

9 December 2016

# Redfern Legal Centre



Consumer Affairs Australia and New Zealand  
Australian Consumer Law Review Secretariat

By email: [aclreview@treasury.gov.au](mailto:aclreview@treasury.gov.au)

Dear ACL Review Secretariat,

## **Australian Consumer Law Review—Interim Report**

We are grateful for the opportunity to respond to the interim report of the five-year review of the Australian Consumer Law (ACL). Redfern Legal Centre's submission will focus on common issues arising from our casework experience of consumer law issues.


Redfern Legal Centre regularly assists vulnerable and disadvantaged consumers who fall victim to unscrupulous commercial practices. Our submission will focus on the ways in which the ACL can be reformed to ensure better protections for *all* consumers, but particularly this demographic.


Our brief submission will respond to the issues raised by the interim report and refocus our substantive recommendations. Our key recommendations consider options for streamlining ACL dispute resolution and remedy process, mechanisms to clarify the interaction between the ACL and ASIC Act in relation to financial services, a prohibition on unsolicited door to door marketing and expanding unfair contract terms protections to insurance contracts.

This review offers a timely opportunity to ensure that the ACL continues to offer effective consumer protections and efficient dispute resolution mechanisms into the future.

We would welcome the opportunity to meet with you to discuss our submission further.

Yours faithfully,  
**REDFERN LEGAL CENTRE**

  
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# Redfern Legal Centre

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*Australian Consumer Law Review Secretariat*

*Australian Consumer Law Review*

*Submission in response to interim report*

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# Redfern Legal Centre

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## **Introduction: Redfern Legal Centre**

Redfern Legal Centre (RLC) is an independent, non-profit, community-based legal centre with a particular focus on human rights and social justice. Our specialist areas of legal practice include domestic violence, tenancy, credit and consumer, employment and discrimination and complaints about police and other governmental agencies.

By working collaboratively with key partners, RLC specialist lawyers and advocates provide free advice, conduct case work, deliver community legal education, prepare publications and submissions and advocate for law reform. RLC works towards reforming our legal system for the benefit of the community.

### **RLC's experience with Australian Consumer Law**

RLC recognises that the protection of financial and consumer rights is essential to securing other rights and freedoms such as secure housing, effective education and social and economic participation.

Since 1977, RLC has run a specialist practice to assist vulnerable and disadvantaged consumers address credit and consumer law problems. We regularly encounter vulnerable consumers who, for a range of reasons, are disproportionately affected by unscrupulous business practices.

RLC offers free legal advice on credit and consumer law matters. We assist clients from all walks of life on a broad range of common legal problems that involve consumer rights and remedies and navigating the dispute resolution process.

### **RLC's Recommendations in Summary**

- **Recommendation 1:** Improve the efficiency and enforceability of dispute resolution outcomes through the implementation of an external dispute resolution process, administered by a Retail Ombudsman scheme. Alternatively, implement an enforceable conciliation/mediation scheme, administered by consumer protection agencies with appeal rights to NCAT for complex or contentious matters.
- **Recommendation 2:** A general prohibition on unsolicited door to door sales and marketing
- **Recommendation 3:** Remove the 'carve out' of insurance contracts from the ACL unfair contract terms provisions.
- **Recommendation 4:** Clarify and provide guidance on the interaction between the ASIC Act and ACL to ensure that consumers who utilize consumer credit and financial services, in connection with basic consumer goods and services, have the benefit of general protection under the ACL and financial services providers improve self regulation in line with the ACL.

### **Submissions in response to the interim report**

## Submissions in response to the interim report

Redfern Legal Centre welcomes the interim report's engagement with a number of the recommendations that were contained in our original submission. This brief response will address some of the interim conclusions, and provide further recommendations for CAANZ to consider in light of the issues raised in the interim report.

### Dispute resolution and remedies

In our original submission, Redfern Legal Centre noted the barriers that consumers face in gaining binding resolutions in disputes with traders. We stated that the adversarial process of the NSW Civil and Administrative Tribunal (NCAT) could:

“...cause significant anxiety to vulnerable consumers due to the cost, time and overall complexity of the processes. Enforcing NCAT judgments against recalcitrant traders is often very time consuming and difficult for consumers.”

Alternatively, consumers can access mediation with NSW Fair Trading. However, mediation by NSW Fair Trading lacks effective power to bind traders and consumers to the outcome. In our casework experience, recalcitrant traders refuse to engage with the NSW Fair Trading mediation process and cannot be bound to do so. As a result, the mediation pathway is often inefficient and ineffective for both consumers and traders. We encourage CAANZ to consider options to enhance the powers of Fair Trading agencies. We also encourage CAANZ to consider the establishment of an external dispute resolution scheme, to investigate, conciliate and make binding determinations to resolve common ACL disputes.

