



29 February 2016

By email: acesstojusticereview@justice.vic.gov.au

Ms Kerin Leonard
Project Manager
Access to Justice Review
Department of Justice and Regulation
Level 24, 121 Exhibition Street
Melbourne VIC 3000

Dear Ms Leonard

Access to Justice Review

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to provide input to the *Access to Justice* Review. We have provided responses to specific relevant questions raised under each Term of Reference of the Review.

Recommendations

This submission discusses where we think the justice needs of vulnerable Victorians are being met and what is effective in meeting those needs, but also recommends specific improvements. This includes:

- Using the experience of the Federal Circuit Court financial counselling for self-represented litigants as a model, look for opportunities to introduce for court-based services that link people with available services.
- The recommendations in the 2013 report *Like 27 Chainsaws: Understanding the experience of default judgement debtors in Victoria*, and in particular highlight recommendations to:
 - Improve the information flow to debtors in relation to the assignment of debts to third parties and during court proceedings;
 - Improve the court process for consumer debtors by providing plain language information about the process and referrals;

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- Create an additional option for debtors when legal proceedings are issued, allowing debtors to enter into an agreement to repay in instalments without having default judgment entered against them; and
- Create a checklist for Registrars and Magistrates to complete prior to granting default judgment in favour of a creditor that will help address ongoing gaps around proof of debt.
- Funding and fostering the development of long term partnerships between legal services and community workers, and legal health checks, to facilitate effective secondary referral programs and processes.
- Expanding the industry external dispute resolution model should to other sectors, including retirement housing and vocational training. We propose the establishment of a Victorian Vocational Education and Training Ombudsman, a Retirement Housing Ombudsman, and a Retail Ombudsman.
- Evaluating all alternative dispute resolution (**ADR**) programs against the six benchmarks used to assess the performance of industry external dispute resolution schemes.
- Ensuring compulsory ADR is free for any party who has already been granted a fee waiver.
- Introducing automatic fee waivers for people who clearly cannot afford an application fee including anyone receiving a social security or veteran's pension, benefit or allowance; in receipt of assistance from Victoria Legal Aid or assistance from a community legal centre; or anyone receiving assistance from a financial counsellor; or anyone in prison or detention. If an applicant is eligible for a fee waiver, that waiver should apply to all fees (including for injunctions and multiple day hearings).
- Simplifying court and tribunal forms and guidance, specifically designed to be accessible to applicants with low literacy.
- Removing the requirement that parties in civil claims at the Victorian Civil and Administrative Tribunal serve papers on each other. Alternatively, if the Government believes that no change is required, it should investigate and publicly report on:
 - how much money VCAT saves by requiring parties to serve each other;
 - how many applications are abandoned or delayed as a result of the current service requirement.
- Relaxing restrictions on parties being represented by a solicitor at VCAT, particularly in cases where an individual applicant is up against a business that is familiar with the jurisdiction or is represented by a solicitor. We suggest that VCAT could publish guidelines setting out when it will allow representation.
- Appointing in-house motor vehicle and other experts to VCAT to ensure that low income applicants are not required to spend large amounts of money hiring expert witnesses or having expert reports produced. The Government should also consider creating a new VCAT list along the lines of the New Zealand Motor Vehicle Disputes Tribunal.

- Funding increases for community legal centres recommended by the Productivity Commission’s *Access to Justice* review be implemented without delay.
- As recommended by the Victorian Law Reform Commission (**VLRC**) in 2008, creating a Justice Fund to provide financial assistance to parties with meritorious civil claims, provide an indemnity in respect of any adverse costs order and meet any requirements imposed by the court in respect of security for costs.
- Scoping the creation of a self-represented litigant service for courts and tribunals (located at courts and tribunals but independent from the courts and tribunals themselves).
- Supporting innovative pilots that can help deliver targeted assistance to Victorians struggling in the justice system, such as the financial counselling service at the Federal Circuit Court.

About Consumer Action

Consumer Action Law Centre is an independent, not-for profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

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TOR 1: The availability of easily accessible information on legal assistance services and the Victorian justice system, including advice on resolving common legal problems

Question One: *How would you normally try to solve a legal problem? Who would you go to for help, information or advice? If you are from an organisation, where do you refer people for legal help?*

Consumer Action is the largest specialist consumer legal practice in Australia. We provide a range of legal assistance services:

- free legal advice to, and litigation on behalf of, vulnerable and disadvantaged consumers across Victoria;
- legal assistance and professional training to community workers who advocate on behalf of consumers;
- information and advice for consumers who are able to self-advocate; and
- general community education on legal issues using campaign websites and expert media commentary.

Our team of expert lawyers provide free legal assistance through a state-wide telephone service, publish self-help legal information, and litigate on behalf of vulnerable and disadvantaged consumers across Victoria. As well as working with consumers directly, we build the capacity of the community sector, especially financial counsellors, to identify and respond to consumer problems by providing secondary consultations and training.

We recognise that legal problems for our clients arise out of complex health, financial and social circumstances and we work closely with our team of financial counsellors to provide a holistic service.

We also understand that we cannot meet all unmet legal need. Our lawyers spot emerging systemic issues and we work closely with our clients and our Policy and Campaigns team to have an impact for all vulnerable and disadvantaged consumers through law reform, encouraging regulatory action and industry change.

Question Two: *What format is most helpful when you are looking for information (e.g. online, printed material, telephone information or face-to-face information)? If you are from an organisation, what forms of material do you find get used by the community you work with? Does this vary between different parts of the community?*

Self-help tool kits and factsheets

Like many others who provide legal assistance, Consumer Action publishes online self-help tool kits whose primary purpose is to provide individual legal assistance aimed at individuals with the capacity to self-advocate, leaving our lawyers free to assist more disadvantaged Victorians who need intensive, individual assistance. Before we create self-help tools or factsheets, we look to what already exists. Our focus on any new information is generally specialist or where information is not available. The most popular fact sheets we publish are rights around the collection of old debts, dealing with private car park fines, and correcting mistakes on a credit report. The factsheet on dealing with old debt was viewed 24,400 times and accounted for 7.3% of the total number of hits to our website in the past year, closely followed by 22,200 view of the private car park fines fact sheet (6.6% of website traffic).

Our emphasis is on written English factsheets, though we have translated materials on door to door selling rights into 8 community languages. Our legal advice service can be accessed via the interpreter service, which ensures access for those with low English.

All our information resources—including tool kits and community education websites—are developed internally by experts in our legal and policy teams, and aim to use clear, straightforward language. All publications are checked internally for their suitability and to confirm they are appropriate in language and content for the audience before publication. We are in the process of developing a formal evaluation process for these publications.

This can of course be a challenge, given that the legal information needs to be given in context and use appropriate legal terms. Many staff members have undergone training in plain language conducted by the Victoria Law Foundation to help us to publish appropriate material.

An internal project is currently revising the content of the legal fact sheets on our website, with a view toward improving their accessibility to the general public. Simplifying the language to broaden the audience for self-help resources and improving the visual appeal should help make our information more accessible.

Public education websites

In addition to our fact sheets and tool kits, we publish a number of websites that provide community education about rights and legal protections whilst pursuing a law reform agenda. We also regularly post media releases and web warnings relating to proceedings we have issued against traders for alleged breaches of the law and other legal issues that we are focussing on. These releases can inform consumers of problems to look out for and the availability of various forums for redress such as the Victorian Civil and Administrative Tribunal (**VCAT**).

Recent examples include:

- Do Not Knock, a website that highlighted consumer rights around door to door selling and referred people to where they could get a Do Not Knock sticker to enforce their rights. It also allows consumers to report instances where businesses breach the law.
- Debt Trap, an information site about payday loans and why it's important to not use them, directing people to alternative such as the No Interest Loans Scheme.
- Fix It, a website that raised awareness about how energy providers can change the price of a "fixed" contract and sought to redress the imbalance of consumer and business rights.

In coming months, a new website will be launched providing extensive information about junk insurance that we believe is commonly mis-sold, that will facilitate consumers applying for a refund for this product.

All these education campaigns appeal to a mainstream audience, and provide general advice as opposed to the targeted and tailored information in a legal dispute. The broad objectives of these websites is to contribute to some systemic change, thereby preventing legal problems as a form of early intervention.

Question Three: *What are some of the legal problems that you have experienced? If you are from an organisation, what are some of the common legal problems experienced by community members you work with?*

Consumer Action assists Victorians with a wide range of consumer law problems, including disputes about:

- defective goods
- the supply of services
- banking
- bankruptcy
- consumer leases (including “rent to buy”)
- credit
- debt collection and debt assistance services
- door-to-door sales
- electricity, gas and water
- insurance (other than following road traffic accidents)
- mortgages
- motor vehicle purchases
- refunds
- telephone and internet
- unfair contract terms

Question Four: *Is the Commission’s proposal to establish a well-recognised entry point to the civil justice system appropriate for Victoria? Would a single entry point to the civil justice system be useful in helping you better understand your legal rights and address the legal problems you have experienced? If established, what should a well-recognised entry point do and how should it be governed?*

We support the proposal for a national referral and advice service with a widely recognised entry point for legal referral. Victoria Legal Aid’s Legal Help service already works as such a service for Victoria. This should not, however, be the *only* entry point to the legal assistance system.

The national debt hotline is another example of how this kind of service might work. The national debt hotline (1800 007 007) connects a caller to a centre in their state staffed by qualified financial counsellors (and in some states also solicitors) who can then provide financial counselling and/or legal advice and referrals to a financial counsellor located near the caller for more extended assistance. Referrals are also given to other legal and community services as required.

The natural progression for this hotline is to be a one stop shop set up where the caller gets access to financial counselling and legal advice (working in a specialist multi-disciplinary team) in each State and Territory in Australia. Consumer Action and other organisations like the Financial and Legal Rights Service in NSW have a multi-disciplinary team including financial counsellors and solicitors. The caller does not need to identify the legal problem because the staff identify the legal problem for the caller.

The national debt hotline is a relatively recent innovation, but is already attracting over 120,000 calls per year. A single national number assists promotion through the media, and it has also made it easier to raise awareness of the availability of financial counselling at the point where people are in the

greatest need of the service. For example, if a debtor defaults on a credit contract, the creditor cannot enforce their rights under the contract before they provide a standard form notice under section 88 of the National Credit Code. Among other things, this notice includes the following:

If you are having financial difficulties you can also contact a financial counsellor on 1800 007 007 (free call)

For information about your options for managing your debts, ring 1 800 007 007 from anywhere in Australia to talk to a free and independent financial counsellor.¹

A nationwide legal referral line could be publicised in similar ways.

Question Five: *What other strategies would be useful to ensure that Victorians know where to go for help to solve their legal problems and understand the available dispute resolution mechanisms and legal assistance services?*

Information alone doesn't help people address their legal problems

There is limited value educating people about their specific legal rights before they need to enforce those rights. The key is making clear information available and readily accessible at the time it's needed. Listing the details of industry based dispute resolution schemes on bills and transaction records, for example energy and telecommunications bills, and bank statements, is one way to direct people to a place where they can seek help if they are unable to resolve a dispute directly with their creditor or service provider.

Online advertising and promotion of key information portals such as the Everyday Law website and other legal information sites is a good start point for promoting available resources, but we note there can often be competition with for-profit services. Consumers seeking help for debt, for instance, will instead be presented with advertising for debt management firms if they search online for help—even though these businesses can exacerbate their financial problems rather than assist in the resolution of them, as a financial counselling session may achieve. Strategies for promoting legal assistance need to recognise that we are in competition with for profit services that may not be independent or acting in their clients' interests.

Financial counsellors and other case workers are also sources of legal information. While they can't provide legal advice, they can solve problems many people would consider need a lawyer, for example negotiating with creditors to avoid bankruptcy.

It's important to recognise that for our particular client base, it is not just a lack of information that prevents access to justice. We refer the review to research by McDonald, Forell and People that talks about moving beyond information provision as a legal solution. To quote the authors directly:

Further analyses of the LAW Survey demonstrate that 'not knowing what to do' about a legal problem was rarely the only reason respondents cited for doing nothing to try to resolve a legal problem and was more commonly reported in combination with several other reasons for inaction. Indeed, two distinct clusters of reasons for inaction were observed: one, including

¹ See Form 12A, National Consumer Credit Protection Regulations 2010.

‘not knowing what to do’, pointing to ‘constrained’ inaction and the other pointing to ‘informed’ or appropriately decided inaction... To be effective, community legal information and education strategies may need to extend beyond the provision of awareness, knowledge and understanding of legal issues to also develop the skills and confidence (or motivation) required to encourage action in response to legal issues.²

Knowledge of rights is only one part of the issue. As McDonald et al conclude:

Strategies that aim simply to improve community legal knowledge and understanding may, in and of themselves, be insufficient to equip some people to act appropriately, because they do not address skill, psychological and resource barriers to action³.

Effectiveness of community legal education strategies

The availability and provision of information on how to solve common legal problems should not in itself be a measure of the effectiveness of legal information. A greater emphasis is needed on the extent to which legal information is being used by target audiences to help them with their specific legal needs.

We refer the review to recent research by the Law and Justice Foundation about effective community legal education and information strategies (CLEI).⁴ One of the most important points made in that paper is that providing generic information may be cheap and relatively simple, but it doesn't provide actual legal advice based on a client's individual circumstances and the barriers people face in successfully resolving their legal issues.

It argues CLEI should be viewed as an element within a broader continuum of available legal assistance service options. CLEI often complements, and is complemented by, other legal assistance strategies. Instead of a simple trade-off between CLEI and legal advice, effectiveness and efficiency at times will require both; and/or potentially, minor assistance and duty services.

