took the vehicle back to the dealership, with assistance for interpreting, to explain the situation but the dealership refused to resolve the issues with the vehicle.

WEstjustice assisted Min-jung to engage an expert to examine the vehicle at a significant cost to this consumer. It was found to have sufficient defects that existed prior to purchase, rendering the vehicle unroadworthy. The cost of repairs would outweigh the value of the vehicle.

The business has refused to provide a refund or meet its obligations under the ACL. The matter will proceed to the VCAT to recover the costs of purchase and all other costs incurred by Min-jung. The expert's fees are not recoverable even if successful at VCAT.

* Please note that the names and some inconsequential facts in all case studies have been changed to protect the privacy of our clients

"Sales representatives' thrive off the pressure they impose upon vulnerable people. They often use tactics like saying the consumer needs to put down a deposit, because someone else is interested who will be coming at, say, 4 o'clock" – Settlement worker, WCEC

"They never seem to tell consumers about the existing cooling-off periods [and] do not mention their rights, they just want their money" – Settlement worker, NH

¹⁴University of Western Australia, 'Project to Help Refugees and Migrants Avoid Phone Trap' (Media Release, 15 July 2010) <<http://www.news.uwa.edu.au/201007152666/business-and-industry/project-help-refugees-and-migrants-avoid-phone-trap>>.

5.4 Need for improvement of consumer protections and remedies for buyers of ‘lemon’ motor vehicles

WEstjustice has provided advice and representation to a significant number of clients who have bought ‘lemon’ vehicles including new and used motor vehicles. The recent CHOICE report into lemon motor vehicles highlights that our clients’ experiences are not unique and that two-thirds of new car buyers faced problems with their car within the first five years of owning them.¹⁵

In our experience, the absence of lemon laws means that consumers have no satisfactory remedy as it is often difficult for our clients to enforce their rights under the ACL when they buy a defective vehicle. Despite the consumer guarantees under the ACL, there seems to be uncertainty over their operation, and consumers have reported finding ‘it difficult to convince dealers to acknowledge that there is a problem with their new cars’.¹⁶ The CHOICE report found that it ‘appears that consumers need assistance to be able to confidently assert their rights, and the law needs to be enforced on their behalf’.¹⁷ It is alarming that despite warranties, extended warranties and the ACL guarantees, 15% of affected consumers were unable to resolve the problem with a lemon vehicle.¹⁸

Furthermore, it can be costly, time consuming and very stressful to have their case heard at the VCAT or a Court.¹⁹ These issues are amplified when consumers, like a vast number of WEstjustice’s clients, are vulnerable.

It should be noted that the volume of casework in this area is concerning, particularly as most problems experienced in the first few years of car ownership should realistically not cost the consumer anything given the legislative framework in place.²⁰

With the evidentiary burden on the consumers to prove that their car has a major defect, our experience indicates that an expert report needs to be obtained to bring a case. This is at significant cost to the consumer. This cost, together with application fees, represents a significant barrier for our clients.

For those that proceed there is a significant risk that such costs may be lost along with the damages incurred through the loss in value of the vehicle. This is particularly so in a conciliated outcome or determination which does not result in a full remedy.

As noted by the Consumer Action Law Centre (CALC) in their submission to the Queensland Parliament’s Legal Affairs and Community Safety Committee 2015 inquiry, this

¹⁵CHOICE, ‘Turning Lemons Into Lemonade: Consumer experiences in the new car market’ (Report, CHOICE, 15 March 2016) 5 <<https://www.choice.com.au/transport/cars/general/articles/lemon-cars-and-consumer-law>>.

¹⁶Ibid 4.

¹⁷Ibid 5.

¹⁸Ibid 9.

¹⁹Ibid 5.

²⁰Ibid 13.

may be due to the conciliation process often focused towards getting parties to agree rather than considering the consumer's substantive legal rights.²¹ In many instances this means that the consumer is offered a repair or a part refund only, despite the ACL enabling full compensation for a major vehicular fault.²² Through our experience WEstjustice can concur with CALC's observation that such a process 'disadvantages particularly vulnerable people who may not be able to effectively advocate for themselves, or those that are unaware of their legal rights'.²³

Regardless, many consumers simply give up on enforcing their rights under the ACL when they discover the significant time and costs that comes with pursuing the matter in a tribunal or court. This is particularly so if there is a risk of appeal when the respondent is a car manufacturer or large organisation and an order may be seen to affect other consumers.

5.4.1 *WEstjustice's experience*

These case studies show different clients seen by WEstjustice who presented with vehicles that had major defects prior to purchase. All clients engaged in lengthy disputes with the traders, who did not admit the vehicle was unfit for purpose even after receiving expert reports that indicated major faults.

²¹ Consumer Action Law Centre, Submission No 22 to Legal Affairs and Community Safety Committee, Parliament of Queensland *'Lemon' Laws: An inquiry into consumer protections and remedies for buyers of new motor vehicles*, 8 October 2015, 4 <<http://www.parliament.qld.gov.au/documents/committees/LACSC/2015/04-Lemons/submissions/022.pdf>>.

²² Ibid.

²³ Ibid 5.

Case Study: Gamila

Gamila was an illiterate single parent with only limited spoken English. She relied on Centrelink benefits and purchased a second-hand vehicle in order to be able to travel to work. At the time of purchase, the vehicle was represented as being in good condition.

Within a week of purchasing her vehicle, Gamila experienced serious technical safety issues with the vehicle. Although she sent it to the business for repair, the vehicle wasn't properly examined and these problems continued over the next few months.

Eventually, the business accepted that there was a significant problem with the vehicle that had not been repaired. Gamila was told that she would need to pay close to \$10,000 to repair the vehicle as it was now out of warranty. She refused and instead demanded a refund- rejecting the vehicle and returning it to the dealer. The business refused to accept the return, threatening additional storage charges.

Gamila sought assistance from WEStjustice. With expert examination of the vehicle, it was clear that the vehicle had suffered a catastrophic failure that should have been covered by warranty under the Motor Car Traders Act 1986 (Vic), as the defects had existed prior to Gamila purchasing the vehicle. It would not have been roadworthy at the time of purchase due to the defects.

The business has refused to provide a refund as required under the ACL. The matter will proceed to VCAT.

Case Study: Rose

Rose was a single parent and refugee from the North of Africa. She purchased a second-hand vehicle for around \$5,000 and was told it was in good condition. She was also told that there was a three month exchange period for the vehicle should a defect manifest itself.

Within a few weeks of owning the vehicle, she experienced technical defects, including the vehicle coming to complete stops. Eventually this required the vehicle to be towed. Rose then took the vehicle to the business, who fixed the vehicle after a few days, charging her for the towing fee and the repairs. She was told that the vehicle was fixed.

However, a few weeks later, she again experienced problems with the vehicle. When she took it to the business for repairs, it was only checked very briefly. The problems continued, and Rose had the vehicle checked by a different mechanic. Rose was then advised to get a refund, but the business refused, offering to find a replacement vehicle for her instead. They took possession of her vehicle, and while several weeks passed, did not find a replacement.

Rose sought assistance from WEStjustice. An expert then confirmed that the vehicle had suffered a catastrophic failure and was not fit for purpose at the time of its initial sale. The matter will proceed to the VCAT.

5.5 International approaches to ‘lemon’ laws

A solution to the problems discussed above may require modelling after other international approaches. Indeed, the United States approach to ‘lemon’ laws has been mentioned in the issues paper section 2.3.4 (Box 6). This law was also discussed by CALC in their submission (pages 6-8).²⁴

As an overview of international approaches:

- **United States:** ‘Lemon’ laws generally focus on breach of warranty for new vehicles. The definition of lemon varies from state to state, usually related to ‘number of unsuccessful repairs or days out of service within a specified time period or distance travelled’. Consumers are generally able to sue for breach of warranty; some states require informal dispute resolution first.²⁵
- **Singapore:** The *Consumer Protection (Fair Trading) Act and Hire Purchase Act (Lemon Law)* ‘apply to all goods that fail to meet standards of quality and performance, even after repeated repair’.²⁶ This includes second-hand, discounted and perishable goods, but does not apply to rental goods/services/property. If the defect is found within 6 months of delivery, it is assumed to have existed at time of delivery (subject to evidence). The consumer may request a ‘repair or a replacement, and if that is not possible, ask for a reduction in price, or even a refund’.²⁷ This is a Small Claims Tribunals, covering disputes up to \$10,000.

Both Canada and New Zealand also have programs to deal with motor vehicle disputes, but as these are specific programs rather than overarching legislation, one an arbitration program and the other a specialised tribunal, they will be discussed below in relevant subsections.

5.6 Proposed provisions

In relation to general provisions for ‘lemon laws’, Westjustice is of the view that a comprehensive set of provisions is needed to deal with the imbalance experienced by refugee and newly arrived migrant consumers, as well as other vulnerable consumers such as the elderly.

²⁴ Consumer Action Law Centre, above n 22.

²⁵ Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review*, Issues Paper (2016) 2.3.4 box 6; see generally Law Offices of Elizabeth Agmon Gayle, *Lemon Law* <<http://www.lemonlawusa.com/>>.

²⁶ Consumer Action Law Centre, above n 22, 7 quoting Ministry of Trade and Industry (Singapore), ‘General Advisory on Amendments to the Consumer Protection (Fair Trading) Act and Hire Purchases Act (Lemon Law) (General Advisory, Ministry of Trade and Industry, 5 May 2012) <<https://www.mti.gov.sg/legislation/Pages/General-Advisory-on-Amendments-to-the-Consumer-Protection-%28Fair-Trading%29-Act-and-Hire-Purchase-Act.aspx>>.

²⁷ Ibid.

In CALC's submission to the Queensland Parliament's Legal Affairs and Community Safety Committee 2015 inquiry,²⁸ CALC strongly supported the introduction of 'lemon' laws. Westjustice strongly supports the framework proposed therein by CALC.