In our submission, we recommended the establishment of a Retail Ombudsman, similar to the UK model. Other stakeholders, including the Consumer Action Law Centre, made similar recommendations. In the interim report, CAANZ noted that

“Many of the stakeholders that supported a Retail Ombudsman did not comment on whether they envisaged any resulting changes to, and broader implications for, the dispute resolution function of ACL regulators and other bodies”

Redfern Legal Centre welcomes the opportunity to provide further information as to how such a scheme would work in NSW, and the advantages of an industry Ombudsman scheme for consumer disputes.

Given that NSW Fair Trading has no enforcement powers and faces resource constraints, the introduction of a Retail Ombudsman scheme would, in our view, necessitate the phasing-out of Fair Trading's mediation mechanism. Although the concept of a Retail Ombudsman is relatively new, we note that there are a number of industry ombudsmen in Australia that have proven experience in establishing efficient and effective dispute resolution schemes. These include the Financial Ombudsman, the Credit and Investments Ombudsman, the Telecommunications Industry Ombudsman and the Energy and Water Ombudsman.

In our view, industry ombudsmen schemes have three clear benefits. First, they can make rulings that are binding on members and which reduce the need for consumers to undertake costly enforcement in tribunals or the Local Court. Second, they are funded by industry members, which reduces public costs, significantly incentivizes early resolution, improves self regulation and frees up public resources for education, compliance and enforcement. Third, the establishment of an industry-funded Ombudsman engenders cultural change within industry members, who face additional incentives to comply with the law. We believe that the external dispute resolution model is well suited to effective and efficient resolution of complaints against the broad range of traders and retailers who operate under the ACL.

Practical limitations on an industry funded retail ombudsman would be the membership and complaint handling costs for smaller retailers and traders. This could be addressed through a tiered membership scheme, which reduces membership costs for small operators. Membership fees could also be scaled according to the volume of complaints against individual traders, where those traders with rates of complaints paying more.

We note that the financial system external dispute resolution scheme is currently under review and this presents a timely opportunity to consider analogous schemes to address consumer complaints.

An alternative to a Retail Ombudsman, which we would also support, is to enhance the powers of state Fair Trading Agencies to investigate and conciliate ACL disputes and make binding and enforceable resolutions. This would address some of the concerns that we have about the unenforceability of the current mediation regime and the inaccessibility of the tribunal system. Conciliated determinations made by a Fair Trading Agency could be reviewable by a Tribunal, to ensure transparency and oversight. However, we consider it likely that a majority of common ACL disputes could resolve and an early stage through Fair Trading Agency conciliation schemes with greater “teeth”.

- **Recommendation 1:** Improve the efficiency and enforceability of dispute resolution outcomes through the implementation of an external dispute resolution process, administered by a Retail Ombudsman scheme. Alternatively, implement an enforceable conciliation/mediation scheme, administered by consumer protection agencies with appeal rights to NCAT for complex or contentious matters.

### Door to door sales and marketing

We note that in the interim report, CAANZ ‘considers there are risks with changing the current balance of the provisions’ relating to unsolicited sales. Redfern Legal Centre would like to reiterate its recommendation that unsolicited sales and marketing, in particular door-to-door sales, be banned. In our view, there are significant risks for ongoing consumer harm, which are entrenched, in this marketing method.

As the Full Court of the Federal Court noted in *ACCC v Lux Distributors* [2013] FCAFC 90 at [10]

*The vulnerability of the consumer to the salesperson in her or his own home arises from the difficulty in putting an end to the sales process once the salesperson is in the home, especially after that person has spent time and undertaken persuasive effort in a sales process or "pitch". People can simply agree to things to put the situation at an end.*

At Redfern Legal Centre, we regularly represent vulnerable clients who are the victims of unsolicited sales. We rarely encounter capable and empowered consumers with the same types of complaints. From our conversations with clients, it is our impression that door to door marketing targets consumers who are vulnerable and unable to protect their own interests. Door to door marketers utilise these tactics because the products they are selling fail to find a market through other channels.

The use of high-pressure tactics by unsolicited sales representatives has far-reaching consequences for very vulnerable clients. These experiences have been writ large over the course of many years. The two most recent examples of door to door marketing malpractice, for energy retail contracts and vocational training, have led respectively to industry making a commercial decision that door to door marketing should be abandoned<sup>1</sup> and government making a policy decision that door to door marketing should be banned.<sup>2</sup> We are firmly of the view that the most appropriate policy response to reduce consumer harm is to prohibit door to door sales and that this is long overdue.

