Financial Rights LEGAL CENTRE

Submission by the Financial Rights Legal Centre

Treasury

Australian Consumer Law Review: Issues Paper – March 2016

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About the Financial Rights Legal Centre

The Financial Rights Legal Centre (*formerly known as the Consumer Credit Legal Centre (NSW)*) is a community legal centre that specialises in helping consumer's understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the Credit & Debt Hotline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies. Financial Rights took over 25,000 calls for advice or assistance during the 2014/2015 financial year.

Financial Rights also conducts research and collects data from our extensive contact with consumers and the legal consumer protection framework to lobby for changes to law and industry practice for the benefit of consumers. We also provide extensive web-based resources, other education resources, workshops, presentations and media comment.

This submission is an example of how CLCs utilise the expertise gained from their client work and help give voice to their clients' experiences to contribute to improving laws and legal processes and prevent some problems from arising altogether.

For Financial Rights Legal Centre submissions and publications go to
www.financialrights.org.au/submission/ or www.financialrights.org.au/publication/

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Credit & Debt Hotline 1800 007 007
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Monday – Friday 9.30am-4.30pm

Introduction

Thank you for the opportunity to comment on the Australian Consumer Law Review: Issues Paper. The Financial Rights Legal Centre (Financial Rights) wishes to respond to those sections of the Australian Consumer Law and Review Issues Paper that impact upon consumers' interaction with financial products and services as well as issues of financial hardship more generally. Specifically this submission puts forward our perspective with respect to unconscionable conduct (2.2.2), unfair contract terms (2.2.3), unfair practices (2.3.2), door-to-door sales (2.3.5), unsafe products (2.3.7), new and emerging business models (2.4) a public ancillary fund (3.2) and remedies more generally (3.3), issues of data and information privacy (4.4.1) and disclosure requirements (4.4.2).

In brief, our submission argues that the ACL regime as it currently stands does not make it easy for consumers both individually and collectively to assert or defend their rights and that regulators need to be empowered and resourced to deal with systemic issues more proactively.

Unconscionable conduct

2.2.2 Prohibiting unconscionable business conduct (Part 2-2)

Financial Rights believes that the concept of unconscionability remains a difficult concept to apply and too legalistic to be of significant value to everyday consumers pursuing and protecting their interests.

As has been noted in the Issues Paper and elsewhere – most comprehensively by the Consumer Action Law Centre in its *Discussion Paper: Unfair trading and Australia's consumer protection laws*[1] - the law surrounding the concept of unconscionability is uncertain, unclear and split. One line of authority considers accepted 'norms of society' the other a higher standard of 'moral obloquy.' This has led to difficulties in enforcement and ensures that individual consumers – particularly vulnerable and disadvantaged consumers – are forced to spearhead any action against unconscionable behaviour that should be dealt with on a systemic and preventative basis.

We also note that the Credit and Investments Ombudsman has recently drafted a Position Statement on how they deal with complaints about unconscionable conduct.[2] While still only a draft, the position statement outlines a narrow set of special disadvantages that a complainant

[1] http://consumeraction.org.au/wp-content/uploads/2015/07/Unfair-Trading-Consumer-Action-2015-Online.pdf
[2] http://www.cio.org.au/cosl/assets/Image/Position%20Statement%20-%20Unconscionability%20-%205%20February%202016.pdf

would need to face (including the inability to speak English, sickness, drunkenness) to ensure that they would fall into a category of equitable unconscionability. Mere imbalance in bargaining power is not considered special disadvantage for the purposes of unconscionability. When considering statutory unconscionability the CIO notes that special disadvantage is not required but that the financial service provider must have "no regard for conscience or was irreconcilable with what is right and reasonable." These are significant hurdles to face for financially vulnerable, under resourced and disempowered consumers.

Financial Rights believes more legislative guidance is required to further clarify the concept of unconscionability and its elements.

Furthermore there is nothing in the ACL that proactively works to prevent unconscionable conduct from occurring, rather the ACL is merely responsive. What would improve the situation for consumers more broadly would be for regulators to be empowered to take action to prevent unconscionable conduct occurring, or a representative to intervene prior to the harm taking place as opposed to after the harm is done. Financial Rights notes that the issues paper acknowledges that effective dispute resolution ensures that "problems are generally prevented or avoided in the first place." One simple way to ensure this is to empower regulators to act prior to harm.

