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By email: aclreview@treasury.gov.au

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Dear Secretariat

Australian Consumer Law Review

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

The Review is highly anticipated, and offers a rare opportunity to improve and extend the Australian Consumer Law (**ACL**). The ACL not been reviewed since coming into operation on 1 January 2011, and while it has been a largely effective piece of legislation, there are clearly areas which require revision—and more that it can achieve. The ACL plays a crucial role in ensuring that consumers are empowered and protected, that markets are competitive, and that suppliers are required to trade fairly. This is not only a moral imperative, but also has clear economic benefits in promoting consumer confidence and healthy, robust markets.

Consumer Action is particularly concerned with the interaction between the ACL and low-income or otherwise vulnerable consumers. We note too that the Intergovernmental Agreement for the Australian Consumer Law does identify those consumers as one the six primary operational objectives for the ACL, stating that the law should:

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

The Productivity Commission has found that low-income consumers do not always benefit from competitive markets to the same extent as other consumers,² and further research³ has found that low-income consumers are often caught in the perverse position of paying more for goods and

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

² Productivity Commission, *Review of Australia’s Consumer Policy Framework*, 30 April 2008, pp 113 - 114.

³ Jaravel, Xavier, *The Unequal Gains from Product Innovations*, Harvard University, May 16 2016.

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services than wealthier consumers do. This dynamic is sometimes driven by inherently unfair business practices, and we would ask that CAANZ remain particularly mindful of this issue as the review progresses. If the over-arching goal of the ACL is to empower and protect consumers, and in so doing, to promote healthy competitive markets and encourage economic efficiency—then equity and economic fairness are valid considerations.

Although our reform priorities do emphasise measures which would particularly enhance the ACL for vulnerable consumers, they would benefit all Australians—and it is worth noting that all consumers can be vulnerable at one point or another, or to particular forms of commercial activity.

The rapidly developing field of behavioural economics is increasingly showing that the concept of the “rational consumer” is an outmoded theoretical construct, and should not dominate the further development of consumer law. Instead, regard should be had to how suppliers can have an incentive to exploit behavioural biases to generate unfair outcomes.⁴

While the 2011 iteration of the ACL picked up on behavioural economics principles through the implementation of unfair contract terms provisions (as had been recommended by the 2008 Productivity Commission *Review of Australia’s Consumer Policy Framework*), there is a need to extend the legislation further in the same direction. Just as the behavioural reality of standard form contracts has been acknowledged, so too should the dynamic of unsolicited in-home sales, and of unfair business practices which border on scams.

Over decades, Consumer Action and its predecessors have seen the harmful impact that unsolicited in-home selling has had across a number of industries. In-home sales have been used to sell maths education software programs, energy contracts, solar panels and domestic products (such as vacuum cleaners), amongst other goods. The particularly personal nature of in-home sales as a selling technique, and the commission-based incentives which drive salespeople to sign consumers up for expensive and inappropriate purchases, have driven poor consumer outcomes across numerous industries.

The 2011 ACL does acknowledge unsolicited sales as a problem area and did go some way towards protecting consumers, particularly through the mandating of a cooling off period. In Consumer Action’s view, this measure has failed to provide the expected protection and may actually have aided the selling process. Salespeople can now reassure consumers with the false security of a cooling off period upon which they know only the most proactive consumers are actually likely to act.⁵ Given the ongoing issues with in-home sales across a number of industries, Consumer Action believes that a prohibition on in-home sales is the only measure that is likely to provide effective consumer protection.

While the measure may seem severe, we question the value of retaining in-home sales. The in-home sales technique seems inherently intrusive and anti-competitive, capturing the consumer in their home and working against the notion of informed consumer choice. It also seems

⁴ Costa, Elizabeth; King, Katy; Dutta, Ravi; Algate, Felicity - Behavioural Insights Team, *Applying behavioural insights in regulated markets*, Citizens Advice (UK), 26 May 2016, p 6.

⁵ Sovern, Jeff, *Written Notice of Cooling-Off Periods: A forty-year natural experiment in illusory consumer protection and the relative effectiveness of oral and written disclosures*, St John’s School of Law Legal Studies Research Paper Series, July 2012, available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2103807>.

anachronistic. In past decades, where media was limited to radio and print, and a larger proportion of the population stayed at home, in-home sales made more sense as an avenue to sales and productive growth. In a contemporary online world, with a highly mobile and engaged workforce, a high penetration of personal media devices and multiple online and social media platforms through which to reach customers, the notion that in-home sales are somehow economically necessary seems tenuous at best, and farcical at worst. It would seem that the only reason to retain in-home sales as a selling technique is because it grants the seller a powerful advantage in the sales process, and enables traders to routinely sign consumers up for expensive goods that they have not sought, do not need, and often do not even really understand—quite often, because the selling process itself has been deceptive or otherwise dishonest.

Consumer Action also sees multiple instances of business practices which trade on the false hope of often vulnerable consumers. These businesses provide little to no real value and generally erode consumer confidence—yet are not easily caught by the existing protections of misleading and unconscionable conduct. Adopting a broad prohibition against unfair commercial practice would provide consumer protection against these kind of practices, and would align the ACL with US and EU consumer protection legislation. Such a reform would empower consumers and send a significant signal to the market—and would not curtail legitimate, productive commercial activity.

On a similar note, the establishment of a broad-based Retail Ombudsman to hear consumer disputes (as is also mandated by the EU), and a specialist motor vehicle tribunal (as exists in jurisdictions such as Canada, and New Zealand) would be important steps towards empowering consumers and promoting consumer confidence.

In summary, Consumer Action's major policy priorities for the ACL review are:

- the introduction of a general unfair trading prohibition,
- a ban on unsolicited door to door selling,
- the establishment of a Retail Ombudsman,
- the introduction of a specialist tribunal or ombudsman to hear motor vehicle complaints.

In addition, the consumer guarantee provisions of the ACL are complex, impractical and require amendment. In our view, a time limited reversal of the onus of proof, as applies in Singapore, would be a useful reform to the consumer guarantees regime. Current penalties under the ACL are also outdated, inadequate and require revision.

Finally—and as the Issues Paper anticipates—provisions must be put in place to ensure that consumers have access to their own data, and may use that data to assist their own decision making.

While these remain our headline priorities, Consumer Action has a view on all of the questions raised by the Issues Paper and have accordingly structured our submission as a direct response to the Paper.

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. Consumer Policy in Australia

Australia's consumer policy framework objectives

1. Do the national consumer policy framework's overarching and operational objectives remain relevant? What changes could be made?

The overarching goal of the ACL is to empower and protect consumers, and in so doing, to promote healthy competitive markets and encourage economic efficiency. This remains a valid purpose, provided adequate emphasis is given to the notion that empowering and protecting consumers is a mechanism for engineering healthy markets and economic efficiency—and is not somehow seen as a trade-off.

Consumer Action is wary of the perceived need to balance the prerogative to empower and protect with “*not imposing unnecessary compliance burdens on business or stifling effective competition and market innovation.*”⁶ Too often, a “trade at all cost” mentality dominates the consumer policy debate, while the nature or quality of that trade—and the negative impact it may have on consumers—is underplayed.

In our view, consumer protection legislation must be adequate for the purpose of protecting consumers—and should not be viewed as a regulatory burden. Confident, empowered consumers are essential to the efficient and productive functioning of a healthy consumer economy. Consumer protection is not a cost—but should instead be viewed as a facilitating mechanism to encourage economic activity and growth. As Ron Bannerman (the first Chairman of the Trade Practices Commission) said:

*“...consumers not only benefit from competition, they activate it, and one of the purposes of consumer protection law is to ensure that they are in a position to do so.”*⁷

On that basis, Consumer Action respectfully submits that the notion of balancing consumer protection against the potential for regulatory burden fails to fully take into account the powerful economic benefits of fashioning consumer protections for their primary purpose—without limiting protections on the basis they create a “regulatory burden”. These are not competing interest to be weighed against each other, but are instead two complementary aspects of the same functioning system. Consumer protection, empowering and protecting consumers, is itself a powerful mechanism to promote economic efficiency based on fair, ethical business practices.

⁶ ACL Issues Paper, p 4.

⁷ Trade Practices Commission Annual Report, 1983/84.

As stated earlier, there is a need for the ACL to further embrace behavioural economics in pursuing this aim, and to move away from the false notion of the “rational consumer”. This conceptual bias has historically led to poor policy outcomes—such as an over-reliance on disclosure as a means of consumer protection. At its heart, consumer protection needs to take into account the complexities and limitations of human behaviour in commercial activity. To base consumer policy on the notion that a consumer “...*should have a deep understanding of the market and its cost structures, and be somewhat aware of what a supplier’s competitors are offering*”⁸ sets an unrealistically high bar which most consumers should not be expected to reach. Consumer choices are made in the context of increasingly busy and stressful lives, under an increasing bombardment of information which tends towards information overload.

Often, consumer choices are made for emotional reasons and then rationalised after the fact. They are not arrived at through a careful and objective assessment of all available options, but are made on the basis of ‘gut instinct’, usually arrived at through one or a number of decision making short-cuts or biases, known as heuristics, which themselves may have little basis in rationality. Successful industries have understood the true decision making processes of consumers for decades, and are increasingly sophisticated in their sales and marketing techniques to maximise that knowledge. This leaves some consumers vulnerable to sales appeals with promises of false hope, or play on undue fears and concerns.

Cynically tapping into emotional triggers and cognitive limitations to make sales which are inappropriate for the needs of the consumer, and can have a disastrous impact on their financial health, is something that any good consumer protection legislation should guard against. Indeed, it is hard to see how such legislation can effectively protect and empower consumers if it fails to take these factors into account.

Finally, we note that effective enforcement of consumer protection legislation remains an ongoing challenge. Resource constraints create significant difficulties for regulators, and these have the potential to undermine good legislation if not addressed. In 2013, Consumer Action published a report titled “*Regulator Watch: The Enforcement Performance of Australian Consumer Protection Regulators*”. In that report, we found that there was room for all consumer regulators to increase the amount of enforcement work that they undertake.⁹ This was reflected in the results of the recent ACL Consumer Survey, which found that only 54 per cent of consumers believe the law adequately protects them¹⁰—an increase of only 4 per cent on the 50 per cent figure recorded in 2011.¹¹ While the focus of this review is to enhance the legislative framework of the ACL, any enhancement of consumer protection should be supported by increased resourcing and enforcement activity by key regulators.

⁸ Lee Worth, Brenton, “*Are we there yet? A return to the rational for Australian consumer protection*”, (2016) 24 AJCCL 33, p 38.

⁹ Renouf, Gordon; Balgi, Teena and the Consumer Action Law Centre, “*Regulator Watch: The Enforcement Performance of Australian Consumer Protection Regulators*”, (2013) p 18.

¹⁰ The Treasury on behalf of Consumer Affairs Australia and New Zealand, “*Australian Consumer Survey 2016*”, (2016) p 25.

¹¹ Australian Consumer Law Survey Infographic (2016)

2. Are there any overseas consumer policy frameworks that provide a useful guide?

Australia's consumer policy framework is generally sound, although we do believe there are significant enhancements to be made by adopting concepts and practices from other jurisdictions.

Consumer Action strongly advocates for the adoption of a general prohibition on unfair trading practices. This would mirror existing protections in both EU and US consumer law and would provide protection to consumers who are currently caught by unquestionably sharp business practices, yet are difficult to show as "unconscionable".

We also advocate for a Retail Ombudsman, similar to the model currently operating in the UK, which itself is a response to the European Union Directive on Consumer Alternative Dispute Resolution (**ADR**).¹² Further to the point of dispute resolution, through our case work experience, Consumer Action has come to the view that a specialist tribunal to hear motor vehicle disputes is warranted on the basis that motor vehicle disputes are common, consumer outcomes are often poor and the negative impact of those outcomes can be very significant for the consumer. The New Zealand Motor Vehicle Disputes Tribunal represents an effective model to base such a service on.

Finally, we believe the consumer guarantee provisions under the ACL could be significantly strengthened by adopting a time-limited reversal of the onus of proof, which currently applies under Singaporean consumer law. In 2012, Singapore introduced lemon laws that apply to all goods that fail to meet standards of quality and performance, even after repeated repair. Eligible goods include second-hand goods, discounted goods and perishable goods. The laws do not apply to rental goods, services or real property. Under the provisions, if a defect is found within six months of delivery of the goods, it is assumed that the defect existed at the time of delivery unless the retailer can prove otherwise. The consumer can make a request for repair or replacement, and if that is not possible, can ask for a reduction in price or a full refund. In cases where legal action is required, consumers may seek recourse through the Small Claims Tribunals, which can hear claims of up to \$10,000.¹³

While we elaborate further on these points later in our submission, we raise them here as an indication of the international approaches that we believe could be adopted to strengthen the ACL. We are also conscious that there are areas where the ACL could take an international lead, and a ban on unsolicited in-home sales represents an excellent opportunity to do so.

¹² Directive 2013/11/EU on Alternative Dispute Resolution for Consumer Disputes [2013] OJ L 165/63.

¹³ 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>>.

3. Are there new approaches that could help support the objectives of the national consumer policy framework, for example, innovative ways to engage with stakeholders on the ACL issues?

The ongoing development of consumer policy is opaque, and should be opened up for broader consultation. CAANZ, CAF and sub-committee meetings are held without being publicised, and there is no direct capacity for stakeholders to make submissions to those forums. As was recommended by the Review of Governance Arrangements for Australian Energy Markets, consumers and their advocates would benefit from “*improved visibility, transparency and accountability of... processes and operations*”.¹⁴

Consumer Action’s 2013 report about regulator enforcement, titled “*Regulator Watch: The Enforcement Performance of Australian Consumer Protection Regulators*”, found not only that more enforcement action was required, but that more consistent reporting and improved transparency could also play an important role in improving consumer policy development.

A rolling process of consultation and review has the benefit of addressing issues as they arise, and could potentially be more effective than periodic major reviews. Reviewing the large pieces of legislation in their entirety tends to raise a number of issues, often leading to a natural tendency towards “trading off” reforms intended to satisfy competing views. Arguably, a more ongoing reform process allows each policy issue and potential reform to be assessed clearly on its own merits and not seen as one element amongst a suite of reforms, which must be weighted to serve opposing interests.

Consumer Action submits that there is also a need for a well-funded National Consumer Policy Research Centre (NCPRC), as was recommended by the Productivity Commission in 2008. In 2009, the Federal Government consulted on need for government support for consumer advocacy and consumer policy research.¹⁵ Despite there being over 30 submissions in favour of nationally funding consumer advocacy and research, the Government did not finalise this consultation. There are international precedents for such an organisation, such as the French Research Centre for the Study and Observation of Living Conditions. The UK Government also funds the Consumer Advice Bureau to undertake consumer policy research and advocacy.

2. Structure and clarity of the Australian Consumer Law

4. Is the language of the ACL clear and simple to understand? Are there aspects that could be improved?

It should be the aim of any legislative review process to continually simplify the expression of the law to enhance accessibility, without sacrificing legal meaning and accuracy.

In the case of the ACL, the expression of the document is generally clear and should be understandable to most consumers with basic literacy. For the most part, plain English drafting

¹⁴ Vertigan, M, Yarrow, G & Mortan, E, *Review of Governance Arrangements for Australian Energy Markets—Final Report*, October 2015, available at: <<https://scer.govspace.gov.au/files/2014/12/Review-of-Gov-Arrangements-for-Energy-Markets-Final-Report-Jan-2016-PDFTAG.pdf>>.

¹⁵ Treasury, *Consumer Voices: Sustaining Advocacy and Research in Australia's New Consumer Policy Framework*, May 2009, available at: <<http://archive.treasury.gov.au/contentitem.asp?ContentID=1532>>.

has been successfully applied—although one obvious use of outmoded language in the ACL is the reliance on the term “unconscionable”. The term “unconscionable” is not commonly used or understood in the wider community, and this limits the efficacy of the unconscionable conduct protection (in addition to the generally narrow judicial approach to the concept). It is partly for this reason that we believe a general prohibition on unfair trading is required—the term “unfair” certainly has far greater currency and relevance for most consumers than does the term “unconscionable”. For more on this point, please see our response to question 9 of the Issues Paper.

While we do not have major concerns around the expression of the ACL, we do believe that clarity can always be improved—so we believe it would be useful for the legislation to be thoroughly reviewed with re-drafting for improved accessibility. Given that the ACL does apply to all Australians, there is a greater need for it to be highly usable than some other legislation, which inevitably tends towards a narrower, more expert audience.

Further, while the language of the ACL is not particularly problematic, there are issues with the structure which we discuss in our response to question 5.

5. Is the structure of the ACL easy to understand and navigate? Are there aspects that could be improved?

The location of the ACL as Schedule 2 to the *Competition and Consumer Act 2010 (Cth)* makes it obscure and potentially difficult to find for lay consumers. In our view, the accessibility and user friendliness of the ACL are of prime importance—the more the legislation is known and understood, and the more easily it can be found—the more empowered consumers become. Accordingly, we recommend “excavating” the ACL from its status as a schedule, and making it more accessible to everyday consumers. For the same reason, the National Credit Code (which sits as a Schedule 1 to the *National Consumer Credit Protection Act 2009 (Cth)*), should also be given more prominence.

The placement of the ACL as a schedule means that it is not formatted for ease of use in the same way that a primary Act is, and we believe that this should be addressed. Appropriate use of headings, bold type and varying fonts may seem superficial—but can have a significant impact on accessibility for the average user. A clearly formatted and easily located online version of the ACL, thoroughly hyperlinked for ease of navigation would be ideal. This could be placed on the www.consumerlaw.gov.au website, rather than that site merely linking to the Federal Register of Legislation.

In terms of specific areas of the Act, the consumer guarantees provisions could be re-drafted for improved navigation and ease of use— anecdotally, the consumer guarantees division of the ACL is often cited as a difficult area of the legislation to work with.

6. Are there overseas consumer protection laws that provide a useful model?

The *Consumer Rights Act 2015 (UK)* is set out like a FAQ guide, which makes it user friendly and far easier to navigate than the ACL. Consideration could perhaps be given to re-drafting the ACL along those lines. Simply by framing some headings as questions, the ACL could be made easier to use.

In addition to re-drafting the ACL, additional online resources could be drafted to help consumers better understand their rights under the legislation. The New Zealand 'Consumer Protection'¹⁶ web-site does this particularly well.

7. Is the ACL's treatment of 'consumer' appropriate? Is \$40,000 still an appropriate threshold for consumer purchases?

Consumer Action has no particular concerns around the current ACL definition of consumer, although we do question the need to retain the \$40,000 threshold for consumer purchases—particularly given the wide exemptions that already apply (e.g. motor vehicles, domestic and household goods).

Although it is rarely a concern for us given our client base, we do not see any legitimate basis for the \$40,000 threshold. We take the view that consumer protection ought to apply to all consumers, and should not be curtailed by an arbitrary value set on the purchase.

General protections of the Australian Consumer Law

8. Are the ACL's general protections working effectively? Do they address the risks of consumer and business harm without imposing disproportionate or unnecessary costs on business?

As confirmed by the recent Australian Consumer Law Survey, consumer perception of their own levels of protection have improved slightly since the ACL was enacted in 2011. For example, consumer confidence in the law providing adequate protection has risen from 51 per cent, to 54 per cent. In Consumer Action's view this would suggest that while the general protections of the ACL have been reasonably effective, there is significant room for improvement. This is equally applicable to the specific protections of the ACL, which we address in our response to questions 10 to 14.

As stated in our response to question 1, Consumer Action is wary of consumer protection being viewed through the lens of regulatory burden. Consumer protection is a productivity and efficiency measure in its own right. Regulation which empowers consumers and enhances economic efficiency has macro-economic benefits which are potentially lost if those measures are diluted because they are erroneously classified as a cost. While we do not dismiss the fact that businesses do occasionally incur compliance costs in relation to consumer law, we do not believe that legitimate consumer protection should be constrained as a result.

Consumer Action strongly advocates for the implementation of a general prohibition on unfair trading practices, which would mirror equivalent protections in the US and the EU. Such a protection would address the need to curb systematically unfair business practices which are not currently caught by the unconscionable conduct protection. We believe this would be a powerful addition to the range of general protections currently available under the ACL, and elaborate further on this issue in our response to questions 15 and 16 below.

¹⁶ Available at: <http://www.consumerprotection.govt.nz>

9. Are there any changes that could be made to improve their effectiveness, or address any of the issues raised in section 2.2? Are there any gaps that need to be addressed?

Misleading or deceptive conduct

Misleading or deceptive conduct under the ACL should attract the same penalties as those which apply to false or misleading representations.

Under section 151 of the ACL, false or misleading representations may attract criminal penalties of up to \$1,100,000 for a body corporate, and \$220,000 for an individual—in addition to a range of civil remedies. By contrast, penalties for breach of section 18 are limited to civil remedies including injunctions, damages, compensatory orders, orders for non-party consumers and non-punitive orders.

Consumer Action submits that penalties for misleading or deceptive conduct should include criminal penalties equivalent to those which apply to false or misleading representations. There is no apparent justification for misleading and deceptive conduct to attract such a comparatively light range of penalties. We further note that the quantum of those penalties ought to be increased, and address this later in our submission, in response to question 20.

Consumer Action also believes that the prohibition on misleading conduct should be broadened to cover misleading omissions. This is discussed in our response to question 35.

Unconscionable conduct

While the protection against unconscionable conduct is useful, it has series flaws and leaves Australian consumers exposed to unfair, predatory business practices which border on scams—yet are not caught by the high threshold of misconduct that proving unconscionable conduct requires.

In addition to creating a high threshold, unconscionable conduct also has an uncertain meaning which has led to varying judicial interpretations, and regulator uncertainty. The combined effect of these limitations has made unconscionable conduct difficult to enforce. Finally, the lack of a common community understanding of the term ‘unconscionable’, (an outdated legal term originating through the doctrine of equity), means that everyday consumers remain largely unaware of the protection—and it therefore does little to fulfil the ACL intention of “empowering consumers”.