#### **Case Study: Aung**

Aung was a refugee from Myanmar (Burma) who shared boarding house with several other students. A door-to-door energy sales representative, who was visiting properties to convince them to switch energy suppliers, approached her at home and told Aung that he was from the Government. Aung told the representative that she was not the energy account holder, and that she had trouble understanding English. The representative insisted that she needed to speak to another person from the same company on his mobile phone. He put the phone on loudspeaker, and guided Aung through the questions that the phone sales representative asked by writing "yes" or "no" on a piece of paper and guiding Aung to provide the appropriate response. As a result, Aung unknowingly entered into a contract for the provision of electricity for the entire boarding house. She incurred a significant debt, which the landlord refused to pay. After Aung approached Redfern Legal Centre, we expended a significant volume of resources to negotiate a resolution, which included a debt waiver by the energy retailer. Aung's case demonstrates the undue influence, imbalance in bargaining power and coercion inherent in door-to-door sales.

**Recommendation 2:** A general prohibition on unsolicited door to door sales and marketing

#### **Unfair Contract Terms and Insurance Contracts**

As we noted in our original submission, there is no cogent legal or policy rationale to exclude insurance contracts from the general and specific protections set out in the ACL. There is nothing inherent to insurance contracts that differentiate them from any other

<sup>1</sup> <https://www.energyaustralia.com.au/about-us/media-centre/current-news/door-to-door-energy-sales>

<sup>2</sup> <https://ministers.education.gov.au/hartsuyker/stronger-protections-vet-students-commence>

contract attracting the protection of the consumer law. The 'good faith' requirements in the *Insurance Contracts Act* do not effectively prevent unfair terms or industry malpractice.

In relation to the 'further questions' posed in the interim report, we believe that the unfair contracts provisions should be applied to all insurance contracts, without exemptions. We believe that this wouldn't require changes to the majority of insurance contracts, but that it will provide an important protection to the minority of consumers, often vulnerable, who are adversely affected by unfair terms in insurance contracts and the implications this can have for claims handling process.

There seems to be no convincing policy or law reform rationale for continuing to exclude insurance contracts from unfair contract terms protections under the ACL. We consider that such a change would have a significant deterrent and self-regulatory effect on the insurance industry at a very low public cost.

- **Recommendation 3:** Remove the 'carve out' of insurance contracts from the ACL unfair contract terms provisions.

### Interaction between the ACL and ASIC Act

As we noted in our original submissions, the interaction between the ACL and the ASIC Act is poorly defined, and there is significant ambiguity about the difference between 'financial services' and 'financial products'. Although some of the resulting ambiguity may be addressed by the MOU between the ACCC and ASIC, this is not easily understood by businesses and consumers. As a result, this review presents a timely opportunity to rectify this ambiguity and more clearly define the roles of ASIC and the ACCC in relation to consumer rights and remedies in relation to financial services.

RLC regularly encounters consumers who have consumer law grievances about financial services connected to basic household goods or credit. The consumers we encounter in this space resort to consumer leases or consumer credit to access basic consumer goods and services as they are already in financial hardship and cannot afford the initial outlay to buy a fridge, washing machine or TV. The most common complaints relate to consumer leases and in store consumer credit to purchase basic consumer goods. Complaints in this space routinely raise issues of misrepresentations about the nature of these financial services and the unsuitability and assessment process around the provision of credit. The current legislative definition of these financial services serves to limit the way in which consumers can seek effective redress for their complaints. Despite pertaining to basic ACL rights, the resolution of these complaints is effectively limited to the Financial Ombudsman Service, the Credit and Investments Ombudsman and the Federal Court.

Consumer complaints about financial services, particularly those connected to the purchase of basic household goods, should have recourse to tribunals, which have been established under the ACL. We again note the financial system external dispute resolution scheme is currently under review and consider this a timely opportunity to address this ambiguity and anomaly. We encourage CAANZ to consider legislative mechanisms which will better harmonise the ACL and ASIC Act, increase regulatory deterrence for financial



service providers and improve protections for consumers who access financial services to purchase basic consumer goods.

- **Recommendation 4:** Clarify and provide guidance on the interaction between the ASIC Act and ACL to ensure that consumers who utilize consumer credit and financial services, in connection with basic consumer goods and services, have the benefit of general protection under the ACL and financial services providers improve self regulation in line with the ACL.