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SOCIAL EQUITY  
INSTITUTE

## Submission to the Australian Consumer Law Review

May 2016

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The **Melbourne Social Equity Institute** welcomes the opportunity to make this submission to the Australian Consumer Law Review.

The Melbourne Social Equity Institute at the University of Melbourne supports interdisciplinary research on social equity issues across the full spectrum of social life including health, law, education, housing, work and transport. The Institute brings together researchers from across the University of Melbourne to identify unjust or unfair practices that lead to social inequity and work towards finding ways to ameliorate disadvantage. It facilitates researchers working with government and community organisations and helps with the dissemination and translation of research for public benefit.

### INTRODUCTION

#### Consumers with mental and intellectual impairments

This submission responds to the issues raised in the Australian Consumer Law Review issues paper in relation to consumers with mental and intellectual impairments. For the purposes of this submission the term 'consumers with mental and intellectual impairments' aims to capture a broad range of neurodevelopmental conditions (e.g. intellectual disability, autism, down syndrome) and neurocognitive conditions (e.g. dementia, Alzheimer's disease), as well as mental illness and Acquired Brain Injury. These terms echo the terms used in Article 1 of the Convention on the Rights of Persons with Disabilities.

Consumer transactions are an essential part of daily living, yet for individuals with mental and intellectual impairments they present inequitable risks which are disproportionate to those faced by consumers without a disability. As consumers, people with mental and intellectual impairments are typically more vulnerable and less able to protect themselves in the marketplace compared to people without disabilities. Difficulties with memory, problem solving, and attention increase the likelihood of the individual exercising poor-judgement when

entering into a contract, in some cases leading them to sign contracts they do not understand or cannot fulfil. These consumers also exhibit a greater vulnerability to ‘pressure selling’ techniques and a lack of understanding and ability to enforce their consumer rights. Therefore, they may not be able to engage in normal consumer services as easily as other persons.

In 2008 Australia ratified the United Nations Convention on the Rights of Persons with Disabilities. Article 12 (5) of the convention requires State Parties to “take measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property”. Despite this, in 2014 the Australian Law Reform Commission in its inquiry into *Equality, Capacity and Disability in Commonwealth laws*<sup>1</sup> identified consumer laws as an area that needed further consideration in relation to how best to ensure those with mental and intellectual impairments are not denied equal access to goods or services.

Due to the widespread financial stress experienced by many individuals with mental and intellectual impairments<sup>2</sup>, it is crucial that these individuals are provided with adequate and appropriate support when exercising their rights as consumers. Precisely what this support should look like has not yet been amply determined in Australia. The Australian Competition and Consumer Commission<sup>3</sup> posit that businesses need to *act responsibly* to ensure that no unfair advantage is taken of customers who may not have the capacity to make an informed decision. To improve protection for people with disabilities entering into contracts, the National Association of Community Legal Centres<sup>4</sup> recommend that companies should be required to ensure that consumers have the capacity to fulfil the terms of contracts. And although there has been some improvement regarding the *simplification* of contracts, clearer regulations are needed to ensure that people with intellectual disabilities entering into contracts have the capacity to understand and fulfil them<sup>5</sup>.

### **Supported decision making**

It is well established that individuals with mental and intellectual impairments experience marginalisation and financial stress at a dramatically higher rate than other Australians<sup>6</sup>. Because of this widespread financial stress, it is crucial that these individuals are provided with support when entering into contracts.

New laws promoting personal autonomy of people with intellectual disabilities (in place of paternalistic, ‘substituted’ decision-making models) are being considered around the world. In Victoria, Powers of attorney changed on 1 September 2015, with the commencement of

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<sup>1</sup> Australian Law Reform Commission (2014). *Equality, capacity and disability in commonwealth laws*. Final report. ALRC report 124.

<sup>2</sup> Consumers Affairs Victoria (2004). What do we mean by ‘vulnerable’ and ‘disadvantaged’ consumers? CAV Discussion paper.

<sup>3</sup> Australian Competition and Consumer Commission (2011). Don’t take advantage of disadvantage: A compliance guide for businesses dealing with disadvantaged or vulnerable consumers.

<sup>4</sup> National Association of Community Legal Centres (2014). Submission to the Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws*. Submission 78.

<sup>5</sup> Atmore, C., Wilding, D., & Beal, E (2006). *Not So Special: Telecommunications Contracts, Disability and Unfair Practices*. Melbourne: Communications Law Centre.

<sup>6</sup> Price Waterhouse Coopers (2011). *Disability expectations: Investing in a better life, a stronger Australia*.

the Powers of Attorney Act 2014. The Bill allows for appointment of a ‘supportive attorney’ to support a person with impaired decision making ability. This is a legislative first in Australia, and recognises that some people with impaired decision making ability are able to make their own decisions with support, not with a guardian or administrator.

