

Legal Aid Queensland (LAQ) welcomes the opportunity to make a submission to the Review of Australia's Consumer Policy Framework.

Legal Aid Queensland's civil law services seek to make legal rights a reality for disadvantaged people. We provide community legal education, legal information, legal advice, extended assistance and casework services in relation to consumer issues.

We provide advice to approximately 50,000 people each year and around 30% of those advices are in relation to civil law issues. We also have a specialist Consumer Protection Unit (CPU) with a focus on consumer credit. That unit provides direct advice to over 1000 Queenslanders each year and conducts limited casework to the extent our resources permit. The unit gives priority to matters where there may be a more wide-ranging beneficial effect for all consumers and where clients have been victims of consumer injustices.

### **The rationale for consumer policy**

LAQ believes there is a need for a strong consumer protection framework which acknowledges the inequality of bargaining power in many consumer transactions. In addition the framework must recognise the nature of many consumer transactions made by people living in poverty. Often their consumer choices are made in circumstances of desperation where the inequality of bargaining power is extreme. They are participants in sections of markets which well-informed consumers avoid and where there is no capacity for empowered consumer behaviour to provide effective outcomes. Strong government regulation is necessary to protect the vulnerable from exploitation.

A typical example from our casework which illustrates this situation is the case of a family who needed to borrow \$500 to pay for car registration to keep an old car on the road. The car was necessary to get a child to school and a family member with a chronic medical condition to medical treatment. This loan was at the interest rate of 20% per month compounding. A further advance was made of approximately \$300 for the purpose of attending a family funeral interstate. After paying back almost twice the amount borrowed over a period of several months, the family fell into arrears with the loan repayments and action was taken by the lender to repossess the car. At that time, the lender asserted the family still owed almost twice the amount that they had borrowed.

Clearly this was a consumer transaction driven by circumstances of desperation. There was no equality of bargaining power. The family, due to financial difficulty in the past were locked out of the mainstream market for credit and forced to the fringe of the market. The lack of any alternative means of providing for the necessities of life (in this case a car) was the motivation for the transaction. The fringe credit market has grown up in response to such circumstances of desperation. The effect is that people are locked in poverty as they struggle to pay very high rates of interest and money which governments pay to support families during times of financial difficulty is being diverted to operators in this fringe market. This is an example of market failure. The product (credit at very high rates of interest) is inherently flawed and arguably not fit for the purpose for which it was sold, yet it is still purchased out of desperation and this fringe market flourishes in the absence of government regulation in Queensland. LAQ submits that an effective regulatory framework would step into failed markets to protect vulnerable consumers. In addition, government and community partnerships could provide alternative products which meet the consumer need – in this case credit for the necessities of life in circumstances of financial distress.

Another example from our casework demonstrating market failure and the need for government intervention in the market for “aspirational” products or services aimed at vulnerable consumers. These can seem trivial but are often linked to long term credit contracts and have a very negative impact on people living in poverty. LAQ has provided assistance to:

- People suffering from psychological problems who have run up enormous bills on telephone psychic lines
- People who have paid thousands of dollars in response to high pressure sales tactics for “educational systems” to help their children learn which are nothing more than a series of videos
- People who have paid thousands of dollars in response to high pressure sales tactics to acquire household goods such as pots, pans, crockery etc for which they have little need and which could be purchased at a fraction of the price elsewhere.

While these cases can be seen as simply people acting foolishly, they can also be seen as providers of goods and services acting unconscionably by exploiting the vulnerable. Our success rate in assisting these clients is much higher in circumstances where there is specific legislation (eg regulating door to door sales and providing a cooling off period) than in circumstances where we can only rely on more general provisions concerning unconscionability or misleading and deceptive conduct. Such general provisions require recourse to litigation where the facts about the description of the product or service will invariably be in dispute, there is a written document which supports the trader rather than the consumer, and our clients, because of their vulnerabilities (eg: psychological problems) face difficulty if the case is determined solely on the basis of their credibility as a witness. Even if Legal Aid were able to resource the routine conduct of such litigation, the client faces a significant costs risk if unsuccessful and the amounts in dispute, while significant to the client, do not warrant the costs of litigation.

LAQ submits that in markets such as these, the regulatory framework needs to be specific so there is no need for arguments about whether a transaction was “unconscionable”.

