



9 December 2016

By email: aclreview@treasury.gov.au

ACL Review Secretariat
Consumer Affairs Australia New Zealand (**CAANZ**)
c/- The Treasury
Langton Crescent
Parkes ACT 2600

Dear Secretariat

Australian Consumer Law Review: Interim Report

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to respond to the *Australian Consumer Law Review—Interim Report (Interim Report)*.

While we are engaged with the process, we feel that the Interim Report does not strike an even balance between consumer protection and the potential risk of regulatory burden and takes an unfortunate “small target” approach to reform. The primary intent of the ACL—to empower and protect consumers—does not appear to form the underlying narrative of the document. Instead, the Interim Report seeks to present alternative views of various stakeholders, and identify minor regulatory “gaps”, operating from the basis that the ACL as it currently stands is generally effective. In our view, this approach risks squandering the opportunity to significantly move the ACL forward as Australia’s central piece of consumer protection legislation.

In order to more effectively meet its primary legislative objectives we believe that the ACL requires more significant reform than proposed in the Interim Report. These objectives are outlined in the Intergovernmental Agreement for the Australian Consumer Law—and we refer in particular, to the objective to:

“...meet the needs of those consumers who are most vulnerable, or at greatest disadvantage.”¹

As a specialist consumer law legal service providing advice to low-income and otherwise disadvantaged consumers, Consumer Action is particularly concerned that the needs of these consumers be taken into account throughout the ACL Review. In order to genuinely meet this objective, it is necessary to first acknowledge that rational choice theory, which has traditionally

¹ Intergovernmental Agreement for the Australian Consumer Law (2 July), paragraph C, www.coag.gov.au/sites/default/files/IGA_australian_consumer_law.pdf.

Consumer Action Law Centre

Level 6, 179 Queen Street Telephone 03 9670 5088
Melbourne Victoria 3000 Facsimile 03 9629 6898

info@consumeraction.org.au
www.consumeraction.org.au

underpinned much of the thinking behind consumer protection, is an outdated and fallacious conception of consumer behaviour. Significant advances in behavioural economics have been made in the five years since the ACL came into effect and ought to inform any revision of the legislation. In particular, behavioural research around the impact of poverty on cognitive capacity should inform the reform process to ensure the ACL adequately protects vulnerable and disadvantaged consumers.

This research is widely known. For example, high profile multi-institutional research², published in *Science* on August 30 2013 hypothesised that:

*“The poor must manage sporadic income, juggle expenses, and make difficult trade-offs. Even when not actually making a financial decision, these preoccupations can be present and distracting. The human cognitive system has limited capacity. Preoccupations with pressing budgetary concerns leave fewer cognitive resources available to guide choice and action.”*³

Through their laboratory studies, the researchers determined that this hypothesis was correct:

“The data reported here suggest a different perspective on poverty: Being poor means coping not just with a shortfall of money, but also with a concurrent shortfall of cognitive resources. The poor, in this view, are less capable not because of inherent traits, but because the very context of poverty imposes load and impedes cognitive capacity. The findings, in other words, are not about poor people, but people who find themselves poor.

How large are these effects? Sleep researchers have examined the cognitive impact (on Raven’s) of losing a full night of sleep through experimental manipulations. In standard deviation terms, the laboratory study findings are of the same size, and the field findings are three quarters that size. Put simply, evoking financial concerns has a cognitive impact comparable with losing a full night of sleep. In addition, similar effect sizes have been observed in the performance on Raven’s matrices of chronic alcoholics versus normal adults and of 60-versus 45-year-olds. By way of calibration, according to a common approximation used by intelligence researchers, with a mean of 100 and a standard deviation of 15 the effects we observed correspond to ~13 IQ points. These sizable magnitudes suggest the cognitive impact of poverty could have large real consequences.

*This perspective has important policy implications.”*⁴

In terms of consumer protection policy, these findings have particular application to the regulation of unsolicited consumer agreements—where high pressure sales tactics are commonly employed, frequently to the detriment of vulnerable consumers who have a weakened capacity to resist such approaches. When viewed through this lens, it is not surprising that the current cooling off protection is inadequate—and that an “opt-in” approach would be far more effective. The opt-in

² Authors of the study were from the University of Warwick, Harvard University, Princeton University and the University of British Columbia respectively.

³ Mani, Anandi; Mullainathan, Sendhil; Shafir, Eldar; and Zhao, Jiyang, *Poverty Impedes Cognitive Function*, *Science*, Vol 341, 30 August 2013, p. 976.

⁴ Mani, Anandi; Mullainathan, Sendhil; Shafir, Eldar; and Zhao, Jiyang, *Poverty Impedes Cognitive Function*, *Science*, Vol 341, 30 August 2013, p. 980.

model would operate to ensure that vulnerable consumers make purchases of their own volition, rather than feeling pressured into them. Consumer Action has commissioned research from the Centre of Consumer and Employee Wellbeing at Deakin University which strongly supports this assertion, and which we discuss at length later in this submission.

We hasten to add that consumer-centric reform which genuinely takes into account the needs of low-income and vulnerable consumers should not be viewed purely in terms of protection. Through adequate protection, consumers are empowered to engage positively in the market—and financial inclusion is maximised in all sectors of the community and the economy, for the benefit of all.

In 2015, Former Treasurer Joe Hockey spoke about the potential for economic growth through ‘empowered consumers’ and ‘consumer sovereignty’.⁵ For consumers to be empowered, the policy environment should provide them with the support and protection to exercise real consumer choice. That is, available choices should be meaningful and presented in a way that makes it easy to choose. Moreover, the consumer law should encourage a regulatory environment that embraces business models that benefit consumers but effectively tackles business models that inhibit consumer sovereignty (i.e. unsolicited sales and unfair business practices).

As Consumer Action noted in our initial submission to the ACL Review, the Productivity Commission has found that low-income consumers do not always benefit from competitive markets to the same extent as other consumers.⁶ Further research⁷ has found that low-income consumers are often caught in the perverse position of paying more for goods and services than wealthier consumers do. The economic inefficiencies inherent in this dynamic can be partly addressed by the ACL taking greater account of the needs of vulnerable consumers, and fashioning consumer protection accordingly.

For example, the operation of systemically unfair business practices which either directly target or have a disproportionate impact upon low-income consumers could be better addressed through a broad “unfair trading” provision, than they currently are by the existing unconscionable conduct provision.

While the Interim Report finds that, “*On balance...a case has not been made for amending the unconscionable conduct provisions*”,⁸ we maintain that for certain business practices which target vulnerable consumers in financial hardship, such as debt management firms and credit repair companies, an unfair trading provision would provide a higher and more certain degree of consumer protection than the current unconscionable conduct provision.

The recent decision in *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28 (*Paciocco*) indicates that the concept of unconscionability is unlikely to be extended by the courts. Rather than determining unconscionability on the basis of ‘community standards’ as the Full Federal Court had done in *Australian Competition and Consumer Commission v Lux*

⁵ The Hon Joe Hockey, *Australia’s Economic Prosperity*, Address to the Institute of Public Affairs, 31 March 2015. Available at: <http://jbh.ministers.treasury.gov.au/speech/011-2015/>

⁶ Productivity Commission, *Review of Australia’s Consumer Policy Framework*, 30 April 2008, pp 113 - 114.

⁷ Jaravel, Xavier, *The Unequal Gains from Product Innovations*, Harvard University, May 16 2016.

⁸ Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review – Interim Report*, October 2016, p. 109.

Distributors Pty Ltd (No 2) [2015] FCA 903 (**Lux**), in *Paciocco* the High Court instead reverted to the narrower and arguably anachronistic concept of ‘moral obloquy’. As a result, it was recently noted by Professor Bob Baxt that “...the prospects of our courts taking a broader interpretation of the statutory unconscionable conduct remedy has been significantly dampened.”⁹

In that context, and while the Interim Report is unequivocal in its rejection of the concept of an unfair trading provision, we respectfully submit that CAANZ should reconsider this position. This reconsideration should bring particular focus to the effectiveness of the ACL when protecting disadvantaged consumers from sharp business practices.

