



Law Council
OF AUSTRALIA

Legal Practice Section

30 June 2016

Mr Gary Clements
Chair
Consumer Affairs Australia and New Zealand
c/o The Treasury
Langton Crescent
PARKES ACT 2600

By Email: ACLReview@treasury.gov.au

Dear Mr Clements,

Australian Consumer Law Review

I am pleased to enclose a submission prepared by the Legal Practice Section of the Law Council of Australia. The submission has been prepared by the Australian Consumer Law Committee and the Not-for-profit and Charities Committee.

Both Committees would welcome the opportunity to discuss the submission further. In the first instance, please contact Mr John Farrell, Secretariat Liaison, Legal Practice Section: (T) 02 6246 3714 (E) j.farrell@lawcouncil.asn.au.

Yours sincerely

MICHAEL BRETT YOUNG
Chief Executive Officer



Law Council
OF AUSTRALIA

Legal Practice Section

Australian Consumer Law Review

Submission of the Law Council of
Australia Legal Practice Section

Consumer Affairs Australia and New Zealand Treasury

30 June 2016

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Executive Summary

1. The Legal Practice Section (**LPS**) welcomes the opportunity to comment on the Issues Paper released for the Australian Consumer Law Review. The Section is one of five in the Law Council of Australia – the peak national representative body of the Australian legal profession. **Attachment A** provides a profile of the Law Council.
2. The following comments have been prepared by the Australian Consumer Law Committee and the Not-for-profit and Charities Committee. Other Law Council sections or committees may also provide comments.
3. This submission responds to selected questions in the Issues Paper released for the Australian Consumer Law Review. It addresses two key issues related to Australia's consumer law system, namely: access to justice under the *Australian Consumer Law 2011 (Cth)* (**ACL**); and the regulation of not-for-profit organisations (**NFPs**) under the ACL.

Access to Justice

4. This submission is concerned primarily with access to justice issues including access to remedies and the role of private legal action in enforcing the ACL. Some practical measures for increasing access to the legal system are proposed, such as:
 - the implementation of a mechanism to allow courts to cap adverse costs in specified circumstances;
 - the availability of legal representation in jurisdictions that otherwise restrict or prohibit legal representation;
 - the availability of an asymmetrical costs order regime in jurisdictions that are otherwise 'no costs' jurisdictions in circumstances where a consumer has sought to advance the broader interests of consumers; and
 - the establishment of a civil justice fund.
5. These measures would provide a more 'level playing field' to litigants with consumer law claims, increasing access to justice and delivering greater social and economic benefits.
6. The submission responds to selected questions in the Issues Paper, in summary as follows:

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?

7. Many consumers and businesses are deterred from taking private action by the delays and expense of the justice system, and its relatively high level of risk. These deterrents are particularly acute where matters are complex and require substantial legal and other expert resources to pursue claims against a better resourced corporation. Claims brought under the ACL by consumers are typically small value claims and where those claims are strongly arguable, can become uneconomic for

consumers to pursue due to costs, uncertainties and delays. LPS Members' experience of this perception has been confirmed by independent empirical studies.

8. Many clients considering a court action are dissuaded from litigating for fear of having an adverse costs order made against them. This is a critical risk factor. Respondents can often afford to escalate, or threaten to escalate, the costs in a dispute to the point where it is uneconomical for individual clients to pursue a claim. If the costs to the individual claimant, including the risk of adverse costs, increase to such an extent that, considering the disparity between the loss suffered and those costs, the case becomes unviable, individual consumers and small businesses will withdraw a complaint. Worse still, the risk of incurring such costs often prevents meritorious complaints being made.
9. The failure of a proper weighting of costs risk in ACL claims currently hinders the efficacy of private litigation as a regulatory tool. The imbalance also directly affects claimants of limited means, who, only by way of the operation of circumstance, find themselves with claims against 'deep-pocket' defendants.
10. The imbalance may, in the first instance, appear at odds with the generally accepted proposition that legal costs ought to follow the event. There are sound and obvious reasons as to why the payment of a proportion of legal costs ought to flow from the unsuccessful party in litigation to the successful party. The current costs regime applied in Australian courts favours those parties that comply with the law (including court procedures) and it discourages the pursuit of unmeritorious claims and applications. Those objectives and procedures ought to be maintained and protected. However, formal equality between parties on the question of legal costs does often mask a substantive imbalance between the real resources that litigants have at their disposal to pursue or defend legal action. This imbalance, to the extent that it discourages private litigants with limited resources, also affects the public's perception of whether there is, in a real sense, equality before the law. Good claims are sometimes not pursued, due to structural imbalances in the legal system, which have little or no correlation to the merits of the legal questions in issue in a particular case.