Further, we are not convinced that the protection against unconscionable conduct is sufficient to address some of the systemic issues that we see arising through our casework.

In order to do that, an additional general protection—a prohibition against unfair business practices—is required. We expand on this point later in this submission, in response to questions 15 and 16.

We expand on our views regarding the unconscionable conduct protection immediately below.

Unconscionable conduct involves a high threshold of misconduct

The prohibition imposes a high threshold before conduct will be considered 'unconscionable'. Conduct that is simply unfair will not be sufficient.

This high threshold makes it difficult for regulators to take action against traders that test the boundaries. In a submission to a 2013 Senate Inquiry, the Australian Securities & Investments Commission (**ASIC**) stated:

*'The courts have set a high bar for establishing unconscionability, particularly for commercial transactions. Whether a specific transaction is unconscionable depends on the individual facts and circumstances of the case. A general power imbalance between parties or a contract that favours one party more than the other is not sufficient to support a claim of unconscionable conduct.'*¹⁷

ASIC has also stated that this has limited the ability of the prohibition addressing systemic or widespread issues. ASIC states:

*'[the unconscionable conduct provisions] are dependent on the particular facts and circumstances of individual cases. Findings that they have been breached tend to be specific to the case at hand and rarely set a general rule or precedent. The conduct standards in the ASIC Act were therefore at best an imperfect tool for a regulator seeking to address systemic or widespread issues.'*¹⁸

Further, the unconscionable conduct provisions do not actually prohibit unfair trading. The Federal Court recently stated that 'conduct which is unfair or unreasonable is not for those reasons alone unconscionable'.¹⁹ The prohibition imposes a high threshold before conduct will be considered 'unconscionable'.

Uncertainty of meaning

Various federal and state judiciaries have wrestled with the statutory concept of 'unconscionable conduct' and have arrived at different interpretations. The High Court is yet to consider the statutory prohibition in any depth, meaning confusion is likely to persist in the lower courts for some time yet.

In *Attorney General (NSW) v World Best Holdings Ltd*,²⁰ Chief Justice Spigelman found that 'moral obloquy' needed to be found in order for conduct to be 'unconscionable'.²¹ 'Moral obloquy' might be defined as disgraceful immoral conduct, such that deserves public condemnation

¹⁷ Australian Securities and Investments Commission, 'Senate Inquiry into the performance of the Australian Securities and Investments Commission - Submission by ASIC on reforms to the credit industry and 'low doc' loans, October 2013, p. 6.

¹⁸ Australian Securities and Investments Commission, 'Senate Inquiry into the performance of the Australian Securities and Investments Commission - Submission by ASIC on reforms to the credit industry and 'low doc' loans, October 2013, p. 6.

¹⁹ *Australian Competition and Consumer Commission v ACN 117 372 915 Pty Ltd (in Liq) (formerly Advanced Medical Institute Pty Ltd)* [2015] FCA 368 at [39].

²⁰ *Attorney General (NSW) v World Best Holdings Ltd* [2005] 63 NSWLR 557.

²¹ Prof. Bob Baxt, 'A clear definition', *Company Director*, May 2015, p. 58.

In *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd*,²² the Full Federal Court diminished the importance of the concept of moral obloquy. While noting that moral obloquy or moral tainting might be relevant, the Court ruled that the court should be concerned with 'conduct against conscience by reference to the norms of society that is in question.' This approach has been followed in other Federal Court decisions, such as *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd*²³ and *Paciocco v Australian and New Zealand Banking Group Ltd*.²⁴

However, the Victorian Supreme Court of Appeal decision of *Director of Consumer Affairs (Vic) v Scully (No. 3)*²⁵ reverted to the narrower and restrictive interpretation by requiring moral obloquy once again. This approach has been followed by subsequent Victorian Supreme Court cases, including *DPN Solutions Pty Ltd v Tridant Pty Ltd*²⁶ and *Sgargetta v National Australia Bank Ltd*.²⁷

It is clear that two differing lines of authority are developing around the meaning of unconscionable conduct in the Federal Court and Victorian Supreme Court, again demonstrating the difficulty of applying this imprecise concept. In fact, the Full Federal Court has acknowledged that it is futile to attempt to define the concept of unconscionable conduct, saying:

*'...any agonised search for definition, for distilled epitomes or for short hands of broad social norms and general principles will lead to disappointment, to a sense of futility, and to the likelihood of error. The evaluation is not a process of deductive reasoning predicated upon the presence or absence of fixed elements or fixed rules.'*²⁸

Some judges appear to believe that the statutory prohibition 'could result in the transformation of commercial relationships in a manner which... was not the intention of the legislation.'²⁹ This concern appears to have unnecessarily limited the application of the prohibition against unconscionable conduct in some courts to those cases that involve 'moral obloquy'. This sentiment appears to be shared by the High Court, with the Court in *Kavakas v Crown Melbourne Limited* toying with the idea that moral obloquy was relevant in evaluating unconscionability, although not deciding the matter.³⁰

Difficulties in enforcement

If a regulator chooses to proceed with an unconscionable conduct case, it will face evidentiary challenges. Victims are often vulnerable and disadvantaged consumers, and raise particular issues for enforcement activity. They are often less willing to complain, more easily intimidated, less likely to have retained documentary records and less likely to perform well as witnesses in court proceedings where among other things they can be readily confused under skilled cross

²² *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90.

²³ *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405.

²⁴ *Paciocco v Australian and New Zealand Banking Group Ltd* [2015] FCAFC 50.

²⁵ *Director of Consumer Affairs (Vic) v Scully (No. 3)* [2013] VSCA 292.

²⁶ *DPN Solutions Pty Ltd v Tridant Pty Ltd* [2014] VSC 511.

²⁷ *Sgargetta v National Australia Bank Ltd* [2014] VSCA 159.

²⁸ *Paciocco v Australian and New Zealand Banking Group Ltd* [2015] FCAFC 50 at [304].

²⁹ *Attorney General (NSW) v World Best Holdings Ltd* [2005] 63 NSWLR 557 at [121].

³⁰ *Kavakas v Crown Melbourne Limited* (2013) 250 CLR 392.

examination.³¹ As such, regulators may face barriers when taking on cases affecting vulnerable and disadvantaged consumers that significantly rely on individual consumer testimony. In the regulators' defence, courts and the rules of evidence are not generally open to approaches that may ameliorate the impact on vulnerable consumers.

Another problem for regulators is the complexity of many unfair business models. Where there are complex business models with a number of parties in a supply chain, even where unconscionable conduct is found, some key actors can escape liability. This limits the ability of the prohibition to have a systemic effect on these more complex business models. This was a notorious problem in relation to finance broking before the enactment of the *National Consumer Credit Protection Act 2009* (Cth), where lenders could not be found responsible for the unconscionable conduct of brokers.³²

Community understanding

Perhaps most importantly, however, is the complexity of the phrase 'unconscionable conduct' itself. Ask an average business owner or consumer what the phrase 'unconscionable conduct' means and you are likely to get a blank stare in response. 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 commonly understood, and makes it difficult for businesses and consumers alike to recognise when conduct may be 'unconscionable'.

Unfair contract terms

The unfair contract terms provisions were a major benefit of the implementation of the ACL, although they do have significant shortcomings which ought to be addressed.

First, Consumer Action reiterates its longstanding objection to the exclusion of standard form insurance contracts from the unfair contracts terms provisions of the ASIC Act. We do not believe that any sensible policy discussion of the operation unfair contract terms protections can ignore the ongoing and unjustified exclusion of insurance contracts from unfair contract protections—the *Insurance Contracts Act 1984* (Cth) simply does not provide equivalent protections, and ought to be amended to mirror the unfair contract terms provisions of the ASIC and ACL Acts. While we mention this here, we have expanded further on the point in our response to question 17.

Second, Consumer Action is of the view that the unfair contract terms provisions should be expanded to void a contract that is unfair as a whole. While the selective protection of voiding individual terms that are deemed to be unfair does provide some useful protection, there are contracts where the sum effect of various terms amounts to unfairness, and those contracts should be voidable on that basis. This includes contracts that are very lengthy (sometimes

³¹ See Australian Law Reform Commission, *Uniform Evidence Law (ALRC Report 102)*, Chapter 5, 8 February 2006, available at: <http://www.alrc.gov.au/publications/5.%20Examination%20and%20Cross-Examination%20of%20Witnesses%20/examination-witnesses>.

³² These difficulties are demonstrated by the Western Australia Supreme Court's decision in *Perpetual Trustee Company v Burniston (No. 2)* [2012] WASC 383.

hundreds of pages in length) and those that incorporate policies and other documents outside of the written contract itself. Consumers should not be required to be directed to different documents found in different places to determine their rights when agreeing to a contract.

The power to have a contract with unfair terms deemed unfair as a whole would be a valuable tool for regulators seeking to challenge systemically unfair business practices. This power would operate on a similar conceptual basis to, and would complement, a general prohibition on unfair trading. We discuss how such a general prohibition may work in our response to questions 15 and 16.

Third, the unfair contract term regime has failed to address some key unfair contractual terms. The benefit of the regime has largely resulted from businesses proactively changing their contracts, or regulators working with industries to improve terms³³—there has been limited case law that provides judicial guidance about particular problematic terms. We raise two persistent examples, terms that allow for contracts to automatically renew unless the consumer provides notice; and terms that impose large cancellation fees in the event of termination or breach of contract.

1. Gym contracts commonly include terms that allow for a contract to be automatically extended unless the consumer provides notification. In its guidance on unfair terms in health and fitness centres, Consumer Affairs Victoria (**CAV**) states that consumers who have signed automatically renewing contracts should be able to give notice before the minimum term expiry date,³⁴ allowing for any notification period, so that their membership will terminate when the minimum term expires.

Insurance contracts also commonly include terms that allow for automatic renewal. While unfair contract term provisions do not apply to insurance contracts, the Australian Securities & Investments Commission has required insurers to improve disclosure of these terms due to concerns consumers were being misled.³⁵ CAV has also focused on disclosure, requiring one provider to give notice before the end of any minimum term.

The protection offered to consumers is insufficient, and automatic renewal terms are actually anti-competitive as they inhibit a consumer shopping around by not turning their mind to the service they receive. We submit that the unfair term provisions should specifically prevent terms that allow for automatic renewal of contracts, unless the consumer opts into the renewal in the period prior to the contract end date.

2. Terms that allow for the imposition of a fee on cancellation or breach or which impose a restriction from doing the particular act, reserving a payment if it is done, are common place in many consumer contracts, from credit cards, personal bank accounts, private car

³³ Australian Competition and Consumer Commission, *Unfair Contract Terms—Industry review outcomes*, March 2013, available at: <<https://www.accc.gov.au/publications/unfair-contract-terms>>.

³⁴ Consumer Affairs Victoria, *Preventing unfair terms in health and fitness centre membership agreements*, 2011, p 11,

³⁵ Australian Securities and Investments Commission, *Media release: ASIC drives better disclosure of automatic renewal of car insurance*, 19 November 2015, available at: <<http://asic.gov.au/about-asic/media-centre/find-a-media-release/2015-releases/15-345mr-asic-drives-better-disclosure-of-automatic-renewal-of-car-insurance/>>.

parks, retail telecommunication products, private training courses or others. Section 25(1)(a) of the ACL provides that a term that penalises, or has the effect of penalising, one party (but not another party) for breach or termination of the contract may be unfair. Despite this provision, there are many contracts that charge fees that appear to be greatly above the reasonable direct cost suffered by the provider because of a breach, cancellation or failure to comply with a stipulation by the consumer.

Case study

Sally is a single mother who, up until recently, worked 40 hours per week picking and packing orders. Sally contacted Training College Pty Ltd (**TCPL**) to enrol in Diploma of Interior Design and Decoration, which commenced in February 2014. Sally had suffered a neck injury at work and was receiving some income protection. However, Sally was concerned that her company would dismiss her, so she thought she should retrain.

A representative of TCPL conducted a quick interview to discuss the course before enrolment, stressing it would be difficult but that he thought she could complete it. Sally says that the representative assured her that TCPL would be available at all times of the day and weekends, but that in reality it was difficult to obtain assistance. Sally instructs that she found the online learning space difficult, and thought that the trainers did not provide enough training on how to use the TCPL system.

After enrolment, Sally received an email from TCPL would be transitioning Sally into a new course with an alternate college.

The cost of the course was \$7,990 and was payable in weekly instalments. Sally was told she only had a 5 day cooling off period. After 6 months Sally came to the conclusion both she could not afford and that it was too difficult. Despite discontinuing the course, money continued to be debited from her account until she cancelled the debit order. In total, Sally paid approximately \$3,500 for the course.

Following cancellation of the debit order, a direct debit company associated with TCPL sent Sally a letter of demand requesting outstanding fees of around \$1,800. The TCPL subsequently contacted Sally seeking over \$2,000 and some months later the matter was referred to a debt collection agency who sought over \$5,000. The termination fees sought appeared to be unrelated to the loss incurred by TCPL.

*Name changed for privacy reasons

The ACL provision needs to be considered in light of the common law doctrine of contractual penalties, which has been recently read down by the Full Federal Court. In *Paciocco v Australia and New Zealand Banking Group Limited*,³⁶ the court held that certain late payment fees on credit cards were not breaches and did not involve a breach of unfair contract term laws. The court held that the fees were not extravagant, exorbitant or unconscionable, and that the court should assess the fee against the greatest loss that could conceivably flow from non-payment, assessed at the time the contract was entered

³⁶ [2015] FCAFC 50.

into (*ex ante*) rather than retrospectively (*ex post*). The court also held that indirect consequences and costs as a result of non-payment can be taken into account when determining the greatest conceivable loss. Significantly, the court took a broad view as to the kinds of losses that could be taken into account when conducting an *ex ante* assessment in respect of the fees in question. In determining the reasonableness of the late payment fees, the Court considered that, among other things, provisioning costs, costs for maintaining regulatory capital and costs related to running a collections apartment could all legitimately be taken into account.

It must be noted that the High court has reserved its decision in relation to the *Paciocco* case. Nevertheless, Consumer Action submits that this decision reflects an ambiguity that results in insufficient protection for consumers. If section 25(1)(a) is construed in the same way, providers would be able to continue to charge large fees for breach or termination of a contract. This includes very large late payment fees, as well as cancellation fees for contracts like courses that seek to recover all or a majority of the contract cost.

Consumer Action submits that the unfair contract term provisions should be amended to require that providers can only recover loss or damage that is reasonable and directly related to the breach or termination. This would inhibit providers from recovering costs that they largely would have been required to have sustain if there was no breach or termination. It is unfair for consumers specifically to be charged such fees, and they can burden vulnerable consumers disproportionately. It is often lower income or vulnerable consumers that are required to breach or terminate contracts due to affordability concerns, or a change in their circumstances.

Finally, Consumer Action believes the definition of an unfair contract term needs to be enhanced so that the regime can better deal with unfair terms that permeate a whole industry or sector.

Sub-section 24(1)(b) of the ACL provides that a term may be fair where it is necessary to protect the legitimate interests of a supplier. Sub-section 24(4) provides that a term of a consumer contract is presumed not to be reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise. To date, there has been little judicial interpretation of “legitimate interests”. In its guide on unfair contract terms, the ACCC provides some commentary on the evidence that might be required to demonstrate why it is necessary for the contract to include the term:

*Such evidence might include material relating to the business’s costs and business structure, the need to mitigate of risks or particular industry practices.*³⁷

In her article on the unfair contract term provisions, Dr Jeannie Patterson of the University of Melbourne Law School states:

There would seem to be two stages to this inquiry. First, it must be shown that the term protects a legitimate interest of the trader. This requirement might be satisfied by showing that the term protects the trader from risks inherent in the transaction. Secondly, the term must be reasonably

³⁷ Australian Competition and Consumer Commission, Unfair Contract Terms, A Guide for Businesses and Legal Practitioners, March 2016, p. 11.

*necessary to protect the trader's legitimate interests. It seems likely that a relevant consideration will be the proportionality of the term. Typically, it is suggested that a term will be reasonably necessary to protect the legitimate interests of the trader only where the term represents a proportionate response to the risk it addresses. This inquiry may require courts to consider other possible ways of protecting the trader's interests that would be less burdensome to the consumer. Parties may be expected to bring evidence of this issue. Market practice may also be relevant.*³⁸

Dr Patterson references the case of *Jetstar Airways v Free* [2008] VSC 539 which related to the previous iteration of unfair terms law in Part 2B of the *Fair Trading Act 1999* (Vic). In that case, Cavanough J referred to the term 'legitimate interests' in relation to an argument about whether the particular term was 'contrary to the requirements of good faith' (which was a feature of Part 2B; good faith is not referred to in the ACL):

*It [the argument that unfair contract terms laws necessitate a consideration of the legitimate interests of both the consumer and the supplier] suffers from its own inherent tentativeness. But, moreover, it may call for an inquiry into each individual consumer's undefined "legitimate interests" and each individual supplier's undefined "legitimate interests" (including, perhaps, the detailed financial circumstances of each particular consumer and of each particular supplier.). I can see no sufficient warrant for this in the language or history of the relevant provisions. In my view, section 32W is centrally concerned with the fairness of the terms of contracts in themselves, in the light of broad business practices in the relevant industry, and in the light of the circumstances in which each relevant contract was made, and not so much with the multifarious personal interests of individual parties to which their contracts might directly or indirectly relate.*³⁹

This analysis suggests that a particular business's financial interests, and general industry practice, is relevant to determining what amounts to a business's legitimate interests.

In 2013, Consumer Action and the Consumer Utilities Advocacy Centre made an application to amend the National Energy Retail Rules to prohibit an energy contract from allowing an energy retailer to unilaterally vary the price of energy.⁴⁰ In support of this argument, we suggested that such terms may be unfair contract term in breach of the ACL. The Australian Energy Market Commission felt it did not have jurisdiction to determine this issue, and it was suggested that given retailers managed uncertain costs and given inclusion of such terms were general industry practice, such terms may not amount to unfair contract terms.

This example demonstrates the weakness of the regime in voiding contract terms that are unfair to consumers that permeate an entire industry. The ACL could be enhanced by being amended to clearly state that "common industry practice" has no bearing on the concept of unfairness, at all.

As stated by Brenton Lee-Worth in his article *Are we there yet? A return to the rational for Australian consumer protection*:

³⁸ Dr Jeannie Patterson, *The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts*, Melbourne University Law Review, (2009), p 944-45.

³⁹ *Jetstar Airways v Free* [2008] VSC 539, para 119.

⁴⁰ Australian Energy Market Commission, *Retail Rule Change: Retailer Price Variations in Market Retail Contracts*, available at <<http://www.aemc.gov.au/Rule-Changes/Retailer-Price-Variations-in-Market-Retail-Contract>>

“...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. This is on the basis that behavioural economics has realised that consumers rarely undertake detailed research of a market prior to entering a transaction, and even if they do, are often unable to fully understand the implications of salient features of a contract such as a refund policy. As such, it is submitted that the focus should remain on the substantive fairness of the term itself, and it should be made explicit that otherwise unfair terms may not be legitimised simply on the basis that they are uniform within an industry. In turn, this would accord with the intention of the legislature, by ensuring that suppliers assess their risk properly, and do not use their stronger bargaining position to simply push all the dangers involved with doing business onto the consumer.”⁴¹

The Australian Consumer Law’s specific protections

10. Are the ACL’s specific protections working effectively? Do they address the risks of consumer and business harm without imposing disproportionate or unnecessary costs on business?

Please refer to our response to question 8, as those comments in relation to general protections are equally applicable to the specific protections we discuss below.

In short, we believe that while the specific protections of the ACL are useful, there is room for significant improvement. We also believe that enhancing specific protections of the ACL should not be viewed through the lens of regulatory burden. To do so badly underestimates the economic benefits that flow from improved consumer confidence, and the inherent societal benefits of promoting fairness in the consumer economy.

11. Are there any changes that could be made to improve their effectiveness, or address any of the issues raised in section 2.3? Are there any gaps that need to be addressed, or overseas models that could provide a useful guide?

Unsolicited supplies of goods and services

The existing ACL protections against unsolicited selling, (which are fundamentally based in ideas derived from behavioural economics), are useful but do not go far enough.

Unsolicited sales are inherently at odds with rational choice theory, as they involve the trader making an unrequested approach to a consumer who is not necessarily looking to buy the good—and is therefore not taking steps to inform themselves of their options in the market. Unsolicited sales staff are often highly trained and motivated by commission-based payment structures. Sales staff are not concerned that the good or service should be appropriate or affordable for the consumer, but simply that the sale be closed. Often, the salesperson involved is not directly employed by the company selling the good or service, but is instead employed by a direct selling company—and this creates a further disconnect between the consumer and the good or service on offer. Such salespeople have no incentive to conduct themselves fairly, because any

⁴¹ Lee-Worth, Brenton, *Are we there yet? A return to the rational for Australian consumer protection* (2016) 24 AJCCL 33 p50.

'comeback' will sheet home to the company selling the good or service, not the salesperson themselves. Reputational damage is therefore no deterrent—all that matters is the sale.

Case study

Carolyn* contacted us about her recent experience with an education broker. Carolyn said that she received a phone call on 13 February 2015 at approximately 6.30pm from a telemarketer. The telemarketer said that he was calling about an online diploma 'that's paid for by the Government', and that if Carolyn enrolled she 'would get a free laptop'.

Carolyn advised that her income was around \$20,000 per annum. Carolyn was told the college was Australian Vocational Learning Institute. Carolyn agreed for someone to visit her to discuss further. Carolyn says that she is listed on the Do Not Call Register.