### **Market trends and developments**

LAQ agrees that the increasing complexity of the market, particularly for intangible products (such as insurance, and finance) and for services, has led to the emergence of intermediaries. The regulatory framework has been slow to catch up with this market trend, and this has allowed unscrupulous operators to sell services of little value. LAQ has assisted clients in the following circumstances:

- Finance brokers cold calling offering alternate finance packages which are less favourable than the client's existing finance
- Finance brokers assisting clients into very high interest loans where there is a link between the finance broker and the finance provider.

LAQ believes that absence of a comprehensive regulatory framework for finance brokers and the lack of access to an external dispute resolution regime has meant that regulators have been unable to act against unscrupulous operators and consumers have had little redress.

LAQ considers that an effective regulatory framework should have the capacity to respond quickly to market trends.

## **How well is the current framework and the suite of measures performing?**

### Overall framework and approach

LAQ considers that the current consumer framework does not always address the needs of vulnerable consumers locked out of effective markets.

### Policy tools

LAQ considers an effective combination of policy responses should include:

- A strong role for the regulator who is resourced to take action in relation to serious breaches of the regulatory framework
- A low cost, accessible, fast and fair remedy for individual consumers
- Broad generic legislation which covers most markets
- Specific legislation which applies to markets for complex and high value products and to markets or sections of markets for basic goods and services which are exhibiting market failure (i.e. there is an inappropriate producer surplus at the expense of consumers and the price of goods or services far exceeds the cost)

### Disadvantaged and vulnerable consumers

LAQ considers that the terms “disadvantaged” and “vulnerable” should be understood in the context of the limited consumer choices which people have when living in poverty. It must also be understood that choices are made in circumstances of desperation. Therefore while they might appear irrational to an observer taking a long term view of the circumstances they are completely rational given the choices the consumer faces. An example from our casework is the case of a single mother who entered into a rent buy contract which resulted in her paying a very high price for a refrigerator. While this may appear irrational, it is not when seen from her perspective of the other choice she had at the time, namely to attempt to provide for her children without a refrigerator in the home.

In our experience disadvantaged consumers are most likely to be assisted by legislative regimes which tip the balance in their favour to overcome inequality of bargaining power (for example reasonable cooling off periods) and by external dispute resolution schemes which provide real redress without the need for litigation.

### Generic v industry specific regulation

In our view generic regulatory measures are only successful if they can be enforced. For the reasons given above (limited access to free or low cost legal services, costs and risks of litigation, and standard form contracts which protect the trader) enforcement of generic consumer protections is not a realistic option for most consumers.

Generic legislation such as unfair contracts legislation could assist consumers if accompanied by procedural provisions which overcame inequality of bargaining power, for example a requirement that a trader seeking to rely on some types of provisions to prove that those provisions are fair.

By contrast, industry codes of conduct supported by external dispute resolution schemes have proven an effective means of consumer protection.

LAQ considers that regulation is necessary in those markets or sections of markets which are exhibiting market failure. We consider that the fringe credit market is one such market where specific regulation is warranted. Court action to establish that an interest rate of 1000% is unconscionable is of far less systemic effect than a provision which caps interest rates or which requires a lender to demonstrate that their rate was not unconscionable.

Enforcement and redress issues

LAQ considers that there are gaps in the enforcement framework. Generally regulators lack the resources to take action frequently enough to provide a disincentive for breaches by traders.

Consumers also lack the resources to take enforcement action on their own behalf due to the limited free or low cost legal assistance which is available and the procedural complexity in the courts. In our view the external dispute resolution schemes operated by industry have proven a very effective mechanism for enforcing appropriate behaviour by traders in specific industries particularly in finance and insurance.

Unfortunately Queensland lacks an all purpose tribunal for dealing with general consumer matters with jurisdiction split between the Magistrates Court, the Small Claims Tribunal and Commercial and Consumer Tribunal. This means that some consumer protection measures (eg: the provision for application to vary consumer credit loans) are largely illusory because of the complexity of the process and the limited access to free or affordable legal services.

Currently in Queensland, the one Consumer Protection Unit lawyer position at LAQ is the only specialist consumer legal service lawyer with the capacity to conduct litigation. LAQ is of the view that additional resourcing is required for legal services to assist consumers. In particular, additional funding is required to enable the provision of extended assistance (more than advice but less than full casework) to vulnerable people in relation to basic legal rights. Effective external dispute resolution mechanisms minimise the need for traditional litigation, however funding should still be available for litigation in cases where: basic legal rights are at stake; there is no private alternative; and casework representation can provide a means to redress the social exclusion experienced by vulnerable and disadvantaged consumers.

Non regulatory approaches

LAQ considers that a publicly funded consumer advocacy body would assist to advance the interests of consumers in Australia. However, this should not be a substitute for effective regulation.