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

11. Where consumers or small businesses are seeking to privately enforce their rights under the ACL, greater access to justice could be achieved if the ACL regulators provide support to and co-operate with those claimants to the greatest extent possible. In addition, consumers and small businesses with significant claims should be able to access legal assistance, whether that is privately or publicly funded.

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

12. Some commentators have proposed that under-resourced litigants be allowed to pursue their claims with the assistance of a publically managed trust fund. The Victorian Law Reform Commission, for example, has recommended the establishment of a publically funded 'Justice Fund' to assist civil actions. Similar funds, although on a limited basis, currently exist in Hong Kong, South Australia and Victoria.
13. In Hong Kong, the 'Consumer Legal Action Fund' provides consumers access to legal remedies in the form of financial support and legal assistance. Legal assistance may

include advice, assistance and representation by a solicitor or counsel. The fund is limited to claims that have exhausted all other means of dispute resolution. If an action is unsuccessful, no payment, other than the registration fee, is necessary. If an action is successful the claimant is required to reimburse the fund for all amounts paid out of the fund. Further, successful claimants are required to pay a contribution, of the damages they are awarded, to the fund. Where damages in a claim are non-monetary, for example where an award is for the transfer of a title on property interest or for rectification damages, a successful claimant is required to pay a monetary contribution to the trust.

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

14. The extension of the follow-on provisions to admissions of fact made by persons against whom proceedings have been brought (in addition to the existing follow-on provisions regarding findings of fact in the *Competition and Consumer Act 2010* (Cth)), could be an effective way for regulators to help consumers enforce their rights under the ACL.

Regulation of not-for-profits

15. The review of the ACL is an ideal opportunity to significantly improve regulation of not-for-profit organisations (**NFPs**) and to address and regulate fundraising by NFPs so as to simplify this essential activity and remove the difficulties of dealing with differing state based regulations.

Access to Justice

Introduction

16. The Issues Paper requests that stakeholders provide feedback on specific questions and/or broader issues relating to the Australian Consumer Law (**ACL**), being Schedule 2 to the *Competition and Consumer Act 2010* (Cth). The Section notes the matters raised by the Consumer Action Law Centre (**Consumer Action**) in its response to the Issues Paper (dated 30 May 2016), including those regarding the current operation of the consumer guarantee provisions. In particular, it supports the conclusions of Consumer Action that:

- the distinction between ‘minor’ and major failures concerning goods defects creates confusion and delays for consumers and that the consumer guarantee provisions require amendment (in the manner set out on pp 3 and 26);
- there exists a need for a specialist forum to deal with motor vehicle disputes, along the lines of an ombudsman or the New Zealand tribunal approach (as described on pp 3, 27-28); and
- the establishment of a Retail Ombudsman would provide effective access to justice for consumers (pp 6, 51-55).

17. This submission specifically provides feedback on the role of private legal action in enforcing the ACL, and whether the scope for private action could be improved. In particular the submission responds to the questions raised in paragraph 3.3 of the Issues Paper, numbered 25–28:

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?

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

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

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

The role of private actions

18. The Australian Consumer Law is based on a multi-regulatory model that primarily relies on enforcement activities by federal and state based regulators. Private litigation is a tool that can complement these activities as regulatory bodies do not and cannot be expected to cover the field of enforcing consumer rights. Harm caused to an individual consumer or small business, while important to that individual consumer or small business, may not be of sufficient public interest to warrant the use of public resources to investigate, or may not coincide with the regulator’s current policy and enforcement objectives.

19. The regulators of consumer complaints (including the Australian Competition and Consumer Commission (**ACCC**), the Australian Securities Investments Commission (**ASIC**), the offices of Ombudsmen, and state-based regulators) play a critical role in the enforcement of the consumer law. Other relevant regulators include the Australian Prudential Regulatory Authority (**APRA**), state-based building industry regulators, the Australian Small Business and Family Enterprise Ombudsman (**ASBFEO**), the Financial Ombudsman Service (**FOS**) and the National Heavy Vehicle Regulator (**NHVR**).

20. At the federal level, the ACL is administered by the ACCC. The ACL confers on the ACCC some particular legal rights and methods of enforcement. By way of example, the regulator can take action on behalf of consumers against manufacturers and suppliers in respect of failures to comply with consumer guarantees in prescribed circumstances.¹

21. However, the ACCC and the other regulators rely on limited public resources, and are not in a position to investigate, fund or pursue all potential breaches of the consumer law, whether on their own motion or through a representative action.