Forell and McDonald report that analysis of the LAW Survey data undertaken by McDonald and Wei indicates that while resources are widely available, use of legal information and self-help tools by the general community remains relatively low. By way of example, a self-help resource was used for 19.5 per cent of problems, but it was the highest level of action (or the most intensive assistance sought) for only 8.7 per cent of problem). The researchers highlighted that those with three or more indicators of disadvantage tried a self-help resource for 14.9 per cent of their problems, but it was the highest level of action for only 3.6 per cent of problems. These findings reinforce other research that suggests that self-help materials are less suited to those with lower capability.⁵

Forell and McDonald have developed a model to help differentiate between different types of CLEI, to think more specifically about when to use CLEI, for whom and to what end. They identify 3 broad

² Hugh M. McDonald, Suzie Forell & Julie People, *Limits of legal information strategies: when knowing what to do is not enough* Updating Justice No. 44, December 2014, p1

³ McDonald et al, *Limits of legal information strategies*, p5

⁴ S Forell and H McDonald *Beyond great expectations: modest, meaningful and measurable community legal education and information* online at <http://www.lawfoundation.net.au/ljf/app/&id=D1D67F87F681ECBACA257F0F0021C08A> accessed 4/2/2016

⁵ McDonald et al, *Limits of legal information strategies*, pp 6-7

types of CLEI have been identified: CLEI to self-help; CLEI to get help and reinforce help; and CLEI to give help.

For the most vulnerable Victorians, access to an advocate who can provide individual help to resolve a dispute simply can't be substituted by a fact sheet or self-help tool kit. Funding for an appropriate level of frontline services remains a priority area for Consumer Action and is discussed further under TOR 6.

TOR 2: examine options for diverting people from civil litigation and into alternative services where appropriate, such as a ‘triage’ model

Question One: How do organisations currently employ triage and diversionary strategies, and what referral mechanisms are the most effective?

Triage and diversionary strategies

Legal service

Consumer Action’s legal practice uses a well-considered, detailed and documented process to ensure that we focus resources efficiently, using an internal triage approach. We provide assistance to people calling our consumer advice line with reference to the following service levels:

- triage (3-15 minutes)
- call back (up to 45 minutes)
- ongoing assistance (longer than 45 minutes, but without direct advocacy)
- case work (direct advocacy)
- follow-up

These service levels (developed following an independent review of our intake process in 2012) allow us to minimise the amount of time we spend with people we cannot assist and to maximise the resources to disadvantaged consumers to assist them to achieve meaningful outcomes, and those who present with public interest issues.

The 'triage' stage goes well beyond assessing eligibility against income criteria. During this stage, a solicitor quickly identifies whether the consumer resides in Victoria and is enquiring about a consumer issue, and for callers who do not meet those threshold tests, we aim to end the call within a few minutes. Where callers meet these thresholds, the solicitor will provide limited information, advice and referrals, where this is appropriate. Lawyers also seek to identify any vulnerability or disadvantage that may be a barrier to the consumer accessing the advice and assistance they need as well as any broader systemic issues their legal problem raises.

In the event that more assistance is required and the caller is identified as being disadvantaged or vulnerable, the solicitor may arrange for relevant documents to be sent in by the client, and arrange for a call back.

During the call back stage and in subsequent stages (should they be required) the focus is on providing information, advice and assistance to consumers which will empower them to resolve their dispute in the best possible manner. At each stage there are processes to ensure that resources are directed at the people who need them the most. For example, in determining whether to provide a call back for a consumer, there set guidelines which the lawyers must have regard to:

- the consumer is vulnerable or disadvantaged;
- there is a likelihood that further assistance will contribute to a beneficial policy outcome for disadvantaged or vulnerable consumers; and/or
- further assistance will enable the consumer to obtain a favourable outcome.

No matter is taken on for case work unless approved by a weekly case intake meeting which assesses the value of directing resources to the matter against a variety of indicators including:

- the position of the client (for example, whether they are disadvantaged or vulnerable, or whether they are capable of advocating for themselves with more limited assistance);
- what is at stake for the client (for example, a client at risk of losing their family home will be more likely to receive assistance);
- the legal merit of the case, and what can realistically be achieved;
- whether the matter would be better assisted by another service;
- whether taking on the matter would have a broader impact.

Combined with good processes for reducing demand for our services—such as good self-help kits and providing support to financial counsellors rather than having the financial counsellor refer the client to us—this makes for an efficient and sophisticated method of targeting resources where they are needed.

Financial counselling

Our MoneyHelp financial counsellors are rostered on to provide triage and non-triage sessions in order to be able to meet call demand. When the financial counsellors are rostered on to triage sessions they aim to complete the call in under 15 minutes. During a triage call the counsellor will:

1. Identify the urgency level
2. Identify whether Moneyhelp is best placed to assist the client (rather than a face to face financial counsellor), for example does it appear that the information required is straight forward, or is the client going to need immediate support or advocacy that we cannot give?
3. Identify whether client needs a longer session of support and referral to face to face counselling, for example if client is very stressed about circumstances and a longer explanation will help alleviate stress before a face to face appointment
4. Provide information to the caller where the request is simple, for example information about a credit report, referral to Ombudsman for disconnection, and
5. List for a callback by another financial counsellor later in the day if the request is going to require a session of more than 15 minutes.

We have found this division of triage and non-triage calls to be essential when dealing with periods of high demand which can occur at different times during the day.

Effective referral pathways

Consumer Action has a mix of avenues to enable effective referrals for consumers needing help with a consumer law problem.

Co-location

One way to facilitate referrals is to co-locate services at point of delivery. Consumer Action co-locates financial counsellors (MoneyHelp) and our community legal centre solicitors. Other community legal centres (**CLCs**) have a similar model.

One of the benefits of co-location is that it encourages a sound understanding among one group of caseworkers of what the other group does, and what they can do for clients. This understanding comes as much out of sharing the same space (for example, informal discussions in the lunchroom) as it does from formal mechanisms (like having representatives of the legal practice attend financial counsellor team meetings, and vice versa). This kind of understanding should reduce the amount of incorrect referrals which waste resources and fatigue clients. Co-location also makes it easy for members of each team to access informal advice on points in the other team's expertise.

Co-location also facilitates a situation where financial counsellors and solicitors can work as a team to provide a holistic solution for the client's problems. The model of financial counsellors and solicitors working together on complex cases was a direct reaction to problems arising where the legal case would be solved only for the client to end up in bankruptcy or lose their home anyway because the rest of their financial situation required advice.

Additionally, Consumer Action has a policy and campaigns team who look to address any systemic issues arising from both the financial counselling and legal practices. It is an effective way of maximising efficiency.

The report *Consumer Credit Legal Services in Australia*⁶ supported the co-location of financial counselling and legal services in consumer credit legal services. The report recommended specialist consumer credit legal services be available in every state and Territory in Australia. We contend that Governments should adopt the recommendations of the report and embark on a strategy of integrating credit legal services and financial counselling across Australia.

Worker advice line

Good systems can also provide assistance without co-location. For example, Consumer Action runs a worker advice line which allows external financial counsellors (and other community workers) to access advice from a lawyer on points raised in their casework which are outside of their expertise. This is far more efficient use of resources than a referral only process. It aims to prevent the need for referrals (where the advice allows the financial counsellor to manage the case themselves) and means that the legal information can benefit multiple clients of the financial counsellor in future.

Outreach program

Consumer Action runs an outreach program, whereby our specialist lawyers provide training to other professionals in consumer law matters. As well as a skills and knowledge transfer, the intention is to build relationships and ensure workers can identify consumer law issues when working with clients, so that where questions of consumer law arise, workers know who to approach for help and legal needs are addressed.

This year we provided approximately 60 hours of training to hundreds of community workers on a variety of topics, undertook a review of how we deliver our professional training program and identified short and long term strategies to both improve and tailor these services. Workers consistently evaluate this service highly with feedback such as:

"The content was well designed to the level 2 audience, anchored with useful and relevant content and delivery was engaging".

"In particular, the 'mock debate' was an extremely effective tool which afforded participants the opportunity to employ their new skills during a simulation".

⁶ G Renouf and P Porteous, *Consumer Credit Legal Services in Australia*, unpublished report to ASIC, 2011.

Building links with community based service providers

Collaboration is also possible using more innovative methods, and we would strongly advocate trials using different approaches to gain an insight into what can work, rather than taking a one-size-fits-all approach. For example, legal training supported by a remote service delivery offer (using phone, email, teleconference, online resources etc)—to collaborate with service providers who already have strong links and work with disadvantaged communities may be effective. We expect that health service providers will be particularly well placed for developing linkages. This will help reach people unlikely to gain legal help for their legal problems, enabling earlier intervention to de-escalate severity of problems. This idea is discussed further below in secondary consultations.

Question Two: *Are there appropriate services for people who come into contact with the justice system to be referred to? What connections between organisations are needed to support useful referrals?*

There are numerous obstacles to people seeking advice around their civil law problems, including a paucity of referrals and plain English information even once the person is within the legal process.⁷ These factors result in vulnerable and unsophisticated litigants being confused by court documents, unable to identify their legal position, and unsure of where to go for legal advice. These defendants are consequently less likely to make a timely response to civil claims, even where the claims may be unsound in law. Further, the limited legal options available to civil defendants are often inappropriate to their circumstances.

Public confidence in the administration of justice and the integrity of the judicial system can be greatly enhanced if defendants can seek advice and respond appropriately, based on clear and timely information about how the system works, their rights and obligations, and where to go to seek help.

The role of courts

We believe that, without compromising its impartiality, a Court can play a valuable role in providing information and referrals at key points in the court process, and so enhance its fairness, as well as confidence in the legal process overall.

One example of a timely, appropriate intervention is a pilot service at the Federal Circuit Court providing direct financial counselling services to self-represented debtors in the Court's bankruptcy lists. The pilot service was a collaboration between us, the Court, and a research team from the University of Melbourne Law School (**MLS**).

The objective of the project for us was to assist self-represented debtors to understand the nature of bankruptcy proceedings so they are better able to determine their rights, and to make effective decisions in presenting their cases. The MLS evaluation of the project found that the project has achieved this aim, helping several debtors to demonstrate solvency (thereby avoiding bankruptcy) and helping others to accept bankruptcy as a positive option in their particular circumstances. The

⁷ C Coumarelos, D MacCourt, J People, H.M. McDonald, Z Wei, R Iriana and S Ramsey, *Access to Justice and Legal Needs: Legal Australia Wide Survey Legal Need in Australia*, Law and Justice Foundation of New South Wales, Sydney, August, 2012; M Schwarz, F Allison and C Cunneen, 'A Report of the Australian Indigenous Legal Needs Project', Cairns, James Cook University, 2013. See http://www.jcu.edu.au/ilnp/public/groups/everyone/documents/technical_report/jcu_131180.pdf accessed 17 January 2014 and M Schwarz, F Allison and C Cunneen 'The Civil and Family Law Needs of Indigenous People in Victoria', Cairns, James Cook University, 2013.

Court Registrars have also stated that the project has ensured that debtors can participate more meaningfully in the court process.⁸ We discuss the specific outcomes of this project in TOR 8.

Overall, we have seen that assistance at courts has improved in recent years. However, this does not assist people who don't attend court, including in bankruptcy or debt recovery processes. These are often the most vulnerable people – they commonly don't respond to court documents because they don't understand what is happening, are suffering significant personal stress, or often suffer mental health issues or other disabilities. Targeted intervention is needed to ensure people in this situation are required to come to court or have some further action that helps them understand what is happening, before the next legal steps with significant ongoing consequences are taken.

Recommendation: Using the experience of the Federal Circuit Court financial counselling for self-represented litigants as a model, look for opportunities to introduce for court-based services that link people with services

Improving the experience of default judgement debtors

There are also opportunities to address procedural issues that are impacting disadvantaged Victorians who are failing to engage with the legal system when they should be.

In 2013 a report prepared for the Consumer Action Law Centre by Dr Eve Bodsworth of the Brotherhood of St Laurence, investigated the experiences of people who have received 'default judgments' for debt-related problems.

Each year 30,000 to 40,000 consumers receive default judgments against them in the Victorian Magistrates' Court, often for relatively small debts. Default judgment is a court order imposed without a hearing against one party, usually the debtor being sued, because they failed to provide a defence to court action initiated by a creditor.

The impetus for this study focusing on court data and individual consumers' experiences of default judgment came from concerns about prevalence of default judgments and the impact of such legal action on vulnerable debtors. The majority of all civil complaints in the Victorian Magistrates' court result in default judgment (Magistrates' Court of Victoria 2012). Of particular concern was the high number of claims for small debts which result in default judgment, given the potentially harsh and ongoing consequences for vulnerable consumers.

The report found that the court process confuses many debtors and provides few options for those who cannot afford to repay their debt in full. Most judgment debtors do not seek assistance or advice until late in the debt recovery process. Many judgment debtors acknowledge their debt but felt there is nothing they can do if they cannot pay. Feelings of shame and pride also affected whether they sought help.⁹

Reflecting these findings, a number of changes to default judgement processes were recommended to assist these debtors which we commend to the Review:

⁸ Annual Report 2015, Consumer Action Law Centre, p9

⁹ E Bodsworth, Like Juggling 27 Chainsaws: Understanding the experience of default judgment debtors in Victoria, Consumer Action Law Centre 2013, p9.