Consumer Action is pleased that the Interim Report posits the option of unfair contract terms applying to insurance contracts. The exemption of insurance contracts from unfair contracts laws is not justified by the weaker protections of the *Insurance Contracts Act 1984*, and this has long been a frustration for Consumer Action and other consumer advocates. Australian consumers (and it should be noted that those making an insurance claim who often find themselves in a vulnerable position) deserve to be protected from unfair contract terms in insurance contracts, just as they are in other standard form contracts. An extension of unfair contract terms provisions to insurance contracts ranks equally with the shift to an opt-in model for unsolicited consumer agreements as the most positive initiative proposed in the Interim Report.

We note that a general safety provision would also be a major step forward, bringing Australia’s product safety regime onto a more proactive footing—and aligning more closely with community values. We strongly support CHOICE’s advocacy in relation to product safety regulation.

Finally, we are also supportive of the proposal to clarify the consumer guarantee provisions of the ACL by more clearly distinguishing between minor and major failures, and the point at which a succession of minor failures qualify as a major failure. Based on our advocacy for a reversal of the onus of proof for all consumer guarantees (so as to provide for more effective protections for all ‘lemon’ goods), we do not recommend the introduction of industry specific consumer guarantee provisions for motor vehicles (i.e. ‘motor car lemon laws’)—although we repeat our call for the establishment of a dedicated motor vehicle dispute resolution forum, along similar lines to the New Zealand Motor Vehicle Dispute Tribunal.

We note that the recent Victorian Government *Access to Justice* report proposed that Consumer Affairs Victoria (CAV) should establish a dedicated conciliation service for motor vehicle disputes, and utilise technical experts when providing that service.¹⁰ As Consumer Action raised in our initial submission to the ACL Review, the lack of technical expertise held by generalist tribunals such as VCAT, together with the onus on consumers to prove a failure to meet consumer guarantees, lies at the heart of most consumer dissatisfaction with current motor vehicle dispute resolution—and can lead to capricious, costly and unpredictable outcomes. We view the Victorian proposal as a complementary one to the concept of a dedicated tribunal service. The fact that the conciliation

⁹ Baxt, Bob. *Unconscionable conduct: has the High Court “muddied” the interpretation?*, Company Director, October 2016, p. 54.

¹⁰ Victorian Department of Justice and Regulation, *Access to Justice Review*, Recommendation 5.8. Available at: <https://myviews.justice.vic.gov.au/accesstojustice>.

service has been proposed underlines the very real difficulties that consumers, and particularly disadvantaged consumers, experience with motor vehicle disputes.¹¹

Consumer Action's response to the Interim Report is not lengthy, and does not address all seventy of the discussion points raised therein. Instead, we have chosen to focus on those areas which are most significant to us, and where the greatest gains may be made in the current process on behalf of vulnerable and disadvantaged consumers.

Namely, those areas are:

- Unsolicited consumer agreements—and the need to shift from the current cooling off model to an opt-in model.
- The extension of unfair contract terms to standard form insurance contracts.
- Reconsideration of an unfair trading provision as an advancement on the current unconscionable conduct provision—with a similar legislative intent, but more practical effect.
- Clarification of the consumer guarantee provisions.
- Clarification and the application of an opt-in model to extended warranties.
- The creation of a specialist motor vehicle dispute tribunal.
- The implementation of a general product safety provision to make Australia's product safety regime more proactive, and more aligned with community values and expectations.

Our comments are detailed more fully below.

About Consumer Action

Consumer Action Law Centre is an independent, not-for profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

1. Unsolicited consumer agreements

Over the past decade serving low-income and otherwise vulnerable consumers, Consumer Action has consistently encountered consumer harm arising from unsolicited consumer agreements. While the products sold have varied (to include energy contracts, education software, mattresses and solar panels amongst others), a key feature across all cases is the use of high pressure sales tactics either over the phone or at the door, to sign consumers onto contracts that they do not need or even really want.

¹¹ We believe, that to be effective, this conciliation service, will need to have binding determinative powers, along the lines of ombudsman schemes or the soon-to-be-established Domestic Building Dispute Resolution Victoria service.

In the energy sector, systemic issues arising from unsolicited door to door sales have resulted in a series of large fines for major energy retailers.¹² In 2013 Energy Australia (along with the other large energy retailers) voluntarily chose to cease unsolicited door to door selling, and has been vocal in their call for others in the industry to do the same.¹³ Energy Australia CEO, Catherine Tanna, has stated:

*"EnergyAustralia stopped door knocking in 2013 because it was the right thing to do. There's no good reason for the practice and we'd like to see all retailers do the right thing and stop door-to-door sales."*¹⁴

While the Interim Report does not support a ban on unsolicited door to door sales, (noting that it would be a significant regulatory intervention, and could only be justified on the basis that all other forms of regulation have failed)¹⁵, the paper does present a number of options for milder regulation of unsolicited sales. Of the options presented, Consumer Action is strongly supportive of option 2—replacing the cooling off period with an 'opt-in mechanism'.

Our support for option 2 is grounded in our experience that the current ten day cooling off period for unsolicited consumer agreements is very rarely used by consumers generally, and is even less likely to be used by vulnerable consumers balancing the pressures of low-income living with other factors. For a variety of behavioural reasons, consumers are pre-disposed not to utilise cooling off periods. Consumer Action has worked extensively with Dr Paul Harrison, co-Director of Deakin University's Centre for Consumer and Employee Wellbeing, and professor of marketing at Deakin Business School. In a recent article in online publication *The Conversation*, Dr Harrison explained the propensity not to use cooling off periods in the following terms:

"The problem with the current cooling-off periods is that they operate after a customer has taken ownership of something or signed an agreement. Our research finds cooling-off periods simply don't overcome many of the inherent biases of human behaviour.

Dr Josh Newton and I, from Deakin University's [Centre for Employee and Consumer Wellbeing](#), tested how 759 consumers responded when presented with cooling-off and opt-in alternatives as part of an online survey.

*A number of behavioural theories, such as the [endowment effect](#), the [status quo bias](#) and [consistency theory](#), show that once a person "owns" something, they value it more and are less likely to give it up – at least in the short term. This is particularly the case if they have put mental, physical or social effort into their decision."*¹⁶

The research referred to by Dr Harrison was commissioned by Consumer Action and the full results will be outlined in a report in the near future. In the meantime Dr Harrison has provided the headline results of his research, which was designed to test consumer responses when presented with

¹² Origin was earlier fined \$2 million, AGL \$1.5 million and EnergyAustralia \$1.2 million.

¹³ Robbins, Brian. *Call to halt door knocking energy sales rebuffed*, Sydney Morning Herald, 29 August 2016. Available at: <http://www.smh.com.au/business/energy/call-to-halt-door-knocking-energy-sales-rebuffed-20160826-gr1vxk.html>

¹⁴ Ibid.

¹⁵ CAANZ, *Australian Consumer Law Review Interim Report*, October 2016 pg 146.

¹⁶ Harrison, Paul. *Cooling off periods for customers don't work: study*, *The Conversation*, November 28 2016. Available at: <https://theconversation.com/cooling-off-periods-for-consumers-dont-work-study-69473>

cooling off and opt-in alternatives. In the experiment, 759 online participants were asked to select one of two reward options:

- Receive \$2 immediately; or
- Receive \$1 immediately plus a chance to win \$25.

The 240 participants who chose the latter option were then randomly allocated to one of four study conditions, of 60 participants each.

The groups were:

- Control
- Cooling off
- Double opt-in, provider contacts
- Double opt-in, consumer contacts.