A salesperson visited Carolyn on 16 February 2015. Carolyn advised that she was only working one day a week, and had no formal qualifications. The salesperson stated that "this program is specifically for the housewives". Carolyn said she was interested in the management course. The salesperson suggested that Carolyn enrol in the project management diploma. He mentioned that Carolyn would be studying 2-3 hours a week. Carolyn is assured that this is a 'very easy diploma' and that she would 'be able to get a good job'.

* Name changed for privacy purposes.

Case study (provided by Loddon Campaspe Community Legal Centre)

Arun migrated to Australia in 2008. He had limited understanding of English. After working in a factory for a few years he decided to open a business. One day while he was at the business, two door-to-door salesmen arrived unannounced trying to sign Arun up to solar energy. It was a very busy time for Arun. After more than half an hour their sales pitch—which Arun barely understood—Arun indicated that he was very busy.

A few days later, one of the two salespeople returned to Arun's business at an equally inconvenient time and again tried to sell him solar. An interpreter was not used and all Arun understood was that solar panels would make his energy bills cheaper. In Arun's culture it is impolite to say no and turn someone away. After the salesperson had spent almost one hour at his work, Arun felt pressured say yes and switch to solar. The salesperson asked Arun for his bank details and proceeded to fill out a form on his behalf, which he then asked Arun to sign. The form was a credit contract with a finance company by which Arun would repay the solar panels in fortnightly instalments of \$100 direct debited from Arun's bank account until full amount of \$9000 was paid. There were also fees and charges. The credit form referred to Terms and Conditions, but no separate document with Terms and Conditions was provided. Arun was not advised that he there was 10 days cooling off period in which he could change his mind without incurring any costs. Less than 10 days later solar panels were installed in his house.

Several months later, Arun's business closed down and he fell into financial hardship. His electricity bills with solar no cheaper than his previous bills. After falling into arrears with his

repayments, the finance company sued him for the balance. The litigation has caused Arun tremendous stress and added to his hardship.

**Arun is not the clients real name, names have been changed for privacy purposes*

While all unsolicited sales scenarios place the consumer at some level of disadvantage, in home sales—including “door to door” —set up a particularly challenging power dynamic for the consumer, and very often result in poor outcomes. While the ACL currently acknowledges this and makes some attempt to protect consumers through limiting the times at which door-to-door and salespeople and telemarketers can call and mandating a ten day cooling off period for unsolicited sales, we do not believe these protections have been successful. In-home sales, telemarketing and door-to-door selling should be banned as an inherently unfair business practice. We elaborate on this view in our response to questions 30 to 33.

To be clear, our concerns extend beyond unsolicited consumer agreements as they are defined by the ACL, and include in-home selling or other targeted contact where the consumer may have ‘invited’ the salesperson to make contact. This distinction is particularly important in the context of digital selling techniques.

Currently, a sale is not considered to be unsolicited if the consumer “invites” the dealer to visit their home or make a telephone call to sell the good or service. Section 69(1)(c) of the ACL states in part that an approach is unsolicited if “...*the consumer did not invite the dealer to come to that place, or to make a telephone call, for the purposes of entering into negotiations relating to the supply of those goods or services.*”

Consumer Action has seen multiple cases of consumers who are contacted by traders because the consumer has provided their contact details in an online form. In one matter, the trader’s web-site provided online tools that could only be accessed by the user if they provided their full contact details. The user subsequently received a sales approach which in our view constitutes an unsolicited approach. In another case, a client received a phone call from a trader after they had simply clicked on an online ad place by that trader.

In the vocational training sector, we have seen numerous cases of consumers being contacted by private training colleges after having provided their contact details to a job search web-site.

This practice is highlighted by the following case study:

Case study

Sarah* had been applying online for jobs via a job advertisement board operated by Acquire Learning. Sarah received a telephone call from an Acquire Learning representative offering to enrol her in a Diploma of Management. The representative sent Sarah an email whilst on the telephone, and told her to click on various links to sign her up to a course that was government funded and would help her obtain a job. Sarah was told by the sales representative not to read the email. Sarah says the sales representative did not ask any questions about her ambitions

or capabilities. Sarah did not commence the course, but later received notification of a VET FEE-HELP debt of over \$23,000.

* Name changed for privacy purposes.

This kind of contact detail “harvesting” through job search web-sites is arguably caught by section 69(1A) of the ACL which states in part that: “*The consumer is not taken, for the purposes of subsection (1)(c), to have invited the dealer to come to that place, or to make a telephone call, merely because the consumer has:*

(a) given his or her name or contact details other than for the predominant purpose of entering into negotiations relating to the supply of the goods or services referred to in subsection (1)(c)...”

While the clause was arguably framed to capture information harvesting through competitions and giveaways, in our view it equally applies to the practices undertaken by training colleges, through job search websites.

Unfortunately, despite the existing protections in the ACL, traders continue to obtain consumer details through these and other online means—and assert that subsequent approaches are solicited.

Enforcement in this area is difficult for regulators as, in the case of initial contacts made by telephone, this appears to be done by lead generators who do not have a direct business relationship with the business selling the good or service, or even the salesperson that visits the home. Lead generators may ask the customer whether they would like a visit to receive some information or a demonstration. When the customer consents, the lead generator ‘sells’ the lead to the business, who then engages their own sales person or a third-party salesperson to visit the home of the consumer.⁴² Even if a dispute does arise about these practices, it can be difficult to trace the conduct of the initial lead generator, as the consumer will commonly not know the identity of this business.

⁴² For further information about these practices, see <https://thenaysayer.net/2016/02/25/telemarketing-do-not-call-and-the-the-property-investment-link/> and <https://thenaysayer.net/2015/09/15/dodgy-marketing-of-college-courses/>.

Case Study

Mark * was cold called by a solar provider on or about 3 December 2015. He entered into an unsolicited consumer agreement for the purchase and installation of solar system at a purchase price of \$12, 800.

The provider told him that he had a cooling off period but the contract provided did not refer to a cooling off period or include a Notice to Cool Off. The terms and conditions of the contract stated: “[the trader] acknowledges that in times of hardship that the customer may activate the cool off period and withdraw from this contract within the statutory time frame of 10 days”.

Upon installation, the system did not work. Mark called his utility service provider who advised him that they require a certificate from the installer to connect the system. Mark made numerous attempts to contact and arrange for the system to be connected but the solar provider refused and/or neglected to provide the necessary documentation to effect the connection of the system.

* Name changed for privacy purposes

Another issue is that even when a consumer does seek to cancel the contract, the process can be frustrated by the trader. Consumer Action has seen instances where consumers have been provided with incorrect, outdated or incomplete address details on letterheads—or where consumers have called, but been advised that they should speak to a specific sales representative, who isn’t available at that time. The consumer is effectively stalled or kept waiting, and the cancellation process is frustrated, as illustrated in the case study directly above.

In our view, none of the above scenarios involve genuine consent to be contacted—and any subsequent approach should be taken to be an unsolicited sales approach. Such an approach should therefore be subject to the protections that apply to unsolicited sales. These include the ten day cooling off period, and clear notification to the consumer of their rights. If these requirements are not met, the contract is voidable for six months following the sale.

The ACL should be amended to state that very clear pro-active consent must be provided by the consumer in the online environment, in order for any subsequent sales contact to be considered solicited. This has a strong basis in behavioural economics and would have the effect of restoring the consumer, as far as possible, to the position of a “rational consumer” independently exercising their consumer choice.

To achieve this, any legally sufficient consent should take the form of a pro-active opt-in model, whereby the consumer clearly requests the trader contact them—explicitly to discuss purchase of the good or service. Unsolicited sales protections need to be drafted broadly to capture invitations online or via telephone.

Furthermore, if the consent does not explicitly clarify that the consumer is requesting more than a quote, then the legislation should state that any subsequent contact should, prima facie, be taken to be subject to section 69(2) of the ACL, which states that “*An invitation merely to quote a price for a supply is not taken, for the purposes of subsection (1)(c), to be an invitation to enter into negotiations for a supply.*”

Pyramid schemes

The definition of 'pyramid scheme' in the ACL is drafted too narrowly, and needs to be updated to reflect similarly harmful multi-level marketing schemes.

Pyramid schemes involve new participants providing a financial or other benefit to other existing participants in the scheme.⁴³ New participants are induced to join substantially by the prospect that they will be entitled to benefits relating to the recruitment of further new participants. However, similar schemes can be established on the basis that at least some benefits received by participants are occasioned by a genuine underlying transaction, rather than the introduction of new participants to the scheme. Schemes which allow the earning of money by selling genuine products or services to consumers and not from the recruiting process will not be unlawful pyramid schemes. For example:

- The Lyoness shopping loyalty program included the ability for members to earn various rebates and bonuses from shopping. Consumers could also earn bonuses if they introduce new members who also shop or make down payments on future shopping. In 2014, the ACCC took legal action against Lyoness, alleging it was a pyramid scheme. In its application, the ACCC noted that the scheme grew rapidly over a short period of time, suggesting that profits and/or benefits were being made by the introduction of new participants rather than any genuine economic activity. Despite this, the Federal Court found that Lyoness was not a pyramid scheme: benefits accrued not from introducing new members, but from shopping activity by new members and the shopping activities of further new members who, in turn, may have been introduced by such new members.⁴⁴
- Similarly, Aspire Worldwide purported to be a cashback loyalty scheme into which members, who paid between \$3000 and \$30,000 to join, were enticed with promises of earning money for doing nothing. Members were promised they could earn so-called "passive income" by signing small businesses up to the payments system to create "micro shopping communities", while also earning commission for signing up other members. In theory, customers would be encouraged to make payments at participating stores using the Aspire system. The commission paid to the Aspire franchisee who signed up the store would be charged instead of a credit card processing fee. Action has not been taken against Aspire Worldwide, despite it being reported to have collapsed, leaving Australians \$5 million out-of-pocket.⁴⁵

Consumer Action has assisted vulnerable clients caught up in similar complex schemes, where although the scheme appears to involve pyramid-selling, there are other benefits and transactions involved. This can make it complex as to whether there has been unlawful conduct, and very time-consuming and expensive legal work can be required to challenge the scheme and seek a remedy.

⁴³ Section 45, Australian Consumer Law.

⁴⁴ *Australian Competition and Consumer Commission v Lyoness Australia Pty Limited* [2015] FCA 1129.

⁴⁵ Frank Chung, "Did we fall for snake-oil salesmen?: Aussies claim they were stung in \$5m shopping scheme", news.com.au, 5 April 2016, available at <http://www.news.com.au/finance/small-business/did-we-fall-for-snakeoil-salesmen-aussies-claim-they-were-stung-in-5m-shopping-scheme/news-story/0c1bbef0ce2608842f7c88a4072fce22>.

More broadly, multi-level marketing schemes commonly operate to take advantage of vulnerable people. They can involve powerful psychological manipulations about ‘making passive income’ and ‘working for yourself’.⁴⁶ While there may be some genuine underlying economic activity involved in these schemes, they commonly operate to profit those at the top of the scheme and disadvantage those at lower levels. Given this, there is a strong case to extend the law relating to pyramid schemes to include multi-level marketing schemes that don’t provide a realistic chance of a successful return.

Single pricing rule

Section 48 of the ACL requires traders to clearly display a ‘single price’, which is the minimum total cost that is able to be calculated, when a price is advertised or promoted in association with a good or service. However, where prices are contingent (i.e. they are charged for ‘optional’ extras), then they are not required to be included in the ‘single price’.

This loophole has benefited some industries, most notably the airline industry, the ticketing industry and some other retail sectors. These businesses commonly charge for ‘optional’ extras—for example, some airlines charge separately for seat selection, baggage, food, entertainment and so on. This allows them to charge a relatively low ticket price, and hide the additional charges throughout the transaction.

The prohibition against misleading conduct can play a role to prevent prices being hidden. But it also has limitations. In a recent case on ‘drip pricing’, the ACCC was only partially successful against airlines Jetstar and Virgin.⁴⁷ The Federal Court only found particular instances of representations by each of Jetstar and Virgin to be false or misleading. In Virgin’s case, the Court only found contraventions in respect of its mobile site.

The key element that distinguished the instances where the ACCC was successful from those where it was not, was the adequacy and timing of the disclosure of the relevant fees. Contraventions were found in relation to the existence and quantum of the booking and service fee, which was not disclosed until the consumer reached the “payments” page of the website. However, the ACCC failed to make out its case in relation to representations where the airlines had taken appropriate steps to disclose the existence and amount of the fees early in the booking process.

The single pricing requirement, if it was effective, is clearly pro-competitive and will arguably grow in importance given the increasing role of online sales, where the sales process can take a number of steps. Having a total price disclosed upfront, particularly in advertisements, allows customers to exercise consumer choice more easily. In the airline case, while some fees were disclosed early in the booking process, these are not clear in advertisements which play an important role in directing consumers to a particular provider or website. Many consumers will have been committed to the purchase following their review of the advertisement and visiting the website, meaning that the provider can take advantage by imposing the additional fees.

⁴⁶ See, eg, This American Life, “*Wake Up Now*”, 26 December 2012, available at: <http://www.thisamericanlife.org/radio-archives/episode/543/transcript>.

⁴⁷ *Australian Competition and Consumer Commission v Jetstar Airways Pty Limited* [2015] FCA 1263.

Consumer Action submits that the single pricing law could improve competitive market outcomes by requiring the single price to include contingent fees, where a majority of customers that purchase the good or service pay the contingent fee. This would not disadvantage customers who do not choose the contingent item, as they would still effectively obtain a discount from the advertised rate. However, such a requirement is likely to increase the competitive pressure on businesses with respect to their upfront prices.

Harassment and coercion

The prohibition against harassment and coercion has been very effective, particularly in relation to debt collection. Cases taken by both ACCC⁴⁸ and ASIC⁴⁹ have demonstrated the effectiveness of this law. The ASIC/ACCC guideline on debt collection has also been effective in providing practical guidance about appropriate and inappropriate debt collection conduct.

Consumer Action submits, however, that the ACL could be enhanced by adopting the prohibited debt collection provisions found at Part 4.1 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic). These provisions provide some important protections including:

- banning certain debt collection practices;
- making it clear that a debtor has a right to tell a debt collector to stop contacting them, unless through a tribunal or court;
- in certain circumstances, prohibiting the recovery of debt collection or enforcement fees and charges associated with collection of a debt that is not a credit contract.

Where a debtor has experienced humiliation or distress due to a course of conduct that contravenes the prohibited debt collection provisions, they can seek damages up to \$10,000. This is an important measure that provides an incentive for creditors and debt collectors to comply with the law.

Consumer guarantees

In 2012, Singapore introduced lemon laws that apply to all goods that fail to meet standards of quality and performance, even after repeated repair. Eligible goods include second-hand goods, discounted goods and perishable goods. The laws do not apply to rental goods, services or real property. Under the provisions, if a defect is found within six months of delivery of the goods, it is assumed that the defect existed at the time of delivery unless the retailer can prove otherwise. The consumer can make a request for repair or replacement, and if that is not possible, can ask for a reduction in price or a full refund. In cases where legal action is required, consumers may seek recourse through the Small Claims Tribunals, which can hear claims of up to \$10,000.⁵⁰

⁴⁸ *Australian Competition and Consumer Commission v Excite Mobile Pty Ltd* [2013] FCA 350.

⁴⁹ *Australian Securities and Investments Commission v Accounts Control Management Services Pty Ltd* [2012] FCA 1164.

⁵⁰ 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)>

The ACL's consumer guarantee provisions could be significantly enhanced by adopting the Singaporean notion of the reversal of the onus of proof. It is not unreasonable to assume that a good is in working order when purchased, and that it should continue to work for a reasonable period of time. If a defect or fault becomes apparent within six months, then it is also not unreasonable to assume the good was faulty upon purchase. This would be a positive reform for consumer confidence, and should be accompanied with the Singaporean system of granting the consumer discretion over the remedy they seek—repair, replacement, price reduction or full refund. The argument for a range of remedy options is also supported by the EC, which has a long standing and well developed policy around consumer guarantees, set out in Directive 1999/44/EC.⁵¹

Under the Directive, EU countries can require consumers to inform traders of a fault or defect within two months after its discovery⁵²—although in our view the Singaporean six month model is preferable, as the date of discovery of a defect is typically harder to establish than the date of delivery of a good.

Article 3 of the EU Directive states in part:

1. The seller shall be liable to the consumer for any lack of conformity which exists at the time the goods were delivered.

2. In the case of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge by repair or replacement, in accordance with paragraph 3, or to have an appropriate reduction made in the price or the contract rescinded with regard to those goods, in accordance with paragraphs 5 and 6.

...

5. The consumer may require an appropriate reduction of the price or have the contract rescinded:

- if the consumer is entitled to neither repair nor replacement, or*
- if the seller has not completed the remedy within a reasonable time, or*
- if the seller has not completed the remedy without significant inconvenience to the consumer.*

6. The consumer is not entitled to have the contract rescinded if the lack of conformity is minor.

The point in paragraph 6 about the lack of conformity being “minor” raises the major/minor distinction in the consumer guarantee provisions of the ACL.

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 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. While rejecting the good and claiming a refund on the basis of a minor defect

⁵¹Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31999L0044:en:HTML>

⁵² Available at: http://ec.europa.eu/consumers/consumer_rights/rights-contracts/sales-guarantee/index_en.htm

may be excessive, requesting a replacement good is not—and the power to choose that option should lie with the consumer.

Another difficulty with consumer guarantees is that expert technical knowledge is often required in order to determine the validity of a claim. Generally speaking, members of small claims tribunals such as VCAT do not have the requisite technical knowledge—and expert reports can be prohibitively expensive for consumers to obtain, or may not be provided by some large organisations. VCAT frequently requires applicants to produce expert reports and witnesses before it will accept a claim involving complex facts.

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—it is simply too time consuming to do so.

Motor vehicles represent one area where the consumer guarantee provisions of the ACL often fail to adequately protect the consumer, and this can have a profoundly negative impact on the consumer's life – 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, purely on the basis of attrition.

It is important 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.

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.

The need for a specialist motor vehicle dispute forum has been acknowledged in other countries, and the New Zealand Motor Vehicle Dispute Tribunal⁵³ 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.⁵⁴

Consumer guarantees and digital content.

Consumer Action does not have a developed view on this areas and defers to our colleagues in the consumer movement at the Australian Communications Consumer Action Network (**ACCAN**).

Extended warranties

Consumer Action is aware that retailers commonly sell extended warranties as an “add-on” product, just as consumers are finalising their purchase of a good. We believe that extended warranties are analogous to junk insurance policies, as they offer very little (if any) real value, are sold at the same stage of the selling process, and play on the same vulnerabilities and fears. Consumers are made to feel that they should purchase the product, as it is better to be “safe than sorry”. This is a deceptive sales pitch, however, as consumers are already protected by the consumer guarantee provisions of the ACL—a fact which they are not always made aware of when purchasing the good.

⁵³ See <http://www.justice.govt.nz/tribunals/motor-vehicle-disputes-tribunal>

⁵⁴ See <http://www.justice.govt.nz/tribunals/motor-vehicle-disputes-tribunal/hearing-process>

In February 2016 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.⁵⁵ 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 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.

CAV were 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 believes 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*, Consumer Action made the recommendation that consumers should be protected against purchasing junk insurance policies by mandating a compulsory delay 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 clearly broken—so the consumer does not feel that the extended warranty is a necessary purchase.

In addition, the consumer should be required to proactively opt-in to the purchase (i.e. they should contact the salesperson to confirm the purchase, rather than the other way around). To avoid doubt—no add-on product should be sold through an opt-out process, such as a tick-box system where the consumer agrees to purchase the add-on unless they say otherwise.⁵⁶

⁵⁵ *Director of Consumer Affairs Victoria v The Good Guys Discount Warehouses (Australia) Pty Ltd* [2016] FCA 22

⁵⁶ 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.

These recommendations are equally applicable to extended warranties, and 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.

12. Does the ACL need a ‘lemon’ laws provision and, if so, what should it cover?

Consumer Action does not believe that the ACL needs specific lemon laws to cover motor vehicles alone. Instead, we believe that the general consumer guarantee regime should be strengthened by a time limited reversal of the onus of proof, as exists under Singaporean consumer law. This would be a more effective ‘lemon’ law that applied to the entire marketplace.

Further, we believe that a specialist tribunal to hear motor vehicle disputes, (with members who have the mechanical knowledge to preside over such matters), is also necessary. We believe that the New Zealand Motor Vehicle Disputes Tribunal provides a good model for such a tribunal. For more information, please see our response to question 11, under the heading “consumer guarantees”.

13. Do the ACL product safety provisions respond effectively to new product safety issues, and to the changing needs of businesses in today’s marketplace?

General safety provision

Consumer Action supports a general safety provision to be included in the ACL, to require all consumer goods to be reasonably safe. We believe that such a provision would enable a more proactive approach by industry to ensure products are safe. While there is a consumer guarantee that requires products to be safe (the guarantee applies to both retailers and manufacturers), suppliers have 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.

A similar idea has been proposed by the Financial System Inquiry (**FSI**) in relation to the safety and fairness of financial products.⁵⁷ The FSI recommended the introduction of a principles-based product design and distribution power which would require suppliers to consider a range of factors when designing products and distribution strategies. In addition to commercial considerations, issuers and distributors will be required consider the type of consumer whose financial needs would be addressed by buying the product and the channel best suited to distributing the product.

The FSI stated that the obligation would cover:

- During product design, product issuers should identify target and non-target markets, taking into account the product’s intended risk/return profile and other characteristics. Where the nature of the product warrants it, issuers should stress-test the product to assess how consumers may be affected in different circumstances. They should also consumer-test products to make key features clear and easy to understand.

⁵⁷ Financial System Inquiry, December 2014, Recommendation 21, available at: <http://fsi.gov.au/publications/final-report/chapter-4/accountability/>.