- Improving the information flow to debtors in relation to the assignment of debts to third parties and during court proceedings;
- Improving the court process for consumer debtors by providing plain language information about the process and referrals; and
- Creation of an additional option for debtors when legal proceedings are issued, allowing debtors to enter into an agreement to repay in instalments without having default judgment entered against them¹⁰.

The report also recommended the creation of a checklist for Registrars and Magistrates to complete prior to granting default judgment in favour of a creditor. The checklist, which would form part of the judgment (and therefore be available to the public) could include ensuring that the following have been provided by the creditor before judgment is entered:

- Proof of debt
- Proof of ownership of the debt (in the case of assignment)
- Details of efforts to recover the debt, including any agreements entered with the debtor, agreements to waive part of the debt, repayment plans and so on.

Recommendation: We refer the Review to the recommendations of Like 27 Chainsaws, and in particular highlight recommendations to:

- **Improve the information flow to debtors in relation to the assignment of debts to third parties and during court proceedings;**
- **Improve the court process for consumer debtors by providing plain language information about the process and referrals.**
- **Create an additional option for debtors when legal proceedings are issued, allowing debtors to enter into an agreement to repay in instalments without having default judgment entered against them**
- **Create a checklist for Registrars and Magistrates to complete prior to granting default judgment in favour of a creditor that will help address ongoing gaps around proof of debt**

Question Three: *What possibilities exist to improve the way in which people are diverted from civil litigation prior to commencing proceedings, to alternative services, at the earliest opportunity?*

We caution against assuming that diverting all attempts to undertake civil litigation as a good thing. Our client group are hard to reach and often reluctant to seek help in the first instance. Left unsupported they will not generally seek to enforce their rights whether this be through the courts or through alternative dispute resolution services. That is, our client group generally aren't highly litigious to the extent that, without our support, many would forego important legal rights to avoid civil litigation.

Litigation is an important way of testing the bounds of the law, creating precedents, highlighting the importance of abiding by the law and holding traders engaging in unlawful conduct to account. All of which goes some way to minimising the number of consumer disputes people have.

That said, we do recognise that ADR schemes that offer quick, free and fair resolution of disputes are a necessary and welcome part of the legal landscape. Where we have seen these services work well is in industry funded ombudsman schemes such as the Financial Ombudsman Service (**FOS**) and

¹⁰ Ibid

the Energy & Water Ombudsman Victoria (**EWOV**) scheme. Where alternative dispute services are provided, it is imperative that they have consciously implemented structures, processes and staff training that ensures that they are accessible to vulnerable people. Significant gaps exist though, and we discuss this in more detail under TOR 3 and 4.

Question Four: *What could be done to help members of the community make informed choices about diversion from civil litigation?*

It is largely incorrect to say that members of the community make “choices” among different civil dispute resolution options. In most cases there is only one (or possibly no) practical ADR forum available to people, depending on the nature of their dispute.

In most cases where our clients have a choice of court or ADR, one option is much better than the other. For example, even if someone might end up in court, it makes sense for a consumer to go to an industry dispute resolution scheme first, because any decision is not binding on the consumer and the consumer can have a second chance. In disputes with financial services providers, where the latter have issued legal proceedings, individuals may elect to use ADR by complaining to the relevant ADR scheme, in effect staying the court proceedings. In other cases there may be no appropriate ADR options and time will be running out to issue legal proceedings.

We believe that it is important that if people are going to be diverted from civil litigation, they are making an informed choice to do so. This can only happen if they have early access to legal advice and, where necessary, assistance. This can be particularly difficult to ensure for vulnerable people who either don't recognise that they have a legal issue until it is too late (for instance court proceedings have been issued against them for a debt that legally they did not owe in the first place) or who do not know how to access legal services.

It is for this reason that we think it is critical that legal services collaborate with other community services who already have strong links with vulnerable and disadvantaged communities. As stated above, and below in relation to secondary consultations, we believe that these linkages will ensure 'hard to reach' communities are obtaining earlier legal intervention to de-escalate the severity of problems.

Question Five: *Is there a culture of people wanting to 'have their day in court' that creates a barrier to diversion from civil litigation? If so, how could this change?*

We have no evidence that the desire to have a day in court exists amongst our client base of low income, disadvantaged and vulnerable Victorians. If anything, needing to appear in court or participate in legal proceedings is a significant barrier to our client's pursuing their legal rights with many clients agreeing to a compromised settlement offer to avoid litigation in what is otherwise a legally meritorious claim.

Question Six: *Is the proposal to establish a well-recognised entry point to the civil justice system an appropriate proposal for implementation in Victoria?*

As outlined extensively in our response to this question in TOR 1, we support the proposal for a national referral service with a widely recognised entry point for legal referral and suggest it replicate the 1800 debt hotline.

Question Seven: *What possibilities exist to improve the way in which VCAT and the Courts divert people into alternative services and mechanisms for resolving disputes?*

The fundamental difficulty with seeking to divert complaints is that once a matter has gone to court or VCAT, the matter has generally escalated to such an extent that untangling it can be resource intensive. Duty lawyer services that see people at the point at which they file or defend proceedings could assist to divert to more appropriate dispute resolution opportunities—rather than the day of the hearing—but this should not be prioritised over and above resources for early intervention strategies.

Additional specialised Ombudsman schemes, that require a stay of court proceedings while an investigation can be undertaken, are one option for diverting complaints and is discussed in greater detail under TOR 3 and 4. Where no appropriate ADR schemes exist, individuals only have the option of taking a matter to court. Needless to say, increasing the costs of fees in courts and tribunals is not an equitable way of diverting people to other alternative services.

Question Eight: *What opportunities are there to expand the use of diagnostic tools and contemporary service delivery models (such as holistic services) in Victoria?*

Secondary consultations as effective referrals

The Productivity Commission *Access to Justice Arrangements* report noted, most people consult only one adviser when they have a legal problem.¹¹ Any system would need to ensure that those seeking legal advice were not simply referred elsewhere, which could easily result in drop off.

Many professionals provide services to disadvantaged Australians, but may be unable to identify a legal need. Even if they do, they may not have the confidence to handle it or refer it correctly.¹² Individuals only consult lawyers for about 16% of their legal problems and a key access point to services for disadvantaged individuals is the health profession.¹³ It is certainly our experience that clients are usually experiencing multiple issues in their life when they contact our service for legal assistance and they have generally accessed health services before they get to us.

Problems capable of legal solution that might not generally be referred to Consumer Action include energy disconnection and debt, debt collection, fringe lending, unfair contracts etc. With community

¹¹ Productivity Commission, *Access to Justice Arrangements* Productivity Commission Inquiry Report, Vol 1, September 2014 figure 5.4, p164

¹² L Curran *The Under-rated Value of Secondary Consultations* Conference Paper the National Association of Community Legal Centres Conference, August. 2015

¹³ Coumarelos, C., MacCourt, D., People, J. McDonald, H.M., Wei, Z., Iriana, R. & Ramsey, S. (2012) *Access to Justice and Legal Needs: Legal Australia Wide Survey Legal Need in Australia*, (Sydney, Law and Justice Foundation of New South Wales). Available at: [http://www.lawfoundation.net.au/ljf/site/templates/LAW_AUS/\\$file/LAW_Survey_Australia.pdf](http://www.lawfoundation.net.au/ljf/site/templates/LAW_AUS/$file/LAW_Survey_Australia.pdf), accessed 21 October 2015.

services increasingly being provided by private operators (i.e. National Disability Insurance Scheme, aged care, training), vulnerable people are also becoming consumers in new markets.

Having lawyers work with non-lawyers is effective at targeting those currently excluded from gaining legal assistance, according to Dr Liz Curran. Secondary consultations also help increase the capacity and confidence of non-legal professions to better use legal solutions, and for lawyers to better understand their clients by working with agencies already providing professional services to them.¹⁴

Clients are likely to go to a trusted intermediary for help with their problems rather than a lawyer, making secondary consultations one of the most significant and effective factors in reaching 'hard to reach' clients. Critically, her research finds that trust in the lawyer is a critical pre-condition for many non-lawyers in deciding whether they will refer a client to a lawyer.¹⁵

In our experience providing a legal advice line for workers, largely generalist legal centre lawyers and financial counsellors, has been that successful relationship building requires time, a good experience, and trust. One off contacts are rarely enough to build long term successful relationships. Long term partnerships require long term funding and integration.

We think that a program of funding for secondary consultation pilots could greatly extend legal services to hard to reach Victorians with unmet legal needs.

Legal health checks are another tool for assisting the public to identify legal problems. It is our experience that many callers to our services do not readily identify their issue as a 'legal' problem. For example, callers to the debt hotline 1800 007 007 are usually calling because they have a 'debt' problem. It is the expertise of staff that answer the calls that identify that a legal problem may have arisen, for example, breaches of responsible lending obligations or a payday lending contract that breaches consumer protection requirements. We contend that legal health checks, especially when developed in a way that doesn't require the individual to identify their problem as 'legal', are well suited to a multi-pronged approach and should include:

- the development of online interactive tools on a well-publicised website;
- access to legal health checks through a national phone number;
- government resourcing and kits provided to agencies who have regular face to face contact with disadvantaged clients;
- consultation with established free legal service providers in developing the health checks
- comprehensive training on administering health checks; and
- a recognition that the health checks are a tool to identify problems and no substitute for tailored, practical and useful legal advice.

Recommendation: Fund and foster the development of long term partnerships between legal services and community workers, and legal health checks, to facilitate effective secondary referral programs and processes

14 Curran, The Under-rated Value of Secondary Consultations

15 Ibid

TOR 3: whether and how alternative dispute resolution mechanisms should be expanded so that more Victorians can make use of them

Question One: *Are there circumstances where it would be appropriate to expand the use of ADR in Victoria? If so, how should that be done?*

We are wary about extending the use of ADR in many cases, as we discuss below. However, we do think there is a case for extending the successful industry External Dispute Resolution (**EDR**) model. Consumer Action has significant experience in supporting and acting on behalf of consumers with disputes considered by industry ombudsman schemes (such as FOS, the Credit and Investments Ombudsman service, EWOV 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.

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;
- industry ombudsman schemes are funded by industry, so industry has a financial incentive to minimise consumer disputes and costs to the state are minimised;
- 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 Ombudsman can make findings binding upon the trader;
- industry ombudsman have internal experts (both legal and non-legal) on the issues the scheme investigates, which results in better and more efficient outcomes for the parties;
- some Ombudsman schemes usefully require members to stay any court action relating to the dispute while the Ombudsman investigates. Resolution of the dispute therefore results in no further court action;
- Ombudsman schemes 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 get solved at their source; and
- Ombudsman schemes 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

Extending the use of industry EDR schemes

We strongly recommend that industry EDR models are extended to three markets with significant consumer problems and a lack of suitable dispute resolution:

- Retirement housing
- Vocational education and training
- New energy products and services that are currently not within the jurisdiction of EWOV

We also support the establishment of a Retail Ombudsman, based on the model already operating in the United Kingdom (**UK**). A European Union (**EU**) directive, implemented in 2015, seeks to encourage ADR. It requires businesses that engage in cross-border trade in EU to have systems for effective ADR, which in turn has created an incentive for businesses to join ombudsman schemes. In the UK, there is Retail Ombudsman, in addition to a Consumer Ombudsman which appear to have some degree of overlapping jurisdiction and the apparent ability to investigate complaints about non-members.

Where we are proposing new ombudsman schemes (that is, in retirement housing and vocational education and training) the scheme could be government-run or an industry funded scheme comparable to existing operations like EWOV or the Public Transport Ombudsman Victoria. The ombudsman would be expected to comply with the *Benchmarks for Industry-based Customer Dispute Resolution*, which currently apply to all industry EDR schemes we work with. These benchmarks set out minimum standards in relation to accessibility, independence, fairness, accountability, efficiency

and effectiveness. They also provide a basis upon which each scheme can be independently evaluated.

Industry EDR schemes only have jurisdiction to hear disputes against businesses who are members of that scheme, so to cover a whole industry, there must be some kind of requirement for businesses to join an ombudsman scheme before they can trade. In industries where each business needs a license to operate (such as in credit and financial services) or needs to be registered with a government agency (such as retirement villages), membership of an EDR scheme can be made a prerequisite of licensing or registration.

Industry EDR schemes are funded by their members through regular membership fees, and also through additional fees by individual traders each time a consumer makes a complaint against that business. They are free for consumers to use. This funding model is a critical element of their success as a dispute resolution option—businesses have a clear incentive to settle disputes with their customers before the dispute reaches EDR, and low income consumers are not deterred from bringing disputes by an unaffordable fee or potential cost risks.

Recommendation: The industry EDR model should be extended to retirement housing, and consumer energy transactions discussed above that are not currently within the jurisdiction of EWOV. We propose the establishment of a Victorian Vocational Education and Training Ombudsman, a Retirement Housing Ombudsman, and a Retail Ombudsman.

Box 1 – Retirement housing

We often receive complaints from residents and their families about retirement housing—transactions with a variety of businesses including retirement villages, residential parks, rental villages and Independent Living Units which provide housing and other services for older Victorians.

The key issues raised include:

- complexity of contracts
- unfair fees
- inadequate repairs and maintenance
- lack of financial accountability and poor financial management
- lack of staff training and qualifications
- bullying and intimidation by management and other residents
- property sale delays and costs

Our casework and discussions with residents clearly suggest that VCAT is largely an ineffective forum for resolving retirement housing disputes. It is often a lengthy, stressful and expensive process. By way of example, we have had an active dispute at since December 2014—a total of fifteen months (at the time of writing) and counting.