Financial Rights strongly supports the introduction of a general unfair trading provision. Consumer Action has undertaken significant preliminary work in its *Unfair trading and Australia's consumer protection laws* paper to set out a case for a broad provision against unfairness based upon the European Unions' Unfair Commercial Practices Directive. An unfair trading provision would assist in defining aggressive market practices, capture misleading omissions and provide prospective powers to the regulator to take action before harm is created and to deal with ever-emerging, constantly evolving unfair business models such as credit repair services, for profit debt negotiators and other businesses that pray on hardship and consumers with a reduced ability to protect their own interests.

Unfair Contract Terms

2.2.3 Protecting consumers from unfair contract terms (Part 2-3)

In the same way as the issues faced by consumers with respect to unconscionable conduct, it is Financial Rights' experience, that it is difficult and disproportionately burdensome for an individual consumer to enforce an unfair contract term in a court or tribunal.

As an example Financial Rights has been concerned for some time with quasi-"insurance" products provided by rental car companies. Rental car companies regularly offer a form of "insurance" at the time of hiring however they are not insurance – they are liability limitations in the contracts. The terms and conditions of this limited liability coverage are usually set out in the rental agreements, are complex, differ from company to company and are usually very difficult for a consumer to understand, particularly in the time pressured period when hiring.

The use of "insurance language" often leads to consumers misunderstanding what the contract purports to do. The use of the word "insurance" and "excess" and other terms should be banned unless it is actually insurance provided by a licenced insurer who is a member of an External Dispute Resolution scheme.

Many of the liability limitations products may not cover the driver for damage to the rental car or the vehicles of third parties. Some rental car companies do offer limited protection to drivers in the event of an accident however the contracts are difficult to interpret and ascertain what the driver is and isn't covered for. Rental agreements also often contain numerous exclusions such as not covering tyres, windscreens, the roof, the interior and the undercarriage, hitting animals after dusk and other surprising events that most consumers would expect to be covered. It is Financial Rights view that there should be warnings provided to car rental consumers about the key exclusions in the contract eg being liable to other driver if you are at fault.

In April this year the Federal Court found that a number of the terms in Europcar Australia's standard rental agreement to be unfair and therefore void, in proceedings brought by the ACCC.

The Court found that various terms in Europcar's standard rental agreement were unfair because they held consumers liable for vehicle loss or damage regardless of whether the consumer was at fault. Other terms were also found to be unfair because consumers were liable for vehicle loss or damage when they breached the rental agreement, no matter how trivial the breach or whether it had any connection to the loss or damage caused.

Europcar has now amended its standard rental agreement to remove the unfair terms and the statements have been removed from its website. The ACCC are also examining contracts by Hertz.

This action took over four years to run its course. In the meantime many consumers would have been subject to these rental agreements and potentially disadvantaged.

The action taken would have been expensive, risky, difficult and lengthy option for an individual or collective of individuals to undertake. Financial Rights will go into the ability for consumers to undertake private actions in more detail below (at 3.3); suffice it to say here again though that they face significant hurdles both as individuals (and collectively) in addressing issues of unfairness and unconscionability due to the inherent imbalance of power they face, the administrative and bureaucratic obstacles in the way and risks at play.

Financial Rights notes too the fact that actions taken by the ACCC while important and achieve positive outcomes are fundamentally reactive. We reiterate the need for regulators to be empowered to take proactive action.

Whether standard form contracts covered by the *Insurance Contracts Act 1984* (Cth) should be subject to similar protections against unfair contract terms as apply under the ACL and ASIC Act

When the ACL commenced on 1 January 2011 it replaced and amalgamated 17 existing laws and included new unfair contract terms (UCT) provisions. However, as noted in the Issues paper, the UCT regime does not apply to insurance contracts. The *Insurance Contracts Act 1984* (Cth) does not include protections against unfair contract terms and excludes any Commonwealth, state or territory laws regarding contractual 'unfairness' from applying to contracts of insurance regulated under that Act, such as the unfair contract terms provisions in the ACL and ASIC Act.