- During the product distribution process, issuers should agree with distributors on how a product should be distributed to consumers. Where applicable, distributors should have controls in place to act in accordance with the issuer's expectations for distribution to target markets.
- After the sale of a product, the issuer and distributor should periodically review whether the product still meets the needs of the target market and whether its risk profile is consistent with its distribution. The results of this review should inform future product design and distribution processes.

A general safety provision could draw on similar concepts to require suppliers to consider the entire supply chain of their products, to ensure that safety is considered at every step.

To be effective, a general safety provision should be accompanied by a power by the regulator to take enforcement action in relation to products that “will or may cause injury.” The ACCC has recently taken action against Woolworths in relation to the supply of unsafe goods, relying on an argument that Woolworths engaged in misleading conduct by representing a number of its home-brand products were safe.⁵⁸ This was because Woolworths had become aware that various products were unsafe, but it continued to offer them for sale. While this was an innovative argument and action, a general power for the regulator to take action in relation to products that “will or may cause injury” would enable the regulator to be more proactively—it would also ensure the obligation is on the business to ensure it only had safe products for sale.

Mandatory reporting

Sections 131 and 132 of the ACL require a supplier to report incidents where consumer goods have been associated with a death or serious injury or illness of any person. Serious injury or illness is defined to be an acute physical injury or illness requiring medical or surgical treatment by, or under the supervision of, a qualified doctor, nurse or paramedic.

Section 132A of the ACL should be repealed. This provision provides that mandatory product safety reports are confidential, unless the reporter consents to disclosure. Confidentiality undermines the public interest—mandatory reports should be placed on a public register, so that the public and other safety regulators can be aware of safety risks associated with consumer goods.

Consumer Action submits that these mandatory reporting requirements should be strengthened to include a broader range of harm, for example, near misses or other illness or injury that does not require medical treatment. This would ensure the regime acts proactively to prevent harm that might be caused to others.

Incorporation of voluntary standards

Consumer Action also supports better incorporation of voluntary standards into mandatory product safety standards. We agree that this would reduce confusion for suppliers, and ensure that the content of standards are up-to-date.

⁵⁸ *Australian Competition and Consumer Commission v Woolworths Limited* [2016] FCA 44.

14. Could the handling of unsafe products that fall within the scope of the ACL and a specialist regulatory regime be more effective, and how? Should protocols or other arrangements be established between the ACL and specialist regulators?

Consumer Action submits that the dispersal of regulatory responsibilities between state and Commonwealth agencies creates inconsistency and weakens the enforcement of product safety laws. More must be done to ensure regulators communicate better and have the capacity to enforce the same law.

One of the challenges with industry-specific regulators compared to the general consumer law regulators is that they can become too easily focused on industry assistance, rather than consumer outcomes. An example of this is the former Building Commission in Victoria, which was responsible for Victoria's building consumer protection framework. The Building Commission was subject to a number of critical assessments by the Victorian Auditor-General and other oversight bodies over a long period of time. Media and other reports also aired allegations of serious failures of corporate governance, corruption⁵⁹ and also that Commission funds have been spent on corporate entertainment for major building firms, suggesting the Commission has been captured by the businesses it should be regulating.⁶⁰ Following this, the Commission was abolished and replaced with the Victorian Building Authority.

To protect against this sort of outcome, governments should more clearly set consumer protection objectives for industry-specific regulators, and take measures to adopt performance frameworks that focus on regulators' ability to deliver good consumer outcomes.

We would also encourage better protocols and cooperation between regulatory authorities. We acknowledge that this is difficult work, and where there are gaps or overlaps between regulators, there can be a tendency for an organisation to focus on its core work rather than address the risk caused by the gap or overlap. One way to address this would be to ensure that all regulators have the same level of compliance and enforcement powers and authority to deal with likely consumer detriment. Another way to address this is to put greater expectation on regulators to enhance consumer outcomes. The Federal Government's existing regulator performance framework, a 'cutting red tape' initiative, has its focus on reducing regulatory burden on industry participants—it has no focus on consumer outcomes.⁶¹ We submit that governments should reform regulatory performance frameworks to promote consumer outcomes—regulators should have the resources, power and culture to effectively protect consumers, and they should report publicly on their impact for consumer.

⁵⁹ 'Building watchdog shambles', *The Age*, 4 April 2012; 'Fees queried in new claims', *The Age*, 19 May 2012.

⁶⁰ 'Builders winned, dined by regulator', *The Age*, 5 April 2012.

⁶¹ Australian Government, 'Regulator Performance Framework', available at: <https://cuttingredtape.gov.au/resources/rpf/kpis>.

Other issues

15. Should the ACL prohibit certain commercial practices or business models that are considered unfair?

Consumer Action strongly advocates for the implementation of a new general consumer protection against business models that are inherently unfair, yet difficult to prosecute on the basis of unconscionable conduct.

In our experience, there are a range of business practices which tend to play on consumer vulnerabilities and offer very little more than false hope—yet sometimes charge significant amounts, and cause serious financial harm. In the case of credit repair companies and debt management firms, the business model specifically targets those who are in financial difficulty. At Consumer Action we have termed these business “debt vultures”. Debt vultures represent a systemically unfair business practice which could be caught by a general prohibition on unfair trading—yet can be difficult to prosecute under existing consumer law.

As with many other elements of consumer law, behavioural economics provides a strong justification for a general prohibition against unfair trading. Community concepts of fairness, and that the law should guard against inherently unfair practices, are important for the promotion of consumer confidence. As stated by Ian McAuley of the University of Canberra and Centre for Policy Development, in his address to the behavioural economics stream at the Australian Economic Forum, 2010 – “*A strong finding in behavioural economics is that fairness matters. We value fairness in its own right.*”⁶²

The inclusion of a general prohibition on unfair trading practices would serve the overarching ACL objective of empowering and protecting consumers, while ensuring that markets are competitive and that suppliers are required to trade fairly. It would also meet the clear objective of the Intergovernmental Agreement for the Australian Consumer Law—that the ACL should:

- *meet the needs of those consumers who are most vulnerable, or at greatest disadvantage.*⁶³

For many years, there has been discussion in Australia of the possibility of extending the prohibition on unconscionable conduct to a prohibition on unfair trading.⁶⁴ Both the United States and the European Union have prohibitions outlawing unfair trade practices.

United States

Section 5 of the Federal Trade Commission Act prohibits unfair or deceptive acts or practices in or affecting commerce. Under this provision, an act or practice is unfair if it is likely to cause

⁶² McAuley, Ian, University of Canberra and Centre for Policy Development - Speech to Australian Economic Forum, 2010, p18.

⁶³ Intergovernmental Agreement for the Australian Consumer Law (2 July), paragraph C, www.coag.gov.au/sites/default/files/IGA_australian_consumer_law.pdf.

⁶⁴ Productivity Commission, 'Review of Australia's Consumer Policy Framework - Productivity Commission Inquiry Report', (30 April 2008), vol 2, 141.

substantial consumer injury, the injury is not reasonably avoidable by consumers, and the injury is not outweighed by benefits to consumers or competition.⁶⁵

This provision has been interpreted in an economic way, considering whether the costs to consumers of particular acts or practices are outweighed by countervailing benefits to consumers or competition. Unlike the Australian prohibition on unconscionable conduct which is based on moral standards of conscience, this prohibition might be viewed as a type of cost-benefit analysis. Indeed, the Federal Trade Commission (FTC) has stated that it will not consider non-economic factors, such as whether the practice violates public morals, in deciding whether to prosecute conduct as an unfair method of competition.⁶⁶

This provision has been used by the FTC in relation to practices that are arguably not unconscionable. For example, a company that markets home security video cameras settled an unfair practices claim initiated by the FTC, after it was found that the cameras had faulty software that left them open to online viewing such that they were not 'secure'.⁶⁷ Such a provision might also be used in relation to debt negotiation or car-napping, described above. For example, these practices might not only harm individual consumers, but may cause harm to other industry participants, such as banks or insurers. They are unlikely to deliver countervailing benefits to consumers or competition.

Europe

In 2005, the European Union adopted the Unfair Commercial Practices Directive (**the EU Directive**).⁶⁸ The EU Directive has been implemented in the United Kingdom through the Unfair Trading Regulations 2008. The EU Directive takes a three-tiered approach which consists of a general prohibition of unfair commercial practices, prohibitions against practices that are misleading (whether by act or omission) or aggressive, and 31 specific practices that are prohibited in all circumstances.

A business will contravene the first tier, the general prohibition of unfair commercial practices, if it is not professionally diligent, and it materially distorts (or is likely to materially distort) the economic behaviour of the average customer. Economic behaviour will be 'materially distorted' if, for example, the average consumer would buy a product they would not otherwise have bought.

The second tier prohibition against misleading acts/omissions and aggressive practices focusses on whether the business' conduct has caused the average consumer to make decisions they wouldn't otherwise. In relation to aggressive practices, there is also consideration of the impact

⁶⁵ 15 U.S.C § 45(n) (2012). See also FTC Policy Statement on Unfairness (appended to Int'l Harvester Co, 104 E.T.C. 949, 1070 (1984)).

⁶⁶ Commissioner Joshua D Wright, 'Proposed policy statement regarding unfair methods of competition under section 5 of the Federal Trade Commission Act', (19 June 2013) <https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-joshua-d.wright/130619umcpolicystatement.pdf>

⁶⁷ Federal Trade Commission, 'Media Release: Marketer of Internet-Connected Home Security Video Cameras Settles FTC Charges it failed to protect consumers' privacy', (4 September 2013) <<https://www.ftc.gov/news-events/press-releases/2013/09/marketer-internet-connected-home-security-video-cameras-settles>>.

⁶⁸ Directive 2005/29/EC on Unfair Commercial Practices, [2005] OJ L 149/22

<http://ec.europa.eu/consumers/consumer_rights/unfair-trade/unfair-practices/index_en.htm>.

the businesses' conduct has on the average consumer's 'freedom of choice' concerning the product.

An unfair trading provision for Australia

Drawing on the international approaches, there are three ways in which Australia's existing prohibition could be enhanced. Firstly, being more specific about aggressive market practices; secondly, extending to misleading omissions; and thirdly, becoming prospective.

The first enhancement might involve defining aggressive market practices—not as in specific conduct or practices, but in terms of the effect of such practices on consumer decision-making. This picks up on the EU Directive's focus on conduct that 'materially distorts the economic behaviour of the average consumer' or 'significantly impairs the average consumer's freedom of choice or conduct'. Rather than focusing on whether the conduct offends conscience, such analysis can bring in consideration of consumers' behavioural biases that might be exploited by traders. For example, tactics used by some in-home salespeople that make it more likely that a consumer will sign up may be caught. Framed in this way, the prohibition is more likely to be pro-competitive, as it promotes consumer choice.

The second enhancement relates to misleading omissions. Australia's existing prohibition on misleading or deceptive conduct (or conduct that is likely to mislead or deceive) does extend to some misleading omissions. However, the case of *Australian Competition and Consumer Commission v AGL South Australia Pty Ltd* suggests misleading omissions will not be caught unless there is a 'reasonable expectation for disclosure'.⁶⁹ The UK Unfair Trading Regulations 2008 approach is broader, covering practices which 'omit or hide material information, or provides it in an unclear, unintelligible, ambiguous or untimely manner'. This approach would require traders to bring much more clarity to their marketing and business practices than the current Australian provisions.

The third enhancement would be to make the prohibition prospective. Currently, the prohibition on unconscionable conduct applies to past conduct. This contrasts to the EU Directive where the prohibition includes conduct that 'is likely to' significantly impair the average consumer's freedom of choice or conduct concerning the product or 'is likely to' result in the average consumer making a different transaction decision. This approach aligns with the prohibition on conduct that 'is likely to' mislead or deceive. Such an approach may mean that a regulator does not need to prove that the conduct occurred and harm resulted. It may also mean that the regulator does not need to rely on vulnerable witnesses. Instead, a broader range of evidence could be considered, including survey evidence or evidence from experts about consumer decision-making.

The benefits of an unfair trading prohibition

The benefits of introducing a general unfair practices provision extend beyond simply providing better protections to consumers. There are also economic and social benefits for the broader community.

⁶⁹ *Australian Competition and Consumer Commission v AGL South Australia Pty Ltd* [2014] FCA 1369.

The Productivity Commission has suggested that allowing market misconduct to occur without redress can be anti-competitive in that it gives legally non-compliant traders an advantage over those that do comply.⁷⁰ Allowing consumers and 'fair' businesses to absorb the cost of the practices of unfair traders is inefficient and does not promote productivity. In addition, unfair practices have a detrimental impact on consumer confidence, which affects the business community more broadly. An unfair trading prohibition would arguable increase competition and consumer confidence, to the benefit of all 'fair' traders.

An unfair trading prohibition also provides a lifeline to regulators. Such a provision would enable regulators to prosecute traders based on their business models, rather than focus on individual incidents of past misconduct. Regulators may be more proactive, with powers to intervene before significant harm has occurred, rather than engage in late-stage intervention strategies.

Any standard for unfair trading should be linked to the distortion of economic behaviour, which is more certain than the morally-rooted concepts of 'unconscionability' and 'moral obloquy'. The term 'unfair' makes much more sense to consumers and traders, and would allow them to make at least a general assessment of the likely lawfulness of conduct themselves. This could have clear compliance benefits.

Unfair business models will continue to thrive until we seal the gaps in our consumer protection laws. While existing prohibitions against unconscionable and misleading conduct have served the community well, further reform is needed to stamp out unfair practices. The Government will be reviewing the Australian Consumer Law in 2016, and must consider whether it is time for a new standard that demands businesses treat consumers fairly. But a general prohibition against unfair practices is not just important for consumers. Robust protections for consumer consumers would level the playing field between those that seek to do the right thing by consumers and those who don't. The introduction of an unfair trading prohibition would be a win for consumers, 'fair' businesses, and the economy.

16. Is introducing a general prohibition against unfair commercial practices warranted, and what types of practices or business models should be captured? What are the potential advantages, and disadvantages, of introducing such a prohibition?

As outlined in our response to question 15, Consumer Action is convinced that a general prohibition against unfair commercial practices is not only warranted, but would be highly beneficial. In our view, such a protection is necessary—and long overdue.

Business practices that would be caught by a general prohibition on unfair trading practices are those which prey on financial, behavioural or emotional vulnerabilities to sell unsuitable products with very little (if any) real value. Often these products are also sold with confusing contracts.

One common element of systemically unfair business practices is that tend to offer false hope, and leverage the hope of the consumer to make promises which cannot be kept (examples include credit repair companies, vendor terms homes sales and hair loss “solutions”). In this manner, many businesses that would be caught by a general prohibition against unfair trading practices can be said to be border on being scams. In behavioural terms, they tend to operate in

⁷⁰ Productivity Commission, above n 28, 193.

the same way a scam does in order to make a sale—they induce an expectation in the purchaser's mind which will not be met by the product offered. However, rather than being non-existent (as in a scam), the product or service sold is generally of very limited value to the extent that any worth is illusory.

Predatory business models

In each of the models discussed below, the businesses use unfair tactics to target consumers with unsuitable products or confusing contracts. Generally consumers end up with a product that is unsuitable for their needs or which they can't afford.

Credit repair

Credit repair companies (**CRCs**) charge very high up-front fees, sometimes thousands of dollars, to 'repair' customers' credit histories. People who contact CRCs may not understand Australia's credit reporting system and are often experiencing acute financial stress. This means that they are vulnerable to high-pressure sales techniques and unrealistic promises.

The promise at the centre of this business model is that CRCs will remove barriers to accessing credit, which many consumers hope will relieve financial pressure. Many Australians believe, wrongly, that CRCs can remove legitimate listings from their credit files. Capitalising on this lack of understanding, often CRCs fail to tell their clients that, in some cases, they can amend incorrect listings on their own credit reports simply by contacting their creditors directly. Instead, CRCs charge high fees for services provided free of charge by industry ombudsmen, financial counselling services and community legal centres. CRCs are also reluctant to publicise their fees and often impose large additional charges for late payment, cancellation or other 'administrative' services.⁷¹

For-profit debt negotiation

For-profit debt negotiators or debt settlement companies promise to settle a consumer's debt for a fraction of what they owe. The idea is simple: debt settlement companies offer to negotiate down the outstanding debt (usually from credit cards or personal loans) owed to a more manageable amount so that the consumer can become debt free. Unfortunately debt settlement carries significant risks that may result in consumers becoming even worse off.

Debt settlement is an inherently risky venture: often the advice is for consumers to default on their debt which can result in fees, increased interest rates, and sometimes even legal action by creditors. Even after assuming all of this risk, consumers are offered no guarantees. In fact, some creditors refuse to negotiate with these businesses at all. Even if a settlement is reached, a consumer unable to keep up with the new settlement arrangement risks falling back into default.

These businesses regularly target their marketing efforts at those who are heavily in debt and thus vulnerable to accepting their promises. For example, these businesses purchase lists of judgment debtors or trawl court lists with details of bankruptcy and home repossession.

⁷¹ Ali, Paul; O'Brien, Lucinda and Ramsay, Ian, 'A Quick fix? Credit Repair in Australia' Australian Business Law Review, Vol 43 No 3, 2015, pp 179 – 205.

Consumers on these lists can find themselves inundated with marketing paraphernalia and promises to “solve” their debt stress.

Car-napping

Many Australians have little understanding about their rights and obligations when involved in collisions, and they can be vulnerable to traps orchestrated by towers, repairers and debt collection lawyers.⁷² At accident scenes, drivers who are ‘not at fault’ may be approached and offered a towing service by tow-truck drivers. They may be asked to sign paperwork to facilitate this, often at the roadside. Unbeknownst to them, this paperwork may be providing the repairer with authority to store and repair a vehicle, and also an authority to a lawyer to seek recovery of costs from the ‘at fault’ driver. The driver is sometimes told that the repairer is quick or cheap, or that it has a free hire car. In some cases, drivers may be told that this is a better option than involving insurance companies, because claiming may impact their no-claim bonus.

This practice is known as ‘car-napping’, as the driver may later be asked to pay significant amounts for repair and storage to recover their vehicle if these amounts cannot be recovered from the other driver (or their insurer). The practice can impact the ‘at fault’ driver as well, when they or their insurance company are targeted with inflated claims for the cost of repairs. In some instances, this results in court action initiated by the lawyer acting on behalf of the ‘not at fault’ driver, commonly without the full knowledge of that driver.

In addition to the business practices identified above, other business models that may be caught by a prohibition on unfair trading include:

Publicity firms

Consumer Action is aware of a business which claims to assist small business owners to improve their online presence through online marketing, search engine optimisation and Google places optimisation. The company makes unsolicited sales through cold calling, and locks customers into long term contracts. Frequently the customer is automatically charged another fee at the end of the initial 12 months, and the company is not responsive to complaints. In many cases, it’s alleged that the business does not deliver results and has both harassed and threatened those who complain with legal action or suspension.

Consumer Action is aware that there have been almost 90 individual actions taken by affected small businesses at small claims tribunals in New South Wales and Victoria⁷³, but there has been only one reported decision.⁷⁴ The vast majority of disputes appear to be mediated confidentially. Given the way the business markets its service, and the number of complaints and disputes that have been made, it could be open to surmise that the business relies on locking customers into a contract and frustrating customers’ efforts to complain, rather than providing a good service and hoping for ‘word of mouth’ referrals.

⁷² Taylor, Josie, ‘*Suncorp reports spike in smash repairers car-napping vehicles and holding owners to ransom*’, 6 November 2015, available at: <http://www.abc.net.au/news/2015-11-05/suncorp-sees-rise-in-car-napping-vehicles-held-for-ransom/6914588>.

⁷³ <https://forums.whirlpool.net.au/forum-replies.cfm?t=1966958&p=74>

⁷⁴ <http://www.austlii.edu.au/au/cases/nsw/NSWCTTT/2012/141.html>

There may well be arguments around misleading conduct and also unconscionable conduct, but these would require hundreds of individual small business owners to pursue an individual complaint. An unfair trading prohibition, broadly drawn, might help regulators and others attack this business model. It would seem to us to be much more efficient for the justice system, through a regulator or other joint action, to resolve these matters systemically, thereby also preventing future harm from occurring. Individually resolving disputes through confidential and opaque mediation does little to prevent future legal issues arising.

Vendor terms home sales

Vendor terms and rent-to-buy schemes promise the dream of owning your own home—but without a bank loan. Typically under these schemes, people who cannot get a mainstream mortgage because of their income, savings or credit history are sold the hope of a secure place to call their own. While the details of these schemes vary, generally a buyer pays a deposit and regular payments towards the purchase of a home. Under many agreements, the buyer must refinance in several years, generally through a traditional mortgage. The buyer does not legally own the property until all payments are made. The legal rights of the buyer, and also the vendor, are often unclear or very limited. Consumer Action and other legal services, as well as consumer regulators across Australia, have seen numerous risky deals result in big financial losses.

Consumer Action has seen buyers who have entered vendor terms or rent-to-buy deals with the belief that they could turn around their financial situation and refinance with a traditional lender within several years. A number of these buyers had that belief because of representations made by the broker at the time they signed up. Of the cases seen by Consumer Action in recent years, no buyers fully understood the legal status of their deal and none received independent legal advice before entering a deal. Several spoke with a lawyer connected with the broker but were not made aware of their rights and liabilities under the deal. There is a trend of buyers entering these deals with little to no understanding of the consequences, largely due to representations on the part of brokers.

Hair loss solutions

The following case demonstrates the illusory promise at the centre of many hair loss ‘services’. There are other quasi-health services that similarly offer little of substance.

Mastos v Advanced Hair Studio Pty Ltd (Civil Claims) [2016] VCAT 57

The applicant took Advanced Hair to the Victorian Civil and Administrative Tribunal (**VCAT**), arguing that Advanced Hair had breached various consumer protections. He sought a refund of \$3495 which was for balding treatment, including laser beams which are said to stimulate capillaries and circulation in the scalp, and the supply of a liquid to be applied to the scalp.

