4 November 2013

By email: access.justice@pc.gov.au

Access to Justice Arrangements
Productivity Commission
PO Box 1428
CANBERRA CITY ACT 2601

Dear Commissioners

Inquiry into Access to Justice Arrangements

Consumer Action welcomes the opportunity to provide a submission to the Productivity Commission (the **Commission**) on its Issues Paper, *Access to Justice Arrangements* (the **Issues Paper**).

Key points and recommendations made in this submission:

- The inquiry should focus on how the justice system can efficiently deliver just outcomes rather than only procedural access to justice.
- Access to justice creates broader community benefits, including by improving the efficiency of markets.
- Community legal centres are more efficient if they combine direct service provision with strategic work like policy, law reform and advocacy.
- Prevention and early intervention is important, but efforts in these areas must go much further than simply education or information campaigns.
- A combination of generalist and specialist community legal centres creates a far more efficient and effective legal assistance system than could be achieved with generalist centres alone.
- Appropriate linking of legal services with other community welfare services—for example, linking financial counselling and consumer credit legal services—is an efficient way of extending legal assistance services.
- ADR and mediation processes should be made more transparent, by being subject to regular and public evaluations, so as to contribute to quality outcomes and efficient resolution of common legal problems.
- Moves towards a 'user pays' approach for application fees in tribunals undermines the purpose of having tribunals and so reduces access to justice and creates

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inefficiencies.

- Court and tribunal fee waiver processes should be designed to remove barriers for applicants who have already been assessed as having a very low income.
- Any limitations on legal representation at tribunals should be flexible to ensure that limits do not inhibit efficiency or produce power imbalances between parties.
- Efficiencies in court processes that produce unjust outcomes, such as default judgment processes, can actually undermine efficiency by imposing social costs on individuals affected.
- Court rules or legislation should be introduced that expressly give courts discretion to provide protection against adverse costs orders to public interest litigants.
- Measures should be taken to encourage private funding of litigation, whether by class action lawyers or litigation funders, as an efficient means of providing access to justice by reducing the reliance on public funding for litigation.
- The tax deductibility of legal costs for business creates inequity between business and individual litigants and means business pays a smaller contribution towards the publicly funded legal system than do other litigants, despite being heavy users of that system.
- Funders should resource, enable and encourage community legal centres to develop evaluation tools best suited to the nature of their service.
- There are benefits of using social return on investment methodology to assess and track the social benefits and impact of the access to justice arrangements.

About us

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action offers free legal advice, pursues consumer litigation and provides financial counselling to vulnerable and disadvantaged consumers across Victoria. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Key points

Before responding specifically to the issues paper, we would make three key points:

- the Commission should focus this inquiry on how best the justice system can deliver just outcomes, rather than procedural access to justice;
- access to justice creates community wide benefits, beyond benefits to individual parties to a dispute, by improving the efficiency of markets and returning investment on public funding;
- community legal centres are most efficient when they combine direct services (like legal and financial counselling advice) with strategic activity (such as policy, law reform and advocacy). Where the same problem affects many people, it makes little sense to limit our involvement to providing the same assistance to hundreds clients

after they have been exposed to harm. It is more efficient for this kind of problem to be addressed at its source.

Scope and focus of inquiry

Consumer Action supports the scope of the inquiry as identified by the Commission in the Issues Paper—that is, it should focus on the civil dispute resolution system, and particularly how to constrain costs and promote access to justice and equality before the law. We submit, however, that the inquiry should focus on the civil dispute resolution system in its broad sense. That is, it should not just focus on access to justice for individuals in their particular disputes, but should consider access to justice from a community wide perspective.

The Issues Paper states that:

> While the terms of reference ask the Commission to consider how to promote access to justice and equality before the law, access to justice can only ever mean, in broad terms, relatively equitable access to, and treatment by, legal processes. Access to justice is no guarantee of a successful outcome in the process.

Consumer Action believes that the Commission should consider how best the civil justice system can deliver just outcomes for all participants, including the broader community, not just the procedural notion of 'access to justice'. As noted by the terms of reference to the inquiry:

> A well-functioning justice system should provide timely and affordable justice. This means delivering fair and equitable outcomes as efficiently as possible and resolving disputes early, expeditiously and at the most appropriate level.[emphasis added]

We strongly support this proposition. By having a focus on outcomes, rather than procedural fairness, the Commission can bring to this inquiry its expertise in areas such as cost-benefit analysis, productivity and efficiency, and the long-term interests the Australian community.

Arguably, other bodies are more adept at providing recommendations about procedural access to justice, which is also important consideration for a well-functioning justice system.[1] However, in addition to ensuring procedural fairness, we acknowledge that governments must make judgments about the cost effectiveness of particular policy or program decisions that support the aims of the civil justice system. In making such judgments, governments should be rightly concerned with whether both policy frameworks and government funding programs are achieving their identified aims. The Commission's role is to help governments make better policies in the long term interest of the Australian community.[2] This inquiry represents a significant opportunity for the Commission to bring its expertise to bear to identify the economic and social benefits and costs of various aspects of the overall civil justice system.

Recommendation

The Commission should focus this inquiry on how best the justice system can deliver just

[1] For example, the Australian Law Reform Commission.
[2] Productivity Commission, available at http://www.pc.gov.au/about-us.

outcomes, rather than procedural access to justice

The broader benefits of access to justice

Access to justice brings benefits not only to individuals with legal need but to the whole community. This benefit is particularly evident in consumer disputes. Where consumers cannot easily complain about poor treatment and seek redress, dishonest traders hold a competitive advantage over more responsible traders. Poor business conduct is a drag on efficient markets. Accessible and effective dispute resolution, active regulators and ready access to legal support improves the ability to hold poor business conduct to account and reduces the incentives for poor conduct.

Recommendation

The Commission should seek to assess the market benefits that come with providing access to justice.

Consumer Action's strategic approach: efficient delivery of legal assistance services

Consumer Action is a community legal centre and consumer advocacy organisation, and provides direct services including legal advice (by telephone and email), ongoing legal assistance, legal representation, telephone financial counselling, as well as training and advice to community workers across Victoria. Our telephone financial counselling service, MoneyHelp, is nationally-recognised as the first point of telephone contact for anyone with credit, debt and money issues in Victoria. Through our services, we directly support around 15,000 Victorians a year. This includes almost 1,000 casework legal files (includes extended advice).

In addition to providing these direct services, we respond to issues identified in casework through other activities including policy and law reform, education and advocacy. There are sound reasons for directing resources to these broader activities. One is that (as we explain in more detail below), no community legal centre has the resources to provide the necessary level of direct legal or financial counselling services to every client who seeks it. We recognise that the 15,000 consumers we assist each year are only a small proportion of those who might require assistance and many (especially the most disadvantaged) may not even be in a position to seek help at all. However, we can provide some level of assistance to everyone who comes to our service if we create education or self help tools to which consumers can be referred. We can assist even those who don't reach us if we improve the standard of business practices through law reform and advocacy.

Perhaps an even more compelling reason is that, even if resources were no object, it is simply more efficient to solve repeat problems by addressing them at their source rather than providing hundreds of sessions of legal assistance to hundreds of clients with the same problem.

We are funded primarily by the Community Legal Services (**CLSP**) Program (Victoria Legal Aid and Commonwealth Attorney-General's Department) and Consumer Affairs Victoria to undertake policy and advocacy work. While some of the centre's policy work is undertaken within its CLSP funding, the additional resources provided by CAV enable the centre to focus on more systemic issues, and undertake more in-depth policy and advocacy work, including

maintaining a high public profile. Maintaining a public presence is critical in alerting a broader range of consumers to the laws and their operation. This ensures more people are aware of consumer frameworks than the centre would reach through individual advice work.

In her report *Reclaiming Community Legal Centres: Maximising our potential so we can help our clients realise theirs*,[3] Nicole Rich (a previous senior employee of Consumer Action) argues that community legal centres must engage in more than individual service work, submitting that it 'simply more effective to engage in a mix of activities if we want to maximise the benefits we provide to our clients'.[4] We believe that taking an approach that goes beyond direct service work is essential to efficient service delivery and positive outcomes for consumers.

This submission provides various examples from our work about this approach. In our view, many of these activities could not be undertaken by consumers in isolation, or by traditional legal services (i.e. private practice or legal aid commissions) which focus on the needs of individuals. Below are two examples.