This means that unfair contract term protections currently apply to every other contract an Australian consumer is ever likely to enter apart from insurance including financial products and service contracts under Subdivision BA of Division 2 of Part 2 of the *ASIC Act 2001 (Cth).*

It has long been the view of consumer advocates that there is no sound reason to exempt the insurance industry.

The Issues paper mentions the imposition of the duty of utmost good faith in the *Insurance Contracts Act 1984* (Cth) as one requirement currently placed upon insurers. Insurers have argued that this duty covers the same issues that arise with unfair contracts and imposing the UCT regime on insurers would add an additional layer of regulatory complexity. Financial Rights disagrees with this view and believes that the duty of utmost good faith has neither prevented the spread of unfair terms in insurance contracts nor has it provided the courts or external resolution schemes with any power to provide a remedy to consumers when an unfair term has been used.

Sections 13 and 14 of the Insurance Contracts Act do not provide that an insurer is in breach of the duty of utmost good faith merely because of the fact that they wish to rely on a contractual term that is unfair. Most consumers do not argue on the basis of good faith at the Financial Ombudsman Service and it is not commonly relied upon, if at all as a basis, for relief from an unfair term. The Financial Ombudsman Service has struggled in determinations to deal with unfair contact terms due to the limitation in the Insurance Contracts Act 1984 and the limited scope of the duty of utmost good faith.

Unfair terms are usually hidden away in the fine print of an insurance contract or product disclosure statement and are rarely read or understood by a consumer when selecting coverage.

Financial Rights regularly come across unfair contract terms in insurance cause a significant imbalance in the parties' rights and obligations arising under the contract; are not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

Financial Rights provides the following examples to illustrate

The RAA include the following statement in its comprehensive car insurance:

> *"If your claim has been investigated and you withdraw your claim or we refuse to accept it, you may have to pay any costs incurred for the investigation of your claim."*[3]

This term is both a significant incentive for the insurer to investigate every case and delay payouts. It also acts as a significant disincentive to make a claim when the policyholder knows that they could be up for the cost of an investigation.

AVEA include the following term in their Motor Vehicle Insurance:

> *If You are responsible for damage to another person's Vehicle, We will pay the costs of hiring a substitute Vehicle for that person at publicly available commercial rates not exceeding $100.00 per day to a total of $1,500.00. See Additional Benefits Section for details about how rates are calculated.*[4]

and

> *If You are responsible for damage to another person's Vehicle, We will pay the reasonable costs of hiring a substitute Vehicle for that person at the lowest publicly available commercial rate, not exceeding $100.00 per day. This benefit is limited to $1500.00*[5]

These terms limit liability for 3rd parties seeking damages against the at fault party insured with AVEA. They limit the cover to $1500 when most other policies have liability cover up to $20 million.

RSPCA Pet Insurance includes the following cancellation term:

> *We will only accept notices of cancellation given in writing and signed by you. We will not accept cancellation requests by telephone or email unless agreed to by us, If you return your policy during the cooling off period, we will refund any premiums paid since commencement or renewal, less any reasonable administrative and other transaction costs incurred by us which we are unable to recover and any taxes or duties that we are unable to refund.*[6]

Limiting cancellation to the provision of notice in writing "unless agreed by us" and retention of "reasonable administrative costs" that are not specified unreasonably disadvantages the consumer and causes enormous difficulties to consumers trying to cancel a policy.

Youi's Uninsured motorist extension provides cover in the following limited circumstances:

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[3] RAA, (2014). Comprehensive Car Insurance, Product Disclosure Statement http://www.raa.com.au/documents/comprehensive-car-insurance-pdsapr15 p22
[4] AVEA Product Disclosure Statement – Motor Vehicle Insurance https://www.avea.com.au/download/product_disclosure_statements/MotorVehicle_V011214_Web.pdf p.6
[5] AVEA Product Disclosure Statement – Motor Vehicle Insurance https://www.avea.com.au/download/product_disclosure_statements/MOT_V011115_Web.pdf p.8
[6] RSPCA Pet insurance p24. https://www.rspcapetinsurance.org.au/RSPCA/media/Document/rspca-policy-booklet.pdf