In the control group, participants automatically received their chosen reward (\$1 plus a chance to win \$25). In the cooling off group, participants were given a 48 hour window to revert to the alternative reward choice (\$2) if they chose to do so. In the double opt-in, provider contacts group participants were contacted within 48 hours via email and asked to confirm their choice. If they did so, they received their initial chosen reward. If they didn't confirm or respond, then they received the alternative reward. The final group required participants to proactively opt-in within 48 hours to confirm their choice by email. Those who did not respond or confirm then received the \$2 reward.

The findings were statistically significant and showed that:

- 100 per cent of participants who were offered a 'cool-off' option (i.e. they were required to make active contact to change their mind) did not change their initial decision.
- 100 per cent of participants who were offered the 'opt-in' option (i.e. they were required to make active contact to confirm their decision) also did not change their initial decision, even though doing so would have provided them with the same choice as the 'cooling off' group;
- 70 per cent of participants who were contacted and asked to 'opt in' to receive the same choice as the cooling-off group did not change from their initial choice.

Dr Harrison's concludes that the findings are explained by the behavioural concept of consumer "inertia". Those who make a decision are very unlikely to use their cooling off rights to change their mind. Similarly, people are highly unlikely to confirm an initial decision if they are required to opt-in to it at a later time. Even if they are prompted to opt-in by the provider, the research shows that most people (in the study, 70%) stick with an initial decision—although this was the only category in which active confirmation behaviour was observed.

In short, the study overwhelmingly found that passivity is the dominant behavioural trait when faced with either a cooling off or opt-in option—and this has direct relevance to the options presented in the Interim Report.

Option 1 would maintain the current cooling off regime, and gather data about consumer impact. Consumer Action respectfully submits that sufficient research has been done¹⁷, and the long running issues with unsolicited sales (such as those highlighted in the energy industry) show that consumer harm does exist as a result of unsolicited sales—and that cooling off rights have not been sufficient to protect consumers. We further submit that this failure is explained by behavioural factors, as identified by Dr Harrison’s research.

Options 3 and 4 also proposed a relatively light touch approach to extending regulation of unsolicited sales, segmenting various forms or categories of sales for particular treatment. Option 3 would see cooling off periods extended beyond the current 10 day period for enduring service contracts, or potentially providing statutory rights to cancel such contracts without a cancellation fee with a pro rata refund for any services paid for but not yet supplied. Option 4 proposed a two-tiered approach—stronger protections (potentially including an opt-in approach) for goods or services over \$500 in value, or possibly for enduring service contracts—while easing restrictions on unsolicited sales for lower value transactions.

Option 2, by contrast, proposes the simpler and more comprehensive option of replacing the current cooling off protection with an opt-in model. Under Consumer Action’s preferred version of the opt-in model, consumers would have a 48 hour period in which to consider their decision, and following that period could proactively opt-in (i.e. without being contacted), if they chose to do so. As noted in our earlier submission to the ACL review, this concept has some precedent in the VET Guidelines—where clause 4.9.2 dictates that a VET provider must not accept a VET FEE-HELP loan form unless two business days have passed from the date and time the person has enrolled.

The opt-in model has the benefit of “re-setting” the power dynamic between the trader and the consumer, and allowing the consumer to make a considered choice of their own volition—away from the high pressure sales tactics that are so often employed in an unsolicited sales practice.

By temporally displacing the consumer’s decision from the sales interaction, an opt-in model can ensure that consumers who choose to proceed with a purchase are doing so because they

¹⁷ For examples, please see:

- Consumer Action Policy Report, *Coercion and Harassment at the Door – Consumer experiences with energy direct marketers*, November 30 2007. Available at: <http://consumeraction.org.au/policy-report-coercion-and-harassment-at-the-door-consumer-experiences-with-energy-direct-marketers/>
- Berta, Laura; Brody, Gerard; Mackenzie, Cynthia. *Strangers are calling! The experience of door to door sales in Melbourne’s refugee communities*, Footscray Legal Centre, 6 May 2013. Available at: <http://apo.org.au/resource/strangers-are-calling-experience-door-door-sales-melbournes-refugee-communities>
- Harrison, Paul; Massi, Marta; Chalmers, Kathryn and Consumer Action. *Shutting the Gates: An analysis of the psychology of in-home sales of educational software*, Deakin University and Consumer Action, March 2010. Available at: <http://consumeraction.org.au/wp-content/uploads/2012/04/Shutting-the-Gates.pdf>
- Consumer Utilities Advocacy Centre, *Minimising Consumer Detriment from Energy Door to Door Sales*, December 2012. Available at: <http://www.cuac.org.au/research/cuac-research/276-minimising-consumer-detriment-from-energy-door-to-door-sales/file>
- Cormack, Lucy. *Unsolicited and door-to-door selling practices still hurting consumers, advocates say*, Sydney Morning Herald, 18 May 2016. Available at: <http://www.smh.com.au/business/consumer-affairs/unsolicited-and-doortodoor-selling-practices-still-hurting-consumers-advocates-say-20160518-goxrj3.html>

genuinely want or need the good or service—and are not simply doing so to please a salesperson, or because they wish to be left alone. When considering the opt-in model, it is important that CAANZ consider that unsolicited sales staff are often coached with scripted sales pitches designed to manipulate consumer emotions, and that they can be highly practised—and often driven to make sales by commission based payment structures.¹⁸ Consumers, on the other hand, are caught off-guard and not prepared for a sales interaction. The cognitive resources required to resist insistent sales practices while at the same time not being rude or otherwise causing offence can be considerable, and (as discussed earlier in this submission), the pressures of low-income living are in themselves sufficient to deplete those cognitive resources.

On that basis, an opt-in model (Option 2, with a 48 hour no contact period) is clearly the most effective option presented in the Interim Report for the purposes of meeting the needs of those consumers who are most vulnerable, or at greatest disadvantage.

Recommendation

Implement an opt-in model to replace the current cooling off protection for unsolicited consumer agreements. The opt-in model should provide for the consumer to pro-actively opt-in, without contact from the trader, no sooner than 48 hours from the time of the unsolicited sales contact.

2. Unfair contract terms and insurance contracts

Consumer Action strongly supports the extension of the unfair contract terms regime to insurance contracts. As stated in our previous submission to this Review, there is no justification for excluding insurance contracts from the unfair contract terms regime.¹⁹ Our submission to the current parliamentary inquiry into the life insurance industry reiterated this position.²⁰

The 2004 review of the Insurance Contracts Act found that the duty of utmost good faith had the “*potential to be utilised by insureds in connection with insurer conduct that might otherwise be dealt with under statutes dealing with unfair contracts or unconscionable conduct*”.²¹ However, analysis by National Legal Aid in 2009 found that section 14 is in fact rarely used by either consumers or ASIC.²² This mechanism has proved inaccessible, ineffective, or both. It does not

¹⁸ While not concerned with unsolicited sales, Dr Paul Harrison's 2010 report, *Shutting the Gates: An analysis of the psychology of in-home sales of educational software*, outlines the ways in which such sales practices are taught, how sales scripts are frequently designed to emotionally manipulate the consumer and how difficult it can be for consumers to extract themselves from such interactions once they have engaged with a salesperson. While the report concerns pre-arranged in-home sales, the sales tactics used are the same in unsolicited sales – particularly door to door.

¹⁹ Consumer Action, *ACL Review submission*, May 2016, p 13, <http://consumeraction.org.au/australian-consumer-law-review-submission/>.

²⁰ Consumer Action, *Submission: Life insurance industry inquiry*, November 2016, <http://consumeraction.org.au/submission-life-insurance-industry-inquiry/>.

²¹ Treasury, *Review of the Insurance Contract Act 1984 (Cth), Final Report on second stage: Provisions other than section 54*, June 2004, para 6.16, p 54.