Do Not Knock

For many years, consumers complained about the conduct of door-to-door sellers to Consumer Action, other legal centres and financial counsellors. Complaints to our centre indicated that this form of selling particularly impacts the elderly, newly-arrived communities, and others, who may be less able to say 'no' to a salesperson. We were also concerned that door-to-door sales are also anti-competitive, as consumers are forced to sign up on the spot, without being given the chance to shop around and consider other options. Sellers are typically paid by commission and so have an incentive to use high pressure sales tactics.

In 2007, Consumer Action created the Do Not Knock sticker—a simple graphic and text directing salespeople not to knock, and informing them that doing so is unlawful. Following the introduction of the Australian Consumer Law in 2011, we argued that the sticker amounts to a direction to leave under that law, which requires salespeople to leave a household upon request. By 2013, with a range of partners, we've distributed around 400,000 stickers across Australia. Many others, including councils, MPs and consumer regulators, have distributed their own stickers. Consumer Action also established a simple website through which consumers can get a sticker sent to them, and also make a complaint about door-to-door selling.

With increased consumer awareness associated with the sticker came more evidence that some salespeople simply ignored clear directions from householders not to knock. We assisted many consumers complain to the Australian Competition & Consumer Commission (**ACCC**), which quite rightly took up the issue as an enforcement priority. The ACCC has taken enforcement action against a number of energy retailers, resulting in million dollar penalties. The Federal Court has also confirmed that ignoring a Do Not Knock sticker amounts to a breach of the consumer law.[5]

As part of the campaign, Consumer Action urged energy retailers to voluntarily cease door-knocking after noticing that this industry was responsible for a disproportionate amount of door to door sales complaints. Over the last few months, the three largest energy retailers in Australia have, to their

[3] N. Rich, *Reclaiming Community Legal Centres: Maximising our potential so we can help our clients realise theirs,* April 2009, available at: http://consumeraction.org.au/wp-content/uploads/2012/04/Reclaiming-community-legal-centres.pdf.
[4] As above, p 10.
[5] ACCC v AGL Sales [2013] FCA 1030.

credit, acknowledged this clear expression of consumer sentiment and ceased door-to-door sales.

By undertaking a mix of activities—not just responding to individual complaints or requests for legal assistance—this activity has resulted in significant change in practices within door-to-door selling. This reduces the likelihood of further legal need arising, and importantly, reduces the demand for legal advice from our service, allowing our solicitors to assist consumers on other issues. We work collaboratively with consumers, community organisations, MPs, consumer regulators and businesses as appropriate to the matter at hand. The campaign approach to this problem has been integral, using a range of planned actions designed to achieve the overall aim of ensuring consumers have a real choice not to be door-knocked.

Linked credit

In 2010, Consumer Action successfully represented a couple who sought to recover over $9,000 from a linked credit provider, Lombard Finance, who financed their purchase of goods from Kleenmaid Pty Ltd. After becoming aware that Kleenmaid had gone into administration, our clients contacted Lombard and attempted to terminate their contract. However, Lombard rejected the termination and instead advised them they should continue to make payments or else risk obtaining a bad credit rating, despite the fact that they were not likely to receive the goods.

After contacting the legal practice, our clients issued an application in the Victorian Civil and Administrative Tribunal (**VCAT**) alleging their termination of the credit contract was valid. In a landmark decision, VCAT found that the credit contract with Lombard had indeed been lawfully rescinded, and made an order for our clients to have $9,153.00 credited to them by Lombard, this being the amount they had paid to Lombard under the loan contract.

Given that Lombard Finance estimated it had extended $6.5 million in similar financing to almost 7,000 Kleenmaid customers, the case was a highly important development for those who had been left out of pocket by linked credit contracts where the supplier has collapsed. Consumer Action used the media to ensure that consumers would be aware of their rights under credit laws. We also raised the issue with fair trading agencies and ombudsman schemes, who would be able to inform consumers directly (from the list of creditors) and negotiate with the financier. The Commissioner for Consumer Protection in Western Australia welcomed the decision, and stated that:

> Consumer Protection is currently reviewing complaints from a number of WA consumers who are in a similar position and are questioning the validity of contracts totalling more than $90,000.[6]

The result in VCAT could only have been achieved with the provision of legal assistance. However, the broader work in the media and with regulators multiplied that victory for two individuals into a benefit for many more.

Consumer Action has seen similar situations including where the financier is a large bank. In some instances, matters have been resolved by confidential settlement. While such settlements may be in the best interests of individual clients, confidentiality can act against the public interest, as the outcome may not benefit consumers in a similar situation. It could be argued that this is an inefficient use of legal assistance services, as it is purely focused on outputs (number of clients assisted) rather than outcomes (consumer detriment identified and resolved).

[6] Commissioner for Consumer Protection, 26 October 2009, available at: http://www.commerce.wa.gov.au/corporate/media/statements/2009/October/Legal_victory_important_for_WA.html.

We also provide the Commission with a report we commissioned jointly with the Footscray Community Legal Centre, entitled *Solving problems—A Strategic Approach: Examples, processes and strategies* (attached). This report, primarily designed for other community legal centres, provides further examples of solving legal problems using strategic, integrated and collaborative approaches which can achieve substantive outcomes in a cost-effective and efficient way.

Avenues for dispute resolution

This section responds to chapter 2 of the issues paper

The Issues Paper refers to the range of different avenues for dispute resolution, including the formal courts and tribunals but also more informal methods such industry ombudsman schemes.

Consumer Action believes that effective, accessible dispute resolution, particularly in the areas of consumer and business matters, not only benefits individuals in terms of access to justice, but contributes to the functioning of competitive markets thus supporting broader economic and social outcomes. The Commission itself has supported this in saying that

> [consumer] redress arrangements...should be accessible, procedurally fair, proportionate, timely and accountable, have no major gaps in coverage and be run efficiently".[7]

The Commission has made the case that allowing market misconduct to occur without redress can be anti-competitive in that it gives legally non-compliant traders an anti-competitive advantage over those that do comply. In its report on consumer policy, the Commission stated that:

> Redress processes have positive and adverse incentive effects:
> - They serve an enforcement role in their own right, pushing up the cost of, and thereby deterring, 'bad' behaviour by business.
>
> ...
> - Expensive redress systems...favour parties with deep pockets (usually business) ...
> - They provide incentives for public disclosure of complaints, which helps regulators to identify rogue traders and systemic problems that might require legislative or other responses.
> - They provide efficient insurance by reducing consumer risk when engaging with suppliers whose reputation is inherently uncertain (such as for experience goods or for new, smaller firms). Confident consumers are more likely to be willing to shift their demand to new suppliers, aiding innovation and competition in its own right.
> - Accessible and cheaper redress mechanisms can divert complaints from more costly ones".[8]

In light of the above effects, we encourage the Commission to consider each dispute resolution avenue closely for how it effectively contributes to overall justice outcomes. This

[7] Productivity Commission, *Review of Australia's Consumer Policy Framework—Inquiry Report 45 (volume 2)*, April 2008, available at: http://www.pc.gov.au/projects/inquiry/consumer/docs/finalreport, p 192.
[8] As above, page 193.

submission considers the various avenues further in response to the following chapters of the Issues Paper:

- Chapter 9 on alternative dispute resolution including ombudsman schemes;
- Chapter 10 on tribunals, particularly our experience with the Victorian Civil & Administrative Tribunal; and
- Chapter 11 on courts.

Legal need and unmet legal need

This section responds to chapter 3 ('Exploring legal need') and chapter 5 ('Is unmet need concentrated among particular groups') of the issues paper

Definition of 'legal need' and relationship with 'access to justice'

We agree that, for the purposes of this inquiry, legal need could be defined as 'legal issues that individuals have not been able to resolve efficiently by their own means'. From this definition, 'access to justice' would refer to the individuals being able to access support to resolve the issues, and accessing a just outcome.

Unmet legal need

The issues paper (citing the Law and Justice Foundation of NSW *Legal Australia-Wide (LAW) survey*) notes that around half of the population experience at least one civil and/or criminal problem in each 12 months, and half of those experienced a substantial legal problem.[9] While these figures are useful, it is more important to consider the level of unmet legal need within this group.