22. While the ACL is a far reaching legislative instrument, it does not extend into all areas of consumer’s concerns. The ACL provides for a series of general protections that

¹ *Competition and Consumer Act 2010* (Cth), Sch 2 s 277. These actions were not possible under the original Trade Practices Act regime. See: J Malbon and L Nottage (eds), *Consumer Law and Policy in Australia and New Zealand* (Federation press, 2013).

broadly apply to the market, aimed at enforcing commercial norms. Examples include the general ban on corporations engaging in misleading and deceptive conduct in trade or commerce, the general ban on unconscionable conduct and the provisions that void certain unfair contract terms. The ACL also provides specific protections for consumer transactions for goods² and services entered into after 1 January 2011 where the amount paid is less than \$40,000.³ Specific prohibitions on unsolicited sales and product safety are also covered by the ACL, amongst other examples.

23. The ACL does not cover transactions that occurred prior to 31 December 2010. Earlier national, state and territory consumer laws continue to apply. State based legislation also continues to govern transactions over \$40,000 that are excluded by the ACL. The ACL also does not apply to financial services or claims relating to financial products as such protections are provided in the *Australian Securities and Investment Commission Act 2001*(Cth).⁴ Nor does it apply to insurance contracts⁵ electricity or gas supply, or many domestic building and construction claims.
24. As such, a gap occurs where public policy is also interested in broader benefits that may not always be equivalent to the private financial returns of pursuing a claim, or indeed, the capacity of the regulator to pursue potential claims.⁶ The system as it stands results in breaches being un-actionable, which undermines Australia's consumer protection and regulatory regimes, which rely on both public and private enforcement of the law.
25. The view of the LPS is that there needs to be a broader recognition of the role that private actions can play in promoting the rights of consumers and small businesses; particularly where regulatory bodies cannot assist due to statutory or resourcing constraints.
26. Private litigation, whether conducted as a group through a representative proceeding (or class action) or by way of individual action, can deter undesirable commercial conduct⁷ and provides a direct mode of restitution from the wrongdoers to the victims of this conduct.
27. In 2014, ASIC Chair, Greg Medcraft, endorsed the role of class actions in private litigation, commenting:

In terms of our own resources, personally being a free enterprise person, I'd rather people deal with the issues between themselves than actually involve ASIC...That's where I see class actions as a good development, because if the market decides there's something they want to take on rather than coming back to the public purse, to me it's part of market efficiency....The strategy is that if the private sector is willing to take on, for example a compensatory action, then our job is to try and use the resources we have the most effectively we can....If in fact private litigation can achieve an outcome that we

² E.g. in Victoria, s 8 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic) applies the Australian Consumer Law as the law of the state of Victoria.

³ *Competition and Consumer Act 2010* (Cth), Sch 2 s 3(a). Some goods and services costing more than \$40,000 are also covered, where a person who purchases goods or services which are of a kind ordinarily acquired for personal, domestic, or household use or consumption.

⁴ See for example: *Australian Securities and Investment Commission Act 2001* (Cth) s 12DA.

⁵ *Insurance Contracts Act 1984* (Cth) s 15. See in addition, part 3 of the ACL.

⁶ Productivity Commission, *Review of Australia's Consumer Policy Framework*, Inquiry Report No 45 (2008), 215.

⁷ Productivity Commission, above n 6, 193.

*might have done previously then we should let the private litigation pursue that outcome, because we can use those resources to devote to another area.*⁸

28. The ACCC has also recommended that consumers consider seeking private legal advice in addition to contacting the relevant regulators if they have a complaint.⁹
29. The availability of an effective private enforcement mechanism is essential to achieve broader social and public objectives, to provide confidence in the efficient operation of markets and to enhance confidence in the justice system.
30. Where consumers or small businesses are seeking to privately enforce their rights under the ACL, greater access to justice could be achieved if the ACL regulators provided support to and co-operated with those claimants to the greatest extent possible. In addition, consumers and small businesses with significant claims should be able to access legal assistance, whether that is privately or publicly funded, as noted below.
31. A reduction in the cost barriers that weigh against the use of private lawyers would also be a beneficial reform, as noted below.

Legal representation and inequality of arms

32. Consumers and small businesses are particularly at risk of being unaware of their rights in relation to complex products such as insurance contracts, building and renovation contracts, superannuation, and banking and financial investment products, mainly due to an imbalance of information and a lack of understanding of complex legal information. In addition, some consumers have a limited understanding of their consumer guarantee rights, including corporations' obligations not to engage in misleading or deceptive conduct or engage in restrictive practices when dealing with competitors or suppliers. The experience of private practitioners who are members of the LPS correlates with academic analyses of these barriers.¹⁰
33. Consumers' primary avenue for enforcing their ACL rights is to request the relevant regulator to commence action on their behalf, or by complaining to an Ombudsman if their dispute falls within the applicable terms of reference. Alternatively, consumers can take steps by themselves to enforce their rights. They may find effective relief for small claims by bringing the case to a merits-review tribunal.¹¹
34. A Tribunal can be a less formal and costly venue than a court and restrictions can apply to keep legal costs down, particularly in relation to disputes relating to relatively small amounts (such as under \$10,000 in some jurisdictions). In practice, however, often complainants may face a well-resourced and more sophisticated respondent, and tribunals that do not permit legal representation as of right tend to benefit the more powerful party. Some tribunals can grant leave for parties to be represented, but even then the operation of that power can work against consumers. For example, LPS members have had the experience of a consumer bringing a claim against a car hire