There was no formal pleadings, but in essence the applicant said that Advanced Hair had misled him when it represented that chances of success were good. However, there was also communication in writing, such as on the box of the liquid, which played down the prospect of

success. The contract signed by the applicant said that no specific result in terms of hair regrowth could or had been promised.

The VCAT member decided that there were problems with the contract, in that it contained unfair contract terms. The terms found to be unfair include one that required the applicant to acknowledge that both the regrowth formula and the laser treatment have effect only while treatment is maintained. The member said that this term appeared to mean that the customer must continue to spend money on the treatment at the same time as acknowledging that the treatment may not experience hair regrowth.

Another clause that said that sustained hair regrowth cannot be guaranteed after the expiry of the contract, though the continued use of the products is recommended and should prolong the regrowth. The member found that this was ambiguous—the term sustained was used without comparison point. Other clauses were also problematic, including one which seemed to state that Advanced Hair had no obligations to its customers.

Despite these findings, the applicant did not succeed in getting his money back. This is because misleading conduct was not found—the limitations of the product were disclosed in the contract. The VCAT member stated: “In the event the Applicant is not entitled to any meaningful remedy. Because the Respondent promises so little, the Applicant has got what he paid for”.

Advantages and Disadvantages of a general prohibition on unfair trading practices

For the reasons outlined above and in response to question 15, Consumer Action is supportive of a general prohibition on unfair trading. We believe it would be overwhelmingly positive for consumers and the broader economy, and would be an important new tool for the ACL to better achieve its stated purpose.

That being said, we note that there are likely to be objections to the implementation of the general protection and take the opportunity here to provide our rebuttal of those anticipated objections.

First, it will likely be contended that the term “unfair” has no clear meaning. We refute this on the basis that standards of unfairness are already applied in other areas, including unfair contract terms provisions, the ASIC licensing scheme, and in decision making of industry-based customer dispute resolution schemes.⁷⁵ Unfairness is a well understood concept in the community generally, and as stated in our response to question 15, is far clearer in its meaning than the term “unconscionable”. We do not believe that a general prohibition on unfair trading practices can be reasonably objected to on the basis that the meaning of the word “unfair” is unclear.

Second, it will likely be argued that the implementation of a general prohibition on unfair trading practices will limit innovation and stifle economic growth. In our view, the protection would have no such effect—it is quite clear that the protection would apply to inherently unfair business practices, and would have no impact on legitimate businesses providing goods and services to

⁷⁵ Treasury, *Benchmarks for industry-based customer dispute resolution schemes*, principle 7, available at: <<http://www.treasury.gov.au/PublicationsAndMedia/Publications/2015/benchmarks-ind-cust-dispute-reso>>.

consumers on fair terms. There is no intention in the protection to limit innovation—only to empower and protect consumers, and to foster healthy and robust competition. Any objection to the protection on this basis is misguided, and fails to take into account the benefits that the measure may deliver in terms of improved consumer confidence.

Third, the protection may be objected to on the basis that it will lead to excessive and/or vexatious litigation—and create a “lawyer’s picnic”. We refute this objection on the basis that the protection has not had this effect in the UK or the US. Furthermore, the same objection was raised in objection to unfair contract terms provisions—and the feared lawyer’s picnic has not come to pass. In our view, if the general protection is implemented with clear guidance then it may well have a positive preventative effect. Of course, this will also depend on how broadly known and understood the protection is—both by consumers, and by traders.

17. Does the current approach to defining a ‘financial service’ in the ASIC Act create unnecessary complexity in determining if certain conduct falls within the scope of the ACL or the ASIC Act? How could this be addressed?

Consumer Action believes that this is a significant issue.

First, there is the practical operation of the Acts and the difficulty in navigating through the legislation. Our solicitors report that the construction of the ASIC Act and the ACL, and the way the nexus between them is expressed, can make it difficult to assess which legislation a product or service may be covered by. The ACL is not clear on the issue, as the exclusion of financial services is located in the body of the *Competition and Consumer Act* (section 131A), not in the ACL itself. The definition of a financial product or service must then be determined with reference to the ASIC Act and its Regulations.

Second, the exclusion of financial services from the ACL means that some products potentially do not receive important protections (such as consumer guarantees), when in our view they clearly should. The most obvious example is consumer leases, which are defined as a financial product by the ASIC Act Regulations.⁷⁶ This means that the consumer guarantee provisions of the ACL would not apply to goods acquired on consumer lease, which is a significant failing of the consumer law. At the same time, the ACL purports to encompass goods acquired on lease, so arguably intends that consumer guarantees *do* apply. Given that the consumer base for consumer leases is generally low-income, (and very often welfare dependent), we submit that this situation needs to be clarified in order for the ACL to fulfil its remit under the Intergovernmental Agreement, to “*meet the needs of those consumers who are most vulnerable, or at greatest disadvantage*”.

In a similar manner, the status of gift cards as a financial product has meant that in the event of a retail collapse, consumers do not have the benefit of consumer guarantee protections. The recent high profile collapse of the electronics retailer Dick Smith recently prompted a Senate Economics Committee inquiry that considered the status of gift cards in the event of retail collapse, to which Consumer Action made a submission.⁷⁷ While the issues in relation to gift cards extend beyond

⁷⁶ Regulation 2B(3)(b)(ii)-(iv)

⁷⁷ Consumer Action, *Submission to Inquiry into the Status of Gift Cards in the event of Retail Collapse*, available at:

http://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Economics/Dick_Smith/Submission

the lack of consumer guarantees, bringing them under the consumer guarantee regime would be a useful protection.

Consumer Action is also concerned that financial products and services are not subject to the same restrictions on unsolicited sales as non-financial goods under the ACL. As stated in our response to question 11, the behavioural implications of unsolicited selling are significant. Consumers do require additional protection from potentially poor outcomes of unsolicited sales, and this is evidenced by the existing protections of the ACL. By comparison, the ASIC Act has a relatively limited and narrow provisions to address unsolicited sales (being section 12DL relating to unsolicited credit cards, and section 12DM relating to assertion for payment for unsolicited financial services). This means products such as consumer leases and car hire again fall through the net of consumer protection.

Adding to the complication, the Victorian ACL application act seemingly does apply to financial products and services—so it may well be that consumer guarantees *can* be applied to financial products and services, at least in Victoria. However, CAV as the Victorian consumer law regulator, does not treat itself as regulating financial products and services.

Section 992A of the *Corporations Act 2001* (Cth) does prohibit unsolicited sales of financial services through the so-called anti-hawking provisions. However, there are limitations to these provisions, including that they do not apply where invitations are made and that they do not apply to consumer credit. Section 156(1) of the *National Consumer Credit Protection Act 2011* (Cth) prohibits the canvassing of consumer credit at home, but this does not include consumer leases and does not prohibit off-business premises sales where there can be a similar opportunity for pressure selling.

Any shortfalls in protection (other than that relating to insurance, which we discuss below) are likely to be an unintentional consequence of the complexity of the interaction between ACL and the regulation of financial services. Needless to say, these areas need to be clarified—and clear, national consumer protection for financial services and products ought to be provided by importing equivalent protections from the ACL, into the ASIC Act.

Insurance contracts and unfair terms

Finally, and as stated in our response to question 9, insurance contracts should be subject to the same unfair contract protections as other standard form contracts, and that their failure to do so represents a significant failure of Australia's consumer law. This has been a long running policy debate, with the insurance industry assiduously working to ensure that insurance contracts remain outside current unfair contract terms protections. The current review of the ACL could address this issue.

Currently, section 15 of the *Insurance Contracts Act 1984* (ICA) prevents judicial review of insurance contracts on the ground of unfairness (among other grounds) on the basis that the Insurance Contracts Act contains its own consumer protection provisions.

Section 15 of the ICA overstates the effectiveness of consumer protections contained within the ICA. The key provisions in this respect are section 14 and sections 35 and 37. Section 14, prevents an insurer from relying on a contract term if to do so "*would be to fail to act with the utmost good*

faith". This is an unrealistic protection, requiring a consumer to proactively engage with an uncertain and cumbersome process. While unfair contract terms in insurance contracts are common, section 14 is rarely utilised by either consumers or ASIC. This would suggest that the protection is either inaccessible, ineffective, or both.

Sections 35 and 37 of the ICA seek to prevent insurers from relying on non-standard or unusual terms without informing the insured of the effect of those terms before the insured enters into an insurance contract. The rationale for this provision was to ensure consumer understanding of the extent of their policy coverage. However, insurers can legally satisfy the requirements of sections 35 and 37 by burying "written notice" of non-standard terms in the policy's fine print. This provision does not address the problem it was designed to solve, and arguably exploits the very behavioural weaknesses that unfair contract terms were introduced into the ACL to address in the first place.

Consumer Action has examined numerous insurance contracts which we believe could be successfully challenged on the basis of unfair contract terms, if those protections were available.

Some of these include:

- Travel insurance: Blanket mental health exclusions which rule out any cover for an event related to any mental health problem. These are arguably unfair on the basis of s12BF of the ASIC Act because they disadvantage the consumer without any claims or actuarial data to justify such broad exemptions.
- Motor vehicle insurance: Uninsured Motorist Extension (UME) conditions which are often included in non-comprehensive car insurance policies. They provide limited cover (usually about \$5000) for accidental damage where the damage was:
 - Entirely the fault of a third party; and
 - The third party is uninsured.

UME is unnecessary in comprehensive policies, as accidents (whether caused by uninsured third parties or not) are covered by the insured's policy. Extensions of this kind are also not required if the at fault party is insured, as the at-fault driver's insurer would indemnify the not-at-fault driver if they had no cover themselves.

UME is arguably unfair because:

- It often permits the insurer a complete discretion to decide whether the third party driver is at fault, seemingly without regard to facts or evidence before them (see 12BH(1)(a) of the ASIC Act); and
- It often does not pay out unless the not-at-fault driver does things which may be impossible under the circumstances, such as
 - proving that the other driver is uninsured; and
 - getting the other driver's name, address, registration, and vehicle make and model.

This will be impossible if the at fault driver is uncooperative, threatening, or flees the scene.⁷⁸

- **Life insurance:** Narrowly defined medical conditions clauses which led to a recent Four Corners investigation into non-payment of claims by CommInsure, a division of the Commonwealth Bank. In one instance the investigation found:

In one case highlighted by Ferguson, the CommInsure claims management department admitted the claimant had indeed suffered the serious heart attack he had claimed, but was not covered under the Total Permanent Disability (TPD) policy he been paying for much of his adult life. CommInsure claimed it was just the “wrong sort” of heart attack. Instead of A\$1 million, he got A\$25,000.⁷⁹

Consumer Action has long argued the unfair terms provisions should also apply to insurance contracts, and since 2009, four independent inquiries have taken the same view.⁸⁰ This proposal was recently presented to Parliament, (through the *Insurance Contracts Amendment (Unfair Terms) Bill 2013*), but the Bill lapsed with the calling of the 2013 election. In our view, the current review should address this shortfall in Australia’s consumer law framework and ensure that unfair contract terms provisions equivalent to those of the ACL are written into the ICA.

3. Administering and Enforcing the Australian Consumer Law

18. Does the ACL promote a proportionate, risk-based approach to enforcement?

Consumer Action has long held the view that the ACL is under-enforced, and that the multi-regulator model does lead to inconsistencies in enforcement across jurisdictions—both in terms of the amount of enforcement action taken, and the approaches adopted when it is taken.

As stated in our response to question 1, our 2013 report “*Regulator Watch: The Enforcement Performance of Australian Consumer Protection Regulators*”, found that there was room for all consumer regulators to increase the amount of enforcement work that they undertake.

⁷⁸ Consumer Action is advised on an incident in which a claimant’s insurer refused to pay a UME claim because the insured couldn’t produce the other driver’s name and contact details—even though the other driver was aggressive, seemingly drug affected and had produced a large knife at the scene of the accident.

⁷⁹ McConnell, Pat, *The CommInsure Scandal highlights a conflict at the heart of all life insurance*, Business Insider Australia, March 8 2016. (<http://www.businessinsider.com.au/the-comminsure-scandal-highlights-a-conflict-at-the-heart-of-all-insurance-2016-3>)

⁸⁰ Senate Economics Legislation Committee report into the *Trade Practices Amendment (Australian Consumer Law) Bill 2009* (2009), at paragraph 10.13; Natural Disaster Insurance Review inquiry into flood insurance and related matters (2011), at recommendation 37; House of Representatives Committee on Social Policy and Legal Affairs inquiry into the operation of the insurance industry during disaster events (2012), at paragraph 7.22; and the draft report of the Productivity Commission into Barriers to Effective Climate Change Adaptation (2012) at pp 242-3. The final report of this Productivity Commission enquiry also spoke favourably about extending unfair contract terms protections to general insurance though did not specifically recommend it, perhaps because the report assumed the reform was already underway: pp 318-9 and also 312, 315.

We have attempted to compile enforcement figures for the period since 2013, and have found that enforcement levels (when they could even be determined) have generally declined. The findings that we made in *Regulator Watch*, that is, that more enforcement work needed to be done; that the work needed to be better reported; that the media needed to be used more by regulators as a tool to encourage compliance and influence culture; and that regulators needed to improve their ability to work with vulnerable consumers, all still stand.

While resource constraints are an obvious limitation, it is also important to demonstrate a culture of action and enforcement, and for regulators to co-ordinate their actions for greater consistency. The recent Australian Consumer Survey found that only 51 per cent of consumers believed that businesses which treated consumers unfairly would be detected by regulators, which was only a slight improvement on the 47 per cent result recorded in 2011. This would suggest to us that enforcement is not proportionate, but insufficient. That being said, we do not believe this can be remedied through amending the ACL, but needs to come through additional resourcing and a shift in regulator culture. We are conscious that the Productivity Commission is conducting an inquiry into the effectiveness of the multi-regulator model, and we will be engaging with that process.

Effectiveness of remedy and offence provisions

19. Are the remedy and offence provisions effective?

Jail time

Consumer Action submits that jail time is needed for repeated or egregious contraventions of the ACL. While breaches of a number of the ACL provisions can result in criminal offences—for example, the making of false or misleading representations, consumer guarantees, the product safety regime and the unsolicited sales provisions—the court can only award financial penalties, not jail time. The maximum value of criminal fines are the same as civil pecuniary penalties and, as such, the regulator generally seeks pecuniary penalties due to the lower standard of proof.

Jail time is available for breach of consumer laws in Canada (up to 14 years), the United Kingdom (up to 2 years), Japan (up to 5 years), and Korea (up to 3 years).⁸¹ Consumer Action submits that jail time can act as an important deterrent and may particularly work to prevent consumer harm caused by businesses phoenixing or engaging in repeated consumer law contraventions.

An example of where criminal penalties and jail time may have been justified was the matter of Clinica Internationale and its director Radovan Laski.⁸² Consumer Action first complained of this business in around 2010-11. Clinica offered migrants training and sponsored employment in the cleaning industry under a program which it claimed would lead to permanent residency. Approximately 90 migrants paid fees totalling more than \$760,000 to participate in the program, with many paying in excess of \$10,000 each.

⁸¹ ACCC, Submission to Senate Economics References Committee inquiry into Penalties for White Collar Crime, April 2016, available at: <https://acc.gov.au/system/files/ACCC%20Submission%20to%20the%202016%20White%20Collar%20Crime%20Penalties%20Inquiry.pdf>.

⁸² *Australian Competition and Consumer Commission v Clinica Internationale Pty Ltd (No 2)* [2016] FCA 62

In most cases, they were newly arrived migrants on temporary visas with limited commercial experience who needed to obtain permanent residency within a short period of time in order to be permitted to stay in Australia. In the civil case, the Federal Court found that the respondents had made false or misleading representations and engaged in unconscionable conduct. While the court ordered refunds and penalties more than \$1 million and disqualified Mr Laski from managing a company for 5 years, this may have been a case where criminal proceedings were justified. This is because Mr Laski had previously been found to breach consumer laws, following enforcement action by the ACCC in 2003.⁸³

Consumer Action notes that the NSW ACL application legislation does allow for jail time. Section 64 of the *Fair Trading Act 1987* (NSW) provides that the court may decide to imprison an individual for a second or subsequent conviction for a contravention of Divisions 1, 2 or 5 of the Part 4-1 of the ACL. There has been at least one order of jail time by a NSW court pursuant to this provision, in relation to a scam involving false advertising.⁸⁴ A similar provision should be included in the ACL, so that all regulators can seek jail time for such offensive and harmful breaches of consumer laws.

Consumer compensation

The ACL allows for a regulator to seek orders for non-party consumer redress. This was a new provision in the ACL, and has not been used extensively by regulators (though, the ACCC did obtain non-party redress in a matter against energy provider AGL, requiring that firm to recalculate energy bills based on promised discounts⁸⁵). Consumer Action recommends regulators include orders for non-party consumer redress in all relevant enforcement actions.

Another option would be to allow for orders to set up remediation schemes in appropriate cases. The recent enforcement action against hire-car company Europcar is a case in point.⁸⁶ In that case, the Federal Court found that Europcar made false or misleading representations on its website that consumers' liability for vehicle accident damage would be limited to a "Damage Liability Fee" of \$3,650, or less if the consumer purchased Europcar's "extra cover" products. In fact, under Europcar's standard rental agreement, consumers' liability was not limited to these amounts in cases of overhead, underbody or water damage, even when "extra cover" products were purchased.

It is likely that many consumers paid the Damage Liability Fee to Europcar, but were charged extra. A remediation program might have been established to require Europcar to identify such consumers, and arrange appropriate compensation or other redress. Consumer Action submits that the ACL be amended to allow orders relating to such a remediation program, and a requirement for consumer redress to be sought in all relevant proceedings.

⁸³ *Australian Competition & Consumer Commission v Michigan Group Pty Ltd (ACN 065 378 029)* [2002] FCA 1439

⁸⁴ NSW Fair Trading, Media Release – 'Fraudster sentenced to 15 months jail', 17 February 2015, available at: http://www.fairtrading.nsw.gov.au/ftw/About_us/News_and_events/Media_releases/2015_media_releases/20150217_fraudster_sentenced_to.page

⁸⁵ *Australian Competition and Consumer Commission v AGL South Australia Pty Ltd* [2015] FCA 399

⁸⁶ *Australian Competition and Consumer Commission v CLA Trading Pty Ltd* [2016] FCA 377.

Penalties for breach of unfair contract term prohibition

Consumer Action submits that breach of the unfair contract term provision should attract monetary penalties in addition to having the unfair term declared void. Without the presence of monetary redress, and potentially a punitive penalty, the ACL does not provide a sufficient deterrent for the continued use of unfair contract terms.

20. Are the current maximum financial penalties under the ACL adequate to deter future breaches?

It is clear that the current maximum financial penalties under the ACL are inadequate, particularly in respect of breaches by very large corporations. Recent cases against Coles and Reckitt-Benckiser demonstrate this.

In *ACCC v Coles*,⁸⁷ the ACCC alleged that Coles had demanded payments from suppliers that it was not entitled to; threatened harm to the suppliers that did not comply with the demand; and withheld money from suppliers it had no right to withhold. In December 2014, the Federal Court by consent made declarations that Coles had engaged in unconscionable conduct in breach of the ACL and ordered Coles to pay \$10 million in financial penalties. Coles also entered Court enforceable undertakings to provide redress to over 200 affected suppliers. In her judgment, Justice Gordon stated that:

“while it is a matter for the Parliament to review whether the maximum available penalty of \$1.1 million for each contravention by a body corporate is sufficient when a corporation with annual revenue in excess of \$22 billion acts unconscionably... the current maximums are arguably inadequate for a corporation the size of Coles.”

In *Reckitt-Benckiser*, the Federal Court found misleading representations in relation to Nurofen Specific Pain products. The representations were that each product was formulated to specifically treat a particular type of pain when, in fact, each product contained the same active ingredient.⁸⁸ The court ordered a penalty of \$1.7 million, which appeared to be out of proportion to the financial loss suffered by consumers due to the price premium attached to the products. Reckitt-Benckiser is also a multi-national corporation, with annual revenue of over \$AUD15 billion. The penalty provided is manifestly inadequate given these circumstances, and that the ACL should be amended to increase the maximum penalties. We note that the ACCC has recently appealed this penalty decision to the Full Federal Court.⁸⁹

We note that the maximum penalty for breach of the competition provisions of the *Competition and Consumer Act 2010* (Cth) are much higher than the equivalent maximum penalties of the ACL. For these provisions, the maximum penalty is \$10 million, three times the gain obtained from the conduct, or 10 per cent of the annual turnover of the business. Consumer Action sees

⁸⁷ *Australian Competition and Consumer Commission v Coles* [2014] FCA 1405,

⁸⁸ *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd (No 7)* [2016] FCA 424

⁸⁹ Australian Competition & Consumer Commission, *Media release—ACCC appeals \$1.7m penalty against Reckitt Benckiser for misleading Nurofen representations*, 23 May 2016, available at <<http://www.accc.gov.au/media-release/accc-appeals-17m-penalty-against-reckitt-benckiser-for-misleading-nurofen-representations>>.

no policy basis for different penalties for breaches of the competition law provisions, and submits that these should be applied for breaches of the ACL.

21. Is the current method for determining financial penalties appropriate?

Consumer Action is broadly supportive of the current method for determining financial penalties. However, as outlined above, we support a significant increase to the maximum amount under the law. This would better allow a court to tailor a financial penalty to the severity of the offence.

We also support the maximum amount to be indexed, rather than applying a flat cap. This would ensure that the maximum financial penalty does not erode over time.

22. Are the non-punitive orders available under the ACL sufficient for the court to apply an appropriate order to address the harm caused by a breach?

The non-punitive orders available under the ACL should be enhanced to better allow orders to address consumer harm caused by a breach.