5.6.1 *Definition of a lemon*

The definition of a lemon would include (as proposed by CALC):

- A vehicle that has been repaired at least three times by the manufacturer or importer, and the vehicle still has a defect; or
- A vehicle that is out of service for 20 or more days in total due to a defect; or
- A vehicle that is repaired once for a defect that is a danger to the personal safety of the driver/other road users.²⁹

Lemon laws should protect vehicles within two years after their sale (including if the vehicle is re-sold, the subsequent owner is protected).³⁰

The definition of a lemon would apply to a used car, 'so long as that car is subject to mandatory warranty protection under the relevant state motor car traders' legislation'.³¹

5.6.2 *Onus of proof*

The onus of proof is reversed where there has been a major problem or the vehicle is a lemon. The obligation is then 'on the trader to demonstrate that there has been no breach of the consumer guarantees'.³²

5.6.3 *Choice between refund and replacement for lemon vehicles*

If the vehicle is a lemon/had a major problem, the consumer 'should have the choice of a refund or a replacement vehicle'; (alternatively, 'reverse onus on all goods for a period after purchase', e.g. 3 to 6 months, modelled after Singapore).³³

5.6.4 *Reselling lemons*

Manufacturers 'should be required to notify all potential purchasers that the vehicle is a lemon if they re-sell it'.³⁴

5.6.5 *Westjustice's view*

Westjustice strongly supports a set of provisions constructed in this manner (the above structure is that proposed by CALC). A clear definition of a 'lemon', as provided above in

²⁸²⁸ Consumer Action Law Centre, above n 22.

²⁹Ibid 8.

³⁰Ibid.

³¹Ibid 9.

³²Ibid 9.

³³Ibid.

³⁴Ibid.

5.6.1, would help clarify the process for community workers and clients, as well as tribunals. It would clarify what vehicles are clearly within the frame of the legislation, making it easier for clients in these situations to bring a claim, as well as settle matters that are clearly violations.

Additionally, the definition above refers directly to number of repairs and provides a maximum number of days for a vehicle to be out of service. This would assist consumers in avoiding long delays in getting vehicles repaired. Due to the low income of many consumers that WEstjustice sees, and the reliance many of these consumers place on having a vehicle, these consumers are among the most vulnerable to harm from significant delays or successive failed repairs. It is therefore of particular importance to WEstjustice that protection of this nature be introduced.

Additionally, WEstjustice seeks further clarification as to when a manufacturer or retailer should refund, repair or replace a vehicle. The definitions of ‘major’ defect currently provided do not assist.

Recommendation 1: Introduction of national ‘lemon laws’ under the ACL, covering all new cars within the first two years after sale and used cars subject to mandatory protection under the relevant motor car traders legislation.

WEstjustice further notes that in Victoria, the mandatory warranty protection for used cars does not apply to cars that are more than 10 years old or have been driven for more than 160,000 kilometres. The warranty expires after 3 months or the first 5,000 kilometres. It is therefore crucial that more protection is introduced under a national scheme.³⁵

Recommendation 2: Amend the ACL to reverse the onus of proof placing the obligation on the trader to demonstrate that there has not been a breach of the consumer guarantee where it is alleged that the vehicle has a major fault or the vehicle is a lemon.

5.7 Experts and Technical Expertise

5.7.1 *Technical experts at tribunals*

A specific approach, aimed at dealing with the barrier to justice created by the cost of experts, may be to implement technical experts at tribunals. Additionally, it is noted that the lack of technical expertise available to adjudicators, noted in the current issues paper at 2.3.4, is particularly pertinent to our client base as refugee and newly arrived migrant consumers lack technical knowledge and experience of the system, as well as low understanding of their rights and services available to them (discussed in 5.3).

³⁵*Motor Car Traders Act 1986 (Vic)* s 54.

CALC discussed the evidentiary burden placed on consumers by the requirement of expert reports in their submission to the Queensland Parliament's Legal Affairs and Community Safety Committee 2015 inquiry.³⁶ The costs of expert reports provide a 'real barrier to justice', and an alternative like hearing assigned technical assessors would be of great benefit to consumers.³⁷ Many of the clients seen by Westjustice have a low income, and this additionally adds to their vulnerability, as the cost of an expert report can have a significant effect on these consumers, on top of the burden of already being without a vehicle.

New Zealand has a Motor Vehicle Disputes Tribunal (MVDT). A technical assessor is appointed by the Tribunal for each hearing, and 'may ask questions of the parties and any witnesses'.³⁸ The MVDT has jurisdiction to hear matters worth up to \$100,000 (NZD), though it takes longer to acquire a hearing in the MVDT than in the general Disputes Tribunal.³⁹ This approach ensures that a person with the relevant technical experience will be present at all hearings and would negate the costs of experts currently present in our system.

However, it is noted that this is not necessarily the most effective route for consumers in New Zealand to take, given the often urgent nature of vehicle disputes and the delays that can be involved with bringing a claim in MVDT. However, these delays are not necessarily translatable to the Australian model, if experts/technical assessors were incorporated into the tribunal model (VCAT and equivalents). Moreover there is reason to believe that mere knowledge of the existence of an independent technical assessor at the tribunal would be sufficient to resolve many of the more blatant cases currently seen by Westjustice

Incorporating specialist assessors was supported by the Commonwealth Consumer Affairs advisory Council (CCAAC) in 2009, as noted in section 2.3.4 of the Issues Paper (Box 5).

This approach is highly useful and is a convenient way to lower the burden on consumers associated with expert costs. Westjustice considers this to be a significant barrier to justice, as discussed and providing experts at tribunals would go a long way to evening the playing field for vulnerable consumers.

The Victorian Lemon Law Report prepared by Janice Munt MP and CAV also considered that technical assessors could play a role in determining significant threshold question of 'major' and 'minor' problems and reasonable periods for repairs.⁴⁰ This can assist

³⁶Consumer Action Law Centre, above n 22, 4.

³⁷Ibid.

³⁸ Motor Vehicle Disputes Tribunal (New Zealand), *Hearing Process* <<http://www.justice.govt.nz/tribunals/motor-vehicle-disputes-tribunal/hearing-process>>.

³⁹Ministry of Business, Innovation and Employment (New Zealand), *Consumer Protection* (17 December 2014) <<http://www.consumerprotection.govt.nz/for-consumers/motor-vehicles/got-a-problem/motor-vehicle-disputes-tribunal-mvdt>>.

⁴⁰Janice Munt MP and Consumer Affairs Victoria, 'A report on the Motor Vehicle Lemon Law consultations' (Report, Parliament of Victoria, July 2008) [5.2.2].

consumers' awareness of the scope of the problem and their rights even before they seek relief in tribunals or courts.

5.7.2 *External dispute resolution*

Another specific example, and an alternative to the above system, is a system of external dispute resolution. An example of this was suggested by CALC, who strongly supported 'the introduction of a compulsory industry-based external dispute resolution scheme' much like those existing for other industries in Australia.⁴¹ CALC noted that a 'particular benefit' of external dispute resolution schemes is that they 'can develop expertise around the subject of the dispute'⁴² and competently investigate facts; not simply mediating a dispute.⁴³ CALC suggested that such a scheme could be established 'by making membership a condition of holding a licence to trade in motor vehicles'.⁴⁴ This can lead to greater consistency for consumers across different demographics.⁴⁵

This is similar to the scheme adopted by Canada: CAMVAP. However this only applies to disputes between consumers and motor vehicle manufacturers, not dealers.⁴⁶ This process is said to be 'fair, fast and friendly' and it is funded by the automobile industry.⁴⁷ It is restricted to vehicle models from the 4 previous years.⁴⁸ It does not cover consequential or incidental damages, loss of profits, inconvenience, loss of use or punitive damages.⁴⁹ It is 'free for consumers...normally takes less than 70 days...[and] consumers do not need a lawyer'.⁵⁰

Due to the serious ramifications of vehicle disputes, the stress already placed on the consumer, and the urgency in having a working vehicle, it is important that there is an efficient and clear process available to all consumers. For this reason, the speed of this process and the fact that it is free for consumers are highly desirable.

However, restricting a scheme to manufacturers would not assist many of our clients, as many cases seen by WEstjustice involve unconscionable conduct by dealers (see Case Studies at 5.4.1). If a general scheme, such as that proposed by CALC, could be applied to the whole industry, this would be highly beneficial. It would help to provide an equal footing for consumers who are often in incredibly vulnerable positions, and may provide a step in the right direction towards deterring dealers from acting unconscionably towards clients in refusing repairs that have existed from purchase(see Case Studies at 5.4.1). Again,

⁴¹Consumer Action Law Centre, above n 22, 10.

⁴²Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵Paul O'Shea, 'The Lion's question applied to industry-based consumer dispute resolution schemes'(2006) 8(5) *ADR Bulletin*<<http://epublications.bond.edu.au/adr/vol8/iss5/2/>>.

⁴⁶ Consumer Action Law Centre, above n 22, 7.

⁴⁷ Canadian Motor Vehicle Action Plan, *About CAMVAP*<<http://www.camvap.ca/about/>>.

⁴⁸Ibid.

⁴⁹ibid

⁵⁰Consumer Action Law Centre, above n 22, 7.

as with the proposed technical advisors, we believe the existence of this type of scheme would significantly reduce the number of cases of blatant exploitation involving poor quality or badly damaged vehicles. Additionally, it may help to provide consistency in how to deal with these cases.

Recommendation 3: Introduction of a compulsory industry-based external dispute resolution scheme for the motor vehicle industry, including expert opinions, without costs to consumers. Alternatively, provide experts free of charge to consumers at Tribunal hearings.

6. Door-to-door sales practices

6.1 Door-to-door sales have significant effect on communities

WEstjustice, in dealing with a range of new and emerging communities, is aware that in the midst of creating a new life, the members of these communities may be grappling with a new language, laws and new social expectations. Arriving from abroad, many have experienced trauma and separation from family and social connections.