Internationally, the UK and Canada have developed human rights based legislation and practices regarding decision making for people with disabilities, namely ‘Supported Decision Making’ principles and models. Supported decision making is a strengths based human rights model, where individuals are assisted to make decisions with the support of others. In South Australia, such a model has been piloted by the Public Advocate<sup>7</sup>, demonstrating specific benefits in improving the decision making skills of individuals with intellectual disabilities.

In Victoria, research on supported decision and individuals within the mental health system is currently being conducted by researchers at Monash University and the University of Melbourne, as part of an Australian Research Council Linkage project<sup>8</sup>. There is also a project supported by the Melbourne Social Equity Institute trialling supports for accused persons who may be found unfit to plead.<sup>9</sup> However, a gap exists in knowledge regarding the role of supported decision making and *consumer transactions* in Australia

The exercise of consumer choice in a market model is central to the new National Disability Insurance Scheme (NDIS), which will shape disability and community health services in the coming years. The NDIS, currently being rolled out across Australia, represents a new national funding scheme which will provide individualised funding packages to people with disabilities. This makes it ever the more relevant that the consumer experience of persons with mental and intellectual impairments is examined in the Australian context through evidence-based, person-centred methods of inquiry.

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<sup>7</sup> Office of Public Advocate, South Australia (2012). Evaluation of the supported Decision-Making project.

<sup>8</sup> McSherry, B., Brophy, L., Hermann, H., & Kokanovic, R (2014-2016). Australian Research Council Linkage grant – Supported decision making for people with severe mental health problems.

<sup>9</sup> McSherry, B., Arstein-Kerslake, A., Gooding, P., Arabena, K., & Baldry, E. *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Impairments: Addressing the Legal Barriers and Creating Appropriate Alternative Supports in the Community* (Oct 2015 – Oct 2017). This project is jointly funded by Commonwealth, state and territory governments under the National Disability Special Account, administered by the Department of Social Services on behalf of the Commonwealth, state and territory Research and Data Working Group.

Whilst Australia has a comprehensive consumer protection regime, gaps still exist in making consumer law responsive to the needs of persons with disabilities. For example, the Australian Consumer Law (ACL) sets aside contracts obtained with 'impaired consent' resulting from misleading conduct or unconscionable conduct, rather than proceeding on an expectation of *support* being provided for informed decision-making. The standards used by courts in interpreting the ACL are also largely premised on the notion of a capable, rational consumer, which begs the question that if 'by focusing on the economically efficient knowledgeable consumer, have we ignored those persons for whom free choice is a difficult construct?'<sup>10</sup>.

This submissions draws attention to two particular areas of relevance regarding consumers with mental and intellectual impairment– Unconscionable conduct (section 2.2.2) and Access to remedies, namely effective dispute resolution (section 3.3.1).

### **Unconscionable conduct**

Individuals with mental and intellectual impairments are at an increased risk of entering into contracts which contain unfair terms or which were agreed to in the context of unfair practices. It is therefore important to consider the application of unconscionable conduct provisions to this specific consumer group.

Under the ACL, a person, in trade or commerce, is prohibited from engaging in unconscionable conduct. For example, a transaction may be regarded as unconscionable if the business took advantage of the vulnerable position of the consumer. For the sake of procedural fairness, this provision is believed to protect consumers, at least in theory.

In practice, the notion of 'unconscionable conduct' is strikingly unclear as is evidenced by its inconsistent application in case law. For example, it is unclear if the business needs knowledge of the circumstances that make the consumer vulnerable in order for its conduct to contravene the prohibition.<sup>11</sup> This has significant implications for consumers with mental and intellectual impairments. The risk is that a consumer who has been subject to predatory or exploitative conduct by an unscrupulous trader, or equally entered into a manifestly unsuitable transaction due to an element of sheer neglect on the part of a trader, may nonetheless fail to obtain redress on grounds of unconscionable conduct under the ACL.

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<sup>10</sup> Lynden Griggs. Competition & Consumer Law Journal/(2013) The consumer with an intellectual disability -- Do we respond, if so, how?(2013) 21 146

<sup>11</sup> Paterson, J.M. (2015). Unconscionable Bargains in Equity and Under Statute. *Journal of Equity*, 9, 188.

Outside of the legal realm, the term itself ('unconscionable') is generally non-existent in everyday language making it redundant to the layperson in Australia. The fact that the term is not clearly defined by the ACL further compounds the issue of clarity. Add in the difficulties associated with mental and intellectual impairment and the relevance, and appropriateness, of such a term to a vulnerable consumer audience is void. The protective rights granted to vulnerable consumers under the prohibition on unconscionable conduct in the ACL are only of assistance if they are able to understand and articulate the application of those rights to their own personal circumstances, which is highly unlikely when such extraneous legal terminology is utilised.