First, we support the proposal for businesses that a given a community service order to be allowed or required to hire a third party to give effect to that order. This might be appropriate where a business causes financial harm to low-income or vulnerable consumers, and an appropriate community service order might be related to the provision of financial counselling to benefit those consumers. It would obviously be inappropriate for the business itself to deliver the financial counselling, but it would be appropriate for it to fund a local community agency to satisfy the order.

Second, we contend that the ACL remedies could be expanded to facilitate orders to disperse ill-gotten gains. In Victoria, the ACL application legislation provides for a Victorian Consumer Law Fund.⁹⁰ Pecuniary penalties and various other amounts are to be paid into this Fund. There is also a framework for non-party consumer redress to be paid into the Fund which allows affected consumers to claim upon the Fund. Grants can also be paid out of the fund for the purposes of improving consumer wellbeing, consumer protection or fair trading.

Consumer Action strongly supports this Fund, and believes that the ACL should also include such provisions in relation to matters taken under the Commonwealth Law. This would enhance consumer protection broadly, including through enabling a broad range of consumer policy research and advocacy through the Fund.

Consumer Action notes that the Federal Government does not provide specific funding for consumer policy research and advocacy, despite a Productivity Commission recommendation that it should.⁹¹ The Commission has said that there is a need for “high quality advocacy and policy research in priority areas, and [for] the national interest [to be] appropriately represented”. It appears that the Federal Government has been reticent to provide funding for these purposes, given the call on taxpayer dollars. Enabling pecuniary penalties and other undistributed funds to

⁹⁰ *Australian Consumer Law and Fair Trading Act 2012 (Vic)*, sections 134-137.

⁹¹ Productivity Commission, *Review of Australia’s Consumer Policy Framework*, 30 April 2008, recommendation 11.3.

non-party consumers to be directed to a national Consumer Law Fund may work to achieve the Productivity Commission recommendation, without the need to call on taxpayer dollars.

23. What could be done to improve the consistency in the approach to ACL penalties and remedies across jurisdictions?

There should be greater consistency in the approach to ACL penalties and remedies across jurisdictions. As described above, we submit that jail time should be available for repeated or egregious contraventions of the ACL, at least on the basis that it is available in NSW.

Moreover, regulators should align their compliance and enforcement policies, and also approach enforcement action in a high quality way. In our 2013 report, *Regulator Watch*, we recommended that regulators report better on enforcement work, and also make greater use of the media.

In relation to reporting, it is important for reporting to be comprehensive, frequent and timely, consistent and accessible. Regulators should use a consistent and as far as possible standard set of reporting indicators to enhance the ability of the community to compare regulatory performance across jurisdictions.

Regulators should also make systemic use of the media to increase the deterrence value of their enforcement actions and to gain maximum educative value from enforcement outcomes. Consumer Action is concerned that some jurisdictional regulators do not effectively or consistently publicise their enforcement work, limiting its deterrence value.

Consumer Action is also aware that there are different approaches taken by regulators to publicly identifying the recipient of infringement notices. This may be due to the different legislative bases for the ability to issue an infringement notice. The ACCC may issue an infringement notice pursuant to Division 5 of Part XI of the *Competition & Consumer Act 2011* (Cth). The Victorian regulator, by comparison, can issue infringement notices pursuant to section 219 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic). The ACL itself does not include provisions relating to infringement notices.

More robust consumer outcomes would be achieved if there was greater consistency in the issuing of infringement notices. This should include a requirement on regulators to publicly disclose the recipient of an infringement notice through a media release or other public statement.

24. Do you have any views on any of the issues raised in section 3.2?

We fully support an increase in the quantum of penalties, and a broadening of regulators' capacity to effectively enforce the ACL. Again, this shouldn't be viewed as a regulatory burden—it should be seen as necessary to ensure a well-functioning market, with healthy competition and empowered consumers.

Access to remedies and scope for private action

25. Are there any barriers to consumers and businesses enforcing their rights and seeking access to remedies under the ACL? Are there barriers to private action that need to be addressed?

If the ACL is to effectively empower and protect consumers, then access to effective dispute resolution is fundamentally necessary. As the ACL is designed to apply to and protect all Australians, and it follows that private individuals should be able to assert their rights under legislation with ease and minimal, or no, cost. This is particularly true if the ACL is to effectively protect the vulnerable and disadvantaged consumers that Consumer Action represents, and fulfil its requirement under the Intergovernmental Agreement to “*meet the needs of those consumers who are most vulnerable, or at greatest disadvantage*”.

Small claims tribunals

Consumer Action is based in Victoria, and has found over time that VCAT does not provide the forum necessary to meet the need described above. VCAT is costly, cumbersome, and presents an intimidating adversarial court type setting which can represent a significant challenge for many consumers. In our view, VCAT is over-burdened with an unrealistically broad range of matters, and cannot possibly serve all areas of dispute adequately. In dispute resolution terms, VCAT very much runs the risk of being a jack of all trades, and a master of none.

Other barriers inhibiting effective access to justice through VCAT is the impact of upfront fees and delay. In 2013, VCAT increased its application fees substantially. Before the fee increases the application fee for a consumer dispute of less than \$10,000 was \$38.80. From 1 July 2013 the fee is \$44.90 for a dispute of less than \$500 or \$132.30 for a dispute between \$500 and \$10,000. Today, the fee is \$174.10 rising to \$575.30 for claims worth more than \$10,000.

One rationale for the increase in VCAT fees was that the tribunal should shift to more of a 'user pays' model.⁹² This argument has some merit in commercial disputes, where legal costs are another cost of doing business, and a trader can often make a rational choice to either absorb the cost of legal proceedings or the cost of doing nothing. The choice is not always as clear cut for an individual, particularly one on a very low income.

Case study

A client of Consumer Action sought assistance in late 2012. She reported that she had purchased a car for around \$16,000 which proved to be defective and stopped running soon after purchase. The trader originally agreed to repair the vehicle, however the repairs ultimately worsened the defects. The trader subsequently refused to remedy the ongoing defects. The client has school aged children and cannot manage get by without a working car.

Consumer Action assisted our client to make a claim in VCAT for a refund of the purchase price or alternatively, funds to repair the ongoing defects. Our client had spent all her life savings on purchasing the car and at the time of the VCAT application was unemployed and dependent on Centrelink payments. Our client could not afford the \$322 VCAT application fee but paid it out of desperation. The fee was later refunded by VCAT in response to a request

⁹² Victoria, Department of Justice, *Regulatory Impact Statement for proposed Victorian Civil and Administrative Tribunal Fees Regulations*, January 2013, p 42.

for waiver on the grounds of hardship. VCAT ultimately awarded our client \$7,830 to repair the vehicle.

This client (like most of the people we assist) was not in a position to pay anything close to the actual costs of a court or tribunal hearing, and many cannot afford any application fee at all. Neither could this client afford to do nothing—failing to exercise her rights meant she would have lost \$16,000, and would not be able to take her children to and from school. Further, the car trader would have been unjustly enriched, and indeed encouraged to continue selling defective vehicles to low income customers in the knowledge that they were unlikely to ever exercise their rights. This case demonstrates that funding tribunals through a 'user pays' model for individual disputes will not encourage efficiency in the justice system. On the contrary it produces unjust outcomes.

The Victorian Government has recently announced a proposal to reduce the fees for some claims. However, it is still proposing an application fee of \$169.60 for claims valued over \$3,000 and up to \$10,000, and a fee of \$435.60 for claims over \$10,000.⁹³ Consumer Action submits that these fees are an unreasonable barrier to access to justice—we refer to our submission to the consultation on these fees.⁹⁴

Delay also has very real tangible and intangible costs for our clients. For small civil claims, there is typically around a six month delay between applying to VCAT and having a case heard. In a recent case, Consumer Action assisted a client in relation to a defective vehicle which involved an eleven month delay between the time our client stopped using the defective car to the time a favourable result in VCAT was achieved. In the meantime our client had access to another car which was loaned to her, but was not large enough to fit all of her children.

Another significant problem with tribunals is the challenge of enforcing a VCAT order when a consumer succeeds with their action. VCAT does not enforce orders, so a consumer must seek to enforce monetary orders in the Magistrates' Court. This is done by filing with the Registrar of the Magistrates' court a certified copy of the order of VCAT and a sworn affidavit saying that the applicant is the person to whom the payment is made under the order, and the amount of money that has not been paid. With respect to enforcing a non-monetary order, an applicant must file documents in the Supreme Court. These processes are not simple and our experience is that some consumers "give up" when they have been successful in obtaining an order from VCAT, and have not been paid.

Consumer Action strongly recommends that industry External Dispute Resolution (EDR) models are extended to markets with significant consumer problems and a lack of suitable dispute resolution. A Retail Ombudsman for Australian consumers would meet this goal, and could provide a nationally available forum to hear consumer disputes at no cost to the consumer. If sufficiently resourced and appropriately managed, it would also deal with the problems of delay.

⁹³ Department of Justice, *Victorian Civil and Administrative Tribunal (Fees) Regulations 2016 Regulatory Impact Statement*, available at:

http://myviews.justice.vic.gov.au/application/files/2614/6064/5689/Regulations_-_Regulatory_Impact_Statement_RIS_-_Victorian_Civil_and_Administrative_Tribunal_Fees_Regulations_2016_-_FINAL.PDF.

⁹⁴ Available at: <http://consumeraction.org.au/8856-2/>

We believe this would be a significant reform and would greatly enhance the effectiveness of the ACL—particularly in relation to consumer trust and confidence.

We expand further on this point in our response to questions 26 and 27.

Dealing with adverse costs risks

Consumer Action recognises the positive impact of public interest litigation in determining rights on behalf of economically disadvantaged consumers, in addressing issues of systemic and public importance, and in advancing the rule of law. In all such cases, the risk of an adverse costs order will have a chilling effect, irrespective of the legal merit or public interest in the case.

The prospect of adverse cost orders in tribunals and courts can act as a deterrent for our clients in pursuing legal action. This risk arises for our clients if they challenge a trader in VCAT or the Magistrates Court, and are successful but the trader then appeals to a superior court. If the trader wins the appeal, a costs order may be made against the consumer which they are unable to pay.

The risk is particularly present where the claim relates to an area of law that is unclear and, if the consumer is successful, will have implications for the viability of the relevant trader's business model. An example we often see is in relation to consumers who have been charged large cancellation fees for cancelling enrolment in a private college course. Sometimes these fees can equate with the full value of the course. In our view, there is a reasonable claim that the term providing for the cancellation fee is an unfair contract term under the ACL and so void. However, given the relatively small amounts of the claim, the likelihood a private college would appeal a decision adverse to it, and the risk of costs for a consumer, any claim will invariably not be pursued.

We encourage consideration of ways in which this the threat of adverse cost orders can be addressed so as to improve access to justice. We are aware that the Victorian Appeals Costs Fund operates to reimburse parties of their legal costs in limited circumstances and enquire whether its scope can be broadened to protect litigants wishing to pursue public interest or test case matters. In New South Wales, section 47 of the *Legal Aid Commission Act 1979* (NSW) provides that Legal Aid NSW can pay the costs of legally assisted persons. This may provide a model for broader adoption.

Another option may be for the ACL to include a legislative framework allowing for the making of protective cost orders. This would enable an applicant to seek an order that costs should be capped to a level which would not discourage the applicant from pursuing an otherwise meritorious claim. In 1995, the Australian Law Reform Commission recommended such a legislative regime in Australia,⁹⁵ as did the New South Wales Law Reform Commission in 2012.⁹⁶

In both instances, the Commissions recognised that existing court discretions were not being exercised, absent of specific enabling legislation.⁹⁷ A similar proposal has recently been floated

⁹⁵ Australian Law Reform Commission, *Costs Shifting Who pays for Litigation*, Report 75 (1995)

⁹⁶ New South Wales Law Reform Commission, *Security for costs and associated orders*, Report No 137 (2012) [4.1– 4.82, at 4.42]

⁹⁷ See for example New South Wales Law Reform Commission, *Security for costs and associated orders*, Report No 137 (2012) [at 4.42]

to support small businesses in taking action against breaches of competition law.⁹⁸ Consumer Action submits that such a framework would promote the operational objective of the Intergovernmental Agreement, being “*to provide accessible and timely redress where consumer detriment has occurred*”.

The Consumer Law Fund

While Victoria has the Consumer Law Fund (as we noted in Box 15 of the Issues paper), Consumer Action is conscious that no Federal or other state based equivalent exists to support consumer well-being, consumer protection or fair trading initiatives. Consumer Action is aware that the Financial Rights Legal Centre (**FRLC**) is in the process of establishing an independent Public Ancillary Fund which will be known as the Consumer Advocacy Trust and Consumer Advocacy Fund. This body will be able to take charitable donations, and receive money paid pursuant to enforceable undertakings obtained by consumer protection regulators, and other undistributed or surplus funds arising out of ACL breaches. This is an excellent development and will provide valuable resources for consumer research, policy work, casework, advocacy and consumer education.

26. What low-cost actions could consumers and businesses more readily use to enforce their rights?

and;

27. Are there any overseas initiatives that could be adopted in Australia?

A Retail Ombudsman, based on the model already operating in the United Kingdom (UK), would assist Australians with otherwise costly and time consuming disputes relating to the purchase of goods and services. We believe this is a significant access to justice issue, as the current barriers to pursuing an action through small claims forums such as VCAT mean that comparatively few consumers are likely to assert their rights, even when the trader is clearly in the wrong. The cost/benefit analysis for the consumer, (in terms of both time and money), often means that pursuing a claim is simply not worth their while—or is not perceived to be. In our view this represents a major practical failure of consumer law.

Consumer Action has significant experience in supporting and acting on behalf of consumers with disputes considered by industry ombudsman schemes (such as the Financial Ombudsman Service (**FOS**), the Credit and Investments Ombudsman (**CIO**) service, the Energy and Water Ombudsman Victoria (**EWOV**) and the Telecommunications Industry Ombudsman (**TIO**)). We believe that, in providing access to justice, the establishment of these schemes has been one of the most significant advances in consumer protection of the past 30 years. Without industry ombudsman schemes, hundreds of thousands of people would have been left with no avenue for redress other than courts, or more likely, because of cost and other access barriers, would have been left with nowhere to turn. There is a clear need for a free, accessible and efficient means for consumers to have their matters heard and resolved.

⁹⁸ Australian Labor Party, Fact Sheet – *Access to Justice for Small Business*, available at: https://d3n8a8pro7vhmx.cloudfront.net/australianlaborparty/pages/4923/attachments/original/1457929832/Access_to_Justice_for_Small_Business.pdf?1457929832.

The UK Retail Ombudsman (**UKRO**) is an industry ombudsman which began hearing complaints between consumers and retailers on 2 January 2015. The UKRO covers disputes relating to goods and/or services purchased either in stores or online.⁹⁹ Interestingly, the UKRO is a response to two 2013 EU directives—one regarding alternative dispute resolution (ADR Directive 2013/11/EU) and other regarding online dispute resolution (ODR Regulation 524/2013).

EU member states were required to incorporate the requirements of the ADR Directive into national law by 9 July 2015, with the ODR Regulation automatically taking effect six months later on 9 January 2016. Under the ADR Directive, member states were required to ensure that properly certified ADR services would be available for all disputes involving consumer complaints by EU consumers. It is worth noting that the Directive did not apply to business-against-business complaints or to trader-against-consumer complaints, such as debt recovery actions.

Unlike most industry ombudsman schemes in Australia, retail members of the UKRO are not required to join by law or as a requirement of their license.¹⁰⁰ Broadly, the UKRO is funded by retailers who 'opt-in' and pay for membership according to the size of their business. Single shop 'bricks and mortar' retailers are able to join for free, but any retailer beyond that size (including single shop plus online) must pay an annual fee according to a sliding scale. As at January 2015, '3,000 retailers are (were) signed up, and they pay between £100 and £2,600 per year to subscribe'.¹⁰¹

Since September 2015, the UKRO has introduced a "gold tick" scheme whereby members who undergo extra vetting by the Ombudsman and pay it an additional £100 annually,¹⁰² can display their enhanced accreditation status and be recognised as a 'trustworthy trader'. According to the ombudsman's website, the gold tick means that the trader:

*"...has terms and conditions of business that are legally compliant, fair and easy to understand, has a fair returns policy, has a fair complaints policy, their VAT status (if applicable) has been verified, as have their contact details, and a unique check of the trader's website has been carried out."*¹⁰³

As with industry EDR schemes in Australia, the service is free to consumers and the ombudsman's decisions only bind member retailers, who are contractually obligated to comply.

To be eligible for assistance from the UKRO, the consumer must first have complained directly to the trader and given the trader eight weeks to reply, and, that complaint must have occurred in the preceding six months. If after eight weeks the dispute remains unresolved, the consumer can then seek assistance from the Ombudsman. The ombudsman's office will first attempt to

⁹⁹ See: <http://www.theretailombudsman.org.uk/>

¹⁰⁰ See, for example, Part 6 Telecommunications (Consumer Protection and Service Standards) Act 1999 which requires carriers and eligible carriage service providers to enter the TIO scheme to provide a dispute resolution service for complaints about telecommunications services.

¹⁰¹ See <http://www.telegraph.co.uk/finance/personalfinance/11333939/New-Retail-Ombudsman-can-investigate-your-shopping-complaint-but-it-comes-with-a-catch.html> .

¹⁰² See <http://www.pcr-online.biz/news/read/policing-pc-retail-is-the-retail-ombudsman-s-new-gold-tick-just-what-tech-shops-need/036902>

¹⁰³ See <https://www.theretailombudsman.org.uk/what-does-it-mean-to-be-retail-ombudsman-compliant/>

settle the dispute through negotiation, and then by making a recommendation (if negotiation fails). If the recommendation is rejected, the ombudsman may then make a decision which is binding on the trader. If the consumer disagrees with the determination, they may take the matter to court.¹⁰⁴

Remedies offered by the UKRO include directing the trader to take, or stop taking, certain steps (such as providing a refund or exchange or issuing a formal apology), and directing the trader to pay the consumer a financial award by way of compensation (up to £25,000) for proven financial loss.¹⁰⁵

Australia is well-suited to establish a similar ombudsman scheme to the UKRO, in part because our retail sector (particularly in terms of the grocery and hardware sectors), is highly concentrated and dominated by large national chain-stores and franchises. This means that an industry ombudsman scheme could quickly gain significant national coverage by having a relatively small number of very large retailers join the scheme. While this speaks more to the practical implementation of the scheme than the underlying purpose, it does mean that an Australian Retail Ombudsman could quickly be seen to be representative of the retail sector and thereby gain the credibility necessary to have a material impact on consumer confidence.

Furthermore, an Australian Retail Ombudsman which commenced operation with a group of large national retail members could arguably establish a cultural norm which would encourage smaller retailers to join, in order to be seen as a 'trustworthy trader'. A retail sector where it was considered normal to belong to the Australian Retail Ombudsman scheme (and where the scheme was well known and understood by consumers), would be a major advance for consumer protection in Australia—and would align us with the standard already being set by the EU.

An Australian Retail Ombudsman would be more accessible and cost effective for consumers than small claims tribunals such as VCAT, and would be better placed to identify systemic issues. Over time, an Australian Retail Ombudsman could play a significant role in improving market operation and reducing complaints.

28. What are the experiences of consumers and businesses in dealing with ACL regulators? Could they play a greater role in promoting private action in other areas that would help consumers enforce their rights under the ACL?

Consumer Action enjoys very positive and productive relationships with ACL regulators. However, we do agree that relationships could be enhanced.

Reporting of consumer organisations

Consumer organisations play an important role in early identification of consumer issues in the marketplace, through complaints services, legal advice and assistance services, financial counselling and market monitoring. The information provided by consumer organisations to regulators can help identify emerging issues and trends of consumer concern.

¹⁰⁴ See <http://www.telegraph.co.uk/finance/personalfinance/11333939/New-Retail-Ombudsman-can-investigate-your-shopping-complaint-but-it-comes-with-a-catch.html>

¹⁰⁵ See <https://www.theretailombudsman.org.uk/our-powers/>

In recent years, both ACCC and ASIC have significantly enhanced the way in which they report back to consumer groups who are members of their consultative committees. This has involved a complaint register whereby every complaint made by a committee member is listed on the register. The regulator then provides feedback on the complaint and how it is being dealt with at regular intervals (usually ahead of a committee meeting). This mechanism ensure members of the committee are kept informed about the progress and outcomes of complaints, and encourages further complaints, enhancing the ability of the regulator to do its job. Consumer Action submits that other consumer regulators should adopt similar processes.

Super-complaints

Another method to engage consumer organisations in more complaints is through super-complaints. Super-complaint powers are best understood in terms of the UK model, where organisations with a designated status (mainly consumer bodies) can lodge complaints about systemic consumer problems and receive a fast-tracked public response from regulators and government. In the UK, once a super-complaint is made, the body receiving it has 90 days to publish a response setting out what action, if any, it proposes to take and its reasons. This may not be the end of the process—a super-complaint could lead to enforcement action, a market study or a full competition investigation, for example. The Government must then respond within 90 days to the regulator.

A super-complaint framework should be included in the ACL and adopted by consumer regulators. While systemic harm is commonly acted on by regulators when reported by consumer organisations, the public nature of super-complaints is significant, particularly in relation to issues that might “fall between the cracks” of regulatory bodies. A super-complaint might encourage increased focus and cooperation to deal with an issue. A super-complaint framework that also requires a response from Government might also facilitate an issue being dealt with more quickly and efficiently, reducing consumer harm more effectively.

Publication of consumer complaints

Publication of consumer complaint data held by regulators would promote consumer outcomes and help consumers exercise their rights under the ACL. Publication would also assist consumers make informed decisions about where to buy goods and services and would provide incentives for businesses to deliver consistently good customer service. Transparency about complaint data would also serve as a relatively efficient, non-regulatory measure to promote the effective function of consumer markets. The NSW Office of Fair Trading will publish a complaints register from later this year, and has issued guidelines about how it will be designed and administered.¹⁰⁶ Consumer Action submits that all regulators should adopt these guidelines and publish consumer complaints.