²² National Legal Aid, *Submission to Senate Economics Legislation Committee Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill*, 14 August 2009, p 4, <http://www.nationallegalaid.org/assets/NLA-Submissions/2009-Submissions/L-NLA-SEL-Submission2theTradePractAmend-14-08-09scan.pdf>.

protect consumers from broad exclusions or other clauses in insurance contracts that would likely be 'unfair'.

When the unfair contract terms regime was proposed in 2008, the Productivity Commission envisaged a generic law applying to all sectors of the economy.²³ Three reviews have since supported the extension of the unfair contract terms regime to insurance contracts.²⁴

Despite the weight of those recommendations, consumers continue to suffer extremely detrimental outcomes as a result of unfair contract terms in insurance contracts. For example, insurers routinely discriminate by denying cover for people with mental illnesses and while they are required to rely on available actuarial data in doing so,²⁵ no such data is publicly available. In short, there is no evidence that such exemptions are required to protect insurers' legitimate interests—yet they continue to apply.

To elaborate, an insurer cannot lawfully discriminate against people on the basis of disability (or another attribute) unless:

- the discrimination is reasonable on the basis of actual and statistical data or,
- if that data is not available, on the basis of any other relevant factors; or
- avoiding the discrimination would cause an unjustifiable hardship for the insurer.²⁶

The Financial Ombudsman Service (FOS) takes the view that an insurer must have actuarial data to back up such discrimination. FOS reports that in general insurance disputes where actuarial data is not relied upon, insurers have paid each claim.²⁷

Despite these requirements insurers routinely discriminate by denying cover for people with mental illnesses, with no transparency as to the basis for denying cover. Consumer Action is not aware that any actuarial data exists.

For example, in November 2016 Consumer Action identified certain IAG insurance clauses which we believe would qualify as unfair terms, if unfair contract terms protections were to apply to insurance contracts. One such example was:

CGU Travel Insurance

We will not cover any loss or damage as a result of, or caused by... nervousness, anxiety, depression or stress-related disorders that results in a disinclination to travel.²⁸

²³ Productivity Commission, *Review of Australia's Consumer Policy Framework, Inquiry Report No 45*, 2008. See for example, Vol 2, pp 58-61 and Vol 2, p 327

²⁴ Senate Economics Legislation Committee, *Report into the Trade Practices Amendment (Australian Consumer Law) Bill 2009*, 2009, para 10.13; *Natural Disaster Insurance Review, Inquiry into flood insurance and related matters*, September 2011, Recommendation 37; House of Representatives Standing Committee on Social Policy and Legal Affairs, *In the Wake of Disasters—Volume One: The operation of the insurance industry during disaster events*, February 2012, para 7.22,

²⁵ *Disability Discrimination Act 1991* (Cth) s 46(1).

²⁶ *Disability Discrimination Act 1991* (Cth) s 46(1).

²⁷ 'Ombudsman slams 'discriminatory' mental health exclusions', insurance NEWS, 12 September 2016, Available at: <http://insurancenews.com.au/local/ombudsman-slams-discriminatory-mental-health-exclusions>

²⁸ *CGU Travel Insurance Product Disclosure Statement and Policy*, 12 March 2014, p 33,

This broad mental illness exclusion is unfair and contrary to discrimination law, unless the exclusion is informed by data.

The case study below, 'John's story' also outlines how mental illness clauses can be used to unfairly exclude consumers from insurance coverage:

John's story

In May 2015, John stopped working due to his mental illness. He saw his doctor a few days after he stopped work.

In February 2016, John made a disability claim under his CCI policy. In March, the insurer declined the claim, saying that John had not provided evidence that he was working 'immediately before' he became disabled, and his claim was caused by 'disturbance of the mind' due to alcohol—which was grounds to deny the claim.

John asked the insurer to review the decision because:

- he saw his doctor only a few days after he stopped work, so the insurer should not decline his claim on the basis that he was not employed 'immediately before' disablement; and
- there was no evidence that he was suffering from any disturbance of mind or faculty due to alcohol or drugs.

The insurer maintained that it denied the claim.

Consumer Action wrote to the insurer on John's behalf, requesting that the insurer review its decision. We enclosed a further report from John's doctor clarifying that his view was that John was unable to work from the date he left work.

In September 2016, the insurer finally accepted John's claim.

Alcohol exclusions are another category where unreasonable and unfair exclusions continue to be used to deny legitimate claims.

In the case of alcohol exclusions, it is worth noting that alcohol is a contributing factor in a significant number of deaths in Australia each year. A 2014 joint health services report in Victoria found that in 2010, 4.7% of deaths in Australian men and 3.0% of deaths in females were attributable to alcohol.²⁹

Despite this high prevalence, broad drug and alcohol exclusions are common in life insurance policies, and can be unfairly relied upon to exclude legitimate claims. The following case study, 'Bob's Story' illustrates this point.

²⁹ VicHealth, Turning Point and FARE, *Alcohol's burden of disease in Australia*, 31 July 2014, pp 59-60.

Bob's Story

Bob's daughter Carol had complex mental health issues. She was alcohol dependent and had been for a number of years.

In mid-2015, Carol was hit by a car and killed. The Coroner's report did not draw conclusions about any direct or indirect link between Carol's consumption of drugs or alcohol and her death, and concluded that her death was accidental - but did note that alcohol was present in her blood.

Bob made a claim on Carol's life insurance policy. Carol's policy excluded a claim if the claim was '*a direct or indirect result of* alcohol or drugs. In mid-2016, the insurer denied the claim.

Bob is now caring for Carol's young children. His dispute with the insurer continues.

The insurance industry has not publicly committed to move towards products that would comply with the unfair contracts terms regime. There is also no transparency as to the reasons for exclusions in insurance policies, some of which would likely be considered unfair.

Needless to say, if the unfair contract terms regime applied to insurance we would expect to see fairer contracts being sold by insurers. There would be a stronger onus on insurers to ensure exclusions had a reasonable basis, and hidden or unfair exclusions or conditions would likely be removed—reducing the likelihood of disputes and consumer harm.

Applying the unfair contract terms regime to standard form insurance contracts would:

- compel insurers to remove the perverse imbalances in insurance contracts, particularly broad exclusion clauses,
- improve outcomes for people who make insurance claims, including by reducing disputes, and;
- improve public trust in the insurance industry, which is currently at rock bottom.

The lapsed *Insurance Contract Amendment (Unfair terms) Bill 2013* (Cth) may have been a false start in extending full ACL protections to general insurance consumers. However, it is a solid blueprint for reform, developed with industry and consumer representatives.

At the time of the 2013 Bill, extending the unfair contract terms regime to life insurance was slated for future consideration.

In light of this year's CommInsure scandal, which exposed the significant consumer harm caused by out-of-date life insurance policies,³⁰ this Review should now consider the extension of this regime to life insurance.

³⁰ Adele Ferguson, 'Money for Nothing', *ABC Four Corners*, 7 March 2016.

Recommendation

The Insurance Contracts Act should be amended to mirror the unfair contract terms regimes under the ACL/ASIC Act or the provisions proposed by the *Insurance Contract Amendment (Unfair terms) Bill 2013*.

3. An unfair trading provision

In our submission to the ACL review Issues Paper, Consumer Action advocated strongly for the creation of an ‘unfair trading’ provision to expand the application of the ACL beyond the current unconscionable conduct protection. As stated in that submission, such a provision would provide consumer protection against a range of unfair trading practices which are not currently caught by the unconscionable conduct provision, and would align the ACL with US and EU consumer protection legislation. Reform would empower consumers and send a significant signal to the market—while at the same time, would not impeding legitimate, productive commercial activity.

While the Interim Report states that “*on balance, CAANZ considers that a case has not yet been made for amending the unconscionable conduct provisions*”³¹, we are pleased that CAANZ have resolved to continue monitoring development of the law. While we accept that courts do allow for concepts to be developed and refined in response to changing societal values—we would also note that this process can be very slow, and occasionally statutory reform is required to realign the law with societal values when the courts have fallen behind.