The *LAW survey* reported that respondents sought advice for 51 per cent of legal problems, handled 31 per cent of legal problems without advice and took no action for 18 per cent of legal problems.[10] We also note 2006 research by Consumer Affairs Victoria (CAV) which found that only around four per cent of revealed consumer detriment in Victoria is reported to CAV and smaller percentages are reported to other agencies, such as ombudsman.[11]

The number of individuals who take no action to resolve legal problems is a good indicator of lack of access to justice. Reasons reported by the *LAW survey* for inaction included that:

- it would take too long to resolve the problem (35%)
- the respondent had bigger problems (31%)
- it would be too stressful (30%)
- it would cost too much (27%)
- the respondent did not know what to do (21%)
- it would damage the respondent's relationship with the other side (13%).[12]

[9] Issues paper page 6, citing the Law and Justice Foundation of NSW *Legal Australia-Wide (LAW) survey*

[10] Law and Justice Foundation of NSW, *Legal Australia-Wide (LAW) survey,* page xvii.

[11] Consumer Affairs Victoria, *Consumer detriment in Victoria: a survey of its nature, costs and implications*, October 2006.

[12] Law and Justice Foundation of NSW, *Legal Australia-Wide (LAW) survey,* page xvii.

Each of these reasons evidence lack of access to justice in some form or another—whether because processes take too long or cost too much, or because of other disadvantage, or because the individual did not know how to access help.

Notably, the *LAW Survey* found that some disadvantaged groups were less likely to take action or less likely to seek advice if they did. In particular, people with low education levels and people with a non-English main language had higher levels of inaction in most jurisdictions. These two disadvantaged groups also had lower levels of seeking advice when they took action in a few jurisdictions. Unemployed people were also less likely to seek advice.[13]

Some respondents who ignored their legal problem judged that the problem was trivial or unimportant or that taking action would make no difference. The Commission's issues paper takes up a similar point—that two thirds of consumer legal problems were reported to have little or no impact—and suggests that the inquiry should only focus on issues that have a moderate or systemic impact. We disagree that the inquiry should be limited in this way, for two reasons.

The first is that individuals may be a poor judge of whether a matter will create an impact. For example, large numbers of individuals have 'default judgements' entered against them in the Victorian Magistrates Court each year. We discuss this further below, but in short a default judgement is given when a creditor is seeking to enforce a debt through the courts and the debtor does not attend court to defend the proceedings. There are a number of reasons why debtors may not defend these proceedings, but research confirms that an important reason is that the debtor did not understand the summons or did not know what to do. This can have serious impacts even if the individual doesn't recognise them—once the creditor has received default judgement in their favour they can seek to enforce the debt through garnishing a wage or bankrupting the debtor.

The second is that even if a legal issue is inconsequential to an individual it may have significant impacts across the economy. One example is unfair bank fees, such as penalty fees applied when a bank customer makes a late payment or overdraws their account. Contract terms can allow a bank to recoup an amount substantially out of proportion to loss it suffers because of the late payment or overdraw. While these fees may not cost individual customers a significant amount, they may amount to millions of dollars across the economy spent inefficiently.

It is also our experience that some groups are particularly disadvantaged in accessing civil justice. A key feature of community legal centres' work is identifying and supporting such groups. Much of Consumer Action's direct legal service delivery is provided over the telephone. We're aware that some groups find accessing the telephone difficult, particularly those who speak English as a second language.

In an effort to ensure our services assist the most disadvantaged, Consumer Action engaged an expert in legal assistance services and working with vulnerable communities to evaluate our telephone advice service in 2012 and 2013. This process included telephone call backs

[13] Law and Justice Foundation of NSW, *Legal Australia-Wide (LAW) survey,* page xvii.

to clients, particularly to determine whether the advice received assisted them resolve their legal problem.

The evaluation identified some new processes (including scheduled call backs) to ensure that particularly vulnerable groups were effectively assisted by telephone advice. The vulnerable groups identified that required further support included:

- those with lack of education;
- those without an understanding of basic consumer rights;
- those with a disability or serious health problem;
- those with transport problems and/or communication problems;
- those with problems with reading or speaking English;
- those with work, school or childcare commitments that means that it will be difficult to follow through with actions; and
- other circumstances which would make it difficult to deal with consumer problems, such as depression.

We believe legal assistance services of all types need to regularly evaluate their services, not only to ensure vulnerable groups are accessing their service but also to ensure that outcomes are being achieved for those to whom assistance is provided. We provide further comments in relation to measurement in response to chapter 14 of the Issues Paper.

Focusing resources to address unmet legal need

Statistics above and the longstanding experience of CLCs is that demand for legal assistance will always outstrip supply. It is also evident that direct provision of legal services will have limited use in meeting legal needs of the most disadvantaged if they are unlikely to seek assistance. Community legal education and self help resources will assist many to access just outcomes but running a dispute without assistance is still an intimidating and resource intensive exercise. Self help materials will usually only assist people who have a reasonably high level of education and have the resources to devote to the dispute.

Based on direct experience, we have found the most efficient way for CLCs to target unmet legal need is through a combination of direct services (advice and self help) and strategic activity (education, advocacy and law reform).

The costs of accessing civil justice

This section responds to chapter 4 of the issues paper. We also discuss cost barriers in courts and tribunals in other sections below.

Upfront costs

In many situations Australian consumers already have access to high quality and mostly free dispute resolution through industry ombudsman schemes. We discuss this in more detail in the section below on Using Informal Mechanisms to Best effect.

Adverse cost orders

The prospect of adverse cost orders in the 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 currently see is consumers who receive demands for liquidated damages from operators of private car parks when it is alleged that consumers do not comply with car parking conditions. In our view, there is a reasonable claim either that there is no contract between a consumer and the private car park operator and/or that the term allowing the recovery of liquidated damages is an unfair contract term under the Australian Consumer Law and so void. However, given the relatively small amounts of the claim, the likelihood a car park operator would appeal a decision adverse to it, and the risk of costs for a consumer, any claim will invariably not be pursued.

We would encourage the Commission to consider 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.

Delay

Delay has very real tangible and intangible costs for our clients. Even in industry ombudsman schemes (which are free for consumers), a dispute over a debt will cost the consumer as interest continues to accrue on the amount owing while the dispute is being dealt with. This can be a significant amount where there are delays in hearing the dispute.

Similar problems arise in VCAT. 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.

Preventing problems from evolving into bigger problems

This section responds to chapter 7 of the issues paper

Consumer Action agrees that the justice system should seek to prevent legal problems in addition to providing assistance when they arrive. But we caution against an approach that is focused solely on general legal information and education. Indeed, we question the benefit of a general understanding of legal rights. There is a range of research (including research undertaken over the past decade by the Legal Services Research Centre in the United

Kingdom[14]) that demonstrates the importance of people being able to access information when they need it (rather than being 'educated' about a range of issues).

The key outcomes for the community should be that if faced with a legal problem, the person would be able to access the appropriate information or assistance. In some cases, knowledge of legal rights relating to a particular issue which is regularly experienced is important (for example, a homeless person may need to understand about transport fines). However, depending on individual circumstances, it would be adequate for most people to be aware that they can obtain information or assistance in relation to particular issues if they arise, and where to go for help. Their level of awareness could be limited to being aware of the types of issues which could apply to their situation, and knowing they can get information or assistance. So, for example, someone who is on a Centrelink income should be aware that they can obtain information and assistance if they have a dispute with Centrelink, and someone who is at risk of being in financial trouble, should be aware that they can access a financial counsellor or information on the web.

It is our experience that many people do not even identify their problem as a legal problem. For example, a dispute about an ability to pay an energy or telecommunications bill might be seen as a debt issue, not a legal problem (despite the existence of laws providing legal rights in these circumstances). For this reason it's important that assistance services identify themselves as being available to help with the identified problem. For example, with financial counselling generally available in Australia, and the close interaction between many of these services and legal services, an individual would need to be able to find out about financial counselling—not necessarily identify a legal problem. Consumer Action's telephone financial counselling service, MoneyHelp, brands itself separately from the legal centre partly for this reason.

We strongly support efforts to inform people of assistance services at points when assistance is required. For example, pursuant to national consumer credit legislation, creditors must inform debtors of their rights to apply for a hardship variation and the availability of independent ombudsman schemes on default notices. This targeted information has contributed to enabling many debtors to be more aware of their rights, and to take steps to resolve their situation.

Further work could be done to identify ways in which people can be informed about their legal rights, or avenues to resolve disputes, at the most relevant time. Court documents are an obvious example. Since 2010, financial services ombudsman schemes have been required to accept disputes even after a court complaint has been served, but before any further steps in the court process has been taken.[15] It would be helpful, for example, if court complaints issued by members of financial services ombudsman schemes identified the availability of this function. This would ensure eligible disputes are directed into a cheaper, more efficient, and more appropriate dispute resolution avenue.