Follow-on provisions

Consumer Action supports the extension of the “follow on” provisions to apply to admissions of fact made by the person whom proceedings are brought, as well as findings of fact made by the

¹⁰⁶ NSW Office of Fair Trading, *Complaints Register Guidelines*, available at: http://www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/About_us/Complaints_Register_Guidelines.pdf.

court. We note that the Competition Policy Review made a similar recommendation in relation to the competition law provisions of the *Competition and Consumer Act 2010* (Cth). Consumer Action notes that many of the regulator proceedings result in consent orders, where the respondent makes admissions of fact. This should be promoted as an efficient use of regulator and court resources. However, to ensure that affected parties can use these admissions as a basis upon which to seek compensation, they should be available as prima facie evidence in any follow on proceeding.

29. How could the ACL or other Australian laws be improved to provide Australians with better protection when engaging in cross-border transactions with overseas traders?

There are significant risks when engaging in cross-border transactions with overseas traders. These can include goods and services not being delivered as promised, and difficulties in enforcing contracts or consumer protections against businesses that are not within the jurisdiction. While it is clear that the ACL applies against a foreign business,¹⁰⁷ this does not make dispute resolution or access to justice simple or easy.

The most common protection for consumers who find themselves unable to resolve a dispute, or enforce an order, against an overseas trader is through chargeback rights. Chargeback is the return of funds from a retailer or service provider to a consumer's bank account or credit card, usually initiated by the consumer's bank. A bank or other financial service provider will usually reverse a payment where goods or services are not supplied, where there has been duplicate billing or to deal with fraud in cases where the customer did not authorise purchase on their card.

Despite this important protection, chargeback rights are entirely outside the ACL regulatory framework and rely on the payment schemes for their administration (that is, Visa, MasterCard or American Express). Each scheme has different rules that apply to chargebacks, and different time periods can apply. Consumer Action notes that some newer payment mechanisms may or may not be inclusive of rights similar to chargebacks.

To promote consumer confidence in cross-border purchases, the ACL should set some standards as they relate to chargebacks and apply these to all common payment schemes. We note that the ACL regulators presently have a "national project" on chargebacks aiming to "create a readily accessible suite of tools that will help ACL regulators understand the rules and conditions that govern credit card chargebacks".¹⁰⁸ We also encourage the ACL regulators to extend this work to all payment schemes that administer chargebacks (not just credit cards), and to share the output of this work with the community. This would facilitate better protection for consumers engaging in cross-border transactions.

Emerging consumer policy issues – selling away from business premises

30. Does the ACL adequately address consumer harm from unsolicited sales? Are there areas of the law that need to be amended?

¹⁰⁷ *Australian Competition and Consumer Commission v Valve Corporation (No 3)* [2016] FCA 196.

¹⁰⁸ Australian Consumer Law Website, *ACL National Projects*, available at: <http://consumerlaw.gov.au/acl-national-projects/>

The ACL's current protections against unsolicited selling are insufficient to protect consumers from harm, and should be further strengthened based on the principles of behavioural economics. In our response to question 11, we outlined our views on information harvesting through online forms and web-sites, and how the ACL could be clarified to more clearly signal to the market that subsequent approaches are indeed unsolicited, and therefore subject to the relevant protections.

Door to door selling is another area of unsolicited sales which we believe should be significantly strengthened. Consumer Action has actively campaigned against unsolicited door to door selling for many years, successfully distributing thousands of "Do No Knock" stickers to Australian consumers who do not wish to be subjected to unsolicited sales on their own doorstep. We have now arrived at the conclusion that banning door to door sales altogether may be the only effective way to genuinely protect consumers against this form of selling.

In 2010 Consumer Action jointly published a research report with Deakin University outlining the results of an investigation led by Dr Paul Harrison, a behavioural economist, into the psychological techniques used to sell maths education software through in-home sales. While in-home sales can be distinguished from door to door selling on the basis that they occur through pre-arranged appointments, many of the psychological techniques employed in the selling process are the same. In fact, the study found that many of the social persuasion sales techniques used by in-home sales people were adopted from the traditional sales techniques of door to door selling.¹⁰⁹ Furthermore, the context of the selling environment—occurring at the consumer's home—has the psychological effect of lowering certain barriers to sale which may be present in a more traditional environment, such as a store. The fundamental dynamics of the interaction are very different when a salesperson calls unannounced on a consumer in their own home, as opposed to a consumer entering a store of their own volition because they have a desire to purchase a certain good or service.

In-home sales

The products sold through high pressure in-home sales have varied from encyclopaedias to vacuum cleaners and educational software. Most recently this technique has included vocational education and solar panels. Often, the products are sold on credit arrangements, which can lead to serious debt problems.

There are various techniques used during in-home sales to influence consumers' decision-making. People feel more pressure to buy when they have invited the salesperson into their home. The act of inviting the salesperson inside makes it more likely that a consumer will agree to a larger request later, such as buying the product or service being sold.¹¹⁰ There is a strong social element associated with in-home sales. By being in the home, the salesperson obtains information about a person's family or lifestyle, enabling them to exert authority or enhance understanding, liking or similarity. Asking someone to leave your house after you

¹⁰⁹ Consumer Action Law Centre and Deakin University, 'Shutting the Gates: An analysis of the psychology of in-home sales of educational software', 1 March 2010, (2010) p 27.

¹¹⁰ Consumer Action Law Centre and Deakin University, 'Policy report: An analysis of the psychology of in-home sales of educational software', 1 March 2010, available at: <http://consumeraction.org.au/policy-report-an-analysis-of-the-psychology-of-in-home-sales-of-educational-software/>

have invited them in is substantially more difficult than walking out of a retail store. The 'foot in the door' effect is powerful.

Consumers can be asked a number of questions where the answer is obviously 'yes'. For example, 'Wouldn't you like to improve your jobs skills?'. The offering of something 'free' is often the icing on the cake—statements like 'you don't have to pay upfront', or inducements like a free computer, can focus the mind on the initial benefit, rather than the longer-term debt. This can all contribute to the purchase of an item that is often not suitable, wanted or affordable.

Case Study

Consumer Action's client was cold called initially and then arranged an appointment with a solar panel provider in September 2015. The sales consultant discussed the government rebate and said if the client gave her previous 12 months' bills they would determine if the system could be beneficial for her. The sales representative checked the client's bills and advised her that if she installed the system she would not have to pay any electricity bills.

The client agreed to purchase the solar system at \$8,700.00. The contract did not comply with the unsolicited sales provisions, and installation took 6 weeks.

The client's total savings for the period November 2015 to February 2016 was approximately \$45.00. She contacted her energy company, and the solar company. They advised that the system appeared to be working properly. Upon further contact, they said it may be a faulty inverter. Three weeks later they replaced the inverter.

The solar company offered \$200 in compensation. The client's energy bills are still high, and she cannot afford to pay both the bills and the solar finance cost.

Over the years and through our casework, Consumer Action has seen numerous examples of extremely poor consumer outcomes arising through door to door selling, across many varied industries. These have included encyclopaedias, maths software, energy contracts, vocational training courses and in more recent times, solar panels. Typically, these industries have a disproportionately negative effect on vulnerable and disadvantaged consumers. Poor outcomes are often driven by a disconnection between sales staff and the company providing the product.

The fact that salespeople are typically employed through direct selling companies removes the risk of reputational damage for the salesperson and encourages them to pursue inappropriate sales outcomes—particularly when they are operating on a commission basis. The sales interaction becomes one in which a sales person seeks to 'dupe' a consumer into making a purchase,¹¹¹ as opposed to genuinely servicing a consumers wants or needs.

The negative impact of door to door selling is now well understood and has already been incorporated into public policy through the ACL, to some extent. Regulators issue public advice

¹¹¹ (and the common trick of energy sales people to say they represent the regulator, or 'the government' is a good example of this),

based on the principles of behavioural economics, to warn consumers against the “hard sell” (ASIC’s “Money Smart” web-site, especially the page “Avoid sales pressure” is an excellent example).¹¹² Consumers themselves, in a recent Ipsos poll, have indicated that the practice is widely disliked. The poll found that over 80 per cent of consumers had a negative view of door to door selling—and almost 77 per cent would like to see the practice banned.¹¹³

Case study

In March 2016 a door-to-door seller representing a solar provider approached Carl* and signed him up to \$5,500 worth of solar panels. Carl lives alone and is currently undergoing chemotherapy. He was in significant pain at the time.

The sales representative told Carl that 6 panels would be enough to cover all or most of his power bills, and that if there was any problem with them they were covered by warranty. Carl felt reassured by this, and told the sales representative that he did not want to pay on finance – he wanted to pay for the panels outright.

The sales representative convinced Carl that it would be better to pay interest-free over 40 months. Carl was not told that an account opening fee and a monthly account keeping fee would apply. If he had known this, he would not have agreed to pay by instalments.

Carl was not told about his cooling-off rights.

Once installed, the panels provided Carl with 25 percent to 50 percent of his power needs. He is yet to be provided with the certificate he needs for his energy provider. An independent Inspector has since informed Carl that he would need twice as many panels to fully power his house.

* Name changed for privacy purposes.

Case study (provided by Loddon Campaspe Community Legal Centre)

John received a call from a solar panel company asking to come to his house and discuss solar panels. Our client agreed to have a chat with them. Representation were made to our client by the salesman that the system would “pay for itself in 3-4 years.” After John explained that a majority of his power use is at night time.

After signing the contract our client had second thoughts and spoke with his electricity company about the solar panels. The electricity company told our client that not only does that system not have the ability to store power to be used at night time, even if our client was to use his power during the day the capacity of the panels was insufficient for his level of power use. John has no allowed the goods to be installed, one week after he signed the contract he called to speak with the company, and was told no one was available, he would need to speak with the directors of the company and they were both unavailable.

¹¹² <https://www.moneysmart.gov.au/borrowing-and-credit/borrowing-basics/avoiding-sales-pressure>

¹¹³ <http://consumeraction.org.au/new-polling-3-4-australians-want-ban-door-door-sales/>

This matter was conciliated by Consumer Affairs Victoria. The solar company's response was that this is a "very grey area of consumer affairs." This comment refers to the fact that they first contacted John by phone and therefore the attendance at his home was may not be unsolicited. Ultimately the client has been sold a product not fit for a disclosed purpose, he was also not told about the cooling off period, which was written in very small font on the front page of the contract. Our client is trying to recoup his \$10,000 deposit, however the solar company refuses to cancel the contract despite being requested to do so on numerous occasions.

**John is not the clients real name, names have been changed for privacy purposes*

Finally, it can also be said that door to door sales are an inherently uncompetitive and anachronistic sales avenue. They are uncompetitive because they 'capture' the consumer and with the one option being offered, directly working against the rational choice ideal of consumers making well-informed, autonomous consumer choices in an open and competitive market. They are anachronistic because traders have so many avenues and platforms through which to reach consumers (online, TV, radio, print), that it really shouldn't be necessary to approach them in their own homes. In 1950's Australia, where media was limited to print and radio and there was much lower workforce participation by women, door to door sales may have been a more justifiable sales avenue. In 2016 Australia, where the vast majority of consumers carry portable online devices and consume an increasing amount of media content—it is difficult to see why we still need door to door sales.

The ACL did attempt to curb door to door sales in 2011 by restricting allowable times and mandating a ten day cooling off period, but these protections have been shown to be ineffective. The ten day cooling off period may actually exacerbate poor outcomes, by giving salespeople a tool to reassure wavering consumers when seeking to close a sale. Salespeople know full well that only the most resilient and proactive consumers will overcome the "endowment" effect and actually act on the cooling off period, so while the cooling off period can be useful for consumers, it can also (counterintuitively) work in favour of making inappropriate sales. Consumer Action notes that this applies particularly to the most vulnerable and disadvantaged consumers, who are least likely to assert their rights and act on a cooling off period.

We are particularly concerned that with the trend towards deregulating humans services (such as through the National Disability Insurance Scheme (NDIS), and in the aged care sector), many vulnerable Australians could be left exposed to the pitfalls of unsolicited sales—especially in home and door to door sales—if the ACL is not strengthened to protect them. As has been witnessed in the recent VET FEE-HELP scandal, poor unsolicited sales practices also have the potential to create significant costs for government when they are applied to industries which receive direct government funding. In that case, the cost to government of VET FEE-HELP loans ballooned from \$669 million in 2013, to \$1.76 billion in 2015¹¹⁴ – much of it through mis-sold and inappropriate course to students who are unlikely ever to be able to pay back the loan. While ACCC has been actively pursuing action against private colleges, (including a \$160 million settlement with Careers Australia¹¹⁵), it is hard to say at this stage how much of its losses the

¹¹⁴ <http://www.smh.com.au/federal-politics/political-news/emergency-measures-government-freezes-payments-to-private-colleges-20151201-glclvw.html>

¹¹⁵ <http://www.afr.com/news/policy/education/careers-australia-repays-160-million-after-student-loan-scandal-20160516-gowc6h>

government will be able to recoup. With stronger unsolicited sales provisions—including a ban on door to door sales—this scandal may not have occurred, or would at least have been substantially mitigated.

Case Study

Mary* received a door to door approach by a sales person representing an education provider in August 2014. Mary invited the sales person into her home, where the sales person recommended an online Diploma of Leadership and Management to be paid for through the VET FEE HELP system. Mary was advised the course would take one to two years to complete, and was not asked any questions about her prior qualifications or experience.

At the time, Mary had a significant drug addiction and believes this would have been apparent to the salesperson. She was drug affected at the time of the transaction, and several people entered and exited the home during the sales person, amidst numerous mobile phone calls to arrange drug related transactions.

Nonetheless, both Mary and her housemate were signed up for the course. Once signed up, Mary forgot all about the course and did not commence the learning, let alone complete the course.

In early 2015 Mary went into drug rehabilitation. She was subsequently raided and received a conviction for drug possession, and is currently serving an order at a community education centre.

Mary is now free of her drug habit and wants to study towards a drug and alcohol counselling qualification. She also wishes to be released from her VET FEE HELP debt.

* Name changed for privacy purposes.

Despite the 2011 reforms, Consumer Action has continued to see a steady stream of consumers negatively impacted by door to door sales. We are also aware that this is occurring in other states. In 2015 the New South Wales Department of Fair Trading fielded 121 complaints about door-to-door sales—most of which related to roofing, renewable energy and landscaping, education and training, or electricity supply.¹¹⁶

Consumer Action is genuine in its call for unsolicited selling be banned (cold calling and door-to-door), and we call on the ACL Review to seriously consider this option for reform. If a ban is not accepted at this time, we submit that the ACL should be amended to include a process whereby a consumer could “opt in” to an unsolicited agreement, subsequent to the initial contact by the trader. This measure has been proposed in the ACL Issues Paper. This protection would have the same purpose as the cooling-off protection—to give the consumer an opportunity to reconsider a purchasing decision. A consumer could opt-in after a designated period (without further contact or inducements from the trader) to consider their purchase, which could be as

¹¹⁶ <http://www.smh.com.au/business/consumer-affairs/unsolicited-and-doortodoor-selling-practices-still-hurting-consumers-advocates-say-20160518-goxrj3.html>

short as 2 business days. This would benefit traders in comparison with the current arrangement, as they could provide the goods and services and receive payment in a much shorter period of time.¹¹⁷

A similar reform was recently introduced with respect to the sale of vocational training courses through VET FEE-HELP. Clause 4.9.2 of the VET Guidelines¹¹⁸, which came into effect from 1 January 2016, provides that a VET provider must not accept a VET FEE-HELP loan form unless two business days have passed from the date and the time the person has enrolled. This protection is different to cooling-off, and is additional to the general cooling-off period that applies to courses sold via unsolicited consumer agreements and the cooling-off provided by the census date associated with higher education. The protection is really an 'opt-in' requirement, and was designed to slow down the transaction, where the opportunity for high pressure sales was significant. A similar provision could be introduced into the ACL so that an unsolicited consumer agreement does not become binding until the consumer 'opt in' after the 2 day period.

Consumer Action has recently commissioned research, in the form of a behavioural experiment, into the effectiveness of this sort of measure. We will provide the findings to CAANZ in due course.

31. Does the distinction between 'solicited' and 'unsolicited' sales remain valid? Should protections apply to all sales conducted away from the business premises, or all sales involving 'pressure selling'?

The distinction between 'solicited' and 'unsolicited' does remain valid, and is soundly based in principles of behavioural economics. The distinction acknowledges, (and the ACL attempts to remedy), the unhealthy power dynamic that occurs in an unsolicited sales scenario. It highlights that an unsolicited sales approach undermines rational choice theory, and that consumer protections based on the classical concept of the 'rational consumer' are insufficient in that context. We believe this is a sound conceptual framework on which to base consumer protection in this area, although the current protections do not go far enough.

We do not believe that attempting to legislate for all pressure selling scenarios is practical, or would be effective. It is not unreasonable for a trader to attempt to sell a consumer a good if that consumer has expressed an interest and encouraged a negotiation around making a purchase—that is how a consumer economy works. Consumers do enter stores and other sales venues with the knowledge that salespeople may approach them and attempt to sell them a good. From a behavioural economics perspective, this scenario does enable consumers to "arm" themselves psychologically to engage with the sales process; while an unsolicited sales approach does not.

On that basis, all 'unexpected' sales approaches initiated by the salesperson, which the consumer has not actively sought out on their own accord should be caught by the ACL as an unsolicited sales approach. Simply put, those are the circumstances in which the consumer is put at a disadvantage in the selling process and requires additional protection.

¹¹⁷ Section 86 of the ACL provides that generally a supplier must not accept payment or supply goods under an unsolicited consumer agreement for the duration of the cooling-off period.

¹¹⁸ Guidelines made pursuant to Clause 99 of Schedule 1A of the *Higher Education Support Act 2003* (Cth).

Much of the work that needs to be done around reforming the unsolicited consumer agreement provisions of the ACL hinges on how broadly or narrowly “invitation” is defined.

69 Meaning of unsolicited consumer agreement

(1) *An agreement is an unsolicited consumer agreement if:*

...

(a) **the consumer did not invite** the dealer to come to that place, or to make a telephone call, for the purposes of entering into negotiations relating to the supply of those goods or services...

In our view, a genuine invitation by the consumer should be required to clear and unequivocal, and made on the pro-active initiative of the consumer—not at the result of prompting by the trader.

Our further views on this matter are expressed in our responses to questions 11 and 30 above, and question 32 directly below.

32. Do the unsolicited selling provisions require clarification with regard to sales made away from business premises, for example, ‘pop-up’ stores?

Sales made away from business premises such as a pop-up store, or a kiosk in the middle of a shopping centre can be unsolicited if the salesperson leaves the pop-up store or kiosk to proactively engage the consumer—or if the temporary sales venue is established in such a way as to ‘capture’ the consumer, or group of consumers. The key element is whether the consumer has independently engaged the seller to meet a pre-existing want or need, or whether the seller has approached the consumer to attempt to sell them the good or service—without the consumer having expressed any interest in the good or service being sold prior to the approach.

While this distinction seems relatively simple, in practice there does seem to be some confusion about what constitutes a solicited or unsolicited approach.

In a recent Federal Court matter, *Australian Competition and Consumer Commission v A.C.N. 099 814 749 Pty Ltd*¹¹⁹, the court found that the unsolicited consumer agreement provisions of the ACL did not apply because the trader (a tax agent), had put signs up in the community announcing his visit before he arrived—and some of the people in the community had previously had their taxes done by him. Therefore, when the agent arrived and set up a temporary kiosk and office in the community, any interactions between the tax agent and members of the community were taken not to be ‘unsolicited’. This was despite the fact that the agent had not been invited to the community, and that the community was a remote Indigenous community where English was not the first language—leaving the consumers vulnerable to his sales approach.

In that matter, the court felt that the subsequent interactions between the agent and consumers were not unsolicited because there are certain agreements which:

¹¹⁹ *Australian Competition and Consumer Commission v A.C.N. 099 814 749 Pty Ltd* (2016) FCA 403, (22 April 2016)

“...do not result from any prior negotiations because such are unnecessary in the circumstances. That may arise where the supplier has, by public notice or advertisement, informed potential consumers of the nature of his or her services and the conditions upon which they will be supplied including the price and the consumers concerned are willing to accept those conditions and pay the price without further ado. This could also arise where the consumer is an existing client of the supplier and, as a result, he or she is aware of the conditions upon which the supplier’s services are supplied.”¹²⁰

The court also found that negotiations undertaken away from the main business of trader do not necessarily constitute an unsolicited sales approach,¹²¹ and that the unsolicited consumer agreement provisions do not always apply simply for the fact that the sale occurs in a non-retail context.¹²²

Consumer Action suspects that this decision will be appealed by the ACCC, and in our view the matter does expose a weakness in the current unsolicited sales protections. Fundamentally, we feel that the decision fails to meet the reality of the dynamic that was occurring in that matter, whereby a trader proactively approached an entire community who had not sought his services. With reference to the clause reproduced in our response to question 31 above, the agent was not “invited”. Once there, the agent was able to ‘capture’ a group of consumers who would not otherwise have used his services. The reliance on the notices that the agent had put up prior to arriving seems to fall back on the ‘rational consumer’ model of consumer protection, and tends to ignore the reality of the power dynamic at hand, which is better addressed through behavioural economics.

Given the difficulty of applying the current ACL provisions to non-business premises sales (as demonstrated by the matter above), we believe that the ACL should be amended so that all sales made from non-business premises are, prima facie, regarded as unsolicited sales.

In Victoria, this protection used to apply under the Fair Trading Act. While the protection would inevitably capture some sales that were genuinely consumer initiated and could therefore be classed as solicited, there would be no detriment in those sales receiving the protections that apply to unsolicited sales. In our view it is far better to provide the protection to all off-premises interactions to ensure that unsolicited approaches are caught by the legislation. Generally speaking, the only circumstances in which it can be definitely said that a sale has been solicited is when the consumer voluntarily enters a store, or contacts a trader by phone or some other form of communication. In any other circumstance, the potential that the approach is unsolicited is very high. Often, unsolicited sales approaches will be accompanied by high pressure selling tactics and will place the consumer at a significant disadvantage. Therefore, unsolicited sales agreement protections should apply.