In relation to “unconscionable conduct”, Professor Bob Baxt recently provided analysis of the judicial interpretation of the concept, noting that for some time he has felt there has been “...*unwillingness on the part of our judges to give the statutory provisions a broader reading that they may justifiably be given in certain circumstances.*”³² This is largely because the term ‘unconscionable conduct’ is derived from the law of equity, and the history surrounding it—which inhibits attempts to broaden the concept. The judicial interpretation of unconscionable conduct did appear to be broadening following the Full Federal Court finding in *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd (No 2)* [2015] FCA 903 (**Lux**) in which it was determined that ‘community standards’ should drive determination of unconscionable conduct.

This development was reversed, however, by the recent High Court finding in *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28 (**Paciocco**), which reverted to the notion of ‘moral obloquy’ when determining if conduct could be considered unconscionable. In Professor Baxt’s view, the judgements of Justice Keane and Gageler in *Paciocco* “...*have certainly poured “cold water” on the broader interpretation...*”³³ As a result, Baxt notes that “*The legislation should be further amended to ensure that the courts are given clearer guidelines in interpreting this important extension of the common law.*”³⁴

³¹ CAANZ, *Australian Consumer Law Review Interim Report*, October 2016 p.109.

³² Baxt, Bob. *Unconscionable conduct: has the High Court “muddied” the interpretation?* Company Director, October 2016, p. 54.

³³ Ibid

³⁴ Ibid

When considering reform, it is important to return to the intent of the unconscionable conduct provision, which, as Professor Baxt states:

*“...was introduced into the relevant statutes because Parliament felt that consumers needed additional protection in situations where parties with less power in the market can be subject to undue pressure in negotiations and other relationships.”*³⁵

Consumer Action maintains that an unfair trading provision would allow for a step change in the ACL’s substantive protection, aligning it with Parliament’s original intention. The ‘unconscionable’ conduct provision, which continues to hinge on the rather outdated and obscure notion of ‘moral obloquy’, does not meet this purpose. By contrast, an unfair trading provision (drafted to mirror existing protections in both EU and US consumer law), would provide protection to consumers who are currently caught by business practices which are unquestionably sharp—yet difficult to show as “unconscionable”. One particular area of business practice that concerns us is the debt management, personal budgeting and credit repair industries, which we have collectively dubbed “debt vultures”. These industries operate by claiming to assist consumers in financial difficulty, often by making promises which cannot be kept—and charging excessively high fees to do so. In our view, the practices of debt vultures border on scams and target a particularly vulnerable consumer class, often pushing them into further financial hardship in the process. While these practices are not always caught by the concept of unconscionability, they may be caught by a broader “unfair trading” provision. This is because an ‘unfair trading’ prohibition would ensure courts have a greater focus on the impact of the business model on the decision-making of the consumer, rather than any standard rooted in morality of the business conduct.³⁶

In February 2016 Consumer Action convened a round table of forty participants drawn from consumer advocacy organisations, industry associations, ombudsman schemes, government agencies and regulators to review the social and industry impacts of businesses that provide quasi-financial service “solutions” to consumers with debt problems or who have concerns about their credit-worthiness. The roundtable followed the release of a January 2016 report from the Australian Securities and Investment Commission (ASIC) titled *Paying to get out of debt or clear your record: The promise of debt management firms*, and resulted in the issuance of a joint communiqué. The communiqué proposed a number of measures to better deal with debt vultures, including improved standards of conduct, a new regulatory framework and requiring membership of an Ombudsman scheme. The communiqué concluded that “*Action is needed now to tackle the exploitation of financially stressed consumers, and to mitigate the unnecessary cost to business cause by gaps in our financial services regulatory framework.*”³⁷

In the current context, an unfair trading provision may be one way to tackle the exploitation of financially stressed consumers. By contrast, the concept of “unconscionability” largely fails to do so.

³⁵ Baxt, Bob. *Unconscionable conduct: has the High Court “muddied” the interpretation?* Company Director, October 2016, p. 54.

³⁶ For more see: Brody, Gerard and Temple, Katherine. *Unfair but not illegal: Are Australia’s consumer protection laws allowing predatory businesses to flourish?* Alternative Law Journal, Volume 41 Issue 3, September 2016. Available at: <https://www.altlj.org/>

³⁷ Debt management firms regulatory reform communiqué. Available at: <http://consumeraction.org.au/debt-management-firms-comm/>

As stated in our previous submission, one of the drawbacks of the unconscionable conduct provision is the relative obscurity of the phrase ‘unconscionable conduct’ itself, which does not have great currency in the broader community. Business people deciding whether to pursue a particular marketing strategy should not have to delve into case law to discover whether that strategy will operate within the limits of the law. Nor should a consumer have to consider the interplay between equity and statute law when determining whether they have a remedy against a dodgy trader. ‘Unconscionable’ is not a commonly understood term, which makes it difficult for businesses and consumers alike to recognise when conduct may be ‘unconscionable’.

While points of language may not seem significant, the reality is that language has a powerful influence on culture. An ‘unfair trading’ provision in the ACL would have a far greater influence on business practice and culture than the current unconscionable conduct provision does. Further, such a provision would empower consumers by clearly communicating—in plain English—their fundamental rights and protections under the consumer law.

Recommendation

In light of the *Paccicio* decision, reconsider the position that unconscionable conduct should develop through case law, and instead enhance the Australian Consumer Law through a new prohibition on unfair conduct or trade practices.

4. Consumer guarantees

Consumer Action concurs with the CAANZ view that industry-specific approaches are generally only preferable where it is demonstrated that generic approaches have failed to adequately address problems in sectors of concern.³⁸ In our view, (and as expressed in our initial submission), the ACL consumer guarantee regime would benefit from adopting a reversal of the onus of proof—as has existed in Singaporean consumer law since 2012.³⁹ While the Interim Report does not support this proposition, we maintain the view that this would be positive extension of the current consumer guarantees and remains worthy of further consideration.

Of the options presented in the Interim Report, Consumer Action is strongly supportive of clarifying the law on what constitutes a ‘major failure’, and support CHOICE’s call for legislative guidance confirming that a series of minor defects can constitute a major defect. In Consumer Action’s experience the distinction between major and minor defects in the ACL creates frustrations and delays for consumers, given the lack of a clear time period during which a trader must make a repair to a minor defect (a “reasonable” time remains an ambiguous concept). In circumstances of a series of minor defects, consumers should be able to request a replacement good, and not be beholden to the trader to make that offer in the event that they choose not to repair the good.

³⁸ CAANZ, Australian Consumer Law Review Interim Report, October 2016, pp. 44 and 61.

³⁹ Ministry of Trade and Industry Singapore, ‘*General Advisory on Amendments to the Consumer Protection (Fair Trading) Act and Hire Purchase Act (Lemon Law)*’, 5 May 2012, available at: <[https://www.mti.gov.sg/legislation/Pages/General-Advisory-on-Amendments-to-the-Consumer-Protection- %28Fair-Trading%29-Act-and-Hire-Purchase-Act.aspx](https://www.mti.gov.sg/legislation/Pages/General-Advisory-on-Amendments-to-the-Consumer-Protection-%28Fair-Trading%29-Act-and-Hire-Purchase-Act.aspx)>.

In response to question 16 of the Interim Report, we do believe that there should be discretion for the courts to determine the number of 'non-major failures' that amount to a major failure, as a simple numerical criteria may lead to anomalous outcomes. That being said, the two approaches are not mutually exclusive—and it would be possible to implement a “bright line” rule (such as three minor failures in a six month period for example, equating to a major failure), while still allowing for the flexibility in the courts for special cases. Special cases would involve cases where the negative impact on the consumer, (either financially or in terms of inconvenience), is high.