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[14] See: http://webarchive.nationalarchives.gov.uk/20130315183909/http://www.justice.gov.uk/publications/research-and-analysis/lsrc

[15] For more information, see ASIC Report 308, *Review of EDR jurisdiction (debt recovery legal proceedings),* available at: http://asic.gov.au/asic/pdflib.nsf/LookupByFileName/rep308-published-19-October-2012-1.pdf/$file/rep308-published-19-October-2012-1.pdf

More generally, our recent report on the experience of default judgment debtors (discussed further in our response to chapter 11) recommended that initiating court documents could be required to include plain English information, flow charts depicting outcomes of various courses of action, and contact details for central referral points where recipients could access legal or other assistance.[16]

Effective matching of disputes and processes: the value of specialisation

This section responds to chapter 8 of the discussion paper

Specialisation

Our laws are many, complex, specific to areas of law, and vary from jurisdiction to jurisdiction. Accordingly, they are often difficult to navigate. Lawyers cannot be experts in every area of the law and so rely on those who are able to assist and work daily with the complexities and specifics of certain legislation. Generalist CLCs are a vital part of the legal assistance framework as they provide an accessible first point of contact for individuals with legal needs, and will be able to assist with many commonly encountered legal problems. However specialist centres improve access to justice in more complex or less well understood disputes.

Specialist legal centres such as Consumer Action have specialist knowledge of consumer protection law, financial services and consumer credit laws, utility regulation and motor vehicle legislation. Consumer Action offers a worker advice service, through which other community lawyers and non-lawyers such as financial counsellors can seek advice. This is efficient use of resources as it might take a generalist lawyer many hours to research the aspect of consumer law. It also means that Consumer Action's specialist knowledge is able to assist many more individuals than Consumer Action can help individually.

Consumer Action has also undertaken training courses for generalist community legal centres and during 2012 visited 26 centres to provide training on consumer legal matters. In some cases, this has enabled relationships to develop where centres work together to pursue outcomes. In the words of a principal solicitor of a regional centre that worked with Consumer Action in relation to a matter involving a consumer lease provider exploiting local indigenous communities:

> To have a specialist centre support generalist CLCs by training and by sharing its knowledge of the recent laws and the precedents it develops, as well as sharing its skills through expert advice and casework support when requested, improves community legal centres' ability to advocate for their clients and achieve better outcomes.

Specialist legal centres are able to support and amplify the work of generalist centres by training them on particular areas of the law and providing specialist advice when needed. Legal centres that develop specialisation, whether that be on areas of the law or the needs

[16] Consumer Action, *Like Juggling 27 Chainsaws: understanding the experience of default judgment debtors in Victoria,* available at: http://consumeraction.org.au/report-like-juggling-27-chainsaws-understanding-the-experience-of-default-judgment-debtors-in-victoria/, page 62

of their particular communities, are likely to contribute to better social and economic outcomes

Linking with other services

The Commission makes the point that dispute resolution can be best dealt with forms of social welfare service provision outside the formal justice system. We strongly agree with this, and suggest that where such services are closely and appropriately linked with legal assistance services, efficiencies will be achieved and outcomes improved.

The way in which Consumer Action's work encompasses both legal assistance services and financial counselling is a case in point. In addition to providing telephone financial counselling (which is also an entry point for face-to-face financial counselling in the community), Consumer Action has a dedicated worker advice line through which financial counsellors from across Victoria can obtain legal advice to assist their clients. We also deliver professional development for financial counsellors on aspects of consumer law, as well as bankruptcy and credit law. Financial counsellors and consumer lawyers work together very effectively—often working together with the same client. Or, it might be that the financial counsellor acts as an advocate in disputes with businesses and only occasionally needs to call on legal assistance from a lawyer. The national peak body for financial counselling, Financial Counselling Australia, has made the point that access to consumer credit lawyers extend the reach, effectiveness and capability of financial counselling.[17]

Using informal mechanisms to best effect

This section responds to chapter 9 of the issues paper

Industry ombudsman schemes

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, the Credit Ombudsman Service, the Energy & Water Ombudsman Victoria, and the Telecommunications Industry Ombudsman). 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.

We believe the Commission should be particularly alive to the machineries of industry ombudsman schemes from a public interest and outcome perspective. In our view, these schemes contain a number of useful features which contributes to strong justice outcomes, including:

- industry ombudsman schemes are typically a condition of holding a relevant licence, so all businesses in an industry must participate in the scheme;

[17] http://www.financialcounsellingaustralia.org.au/Corporate/News/Good-News-in-South-Australia. See also A Buck and L Curran, 'Delivery of Advice to Marginalised and Vulnerable group: The Need for Innovative Approaches, 2009, Vol 13(9) Public Space: The Journal of Law and Social Justice, 1-29; L Curran, 'Relieving Some of the Legal Burdens on Clients: Legal Aid services working alongside psychologists and other health and social service professionals', *Australian Community Psychologist*, August 2008, Vol 20 (1), pp 47-56.

- industry ombudsman schemes are funded by industry, so industry has a financial incentive to minimise consumer disputes;
- industry ombudsman schemes typically have independent boards with 50 per cent representation from consumers so the dispute resolutions processes are fair and balanced;
- the ombudsman scheme process provides flexible solutions to disputes but also has 'teeth' because the Ombudsmen can make findings binding upon the trader;
- Ombudsmen are typically required to investigate and report on systemic problems, meaning that they not only provide solutions for individual disputes but also help bigger problems be solved at their source; and
- Ombudsmen keep detailed records and make detailed reports that assists the advancement of consumers' interests

The below table provides some further detail about certain features of industry ombudsman scheme, and compares them with other forms of alternative dispute resolution (ADR).

	ADR facilitated by individual ADR practitioner (e.g. pre-court mediation).	**Government Ombudsman (and some agencies e.g. Fair Trading conciliation services)**	**Industry Ombudsman Scheme**
Power to make a binding decision in an individual dispute	Not usually	No	Yes—can make decision binding on industry member (although encourages settlement)
Quality assurance	Minimal surveys/evaluations	Subject to government oversight (i.e. Auditor-General)	Reviews and evaluations reported publicly or to Boards
Systemic issues	Cases dealt with as individual disputes, no response to systemic issues	Yes, can report to Parliament or through annual reports	Report systemic issues arising from cases to the relevant regulator and publish de-identified outcomes
Outcome expectations	Settlements are confidential, and little, if any, publication of outcomes even de-identified		Binding determinations may be published. Case studies also published in annual reports etc or in bulletins can give parties a guide to likely outcome

Limitations of Alternative Dispute Resolution

We caution the Commission against taking an approach that 'alternative dispute resolution' (**ADR**) is necessarily the most efficient way to resolve legal problems.

Mediation is increasingly used in tribunals such as VCAT, as well as in courts, including the Magistrates' Court of Victoria. Recent research suggests that insufficient attention has been

paid to whether mediation achieves just outcomes, and that various aspects of mediation are problematic from a public accountability perspective.[18] For example, it has been suggested that confidentiality of the mediation process and outcomes may do more harm than good in relation to accountability. Also, as mediated outcomes are not publicly available, unlike court judgments, it is impossible for the public to evaluate the quality of outcomes. Flowing on from this is the lack of capacity to address systemic issues through mediation. Not addressing issues systemically means that more resources are put into repeated mediation sessions, when matters could be more efficiently dealt with at a public enforcement level.

This research accords with the experience of Consumer Action, as depicted in the below case studies:

Case study 1

In 2011, one of our solicitors attended a court ordered mediation in a matter where our client was defending a small civil claim against a trader. Our client's sole source of income is from a Centrelink pension and his only asset, a car, is of very little value.

The two mediators told him that the plaintiff would be able to 'take' his car. They were unaware that vehicles valued at less than $6,850 cannot be seized and when our solicitor explained why (the *Bankruptcy Act 1966* (Cth) protects essential, low value household goods from being seized), expressed surprise and at first some doubt. Our solicitor, on putting an offer, instructed the mediators to let the plaintiff know that our client's income was from Centrelink and that therefore a court would not make an instalment order (per section 12 of the Victorian *Judgement Debt Recovery Act 1984*). This too was questioned and it was clear that the mediators did not understand debtors' rights in relation to judgment debt recovery. After speaking with the plaintiff, the mediators returned and stated that the plaintiff had nothing to lose by pursuing the matter whereas they in fact risked incurring costs which they will not recover.

Case study 2

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.

The 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.

[18] Dr Lola Akin Ojelabi & Associate Professor Mary Anne Noone, *Justice Quality and Accountability in Mediation Practice: A Report,* Rights and Justice for Sustainable Communities Research Group School of Law, La Trobe University, Australia (March 2013).