A prohibition focused on 'unfair' practices, modeled on the European Union's *Directive on Unfair Commercial Practices* (the Directive)<sup>12</sup>, as advocated by the Consumer Action Law Centre,<sup>13</sup> would address many of these concerns about providing genuinely effective protection against predatory and exploitative business practices.<sup>14</sup> This change in terminology and associated guidance on the intended scope of the prohibition would address the uncertain and restricted application of the prohibition on unconscionable conduct and also make it more accessible for the ordinary citizen, not to mention for vulnerable consumers who experience difficulties with language and literacy.

### **Access to Redress**

Access to justice in vindicating consumer claims may prove a hurdle for many consumers, but particularly vulnerable or disadvantaged consumers. There are many important protections in the ACL protecting consumers purchasing goods and services - but it is not clear how vulnerable consumers assert those rights. This group of consumers are unlikely to go to court over what are ultimately relatively small value claims, as compared to the cost of litigation.

Navigating even the relative informality of the tribunal system available to resolve consumer disputes requires quite considerable literacy, communication and organisational skills, which may present an almost impenetrable hurdle for many vulnerable consumers, and especially consumers with mental and intellectual impairments. Any conversation about access to justice must include consideration of the types of advocacy and support services that may better facilitate access to dispute resolution by consumers 'at the margin'. It is of vital importance to understand how consumers with mental and intellectual impairments currently interact with a process of mediation and hearings offered by consumer tribunals, and what types of process might be utilised to support this group of consumers in asserting their rights under the Australian Consumer Law.

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<sup>12</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149, p. 22 ('Unfair Commercial Practices Directive').

<sup>13</sup> <http://consumeraction.org.au/unfair-trading-discussion-paper/>.

<sup>14</sup> Paterson, J.M., & Brody, G. (2015). Safety Net Consumer Protection. *Journal of Consumer Policy*, 38, 331.

### **Establishing equitable support models for individuals with mental and intellectual impairments to engage in consumer transactions**

The translation of legislation from paper to practice, specifically the practical strategies to support consumers with mental and intellectual impairments in accordance with Australian Consumer Law, is being examined by the Melbourne Social Equity Institute, in collaboration with Mind Australia (mental health support service) and Scope Australia (Disability support service). The project '*Establishing equitable support models of individuals with mental and intellectual impairments to engage in consumer transactions*' is funded by the Melbourne Law School Major Collaborative Fund and supported by an expert Advisory Board, including representatives from the Australian Communications Consumer Action Network; Australian Federation of Disability Organisations; Carers Victoria; the Consumer Action Law Centre; Office of the Public Advocate; Telecommunications Industry Ombudsman; and Victoria Legal Aid.

The primary objective of this program of research is to establish what supports people with mental and intellectual impairments need when participating in consumer transactions and which support models may assist them to engage more equitably in consumer transactions. The ultimate aim is to build expertise and tools for wider industry participation in supporting people with disabilities to be fully included as economic actors.

A pilot-study is currently underway, involving focus groups and interviews with persons with mental and intellectual impairments, as well as members of disability support agencies, Community Legal Centres, and industry. There are four industry sectors of interest – telecommunications, finance, utilities, and insurance – wherein the practicality of a support model for consumer interactions will be explored, with a view to trialling and evaluating the model in subsequent phases of the project.

There are both social and economic imperatives to conduct this research, with the benefits including:

- A better understanding of the needs of individuals with mental and intellectual impairments in relation to consumer transactions, which is an under researched area.
- Providing individuals with mental and intellectual impairments the opportunity to influence service reform.
- Helping to establish support models which will enable more equitable engagement in consumer transactions for individuals with mental and intellectual impairments, allowing people with disabilities to be fully included as economic actors.

- Aiding consumers with mental and intellectual impairments to understand contractual obligations and associated risks.
- Encouraging service providers to ensure their transactions are socially responsible and cost-effective. This will help businesses with the costly issue of consumers with mental and intellectual impairments entering into unsuitable contracts which they cannot fulfil.
- Building expertise and tools for wider industry participation in supporting people with disabilities. This may include providing a training package or framework to service providers.
- Informing the implementation of models of equitable support which could potentially transform the consumer experience of individuals with mental and intellectual impairments, on a larger scale.

Whilst the program of research is currently focused on improvements to pre-contractual arrangements (the 'front-end'), there are plans to conduct a complementary study examining Access to Justice and Dispute Resolution (the 'back-end'). Together, these studies will inform a broader nation-wide research project, wherein support models will be trialled and evaluated.

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