Everyone has the ‘right to enjoy their personal time without the unwanted distraction of salespeople’, and this is further increased by the vulnerable nature of the newly arrived migrant and refugee, as well as elderly, communities.⁵¹

6.2 Communities are extremely vulnerable to door-to-door sales tactics

There are many factors that contribute to the vulnerability of consumers to door-to-door sales practices, including:

- **Communication and language barriers:** Many newly arrived migrant and refugee consumers have limited English skills, and many are illiterate. They cannot read or understand the contractual documents that they have signed, nor can they properly understand door-to-door sales practices. This results in the migrant consumer being in a very vulnerable and weaker bargaining position vis-à-vis the salesperson.
- **Low understanding of rights/lack of experience/cultural barriers:** In addition to the communication barriers discussed above, culture barriers are a contributing factor to exploitation of newly arrived migrants. Many consumers may not be aware of the requirements of ‘cooling off’ periods.⁵² Footscray Community Legal Centre and Financial Counselling Service (FCLC) prepared a report on African consumers experience of the contestable energy market in the West of Melbourne, which showed, amongst other things, that salespeople failed to properly notify consumers of fees involved, and did not leave a copy of the contract.⁵³ The report also noted that in some cultures not inviting someone into your home is considered very rude.
- **Lack capacity to protect their own interests:** These sales practices often target public housing blocks and approach ‘welfare recipients as they exit Centrelink offices’.⁵⁴ As

⁵¹Consumer Action Law Center, ‘Federal Court finds Do Not Knock Sign is ‘an unambiguous request to leave the premises’ (Media Release, 11 October 2013) <<http://consumeraction.org.au/media-release-federal-court-finds-do-not-knock-sign-is-an-unambiguous-request-to-leave-the-premises/>>.

⁵²Australian Competition and Consumer Commission, *Telemarketing and door-to-door sales* <<https://www.accc.gov.au/consumers/sales-delivery/telemarketing-door-to-door-sales>>.

⁵³Footscray Community Legal Centre and Financial Counselling Service, *The African Consumer Experience of the Contestable Energy Market in the West of Melbourne*, Report(November 2008) 7-8 <http://www.footscrayclc.org.au/images/stories/docs/African_Consumer_Experience.pdf>.

⁵⁴Michael Koziol ‘Push t stop door-to-door diploma marketers targeting the vulnerable’, *The Age* (online), 17 July 2015 <<http://www.smh.com.au/national/push-to-stop-doortodoor-diploma-marketers-targeting-the-vulnerable->

discussed above, newly arrived migrant and refugee consumers often lack the ability to understand what is being presented by the salesperson (see, for example, Case Study: Nouri and Mahnoosh and Case Study: Jashar and Fila). The report commissioned by FCLC mentioned above showed that often salespeople used children as interpreters, offered discounted services, failed to notify consumers of termination fees involved with leaving their existing service providers, and did not provide copies of contracts the consumer was enticed to sign at the door.

- **Low income:** Many newly arrived migrants and refugees are engaged in precarious work, defined as ‘work for remuneration characterised by uncertainty, low income, and limited social benefits and statutory entitlements’.⁵⁵ This further contributes to vulnerability and increases distress. Such newly arrived migrants cannot afford to be scammed by dubious door-to-door sale practices.
- **High pressure selling tactics:** Many newly arrived migrants and refugees are targeted by sales representatives using high pressure sales tactics (see, for example, Case Study: Izaak). These representatives ‘[take] advantage of language difficulties and an understandable lack of knowledge about the legal system’.⁵⁶ Additionally, as mentioned, WEstjustice is aware of consumers who have been offered discounts by door-to-door salespeople that were not discounts at all.

6.3 The effect of door-to-door sales

6.3.1 General background

Door-to-door sales practices are known to place greater pressure on the consumer.⁵⁷ They may also provide a psychological and social advantage to salesmen, by gaining information about a person from being in their home.⁵⁸ It has been recognised by the Federal Court that people subjected to these tactics ‘can simply agree to things to put the situation at an end’.⁵⁹ Consumers in this situation cannot just walk away, like they could in a retail store.⁶⁰ It has

[20150716-gidsxo.html](#)>; see also *ACCC v Lux Distributors* [2013] FCAFC 90, for an example of tactics used on elderly consumers.

⁵⁵Leah Vosko, ‘Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment’ (Oxford University Press, 2010) 3.

⁵⁶University of Western Australia, ‘Project to Help Refugees and Migrants Avoid Phone Trap’ (Media Release, 15 July 2010) <<http://www.news.uwa.edu.au/201007152666/business-and-industry/project-help-refugees-and-migrants-avoid-phone-trap>>.

⁵⁷Consumer Action Law Centre, *Unfair trading and Australia’s consumer protection laws*, Discussion Paper (July 2015) 7-8 <<http://consumeraction.org.au/wp-content/uploads/2015/07/Unfair-Trading-Consumer-Action-2015-Online.pdf>>.

⁵⁸*Ibid.*

⁵⁹*ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90 [10].

⁶⁰Consumer Action Law Centre, *Unfair trading and Australia’s consumer protection laws*, Discussion Paper (July 2015) 8.

also been shown that often door-to-door sales can result in a consumer paying more than is necessary, after selecting an inappropriate offer under pressure.⁶¹

“They do not understand what [the salespeople] are saying and they just say yes, and agree to everything, and then it becomes too late” – Settlement worker, NH.

6.3.2 *The Do Not Knock Campaign*

FCLC organised the ‘Do Not Knock’ campaign in 2009/2010. This campaign raised awareness within the City of Maribyrnong of legal issues and financial implications of door-to-door retailers for gas and electricity companies.

A report commissioned by the Centre into the legal issues of African Refugees in this area showed significant legal problems for these consumers as a result of entering into a contract with a new provider via door-to-door marketing.⁶² These consumers often could not speak English, and salespeople often used their children as interpreters, or were elderly.

Consumers were offered discounted services and salespeople failed to notify consumers that they would have to pay a termination fee to their existing provider. These clients often were not provided with a copy of the contract that they were enticed to sign by the door-to-door salespeople.

We believe these issues are widespread in door-to-door sales practices (as noted for example in Issues Paper, 2.3.5 Case study 7).

6.3.3 *Existing approaches on door-to-door sales*

Communities have attempted to tackle the problem, with some examples discussed below:

- **Canada:** Canadian province government have considered this issue, with a councillor for Mississauga advocating for broadening the systems to include a ban on ‘door-to-door sales of things such as furnaces, air conditioners and water filtration systems’.⁶³ The article discussing this refers to cases of elderly people, one who ‘didn’t even realise she could say no to the salespeople, whom she thought were with the government’.⁶⁴ The ban is only in discussion stages at the moment; however the issue has attracted media coverage and is supported by other government officials.

⁶¹ Consumer Utilities Advocacy Centre, *Minimising Consumer Detriment From Energy door-to-door sales*, Research Report (December 2012) 21-22 <<http://www.cuac.org.au/research/cuac-research/276-minimising-consumer-detriment-from-energy-door-to-door-sales/file>>.

⁶²Footscray Community Legal Centre and Financial Counselling Service, above n 52.

⁶³ San Grewal, ‘Mississauga asks province to ban predatory door-to-door sales’, *The Star* (online), 28 April 2016 <<https://www.thestar.com/news/gta/2016/04/28/misssauga-asks-province-to-ban-predatory-door-to-door-sales.html>>.

⁶⁴Ibid.

- **WujalWujal, Queensland:** the remote Indigenous community has put up signs on ‘the roads into the community to warn salespeople that it is illegal to approach houses with ‘do not knock’ notices’.⁶⁵ Indigenous Consumer Assistance network spokespeople stated that they had seen many people affected by door-to-door sales, and the ‘extra expenses just put them over the poverty line’.⁶⁶ The media coverage noted that the ACCC would evaluate whether such a scheme could be rolled out elsewhere.

6.3.4 WEstjustice’s experience

Current statutory protections do little to assist vulnerable consumers who are subjected to door-to-door practices. While protection will apply for misleading practices,⁶⁷ it does not stop door-to-door sales practices from occurring and harming vulnerable consumers. These consumers do not have the requisite knowledge or expertise to properly assert their rights, and often feel incredibly weak, in terms of power and bargaining position, when compared to the sales people (see e.g. Case Study: Shein).

“Door to door knockers offer [these clients] a lower cost and that is all the information they get. They do not have the capacity to look at other areas [and evaluate the offer]” – Settlement worker, NH.

The case studies detailed below show that newly arrived and migrant consumers, often illiterate and with low English skills, do not have the resources to protect against these practices and are left without sufficient protection. It is important to keep in mind that in many newly arrived migrant communities it is thought culturally inappropriate to not invite visitors, including door-to-door salespeople, into their home.

“When the government’s name is used, often clients who don’t understand English think that if they don’t give [their] details there will be consequences, [as they are] on government benefits” – Settlement worker, WCEC

“It’s easy to pretend that you’re from the government and [need] someone’s details” – Settlement worker, WCEC.

“[These clients] wouldn’t ask for identification [of a door-to-door salesperson]” – Settlement worker, WCEC.

⁶⁵Amy Bainbridge, ‘Remote Indigenous community becomes first town to ban door-to-door salespeople’, *ABC News* (online), 22 April 2016 <<http://www.abc.net.au/news/2016-04-22/door-to-door-salespeople-warned-off-remote-indigenous-community/7347512>>.

⁶⁶Ibid.

⁶⁷See, eg, *ACCC v Neighbourhood Energy* cited in Consumer Utilities Advocacy Centre, above n 62, 6.

Case Study: Izaak

Izaak was an elderly vulnerable client suffering from kidney failure. He was visited by a sales representative at his home, without invitation, selling solar panels. He informed the sales representative that he was worried about the costs involved with this offer. The representative then insisted that he was offering the client a low price for that day only. He continued to offer cheap prices, no charges, and other benefits. The client felt pressured to sign the agreement in order to receive this low price. He was promised significant savings on his energy bills as a result of these energy products. The contract was to the value of \$10,000.

However, the savings he had been promised were exaggerated. After doing research, Izaak also found that alternative quotes for comparative panels from other providers were close to \$6,000 less than what he had signed up to pay.

Westjustice assisted Izaak lodging an application with VCAT on the grounds of misleading and deceptive conduct and unconscionable conduct, the trader offered to settle the matter one day before the hearing and refunded Izaak \$6,000.

Case Study: Nouri and Mahnoosh

Door-to-door rogue salesmen purporting to be government representatives came to Nouri and Mahnoosh's home and offered free laptops. The couple signed an agreement, unaware that they had signed up to a TAFE online course. They didn't receive any paperwork, and only became aware later of what had happened and were advised to cancel their enrolment.

Westjustice called the education provider and were advised that Nouri and Mahnoosh's enrolments would be withdrawn without penalty and would not incur a Commonwealth debt. Westjustice was also advised that the 'rogue salesmen' involved had been terminated. Arrangements were made for the couple to return the laptops.