While in both these cases the individuals were legally represented meaning their rights were upheld, many individuals involved in small civil claims in courts or tribunals will not have representation. Where the matter involves being sued by a trader for a debt, it may be likely that the individual is subject to social and financial disadvantage. These case studies highlight the risk of mediation in the situation of a consumer facing a trader with questionable practices where the strength of the consumer's arguments are underestimated or not recognised by the mediator. Business parties (even if not represented) may be repeat player familiar with the laws and processes and so have an advantage over unrepresented individuals.

Consumer Action's experience also highlights the concern that the confidential and opaque nature of mediation means that systemic issues are not identified, causing inefficiencies in the justice system. For example, we have acted on behalf of many consumers who have disputes with maths software providers or motor vehicle lessors where we have been able to negotiate or mediate solutions, often very positively for the individual, only to find that many more clients present with very similar problems. It is for this reason that we consider other activities to deal with the problem, including research reports[19] or community engagement.[20]

The inefficiencies involved in individually resolving disputes can also be seen in relation to one small business matter, involving a business called Publicity Monster.[21] This business is said to cold-call other small businesses promising to get them in the top seven rankings on "Google Local" for a keyword of their choice. 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. We're aware that there have been almost 90 individual actions taken by affected small businesses at small claims tribunals in New South Wales and Victoria,[22] but there has been only one reported decision.[23] Nearly all other disputes appear to be mediated confidentially. 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 appears to do little to prevent future legal issues arising.

We encourage the Commission to consider the ways in which mediation processes can be made more transparent, both to improve the quality of outcomes but also to ensure there are mechanisms by which similar legal problems can be resolved efficiently. At the very least, mediation services should be subject to regular and public evaluations and services should be required to publish outcome statistics or de-identified case studies of mediation outcomes.

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[19] See Paul Harrison, Marta Massi and Kathryn Chalmers (2010) *Shutting the Gates: An Analysis of the Psychology of In-Home Sales of Educational Software* report at http://shuttingthegates.wordpress.com/the-research-report/ and video at http://www.youtube.com/watch?v=0S83Wsv1dt4

[20] See for example http://consumeraction.org.au/motor-finance-wizard-general-information/

[21] http://www.smh.com.au/technology/technology-news/regulator-chases-party-boys-publicity-monster-20120827-24wgd.html#ixzz2iaruRHnn

[22] https://forums.whirlpool.net.au/forum-replies.cfm?t=1966958&p=74

[23] and http://www.austlii.edu.au/au/cases/nsw/NSWCTTT/2012/141.html

Recommendation
ADR and mediation processes should be made more transparent, by being subject to regular and public evaluations, so as to contribute to quality outcomes and efficient resolution of legal problems.

Improving accessibility to tribunals

This section responds to chapter 10 of the issues paper

Financial Barriers to Access

Recent experience with the Victorian Civil and Administrative Tribunal (VCAT) has raised two concerns about financial barriers to access:

- the size of application fees and the argument for 'user pays' tribunals; and
- access to fee waivers for applicants in financial hardship.

Application fees and 'user pays'

VCAT recently increased its application fees substantially. Before the fee increases the application fee for a consumer dispute of less than $10,000 was $38.80. Since 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. It is our view that a fee of $132.30 will discourage consumers from applying to VCAT for small amount claims.

It is concerning that one rationale for the increase in VCAT fees was that the tribunal should shift to more of a 'user pays' model.[24] 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 recent 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 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) are 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 would meant she would have lost of $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

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

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.

More fundamentally, any comparison between funding of tribunals and courts is flawed. The objective of VCAT (like other tribunals) is to be a cheap alternative to courts. In terms of small claims, it appears the purpose of the Tribunal (including its costs and legal representation rules) is to take small civil claims outside the court system, resulting in more efficient, informal and less expensive justice outcomes. It is inconsistent with that objective to expect tribunal users to pay large fees for access.

Recommendation
Accessibility rather than cost recovery should be the primary consideration when determining application fees for tribunals (and other forums which are designed to be cheap and informal alternatives to courts).

Fee Waivers on the grounds of hardship

Paying even modest application fees will create hardship for clients of very low income. It is essential that courts and tribunals have accessible processes to allow fees to be waived in these situations.

We have recently raised concerns with VCAT that its current fee waiver process may be excluding low income individuals from accessing the Tribunal as well as wasting resources of CLCs and Tribunal staff. For example, the current process requires many applicants (including many who are reliant on Centrelink benefits) to complete a very long and complex income and expenditure form to establish that they are unable to afford Tribunal application fees. In our view this process creates unnecessary duplication—a recipient of Centrelink payment has already been means tested and found to be of low income. It appears wasteful for the Tribunal to then conduct its own assessment rather than accept the assessment of Centrelink. Requiring applicants to fill in a complex application form also drains resources of VCAT registry staff (who have to assess the form and assist applicants to fill it out) as well as community services which are called upon to assist applicants navigate the process.

We have requested that VCAT return to a previous policy of granting fee waivers on the grounds of hardship to applicants who establish that they are reliant on particular Centrelink benefits, for example, by providing a copy of a concession card. VCAT has been willing to engage in discussion on this issue and have committed to review their processes.

Recommendation
Fee waiver processes should be designed to remove barriers for applicants who have already been assessed as having very low income.

Legal representation within tribunals

The issues paper seeks feedback on whether the scope for legal representation should be more or less limited. In our view, it is reasonable for an informal dispute resolution forum to

seek to prevent legal representation to ensure it is user-friendly, avoids excessive legalism and avoids creating power imbalances between parties who can afford representation and those who cannot. However, rules need to be flexible enough to allow legal representation where to do so would actually correct a power imbalance, or improve efficiency.

Representation to improve efficiency

In his review of VCAT, Justice Bell argued that:

> 'creeping legalism' is a feature of cases that are legally and factually complex, especially if the governing principles are open-ended and leave a lot of scope for argument. Excluding lawyers will deny the parties and the tribunal the benefit of their submissions on the issues. It will not make the cases less factually and legally complex.[25]

We would agree with this sentiment, and also point out that there is benefit to the efficiency of the legal system by clarifying grey areas of the law through these types of hearings. Our client base at Consumer Action is made up of some of the most vulnerable members of the community who have a limited ability to put their case to a VCAT member. In some cases, allowing representation (where it would not otherwise compromise accessibility or fairness) may increase efficiency by reducing the length of a hearing and the need for VCAT itself to provide support for the applicant.

Correcting power imbalances

Justice Bell remarks in his review of VCAT that restricting legal representation in VCAT would not resolve criticisms leveled against VCAT as to 'creeping legalism'. He notes that "lawyers are not the only powerful advocates in the tribunal. There are lots of experts and non-legal professional advocates in the same category".[26]

Consumer law disputes will frequently involve an inherent power imbalance between a relatively weaker (consumer) party and a stronger (business) party. As Justice Bell describes, unrepresented consumers may find themselves up against an opponent who, even if unrepresented, may have a far better understanding of the VCAT process, a more expert understanding of relevant facts and law, and are not intimidated by the forum in the way a first time applicant will be. Without assistance, our clients are likely to have none of those elements in their favor. In this case, legal representation may actually level the playing field.

Recommendation

Any limitations on legal representation at tribunals should be flexible to ensure that limits do not inhibit efficiency or produce power imbalances between parties.

Consolidated versus specialist tribunals

The Commission's issues paper asks what principles should be used to determine the balance between generalist and specialist tribunals. Our broad response is that there are benefits to both consolidation and specialisation and that there is no formula for determining

[25] Hon Justice Kevin Bell, *One VCAT, Presidents Review of VCAT,* 30 November 2013, p 79.
[26] *One VCAT*, p 79.

in advance the balance between generalist and specialist tribunals. We consider that the VCAT model—a generalist tribunal with specialist lists—strikes a reasonable balance between efficiency of a consolidated tribunal with specialisation where it is considered necessary.

However, the balance struck by any tribunal system needs to be reassessed at intervals to determine whether it is capable of delivering just outcomes. One area we think would benefit from a specialised response is motor vehicle disputes (including both sales and repairs). In our experience, it is more difficult than usual for consumers to manage a VCAT claim in these matters. A consumer is likely to have limited technical knowledge in the area while the other party is likely to have considerable expertise. VCAT members who will be deciding the dispute will also be likely to lack expertise particularly on technical points around mechanical faults. It is often necessary for an applicant have produce an expert report from a third party to prove their claim or even have a mechanic appear as a witness, but such experts are expensive to obtain and will be out of reach for low income consumers unless provided with a grant. As an applicant can wait for six months for a hearing at VCAT, they may be without their car for an extended period. This could have serious consequences for applicants who rely on a car for their work or other essential obligations. A specialist tribunal should have the power to compensate successful complainants for this kind of loss.