33. How could these issues be addressed?

Please see our response to question 32.

¹²⁰ Para 136

¹²¹ Para 137

¹²² Para 138

Emerging consumer policy issues – online shopping

34. Is it sufficient for a business to disclose the total minimum price before making a payment, or should optional fees and charges also be disclosed upfront?

As outlined in our response to question 11, under the heading, “single pricing rule”, there would be significant competitive benefits in ensuring that firms were required to advertise the genuine price for a good or service—based on the price that most consumers are likely to pay. Currently, the true cost of goods and services can be hidden through the process of optional “add-ons”, which are only revealed through the course of the online shopping process. In behavioural economics terms, consumers run the risk of experiencing the “endowment effect” through this process—and may finalise a purchase, paying significantly more than they expected to.

If traders were required to advertise the “usual” or “common” final purchase price of the good, then consumers could make their choice earlier in the process. This would be beneficial both for health, fair competition—and also for consumer confidence. Those consumers who choose not to opt for add-ons and discretionary extras would simply receive a discount on what they expected to pay—which has positive flow on benefits in terms of consumer satisfaction, and the likelihood of repeat custom.

If the notion of “usual” or “common” cost is too difficult to implement, then the reform could potentially be achieved simply by prohibiting online tick boxes that add on services and costs, if those costs have not been included in the advertised price. Simply put—if the trader does not declare it as a cost of purchase at the beginning of the sales process (i.e. in the advertising), then they would not be able to surprise the consumer by adding it later in the process.

35. Are there any changes that could be made to the ACL to improve pricing transparency?

Please see our response in relation to question 11 (under the heading “single pricing rule”) and question 34.

One way to deal with a lack of price transparency could be to strengthen the current law in relation to misleading omissions. Currently, the existing prohibition on misleading and deceptive conduct does extend to misleading omissions - but this protection is limited to situations where there is a “reasonable expectation” for disclosure.

Determining when disclosure can be “reasonably expected” creates unnecessary complexity in the consumer law, and significantly diminishes its utility in protecting against misleading omissions. Instead, the ACL could simply require that traders must not omit material information (which would clearly include price information), or provide that information in an unclear, unintelligible, ambiguous or untimely manner.

In terms of empowering consumers and enabling healthy, robust competition—clear and timely information for consumers is crucial. Consumers cannot be expected to exercise rational consumer choices if they are offered misleading, or incomplete, information on which to base those choices.

For this reason, we believe the ACL should be far stronger—and clearer—in its treatment of misleading omissions.

36. Does the ACL adequately ensure that online sellers provide safety information about products and services at the point of sale?

Mandated safety information and product labelling should be available in online environments, not just on physical product packaging. An information standard could be made pursuant to section 134 of the ACL to facilitate this outcome—there is not necessarily a need to change the ACL.

37. Do the existing ACL provisions (including provisions on false or misleading representations) adequately address issues regarding the transparency of comparator websites and online reviews? How could this be improved?

The provisions relating to false or misleading representations are insufficient to adequately facilitate transparency and fair outcomes on comparator websites and online reviews platforms. To be clear, Consumer Action strongly supports these services, as they can work to inform consumers about various options, and enhance competition particularly in essential services.

The ACCC guides on comparator website¹²³ and online reviews¹²⁴ are excellent sources of guidance, particularly to ensure that businesses do not engage in conduct that is likely to mislead or deceive. Importantly from a behavioural economics perspective, the guides focus on the *overall impression* created by conduct. We also support efforts to develop industry-based voluntary codes of conduct to deal with the risks in this sector, and promote competition and good consumer outcomes. For example, the Consumer Utilities Advocacy Centre has facilitated the development of the Energy Comparator Code of Conduct.¹²⁵

However, there are significant risks of conflicted remuneration or hidden arrangements in the supply of these services, meaning that the information received by consumers may be biased, inaccurate or false.

For example, commissions received by comparison websites per sale commonly vary between suppliers. The ACCC guidance suggests that disclosing this fact may be sufficient to comply with the ACL. Research suggests that disclosing commissions may lead to perverse outcomes. For example a rewrite of mortgage disclosure information to disclose broker commissions actually increased trust in the broker when it should have led customers to be more critical about the advice.¹²⁶

¹²³ ACCC, *Comparator websites: A guide for comparator website operators and suppliers*, August 2015, available at: <https://www.accc.gov.au/publications/comparator-websites-a-guide-for-comparator-website-operators-and-suppliers>

¹²⁴ ACCC, *Online reviews—a guide for business & review platforms*, December 2013, available at: <https://www.accc.gov.au/publications/online-reviews-a-guide-for-business-review-platforms>

¹²⁵ Consumer Utilities Advocacy Centre, *Energy Comparator Code of Conduct*, August 2015, available at: http://www.cuac.org.au/images/ECCC/Energy_Comparator_Code_of_Conduct_self-enforced_August_2015_Final.pdf

¹²⁶ Lacko, James and Pappalardo, Janis, 2004, *The effect of mortgage broker compensation disclosures on consumers and competition: A controlled experiment*, Federal Trade Commission Bureau of Economics

In relation to online review platforms, incentivised reviews can similarly cause bias. The ACCC has taken action in relation to incentivised reviews, suggesting the practices of solar energy retailer True Value Solar risks misleading consumers.¹²⁷ This is welcome, but it appears that there is still significant amounts of this sort of conduct occurring. Indeed, it has been suggested that misleading practices have become more sophisticated and that ‘astroturfing’ (creating the appearance of a grassroots movement/response) on the internet is widespread, and it is not clear that the ACL is inhibiting these practices.¹²⁸

We would again suggest that information standards could be developed to deal with these issues. Such standards might ensure best-practice approaches to disclosure of commissions, or perhaps a ‘traffic light’ approach that would provide a signal to users about the extent to which each site has adopted reasonable strategies to detect fake reviews.¹²⁹

Emerging business models and the Australian Consumer Law

38. Does the ACL provide consumer with adequate protections when engaging in the ‘sharing’ economy, without inhibiting innovation and entrepreneurial opportunities?

And;

39. Does the ACL provide adequate clarity and certainty for consumers when engaging in the ‘sharing’ economy? What areas need to be addressed, and what types of personal transactions should be excluded?

Consumer Action is not convinced that the ACL provides adequate protections for consumers engaging in the ‘sharing’ economy. As previously mentioned, we do not believe that consumer protections inhibit innovation and entrepreneurial activities. Instead, adequate consumer protections should encourage competition and ensure that businesses in the ‘sharing’ economy are delivering good consumer outcomes. We are particularly concerned to ensure that there are no “gaps” in consumer protection, depending upon the type of business a consumer engages.

To be clear, Consumer Action agrees that new technologies and services and unlock significant opportunities for consumers. They can provide consumers with greater choice in products and services that help them meet their lifestyle needs, and increased competition can drive down the cost of products and services. New technologies and services can also break traditional monopolies and provide better services at lower cost.

Staff Report referenced in Financial Services Authority, 2008, Financial Capability: A Behavioural Economics Perspective.

¹²⁷ ACCC, *Media release—True Value Solar discontinues incentives for positive online reviews*, 11 April 2016, available at: <http://www.accc.gov.au/media-release/true-value-solar-discontinues-incentives-for-positive-online-reviews>.

¹²⁸ Background Briefing, *Don't trust the web*, 18 September 2011, available at: <http://www.abc.net.au/radionational/programs/backgroundbriefing/dont-trust-the-web/3582912#transcript>

¹²⁹ See Justin Malbon, ‘Taking Fake Online Consumer Reviews Seriously’, 36(2) *Journal of Consumer Policy* 139-157.

However evolution in products and services in a modern economy can also create significant challenges for consumers. An increase in choice can provide better outcomes for those people that are empowered to search for the right option for them, and access and understand complex product information prior to making a decision, and for those consumers who are able to advocate for their own interests in the case of a dispute.

For other consumers however, greater market complexity significantly increases the chances of making poor decisions, when faced with inconsistent and difficult to find product information, an overwhelming array of choices, poor regulation and unclear avenues for recourse in the case of a dispute. It is critical to the success of reforms that unlock consumer choice, (and in doing so introduce market complexity), that consumer protections keep pace with market development. The consumer experience must be at the heart of reforms, with good consumer outcomes and trust prioritised over market benefit.

It is clear that some provisions in the ACL will apply to the conduct of businesses involved in the 'sharing' economy. For example, it is clear that platforms and suppliers must not misled or deceive customers.

However, there is some precedent for the proposition that a platform not being liable for misleading information posted by users—for example, is Air BNB liable for misleading information posted by an apartment owner? In *Google V ACCC*, the High Court held that Google did not engage in misleading and deceptive conduct when it displayed 'sponsored links' that were considered misleading or deceptive, as it did not author the links or endorse the misleading representations.¹³⁰

'Sharing' economy platform operators should have obligations about the information on their platforms, and not be able to reject liability in this situation. The ACL should be amended to facilitate this outcome.

There are other provisions of the ACL that need also to be reviewed in the context of the 'sharing' economy. For example, section 36 of the ACL contains a number of prohibitions on different practices concerning advertising goods or services, and then not supplying them. Section 60 provides that services shall be rendered with due care and skill. A platform operator may only be liable for breach of these provisions if they are involved in the supply of the good or service. The law should be clarified so that suppliers are construed as being involved in the supply of services. Platforms should not be able to avoid responsibility given their crucial role in establishing the service proposition.

The issues paper notes that consumer guarantees in the ACL do not apply to auctions, whether online in person. Reference is made to eBay's 'Buy it now' option. While eBay is commonly referred to an 'auction website', many people assume the auction exemption applies. However, the exemption only applies where the auctioneer is the agent of the seller, which doesn't appear

¹³⁰ *Google v ACCC* (2013) ALJR 235.

to be the case with eBay sales.¹³¹ Consumer Action raised this issue with eBay some time ago, which resulted in eBay improving its disclosure about the 'auction' exemption in the ACL.¹³²

Promoting competition through empowering consumers

40. Do consumers want greater access to their consumption and transactional data held by business?

While better access to consumer data can promote competition, the rise of 'big data' holds significant risk for consumers, particularly low-income and vulnerable consumers. As the US based organisation "Data Justice" states:

*"Big data platforms collect so much information about so many people... that correlations emerge that allow individuals to be slotted into hiring and marketing categories in unexpected and often unwelcome ways that usually leave them at a distinct disadvantage in negotiations. This enables advertisers to offer goods at different prices to different people, what economists call price discrimination, to extract the maximum price from each individual consumer. Such online price discrimination raises prices overall for consumers, while often hurting lower-income and less technologically savvy households."*¹³³

In their report, "*Data Justice: Taking on Big Data as an Economic Justice Issue*"¹³⁴, Data Justice makes the argument that big data is not just a privacy issue—it also has serious implications for economic justice, and undermines the efficient operation of the consumer economy:

*"The dynamics of big data is fuelling market concentration in industry sectors across the economy and consumers lose out as dominant institutions have even less pressure to share the economic value of personal data with those users."*¹³⁵

Consumer Action is also conscious that this issue has been considered in relation to consumer finance, through the Financial Services Inquiry, with which we were heavily engaged. We reproduce part of our March 2014 submission to that process immediately below—as it remains relevant to the current debate.

*"...advances in information technology permit businesses to access consumers' personal information and use complex systems to predict an individual's behaviour. In consumer lending, this technology can be used to identify consumers who are likely to be profitable, tailor and price products that the most profitable customers are likely to accept, and develop strategies to reduce the likelihood that the most profitable customers will close their accounts."*¹³⁶

¹³¹ See clause 19 of eBay user agreement, available at: <http://pages.ebay.com.au/help/policies/user-agreement.html>

¹³² Consumer Action, Media Release, *Is eBay selling consumers short?* 4 November 2011, available at: <http://consumeraction.org.au/media-release-is-ebay-selling-consumers-short/>

¹³³ <http://www.datajustice.org/blog/data-justice-report-taking-big-data-economic-justice-issue>

¹³⁴ <http://www.datajustice.org/sites/default/files/Data%20Justice-%20Taking%20on%20Big%20Data%20as%20an%20Economic%20Justice%20Issue.pdf>

¹³⁵ Newman, Nathan, *Data Justice: Taking on Big Data as an Economic Justice Issue*, (March 2015) p 4.

¹³⁶ Harrison, Paul; Ti Gray, Charles and Consumer Action Law Centre (2012) *Profiling for Profit: A Report on Target Marketing and Profiling Practices in the Credit Industry*, Deakin University and Consumer Action Law Centre, pp 5-6.

It is often argued that this technology creates a win-win: consumers get access to products they want, and business can target their marketing and increase profits. However, the increased use of customer information has coincided with a sharp increase in levels of consumer debt. Over the last 20 years, the level of credit and charge card debt in Australia has increased from a total of around \$5 billion to almost \$50 billion. Over 70 per cent of this balance—\$35 billion—is accruing interest.¹³⁷

Our report *Profiling for Profit: A Report on Target Marketing and Profiling Practices in the Credit Industry* produced with Deakin University presented evidence that the two trends are linked. For example, research regarding the US economy found that "the drop in information costs alone explains 37 per cent of the rise in the bankruptcy rate between the years 1983 and 2004".¹³⁸ The report draws on the limited public information about customer management systems, but describes how banks use sophisticated systems to glean intimate personal details, using information gathered from spending patterns, call centres, product registration and point-of-sale transactions, in order to predict an individual's behaviour.

It is not in the interests of lenders to extend credit to people who are unable to repay. However, it is well known to our caseworkers (and, we would suggest, to the credit industry) that there are large numbers of consumers who struggle for years at a time to make repayments to their credit accounts without ever reaching the point of default. These customers will be very profitable for lenders, despite the fact that these contracts cause financial hardship.

Banks and credit providers are increasingly able to use consumer data and technology to better target particular financial services offers to 'profitable' consumers. Recent credit reporting reforms which provide lenders with greater levels of personal information are designed to help lenders better assess credit risks. These reforms are likely to lead to an increased use of 'risk-based pricing', and may result in some lenders targeting 'riskier' borrowers with higher interest rates. It appears to us that some lenders already engage in this conduct, causing consumer detriment.

We see similar problems in the credit card industry—banks would prefer to send credit card offers to those who don't pay back their full balance within the interest-free period. Known as 'revolvers', such credit card users are highly profitable compared to 'transactors' or 'convenience users', who generally do not incur interest on purchases.

The group of consumers who have trouble paying off credit card debt may be very large. ASIC recently reported that 27 per cent of personal credit card holders (being around 2 million people) do not pay off their personal credit card debt in full each month.¹³⁹ This finding is supported by a 2002 report by Visa International, *The Credit Card Report: Credit*

¹³⁷ Reserve Bank of Australia, Credit and Charge Card Statistics, (as updated January 2014). Accessed via <http://www.rba.gov.au/statistics/by-subject.html>.

¹³⁸ Sanchez, J M (2009) *The Role of Information in Consumer Debt and Bankruptcies*. Working Paper Number 09-04, The Federal Reserve Bank of Richmond.

¹³⁹ *Smart people not so smart with their money*, ASIC Media Release 14-041, Wednesday 12 March 2014. Accessed 20 March 2014 from asic.gov.au.

card spending in perspective, which found that 64% of all households with credit cards in use did not pay credit card interest.

Case study

Consumer Action recently assisted in a matter where a consumer sought a loan for \$6,250 from GE Money for the purpose of consolidating her debts. According to the loan documents, approximately \$1,280 was for small debts, and an additional \$4,700 was for 'debt consolidation'. The documents showed that \$4,700 was in fact used to pay off a single credit card debt with a major bank, which the client then closed.

Loan documents show that GE Money gave the consumer a 5 year loan at an exorbitant 34.95% per annum interest—meaning she was repaying over \$14,000 (including interest, fees and charges) for consolidating debts worth approximately \$6,000. Given that credit card interest rates are commonly in the vicinity of 20%, it's likely the GE Money loan put the client into a worse, not better, financial position.

We looked at GE's Money's website in October 2013 to see what interest rates were being advertised. Both personal and debt consolidation loans were being advertised as being from 17.49% p.a. for loan amounts less than \$20,000. On closer inspection, these rates were asterisked with the fine print stating that these rates were only available to approved customers and subject to lending and approval criteria.

Failing to repay credit card balance every month will not always be an indicator of financial hardship. However, it should be a cause for concern because those on lower incomes are disproportionately burdened with credit card debt. Australian Bureau of Statistics figures show that households in the second lowest household net worth quintile hold considerably more credit card debt (\$3,100) than the average (\$2,700), being about the same level of debt as the wealthiest quintile (\$3,200 of debt). The second quintile holds more debt than the third and fourth quintiles (\$2,800 and \$2,400 respectively).¹⁴⁰

The second household net worth quintile bears the same amount of debt as the highest quintile, despite having less than one third of the disposable income (\$552 per week compared to \$1797). The second quintile has a little less than two thirds of the disposable income of the 'all households' average (\$894 per week), while on average bearing more debt. More disturbing is that the credit card debt held by the second quintile is nearly four times the weekly gross income of those households (\$821).¹⁴¹

In a similar vein to credit card marketing, particular mortgage borrowers can be encouraged to redraw additional funds, or to otherwise refinance or increase the amount of their mortgage. We do not mean to say that this is in any way unlawful—the competitive need of corporations to increase their profitability and return to shareholders unsurprisingly

¹⁴⁰ Australian Bureau of Statistics (2013) *2011-12 Household Wealth and Wealth Distribution*, 6554.0, Table 6. Accessed 21 March 2014 from <http://www.ausstats.abs.gov.au>

¹⁴¹ Australian Bureau of Statistics (2013) *2011-12 Household Wealth and Wealth Distribution*, 6554.0, Table 1.

drives them to use personal information and new technologies for their ends, rather than to help consumers access the most appropriate products for their needs.

However, this kind of conduct should be a matter for regulation if it creates risks for consumers and the financial system. We encourage the Panel to consider in more depth the techniques being used to target marketing of credit, and whether existing regulation is adequate to counter the risks it creates. Regulatory responses should be informed by an understanding of how marketing is used and how it is received by consumers.

An example may be the 2011 reforms prohibiting unsolicited credit limit increase offers, unless the customer has consented to receiving such offers.¹⁴² These provisions were designed to address the significant consumer harm caused by the impact on many consumers who are coerced into increasing their levels of debt. Vulnerability to this sort of marketing was described in depth in our 2008 research report, *Congratulations, You're Pre-Approved*.¹⁴³

These effects can be partly ameliorated by giving consumers as much access to their own data as possible. With access to their own data (presented in a usable format), consumers could use that information to make consumer choices which best suit their needs—whether it relates to consumer finance, or any other good or service.

In Victoria, the mandatory rollout of smart meters has allowed consumers to access their electricity usage data from their energy distributor or retailer. This means consumers can quickly identify where they might be able to save money by reducing electricity use (for example, by quantifying how much power is being used by appliances on standby overnight) or by shifting demand (by moving more use to off peak times). Online comparison services enable consumers to compare different 'flexible' energy tariffs based on objective data about when they use energy the most.

Similar reforms in the financial services sector (for example, data about credit card usage or insurance claims history), could assist consumers choose between providers and contribute to more effective competition. Of course, these services would need to be carefully designed to be easily understood and highly accessible. If mishandled, there is a risk that access to consumer data could create information overload for consumers—in which case the potential benefit would be lost.

41. What is the role of the ACL and the regulators in supporting consumer's access to data? Is there anything in the ACL that would constrain efforts to facilitate access?

The ACL could play a role, in conjunction with privacy legislation, in ensuring that consumers are able to access information that is held about them in order to maximise their own economic benefit. The underlying principle of any such reform should be that the data about the consumer cannot be rightly withheld.

¹⁴² *National Consumer Credit Protection Amendment (Home Loans and Credit Cards) Act 2011*.

¹⁴³ Harrison, Paul and Massi, Marta (2008), *Congratulations, You're Pre-approved: An analysis of credit limit upselling offers*, available at: <http://consumeraction.org.au/policy-report-an-analysis-of-credit-limit-upselling-letters/>.

42. Does the provision of data, or the emergence of an ‘infomediary’ market create, or increase, any risks of consumer harm not adequately addressed by the ACL? If so, how could the ACL mitigate these risks as the market evolves?

The risks of big data are outlined by groups such as Data Justice, referred to in our response to question 40. While it is not possible to prevent consumer data from being collected, it is possible to ensure that consumers are able to access that data for their own benefit—thus offsetting the negative impact of data being held exclusively by corporate entities.

In order for the data to be usable, it should be collated and presented in an accessible format, and avoid the danger of information overload. Such a system has been trialled in the UK through the midata initiative, which is described on page 60 of the Issues Paper.

While the UK midata initiative is a voluntary project, Consumer Action believes that a similar project should be compulsory under the ACL. Ensuring that consumers have access to their own consumption and transactional data, particularly if coupled with effective comparator services (such as exist in the energy market), empowers the consumer to make informed consumer choices—thus driving healthy competition. Along with protecting consumers from harm, this is the core purpose of the ACL. We do not feel that provision of data requires extensive investigation or testing, rather, we believe it follows from the basic purpose underlying the ACL that data should be accessible. To do so enables competition, and goes some way towards placing the consumer in the (ultimately theoretical) position of the “rational consumer”. While behavioural factors will always intervene to prevent the concept of the rational consumer being fully realised, it should still be pursued as an ideal outcome.

43. Are the disclosure requirements effective? Do they need to be refined, or is there evidence to indicate that further disclosure would improve consumer empowerment?

Please see our response to questions 40 to 42.

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

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