Recent increases to application fees make VCAT unaffordable for many, and the process for applying for fee waivers is complex. The procedural requirements for applicants are complicated and burdensome, particularly VCAT requirements to produce expert reports and witnesses. Residents can also find it difficult to enforce VCAT decisions if they eventually obtain a

favourable outcome. Residents are often facing well-resourced opposition with legal representation, and VCAT does not sufficiently take into account this imbalance of power.

The lack of free legal assistance services in this sector is also a significant barrier to justice. Community legal centres simply do not have the resources to provide casework assistance to residents. Paid legal advice and support for residents can be difficult to obtain due to a lack of affordable expertise, and the domination of industry favoured law firms, meaning many firms are unable to provide advice due to conflicts of interest.

Current internal dispute resolution systems are also inadequate, as residents are usually required to complain to the very person who is the subject of the complaint: the site manager.

An ombudsman would provide residents with access to free and independent dispute resolution without the need for lawyers. It would create an incentive for operators to settle disputes internally, as they would incur costs each time a case is brought against them. The ombudsman scheme process provides flexible solutions to disputes but also has 'teeth' because the ombudsman can make findings binding upon the operator.

There would have to be further discussion about the types of matters that should be considered by an ombudsman. However, at a minimum, we would expect the ombudsman to consider retirement housing consumer disputes that relate to the Australian Consumer Law, *Retirement Villages Act 1986*, *Residential Tenancies Act 1997*, *Owners Corporation Act 2006*, and associated regulations.

Box 2 – Vocational education and training

The Victorian Government has recently committed to establishing a complaints body for Vocational Education and Training (**VET**) students. We have long championed an ombudsman for VET students and we warmly welcome the Government's announcement.

We receive complaints from students about private VET colleges operated in both Victoria and other states. The key issues raised include:

- Enrolling students in inappropriate courses
- Unfair termination clauses
- Excessive fees
- Poor quality courses
- Failure to disclose cooling off periods or placing barriers to withdrawal before census dates
- Misleading and deceptive representations about the nature of VET FEE-HELP loans
- High pressure sales tactics, particularly cold calling and door knocking
- Use of incentives (such as 'free' tablets and laptops) to target disadvantaged Victorians
- Misuse of personal information from job websites

At present, disputes between private colleges and international students can be heard by the Commonwealth's Overseas Students Ombudsman (**OSO**), but no such process exists for domestic students. Complaints by domestic students in Victoria must be taken to VCAT. For

reasons already discussed to do with cost, the need to provide expert reports, and VCAT's inability to account for imbalances of power between students and colleges, we believe VCAT is not an appropriate forum for resolving these disputes.

As with retirement housing disputes, there is a lack of affordable, expert legal assistance for students in dispute with VET colleges, and community legal centres like Consumer Action simply do not have the resources to provide casework assistance for everyone that needs it.

We understand the Government's proposed complaints body will be Government funded. Nevertheless, the complaints body should have regard to the *Benchmarks for Industry-based Customer Dispute Resolution*. It is also critical that a dispute resolution body set up for students (who are typically living on low incomes and often reliant on social security) is free for students to access.

The question of jurisdiction for the complaints body will also need to be carefully considered. The Commonwealth, Victoria and Western Australia share responsibility for regulating the VET sector, meaning Victoria's regulator VRQA has limited jurisdiction to consider complaints. Given that many Victorian students are studying online courses offered by providers located interstate, it would be preferable that the Victorian complaints body has extended jurisdiction to resolve disputes between Victorian students and these providers. High pressure sales by education brokers and mis-selling of VET FEE-HELP courses have also been significant problems, so jurisdiction should also be extended to cover disputes about the conduct of brokers.

We would expect the complaints body to have regard to relevant state and federal laws, including the Australian Consumer Law, Victorian Training Guarantee contracts, *Education and Training Reform Act 2006 (Vic)*, Australian Quality Training Framework, *the Higher Education Support Act 2003 (Cth)*, *VET Guidelines 2015 (Cth)*, and associated regulations.

We are continuing to advocate for a national ombudsman to be established, which has been supported by the South Australian Government and the Australian Council for Private Education and Training (ACPET). A national ombudsman was also recently recommended by the Commonwealth Education and Employment References Committee, and the Victorian Review of Quality Assurance in Victoria's VET System. We therefore recommend that the Victorian complaints body be designed so that it is easily adapted to a national ombudsman scheme if necessary.

Box 3 – Energy disputes

Australian consumers are increasingly exposed to a range of new energy products and services, enabled by renewable energy technology and smart meters.

The range of new products and service providers are not currently covered under the jurisdiction of EWOV as they are not appropriately licensed and in many instances are either classified as exempt sellers under formal exempt selling regimes, or are simply operating within the market under general laws such as the ACL.

There are a number of categories of energy consumer disputes that are not within the jurisdiction of EWOV, including disputes related to:

- *Embedded networks*: arrangements where electrical infrastructure is privately owned and managed, for example in new residential developments, caravan parks, retirement villages and rooming houses. Consumers living in these developments are often among the lowest income and vulnerable consumers, and usually have no choice over whether they receive their energy from an embedded network;
- *Off grid solutions* (for example, self-built or packaged products enabling consumers to achieve self-reliance and exit the grid);
- *Grid plus solutions* (for example consumers who retain connection to the grid but supplement supply arrangements with solar and or battery products);
- *Finance arrangements* such as leasing products or power purchasing agreements; and
- *Intermediaries* (supply and use). These products and services could include broker advice around demand management, installing direct load control, or advising on energy solutions. Home energy management systems that augment use arrangements would be included here.

Consumers of new energy products and services are already finding themselves faced with complex disputes, where business practices have been misleading, or where products are not fit-for-use.

We think it is clear that the jurisdiction of energy ombudsman needs to be expanded. Over the past seven years several bodies have determined that embedded networks should be members of an ombudsman scheme, we understand that this is being considered currently. Since that time however, the market has transformed. The introduction of smart meters, the uptake of solar, the financial viability of batteries and even the progress of electric vehicles, are further changing the market for consumers.

Box 4 – The UK Retail Ombudsman (TRO)

The UK Retail Ombudsman is an industry ombudsman which began hearing complaints between consumers and retailers from 2 January 2015 relating to goods and/or services purchased either in stores or online.¹⁶ The ombudsman does not have any legislative basis.¹⁷

Unlike most industry ombudsman schemes in Australia, retailer members of the TRO are not required to join by law or as a requirement of their license.¹⁸ Funded by retailers who 'opt-in' and pay for membership according to the size of their business, the Retail Ombudsman allows single shop 'bricks and mortar' retailers to join for free, but any retailer beyond that size (including single shop plus online) must pay an annual fee according to a sliding scale. According to journalist Kate Palmer, as at January 2015, '3,000 retailers are (were) signed up, and they pay between £100 and £2,600 per year to subscribe'.¹⁹

Since September 2015, the Retail Ombudsman has introduced a "gold tick" scheme whereby members who undergo extra vetting by the Ombudsman and pay it an additional £100 annually,²⁰ can display their enhanced accreditation status and be recognised as a 'trustworthy trader'. According to the ombudsman's website, the gold tick means that the trader:

has terms and conditions of business that are legally compliant, fair and easy to understand, has a fair returns policy, has a fair complaints policy, their VAT status (if applicable) has been verified, as have their contact details, and a unique check of the trader's website has been carried out.²¹

As with industry EDR schemes in Australia, the service is free to consumers and the ombudsman's decisions only bind member retailers, who are contractually obligated to comply. The Retail Ombudsman has an 'independent standards board'²² whose role is to "ensure that the Ombudsman remains independent, impartial and fair." The board may draw a maximum of 20 percent of its members from industry²³ but unlike Australian industry EDR schemes, the UK Retail Ombudsman does not explicitly address the balance of the board to ensure that it has consumer representation.

To be eligible for assistance from the Retail Ombudsman, the aggrieved consumer must first have complained directly to the trader and given the trader eight weeks to reply, and, that complaint must have occurred in the preceding six months. If after eight weeks the dispute remains unresolved, the consumer can then seek assistance from the Ombudsman. The ombudsman's office will first attempt to settle the dispute through negotiation, then by making a recommendation (if negotiation fails), and finally by having the ombudsman make a decision which is binding on the trader. If the consumer disagrees with the determination, they may take the matter to court.²⁴

The remedies offered by the Retail Ombudsman include:

- directing the trader to take, or stop taking, certain steps—such as providing a refund or exchange or issuing a formal apology; and
- directing the trader to pay the consumer a financial award by way of compensation (up to £25,000) for proven financial loss²⁵

Extending the use of ADR more generally

We caution against taking an approach that 'alternative dispute resolution' is necessarily the most efficient way to resolve legal problems, or that it should be more widely used at this point.

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.²⁶ 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 or be informed by them. 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.

Nor do we agree with the perspective that ADR is more appropriate for low value disputes because there is less at stake—even low value disputes can have an enormous impact on litigants and deserve to be determined through more formal processes if that is in the best interests of the parties. For example:

- A creditor can apply to bankrupt a debtor for a debt (or debts) of \$5,000.²⁷ When the threshold was previously \$2,000, it was not uncommon for debtors to lose their family home after being bankrupted for well under \$5,000;²⁸
- A \$2,000 car might be the most valuable asset some of our clients will ever own (not only for its asset value but its ability to ensure they get to and from work). Therefore, a dispute over whether a consumer is entitled to a refund of that amount for a faulty car might mean the difference between that consumer losing or keeping their job
- A default of only \$150 can be listed on a consumer's credit file and is retained on the file for five years. A default listing can be expected to prevent most people accessing mainstream credit during that five year period.

¹⁶ <http://www.theretailombudsman.org.uk/>

¹⁷ The TRO is described on its website as 'a non-statutory organisation'. See: 'Terms of Reference and Membership Rules' dated 1 June 2015 at <https://www.theretailombudsman.org.uk/membership-terms-of-reference-and-rules/>

¹⁸ See, for example, Part 6 Telecommunications (Consumer Protection and Service Standards) Act 1999 which requires carriers and eligible carriage service providers to enter the TIO scheme to provide a dispute resolution service for complaints about telecommunications services.

¹⁹ <http://www.telegraph.co.uk/finance/personalfinance/11333939/New-Retail-Ombudsman-can-investigate-your-shopping-complaint-but-it-comes-with-a-catch.html> .

²⁰ <http://www.pcr-online.biz/news/read/policing-pc-retail-is-the-retail-ombudsman-s-new-gold-tick-just-what-tech-shops-need/036902>

²¹ <https://www.theretailombudsman.org.uk/what-does-it-mean-to-be-retail-ombudsman-compliant/>

²² <https://www.theretailombudsman.org.uk/independent-standards-board/>

²³ n 29 above at 1.4 and see https://www.tio.com.au/_data/assets/pdf_file/0015/9132/TIO-Constitution-1-July-2013.pdf

²⁴ <http://www.telegraph.co.uk/finance/personalfinance/11333939/New-Retail-Ombudsman-can-investigate-your-shopping-complaint-but-it-comes-with-a-catch.html>

²⁵ <https://www.theretailombudsman.org.uk/our-powers/>

²⁶ 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).

²⁷ Bankruptcy Act 1966, section 44.

²⁸ Jan Pentland's *Homes at risk: using bankruptcy to collect small debts* (November 2007), includes a number of case studies of bankruptcy being used inappropriately to collect small debts. Eastern Access Community Health. Accessible via www.financialcounselingaustralia.org.au .

While many may prefer mediation rather than litigation, where there are significant power imbalances this should be at the election of the weaker party. Further, it is important that if disputes are subject to compulsory ADR there is appropriate oversight of to ensure that the processes and decision making is of high quality, and the decision makers have necessary specialist knowledge and are capable of accounting for power imbalances between the parties.

It is also necessary to evaluate ADR processes to measure whether just outcomes are being achieved.²⁹ Evaluating ADR requires more than just surveying participant satisfaction and perceptions of fairness. To give a genuine indicator of fairness, evaluation needs to go beyond participant perceptions and measure the outcomes themselves. Non-expert participants usually do not understand their rights under the law and may report that they were satisfied with the process or the result of ADR, even if they ended up with a deal that is far worse than they would have achieved in court.

A study that goes beyond participant expectations could be achieved by taking a sample of ADR outcomes from a particular jurisdiction and comparing them to outcomes of similar disputes settled through other channels. There should also be a requirement for organisations using compulsory ADR to report publicly on what outcomes they are achieving. This will indicate whether ADR is achieving just outcomes as often as other dispute resolution options, and will also indicate which disputes are handled better by ADR.

ADR schemes also need measures to ensure that people running ADR sessions have the appropriate expertise to ensure vulnerable participants aren't left with unjust outcomes. Consumer Action's submission to the Productivity Commission's inquiry into Access to Justice Arrangements included the following case studies to illustrate that mediators do sometimes lack basic understanding of the law relevant to our clients. In both cases below, our clients would have been left with very poor outcomes if they did not have a lawyer present to correct errors in the mediators' reasoning.

Case study

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 *Judgment 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.

²⁹ Mary Anne Noone (2011), 'ADR, Public Interest Law and Access to Justice: The Need for Vigilance', *Monash University Law Review* Vol 37, Number 1; Noone M.A. & Akin Ojelabi L., (2013) Justice Quality and Accountability in Mediation Practice: a Report La Trobe University Melbourne Australia arrow.latrobe.edu.au:8080/vital/access/manager/Repository/latrobe:34707

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

Our client of Sudanese background had a dispute with a motor car trader in relation to a second hand vehicle with a number of defects. Our client had tried to resolve the matter directly with the trader to no avail, so made an application to VCAT seeking a refund of the \$15,000 paid or the vehicle to be repaired.