> *Under Third Party, Fire and Theft or Third Party Property Only cover, up to $5,000 or the car's market value, whichever is the lesser, for accidental damage to the car, if there was an uninsured third party motorised vehicle involved and if:*
>
> *…*
>
> *we agree that the third party was completely to blame for the accident;*
>
> *you provide us with the name, residential address, contact phone number and vehicle make and registration number of the other party; …*[7]

This term permits the insurer to make an arbitrary decision to exclude if they do not agree and do not have to base this on the facts or evidence before them. The requirement to provide name, residential address, contact phone, vehicle make, model and rego is unreasonable if the driver at fault refuses to provide the details or flees the scene. The cover here is not limited in this way under comprehensive cover policies.

Finally Financial Rights solicitors regularly see terms that involve the automatic renewal of policies or fixed term contracts. The UK Financial Conduct Authority lists automatic renewal of a fixed-length contract where the deadline to cancel is unreasonably short, as an unfair contract term. In Australia, ASIC last year reviewed six insurers' car insurance renewal practices.[8] They found that:

> *"consumers were not always clearly informed by insurers, when first purchasing the policy, that it would automatically renew unless the consumer advised otherwise. In most cases consumers were only informed about the automatic renewal practice in the product disclosure statement (which may not be received by the consumer until after the insurance is purchased) and renewal notice."*

The law does not prevent insurers from automatically renewing insurance policies and in some cases consumers seek this feature out, however by structuring the sales and disclosure practice in such a way that does not fully inform consumers of this renewal practice unreasonably advantages the insurer. Where consumers inadvertently find themselves insured twice, they struggle to obtain a refund for the full premium and are often limited in only recovering 50% of the overpaid premium on the basis the insurer was "on risk".

We believe that these terms and the examples provided above prima facie meet the definition of an unfair term in that they cause a significant imbalance in the parties' right and obligations arising under the contact, are unnecessary and can and do cause detriment to consumers. Furthermore none of these terms could arguably fall within the duty of utmost good faith nor be remedied by a court or external dispute resolution service.

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[7] Youi, Car Product Disclosure Statement p12 https://www.youi.com.au/GetPDS/?riskType=VEH
[8] ASIC, 15-345MR ASIC drives better disclosure of automatic renewal of car insurance, 19 November 2015 http://asic.gov.au/about-asic/media-centre/find-a-media-release/2015-releases/15-345mr-asic-drives-better-disclosure-of-automatic-renewal-of-car-insurance/

In 2012 the Federal Government introduced a Bill to extend the protections from unfair contract terms available for consumer contracts of other financial products and services to general insurance contracts. The Bill never entered into law. Financial Rights notes that the UK has banned unfair terms in insurance contracts under their Consumer Rights Act 2015.

Financial Rights believes that subjecting general and life insurance contracts to the unfair contract terms regime would allow remedies for consumers who have suffered significant detriment because an insurer relied on an unfair term. It would create an incentive for insurers to draft their contracts with an eye to fairness and would further encourage insurers to review their existing contracts and remove terms which may be unfair, rather than face enforcement action later. It would also improve the fairness of insurance contract fine print—making policies easier to read and compare, giving consumers stronger protection under the law, and promoting genuine competition.

Unfair practices

2.3.2. Protecting consumers from unfair practices (Part 3-1, Divisions 2 to 5)

Financial Rights notes that the 2015 Financial Services Inquiry raises questions about whether the prohibition against unsolicited debit and credit cards is necessary, as reported in Box 3.

Financial Rights does not support removing the prohibition and believes it continues to act as an important bulwark against practices that exploit vulnerable consumers. If anything, the prohibition needs to be modified not removed. Currently section 12DL applies solely to credit and debit cards. Financial Rights believes that this should be broadened to capture other forms of unsolicited financial products. Financial Rights is aware for example that Small Amount Credit Contract providers undertake similar unsolicited marketing of new loans to clients who have used the service in the past. While not strictly a credit or debit card, pay day loans amount to the same thing, the lenders use similar pressure marketing tactics and target financially vulnerable consumers.