In our view, a specialist dispute resolution forum (whether a separate list within VCAT, an industry ombudsman scheme, or another format) could provide better access to justice for motor vehicle disputes. Decision makers would develop specialist knowledge about the unique issues relating to motor vehicle disputes, and expert assessors could be on staff to assess evidence. Process and remedies could be adapted to the nature of the claims.

Improving accessibility of courts

This section responds to chapter 11 of the issues paper

Court processes

The paper asks a number of questions about court processes, and making more efficient use of scarce judicial resources. However, it is also important to consider whether existing processes which have been introduced to increase efficiency are producing unjust outcomes. It is not efficient for a court to handle cases quickly if in doing so it actually prevents access to just outcomes.

We recently published a report, *Like Juggling 27 Chainsaws: Understanding the experience of default judgment debtors in Victoria*, which was authored by Dr Eve Bodsworth of the Brotherhood of St Laurence.[27] The report explores the experiences of people who have received 'default judgments' for debt-related problems.

Default judgment is a court order imposed against one party, usually the debtor being sued, because they failed to provide a defence to court action initiated by a creditor. This means that a judgment can be entered without a hearing, and usually by a registrar of the court. A registrar need not even see evidence that the debt is actually owed before granting

[27] Available at: http://consumeraction.org.au/report-like-juggling-27-chainsaws-understanding-the-experience-of-default-judgment-debtors-in-victoria/

judgement. The process was established to provide efficiencies for debt recovery, recognising scarce judicial resources. Default judgment usually means that the debtor's liability is increased, due to legal costs involved, and the debt can be enforced using court enforcement processes or bankruptcy. Each year 30,000 to 40,000 consumers receive default judgments against them in the Victorian Magistrates' Court, often for relatively small debts. In fact, the majority of all civil complaints in the Victorian Magistrates' court result in default judgment.

Dr Bodsworth's report finds that the debt recovery process is complex and difficult for debtors to navigate. It finds that vulnerable debtors avoid dealing with problem debts for a range of reasons, including that they are unaware of their rights or other problems take priority. It also finds that debtors did not respond to the initiation of court proceedings because they did not receive notification at all or on time, they did not understand what they were required to do, or they acknowledge they owed the debt but could not pay.

Consumer Action has acted on behalf of debtors where a default judgment has been entered, but a consumer has a defence (or at least partial defence, for example, regarding the amount of liability). In these instances, debtors are able to apply for a re-hearing but there are costs risks involved which can deter them. Further, it is likely that a debtor would have to be pay legal costs in relation to the initial default judgment even if re-hearing was successful.

Given the large number of matters that result in default judgment, we are concerned about whether the process is in fact contributing to just outcomes or whether it is really a 'debt recovery factory'. Our research report recommends, among other things, that there should be some form of substantiation of debts as part of the default judgment process by the court, rather than relying on complaint documents prepared by creditors. For example, we suggest that creditors should be required to provide to the court:

- proof of debt (for example, initial contract),
- evidence that the consumer has defaulted on their payments (such as copies of statements of accounts, correspondence or default notices),
- proof of ownership of the debt (in the case of debt assignment), and
- efforts by the creditor to recover the debt without resorting to the legal system (for example, negotiation, offering payment plans etc)

We believe these recommendations, if enacted, may actually reduce burdens on court processes by encouraging creditors to resolve debt matters outside the court process.

Recommendation
Default judgment processes should require courts to substantiate any debt claim, by requiring creditors to demonstrate proof of debt, evidence of default, and efforts to recover the debt without resorting to the legal system.

Protective costs orders

The Issus Paper seeks views as to how an imbalance of resources available to parties which can cause a party to abandon their case might be addressed. As noted above, a particular imbalance of resources is the ability to withstand the threat of an adverse costs order. The

Issues Paper similarly explores 'fee-shifting' rules that might alter the usual rule that the losing party will pay the winning party's costs.

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.

Public interest litigants are typically seeking injunctive or restorative relief, in matters in which they have limited personal pecuniary interests. The rule that costs follow the event negatively impacts upon public interest matters being brought for determination, at considerable cost to the community, Accordingly, Consumer Action advocates for the introduction of formal court rules or legislation in support of public interest costs orders, under which courts could make a no costs order, or cost capping order in certain limited circumstances.

In 1995, the Australian Law Reform Commission recommended such a legislative regime in Australia,[28] as did the New South Wales Law Reform Commission in 2012.[29] In both instances, the Commissions recognised that existing court discretions were not being exercised, absent of specific enabling legislation.[30]

Recommendation
Court Rules or legislation should be introduced that expressly give Courts discretion to provide protection against adverse costs orders to public interest litigants (including: what factors are relevant to the discretion; the types of orders that can be made; and that such an order can be made at any stage of a proceeding).

Effective and responsive legal services

This section responds to chapter 12 of the issues paper

Legal profession rules and consumer protection

The Issues Paper asks how the rules or behaviours of professional associations obstruct or facilitate competition and consumer protection in the markets for legal services.

Recent court determinations have confirmed that the Australian Consumer Law (**ACL**) applies to lawyers, not just the clients they act for, in the same way that it applies to all other services in the economy.[31] However, Consumer Action is concerned that professional conduct rules that apply to lawyers provide for standards that are in some respects lesser than that provided by the general law, such as the ACL.

[28] Australian Law Reform Commission, *Costs Shifting Who pays for Litigation,* Report 75 (1995)
[29] New South Wales Law Reform Commission, *Security for costs and associated orders*, Report No 137 (2012) [4.1– 4.82, at 4.42]
[30] See for example New South Wales Law Reform Commission, *Security for costs and associated orders*, Report No 137 (2012) [at 4.42]
[31] *ACCC v Sampson* [2011] FCA 1165 (17 October 2011).

For example, rule 28 of the Victorian *Professional Conduct and Practice Rules 2005* and rule 34 of the *Australian Solicitors' Conduct Rules 2011* regulate communications with other persons, such as consumer debtors. Rule 28 of the Victorian Rules states:

> 28. Communications
> A practitioner must not, in any communication with another person on behalf of a client:
> 28.1 represent to that person that anything is true which the practitioner knows, or reasonably believes, is untrue; or
> 28.2 make any statement that is calculated to mislead or intimidate the other person, and which grossly exceeds the legitimate assertion of the rights or entitlement of the practitioner's client;

Rule 34 of the ASRC states:

> 34.1 A solicitor must not in any action or communication associated with representing a client:
> 34.1.1 make any statement which grossly exceeds the legitimate assertion of the rights or entitlements of the solicitor's client, and which misleads or intimidates the other person

These rules can be contrasted with section 18 of the ACL, which prohibits, in trade or commerce, misleading and deceptive conduct, as well as conduct likely to mislead and deceive. Section 18 covers a very wide range of conduct. It can include lying, making false or inaccurate claims, leading to the wrong conclusion, or inaccurate claims. Case law suggests that the overall impression is what matters, and the court will consider whether the conduct is likely to lead a significant number of people to whom it is directed into error, or has the tendency to deceive such persons. In contrast, the professional rules above create a very high threshold. For example, rule 28 appears to allow a lawyer or law firm to engage in conduct which is likely to mislead a debtor but falls short of being grossly excessive.

Industry-specific codes or regulations should be designed to enhance standards required by general laws, bringing them from generic standards to higher standards. Where this is not the case, it can not only reduce consumer protection but lead to uncertainty and inefficiency where it is unclear which standard is to be applied.

Recommendation
Legal profession rules should be reviewed for consistency with general consumer protection standards, to improve efficiency in regulation.

CLC's and Pro Bono—costs recovery

The Commission has asked for views about CLC service delivery as well as pro bono legal services. Specifically, the Issues Paper asks about effective ways to make the provision of pro bono more attractive, and what barriers are faced by lawyers seeking to provide pro bono legal services.

In this part, Consumer Action draws attention to uncertainty about whether CLC s and their pro bono partners are able to enter into enforceable costs agreements with their clients. Whilst most CLC and pro bono case work is delivered on a simple fee decline basis, in litigious matters it is not uncommon for CLCs and pro bono lawyer to enter into a "conditional

pro bono costs agreement", under which fees are charged in the event of a successful outcome.