⁸ Money Management, 'ASIC backs private litigation', reporting comments made at the Australian Institute of Company Directors lunch in Sydney on 25 June 2014
<<http://www.moneymanagement.com.au/news/financial-planning/asic-backs-private-litigation>>.

⁹ See for example: ACCC, 'Where to go for consumer help', <<https://www.accc.gov.au/consumers/consumer-protection/where-to-go-for-consumer-help>>.

¹⁰ See for example: Malbon and Nottage (eds), above n 1, 351.

¹¹ Section 224 of the ACL and *Fair Trading Act 2012* give VCAT the jurisdiction to hear and determine a cause of action arising under any provision of the ACL but exceptions apply in relation to certain orders that VCAT may not make.

company in a state tribunal under s 18 of the ACL, where the tribunal gave the car hire company leave to be legally represented and the consumer had no option but to subsequently obtain their own legal representation.

35. The Law Council's Rule of Law Policy Principles (2011) provide

4. Everyone should have access to competent and independent legal advice

In particular, everyone should have access to a competent and independent lawyer of their choice in order to establish and defend their rights.

Furthermore:

a. The state should provide adequate resources to guarantee access to a competent and independent lawyer in circumstances where individuals do not have the independent means to retain a lawyer.¹²

36. Law Council submits that it is inappropriate and undesirable to restrict areas in which qualified legal practitioners may represent a client. The benefits of legal representation include:

- assisting parties, particularly those who are disadvantaged, to put relevant information and arguments before the tribunal;
- assisting the tribunal and saving time by succinctly presenting complex and technical material; and
- reducing parties' costs on appeal by increasing the likelihood that the tribunal makes the right decision having considered informed arguments.

37. The far less compelling arguments against permitting legal representation include:

- increasing technicality and adversarial techniques;
- increasing costs for the represented party;
- possibly longer hearings; and
- increasing the disadvantage for unrepresented parties.

Costs orders

38. Where legal representation is permitted in tribunals, unlike courts, costs orders do not follow the event, making it less likely that lawyers will agree to act on a conditional fee basis. As modern commerce becomes increasingly sophisticated, consumers can often benefit from having legal representation to advocate their claims and consumers taking action in these tribunals may be worse off without representation. Further, it may be the case, that the complexity of the matters in dispute is substantial and therefore that the matters may be more appropriate for judicial determination.

39. Where claimants are permitted to be legally represented in an ACL matter, the claimant is successful in that dispute and their action is likely to have some broader application to other consumers and small businesses in similar situations, then, they

¹² Law Council of Australia, *Rule of Law Policy Principles* (2011), Principle 4, 3
<<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/PolicyStatementRuleofLaw.pdf>>.

should be entitled to a costs order. This costs regime should be asymmetrical in that it should be available to benefit consumers and small businesses but not well-resourced businesses who would not be entitled to a costs order even if successful in defending the matter. This is because well-resourced respondents are generally better able to respond to claims than a consumer or small business and there are already sufficient existing disincentives to claimants bringing unmeritorious claims.

40. Consumers may be able to engage lawyers from the private sector, legal aid commissions (if aid is available) or the community legal sector. The latter two have limited resources and can really only meet a small portion of the demand for their services.
41. However, even with the aid of legal representation, many consumers and businesses are subsequently deterred from taking action by the considerable number of hurdles faced by private litigants. These include the delays and expense of the justice system, and its relatively high level of risk. These deterrents are particularly acute where matters are complex and require substantial legal and other expert resources to pursue claims against a better resourced corporation.
42. Small value claims, even where those claims are strongly arguable, can become uneconomic for consumers to pursue due to costs, uncertainties and delays. LPS members' experience of this perception has been confirmed by independent empirical studies.¹³
43. By way of example, members have fielded enquiries from small businesses with concerns regarding a supplier's restrictive trade practices. The business owners did not want to proceed with private action due to the perceived cost and uncertainties in the legal system, although the actions of the supplier were significantly damaging to their business.
44. In another example, a supplier of plumbing services attended the premises of a couple aged in their 80s whose gas supply had been severed. The supplier provided them with a quote specifying that it would be necessary to replace the whole of the gas infrastructure to the property at a cost of \$4,950. Concerned at the urgent need to re-connect their gas supply, the elderly couple accepted the quote without obtaining a second quote. They were subsequently informed by two licenced plumbers that the value of the materials and labour supplied should not have exceeded \$2,000. Unfortunately, it was not possible to locate a plumber prepared to prepare a reasonably priced written report and to give evidence in any hearing of the dispute. As a consequence, private action did not follow, despite the claim having good prospects of success under the unconscionability provisions of the ACL.