Case Study: Yashar and Fila

Yashar and Fila arrived in Australia as refugees with limited English skills, requiring an interpreter. They became aware of an opportunity to purportedly receive free laptops from the government, and as a result contacted a door-to-door salesman in order to receive these laptops. They were unaware that they would actually be signed up to a diploma course as a result. The salesmen persuaded the couple to take two laptops, and provided them with a number of forms. Yashar and Fila believed there were no obligations placed on them.

Yashar and Fila only later realised that they had in fact been signed up to a course and owed fees of over \$44,000. WEstjustice sought cancellation of the contracts without penalty on the ground of misleading and deceptive conduct and unconscionable conduct. The institution agreed to settle the matter.

Case Study: Desta

Desta is a newly arrived refugee and has low level English and literacy skills. She is a single parent with five dependent children and relies solely on Centrelink benefits.

A man came to her home asking about her energy company, and Desta showed him her bills. He took notes about the bills and left. Another man later came, again getting her utility bills and taking photographs of them. The client was told that he wanted to know how much she was paying so as to be able to help her.

Desta received letters and phone calls from a debt collection agency, alleging old utility debts from two different companies totalling over \$1,500 for energy over the same billing period. She sought assistance from WEstjustice, but prior to this she had already paid the majority of the alleged debt due to pressure from the debt collection agency.

WEstjustice is seeking cancellation of the debts on the grounds that they are not valid as well as a refund of the substantial payments made by the client towards the alleged debts.

Case Study: Shein

Shein was a single parent with dependent children, living solely on Centrelink benefits. She had only limited spoken English and was illiterate.

She was approached by a man telling her she was entitled to receive a free laptop from the Government to assist with English studies. After providing personal details, she was told she would receive a laptop in the post.

A few days later the same man came to her door, and told her that she also needed to provide a tax file number and passport. Shein signed documents that she did not understand, and was coached through a phone call by the salesman.

A few weeks later the man again came to her house, she refused to come to the door and when he was informed that she was not home, came back again. He offered another laptop for one of her children, and she again signed documents. At this point, Shein said she did not want him to visit again, and didn't understand what was going on. She was afraid and did not like him visiting. She was then told that she had signed up for courses, and would have to study.

Shein came to WEstjustice after receiving notices for two VET FEE-HELP loans for over \$20,000. She had received calls asking her to attend classes. WEstjustice wrote a letter, requesting cancellation of her enrolment in both courses immediately without penalty.

Case Study: Iffah

Iffah had a low level of English skills, receiving a minimum wage income. She was approached by a salesperson from an energy company, and felt obliged to let them enter her home, and was pressured into signing up with them. She was told that she could cancel if she changed her mind and rang up a few days later to do so. This was accepted over the phone.

In the meantime, Iffah moved out of that house. However, after several years, she received a debt collection letter for several hundred dollars, in relation to the debt owed to the energy company. It was billed for a time after she had cancelled the service and after she had moved from the house. Debt collectors continuously contacted her and threatened her.

WEstjustice has lodged a complaint with the Energy and Water Ombudsman in Victoria regarding the validity of the debt as well as the conduct of debt collectors as agents of the energy company.

6.4 WEstjustice's view

These consumers are in a vulnerable position, and the current protections offered by the ACL do not assist. WEstjustice supports an outright ban on door-to-door selling due to the nature of the systemic practices exposed in the case studies above.⁶⁸

Due to the vulnerable nature of WEstjustice's clients and their lack of experience and knowledge and the relevant power imbalance discussed above, it is crucial that protection is given to them – rather than requiring them to enforce their own rights. For this reason, a register for 'Do Not Knock' houses, while helpful, would not adequately protect this portion of the community.

Recommendation 4: To protect consumers in their homes, door to door sales should be banned outright with the only exceptions Charities and Government Initiatives e.g.: free changeover to energy efficient light globes.

Recommendation 5: Sales representatives should be banned from discussing matters with clients who clearly cannot understand English or read English. This may involve a clear example of this conduct as falling within unconscionable.

Recommendation 6: Sales representatives should discuss and clearly mark cooling off periods with consumers (not just for door to door sales) and provide copies of all documents signed by clients before cooling off periods expire. Supply of goods up to \$500 should not be exempt.

⁶⁸See also Consumer Utilities Advocacy Centre, above n 62, 23.

7. Unfair contract terms

7.1 About WEStjustice Tenancy Program

WEStjustice employs two tenancy lawyers who provide specialist advice, casework and representation to vulnerable and underprivileged tenants who live in Melbourne’s West. In the past five years WEStjustice’s tenancy program has assisted over 1,100 clients with almost 1,800 tenancy matters.

Our catchment area includes suburbs in Melbourne’s inner-West (such as Footscray and Sunshine), and Melbourne’s outer-West (such as Werribee, Wyndham Vale and Hoppers Crossing). We also provide a duty lawyer service to assist tenants with on-the-spot advice and representation one day per week at the VCAT in Werribee. Our tenancy service primarily assists tenants in private tenancies, but we also provide assistance to some tenants who live in public and community housing.

Our tenancy program has a particular focus on working with clients from refugee and non-English speaking backgrounds. We work closely with local refugee settlement agencies and community development workers, and almost 60% of our tenancy clients in the past two years were born outside of Australia.

WEStjustice’s submission and recommendations are informed by our significant experience working with tenants in the course of the above casework. To further focus our submission we have chosen to highlight our experiences dealing with unfair contract terms in the retirement living sector.

WEStjustice contends that issues highlighted in the retirement living sector are not unique and that, as such, the casework presents a compelling illustration of how unfair contract terms can adversely affect consumers. This casework will thus form the basis for general recommendations pertaining to unfair contract terms in standard form contracts.

7.2 Background on unfair contract terms in the retirement living sector

The retirement living sector is an increasingly important accommodation sector in Victoria. In 2013 an estimated 37,700 Victorians relied on such a form of accommodation and there were 400 retirement villages listed on the Consumer Affairs Victoria Retirement Village register.⁶⁹

In its casework WEStjustice has been exposed to numerous examples of contracts in this sector that include problematic terms in their standard form occupancy agreements.

⁶⁹Consumer Affairs Victoria, ‘Retirement Villages Amendment (Records and Notices) Regulations 2013 and Retirement Villages Amendment (Contractual Arrangements) Regulations’ (Regulatory Impact Statement, 2013) 1.

7.2.1 *Vulnerability and unfair contract terms*

Individuals in the retirement living sector may be particularly vulnerable and unaware or unwilling to prosecute their rights in relation to unfair contract terms. Whilst age may not in and of itself lead to vulnerability, it is known that residents of the sector are mostly 75 years or older,⁷⁰ and that ‘the incidence of factors giving rise to vulnerability among older consumers tends to be higher than for the general population as older age can bring frailty, ill health, bereavement, and social isolation.’⁷¹

This is compounded by the standard form contractual arrangements which characterise the sector. Contractual arrangements relating to retirement living mostly adhere to a model where the resident:

- Enters into a contract to purchase a right to reside, linked to other contractual arrangements for the supply of services as a member of the village;
- Makes regular payments (typically monthly) to cover the costs of services and facilities provided by the village community;
- May make separate payments to the operator for the provision of personal services (typically in a serviced apartment); and
- Particularly in commercial villages, will receive after exit either the proceeds of the re-sale of the residence right or a refund of the ingoing contribution, net of a fee commonly known as a ‘deferred management fee’.⁷²

Opportunities to bargain are limited and the agreements are mostly provided on a take-it-or-leave-it basis.

⁷⁰Ibid 6.

⁷¹Ibid 25 citing The Allen Consulting Group, ‘Retirement Villages (Contractual Arrangements) Regulations 2008 and Estate Agents (Retirement Villages)’ (Regulatory Impact Statement, 2006) 8.

⁷²Ibid 7 citing The Allen Consulting Group, ‘Retirement Villages (Contractual Arrangements) Regulations 2008 and Estate Agents (Retirement Villages)’ (Regulatory Impact Statement, 2006) 2.

7.3 Case studies

7.3.1 *Attempting to shield contracts from the rent increase requirements in the Residential Tenancies Act*

Case study: Brigitta

Brigitta is the owner occupier of a relocatable home in a retirement village. As part of her Occupancy Agreement, a rental fee is paid fortnightly for the lease of the land upon which the house is located. This amount also includes the use of the village's communal facilities. The Agreement gives Brigitta the right to occupy the land for 99 years.

WEstjustice assisted Brigitta after the retirement village sent and charged her 'rent increases' which did not comply with the provisions of the Residential Tenancies Act 1997 (Vic) (Act).

Despite entitling the letters sent to Brigitta as 'Rent Increase', the retirement village said that the letters referred to an increase in 'occupancy fees' and thus were not rent, or subject to the rent increase provisions of the Act. This was despite the retirement village writing elsewhere in the Occupancy Agreement that the Agreement was subject to the provisions of this Act.

Both the Occupancy Agreement signed by Brigitta and the legal arguments of the village's owners tried to create a distinction between the terms 'occupancy fee' and 'rent'. In the agreement, there are recurring references to the word 'rent', rather than 'occupancy fee' in clauses relating to an 'Annual Rent Review' that itself may not be compliant with the rent increase provisions of the Act. This created confusion for Brigitta and other residents when it should have been clear that the rent and the occupancy fee payable were one and the same.

This was also the stance VCAT held when WEstjustice sought compensation on Brigitta's behalf from the village. They held that the notices sent to Brigitta had to provide her with all relevant information and protection that the Act required, irrespective of the contents of the Occupancy Agreement.

The retirement village had not done so, neglecting to include a statement informing a site tenant of their right to apply within 30 days to the Director to investigate and report on the proposed rent increase.

As this had not been done, the rent increase was declared invalid pursuant to the Act. The retirement village was required to pay Brigitta the additional rent paid in reliance on the notices of 'rent increase' sent to her over a period of over four years.

7.3.2 *Unreasonably attempting to curtail the use and enjoyment of a tenant's property*

Case study: Clemence

Clemence is the owner occupier of a relocatable dwelling in a retirement village. She pays a fortnightly fee to cover the cost of her dwelling occupying the site and her use of all the facilities in the village. She is retired, lives alone and is in receipt of a pension.