In a similar vein, clarifying the number or type of minor failures that lead to a major failure does not preclude the ACL from acknowledging that safety issues also equate to a major failure—the logical test being that the safety issue amounts to a major failure if it is likely to cause serious injury.

Recommendation

The Singaporean concept of the reversal of the onus of proof for consumer guarantees in the first six months following purchase should also be revisited, and reconsidered

Clarify the consumer guarantee regime by defining how many instances of a minor failure equate to a major failure, providing a 'bright line' rule while still allowing for discretion in the courts for special cases, where the consumer is detriment high. Similarly, safety issues that are likely to cause serious injury should also qualify as a major failure for the purposes of the consumer guarantee regime.

5. Extended warranties

Consumer Action is strongly supportive of measures to enhance transparency around extended warranties, which in many cases equate to little more than a kind of junk insurance. In our initial submission to the ACL Review, we made the point that extended warranties constitute a systemic exploitation of consumers, and that disclosure measures such as providing a brochure are insufficient if the consumer is not also provided with clear verbal advice about their rights under the ACL.

In our December 2015 report, *Junk Insurance: How Australians are being sold rubbish insurance, and what we can do about it*,⁴⁰ Consumer Action made the recommendation that consumers should be protected against purchasing junk insurance policies by mandating a compulsory delay (i.e. an opt-in model) between purchasing the primary good, and the add-on insurance policy. This gap could be at as little as 2 days, or as much as 7. From a behavioural economics perspective, the important thing is that the nexus between the sale of the good and the sale of the extended warranty is broken—so the consumer does not feel that the extended warranty is a necessary purchase. To avoid doubt, no add-on product should be sold through an opt-out

⁴⁰ Consumer Action Law Centre, *Junk Insurance: How Australians are being sold rubbish insurance, and what we can do about it*, December 2015. Available at: <http://consumeraction.org.au/junk-merchants-report-how-australians-are-being-sold-rubbish-insurance-and-what-we-can-do-about-it/>

process such as a tick-box system where the consumer agrees to purchase the add-on unless they say otherwise.⁴¹

These recommendations are equally applicable to extended warranties and we maintain that they should be incorporated into the ACL to protect consumers from making unnecessary purchases at a time when they are vulnerable to a hard sales pitch - and are often not fully informed of their existing rights under the ACL.

On that basis, Consumer Action does see some benefit in the measures proposed under *Option 3 – enhance transparency regarding extended warranties*⁴², which are:

- generic information at the point of sale, such as a standard notice about the ACL;
- generic requirements for warranty documents, such as transparency and a plain language summary of key terms;
- specific requirements (such as a comparison between what is offered by the warranty and the ACL); and
- a cooling-off period to allow consumer to absorb the information provided and to reconsider their decision away from the pressure of a sales negotiation. This is particularly the case where consumers may have received verbal representations that differ from the written agreement.

We would add, however, that replacing the cooling off provisions with an opt-in model is likely to be far more effective, for the behavioural reasons we have noted in our response above regarding unsolicited consumer agreements. In order to assess the potential effectiveness of the above measures (maintaining a cooling-off period, rather than an opt-in model), it is worth considering if they would have changed the outcome in the recent Consumer Affairs Victoria action against the Good Guys.

As noted in our initial submission to the ACL Review, in February 2015 Consumer Affairs Victoria (CAV) launched a Federal Court Action against the retail chain, The Good Guys, alleging that a number of Good Guys stores had breached sections 18 and 29(1)(l) and 29(1) (m) of the ACL by engaging in misleading and deceptive conduct when promoting extended warranties for its goods.⁴³

The case was based on five store visits by CAV inspectors, during which they posed as customers interested in purchasing a television. For the purposes of the investigation the inspectors secretly recorded four of the five conversations with sales staff, during which the sales staff made inaccurate statements about the position the customer would be in if a product failed or was faulty after the expiry of the manufacturer's warranty, and failed to refer to the consumer guarantee provisions of the ACL.

⁴¹ Consumer Action Law Centre, *Junk Insurance: How Australians are being sold rubbish insurance, and what we can do about it*, December 2015, pp 29 -30.

⁴² CAANZ, *Australian Consumer Law Review Interim Report*, October 2016, p. 69.

⁴³ *Director of Consumer Affairs Victoria v The Good Guys Discount Warehouses (Australia) Pty Ltd* [2016] FCA 22

CAV was unsuccessful in its action, as the court felt that statements made in the conversations were vague and general—making it difficult to conclude that the statement was an inaccurate description of the position of the consumer in relation to purchasing an extended warranty, and their position under the ACL. It should be noted that in all cases the sales staff provided the CAV inspector with The Good Guys’ in-store extended warranty sales brochure, which provided a description of the consumer guarantees and related remedies in the ACL. While the sales staff had generally emphasised the manufacturer’s warranty during the course of the conversations, the court felt this was not misleading as these provided greater certainty than the consumer guarantee provisions of the ACL.

It was clear, however, that the specific ACL guarantees were not brought to the attention of the inspectors, nor was any explanation about the value of manufacturer’s warranty versus the ACL guarantee. If we want consumers to be informed about their rights, it seems perverse that The Good Guys’ conduct was found to be legal in this case.

Consumer Action respectfully submits that the Good Guys in-store extended warranty sales brochure may well still meet the requirements proposed under Option 3 above (with the exception, possibly, of providing a direct comparison between what is offered by the warranty and the ACL), and that if sold on the basis of a cooling-off period the vast majority of consumers would be likely to maintain an unnecessary purchase of the warranty. Even if the requirements would result in greater disclosure, significant behavioural research has shown that disclosure constitutes a very weak (i.e. ineffective) form of consumer protection.⁴⁴ Therefore, we strongly recommend that the transparency of extended warranties not only be enhanced, but that they be sold on an opt-in basis, adopting the same 48 hour period that we have recommended in relation to unsolicited consumer agreements. As with unsolicited consumer agreements, this would provide the consumer with time to properly assess the product being offered and make a proactive choice of their own volition, with no loss of face, and none of the other behavioural impediments that bedevil cooling-off periods.

Recommendation

Enhance transparency of extended warranties as outlined in Option 3, with the addition that they be sold on an opt-in basis – rather than with a cooling-off period.

6. Motor vehicle disputes – a specialist tribunal

Consumer Action notes the Interim Report discussion of consumer guarantees in relation to motor vehicles, and concurs with the CAANZ view that industry-specific regulation is only preferable to a generic approach where it can be demonstrated that generic approaches would not adequately address the problem. On that basis, we are not advocating for specific lemon laws for motor vehicles. Instead, we advocate for the strengthening of existing consumer guarantees—both by adopting the clarification and safety considerations discussed above, and by revisiting the

⁴⁴ For example see: Omri Ben-Shahar and Carl E. Schneider *More Than You Wanted To Know: The Failure of Mandated Disclosure*, Princeton, Princeton University Press, 2014.

Singaporean concept of reversing the onus of proof in the first six months after purchase. This reverse onus of proof would operate to provide more effective protections for all 'lemon' goods.

That being said, we do believe that the ACL Review process has the capacity to improve the situation of consumers experiencing difficulties with motor vehicles. Motor vehicles do represent one area where the consumer guarantee provisions of the ACL often fail to adequately protect the consumer, and we further note that motor vehicle complaints disproportionately affect low-income and disadvantaged consumers—particularly if it leaves them without transport to attend employment, or otherwise places them under extreme financial pressure. In addition to the need for expert reports, motor vehicle disputes at VCAT often run for longer than one day, but few of our clients can afford a \$400 fee for an additional day of hearing. If VCAT recognises that a person is in financial hardship but refuses to reduce hearing fees because of 'the likely length of the proceeding', well-resourced parties inevitably prevail against low income parties purely on the basis of attrition. Motor vehicle related complaints represent approximately thirty percent of calls to Consumer Action's legal assistance line. The volume of these calls, in conjunction with the consumer detriment arising from motor vehicle disputes, has prompted Consumer Action to make motor vehicle issues a campaign priority for 2017-18.