Adverse costs

45. Many clients considering a court action are dissuaded from litigating for fear of having an adverse costs order made against them. Respondents can often afford to escalate, or threaten to escalate, the costs in a dispute to the point where it is uneconomical for individual clients to pursue a claim. If the costs to the individual claimant, including the risk of adverse costs, increase to such an extent that, considering the disparity between the loss suffered and those costs, the case becomes unviable, individual consumers and small businesses will withdraw a complaint. Worse still, the risk of incurring such costs often prevents meritorious complaints being made.

¹³ G Howells, I Ramsay, T Wilhelmsson and D Kraft (eds), *Handbook of research on International Consumer Law* (Edward Elgar, 2010) 499–500.

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46. The failure of a proper weighting of costs risk in ACL claims currently hinders the efficacy of private litigation as a regulatory tool. The imbalance also directly affects claimants of limited means, who, only by way of the operation of circumstance, find themselves with claims against 'deep-pocket' defendants.
47. The imbalance may, in the first instance, appear at odds with the generally accepted proposition that legal costs ought to *follow the event*. There are sound and obvious reasons as to why the payment of a proportion of legal costs ought to flow from the unsuccessful party in litigation to the successful party. The current costs regime applied in Australian courts favours those parties that comply with the law (including court procedures) and it discourages the pursuit of unmeritorious claims and applications. Those objectives and procedures ought to be maintained and protected. However, formal equality between parties on the question of legal costs does often mask a substantive imbalance between the real resources that litigants have at their disposal to pursue or defend legal action. This imbalance, to the extent that it discourages private litigants with limited resources, also affects the public's perception of whether there is, in a real sense, equality before the law. Good claims are sometimes not pursued, due to structural imbalances in the legal system, which have little or no correlation to the merits of the legal questions in issue in a particular case.

Current financial assistance programs

48. Although Australian law generally recognises a right to representation, there is currently no 'right' to be provided with legal representation at public expense.¹⁴ Legal aid is generally not available to claimants with claims under the ACL.
49. Some commentators have proposed that under-resourced litigants be allowed to pursue their claims with the assistance of a publically managed trust fund. The Victorian Law Reform Commission, for example, has recommended the establishment of a publically funded 'Justice Fund' to assist civil actions.¹⁵ Similar funds, although on a limited basis, currently exist in Hong Kong, South Australia and Victoria.
50. In Hong Kong, the 'Consumer Legal Action Fund' provides consumers access to legal remedies in the form of financial support and legal assistance. Legal assistance may include advice, assistance and representation by a solicitor or counsel. The fund is limited to claims that have exhausted all other means of dispute resolution. If an action is unsuccessful, no payment, other than the registration fee, is necessary. If an action is successful the claimant is required to reimburse the fund for all amounts paid out of the fund. Further, successful claimants are required to pay a contribution, of the damages they are awarded, to the fund. Where damages in a claim are non-monetary, for example where an award is for the transfer of a title on property interest or for rectification damages, a successful claimant is required to pay a monetary contribution to the trust.¹⁶
51. The Victorian scheme, 'Law Aid' was introduced in 1996 as a joint initiative of the Law Institute of Victoria, the Victorian Bar, and the Victorian Department of Justice. The scheme is a non-profit trust, provided by the Victorian Government. It assists in civil litigation matters, which are assessed as having merit and where solicitors and barristers are prepared to work on a 'no-win no-fee' basis, where the client cannot afford to pursue a claim due to the cost of the disbursements. Disbursements can

¹⁴ Victorian Law Reform Commission (VLRC), *Civil Justice Review*, Report No 14 (2008), 607.

¹⁵ VLRC, above n 14, 615.