Following a number of acts of vandalism to her property, which she had raised with village management without response, she had external security cameras installed on her dwelling by a licensed firm.

WEstjustice assisted Clemence after village management alleged that the installation of cameras was in breach of her Occupancy Agreement. She was ordered to remove the cameras within seven days. If not, she was told that tradespeople would be employed by the village to enter the premises and pull her cameras off the house she owned, and that she would be billed for the cost of doing so.

Management said a clause requiring the tenant to abstain from doing anything that might cause nuisance, damage or disturbance to an owner of any adjacent property had been violated. However, the cameras' viewing lines are restricted to her own premises and did not monitor common areas of the village or sites of neighbours.

Management further pointed to terms which give the landlord absolute discretion regarding the alteration or addition to the premises. They invoked the requirement for landlord's written consent for the installation of any fixtures or fittings to the relocatable dwelling, except those necessary for permitted use.

Apart from the fact that Clemence owns the relocatable dwelling outright, and is thus altering her own property, measures to ensure the safety of herself, her home and possessions might be regarded as necessary for 'permitted use' under the Occupancy Agreement. At no point did Clemence claim to ensure her safety and security by recording common or neighbouring private space, and did not put into place any security measures that would create a hazard to neighbours or members of the public.

The threat to enter the premises and remove Clemence's fixtures and fittings is problematic considering that under the same Occupancy Agreement Clemence is entitled to exclusive possession of the site upon which her relocatable dwelling is located and interference with this right might be seen as trespass.

This concern might well extend to tampering with Clemence's relocatable dwelling which she owns outright, and more generally the placing of limits on the addition of fixtures and fittings by an owner that would be lawful on any other dwelling.

7.3.3 Further concerns pertaining to Occupancy Agreements

Further to the problematic provisions identified above, the standard form nature of Occupancy Agreements make it possible for owners of these complexes to include provisions which, prima facie, are problematic and potentially concerning. The following examples are taken from one such Occupancy Agreement.

7.3.3.1 Tenant's Obligations

Along with the provisions highlighted in Clemence's case study, the Occupancy Agreement examined requires the resident to request permission to bring onto the premises 'any object which by its nature or weight might cause damage to the premises'. It may be argued that a natural consequence of being a homeowner that there will be objects that may cause some damage to premises. Heavy objects such as pianos, large pot plants or garden furniture might well cause an element of minor damage to premises, and this thus may raise questions as to the appropriateness of a landlord's consent being required in such circumstances when it pertains to a home belonging to the resident.

7.3.3.2 Ending of Occupancy Agreement

Provisions may be inserted which are incredibly invasive and may create an impermissible imbalance between the tenant and the landlord's rights.

One such provision in an Occupancy Agreement purports to require the tenant to vacate the premises within fourteen days where the landlord is of the 'reasonable opinion' that the tenant is 'no longer able to live independently and are dependent on Assisted Living'.

Alarmingly, this provision attempts to 'irrevocably authorize the manager to discuss with any Medical Practitioner treating the Resident matters pertaining to the said Resident's physical, emotional and mental health and wellbeing'. It further states that the Resident shall consent, upon request from the Manager, to undertaking an assessment by an independent Medical Practitioner as to their capacity to live independently and to agree 'to be bound by such independent assessment'.

If at the conclusion of this process the tenant vacates, the landlord purports to become the attorney to affect the sale of their right to occupy the premises where, 'in the reasonable opinion of the landlord, the resident has not made appropriate arrangements'.

The potential for abuse of this provision, further to the legal and moral appropriateness of such a provision's inclusion in a standard form contract, is concerning.

7.3.3.3 Deferred Management Fee or (Exit Fee)

These fees are said to accrue during the period of ownership but are payable when there is a change of ownership. As such, they are normally fees payable by a deceased's estate. Capped at a set number of years, and calculated as a percentage of either the original purchase price or subsequent re-sale value of the right to occupy the premises, the fee is

accrued annually at each anniversary of the resident's commencement at the village, and are usually paid out to the village owner from the proceeds of the re-sale of the unit.

The particular fee structure examined was capped after 5 years at a maximum of 15% of the sale price. As a result on a sale price of \$165 000, after occupancy of over 5 years, the deferred management fee would be equal to \$24 750.

Whilst such fee arrangements seem to be common practice in the industry, there are questions to be raised as to their appropriateness, especially concerning their size, when they coexist alongside circumstances where a resident has to pay for the relocatable dwelling as well as a fortnightly rental. That the particular structure is mandated in the standard form contract and is thus seemingly non-negotiable may adversely affect certain retirement village tenants and their estates.

7.3.3.4 Events of default and landlord's rights

One Occupancy Agreement examined allows the village owner as landlord to re-enter the premises and end the Occupancy Agreement for a variety of reasons that go beyond those outlined in the Residential Tenancies Act 1997. Of particular concern are the reasons pertaining to the Resident becoming bankrupt, entering into a composition or arrangement with their creditors or, more broadly, becoming "unable to pay their debts as and when they fall due".

Whilst the Property Law Act 1958 (Vic) is invoked to give the Resident fourteen days to remedy a breach capable of remedy, it is unclear how something such as becoming bankrupt may be remedied. The rights of the landlord do not necessarily have to be invoked in a particular case, but they may do so 'on any later occasion'.

This standard form term clearly creates a potential precarious situation for the Resident, and large imbalance in parties' rights, despite their ownership of the relocatable dwelling and the possibility that they may be able to find a way to pay their rent regardless of specific circumstances. That the Resident be unable to even enter into debt management and repayment agreements without the fear of being ordered to vacate is alarming.

7.3.3.5 Interest rate on overdue money

The standard form Agreement also fixes an interest rate on overdue money at 4% more than the rate fixed from time to time by the Penalty Interest Rates Act 1983 (Vic).

As the overdue money will most likely take the form of rent, this item may be contrary to the Residential Tenancies Act 1997 (Vic). Consumer Affairs Victoria state that it is illegal for a landlord or agent to charge any sort of administration fee or 'late fee' to process rent payments, even if the rent is late or in arrears, which may include the charging of interest. The standard form agreement therefore seems to attempt to curtail the relevant legislative framework.

7.3.3.6 Dispute Resolution

Whilst it seems possible for some contracts to include a mediation clause, which require parties to attempt to resolve any dispute by mediation procedure before attempting legal proceedings, there is potential concern as to the impact of such specific dispute resolution clauses in the context of retirement villages.

This is especially so given that the cost of such a dispute resolution mechanism is borne equally by the parties as opposed to processes, such as those provided by the VCAT and equivalents, which may have substantially lower fees. It may well be that the requirement that mediation be undertaken may dissuade legitimate concerns being raised with village management, and prevent them from being resolved quickly, efficiently and inexpensively at the VCAT's Residential Tenancies List and equivalents.

7.4 Need to improve unfair contract term protection and remedies across all industries

WEstjustice believes that the examples above demonstrate the urgent need for a targeted review of site occupancy agreements in the retirement sector by the appropriate regulatory bodies.

A 'retirement village disclosure and contract regulations consultation' was held by Consumer Affairs Victoria in 2013, but it focused on examining the costs and benefits of the proposed regulations to help consumer better understand their rights and obligations when choosing and living in a retirement village, and did not deal with the question of unfair contract terms.⁷³

Recommendation 7: That the regulators complete a targeted review of standard site occupancy agreements in the retirement living sector to identify unfair contract terms.

However, more generally, the intersection between different areas of law inherent in standard form tenancy contracts can make the enforcement of such provisions more complex, as demonstrated by the intersection of the ACL with the *Residential Tenancies Act 1997* (Vic) in the case studies above. This means that such issues when uncovered will not necessarily fit into a simple framework of the VCAT or CAV for enforcement mechanisms.

It may thus be recommended that the ACCC generally turn its mind to providing clarity when such complexity and intersection is raised and the most appropriate authorities to

⁷³Consumer Affairs Victoria, *Retirement village disclosure and contract regulations consultation* <<https://www.consumer.vic.gov.au/resources-and-education/legislation/public-consultations-and-reviews/retirement-village-disclosure-and-contract-regulations-consultation>>.

enforce consumer rights. It seems apparent that there can be confusion as to the ACL and the precedent that it takes over other legislation in the field of enforcement.

Recommendation 8: That there be further campaigning and advertising to make clear that the provisions on unfair contract terms in standard form contracts cannot be contracted out of or superseded by reference to any other legislative framework.

Recommendation 9: That to fulfil the above recommendation, persons in contravention of the unfair contract term provisions be able to be ordered by the court, on application by the regulator, to cover the costs of campaigns or advertisements targeting their particular industry.

Under the current legislative framework of the ACL, an individual claimant may be awarded damages⁷⁴ as well as being able to seek a declaration that certain terms in the contract in question have been unfair.⁷⁵ Westjustice recommends more broadly, in light of the examples above, that regulators be given the power to seek monetary penalties against businesses in breach of the unfair contract term provisions. This would be in addition to having the unfair provisions declared void.

Whilst industry wide reviews, such as those conducted by the ACCC, might bring certain standard form contracts in line with the ACL, it is worrying that it seems that it is only after such intervention that certain businesses see fit to change problematic contract terms. Some of these terms, such as those above, *prima facie* flaunt the requirements of standard form contracts and the expectation that they be fair.⁷⁶

The prohibition on unfair contract terms has been in effect since 1 July 2010 and businesses should now be well aware of them. The regulator should not be expected to make an intervention in order to effect change. The possibility for penalties may provide the incentive for business to ensure that any new standard form contract it enters into complies with the legislative framework.

Recommendation 10: That collaborative compliance mechanism, such as reviews of particular industries or the publication of guides for industry,⁷⁷ be complemented by giving regulators the power to seek monetary penalties against business in breach of unfair contract term provisions.

⁷⁴ACL s 236.

⁷⁵ACL s 250.

⁷⁶See generally Australian Competition and Consumer Commission, 'Unfair Contract Terms: Industry Review Outcomes' (Report, March 2013).

⁷⁷See, eg, Consumer Affairs Victoria, 'Preventing unfair terms in health and fitness centre membership agreements: A guide for the health and fitness industry' (Guidelines, 2011)

It may well be that the awareness and effectiveness of such penalties would be bolstered if the regulator had the power to take an action, such as a representative action, against systemic unfair contract terms.⁷⁸ WEStjustice would be supportive of such a power.