In our experience, the requirement for expert technical knowledge frequently represents a barrier to justice for consumers with motor vehicle complaints. Motor vehicle disputes (usually a dispute between a consumer and a car dealer or mechanic) will often involve highly technical questions regarding the state of the vehicle, whether faults can be repaired, and if so, the cost of repair. Neither consumers nor decision-makers typically have this technical expertise, so consumers will usually have to obtain a report from a third party specialist. The cost of these reports can exceed \$1000 and are out of reach for many of our clients. Large organisations that may be able to provide a cheaper service, such as the RACV, have a policy of not providing expert testimony for motor vehicle consumer disputes at VCAT, as it is simply too time consuming to do so. Consumer difficulties with motor vehicle related disputes are exemplified by the below case study which we provided in our initial submission, and reproduce here for the purposes of this discussion:

Case study

Our client of Sudanese background had a dispute with a motor car trader in relation to a second hand vehicle with a number of defects. Our client had tried to resolve the matter directly with the trader to no avail, so made an application to VCAT seeking a refund of the \$15,000 paid or the vehicle to be repaired.

VCAT heard evidence from both parties on the first day of the hearing, including an expert mechanic providing evidence on behalf of our client. The hearing also involved an interpreter. Despite this hearing and the expectation that the member would use the evidence to make a decision, the matter went to mediation on the second day after suggestions by the VCAT member that 'this is the type of matter that should be resolved by the parties'.

The mediator, who appeared not to have reviewed the claim or evidence, made a number of troubling representations to our client, including that our client would only be entitled to a \$2,000 refund, that VCAT almost never made orders in relation to second hand vehicles, and that it

was in our client's interests to accept any offer made. By this stage our client was exhausted, and was almost willing to consent to any outcome. Taking our solicitor's advice, our client did push on and seek an order from VCAT.

The final order was in the consumer's favour, being a much better outcome than that which was considered possible at mediation.

Instances such as this prompt us to recommend that motor vehicle disputes be dealt with by a specialist forum that is equipped to fairly hear motor vehicle matters, with the technical knowledge to make informed determinations. This could be achieved by establishing a separate list within the existing small claims infrastructure of the various state and territory jurisdictions.

Alternatively, (and as raised in our initial submission to the ACL Review), a new specialist motor vehicle dispute forum could be established, as it has been in other countries. The New Zealand Motor Vehicle Dispute Tribunal⁴⁵ provides a good model for Australia to follow. Decisions in the New Zealand Motor Vehicle Dispute Tribunal are made by an adjudicator who is assisted by a 'Technical Assessor' drawn from a panel of people with technical expertise. During the hearing, the tribunal and expert assessor may examine parts of vehicles or even test drive vehicles.⁴⁶

We further note that consumer issues with motor vehicle disputes formed a significant point of discussion in the recent Victorian Access to Justice Review, and essentially confirmed our views:

"The evidence considered during the Review suggests that consumers face considerable difficulties in resolving disputes about defective motor vehicles at VCAT. The distress and inconvenience caused by a defective vehicle or lengthy repair delays can impact significantly on a consumer and their livelihood and access to education, health, and other services. Motor vehicle disputes often involve technical questions about the state of the vehicle, whether faults can be repaired, and if so, the cost of repair. This necessitates the production of expert evidence, which is costly to obtain and presents a barrier for consumers to enforce their rights.

VCAT already has a power to appoint experts in the course of a proceeding. However, small civil claims are dealt with expeditiously, usually requiring only one hearing. The use of the expert appointment procedures are not well suited to such disputes because the process for appointing an expert is likely to prolong the resolution of the matter and may be disproportionate to the amount in dispute."⁴⁷

The Victorian Access to Justice Review went on to consider potential options for easing the difficulties consumers face in relation to motor vehicle disputes and concluded that a compulsory conciliation service provided by Consumer Affairs Victoria (CAV), (including a requirement for expert technical assessment), could assist:

⁴⁵ See <http://www.justice.govt.nz/tribunals/motor-vehicle-disputes-tribunal>

⁴⁶ See <http://www.justice.govt.nz/tribunals/motor-vehicle-disputes-tribunal/hearing-process>

⁴⁷ Victorian Department of Justice and Regulation, *Access to Justice Review - Volume 1 Report and Recommendations*, August 2016, p. 287 Available at: https://myviews.justice.vic.gov.au/application/files/2414/7554/7522/Access_to_Justice_Review_-_Report_and_recommendations_Volume_1.PDF

“The early resolution of motor vehicle disputes could be improved if Consumer Affairs Victoria had capacity to obtain an expert report in relation to a motor vehicle dispute. Making provision for parties to ask Consumer Affairs Victoria to undertake a technical assessment, and provide a report to assist in dispute resolution, would enhance the flexible conciliation model that it currently operates. If the matter remains unresolved, then VCAT could hear the dispute and have regard to the technical assessment. This would mitigate the key difficulty for consumers in resolving motor vehicle disputes at VCAT, which is the ability to obtain technical expertise without incurring an upfront cost that may not be recovered. Conciliation of motor vehicle disputes by Consumer Affairs Victoria should be compulsory before a party can bring an application at VCAT, in order to ensure that there is an incentive for both parties to a dispute to engage in conciliation. If undertaking conciliation at Consumer Affairs Victoria is not mandatory, there is a risk that respondents will have no incentive to engage in conciliation in an attempt to resolve the dispute. Parties should still have a right to apply to VCAT to resolve the dispute if conciliation is unsuccessful.”⁴⁸

This discussion was formalised by recommendation 5.8 of the Access to Justice Review, which states:

The Victorian Government should make the following changes to reduce the difficulties faced by parties in resolving disputes about defective motor vehicles:

- *propose legislation for compulsory conciliation of motor vehicles disputes by Consumer Affairs Victoria before a claim can be made to the Victorian Civil and Administrative Tribunal; and*
- *fund Consumer Affairs Victoria to provide a conciliation service for motor vehicle disputes, including to undertake a technical assessment to assist in dispute resolution.*⁴⁹

We raise the Access to Justice recommendation in the context of this current submission because it highlights the systemic issues associated with motor vehicle disputes, and presents one option for easing those difficulties. That being said, we believe the Victorian proposal does not go far enough and that the service should be capable of making make binding determinations, akin to an ombudsman service or the new Domestic Building Dispute Resolution Victoria (DBRV) scheme.⁵⁰ Appeals to VCAT (and equivalent tribunals in other jurisdictions) may be appropriate on occasion but the service would certainly stem the flow of motor vehicle disputes to those forums, reduce costs and avoid an overly legalistic approach.

We are also conscious that the proposed solution is limited to Victoria. A similar approach, replicated nationally, is worthy of consideration.

Alternatively, the establishment of a specialist motor vehicle dispute tribunal similar to the New Zealand model remains an option. Finally, we note that one option does not necessarily preclude the other—although if the conciliation model were to be given the power to make binding

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰ For more information see: <http://www.premier.vic.gov.au/ending-costly-building-disputes/>

determinations and proved effective, then the need for a specialist tribunal would be significantly reduced.

Recommendation

Investigate the potential establishment of a specialist tribunal with technical expertise for the determination of motor vehicle disputes.

Alternatively, investigate the potential for the conciliation model proposed in the Victorian Access to Justice Review to be replicated nationally, and to be granted powers to make a binding determination.