With respect to the prohibition on harassment and coercion under section 12DJ, Financial Rights believes the Review needs to consider the impact that new technologies and new business models are having on sales practices and consumers. For example, more and more our everyday business and entertainment is conducted via our phones and tablets. Mobile and tablet 'apps' are built around a business model that is centred on "in-app" purchases and billed via your phone service bill or a related app account (for example via iTunes or Google Play). Consumers purchase ad-free versions of apps, extra game levels, additional content etc via these apps. Children and their parents are commonly vulnerable to these techniques. However many of these techniques border on a form of digital or virtual harassment and coercion that take advantage of the unique experience of digital interaction. The ACCC provides some advice on how consumers can prevent unauthorised in-app purchases[9] and the Australian

[9] https://www.accc.gov.au/consumers/internet-phone/in-app-purchases

Communications and Media Authority provide a guide for consumers to navigate the pitfalls. However Financial Rights believes that consideration needs to be given to expanded or broadening the coercion and harassment protections to capture new forms of digital harassment and selling techniques.

Door-to-door sales

2.3.5 Providing consumers with rights when a salesperson approaches uninvited

While it is generally illegal for sales of financial advice or products to be conducted via unsolicited contact and door-to-door, Financial Rights remains seriously concerned with the disproportionate impact of door to door sales tactics upon the financially vulnerable. We strongly support an outright ban on the practice given the consumer harm versus lack of economic benefits as argued by CHOICE and the Consumer Action Law Centre.

Unsafe products

2.3.7 Protecting consumers from unsafe products (Part 3-3)

Financial Rights notes that the ACL's product safety regime is focussed solely on consumer goods; that is goods intended to be used for personal, domestic or household use or consumption and product related services. Financial Rights believes that there is scope to reconsider this and expand the notion of product safety to financial products and services that are also inherently unsafe in a financial sense. Financial harm can be as dangerous and devastating as physical harm. However the notion that a financial product can be inherently unsafe has yet to be considered. There may be merit in examining the development of a product safety regime crafted specifically for financial services that would involve the issuance of safety warning notices, the banning of products and services and imposing standards of service similar to the product intervention powers recommended by the Financial Services Inquiry.

New and emerging business models

2.4 Other issues

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

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

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

Financial Rights has seen a proliferation in the last few years of consumer complaints against new financial businesses known as Debt Management Firms. In our view these types of businesses prey on and exploit on the most vulnerable consumers in Australia offer.

These businesses can be categorised in the following four groups:

1. **Debt negotiators:** claim they can negotiate with creditors to settle debts for a lesser amount, but often suggest high risk strategies to improve their 'bargaining position';
2. **Credit file "repair" services:** offer to 'clean' clients' credit files by pressuring creditors to have default listings removed;
3. **Debt agreement brokers/referrers:** act as intermediaries for debt agreement administrators under part IX of the Bankruptcy Act and
4. **Budgeting services or debt payment services:** arrange for wages to be paid into an account created and controlled by the company, from which bills are paid on the consumers' behalf.

These businesses have a number of common elements including:

- targeting consumers experiencing financial stress, particularly low-income Australians;
- they fail to provide clear explanations of fees and charges during the initial contact with consumers
- they charge high up-front and on-going fees for 'services' and
- they suggest high cost 'solutions' to debt problems that are not in the consumer's best interests, potentially leaving them in a worse financial position than before, even when there is a free dispute resolution service available to the consumer.

These businesses are also characterised by many of the elements of unfairness distinguished in the issues paper. They depend on a class of consumers that cannot access, or are not aware of, alternative services to meet their needs, and they are based on ongoing fees and fees significantly disproportionate to the cost of providing the service.

Debt management firms can charge large fees and cause significant consumer detriment, but consumers have limited access to justice. Although the fees charged by some providers are very high and disproportionate to the service provided, this may not itself be unlawful.

Importantly none of the above businesses are subject to specific regulation of their activities.

The businesses currently do not currently fall within the meaning of 'financial services' or 'financial products' as defined the ASIC Act or the relevant provisions of the Corporation Act. This means they cannot be licensed by ASIC, are not required to be members of external

dispute resolution (EDR) schemes, are not required to provide any information on their activities nor are subject to regular audits. Even if they were to be licenced the laws currently in place do not necessarily address the business models that these firms use.