VCAT heard evidence from both parties on the first day of the hearing, including an expert mechanic providing evidence on behalf of our client. The hearing also involved an interpreter. Despite this hearing and the expectation that the member would use the evidence to make a decision, the matter went to mediation on the second day after suggestions by the VCAT member that 'this is the type of matter that should be resolved by the parties'.

The mediator, who appeared not to have reviewed the claim or evidence, made a number of troubling representations to our client, including that our client would only be entitled to a \$2,000 refund, that VCAT almost never made orders in relation to second hand vehicles, and that it was in our client's interests to accept any offer made. By this stage our client was exhausted, and was almost willing to consent to any outcome. Taking our solicitor's advice, our client did push on and seek an order from VCAT. The final order was in the consumer's favour, being a much better outcome than that which was considered possible at mediation.

Finally, we are also wary of extending the use of ADR (especially compulsory ADR) as in some jurisdictions it creates more cost for low income clients. We recommend that where a court or tribunal orders compulsory ADR, a free, court-appointed mediator be provided, at least in cases involving one or more impecunious litigants. While in both Magistrates' and Supreme Courts court-appointed mediators are available either as of right, or in cases involving low-income litigants, they are not currently available in the County Court. In a recent County Court proceeding, one of our clients had been granted a fee waiver for all fees until the court required the parties to attend mediation. This required our client to arrange for payment of 50% of the mediator fee, being \$1,100 for a half day. This cost was entirely prohibitive for our client, whose income consists of only a Carer's Pension. Had the mediation proceeded for a full day, the cost for our client would have been \$2,000. In a situation where the court has already accepted that a party cannot afford the costs of litigation, a free, court-appointed mediator should at least be offered.

Recommendation: No ADR programs should be extended until they are properly evaluated against the six benchmarks used to assess the performance of industry EDR schemes.

Recommendation: Existing compulsory ADR programs should be independently assessed as soon as possible, and the results publicly reported.

Recommendation: Compulsory ADR should be free for any party who has already been granted a fee waiver.

Question Two: *What could be done to improve ADR, including mechanisms to address the power imbalance that may exist in some situations?*

ADR processes must be regularly and independently evaluated. Industry EDR schemes are independently evaluated every few years against common benchmarks to ensure they provide just outcomes, and an efficient service. Any compulsory ADR process should be evaluated in the same way. It is not sufficient to simply survey participants on what they thought of the process—non experts often won't know if they received a just outcome or not.

There must be measures to ensure that people running ADR processes have the necessary expertise to ensure participants aren't led into unjust outcomes.

Question Three: *What can be done to improve knowledge and awareness of the availability and benefits of ADR?*

We generally support efforts to raise awareness of the availability and benefits of ADR, as long as the ADR mechanisms themselves are of high quality and properly evaluated. However, we would be wary of spending large amounts of resources to inform individuals about various ADR schemes before they need them. In our experience, it is more effective to ensure information is available to individuals about ombudsman services when they have a problem that could benefit from dispute resolution.³⁰

This is the approach currently taken in much of credit and financial services. For example, under the *National Consumer Credit Protection Act 2009*, financial service providers must give consumers information about industry EDR services in the credit guide when they first sign up for consumer credit, but critically, they also have to provide that information on every default notice. The General Insurance Code of Practice also requires notification about EDR at important points in their consumer interaction, including when rejecting a claim. This type of targeted promotion should be expanded to all other industry areas where opportunities for timely notification are available.

Question Four: *How could the resolution of disputes with government agencies be improved?*

Consumer Action has no comment on this point.

Question Five: *Are there opportunities to expand the use of ADR mechanisms by employing online technologies?*

We welcome expansion of online ADR, as long as the ADR mechanism is of good quality, and as long as expansion online does not lead to other options for accessing ADR being cut off.

Question Six: *What resources or supports would be required to assist people who may face barriers accessing an online dispute resolution process?*

³⁰ Public Legal Education and Support Task Force (PLEAS Task Force) 2007, [Developing capable citizens: the role of public legal education](#), PLEAS Task Force, London; Public Legal Education Network (Plenet) 2009, [Public legal education: improving lives, empowering communities](#), Plenet, London; Public Legal Education Network (Plenet) n.d., [Public legal education: principles and guidance](#), Plenet, London.

Low income Victorians may only have access to the internet through their phones. If ADR is to be accessible online, it must be accessible through all devices.

There are still many people who do not have access (or do not have reliable access) to the internet. Even those who do have reliable access may not be comfortable using the internet for all transactions. Research from the UK indicates that up to one third of consumers either do not use, or prefer not to use the internet (references have been removed):

Consideration has to be given to the question of 'digital divides' and the exclusion from the Internet of some groups in the population. For the United Kingdom, The Oxford Internet Survey research suggests that 'divides are narrowing, but digital inequality persists by age, education, income'. The issue is not physical access: almost everyone can get access via a library or a 'proxy'. Barriers relate more to cognitive abilities, skills and culture. Furthermore, the OIS has discovered that 14% of those with online access are not fans.

...

Once this 14% of discontented users is added to the reported 20% of non-users, we have around a third of the population either not using the Internet or not happy with doing so. This figure for exclusion is likely to reduce over time if only as those now young and familiar with smartphones inevitably age—but people who are poor, old, less well educated and (at least at present) with a disability, are likely to continue to be disproportionately excluded. Currently excluded populations will, to some degree, adapt to the surrounding culture and be forced to do so by governments keen to drive digital services in order to save costs of administration. However, we are left with a sizeable group of the excluded—likely to be high amongst those on low incomes. A reasonable working assumption would seem to be that the overall excluded population rises from about a third to around a half of those on low incomes because, amongst them, will be more of the specifically excluded populations.³¹

ADR operators should ensure that in moving to online delivery they do not close off existing access for people who can't make use of the online channel.

We think it's important that dispute resolution process also incorporate regular phone calls to the parties to clarify the complaint and assist people to understand what the decision maker requires. FOS, for example, has started to do this more in recognition that vulnerable people have difficulty putting their claims in writing. The emphasis should be on supporting people to make a complaint effectively and reaching a just and timely resolution.

Recommendation: ADR operators should be encouraged to accept complaints and resolution processes to help complainants seek a resolution in a just and timely matter rather than prescribed by form

³¹ Roger Smith (December 2014) *Digital Delivery of Legal Services to People on Low Incomes: Summary and Recommendations*, The Legal Education Foundation, pp 11-12. Accessed from <http://thelegaleducationfoundation.org/wp-content/publications/digital-delivery/index.html#1>

TOR 4: Potential reform to the jurisdiction, practices and procedures of the Victorian Civil and Administrative Tribunal (VCAT) to make the resolution of small civil claims as simple, affordable and efficient as possible

Question One: *What reforms could be made to VCAT's jurisdiction, practice and procedures to make the resolution of small civil claims as simple, affordable and efficient as possible?*

In recent years, accessing VCAT has become more expensive and more complicated. This has led to significant drops in the number of applications to VCAT, particularly applications by individuals for disputes over less than \$10,000.

This is extremely concerning. It indicates that Victorians are now less able to access justice, and businesses engaging in unfair and unlawful practice are less likely to be held to account. This creates detriment for individual consumers but also makes markets less competitive for everyone—businesses who invest in treating customers fairly and lawfully are at a competitive disadvantage to those businesses who provide a substandard product, and promote it with dishonest and unfair sales tactics.

Our experience is that low income consumers are not only struggling to make ends meet, their weekly budget is often in deficit. Any application fee, no matter how low, will be a barrier to justice for applicants on the lowest incomes. If the Government believes that the lowest income Victorians deserve access to VCAT, the only option is to remove fees entirely for those people.

Increased Fees

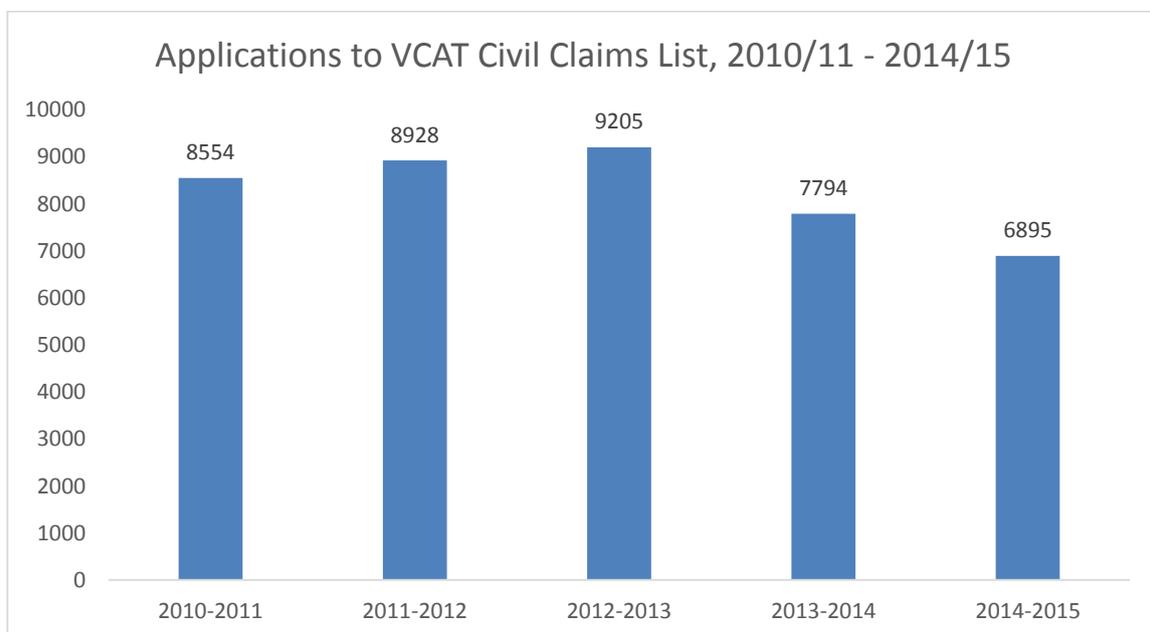


Chart 1 - Total applications to VCAT Civil list, 2010/10 to 2014/15.^{32 33} Applications drop off markedly after fee increases are introduced in 2013.

³² Source: VCAT annual reports 2010/2011 to 2014/15.

³³ The 'total applications' figure for 2009-10 excludes 443 credit matters

Between the financial years 2012/13 and 2014/15, total applications to the VCAT Civil Claims list fell by 25 per cent. This is in clear contrast to the two years immediately before 2012/13, when applications to the Civil List had been steadily increasing, as shown in the chart above.³⁴

The reduction in applications is seen in both high value and low value disputes. However, the figures show that applicants making small claims are being disproportionately affected by reduced access to VCAT.

Applications for small claims (those with a value of less than \$10,000) have fallen away by 25 per cent, the same amount as the overall trend. In contrast, the number of applications worth more than \$100,000 fell by 20 per cent and applications for claims worth between \$10,000 and \$100,000 only dropped 13 per cent—half as much as small claims. The only category of claims falling away more sharply are those with ‘no value’. We note though that the number of these claims has been falling since well before the fee increases.

Applications to civil claims list - percentage change on previous year

Value of Dispute	2011-2012	2012-2013	2013-2014	2014-2015	2012-13 to 2014-15
Total	4%	3%	-15%	-12%	-25%
<\$10,000	5%	3%	-17%	-10%	-25%
\$10,000-\$100,000	10%	15%	-3%	-10%	-13%
\$100,000+	14%	11%	15%	-30%	-20%
No value	-16%	-18%	-32%	-63%	-75%

The trend in applications to VCAT’s Residential Tenancies List tells a similar story. Between 2012/13 and 2014/15, applications to the Residential Tenancies List have been relatively steady, falling 0.5%. But again, individuals have been hit harder by the fee increases. Claims brought by residents have fallen 4 per cent in that time and applications from private landlords have fallen 6 per cent. In comparison, the number of applications brought by real estate agents has fallen 2 per cent and applications by the Director of Housing are actually up 6 per cent.

The 2013 fee increases have clearly reduced applications to the Civil and Residential Tenancies lists, but it would be a mistake to assume the reduction in applications is simply unmeritorious or vexatious claims being deterred by a higher fee. Even if increasing fees leads to a reduction in unmeritorious applications, raising fees is not an appropriate response if it also prevents access by individuals with meritorious disputes.

We know that Government is currently considering where VCAT fees should be set and a Regulation Impact Statement will be released shortly asking for public feedback on proposed fee changes. We propose the following principles should guide Government's decision to set VCAT fees.

- The most important factor in setting application fees is ensuring VCAT is accessible: We understand that the Victorian Government has a limited budget and that public agencies need

³⁴ Comparing numbers of applications further back than 2010/11 becomes complex because of changes to VCAT’s jurisdiction. For example, the introduction of a national credit law meant VCAT was no longer responsible for hearing credit matters after 2009, and Owners Corporations disputes moved from the Civil List to a specialised Owners Corporations list in 2010.

to spend their money wisely. But it is unacceptable to exclude some Victorians from the justice system (particularly from VCAT, which was designed to be a more accessible alternative to the courts) simply because they don't have the money to pay an application fee.

- Using the cost of service provision as a starting point is unhelpful: If accessibility is the most important factor in setting fees, then we recommend that the starting point for determining fees should be an analysis of what applicants can afford to pay, not the cost to the state of running a hearing.
- The 'transactional' view of accessing justice is flawed: Much of the thinking behind court and tribunal fees seems to be driven by the perspective that applicants gain a benefit from accessing justice, so they should pay some of the cost in delivering court and tribunal services. This sees an application to a court or tribunal as a transaction or an investment—the applicant buys a hearing in the expectation of a return on the money they spend.