7. A general product safety provision

Consumer Action strongly supports the inclusion of a general safety provision in the ACL. We believe that such a provision would strengthen Australia's product safety regime, and align it with the world's best practice such as the product safety regime in Canada, (as highlighted in the Interim Report).⁵¹ Further, we believe that a general prohibition against the supply of unsafe goods would bring the ACL into alignment with community expectations and values. Most importantly, and fundamentally, we believe that imposing a positive legal obligation on suppliers to ensure that the goods they are supplying are safe will result in less consumer harm—and will therefore act as a more effective consumer protection than the current, largely reactive, product safety regime.

While we understand the need to consider the cost to business of introducing a general safety provision, we respectfully submit to CAANZ that the cost to consumers of not implementing such a clause should also be considered, and the fundamental purpose of the ACL—to protect and empower consumers—should inform that judgement.

Currently, the consumer guarantee regime requires products to be safe, leaving suppliers with the option of taking the risk that even if the product is defective, no-one will be harmed and also want to sue. A general safety provision would provide an incentive for all suppliers to consider the safety of their products across the supply chain, including design, production and distribution. This is a far more powerful, proactive obligation.

Consumer Action notes that CHOICE advocates strongly for the inclusion of a general safety provision, and we are supportive of CHOICE's advocacy on this issue. We note the extract from CHOICE's initial submission to the ACL Review reproduced in the Interim Report, and would simply emphasise the key point made in that extract:

“One advantage of a GSP [general safety provision] is that it can provide uniform and comprehensive cover of a wide range of consumer products, with associated penalties, and is therefore likely to reduce the incidence of unsafe products appearing in the marketplace.”⁵²

⁵¹ CAANZ, *Australian Consumer Law Review – Interim Report*, October 2016, p. 78.

⁵² Submission from CHOICE to Australian Consumer Law Review Issues Paper, pg. 38.

We would further note that if a general safety provision is likely to reduce the incidence of unsafe products appearing in the marketplace, then it would seem almost perverse not to adopt one. In the end, what is a product safety regime for, if not to prevent death, illness and injury caused by unsafe products in the marketplace? Product safety regulation represents the most basic, fundamental form of consumer protection. Without a general safety provision, the ACL does not adequately fulfil its role as Australia's key piece of consumer protection legislation—and falls far short of community expectations in the process.

In terms of the various international examples of general safety provisions outlined in the Interim Report (the UK, Canada and Singapore), Consumer Action is attracted to the Canadian model by virtue of its comprehensive nature, relative simplicity and significant penalties.

Recommendation

Implement a general safety provision to strengthen Australia's product safety regime and align the ACL with community values and expectations. While further investigation is required, the Canadian product safety regime is attractive by virtue of its comprehensive nature, simplicity and adequate penalties to encourage compliance.

Summary

In this submission we have chosen to focus on those areas which we feel are of most significance to low-income and disadvantaged consumers. We are strongly supportive of a number of reform options posited by the Interim Report, chiefly the replacement of cooling-off periods for unsolicited consumer agreements with an opt-in model, and for the application of unfair contract terms protections to standard form insurance contracts. We view these as positive and long overdue reforms, and look forward to continuing our advocacy on those issues as the review progresses.

In addition, we support the clarification of the consumer guarantee regime by defining the relationship between minor and major failures, and ensuring that a safety issue equates to a major failure. We further believe that the Singaporean model of reversing the onus of proof ought to be reconsidered, and applied to Australia's consumer guarantee regime.

While supportive of proposed measures to improve transparency around extended warranties, we also believe that an opt-in model would be more effective than the cooling-off period proposed.

Further, we take the view that a general safety provision (ideally along the lines of the Canadian model) is necessary to strengthen Australia's product safety regime and align it with community expectations and values.

In addition to the reform options mooted in the Interim Report, Consumer Action remains committed to the concept of an unfair trading provision as a necessary improvement on the current unconscionable conduct provision, which we believe fails to cover the conduct for which it was intended. In that respect, we are particularly concerned about the growth of "debt vultures" and the

consumer harm that is occurring in that sector, (targeted specifically at consumers in financial hardship), and which the ACL is not currently well-suited to address.

Finally, we believe that the ACL ought to address the difficulties faced by consumers in seeking justice in motor vehicle disputes. While we do not recommend an industry specific lemon law for motor vehicles, (on the basis that a clearer consumer guarantee regime, with a reversal of the onus of proof can meet that need), we do believe that access to affordable dispute resolution with the requisite technical expertise is necessary. This may be achieved by the establishment of a specialist tribunal, or by strengthening the Victorian Access to Justice conciliation recommendation to include the power to make binding determinations, and replicating that model across the other state and territory jurisdictions.

The priorities of our submission are dictated by the low income and disadvantaged consumers that we serve. They also aligns with one of the six Intergovernmental Agreement for the Australian Consumer Law – namely, for the ACL to:

“...meet the needs of those consumers who are most vulnerable, or at greatest disadvantage.”⁵³

In achieving this objective, it is essential to take into account the findings that are emerging in the field of behavioural economics. While these findings are broad, we would point in particular to research regarding the impact of poverty on cognitive function, and the implications this has for consumers to resist high pressure and unsolicited sales approaches.

As a final note, we acknowledge the substantial task of reviewing the ACL in its entirety. Consumer Action has not, given the limited time to respond to the Interim Report, had the capacity to respond to all the issues raised.

Our lack of response is not to say these issues aren't important, but it is a factor of our resources and time. Issues we are concerned about include:

- interaction between the ACL and the ASIC Act—our casework experience is that there are considerable issues in this area, and we would be pleased to provide more information should there be further opportunity for consultation (in particular, we are worried about “gaps” between regulator’s jurisdiction on issues like consumer leases, hire cars and others);
- disclosure, including the mandatory notice of warranties against defects—we would not want to see any move away from current standards without far more comprehensive consultation;
- changes to compliance approaches to product safety standards—there needs to be greater resourcing of the Consumers’ Federation of Australia and its consumer representatives standards project to facilitate response to these questions;
- other aspects of product safety, including mandatory reporting and product bans and recalls;

⁵³ Intergovernmental Agreement for the Australian Consumer Law (2 July), paragraph C, www.coag.gov.au/sites/default/files/IGA_australian_consumer_law.pdf.

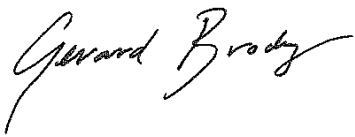
- unfair terms—as per our initial submission, we advocate for the removal of ‘industry practice’ as a consideration of determining whether a term is unfair;⁵⁴
- the adequacy of penalties and access to remedies (we are disappointed by the Interim Report’s view that remedies is a concern for state-based civil justice systems—we encourage CAANZ to play a key role in policy development in this area);
- issues relating to consumer protection and ‘marketplace’ or ‘peer-to-peer’ business models; and
- the weakness of the pyramid selling prohibition and the need to extend this to multi-level marketing schemes.

We are also concerned about the potential for reforms to be traded off against each other in the interests of stakeholder management, rather than made on the basis of detriment and need. In order to avoid this, we believe that the ACL would benefit from an ongoing, issues-based reform process. By adopting such an approach, CAANZ could engage stakeholders on emerging issues as the detriment arises, and achieve reform appropriate to that issue without the potential for weighing it against reforms in other areas, as may inevitably occur in any holistic review process.

Please contact Zac Gillam, Senior Policy Officer on 03 9670 5088 or at zac@consumeraction.org.au if you have any questions about this submission.

Yours sincerely

CONSUMER ACTION LAW CENTRE



Gerard Brody
Chief Executive Officer

Zac Gillam
Senior Policy Officer

⁵⁴ For more on this see: Lee-Worth, Brenton, *Are we there yet? A return to the rational for Australian consumer protection* (2016) 24 AJCCL 33 p50:

“It is submitted that in order to be a successful response to the insights of behavioural economics and return the consumer to the position of the rational economic agent, little weight, if any, should be given to the role of industry practice in the assessment of unfairness.”