¹⁶ Consumer Council, *Consumer Legal Action Fund* (2015) <https://www.consumer.org.hk/ws_en/legal_protection/consumer_legal_actions_fund/clafinfo.html>.

include expert's fees, travelling and accommodation expenses, court filing fees, jury fees, and witness expenses, but not barrister's fees. The applicant is required to repay all monies spent on disbursements and in addition, if the case is successful, pay a fee being a percentage of the verdict or settlement of 5.5%. A solicitor is required to waive all professional costs incurred when the client is unsuccessful in legal proceedings and must not seek payment for professional fees until the successful completion of proceedings.¹⁷

52. This fund aims to improve access to justice.¹⁸ In practice, however, the scheme has limits in its application to consumers. There are a number of reasons for this. For example, in commercial matters where there is a prospect of the relief being non-monetary, for example, in building litigation, the relief may be confined to an order for rectification works, or in a consumer case such as defending a lender's attempt to enforce a guarantee claim, a successful outcome may not result in a monetary award. In these instances the fund is unable to recoup its investment and therefore will not invest in the case at the outset. This means that in the commercial and consumer law context, the ability of the fund to assist in access to justice has limits. Further, claimants may be reluctant to agree to give away 5% of a successful judgment in exchange for an agreement that only results in the provision of funding for certain disbursements (i.e. excluding counsel's fees). At that level of commission, consumers may be inclined to use a private litigation funder who charges a higher commission rate but agrees to meet all, or most, of the anticipated costs.

Proposal: Justice Fund at a national level

53. In 2008, the Victorian Law Reform Commission (VLRC) in its Civil Justice Review recommended the establishment of a civil justice fund. The VLRC outlined the inadequacy in legal aid funding for civil law matters¹⁹ and strongly supported calls for greater funding for legal aid in civil matters.²⁰ It recommended that the fund should be set up, for administrative convenience, as an adjunct to an existing entity such as Victoria Legal Aid, or the existing Law Aid fund could be modified to incorporate the proposed features of the recommended Justice Fund.²¹ Further, it was recommended that the fund be able to enter into joint venture agreements with commercial litigation funders. However, unlike litigation funders that distribute profits to shareholders, profits received by the fund would be used to provide additional funding for commercially viable meritorious litigation, funding important test cases, financing research on civil justice issues, and funding initiatives of the Civil Justice Council. Finally, it was recommended that the fund have considerable commercial flexibility to determine the nature and extent of the financial assistance it provides, in meritorious cases on a needs basis.²² For instance the fund may provide a comprehensive funding package for the litigation as a whole in one case, but provide assistance only up to a certain point in the litigation in another case.

54. An effective national justice fund could draw on the model provided by the VLRC. In our view the proposed fund should possess the following additional features:

¹⁷ Law Aid, *Law Aid, all you need to know*, (2014) <<http://lawaid.com.au/law-aid-all-you-need-to-know/>>.

¹⁸ Law Institute of Victoria, *Law Aid* <<http://www.liv.asn.au/For-the-Community/Legal-Resources-Organisations/Legal-Information/Law-Aid>>.

¹⁹ VLRC, above n 14, 612.

²⁰ VLRC, above n 14, 613.

²¹ VLRC, above n 14, 616.

²² VLRC, above n 14, 616–17.

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- where damages are, or are likely to be, assessed as non-monetary and an action is successful, the claimant ought to be required to reimburse the proposed fund for all amounts paid out of the fund; and
 - in order to maintain the fund's commercial viability, the proportion of any settlement that may be recouped would not be capped in an inflexible way (as is the current requirement under the Law Aid Scheme). This will encourage the proposed fund to be more responsive to the market, potentially take on more claims and spread the funds to a wider pool of potential claimants.

55. In our view, stabilising a workable fund that is both commercially aware and flexible will serve to improve access to justice for a broader range of people.

56. The claimant is, however, still exposed to a potential adverse costs order, even in the event that it has an arguable or reasonable claim. We consider that this exposure is a critical risk factor that the proposed fund may need to accommodate.

Proposal: capped adverse costs orders

57. In our view, in order for an under-resourced claimant to have a real ability to pursue a meritorious claim against a well-resourced defendant, the court must be put in a position where it can consider the effect that adverse costs orders in the proceeding may have on limiting the parties from having equal access to justice *in substance*. As part of the interlocutory process in claims under the ACL, a claimant ought to be given an opportunity to be heard as to whether costs orders should be capped (i.e. a protective costs order issued) to prevent that defendant from attaining an unfair advantage; in circumstances where that advantage could potentially have the effect of discouraging claimants from pursuing an otherwise meritorious claim. Providing the court with this ability would enable it to limit the exposure of parties engaged in litigation that involves less complex issues or are concerned with the recovery of moderate amounts of money, in circumstances where the facts of the case warranted that such an order be made.²³

58. As the law currently stands, protective costs orders are granted only in exceptional cases, generally where there is a pressing question of public interest to be determined and where it is considered that there is a real risk that an applicant would abandon the proceedings otherwise. The High Court outlined relevant principles in *Oshlack v Richmond River Council*.²⁴ In *Bare v Small & Others* [2013] VSCA 204, a claimant subjected to racial abuse by Victoria Police, applied for a protective costs order pursuant to section 65C of the *Civil Procedure Act 2010* (Vic). The judge considered the unemployed man's financial position, that he would likely become bankrupt if forced to pay an adverse costs order, and that the man would likely discontinue his appeal if he could not obtain protection in advance from an adverse costs order. The Court in that case granted a protective costs order, limiting the maximum costs that could be awarded against any party to the amount of \$5,000.