This transactional view of access to courts is in our view deeply flawed. When our clients take a dispute to VCAT they are defending their rights under the law, not buying some kind of extra benefit. When an individual has been the victim of a civil wrong and cannot seek redress through the civil justice system, that person has not missed out on an investment opportunity, they have missed out on enjoying the basic standards to which all citizens are entitled.

The transactional view also ignores that access to justice creates benefits for the whole community. In consumer affairs, the availability of dispute resolution means it is less likely that unscrupulous traders can profit from poor conduct and attract customers from honest firms. More broadly, the existence of an accessible civil justice system gives confidence to consumers and traders alike that they may borrow, invest and enter contracts. The presumption that any litigant should pay the full cost of accessing a court or tribunal is to ignore the clear public benefit that flows from having a well-functioning justice system.

- There is nothing wrong with setting an application fee at zero, particularly for low income applicants: We understand that there is a hypothesis in some areas of government that setting the VCAT application fee at zero will lead to a rush of unmeritorious applications. There is simply no evidence supporting this theory. Consider:
 - **Industry external dispute resolution (EDR) schemes are free for all consumers, and always have been.** EDR schemes have processes for rejecting applications which are outside of their terms of reference, but they certainly do not grind to a halt because of unmanageable levels of vexatious claims. In fact, EDR suffers from the opposite problem—our clients often don't realise free EDR schemes exist, and frequently take their disputes to inferior, expensive, but well-promoted services like 'credit repair' companies when they could get a better service for free at EDR.
 - **NCAT has allowed \$5 'concession' applications since 2005 without evidence of a rush of unmeritorious applications.** There is nothing in the 2006 or 2007 annual reports of the Consumer, Trader and Tenancy Tribunal (CTTT, NCAT's predecessor tribunal handling consumer matters) indicating any rise at all caused by the introduction of a \$5 concession fee. While applications to NCAT did increase significantly in the 2006-07 financial year, there is nothing in that year's annual report

attributing this rise to reduced fees. For example, the 5 per cent rise in applications to the Tenancy list (which received 77 per cent of all applications) in that year was 'mainly attributable to applications made by the Department of Housing'.³⁵ And while there was a 14 per cent increase in 2006-07 to the General list (which received 10 per cent of all applications), the annual report notes that the number of applications received in 2006-07 was still lower than in any year from 1999-2003.³⁶

- **Very few individuals want to take a dispute to VCAT.** The theory that falling prices drives demand only really applies to products that people want to buy, and almost nobody wants to take a dispute to a court or tribunal. Going to VCAT is an unfamiliar, stressful and extremely time consuming process for our clients. Lowering application fees makes VCAT affordable, but does not make the process any more enjoyable.

We accept that reducing application fees may lead to some isolated vexatious applications that would not otherwise be made. But increasing fees to prevent a small number of unmeritorious cases is a disproportionate response if it also bars access to thousands of reasonable claims.

- Reversing recent declines in applications to VCAT should be the minimum measure of success: At a minimum, the aim should be to reverse the trend of falling applications by individuals in the small claims jurisdiction since 2013.
- Fees and fee waivers need to apply to all VCAT fees: If an applicant has proven that they are in financial hardship, all fees—including application fees, fees for injunctions, multiple-day hearings and anything else that would otherwise prevent them from accessing VCAT—must be waived. Making application fees affordable will not make VCAT any more accessible if applicants are then presented with unaffordable fees for multiple day hearings, injunctions or other things.

Reduced access to fee waivers

Problems created by increasing fees are compounded by lack of access to fee waivers for low income applicants.

VCAT's current process for fee waivers is described in a seven page document including three pages of guidance and three different forms for applicants to complete, depending on their circumstances.³⁷ The first form ('concession application form') invites applicants to apply for a waiver if

- you hold a current:
 - Health Care Card
 - Pensioner Concession Card
 - Commonwealth Seniors Health Card; or
- you are in receipt of
 - Legal representation by a professional advocate who is not charging me in relation to these proceedings or legal aid funding for this Tribunal proceeding
 - Youth allowance, Austudy payments or ABSTUDY benefits; or

³⁵ Consumer Trader and Tenancy Tribunal *Annual Report 2006-07*, page 20.

³⁶ Op cit, p 22

³⁷ https://www.vcat.vic.gov.au/adv/system/files/Fee_waiver_guidelines_and_forms.pdf

- you are an inmate of a prison or lawfully held in a public institution.

The concession application form then goes on to say that:

You may wish to provide additional information supporting your claim that the payment of the fee would cause you financial hardship, such as evidence of your bank balance or a statement from Centrelink outlining your entitlements.

Apart from the concession application form, there are two other forms: a 'Financial Hardship' form (for applicants who don't meet the requirements of the 'concession' form but are nonetheless in hardship) and a 'Reduction of Hearing Fee Application Form' (specifically for reducing multiple-day hearing fees). The Financial Hardship form requires applicants to enter details of their income, expenses, assets and debts.

The guidance also includes the following information on what factors VCAT staff will take into consideration when assessing an application:

What factors will be taken into consideration?

- The nature of the proceeding
- The remedy sought, including the amount of compensation claimed (if any).
- Your financial situation at the time the fee is payable.
- Any documents provided in support of the application.
- Income level under Poverty Lines Australia, which are published quarterly by the Melbourne Institute of Applied Economic and Social Research, the University of Melbourne.

The guidance provides the following information on how applications to reduce hearing fees will be assessed:

When can hearing fees be reduced?

Under clause 7(1) of the Victorian Civil and Administrative Tribunal (Fees) Regulations 2013 hearing fees may be reduced having regard to

- The number of parties to the proceeding; and
- The likely length of the hearing of the proceeding.

Despite all of this guidance on how VCAT staff will assess applications for waivers, the guidance also states that 'in all cases, there is a general discretion to grant or refuse the waiver application.'

We have a number of problems with the guidance and forms document.

- **It is unnecessarily complex:** references to subsections of acts and regulations, and legal jargon like 'natural person' will confuse even educated non-lawyers, and anyone with a literacy problem or who speaks English as a second language will find the form almost impossible to use.
- **VCAT seems to have discretion to accept or reject applications based on irrelevant factors:** Almost all of the factors listed above under 'What factors will be taken into consideration' are irrelevant to an assessment of whether a person is in financial hardship. The only factors we think are relevant here are 'your financial situation at the time the fee is payable' and the poverty lines. Even these factors are irrelevant if a person meets one of the

requirements for a 'concession' waiver—proof of the concession entitlement should be all that is required. Considerations such as 'the nature of the proceeding' and 'the remedy sought' seem to invite VCAT staff to make value judgements about whether a person 'deserves' a waiver (eg, can someone in a dispute about a car or a holiday *really* be in financial hardship?) over the evidence of income and expenses.

- **It should never be necessary for someone filling out the concession application form to provide 'additional information':** Following on from the point above, inviting someone who fits one of the concession waiver categories to provide 'additional information' is unnecessary and adds another element of arbitrariness to the process. A person meeting the requirements in the dot point list copied above is clearly in need of a waiver; no additional information is required. More importantly, the request for additional information gives the impression that more information is required (but without specifying what kind of information VCAT has in mind), and that a waiver may be refused if the information is not provided.
- **The factors for reducing hearing fees will lead to unjust outcomes:** The number of parties to a proceeding and the likely length of a proceeding have no bearing on whether a person can afford the fees. At present, hearings that run longer than one day attract hearing fees of \$399.80 per day for days 2-4, \$669.10 per day for days 5-9 and \$1116.60 per day for each day after that. Low income applicants often need to contest matters which run for longer than one day (cases about motor vehicles, for example, can run longer because of added complexity), but almost none of our clients could afford a \$400 fee for even one additional day. If VCAT recognises that a person is in financial hardship, but refuses to reduce hearing fees because of 'the likely length of the proceeding', well-resourced parties will simply win every dispute against low income applicants if the hearing continues for more than one or two days.
- **VCAT seems to be able to accept or reject applications for any reason, or no reason at all:** The statement in the guidance document that VCAT has a 'general discretion' to accept or refuse waiver applications 'in all cases' undermines everything else in the guidance on how VCAT decides waiver applications. It is also contrary to basic principles of administrative law and procedural fairness that government agencies should make decisions based on the information before them, and without relying on irrelevant factors.

Our legal practice advises that since 2013 (when the waiver process was tightened), they have regularly seen low income clients having fee waiver applications rejected on arbitrary bases or without any explanation at all.

Case study

The client approached Consumer Action Law Centre in 2013 following a dispute with a private education provider.

Consumer Action Law Centre's client, who was long term unemployed and in receipt of Newstart allowance, made an application for a waiver of the application fee when she made her initial VCAT application. A review of the Henderson Poverty Line for the relevant period indicates that Newstart recipients live substantially below the poverty line.

The application for waiver was rejected in February 2013. Consumer Action left a number of messages for the relevant Registrar to discuss the rejection, but did not get a response. Around a month after the initial rejection, the client's father offered to pay the fee on the basis that it was causing stress to the client and that it would assist to progress the dispute. The matter settled on a confidential basis with the trader in June 2013. If the client did not have a supportive parent with the ability to cover the application fee, this client would have been denied access to VCAT and would probably not have been able to reach settlement with the trader.

Case Study

Our client, who was having a dispute with a Vocational Education and Training Provider, made an application to VCAT in late 2015 along with an application for a fee waiver. Our client attached a copy of their pensioner concession card, and an explanation that the fee (\$174) would be unaffordable given their low, fixed income.

In this case we acted for our client under a conditional costs agreement. This means that, if our client won their case, and VCAT required the training provider to pay costs, then Consumer Action could receive that amount of costs. Conditional costs agreements are a way for publicly funded legal centres to offset some of their expenses and so make limited funding stretch further but have no bearing on the question of whether a client can afford an application fee.

In response to the fee waiver application, we were contacted by a VCAT staff member responded that they were 'not prepared to grant the waiving of the fee at this point' and requested that Consumer Action also provide a letter advising that we were acting pro bono. We addressed a letter to VCAT which provided details of our costs arrangement with our client.

VCAT did not respond to this letter. The next communication we received from VCAT was an order striking out our client's application (with a right of reinstatement) on the basis that the application fee had not been paid.

This suggests that VCAT:

- believes that someone who has been granted a pensioner concession card can afford a \$174 fee to access a tribunal; and
- continues to reject fee waiver applications based on irrelevant information.

This matter is ongoing.

The introduction of fee waiver would largely mirror the position in NCAT and SACAT (the New South Wales and South Australian equivalents of VCAT). NCAT charges applicants in the first two categories above a concession fee of \$5.³⁸ The South Australian Civil and Administrative Tribunal has a similar system, automatically waiving fees for holders of certain concession cards, students, those under the age of 18, anyone receiving legal aid or anyone in prison or detention (note however that SACAT does not hear consumer disputes).³⁹ We add 'anyone receiving assistance from a financial counsellor' as those clients will also by definition be of very low income. The Federal Court

³⁸ See note 2, http://www.ncat.nsw.gov.au/Pages/apply_to_ncat/fees_and_charges/fees_and_charges.aspx

³⁹ <http://www.sacat.sa.gov.au/bringing-a-case/fees-and-charges/fee-exemptions-and-waivers>

also waives court fees to holders of health care cards and seniors health cards, people granted legal aid, recipients of youth allowance, Austudy or ABSTUDY, among others.

Recommendation: Introduce automatic fee waivers for people who clearly cannot afford an application fee including anyone receiving a social security or veteran's pension, benefit or allowance; in receipt of assistance from Victoria Legal Aid or assistance from a community legal centre; or anyone receiving assistance from a financial counsellor; or anyone in prison or detention. If an applicant is eligible for a fee waiver, that waiver should apply to all fees (including for injunctions and multiple day hearings).

Recommendation: VCAT should continue to offer ad-hoc fee waivers for other people who can demonstrate that they are in financial hardship with increased transparency and rules on accept or reject applications. VCAT must not retain any general discretion to reject applications which otherwise meet the criteria for granting a waiver, and VCAT must not be permitted to consider irrelevant factors in making its decision.

Recommendation: Forms and guidance must be simplified, specifically designed to be accessible to applicants with low literacy

Process requirements

Finally, a number of process requirements present unnecessary barriers to individuals accessing justice.

Service requirements

One relatively recent change made by VCAT is the requirement that applicants serve documents on respondents within 28 days of receiving notice of a hearing.⁴⁰ The requirement to serve documents on an opponent may seem like a small burden, but it is one more change that makes VCAT more like a court and less like the informal, accessible forum it was designed to be. This change will also disproportionately affects those applicants who are already overwhelmed by the process, who struggle with literacy or speak English as a second language. Larger businesses, repeat players and represented parties will be unaffected. Even using the word 'service' is an unnecessary barrier, as the legal meaning of this word is unknown to virtually everybody outside of the law.

VCAT previously served documents on behalf of parties and still sends respondents a notice of hearing and a copy of the original application form. It is not clear to us what VCAT is saving by sending some documents and not others, but we doubt it is a large enough benefit to justify a further barrier for the most vulnerable applicants.

Recommendation: VCAT should immediately remove the requirement that parties serve papers on each other. Alternatively, if the Government believes that no change is required, it should investigate and publicly report on:

- how much money VCAT saves by requiring parties to serve each other;
- how many applications are abandoned or delayed as a result of the current service requirement.