Recommendation 11: That the regulators be given the power to take representative action against systemic unfair contract terms.

Issues in relation to unfair contract terms in standard form contracts are not confined to particular industries. That reviews have been carried out in relation to the provision of goods and services as disparate as hire cars, internet providers, telecommunications and fitness centres attests to this fact.⁷⁹ It may be that penalties are not the only way in which the ACCC could approach issues surrounding unfair contract terms. It is recommended that regulators should turn their mind to developing a framework for effecting change in all the issues pertaining to standard contract more broadly. Targeting specific industries should not be the only solution.

Recommendation 12: That the regulators develop an innovative framework to encourage higher standards across the business community with regard to standard form contracts. Within this framework, targeted interventions should play a role, but not be solely relied on.

⁷⁸Consumer Affairs Australia and New Zealand, 'Australian Consumer Law Review', above n 26, 16.

⁷⁹See, eg, Australian Competition and Consumer Commission, 'Unfair Contract Terms: Industry Review Outcomes' (Report, March 2013); Consumer Affairs Victoria, 'Preventing unfair terms in consumer contracts: Guidelines for businesses' (Guidelines, 2011) 8.

8 Purchasing Employment

8.1 Employment Law Service

The WEstjustice Employment Law Service provides free employment law advice, referral, casework and advocacy to clients from refugee and newly arrived communities who live, work or study in the western suburbs of Melbourne.

The Employment Law Service assists clients with a wide range of matters including, wages and entitlements (sham contracting), unfair termination, workplace injury, bullying/discrimination, disciplinary action and sexual harassment.

“I came across a client [who] got a last reminder notice that his matter was going to the debt collector regarding [payment for] the medical exam to get a job totalling \$700. I asked him [if he was told] in the first step that he had to pay this amount, and he told me no” – Settlement worker, WCEC.

Many of our clients do not understand Australian laws, do not speak English, are illiterate in their own languages and would not have enforced their rights without help from the service.

The WEstjustice Employment Law service works with newly arrived and refugee communities in the West of Melbourne. Through our casework we see a broad range of issues that arise for this vulnerable client group.

We have recently seen the emergence of people claiming to be able to offer work in return for a vulnerable worker paying them an initial upfront fee and/or expending money on vehicles and equipment. In most circumstances, the job never eventuates and the clients are left with the difficult task of trying to recover their funds. This trend of employers or employment agencies acting in a way which is misleading, deceptive and unconscionable is examined in more detail in the following three client stories.

8.2 Case Studies

Case study: Guang

Guang had been working for a labour hire agency as a technician. He had been working with a large client for more than 18 months when he was offered a full time position at \$50 per hour by a different recruitment agency.

The recruitment agency interviewed Guang and he subsequently signed a contract with them. The contract did not include any guarantee of work hours. The agency also told Guang that he would need to source his own vehicle for the job and that the agency could not hire one to him for that purpose. Guang then purchased a vehicle for \$16 000 for the job.

When Guang attended on his first day of work, the agency advised him that he did not have sufficient skills to perform the work and dismissed him. Guang received a payment of \$800 but it was not clear what this payment was for.

Case study: Quan

Quan was working as a courier. He was offered work but he was told that he was required to pay \$15 000 to the employer for a 'run' (opportunity to work). Quan signed a contract which guaranteed \$2 000 per week income. Quan paid the \$15 000 and signed the contract. However, the employer only paid him about \$1 000 per week and he was still owed \$5 000 in wages.

After a lawyer assisted Quan to draft a letter of demand for both the unpaid wages and the \$15 000 he had paid for the work, the employer gave him a cheque for \$15 000; however when Quan banked the cheque it was dishonoured. The employer then began repaying the debt by instalments, however this too stopped after two instalments.

Case study: Tanvir

Tanvir found an advertisement for plastering work on a popular trading website. The employer told him he would need to pay \$2 500 as bond for the work vehicle and for access for the building site. Tanvir met the employer and paid the \$2 500 in cash. The employer told him he would get the contract on his first day of work.

After a week, Tanvir had still not heard from the employer so he called him a number of times. The employer did not respond at all and has now disappeared.

Case study: Dugung

Dugung paid \$10 500 to his employer for training to become a cleaner. He was told he would complete 10 days of training and that once training was complete he would commence work. He was promised a weekly income of \$2 600.

After 10 days of training, Dugung was told that he did not have a job as there was not enough work for him. His boss made two refund payments to him, one of \$4 500 and one of \$3 000. When Dugung asked for the remaining \$3 000 he was told that this money had been deducted for training costs.

Dugung was not paid for his training and came to see WEstjustice for advice on getting his money back.

8.3 ACL

The ACL states:

31 Misleading conduct relating to employment

A person must not in relation to employment that is to be, or may be, offered by the person or by another person, engage in conduct that is liable to mislead persons seeking the employment as to:

- (a) The availability, nature, terms or conditions of the employment; or
- (b) Any other matter relating to the employment.

Note: A pecuniary penalty may be imposed for a contravention of this section.

Despite the fact that the prohibition on misleading or deceptive conduct in relation to employment is part of the ACL and therefore, in Victoria, within the jurisdiction of the VCAT, seeking redress for a violation may not be so clear to members of the public.

Prima facie, a contract for employment would not seem to relate to consumer law. A statement on the VCAT website that it cannot hear disputes between an employer and an employee seems to confirm this assumption.⁸⁰ When asked, the VCAT reception at a branch location did not know whether misleading or deceptive conduct in relation to employment was part of the VCAT's jurisdiction or would be part of the Civil Claims list. A review of the VCAT's case history suggests that this issue has not yet been raised in a dispute, a problem which may be related to the lack of clarity. As a result, those seeking advice or relief for such conduct may be left unsure as to whether they have rights against it, or where they can enforce those rights.

The remedies available for this type of misleading conduct are also difficult and confusing from the perspective of a claimant. Compensation for a contravention of s 31 under s 236 is usually calculated with reference to the loss sustained in reliance of misleading or deceptive representations, often termed 'reliance loss'.⁸¹ This means that claimants should be able to recover money paid for the opportunity for work that never eventuates and for "so called" training courses that provide no real value. It is unlikely that a claimant could claim lost wages from a job which never eventuates or ends prematurely, which would fall under the head of 'expectation loss'.⁸² A consumer might be able to recover damages for wages forgone working elsewhere as a result of pursuing the promised opportunity. However the evidentiary onus is on the claimant to show that alternative work arrangements would have

⁸⁰VCAT, *Civil Disputes* (2016) <<https://www.vcat.vic.gov.au/adv/disputes/civil-disputes>>.

⁸¹*Cf Haros v Linfox Australia Pty Ltd* [2011] FCA 699.

⁸²*Rakic v Johns Lyng Insurance Building Solutions (Victoria) Pty Ltd (Trustee)* [2016] FCA 430.

been made and to show their lost income,⁸³ which can be difficult for precarious workers and the unemployed.

Recommendation 13: A clear statement to be included in the ACL that a claimant who pays money in response to a misleading statement about employment is prima facie entitled to recover that payment and any loss or damage suffered because of the conduct including wages.

Recommendation 14: A clear statement to be included on the website of each state or territory tribunal that they will accept claims under section 31 of the ACL.

Recommendation 15: That tribunal staff be trained on why matters under section 31 are within the tribunal's jurisdiction

⁸³*Gates v City Mutual Life Insurance Society Ltd* (1986) 160 CLR 1.

9. Addressing unfair commercial practices

9.1 Background on the rogue ‘carnapping’ model

WEstjustice has experienced business models that target a class of consumers who are unaware of alternative services available to them. These business models are generally classed as ‘carnapping’ scams.

Consumers involved in a car accident are encouraged, either by a tow truck operator or a smash repairer, to sign a form that authorises a third party to act on behalf of the consumer. The consumer is generally not made aware of the nature of the document, and many consumers make a mistaken inference that the form is merely related to the towing or repair of their vehicle.

This form has the legal consequence of allowing a third party to act on the consumer’s behalf, such as power of attorney, and this results in significant fees being charged for representation to the consumer. The consumer is usually the not-at-fault driver in the accident, and is understandably extremely vulnerable. Consumers may be in shock, worried about the consequences of losing their car, unfamiliar with the process, and overly trusting of operators and repairers at the scene offering to help. Consumers who are newly arrived migrants or elderly are particularly vulnerable to this form of exploitation as they are less likely to make enquiries and may have difficulty understanding the complex processes.

The business model appears to be structured so that smash repairers can charge inflated prices for repairs, towing and replacement car hire on the basis that the at-fault party will accept the inflated fees rather than take legal action.⁸⁴ If the insurer or the at-fault driver will not pay, the repairer will demand payment from the consumer instead.

These smash repairers often offer hire cars at no cost to the not-at-fault driver, based on the premise that the at-fault driver or insurer will pay. However, this may not happen where the at-fault driver is not insured or their claim is rejected, is judgment-proof, or disputes liability. This risk is not mentioned by the smash repairers.

⁸⁴See, eg, Smash Repair Lawyers *How It Works* <http://www.smashrepairlawyers.com.au/what_we_do_2.html>.

9.2 Case studies

Case Study: Beryl

Beryl was an elderly driver who was not at fault in an accident. When getting her vehicle repaired, Beryl was informed by the repair shop that as the not-at-fault driver, the at-fault driver's insurance company would pay for her to use a hire car while her vehicle was being repaired. Beryl was given the number for a hire car company and encouraged to arrange a hire car. The hire company should, at this point, have referred Beryl to her own insurer, but this was not done.

Beryl contacted the hire car company, who also reassured her that this would be covered by the other driver's insurance. Beryl provided her bank details when signing a form with the company. However, a few days later, the company told her that the insurance company refused to pay, and that her only option was to pay for the hire car privately. Beryl, believing she had no choice, agreed to this arrangement.

The repair shop continued to delay on repairing her vehicle, and Beryl continued to have to pay the hire company a daily rate for the hire car for several weeks. Beryl ultimately sought assistance from WEstjustice, but suffered significant distress in the meantime due to the sustained ordeal of waiting for her vehicle to be repaired. She was a vulnerable consumer, taken advantage of by the repair shop and hire company in what appeared to be a coordinated scheme to delay repairs and increase hire fees.