59. In 2014 the Productivity Commission recommended in its *Access to Justice Arrangements* inquiry report that courts should outline the criteria or factors applied when assessing whether to issue a PCO.²⁵ It recommended:

²³ *Hanish v Strive Pty Ltd* (1997) 74 FCR 384.

²⁴ (1998) 193 CLR 72.

²⁵ Australian Government, Productivity Commission, *Access to Justice Arrangements*, Productivity Commission Inquiry [Report No 72](#), Vol 1 (2014) 483, rec 13.6.

Courts should grant protective costs orders (PCOs) to parties involved in matters deemed to be of public interest that, absent in the absence of such an order, would not proceed to trial. To ensure that PCOs are applied in a consistent and fair manner, courts should formally recognise and outline the criteria or factors used to assess whether a PCO is applicable.

60. The Australian Government's response did not address this recommendation,²⁶ when it might have recommended that the Council of Australasian Tribunals or the Council of Chief Justices develop harmonised criteria for courts and tribunals to apply in public interest cases and in consumer claims where the power differential between the complainant and the respondent and all the circumstances suggests that such an order would be in the interests of justice. The separation of powers may have made such a recommendation inappropriate however.

61. In 1995 the Australian Law Reform Commission recommended that the grounds for making a PCO be codified, but this has not yet been implemented. It said:

Recommendation 45 – public interest costs orders

A court or tribunal may, upon the application of a party, make a public interest costs order if the court or tribunal is satisfied that

- *the proceedings will determine, enforce or clarify an important right or obligation affecting the community or a significant sector of the community*
- *the proceedings will affect the development of the law generally and may reduce the need for further litigation*
- *the proceedings otherwise have the character of public interest or test case proceedings.*

*A court or tribunal may make a public interest costs order notwithstanding that one or more of the parties to the proceedings has a personal interest in the matter.*²⁷

62. Where appropriate, a cap on an adverse costs order in the context of consumer law would perform two important functions, both of which are in the public interest:

- first, it would perform a regulatory function and assist with meritorious claims against well-resourced defendants where claimants otherwise would not litigate for fear of excessive adverse costs being ordered against them; and
- second, it could contribute to a more efficient use of the court system by discouraging expenditure disproportionate to the claim, by preventing defendants from using court processes and procedures to run up legal costs.

63. In our view, protective costs orders should not only apply to cases where there is an important question to address at law, but could extend to situations where litigants are deterred from access to the courts due to the imbalance between the financial position of the parties.

²⁶ Attorney-General's Department (statement by the Attorney-General, Senator the Hon George Brandis QC), *Response to the Productivity Commission's report into access to justice arrangements* (29 April 2016), <<https://www.ag.gov.au/LegalSystem/Pages/response-to-report-into-access-to-justice-arrangements.aspx>>.

²⁷ ALRC, *Costs Shifting – Who Pays for Litigation in Australia, Report 75* (1995), [3.19] recommendation 45 <<http://www.austlii.edu.au/au/other/lawreform/ALRC/1995/75.html#13Heading142>>.

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64. A protective costs order, which caps adverse costs, should extend to consumers who are in a disadvantaged position when opposed to the well-resourced defendant resisting their claim. As such a claim would be in the public interest as it would have the practical effect of increasing access to justice.
65. Further, ensuring costs in a proceeding are proportionate is consistent with legislative intent. In Victoria, the *Civil Procedure Act 2010* (Vic) requires the efficient, timely and cost effective resolution of issues as an overarching purpose of the Act.²⁸ Similarly, regulations governing the conduct of legal professionals under the uniform law require that costs be fair and reasonable, that is, they must be proportionate and reasonable in amount relative to the issues in dispute.²⁹ Where the court finds that costs are disproportionate, it may make an order to amend a costs award as it sees fit.³⁰ Providing the court with an ability to cap an adverse costs order would build on these established principles, while giving a claimant greater certainty at the beginning of proceedings, to make an informed decision as to his or her exposure to risk. The cap would be based on current issues in dispute and may be amended where it is reasonable, for instance an issue of importance affects the conduct of the proceedings that was not originally anticipated in the pleadings originally filed.
66. We recommend that the power to order a protective costs order should be express and apply on a national scale in relation to consumers. Thus providing certainty to claimants, courts and tribunals in the commercial litigation context, at the outset of a proceeding. Further, legislative provisions in the ACL could set out guiding principles as to when such an order is appropriate in the consumer context. This would ensure transparency in application, provide guidance to the courts, and increase the utility of the 'certainty factor' an adverse costs order would provide to the litigant.