In the case of CLCs, the *Legal Profession Act* 2004 (Vic) (**LPA**) s. 2.9.4 expressly provides that:

> For the avoidance of doubt a community legal centre is entitled, subject to Part 3.4, to recover legal costs in respect of legal services that it provides.

In practice, the ability of CLCs and pro bono practitioners to recover costs is compromised by operation of the indemnity principle. The indemnity principle provides that the successful party in litigation may only recover costs from the losing party to the extent that the successful party has an obligation to pay his or her lawyer's fees.

CLCs and lawyers acting pro bono will rarely (if ever) enforce a costs agreement against a client that has a successful outcome, unless and until costs are ordered in favour of that client and recovered from the losing party. If the successful party has at best a conditional obligation to pay his or her lawyer's costs, the indemnity principle arguably undermines an application as to costs.

The likelihood of such an outcome is made out in the case law and commentary.[32] Attempts have been made to draft a CLC or pro bono costs agreement that gets around the courts' application of the indemnity principle,[33] but these are largely untested, and many pro bono practitioners and CLCs are either unaware of the issues, or fail to have "compliant" agreement in place.[34]

Any doubt as to costs recovery results in uncertainty for: CLCs and pro bono lawyers; their clients; opposing parties; and the courts. It undermines and distorts the basis on which these parties may offer their services, enter into a retainer, and resolve litigation. It also adds complexity for lawyers, which must resort to terms of art in drafting and explaining complex and potentially ineffective costs agreement. Further, if costs are not recoverable, this delivers an unmeritorious windfall to parties against CLC or pro bono clients, and removes the checks and balances as to costs in litigation.

Ensuring costs are recoverable in these matters levels the playing field between litigants. In a paper that recognises these concerns, the NSW Law Reform Commission (**LRC**) recently concluded:

> We see merit in providing courts with the ability to make a costs order in cases where a lawyer is acting pro bono.[35]

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[32] See for example *Wentworth v Rogers* [2006] NSWCA 145, *King vKing* [2012] QCA 81, in which the costs agreements were not upheld; and New South Wales Law Reform Commission, *Security for costs and associated orders*, Report No 137 (2012) [3.41-3.65].

[33] Consumer Action has a template conditional costs agreement , provided by Justice Connect (formerly PILCH Vic) and drafted by one of its member firms.

[34] In the 18 months to August 2013, Justice Connect received 26 inquiries from lawyers seeking assistance with costs recovery.

[35] New South Wales Law Reform Commission, *Security for costs and associated orders*, Report No 137 (2012) [3.61]

Whilst not recommending an alternative, the LRC had doubts about whether the practitioners acting pro bono should receive those costs. With respect, we submit the LRC conflates conditional pro bono costs agreements (where there is no expectation of fees, and any damages recovered would be quarantined from fees) with no-win-no-fee (where matters are only taken on a commercial assessment the matter will be remunerative, and fees may eat into damages).

Additionally, we fail to see the mischief if a small percentage of lawyers are motivated take up matters pro bono because a small amount on party party costs might be recovered. There is considerable upside in allowing those CLCs and pro bono lawyers that are willing to undertake pro bono to recoup their costs, and by extension, provide services to other parties.

Recommendation
Court Rules or legislation should be introduced that expressly empower a Court or Tribunal to make a costs order in favour of a CLC or pro bono represented client, notwithstanding the client's obligation to pay legal costs to the CLC or pro bono lawyer is conditional on a costs order being made and/or that costs are actually recovered from another party.

We endorse proposed legislation prepared by JusticeNet (formerly PILCH Vic), and slightly varied here, as follows:

Conditional costs agreements in CLC and pro bono cases

(1) This section applies where a court is satisfied that the legal services to which a conditional costs agreement relates have been provided by a CLC or on a pro bono basis.

(2) A court may make an order for costs in a matter to which a conditional costs agreement relates, and those costs are recoverable by the client, notwithstanding that the payment of some or all of the legal costs is conditional upon:
   (a) the making of an order for costs in favour of the client in respect of the matter; or
   (b) the client recovering any sum in respect of the matter from another party by way of costs.

   and the relevant condition has not been satisfied at the time the order for costs is sought or made, or the costs payable under the order for costs are assessed.

(3) On the assessment of costs payable under the terms of any judgment or order, including an order made under this section, or of any settlement of an action or claim no item thereof shall be disallowed merely because the obligation to pay in whole or in part for the service to which the item relates is conditional upon the client recovering any sum in respect of the matter from another party, whether by way of costs or otherwise, and that condition has not been satisfied at the time of the assessment.

Funding for litigation

This section responds to chapter 13 of the issues paper

Contingent billing, litigation funding & class actions

Consumer Action submits that private funding of litigation, whether by class action lawyers or litigation funders, can be an efficient means of providing access to justice by reducing the reliance on public funding for litigation, whether that is funding regulator action or legal assistance services.

We are of the view that, in consumer areas, there is much consumer detriment that goes un-remedied that could be addressed through class actions. While there are a number of consumer class actions run, including current actions in relation to banking fees[36] and payday lending[37] (both of which involve problems initially identified by community legal centres), the amount of litigation does not seem proportionate to consumer detriment evidenced, for example, by the number of systemic issues identified by industry ombudsman schemes. We are unsure of the reason for this, but we submit that ensuring consumer detriment is remedied contributes to fairness and efficiency in markets.

We consider that limitations on lawyers entering contingency fee arrangements should be investigated closely. Lawyers can already enter conditional cost agreements including uplift arrangements, where this is based on the amount of work done by a lawyer. However, lawyers are prohibited from entering into "no win, no fee" arrangements where legal fees are calculated as a percentage of the amount recovered in civil proceedings. This is inconsistent with the position of litigation funders, who are able to fund litigation in return for a share of the proceeds if the case is successful. At the very least, this anomaly needs to be addressed—it may increase competition in this arena.

We acknowledge that there are consumer protection concerns in such arrangements, and we must ensure that funders of litigation (whether lawyers or otherwise) do not exploit the interests of their clients, given their financial interest in the litigation outcome. We agree there can be a conflict of interest between the funder and the client. There are, however, already such conflicts in relation to existing conditional cost agreements. For example, it might be in a lawyers' interest to accept a "low-ball" settlement offer so they get their fee even where the client wants to reject the settlement and have a matter proceed to determination, where there remains a risk of losing (and where the lawyer might not be paid at all).

We would encourage the Commission and policy makers to consider how best these conflicts can be managed, rather than limit access to these forms of litigation funding (which can limit access to justice). With the advent of incorporated legal practices, due to the potential conflict of interest between the board's obligation to shareholders and the lawyers' obligation to clients, legislation allows for audits of such practices which consider (among other things) processes to ensure that lawyers act in the interests of their clients.

[36] See http://financialredress.com.au/.
[37] See http://www.mauriceblackburn.com.au/areas-of-practice/class-actions/current-class-actions/cash-converters-class-action.aspx.

Consideration might similarly be given to any additional legal profession rules that might be adopted to ensure that lawyers act in the interests of their clients where they fund litigation.

Recommendation
Measures should be taken to encourage private funding of litigation, whether by class action lawyers or litigation funders, as an efficient means of providing access to justice by reducing the reliance on public funding for litigation.

Tax deductibility of legal expenses

Currently, the taxation legislation enables a business that incurs legal expenses related to producing or defending income to deduct those costs from its taxable income.[38] An individual who incurs legal expenses in disputes about the provision of goods and services consumed in a private capacity cannot do the same.

Using the example of a common dispute community legal centres are asked for advice and assistance in, this means a motor car trader, who is being taken to a tribunal or a court because they have sold a defective vehicle to a consumer, can deduct legal expenses and associated costs as part of their business costs. The consumer, who may be in dire need of the vehicle to get to and from work, transport children between home and school, or other private and domestic activities, does not enjoy this tax relief, even if lack of access to a vehicle may mean the difference to them between employment and unemployment.

It is also not possible to easily establish how much this relief for business costs the taxpayer in general, as it is a general deduction, not a specific subsidy, and therefore not a reportable item in Treasury's Tax Expenditure Statement. Nor is it possible to glean this information from ATO data captured from annual company tax returns. Under the section in the Company Tax Return form related to expenses, legal costs are not specifically identified, and would presumably be listed under "other" expenses.