These businesses do however fall within the consumer protection provisions of the ACL but the ACL protections have so far proven to be inadequate to protect vulnerable consumers. There are also significant difficulties in applying the consumer guarantees to new and emerging services such as those provided by debt management firms. For example, how does a consumer or regulator know whether a new and emerging service is "fit for any specified purpose" when there is nothing to compare that new service to and there are no standards set for what is essentially a useless service.

Some of the activities of debt management firms may or may not be regulated by the National Credit Act, the Bankruptcy Act and the Privacy Act. What is clear however is that there is no uniform regulatory framework applying to the activities of debt management firms in Australia and they are not required to hold a credit or AFS licence administered by ASIC.

There are also significant complexities and difficulties for consumers (be it individually or collectively) to pursue any action against any debt management firms or any other new and emerging financial businesses. Firstly it is difficult to work out whether a business needs to be licenced as an AFSL, secondly actually pursuing this requires Supreme Court action which is costly and complex and thirdly the rescission provisions under s. 925A of the Corporations Act and the interpretation they have been given by the courts have proven difficult for consumers to get their fees returned or receive declaratory relief.

If debt management firms and other new and emerging financial businesses were required to be licensed there would be greater scope for ASIC to gather information, conduct regular risk-based audits for compliance and ensure that these unfair businesses are subject to an external dispute resolution scheme. There is therefore merit to considering the reasons why these services fall between the regulatory cracks and how these can be addressed. However any move to do so would need to take a broader examination of the laws that would apply to these firms and whether specific legislation is required to address their "innovative" activities that were not foreseen in the current legislation.

While we believe that regulators need to consider targeted action against debt management firms we believe that one important alternative way to deal with these exploitative businesses would be via a general prohibition on unfair trading as outlined above.

As already stated, Financial Rights is strongly of the view that as the ACL currently stands it is far too reactive to a fast changing landscape, where new exploitative business models develop to take advantage the regulatory gaps and unregulated and yet-to-be regulated commercial spaces. A general prohibition on unfair trading has the potential to correct this failing and assist regulators to proactively prosecute traders with inherently unfair business models before the harm has taken place.

3.2 Effectiveness of remedy and offence provisions

3.2.6. Jurisdictional differences in the enforcement 'toolkit'

Financial Rights notes the discussion in Box 15 regarding the management of surplus funds from court-ordered ACL remedies.

There is currently no Public Ancillary Fund or trust at the Commonwealth level (or state level other than in Victoria) to manage undistributed or surplus funds to support research and advocacy in relation to consumer issues generally or financial services. There are funds available for financial literacy but this is not the same as research, policy and advocacy on consumer issues. Many philanthropic trusts fund activities related to human rights, but very few entertain applications aimed at consumer rights.

To address this gap Financial Rights is currently finalising the establishment of the independent Consumer Advocacy Trust, an independent Public Ancillary Fund (or PAF) that will raise funds to promote the objects of the Trust.

The Trust will be able to accept charitable donations as well as accept money paid pursuant to enforceable undertakings obtained by consumer protection regulators such as ASIC and other undistributed or surplus funds arising out of ACL breaches.

The objects for which the Trust has been established are to advance consumer rights and improve consumer outcomes through facilitating independent consumer research, policy analysis, individual casework, systemic advocacy and related consumer education. The Consumer Advocacy Trust will promote improved outcomes for consumers generally, and for consumers facing particular vulnerability or disadvantage (in particular). In order to do this the Trust will:

- develop a funding program which accepts applications from not-for-profit organisations seeking to undertake independent consumer research, policy analysis, casework and/or systemic advocacy (and related consumer education where appropriate) to further the objects of the Trust;
- administer the funding program so as to ensure the funds are spent appropriately to further the objects of the Trust; and
- promote evaluation, research and continuous improvement to ensure the funding program is producing identifiable outcomes consistent with the objects of the Trust.