Case Study: Jack

Jack was involved in a motor vehicle accident and was the not-at-fault driver. He had very little understanding of his rights under his comprehensive insurance policy and contacted a recovery agent recommended by the towing company instead of lodging a claim with his insurer. Jack was convinced by the recovery agent that they would recover the cost of repairs from the other driver with no cost to him. He was then asked to sign their Authority form. While the paper work provided by Jack shows that he did not sign the Authority form, his vehicle has been repaired by the recovery agent.

A few days later the client received a letter from a law firm advising that the other driver had not responded to their letter of demand and that it has become necessary to commence legal proceedings against the other driver. It was not clear whether the other driver was insured or if the claim was refused by the other driver's insurance.

Jack initially was reluctant, but eventually signed the form sent by the lawyer. He only did so as not signing meant that he would definitely be sued by the recovery agent for the repair cost. Jack sought assistance from WEstjustice in attempting to negotiate with the other party to recover the costs of the repair, and take the case to court if the recovery agent does pursue him for costs.

Case Study: Pha

Pha was a newly arrived migrant who had difficulty speaking and reading English. He was involved in a motor vehicle accident caused by a third party. Following the accident, the at-fault driver told Pha that he was insured and that he would 'sort it out'. Pha's car was also comprehensively insured for an agreed value.

Pha's car was towed to a mechanic where he was given an authority document to sign that conferred broad powers of agency to a particular recovery agent to act on Pha's behalf. The tow truck driver did not identify which company he worked for, and Pha believed they were a representative from his insurer. The terms of the document were not explained to Pha, despite the fact he could clearly not understand English. Pha was not given a copy of the signed document.

Case Study: Pha cont/-

The following day, two individuals came to the Pha's home and requested he sign a rental car agreement. They did not identify which company they came from and they did not explain the terms to Pha. This agreement included daily charges of close to \$100, which Pha would be liable to pay if the recovery agent could not recover from the third party's insurer. Pha told WEStjustice that whilst he signed 'Part A' of the rental agreement, he did not sign 'Part B' and any signature attached was not his.

Pha received a phone call from the recovery agent three weeks later. He was informed that the car was written off and that the agency would give him the agreed value. Pha consented to this and he passed on his registration and licence details. This money was outstanding after two weeks, so Pha's niece called his insurer and was advised that Pha needed physical possession of the vehicle to make a claim, and that he should request that the recovery agency cease all action.

Pha's niece called the recovery agency to request that they stop all action on Pha's behalf. The representative stated that the car had already been sold at market value for less than the insured value and that the agency would be retaining half of that amount for payment of the rental car. The recovery agency has since verbally alleged that the client caused damage to the rental car, incurring a vehicle damage excess of over \$1 000, in contradiction to the statements made by individuals who collected the rental car who said that the car was in perfect order. The recovery agency has failed to provide details of the damage.

The recovery agency has since advised WEStjustice that they received a settlement sum from the other driver's insurer; close to the agreed value it had been insured for, from which they subtracted the excess amount for the alleged rental car damage and close to \$500 for a recovery fee. They allege that they mailed Pha a cheque for the remainder of the settlement sum and another for over \$1 000 for the salvage of Pha's car. Pha did not consent for his car to be sold as salvage and he is yet to receive either of these cheques. Further, the recovery fee was not explained to the client.

Case Study: Bruce

Bruce was the at-fault driver in a motor vehicle accident. He was not insured and he had unknowingly defaulted on his monthly payments towards his third party car insurance, resulting in the cancellation of his policy. The other driver was insured, however their insurance company is yet to pursue Bruce for the costs of the damage to the other driver's car.

Bruce received a 'Final Notice' letter from a car accident management service four months after the accident. The letter demanded close to \$6 000 for close to two months of hire car fees charged to the other driver while the other driver did not have possession of his damaged car. After Bruce's son called this service in relation to this letter Bruce was provided with a Tax Invoice, Estimate and Supplementary documentation from the business that repaired the other driver's car.

WEStjustice contacted the car accident management service and were advised that they were retained to recover the hire car charges for the other driver, as the hire car charges were not covered by the other driver's insurance. Due to a smashed tail light, the other driver's car was determined not drivable until repairs had taken place.

WEStjustice was further advised that due to delays out of the other party's control, the business that repaired the other driver's car only assessed the other driver's car two months after the accident. The repairs were completed two weeks after this. This business is yet to provide a written account of the relevant information and dates and copy of the Letter of Need it has on file, outlining the reasons as to why it was necessary for the other driver to engage a hire car service.

9.3 Ability of ACL to deal with these practices

Victims of the carnapping model may have some recourse available to them under the existing provisions of the ACL, but this is contingent on the facts of each case. These relevant ACL provisions only operate retroactively and do not address the systemic abuses found in the carnapping model.

9.3.1 *Unconscionability*

The prohibitions on unconscionable conduct in s 20 and 21 of the ACL may provide relief to victims of carnapping. The difficulty is in establishing that the high standards for ‘unconscionability’ are met. The ACL recognizes both unconscionability within the context of ‘the unwritten law’ and statutory unconscionability. While statutory unconscionability is considered the broader of the two, as it is capable of applying to patterns of behavior and is not limited by the confines of the unwritten law,⁸⁵ there is still uncertainty regarding the scope of the prohibition. The bulk of cases dealing with statutory unconscionability have endorsed a narrow standard of unconscionability that requires some level of ‘moral obloquy’.⁸⁶ Although the Federal Court recognized a broader standard of unconscionability, which is determined with reference to the ‘norms of society’,⁸⁷ it is still unclear what these norms require and what evidence is required to establish a failure to meet them. In the case of *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC90 (*Lux*) a critical determining factor was that the sales technique found to be unconscionable relied on a deceptive ruse to gain entry into the home of consumers.⁸⁸ There are parallels in the carnapping cases, in that consumers are confused about the real nature of the transaction they are being asked to enter into by signing a contract. However, in the absence of a positive misrepresentation by the companies concerned, as opposed to conduct that simply fails to explain the ‘true’ state of affairs in the document being signed, it is unclear whether the conduct would be found to contravene the statutory prohibition.

It is generally accepted that unconscionability is a much higher threshold than unfair practices and a ‘general power imbalance’ alone would be insufficient to meet the unconscionability standard.⁸⁹

9.3.2 *Misleading and deceptive conduct*

Victims of carnapping may seek recourse where there has been misleading or deceptive conduct. However, the circumstances in which ACL will protect consumers who have been misled on account of an omission by another party are very uncertain. Under the ACL a decisive consideration in deciding whether a failure to disclose information is misleading is whether a consumer would have a reasonable expectation of disclosure.⁹⁰ This uncertainty has the effect of creating a significant regulatory gap as many victims of the carnapping model may sign authority documents under the false assumption that the documents relate to repairs or towing without being expressly misled.

⁸⁵See, eg, *Body Bronze International Pty Ltd v Fehcorp Pty Ltd* [2011] VSCA 196.

⁸⁶*Attorney General (NSW) v World Best Holdings Ltd* [2005] 63 NSWLR 557; *Director of Consumer Affairs (Vic) v Scully (No. 3)* [2013] VSCA 292.

⁸⁷*Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90, [41] (*‘Lux’*).

⁸⁸*Ibid* [65].

⁸⁹Australian Securities and Investment Commission, Submission No 45 to the Senate Economics Reference Committee, Parliament of Australia, *Inquiry into the performance of the Australian Securities and Investments Commission* (October 2013) 6

⁹⁰See, eg, *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546, 557 (Lockhart J).

9.3.3 *Limitations of the existing protections under the ACL*

Current mechanisms in the ACL that may protect consumers against the ‘carnapping’ model are all retroactive, and are contingent on consumers identifying the specific encroachments and seeking remedial action. This is problematic as the consumers may not become aware of these practices until very late in the process, and consequently may have accrued significant debts and relinquished their proprietary interests, limiting the ability of insurers to cover the loss.

Reliance on specific consumer protections in the ACL may be difficult for vulnerable consumers, who may not be aware of their rights and how to enforce them. Furthermore, vulnerable consumers may be at a greater risk of intimidation and be less likely to keep documentary evidence of any wrongdoing.

9.4 Overseas models for prohibiting unfair commercial practices

9.4.1 *European Union*

The *Unfair Commercial Practices Directive 2005* provides a regime for regulating unfair business-to-consumer commercial practices, including a general prohibition against unfair commercial practices as well as more specific prohibitions, including misleading and aggressive commercial practices.⁹¹

Under Article 5, unfair commercial practices are described as those that are:

- (a) contrary to the requirements of professional diligence; and
- (b) materially distort or likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.

Under Article 7 a commercial practice will involve an unfair misleading omission if:

in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

There is also a list of specific unfair practices in Annex 1.

⁹¹Council and Parliamentary Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149/22.

9.4.2 *United States*

Section 5 of the *Federal Trade Commission Act* prohibits ‘unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce’.⁹² ‘Unfair or deceptive acts or practices are ones that [cause] or are likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition’.⁹³ However, the Commission ‘may consider established public policies as evidence’ as well.⁹⁴

9.4.3 *WEstjustice’s view*

WEstjustice supports a wider protection that enables preventative measures. This is captured by the ‘likely to cause’ wording in both models. In addition, the specific examples in the European Model may assist in legislating to prevent carnapping models, or other similar practices, as well as provide assistance to professionals in the area with regards to what is and is not acceptable conduct.

Recommendation 16: Amend the ACL to include a general prohibition against unfair commercial practices and that the legislation lists specific practices that are prohibited in all circumstances.

Recommendation 17: Amend the ACL to include an express prohibition on misleading or deceptive conduct by omission.

Whilst WEstjustice acknowledges that under common law the ACL has been interpreted to include misleading and deceptive conduct by omission, we believe the ACL would be improved if an explicit statement to this effect is added.

Recommendation 18: Launch an ACCC investigation into the car hire/repairer scam.