⁴⁰ <https://www.vcat.vic.gov.au/adv/disputes/civil-disputes/applications>

Requirement for self-representation

Individuals are only allowed to be represented by an agent (for example, a lawyer) in 'exceptional circumstances' in the Civil Claims List.⁴¹

We think it is reasonable for VCAT to prevent parties being legally represented to ensure VCAT 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.

Recommendation: VCAT should relax restrictions on parties being represented by a solicitor, particularly in cases where an individual applicant is up against a business that is familiar with the VCAT jurisdiction or is represented by a solicitor. We suggest that VCAT could publish guidelines setting out when it will allow representation.

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.⁴²

We 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".⁴³

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.

⁴¹ VCAT, Preparing for a hearing in the Civil Claims List, p 2.

https://www.vcat.vic.gov.au/system/files/preparing_for_a_hearing_in_the_civil_claims_list_1.pdf

⁴² Hon Justice Kevin Bell, *One VCAT, Presidents Review of VCAT*, 30 November 2013, p 79.

⁴³ *One VCAT*, p 79.

The need for expert reports and witnesses

VCAT frequently requires applicants to produce expert reports and witnesses before it will accept a claim involving complex facts. Motor vehicle disputes (usually a dispute between a consumer and a car dealer or mechanic) will often involve highly technical questions regarding the state of the vehicle, whether faults can be repaired, and if so, the cost of repair. Neither consumers nor decision-makers typically have this technical expertise so consumers will usually have to obtain a report from a third party specialist. The cost of these reports can exceed \$1,000 and will be out of reach for many of our clients.

The Productivity Commission's final report on Access to Justice Arrangements had much to say about extending use of court appointed experts.⁴⁴ We strongly recommend the Victorian Government look at how in-house experts could be used, particularly for motor vehicle disputes, to reduce the likelihood that low-income applicants are denied access to VCAT because of the need to pay for expert evidence.

A working example is the New Zealand Motor Vehicle Disputes Tribunal. Decisions in this tribunal are made by an adjudicator who is assisted by a 'Technical Assessor' drawn from a panel of people with technical expertise. During the hearing, the tribunal and expert assessor may examine parts of vehicles or even test drive vehicles.⁴⁵

Recommendation: The Victorian Government should appoint in-house motor vehicle experts to ensure that low income applicants are not required to spend large amounts of money hiring expert witnesses or having expert reports produced. The Government should also consider creating a new VCAT list along the lines of the New Zealand Motor Vehicle Disputes Tribunal.

Question Two: *What mechanisms, processes or supports could be introduced to better assist vulnerable and disadvantaged people to resolve small civil claims?*

We recommend that VCAT could better assist vulnerable and disadvantaged people to resolve small civil claims by adopting some of the processes of industry EDR schemes, particularly resolving disputes 'on the papers' rather than requiring parties to attend a hearing. Determining disputes on paper still requires complainants to be able to set out their complaint and (to some extent) the relevant law in an application, but removing the hearing makes the dispute resolution process less intimidating and combative, removing some of the power imbalance between first time users and repeat players. Some EDR schemes are now allowing applicants to make applications over the phone rather than in writing where written applications would be a barrier—we consider this an important way to help vulnerable people. Resolving some disputes on the papers would also reduce costs for VCAT (less time spent scheduling and re-scheduling hearings) and reducing inconvenience for parties (who would not have to give up days at work or travel long distances to attend hearings).

More broadly, VCAT could better assist vulnerable and disadvantaged applicants by submitting to regular independent reviews of how it performs against the benchmarks used to assess industry EDR schemes: accessibility, independence, fairness, accountability, efficiency and effectiveness. EDR schemes are required to be independently assessed against these benchmarks every few years in a

⁴⁴ See recommendation 11.6.

⁴⁵ <http://www.justice.govt.nz/tribunals/motor-vehicle-disputes-tribunal/hearing-process>

process that includes investigators looking through samples of files, and consulting with staff, people who have been parties to disputes, and advocacy organisations.

We have already recommended that the Government fund an assessment of VCAT against EDR scheme benchmarks, and we intend to fund a similar piece of research this year in partnership with other community legal centres.

Question Three: *Are there opportunities to use online dispute resolution mechanisms to resolve small civil claims, and if so, what mechanisms would be appropriate?*

We welcome further investigation and testing of whether online dispute resolution mechanisms could help increase access to VCAT for small civil claims. However:

- There are more critical problems with the accessibility of VCAT that should be fixed before attention is diverted to expanding to online applications (see our answer to question one above).
- It should never be compulsory for an applicant to make a claim online. As we discussed above, many people do not have reliable access to the internet, and many others will not be comfortable using the internet for this kind of thing. There should be no financial disadvantage if an applicant chooses to not apply online.

Question Four: *What resources or supports would be required to assist people who may face barriers accessing an online dispute resolution process?*

We refer to our response to the same question under Term of Reference 3.

TOR 5: the provision and distribution of pro bono legal services by the private legal profession in Victoria, including:

- **ways to enhance the effective and equitable delivery of pro bono legal assistance**
- **opportunities to expand the availability of pro bono legal services in areas of unmet need**
- **options for expanding existing incentives for law firms within the Victorian Government Legal Services Panel**

Question One: *What is your experience of pro bono work?*

Consumer Action works closely with numerous firms and barristers that provide assistance on a pro bono basis. These pro bono services play a significant role in helping us to providing access to justice for disadvantaged consumers in Victoria. These pro bono engagements range from co-counselling on large disputes through to the making of direct referrals of clients we cannot assist. Nearly all large cases run in a court or tribunal by Consumer Action are run with the assistance of counsel retained on a pro bono basis.

An important aspect of the pro bono work done for Consumer Action is work done where the Centre acts as the client. This work may be legal research on areas of potential law reform or assistance with practice management issues. This assistance frees up our lawyers to provide direct services to Victorians in need. We are conscious of not asking for assistance with relatively small matters, and seek help from pro bono firms proportionate with the complexity of the legal matter at hand.

Question Two: *Are there other examples of pro bono schemes that you would like to highlight for the benefit of the Review? How are these schemes funded and managed? What works well about these schemes?*

We commend the pro bono schemes administered by Justice Connect. These schemes provide an efficient and effective mechanism for CLCs, community organisation and disadvantaged people with unmet legal need to find pro bono assistance from barristers and solicitors. Justice Connect also play a central role in developing the culture of pro bono work within the legal profession in Victoria.

Additionally, we see value in CLCs and other community groups cultivating their own relationships with firms and barristers directly. These relationships have the potential to bring efficiencies through direct engagement and, importantly, allow firms to develop expertise in relation to the issues that a particular CLC deals with. A firm “matching” service, perhaps auspiced by Justice Connect, may be a way increasing the number of partnerships between firms and the community sector.

Question Three: *What is the most effective way of administering pro bono schemes in Victoria? Should there be greater coordination in the delivery of pro bono services? What else would help to facilitate pro bono work?*

Consumer Action Law Centre supports Justice Connect playing a pivotal role in the coordination of pro bono resources. However, for the reasons identified above, it also sees substantial benefit in community organisation establishing and maintaining direct relationships with pro bono partners.

Some firms offer great incentives for lawyers to reach the aspirational pro bono targets, including making bonuses contingent on meeting the 35 hour a year target. We acknowledge that the organisational cultural support for pro bono work is critical to the success of the voluntary pro bono hours scheme.

Firms to whom we refer clients directly do not means test the clients we refer. This is helpful as it reflects the level of trust built up over time, and removes an administrative burden, which in turn frees us up to provide frontline services.

Question Four: *What are the main barriers for small and medium law firms, sole practitioners and in-house counsel in undertaking pro bono work? What strategies and support would be most effective in overcoming these barriers? What other options are there to promote the delivery of pro bono services by all sectors of the legal profession?*

Consumer Action supports recommendation 19.1 of the Productivity Commission's *Access to Justice Arrangements*. Unbundling of legal services may allow smaller firms to provide pro bono assistance that is commensurate with their overall resources.

In addition to increasing the pool of pro bono hours legal services available to CLCs, there are a range of opportunities to expand the availability of legal support for Victorians who can't afford to pay for it. Access to the skills and expertise of other industries could be expanded. In particular, access to accounting and financial services expertise could offer great benefit to CLC service and clients.

Smaller firms who struggle to provide pro bono hours because of their size may be better placed to provide pro bono support by contributing to a fund that could be used for services that complement legal assistance in lieu of hours. This could include for example funding for expert reports as evidence, tribunal filing fees, funds for interpreting services, and so on that would support the client's pursuit of a just outcome to their dispute. This way, a form of assistance would still be made available in a tangible form.

Another potential improvement, particularly among larger firms, could be the dedication of a CLC pro bono lawyer manager. The increases in efficiency could perhaps be offset by a small reduction in the hours provided by the firm overall.

Question Five: *Where could pro bono work be of the most help? What should the Government do to encourage lawyers to target pro bono work to communities and areas that need it most?*

We'd encourage pro bono firms themselves to publish data that demonstrates that their services are being applied to assist organisations, including CLCs, that are targeting unmet legal need or are otherwise assisting those sections of the community that are experiencing high unmet legal need. We note that many large law firms already publish this information on their websites, and the publication of the National Pro Bono Centre Annual Reports provide detailed statistical information about outputs.

Conflicts of interest can prevent firms being able to meet our request for assistance. We do not doubt that in many instances there are actual conflicts, but often there is no clear conflict but a firm may reject a request on this basis. This may be outside the power of the firm as there may be other strict obligations imposed on firms, for example rules from other jurisdictions imposed on international firms,

or requirements of their clients. We note that banks can consent to allow exceptions so that firms can act even where the bank may be party to an action, but in our experience this is not common. Regular conflicts of interest are par for the course, and the consequence can be that we are not always able to access advice in a timely and helpful way.

Client referrals requests are often rejected due to a lack of capacity on behalf of the pro bono partner. Expanding the pool of available hours of assistance, by lawyers with varying levels of expertise, would mean we could help more clients.

Question Six: *Which (if any) of the strategies outlined above would support lawyers to undertake pro bono work in areas of unmet need? What other options are there to encourage and support lawyers to undertake pro bono work in areas of unmet need?*

Close relationships between firms and community organisations including CLCs who work in an areas of unmet legal need, help build the expertise for both parties—for CLCs to gain subject matter expertise, and firms to gain an appreciation of how to work effectively with vulnerable clients.

Question Seven: *What should the Government do to encourage law firms on the Panel to undertake pro bono work in areas of unmet need?*

Criteria for membership of the Panel should include requisite hours plus a demonstration that hours were targeted toward existing unmet legal need either through partnering with organisations, including CLCs, that target unmet legal need or by providing services to people most susceptible to unmet legal need.

TOR 6: the availability and distribution of funding amongst legal assistance providers by the Victorian and Commonwealth governments to best meet legal need

Consumer Action undertakes a mix of casework services and public policy advocacy, funded by state and Federal funding respectively. Since 2014, restrictions have been placed on community legal centres preventing them undertaking law reform and policy advocacy using federal funds⁴⁶.

It is our strong view that funding for frontline services and broader advocacy are both necessary and complementary. Outreach and community education projects are also important to adequately fund.

Overall funding for community legal centres and legal aid

The Productivity Commission has acknowledged there is a need for additional funding for the sector, on the basis that not providing legal assistance can be a false economy as the costs of unresolved problems are often covered by other areas of government spending such as health care, housing and child protection. There are therefore net public benefits from legal assistance expenditure.

Former Chief Justice Gleeson commented in a speech delivered at the Australian Legal Convention in 1999:

The expense which governments incur in funding legal aid is obvious and measurable. What is not so obvious, and not so easily measurable, but what is real and substantial, is the cost of the delay, disruption and inefficiency, which results from absence or denial of legal representation. Much of that cost is also borne, directly or indirectly, by governments. Providing legal aid is costly. So is not providing legal aid.⁴⁷

The Productivity Commission's 2015 *Access to Justice* review recommended a total \$200 million in funding be provided to legal assistance from federal, state and territory governments, including \$120 million from the Commonwealth government.

The funding mechanism for community legal centres and legal aid commissions is through the National Partnerships Agreement on Legal Services. We'd like to see additional funding, based on the figures recommended by the Productivity Commission, allocated to legal aid commissions and community legal centres – plus an estimated 2% CPI increase per annum – delivered through an amendment to the existing National Partnership Agreement. The total additional amount recommended is \$610 million over four years.

Recommendation: Funding increases for community legal centres recommended by the Productivity Commission's *Access to Justice* review be implemented without delay

Funding for financial counselling

Given that financial counsellors provide community legal centre clients with essential services and the work of community legal centres is more effective when integrated with financial counselling, funding for this sector should also be increased.

⁴⁶ See <http://www.communitylawaustralia.org.au/brandis-restrictions-starting-tomorrow-see-to-silence-community-legal-centres-speaking-out-on-unfair-laws-policies-and-practices/> as at 8/2/2016

⁴⁷ Gleeson, M (1999) "*The State of the Judicature*" speech delivered at the Australian Legal Convention, 10 October 1999

Financial Counselling Australia, the sector peak body, estimates there are 2.5 million Australians living in households of high financial stress. A best practice standard would allow for the equivalent of one financial counsellor available for every 2,000 people in financial difficulty. This therefore requires a national workforce of 1,250 FTEs, at a cost of approximately \$100,000 per annum, with all associated on costs. At a total estimate of \$125 million per annum, it would seem fair that the Commonwealth fund 50%, or \$62 million. However, current funding is \$15 million.