Extension of follow-on provisions

67. In 2015 the Harper *Competition Policy Review* recommended extending an equivalent 'follow-on' provision in s 83 of the *Competition and Consumer Act 2010* (Cth) to admissions of fact made by the person against whom proceedings are brought, in addition to findings of fact made by the court. The Review noted that s 83 is intended 'to facilitate private actions by enabling findings of fact made against a corporation in one proceeding (typically a proceeding brought by the ACCC) to be used as *prima facie* evidence against the corporation in another proceeding (typically a proceeding brought by a private litigant)'. The Review noted that it was currently unclear whether s 83 applies to admissions of fact.³¹
68. The existing provision is beneficial to consumers as findings of fact can be used as *prima facie* evidence of that fact in a 'follow-on' proceeding. This assists affected parties seeking compensation. The proposal to extend the 'follow-on' provisions 'to admissions of facts' is in the interests of consumers contemplating private action and warrants support.

²⁸ *Civil Procedure Act 2010* (Vic), s 7(2).

²⁹ *Legal Professional Uniform Law Application Act 2014* (Vic), s 172.

³⁰ *Civil Procedure Act 2010* (Vic), s 38; *Supreme Court (General Civil Procedure) Rules 2015* (Vic), s 62C(2)(d).

³¹ Professor Ian Harper, Peter Anderson, Sue McCluskey and Michael O'Bryan QC, *Competition Policy Review: Final Report* (2015), 72, 407–08.

Conclusions

69. Absent effective enforcement mechanisms, the substantive provisions of the consumer law are less effective at safeguarding consumer rights than they should be. Access to justice must mean that participation in the justice system is not effectively limited to those who have the most resources. The courts and tribunals should serve consumers, suppliers, business and large corporations equally.
70. This submission addresses issues that are, as a matter of experience, in need of resolution. While private litigation remains an important enforcement mechanism, in practice, private litigation in the consumer law context remains a challenge. Regulators play an important role, but they cannot be reasonably expected to investigate and prosecute all breaches of the law. The consumer law system in Australia relies on both private actions (through individual claims and class actions) along with claims brought by the regulator to enforce the law and maintain social and economic norms.
71. While the Victorian 'Law Aid' and Hong Kong models go some of the way to address these issues, both have drawbacks. Funding solutions that provide assistance with the payment of professional costs and disbursements may increase access to justice in some cases, but at its core access to justice in the consumer law space for claimants is determined by costs, including the potential for adverse costs exposure. It is the fear of excessive costs, an imbalance of resources between litigants and the real fear of adverse costs orders that is turning consumers and small businesses with otherwise meritorious claims away from the court door.
72. In our view, access to justice can be enhanced through the implementation of a mechanism to allow tribunals to give complainants leave to be represented if the circumstances suggest that it would be just to do so, for their costs to be paid if they win and, if in the interests of justice, the tribunal or Court should be able to cap adverse costs in some circumstances. This will ensure that Australians in need of legal assistance are treated fairly. A justice system which is fair, efficient, accessible and affordable, is something from which the entire community benefits; caps on adverse costs orders will serve as a complement to those goals.

Not-for-profit Organisations

Opportunity for clarification

73. The review of the ACL is an ideal opportunity to significantly improve regulation of not-for-profit organisations (**NFPs**). A key area of concern for the NFP sector is the lack of clarity on the application of the ACL including whether recipients of goods and services are 'consumers' and what activities come within 'trade or commerce'.
74. It is essential to take this opportunity to have these areas of uncertainty clarified so that the ACL clearly applies to NFPs. Further consultation is suggested to assist with the extent and circumstances where the ACL should apply to NFPs.

Fundraising regulation

75. The review of the ACL represents an opportunity to also address and regulate fundraising by NFPs, so as to simplify this essential activity and removing the difficulties of dealing with differing state based regulations. The Law Council considers the ACL to be an appropriate mechanism to regulate the consumer interactions of fundraising in Australia and encourages further consultation with State governments on this issue and the sector as to how this can be achieved for the benefit of the NFP sector and for donors.

Availability for consultation and development

76. The Law Council supports the explanations in support of the above two issues as set out in the following submissions:
- Justice Connect;
 - Australian Institute of Company Directors (**AICD**); and
 - ProLegis Lawyers.
77. The Law Council and the Not-for-profit and Charities Committee are available for any consultation and development of clarification regarding the applicability of the ACL to NFPs, and the development of reforms to regulate fundraising specifically.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2016 Executive as at 1 January 2016 are:

- Mr S. Stuart Clark AM, President
- Ms Fiona McLeod SC, President-Elect
- Mr Morry Bailes, Treasurer
- Mr Arthur Moses SC, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Michael Fitzgerald, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.