The inequity created by this differential treatment of individual versus business tax deductions raises a number of concerns. We agree that it is unlikely this deductibility plays a significant role in a business' decision whether or not to commence litigation against other businesses. However, the treatment of legal expenses is likely to play a role in how business litigants commence and conduct legal proceedings against consumers. For example, it is very common for creditors and debt collectors routinely to issue batches of legal proceedings against consumers to recover alleged debts, even where court fees and legal costs exceed the amount of the alleged debt.[39]

As previously outlined, for consumers, high legal costs and risks relating to costs orders have a significant bearing on decision-making, especially where adverse orders may lead to the loss of property such as homes. It is a fact that consumers often agree to settle a matter so as to avoid the risk of further legal costs, even where their case is strong.

[38] Section 8-1 of the *Income Tax Assessment Act 1997* (Cth) allows a deduction for all losses and outgoings to the extent to which they are incurred in gaining or producing assessable income.
[39] Of course, we also recognise that most of these matters are undefended and proceed to default judgment. This often means the consumer is ordered to pay the creditor's costs in addition to the original debt amount.

For businesses, costs are likely to play a similar role in decisions about conducting legal proceedings. Thus the tax deductibility of legal and other expenses related to pursuing litigation is also likely to impact on decisions about pursuing litigation. In particular, businesses might attempt to minimise legal expenses or not pursue claims or defences that lack legal merit if they were unable to deduct legal expenses, leading to increased levels of settled or conciliated disputes.

If reform to the differential tax treatment of business legal expenses did lead to improved litigation conduct by businesses as described above, this would be an excellent policy outcome. However, even if the tax treatment of legal costs does not impact on corporate behaviour in this way, there remain good reasons to change the way in which legal expenses are treated by Australia's tax legislation. The fact that businesses can deduct legal expenses effectively means that business pays a smaller contribution towards the publicly funded legal system than do other litigants, despite being heavy users of that system.

A solution to this would be to amend court fees so that fees for businesses to access the public civil justice system are higher than fees charged to other users, on a formula that redistributes the cost burden of funding our legal system more equitably, but this recommendation has not been widely adopted.[40]

Some parties, notably the Law Council of Australia, have argued that any change in the tax treatment of legal expenses would impact on businesses' "access to justice" and "equity".[41] This argument sits at direct odds with the assertion by the same interests that a change to the tax deductibility of legal expenses would not modify the behaviour of businesses in deciding whether and how to conduct legal proceedings. More importantly, however, it is fundamentally misconceived in that it is the current situation that reflects inequity and a lack of access to justice—for individuals.

Reform to the tax treatment of legal expenses would also likely result in an increase in taxation revenue for the Government, even acknowledging that there might be some offset from any loss of tax on legal expenses received as income by lawyers and experts. In our view, these additional receipts could fund better (and true) access to justice initiatives, for example, more legal aid funding for low-income and disadvantaged members of the community.

Recommendation

Increase the fees for business users of the court and tribunal system to compensate for the tax deductibility enjoyed by business but not consumers in accessing the justice system.

[40] Law Reform Commission of Western Australia, *Review of the Civil & Criminal Justice System in Western Australia*, June 1999, p 50.

[41] See, eg, Law Council of Australia, *Submission to Standing Committee of Attorneys-General*, 17 July 2008, available at: www.lawcouncil.asn.au/sublist.html?section=&month=&year=2008&search=civil+justice&searchon=titles. The Law Institute of Victoria and the Victorian Bar have also opposed any reform to the tax treatment of legal expenses: see Victorian Law Reform Commission, *Civil Justice Review*, Report, May 2008, p 725.

Recommendation
Amend the Company Tax Return to include a line item for legal expenses, to better enable policy makers to assess and report on the cost to the community of subsidising access to justice for the commercial sector.

Better measurement of performance and cost

This section responds to chapter 14 of the issues paper

Evaluation of legal assistance services

Consumer Action strongly supports the Commission's statement in the Issues Paper that with "substantial application of public resources, governments inevitably want reasonable assurance that such resources are being applied efficiently and effectively".

Consumer Action and the Footscray Legal Service have recently done some work on measuring effectiveness which we would ask the Commission to consider. The report, *Encouraging Good Practice in Measuring Effectiveness of Legal Assistance Services,*[42] warns against measurements that are unlinked to the nature of the services being delivered and the aims which the services are supposed to achieve. The report demonstrates, through case examples, how transaction based measurement can overlook effective, holistic, responsive and strategic delivery of legal services which directly respond to client situations working to prevent the revolving door of legal problems. This is not to say that quantitative reporting is not important (see further below), but that evaluations should also be complimented by qualitative research that can explain statistics and contribute to an outcome-focused approach.

In addition, as mentioned earlier, Consumer Action has over the past year has been conducting its own evaluation using the methodology outlined in Dr Liz Curren's report, *I Can See Now there's Light at the End of the Tunnel: Legal Aid ACT: Demonstrating and Ensuring Quality Service to Clients*.[43] This has been adapted to suit the nature of the work and the telephone advice service of Consumer Action. By regularly examining the impact and quality of advice giving through a follow up survey of clients by phone, Consumer Action has been able to ascertain how clients are using the advice and whether as a result we are having an impact on the outcomes they have achieved. This follow-up survey has also enabled Consumer Action to identify systemic barriers facing clients after the advice is given and adapt and enhance the service's approach to advice giving. This evaluation will be conducted twice yearly to enable continual service improvement using techniques that do not place an undue administrative burden on an already lean service.

Consumer Action has also developed its own data management system which is under continuous improvement. This is effectively a customer relationship management system and assists the organisation to meet the data collection requirements of its primary funding bodies and their accountability frameworks.

[42] 'Encouraging Good Practice in Measuring Effectiveness in the Legal Service Sector', May 2013, available at: http://consumeraction.org.au/report-encouraging-good-practice-in-measuring-effectiveness-in-the-legal-service-sector/.
[43] Legal Aid ACT, 2012, available at: http://www.legalaidact.org.au/pdf/Light_at_the_end_of_the_Tunnel_Legal_Aid_Services_Quality_and_Outcomes.pdf.

Recommendation
That funders resource, enable and encourage CLCs to develop evaluation tools best suited to the nature of their service.

Understanding return on investment in public services

As noted above, each agency and service delivery organisation must collect and report on indicators that they have assessed as being important to them, and where appropriate, their funding bodies. However this does not answer the broader question, which is the value to society of a strong, fair, equitable and accessible justice system. Such an exercise is possible, but is beyond the scope of an individual organisation or agency.

To date, such assessments have been framed as a cost-benefit equation. However this tends to measure only financial value, or approximations of it. This means that many things important to society will be unaccounted for, and policy decisions may be deficient as they are based on incomplete information about the full impact of a change or introduction of a new law or regulatory requirement. An evolution of the cost-benefit analysis is the social return on investment (**SROI**) framework, which enables the measurement of, and accounting for, a much broader concept of value by incorporating social, environmental and economic costs and benefits.

This methodology lends itself to the challenge of assessing the value and return to society of an open, affordable and equitable access to justice system, as it can measure change in ways that are relevant to the consumers, organisations and businesses that experience or contribute to it.

While it is not yet widely used in Australia, it is commonly used overseas, and has been taken up by mainstream institutions here in Australia. The National Australia Bank, with the Centre for Social Impact, has published research into the social and economic impacts of its financial inclusion programs. The report, *'Small is the new big: Measuring the impact of NAB's Microenterprise Loans'*[44] found that for every dollar invested, $1.22 was returned to the economy, benefiting community and government by providing employment pathways and new income generation through business returns. Similarly, the same partnership evaluated the social and economic return of NAB's StepUp loan program and found that for every dollar invested, $2.68 was returned to society and the economy through a reduced reliance on welfare, savings on fringe credit and reduced stress and anxiety.[45]

SROI analysis can be used as a powerful tool for strategic decision making and to guide investment. It is underpinned by a robust methodology that can make use of the data already collected by the various agencies, and track progress towards the desired impact. Governments and others can then make judgments about social return provided for the public funding investment, set realistic and meaningful performance targets based on

[44] Helms, Adams and Georgouras (2012) *Small is the new big: Measuring the impact of NAB Microenterprise Loans.* In partnership with the National Australia Bank, March 2012
[45] Bennett (2013) *A little help goes a long way: Measuring the impact of the StepUP Loan program*. In partnership with the National Australia Bank, April 2013

impact, not outputs, and drive a culture of continual improvement based on value for money and good outcomes for the community.

Recommendation
That the Commission consider the benefits of using SROI methodology to assess and track the social benefits and impact of the access to justice arrangements.

Please contact us on 03 9670 5088 or at info@consumeraction.org.au if you have any questions about this submission.

Yours sincerely
CONSUMER ACTION LAW CENTRE

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