Recommendation: Support increased funding for the financial counselling sector

Funding for advocacy

Funding for frontline services needs to be complemented with ongoing funding for systemic advocacy. The importance of funding systemic advocacy was noted in the Productivity Commission's *Access to Justice* review, which concluded:

Given the scarcity of resources, it is critical that existing and additional funds are directed to where they are most needed. Frontline service delivery should be prioritised, along with advocacy work where it efficiently and effectively solves systemic issues which would otherwise necessitate more extensive individualised service provision⁴⁸.

It recommended that Australian, State and Territory Governments should provide funding for strategic advocacy and law reform activities that seek to identify and remedy systemic issues and so reduce demand for frontline services.

CLC's already know the value of systemic advocacy and have long dedicated staff resources to achieving systemic change. Consumer Action has a strategic approach to problem solving which identifies and responds where systemic change is required so as to prevent the revolving door of problems or to fix legislative and administrative failings. For many years we have worked with governments, regulators and corporations, including in an advisory capacity, to bring about positive law reform and improved responsiveness to the needs of the most vulnerable.

Strategic approaches commonly involve coordinated campaigns involving trend identification, research and further investigation, policy work, community education, advocacy, media, direct action and lobbying. We have strong relationships with industry peak bodies, regulators and key government departments which seek our feedback and input. Consumer Action has contributed to system-wide outcomes for consumers by using a strategic approach, including unsolicited sales (the Do Not Knock sticker), fringe credit including payday lending, unsolicited credit card offers, and energy hardship.⁴⁹

We urge the review to recommend that funding for frontline and broader public advocacy services be preserved and increased.

Recommendation: Funding for frontline and broader public advocacy services be preserved and increased.

⁴⁸ Productivity Commissions, *Access to Justice, Overview*, p31

⁴⁹ Evaluating Consumer Action Worker Advice, October 2015, p10 online at <http://consumeraction.org.au/wp-content/uploads/2015/10/Evaluating-Consumer-Action-Worker-Advice-06102015.pdf>

TOR 7: Whether there is any duplication in services provided by legal assistance providers, and options for reducing that duplication, including the development of legal education material

Duplication of services

Consumer Action is the largest specialist consumer legal practice in Australia. In the same way that we think that funding for frontline legal services and funding for systemic advocacy are indivisible, we see a role for generalist and specialist legal services—even where a degree of overlap may exist.

While some generalist services may have some expertise in consumer law, credit and debt and therefore some duplication in expertise exists, we do not believe that this translates into duplication of services. This is because demand for legal services simply outweighs supply. Specialist services such as Consumer Action simply can't service all of the clients who present to it with consumer law, credit and/or debt issues and necessarily relies on the services of generalist centres to assist in providing these services. We believe the same could be said of Legal Aid services and generalist centres assisting in the area of family violence.

Moreover, generalist services, as with any generalist legal practice, do not have an in depth legal knowledge of all the issues that their clients present with. For this reason, they rely on the expertise of specialist services such as Consumer Action to assist with aspects of the multiple legal issues that their clients present with. This is not a duplication of services but rather a collaboration.

We already know that many vulnerable and disadvantaged Victorians have multiple legal problems. The LAW Survey⁵⁰ indicates that 20 per cent of respondents had three or more legal problems within the 12-months prior to the survey. The survey suggests that the co-occurrence or clustering of certain legal problem groups, including consumer and credit/debt issues, indicates legal problems may be meaningfully connected.

In practice, this means that clients often present with a range of legal issues, meaning it's important that the person they consult has the knowledge and expertise to identify and unpack the legal problems and either provide appropriate advice or refer them to someone who can help address the all or particular parts of their multiple issues. It is inevitable there will be some level of overlap, precisely because people have legal needs that don't always fit neatly into single categories.

We have discussed our approach to referrals, and building capacity amongst workers and the need for secondary consultations at length in our response to response to TOR 2.

CAAP advocates

An example where expertise is duplicated but services are not is in relation to the Consumer Advice and Advocacy Program (**CAAP**) funded by Consumer Affairs Victoria (**CAV**). CAV provides a small amount of funding to select community legal services to engage expert consumer advocates to represent vulnerable and disadvantaged consumers in their disputes with traders (a similar program is funded for tenancy disputes). CAAP advocates and Consumer Action lawyers provide similar services. However, rather than being a duplication of services, the services complement and enhance one another: CAAP advocates identify and inform Consumer Action of broader systemic issues that

⁵⁰ LAW Survey [http://www.lawfoundation.net.au/ljf/site/templates/LAW_Vic/\\$file/LAW_Survey_Vic.pdf](http://www.lawfoundation.net.au/ljf/site/templates/LAW_Vic/$file/LAW_Survey_Vic.pdf)

they are seeing through their casework, issues which Consumer Action's policy team can then advocate on and because demand for consumer law services outweighs supply, Consumer Action refers clients it is unable to assist to CAAP advocates.

Gaps in legal services

There are a number of gaps in the access to justice framework that are more pressing than the perceived duplications. These have been identified in a number of reports. For instance, the Indigenous Legal Needs (Victoria) report⁵¹ highlights a number of civil law issues experienced by Aboriginal and Torres Strait Islander people in Victoria that are not being addressed through the current justice framework and funding programs. In the area of consumer law, access to legal advice and assistance by Victorian consumers involved in building disputes is another important and costly gap.

The 2008 Victorian Law Reform Commission's *Civil Justice Review* also identified other important gaps. Specifically, the review recommended consideration of the creation of a Justice Fund.⁵² The fund "would provide financial assistance to parties with meritorious civil claims, provide an indemnity in respect of any adverse costs order and meet any requirements imposed by the court in respect of security for costs."⁵³ The potential for adverse costs risks inhibits public interest litigation, and needs to be offset by a fund if it is to be addressed.

Recommendation: As recommended in 2008, create a Justice Fund to provide financial assistance to parties with meritorious civil claims, provide an indemnity in respect of any adverse costs order and meet any requirements imposed by the court in respect of security for costs

Duplication of education material

We suggest the review be wary of being overly concerned with duplication of education material, as there is an inbuilt incentive (being limited or no funding provided for this work) for many in the community law sector to work co-operatively—and our experience is that there is already a degree of co-ordination and efforts are made to avoid duplication in order to maximise the effectiveness of our limited resources.

As discussed in our response to TOR 1, we think there needs to be a greater emphasis on ensuring legal education material is fit for that purpose, and recognise that for the most disadvantaged and vulnerable consumers, information alone is unlikely to provide the legal support they need. Education material is only going to be useful for people with the ability to undertake self-advocacy.

When Consumer Action undertakes to develop fact sheets and other legal education material, we take into account a range of factors including:

- Demand for the information—is it a common question asked of our lawyers;
- Whether relevant information is already available;
- Whether publishing the information would be helpful for some of our client base; and
- Any risk of publishing that information.

⁵¹Melanie Schwartz, Fiona Allison, Chris Cunneen, The civil and family law needs of Indigenous people in Victoria, online at https://www.jcu.edu.au/data/assets/pdf_file/0011/121889/jcu_131180.pdf

⁵² <http://www.lawreform.vic.gov.au/sites/default/files/VLRC%2BCivil%2BJustice%2BReview%2B-%2BReport.pdf> pp616-617

⁵³ Ibid at p615

There is rarely a budget for publications, unless funded by a specific grant (such as Do Not Knock stickers)—so our legal education material is produced with a view toward publication on our website only.

We work with our sector colleagues to provide our expertise where it is requested. For example, in 2014 we provided input to Victoria Legal Aid on what gaps exist in their legal fact sheets and recommended potential new topics that reflected calls to our legal advice line. We also provided feedback and advice on proposed material when requested.

Customisation to the intended audience can make a difference to the uptake and effectiveness of a publication. Centacare Forbes Wilcannia produced an ATSI-targeted Do Not Knock resource pack, with information on rights at the door as well as a sticker. The pack has been culturally appropriate and hugely successful; ongoing demand means another print round will shortly begin.

Instead of focussing on avoiding duplication, we think there's an opportunity for greater exploration of the extent to which legal information is being used by target audiences to help them with their specific legal needs, and how effective this intervention is.

TOR 8: The resourcing of Victoria Legal Aid (VLA) to ensure that Government funding is used as effectively and efficiently as possible and services are directed to Victorians most in need, including:

- **within the total funding envelope, the types of matters funded by VLA, eligibility criteria for legal assistance and the level of assistance provided**
- **VLA's current service delivery model, including the use of panel arrangements and internal lawyers, and spending on allied support services**

We offer only brief comment on this term of reference, to reiterate our detailed points under TOR 6 funding for legal assistance services are significantly underfunded and ask the review to recommending the overall funding envelope be increased.

TOR 9: options for providing better support to self-represented litigants throughout the Victorian justice system.

Making dispute resolution accessible for all Victorians, through the expansion of industry dispute resolution to areas that are currently underserved—including retirement villages and vocational training, as discussed in detail earlier in this submission—will significantly improve access to justice.

Additionally, we see the value in enhancing support services for self-represented litigants, particularly those who are, effectively, unrepresented.

Self-represented litigant support service

As discussed in TOR 2, there are numerous obstacles to people seeking advice around their civil law problems, resulting in vulnerable and unsophisticated litigants being confused by court documents, unable to identify their legal position, and unsure of where to go for legal advice.

In many instances, self-represented litigants could be more accurately described as unrepresented litigants. These people arrive at a hearing without having sought any legal or other advice (as opposed to those who actively decide they have the skills and knowledge to represent themselves in a dispute), and this is the cohort we are concerned with.

It may be useful to consider making a self-represented litigant service for courts and tribunals, as a means of giving individuals the best chance to achieve a just outcome. Such a service wouldn't provide legal advice, but would provide support and information on court or tribunal procedures, and seek to refer people to services they may need, such as financial counselling or a social worker. It would also need to reflect that many litigants join the process beyond a time when they can change the legal outcome of the dispute.

Take for example, a person having their home repossessed. If their first attempt to engage with the legal process is attending court to try and prevent repossession, the legal process is almost at an end and there is very little that can be done to prevent this outcome. Having legal assistance services and other support services such as financial counsellors and social workers on hand at the court to provide guidance would be helpful—given that there is little option at this point to change the outcome of proceedings.

We also note that self-represented litigants who seek to challenge a VCAT finding at the Supreme Court find that they have gone from a relatively informal tribunal to a formal court environment. We expect that additional assistance in navigating the change in forums may also be useful to this group.

Some volunteer based support services already exist, but there needs to be an assessment of the experiences of self-represented litigants and view formed on whether professional services would be more appropriate. A review of duty lawyer services would also shed light on where to best put resources to meet the needs of people entering at various stage of the legal process.

Process alone can ever ensure that people act and respond to legal proceedings; many people are scared, overwhelmed and confused when they find themselves party to a legal action and for a range of reasons will not have the capacity to act to protect their interests. Support mechanisms need to be

in place at every stage they may enter the legal process, so that the broader harm they may suffer as a result is minimised.

Recommendation: Scope the creation of a self-represented litigant service for courts and tribunals (located at courts and tribunals but independent from the courts and tribunals themselves)

Federal Circuit Court bankruptcy pilot service

Targeted assistance reaps real rewards for vulnerable self-represented litigants. We referred earlier to the pilot service Consumer Action ran in 2015 with the Federal Circuit Court, providing direct financial counselling services to self-represented debtors in the Court's bankruptcy lists. This pilot project is an example of how targeted assistance to self-represented litigants, even late in proceedings, is of significant value to both the court and the individuals involved.

Consumer Action's financial counsellors attended all hearings of the Bankruptcy List on Tuesday and Thursday mornings. The presiding Registrar referred 38 self-represented debtors to the counsellors during the trial period.

An evaluation report concluded that the project has been highly successful in assisting self-represented debtors in bankruptcy proceedings, and in increasing efficiency in the resolution of those proceedings. Some of the benefits of the project identified by the report were:

- The project has helped several debtors to demonstrate solvency (thereby avoiding bankruptcy) and several others to accept bankruptcy as a positive option in their particular circumstances.
- All debtors, financial counsellors and Registrars, and the majority of creditors' solicitors, agreed that the project helps debtors to understand the purpose of a bankruptcy proceeding and the consequences of being made bankrupt.
- Debtors who are referred for consultations with financial counsellors have a high proportion of resolutions by consent which will inevitably reduce the numbers of reviews and appeals from Registrars' decisions, which in turn will reduce the workloads of both FCC and FCA judges.
- The project has also increased the Court's efficiency by reducing the number of hearings taken to finalise matters involving self-represented debtors. Before the implementation of the project, matters involving self-represented debtors would often take three or more hearings. These matters are now taking one or two hearings to resolve.
- Significant efficiencies also result from giving debtors a better understanding of the nature of bankruptcy proceedings, and of the focus of the Court on issues of solvency. When debtors are able to appreciate the real issues before the Court, to put on relevant submissions and evidence and to enter into informed discussions with creditors, they can more properly participate in and engage with their proceedings, promoting access to justice, and leading to a more just resolution of proceedings.

The Federal Court project was due to finish in September 2015, however due to the project's success, the Court has agreed to extend its share of the funding for at least a further 6 months from the end of September 2015. The Registrars have indicated their intention to seek support from the Federal Court executive for further funding past this date.

Recommendation: Support innovative pilots that can help deliver targeted assistance to Victorians struggling in the justice system.

Finally, we note that the *Access to Justice* discussion paper on ADR, listed Consumer Action's telephone financial counselling service, MoneyHelp, as an ADR provider. We advise that MoneyHelp is not an ADR provider.

Please contact David Leermakers, Senior Policy Officer on 03 9670 5088 or at david@consumeraction.org.au if you have any questions about this submission.

Yours sincerely

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