⁹²*Federal Trade Commission Act* 15USC, § 45.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

10. Alternative dispute resolution mechanisms

10.1 Ombudsmen

An alternative to the traditional court and tribunal system is the use of external dispute resolution schemes. Such schemes are not novel to the Australian context. Current Industry Ombudsman schemes include the Financial Ombudsman Service (FOS), the Telecommunication Industry Ombudsman (TIO) and the Energy and Water Ombudsman Victoria (EWOV).⁹⁵

Such schemes are independent, free of charge, less formal and generally faster than tribunals such as the VCAT and equivalents. When resolving a dispute the schemes are required to take account of the law, good industry practice and what is fair and reasonable in each circumstance.⁹⁶

Industry Ombudsman schemes are generally funded through regular membership fees and additional fees paid by a business when a consumer makes a complaint against a particular trader. Businesses thus have clear incentive to settle a dispute before the scheme is engaged and disadvantaged individuals are 'not deterred from bringing disputes by an unaffordable fee or potential cost risks'.⁹⁷

In their submission to the Victorian Department of Justice and Regulation's *Access to Justice Review*, the CALC writes that the establishment of these Ombudsman schemes has been one of the most significant advances in consumer protection of the past 30 years.⁹⁸ Westjustice endorses this point of view. These schemes have allowed hundreds of thousands of people an avenue to redress.⁹⁹

10.2 VCAT: Current Barriers

At present, in the retail sector, it seems that structural barriers in current dispute resolution procedures are denying consumers' access to justice. If Victorian consumers are unsuccessful in resolving a dispute with a retailer, their only option is to take the matter to the VCAT or to go through the court system.

As indicated in our submission to the *Access to Justice Review*,¹⁰⁰ the overly legalistic nature of the VCAT reinforces the power imbalances between retailers and consumers. The VCAT's

⁹⁵ Stephen Corones et al, Department of Treasury (Cth), *Comparative Analysis of Overseas Consumer Policy Framework* (2016) 218.

⁹⁶ Ibid.

⁹⁷ CALC, Submission No 53 to the Department of Justice and Regulation, Parliament of Victoria *Access to Justice Review*, 29 February 2016, 22 ('CALC Access to Justice submission').

⁹⁸ Ibid 20.

⁹⁹ Ibid.

¹⁰⁰ Westjustice, Submission No 12 to the Department of Justice and Regulation, Parliament of Victoria *Access to Justice Review*, Submission, February 2016, 36.

arduous procedural requirements for civil claims list applicants, including service of documents upon the respondents, fee waiver requirements and the increases to its application fees have made the VCAT a difficult and costly dispute resolution body to navigate.¹⁰¹ Furthermore, the fact that, at the VCAT, consumers have no automatic right to representation for claims under \$10 000 severely disadvantages individuals from newly arrived communities with poor communication skills.¹⁰²

*“The wait times are too long...[they] need to be decreased and better services need to be given” –
Settlement worker, NH.*

To initiate a proceeding with the VCAT, the onus of proof is on the consumer to provide substantial evidence of a breach of the ACL. This task is almost impossible for a disadvantaged citizen who does not have the appropriate knowledge, experience or communication skills to self-advocate.¹⁰³ Furthermore, as the VCAT’s decisions are unenforceable, orders are often escalated requiring registering with the Magistrates’ Court and enforcement proceedings.

Thus, whilst in theory these avenues of legal redress exist, the complex architecture of these dispute resolution processes undermines true access to justice.

10.3 Call for establishment of a Retail Ombudsman

Westjustice supports CALC’s recommendation for the establishment of a Retail Ombudsman in Australia to seek to remedy these complex issues, by enabling an effective and simple mechanism for dealing specifically with disputes between traders and consumers.¹⁰⁴

The Retail Ombudsman should deal with complaints to do with the sale of goods and services that are purchased both online and in-store,¹⁰⁵ and should be led by experts within the fields of consumer law and ADR.¹⁰⁶ A Retail Ombudsman would, unlike the VCAT or equivalent tribunals, provide a time efficient dispute resolution service that is free for

¹⁰¹Productivity Commission, *Access to Justice Arrangements*, Inquiry Report (2014) 357.

¹⁰² Stephen Corones, Sharon Christensen, Justin Malbon, Allan Asher & Jeanie Marie Paterson, *Comparative Analysis of Overseas Consumer Policy Framework*, The Commonwealth Department of Treasury, (2016) 201.

¹⁰³ M A Noone, ‘Public Interest Law and Access to Justice: the Need for Vigilance’ (2011) 37 *Monash University Law Review* 57.

¹⁰⁴CALC *Access to Justice submission*, above n 98, 21.

¹⁰⁵ The Retail Ombudsman, *Complaints We Can Deal With* <<https://www.theretailombudsman.org.uk/about-us/complaints-we-can-deal-with/>>.

¹⁰⁶CALC *Access to Justice submission*, above n 98, 26.

consumers thereby empowering low income consumers to bring disputes without facing unaffordable fees or potential cost risks, as described above.¹⁰⁷

WEstjustice supports CALC's submission that such a Retail Ombudsman be based on the United Kingdom (UK) model.¹⁰⁸

10.3.1 UK Retail Ombudsman

The UK Retail Ombudsman is funded by retailers, who pay a membership in accordance to the size of their business.¹⁰⁹ It hears complaints 'relating to goods and/or services purchased either in stores or online'.¹¹⁰ Unlike other Australian Ombudsman models, the UK Retail Ombudsman does not require all retailers to join by law and instead adopts an 'opt-in' model.¹¹¹ This means that retailers must choose to become a member of the Ombudsman to engage in this dispute resolution process. Single shop 'bricks and mortar' retailers may join for free whilst any other retailers, including single shop plus online, pay for membership annually according to a sliding scale relating to the size of their business.¹¹² Currently, annual membership ranges from around \$200 to \$5 000 dollars.¹¹³

Importantly, this Ombudsman is free to consumers, providing consumers with a cost-effective means of resolving their retail disputes. Decisions made by the Retail Ombudsman are only binding on the retail member, allowing the consumer to still have the option to take the matter to a tribunal or court.¹¹⁴

Additionally, whilst only members of the scheme are contractually obligated to implement the decision, the Retail Ombudsman still has power to investigate matters concerning non-members. In such cases, non-member retailers have discretion to abide by the decision.

A particular feature of the UK Retail Ombudsman is an Independent Standards Board. The Independent Standards Board's mandate is to scrutinise the Ombudsman and make sure it maintains its impartiality, independence and fairness.¹¹⁵ The retail industry may make up a maximum of 20% of the members of the Independent Standards Board.¹¹⁶

¹⁰⁷See also *ibid* 22.

¹⁰⁸ *Ibid*.

¹⁰⁹ *Ibid*.

¹¹⁰*Ibid* 26.

¹¹¹*Ibid*.

¹¹²*Ibid*.

¹¹³Kate Palmer, 'New Retail Ombudsman can investigate your shopping complaint- but it comes with a catch', *The Telegraph* (online), 19 January 2015

<<http://www.telegraph.co.uk/finance/personalfinance/11333939/New-Retail-Ombudsman-can-investigate-your-shopping-complaint-but-it-comes-with-a-catch.html>>.

¹¹⁴ The Retail Ombudsman, *Our Powers*<<https://www.theretailombudsman.org.uk/about-us/our-powers/>>.

¹¹⁵*Ibid*.

¹¹⁶CALC *Access to Justice submission*, above n 98,26.

10.4 Implementation in Australia

The implementation of an Australian Retail Ombudsman would thus be an industry-funded scheme available alongside the VCAT and equivalent to facilitate a platform for consumers to seek redress of their retail disputes in a cost effective and straightforward way.

Such a Retail Ombudsman would be free of charge to consumers and its decisions binding on member retailers, thereby producing a dispute resolution system that is accessible and enforceable. Through this it would provide a regulatory support function within the retail industry that would strengthen fair trading conduct like other Australian Ombudsman schemes have done, such as the EWOV, TIO and FOS. Binding determinations and case studies would be able to be published in annual reports or the like thus giving parties a guide to likely outcomes in a dispute. Consumer satisfaction would be aided by the specialised nature of an Ombudsman services that allows resolutions to be tailored to the individual dispute and needs of the consumer.¹¹⁷

The benefits of an Ombudsman scheme should not only extend to consumers. Its implementation should seek to provide an ethos of good and fair conduct amongst retailers. Although the UK Ombudsman does not require retailers to be members of the scheme, WEstjustice believe that an 'opt-in' system could be strategically designed to successfully encourage retailers to become members of the scheme.

The UK Retail Ombudsman's introduction of an accredited member 'gold tick' of approval is one example. For an additional fee, currently set at around \$200, this feature enables retailers to undergo extra vetting by the Ombudsman to be recognised 'as a trustworthy firm to do business with'.¹¹⁸ The Ombudsman confirms that the retailer's dispute resolution policies are fair and that they are upholding their corporate responsibilities.

At the conclusion of this process, the UK Retail Ombudsman lists the retailer as an accredited member and allows them to use the gold tick on all of their promotional material. WEstjustice believes that such a feature should also be included in an Australian scheme so as to couple membership with marketing opportunities advantageous to business.

Following CALC's submission, WEstjustice supports the introduction of an Australian Retailer Ombudsman with the power to investigate disputes between non-member retailers and consumers, mirroring the UK model.¹¹⁹ Although these decisions may not be binding, WEstjustice believes that such a mechanism would extend the reach and influence of this proposed ADR scheme.

¹¹⁷ See M SalehJaberi, 'Solving securities exchange disputes by means of ombudsmen: Does it work?' (2014) 25 *Australasian Dispute Resolution Journal* 55.

¹¹⁸ Dominic Sacco, 'Policing PC retail: Is the Retail Ombudsman's gold tick just what tech shops need?', *PCR* (online), 17 September 2015 <<http://www.pcr-online.biz/news/read/policing-pc-retail-is-the-retail-ombudsman-s-new-gold-tick-just-what-tech-shops-need/036902>>.

¹¹⁹ CALC *Access to Justice* submission, above n 98, 22.

Recommendation 19: WEstjustice recommends the establishment of an Australian Retail Ombudsman based upon the existing UK model. In particular, we recommend that this Ombudsman scheme be:

- industry funded scheme with a “gold-tick” system or similar;
- free to consumers;
- have an Independent Standard’s Board that scrutinises the Retail Ombudsman’s decisions;
- expected to comply with the *Benchmarks for Industry-Based Customer Dispute Resolution*; and
- have the ability to investigate complaints about non-member retailers.