Financial Rights strongly believes that once established the Consumer Advocacy Trust can fill the clear gap that currently exists in the enforcement 'toolkit' and assist to ensure that Australian consumers benefit from the surplus funds that from time to time emerge from court ordered ACL remedies, and enforceable undertakings obtained by consumer protection regulators including ASIC.

Remedies

3.3 Access to remedies and scope for private action

Financial Rights is strongly supportive of Australia establishing a Retail Ombudsman as an alternative dispute resolution mechanism to hear and help resolve consumer complaints. Financial Rights has extensive experience in working with the Financial Ombudsman Service, the Credit and Investment Ombudsman, the Telecommunications Industry Ombudsman and the Energy and Water Ombudsman NSW and we believe these services produce significant positive outcomes for consumers in terms of easy, low threshold access to alternative dispute resolution, resolution of issues and consumer satisfaction.

It is compulsory to join an external dispute resolution (EDR) scheme for Australian financial services. The model for a potential retail EDR scheme is the UK's Retail Ombudsman. The UK Retail Ombudsman however is an opt-in service with membership of the scheme voluntary, the retailers themselves paying for membership on a sliding scale. It is unclear whether this voluntary regime has led to haves and have-nots in terms of access to alternative dispute resolution and justice. In Financial Rights' view all retailers would ideally be members of the scheme.

The Retail Ombudsman service in the UK is free to consumers with the decision of the ombudsman only binding the member retailers who would be contractually obliged to comply with a decision. This is similar to the way FOS and CIO work here and is generally well regarded. The EDR schemes are also generally less cumbersome for consumers to use with the state based tribunal more complex administratively and bureaucratically.

For example, Financial Rights has found that the NSW Civil and Administrative Tribunal is more technical, legalistic and difficult to navigate for a consumer. Rather than simply writing down one's issues in a dot point list, listing the important events, and gather documents, as suggested by the NCAT website - Financial Rights has found that this has not been enough, with clients asked to number each page create an index and place all the documents in two identical folders. In addition, for small amount matters Financial Rights has anecdotal experience that consumers are encouraged by Tribunal Members to "not bother" with seeking recovery of small sums ($600).

Generally speaking consumers find it difficult and overwhelming to bring claims before a court or a tribunal. In the first place, the issues consumers face can be complex due to the natural complexity of the products or services that they are dealing with (such as insurance, banking and superannuation products). They have a limited understanding of their rights and obligations and have limited experience, if at all, of working within the court and tribunal system. This is not helped by processes that are overly legalistic, bureaucratic and administratively complicated.

Even when legally represented there are significant barriers to entry for consumers including cost, time, a significant imbalance of power and resources, and significant risks. Particularly noteworthy are the disincentives created by adverse costs orders. Financial Rights is currently

experiencing significant reluctance from already financially vulnerable yet significantly harmed clients to enter into a class action against a financial service provider. This is understandable given what is at stake for our clients versus the resources of the financial service provider and the potential to escalate costs to the point where the cost benefit analysis makes little sense for individuals involved. While there may be formal equality between the parties, there are significant structural imbalances through an imbalance of resources that discourage meritorious litigation.

In order to address this Financial Rights supports consideration of the proposals being put forward by the Australian Consumer Law Committee in it's submission to this Review. These are, firstly, the development of a national justice fund similar in form to the Hong Kong Consumer Legal Action Fund – which provides consumers access to financial support and legal assistance – and the Victorian Law Aid scheme that assists in civil litigation. And secondly the capping of adverse costs orders. This would involve giving consumers claimants the ability to apply for the capping of costs orders to prevent the defendant from attaining an unfair advantage and discouraging otherwise meritorious litigation. A cap on adverse costs order would ensure that meritorious claims get a fair hearing when they would normally not proceed due to the clear risks involved for individuals and would have the benefit of ensuring that defendants do not strategically run up legal and court costs, leading to more efficient use of the courts.

Privacy

4.4.1 Consumer access to data

Financial Rights notes that there is a review into data availability and use by the Productivity Commission.[10] While we agree that greater access to one's own personal data will be of benefit to consumers, it is important to tread carefully as individual consumer interests will compete with vested commercial and government interests. Personal information is sensitive and disclosure of that information can cause serious detriment.

Financial Rights just has to point to recent coverage of problems with credit reporting to illustrate the potential for harm that arises when commercial interests handle personal data.[11] Through our casework, Financial Rights sees a large number of errors and misleading information in consumers' credit reports and files. People are mistaken for the wrong person or subject to identity theft and difficult to correct the information. Incorrect information is attached to the wrong file and other basic errors sneak into reports leading to significant negative impacts upon consumers and their ability to gain finance, rent or undertake basic

[10] http://www.pc.gov.au/inquiries/current/data-access
[11] ABC 7.30, Veda Advantage accused of providing incorrect credit information, refusing to fix errors http://www.abc.net.au/news/2016-05-25/veda-advantage-provided-incorrect-credit-reports/7444392

financial transactions. Financial Rights lacks any confidence in the ability or motivation of the key reporting agencies to correct this information in a timely and efficient manner.

Furthermore, Financial Rights has serious concerns with the behaviour of credit reporting agencies particularly in respect of the sale and sharing of personal data to marketers, third parties and related commercial entities; the disproportionate promotion of expensive paid credit reports in lieu of legislated access to free credit reports; and how particular information, such as a consumer requesting and receiving a hardship variation, is recorded under the credit reporting regime. Consumers need to be treated fairly and consistently in credit reporting and efforts should be centred on ensuring greater accuracy of that data, curbing major privacy and security risks. So far Financial Rights has seen little evidence of this.

Financial Rights also notes that concerns have been raised in the UK too about the negative consequences of credit reporting on the poor and disadvantaged. A report from the Centre for Responsible Credit found a lack of evidence that credit information was being used to ensure responsible lending decisions nor was data sharing leading to more responsible lending practices.[12]

In other sectors consumers are treated just as badly if not worse than in the credit reporting space. Financial Rights notes, for example that consumers still do not have the right to free insurance reports nor a free tenancy report and have to pay for their own information.

This overview of issues relating to the increased availability of data demonstrates the fraught nature and detrimental consequences that increased collection, access and use of personal financial, consumption and transactional data can cause. Any movement in this area needs to ensure that consumers have greater control over their own personal information rather than less and that government, industry and other commercial and vested interests should be tempered with a directed focus on the privacy and security interests of the individual consumer.

Financial Rights is therefore opposed to mandatory data reporting until the current system has been bedded in and reviewed.

Disclosure

4.4.2 Disclosure requirements

Financial Rights supports any moves to improve the disclosure of critical information including pricing, coverage, warranties etc. However we wish to emphasise the need to consumer test any changes in disclosure to ensure that the changes not only informs consumer choice but, more importantly leads to positive improvements in actual consumer behaviour.

[12] Damon Gibbons, Does increased credit data sharing really benefit low income consumers? Centre for Responsible Credit, February 2013

It is often erroneously assumed by researchers and policymakers that more disclosure leads to improved comprehension which subsequently and necessarily leads to improved decision making. It has been rarely if ever examined whether this assumed relationship in fact exists. That is to say, just because a consumer is better informed about key information relating to a product does not necessarily mean that this leads to the purchasing of products that are best suited to their needs in terms of price, quality, or other benefits. Consumers may consequently pay too much or receive fewer benefits than would be possible if they fully comprehended the implications of their purchase decisions.

Financial Rights is currently working on examining disclosure requirements in the insurance sector, to see what works, what doesn't and what insurers should do to improve consumer decision-making. As a part of this project the research will take a look at the new mandated Key Fact Sheet for home building and contents insurance products following the Queensland floods. The Government introduced the KFS to address the fact that many consumers fail to read their Product Disclosure Statement before taking up an insurance policy. The prescriptive document is intended to enable easy comparison and get across basic key information to the consumer. However no consumer testing was conducted into the final version currently being distributed with insurance policies. The KFS may very well be an effective disclosure tool however this remains completely unknown.

Financial Rights is not opposed to innovative disclosure but simply argues that there must be sensible consumer testing before any such change or innovation is introduced.

Concluding Remarks

Thank you again for the opportunity to comment. If you have any questions or concerns regarding this submission please do not hesitate to contact the Financial Rights Legal Centre on (02) 9212 4216.

Kind Regards,

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