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Research Report



Unconscionable Conduct and Aboriginal and Torres Strait Islander Consumers

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Executive summary

This research was undertaken in response to ongoing complaints received by ICAN about traders behaving unfairly and unconscionably in their dealings with Aboriginal and Torres Strait Islander people throughout Northern Queensland. In particular, it was apparent that certain traders would deliberately set about targeting Aboriginal and Torres Strait Islander people, in regional centres, and in remote communities with a view to entering into unfair contracts and engaging in unconscionable dealings with them. Whilst legal proceedings have been instigated against a number of these traders with varying degrees of success, it remained apparent to ICAN that the law and the mechanisms provided by the law were not effective in adequately protecting Aboriginal and Torres Strait Islander consumers from those traders who deliberately engage in unconscionable conduct from a practical point of view. To start to develop an evidence base and detail around this issue ICAN decided to interview a number of clients about their experience of the contractual negotiations to begin to identify and articulate the issues around transactions involving possible unconscionable conduct.

Recent government reports and court cases reveal that Aboriginal and Torres Strait Islander people, particularly those living and working in remote and regional areas, are vulnerable and disadvantaged consumers when it comes to the selling of goods and services. This appears to be due to a number of factors which include English as a second language and the tendency, in many cases, for Aboriginal and Torres Strait Islander people to answer 'yes', an apparent agreement, to what is presented in that context. There are also very few information and advocacy services available, accessible and willing to assist people living outside of metropolitan areas in making complaints or pursuing their legal rights through the courts. Aboriginal and Torres Strait Islander people living in remote and regional areas also tend to have lower levels of financial literacy because of isolation. It is the combination of these unique cultural and geographical issues that has created a special set of circumstances that requires pointed research and reform in the area of Aboriginal and Torres Strait Islander consumer protection in Queensland and Australia.

The primary benefit of this project for Aboriginal and Torres Strait Islander people will be to provide information for community organisations and government agencies to use as a source of information and evidence for future policies, funding, law reform and potential investigation and prosecution.

Methodology

The main aim of the unconscionable conduct and Aboriginal and Torres Strait Islander consumers research project was to investigate the reasons Aboriginal and Torres Strait Islander people enter into consumer transactions which are not beneficial, particularly, in a direct marketing situation. The aim of the project is centred on an understanding of the influences on Aboriginal and Torres Strait Islander people at the time that they enter into a consumer transaction which lead them into a potentially legally binding contract for goods or services. The transaction involves two parties therefore the approach taken was to consider the transaction from two aspects. The first aspect involved exploring attributes of the consumer as an Aboriginal and/or Torres Strait Islander person and the role this plays in these consumer transactions. The second aspect involved an exploration of the strategies used by traders in direct marketing and other sales contexts and how these impact on or influence Aboriginal and Torres Strait Islander people in entering into contract which provides little or no benefit and in some cases even acts to their detriment. It further seeks to consider Indigenous consumer issues in the context of commercial behaviours which businesses engage in, and which place the Indigenous consumer at a direct disadvantage.

The research project is aimed at strengthening the rights of Aboriginal and Torres Strait Islander people in the financial, consumer and commercial arenas. In the context of recent welfare reforms based on financial and commercial factors, strengthening the rights and capacity of Aboriginal and Torres Strait Islander people in this area is critical.

A key outcome sought in conducting the research is to use the information provided by the Aboriginal and Torres Strait Islander consumers interviewed to argue that Aboriginal and Torres Strait Islander people have a particular disadvantage within the meaning of the law, this being the first threshold test for the proving of unconscionable conduct by traders in Australian law. In a more general context, the research also seeks to act as a starting point for further discussion around the protection of Aboriginal and Torres Strait Islander consumer rights in looking at existing laws and policies to identify gaps and options for reform.

The research comprised of two stages. The first stage of the research involved a review of the cases involving Indigenous consumers in Australia in order to identify the key issues brought before the courts to date. The second stage of the research involved interviewing ICAN clients face to face. This stage would permit the collection of information about the experience of Aboriginal and Torres Strait Islander consumers who had been party to a contract which was unfair and which appeared to involved unconscionable conduct on the part of the trader.

The method of contact and recruitment of participants for the second stage was through ICAN staff approaching ICAN clients who had entered into an unfair contract or where there appeared to be unconscionable conduct on the part of the trader. Those individuals who were interested were then interviewed face to face.

Cases Involving Aboriginal and Torres Strait Islander Consumers and Unconscionable Conduct in Australia

The Insurance Cases

A number of cases have been brought before the Federal Courts by the Australian consumer protection watchdog, the Australian Consumer and Competition Commission (ACCC) on behalf of Indigenous consumers. The first of these cases involved not just one provider but a series of insurance companies with investigations undertaken by the then Trade Practices Commission now the ACCC. The investigations were carried out over two years from 1992-1993 and reported on in 1994 in a publication titled *Taking Advantage: Sale of Life Insurance to Aboriginal people in remote communities*. The cases involved three insurance companies – The Colonial Mutual Life Insurance Society Limited (Colonial Mutual); Norwich Union Life Australia Limited (Norwich Union); and Mercantile Mutual Life Insurance Company Limited (Mercantile Mutual). These cases were the watchdog's first significant investigations into allegations of systematic and prolonged misleading and unconscionable conduct by providers in relation to Indigenous people, all of whom in these cases lived in remote areas. The final outcomes of these cases were ultimately decided not by the Federal Court but by the parties. Deeds were entered into with each of the insurance companies with varying terms.

A number of matters in relation to Indigenous consumers came to light as result of these cases and were identified by the watchdog as key factors which impacted on the bargaining positions of the parties and the advantage of the provider over the consumer.

Social factors

The first group of these factors can be broadly categorised as social factors. The Commission identified that the majority of policy holders 'were poorly educated people'.¹ In general, the policy holders had low levels of numeracy and low levels of literacy.

¹ Trade Practices Commission, *Taking Advantage: Sale of Life Insurance to Aboriginal people in remote communities* (1994) 2.

Economic factors

The second group of matters can be brought together broadly under the umbrella of financial issues. In addition to issues around literacy and numeracy the Commission identified most of the policy holders as having little to no commercial experience and with low levels of financial literacy.² In fact one of the insurance companies reported that 'the majority of Islanders interviewed '... found it difficult to grasp the complexities of insurance, interest rates, responsibility periods etc ...' and '... they (Islanders) cannot come to grips with business type letters and in fact ... in many cases they do not even open them'.³ The Commission identified that most of the policy holders were essentially unemployed and working for the local Council as part of the Community Development Employment Program (CDEP) which in real and plain terms is a work for the dole scheme.⁴ The Commission found in their investigations that policies held by CDEP workers 'generally lapsed'.⁵ The Commission attributed this to three reasons: 'lack of knowledge and understanding of the product'; 'inadequate income to continue premium payments'; and the fact that 'if a person moves to another community, continuity of payments ceases'.⁶

Geographical factors

The third group of factors referred to was the impact of geographical issues. It was found by the Commission that there was no access to independent financial or legal advice for the policyholders before entering into the agreement and no access to other options for the service or product.⁷

Historical factors

All of these factors, obstacles, difficulties can be traced back either in small or large part to the history of remote Indigenous communities. The role of history in the quality of life of Aboriginal and Torres Strait Islander people is increasingly acknowledged and accepted in the social, political and legal spheres.

² Ibid.

³ Ibid 6.

⁴ Ibid 2.

⁵ Ibid 30.

⁶ Ibid 30.

⁷ Ibid.

Cultural factors

The fourth of these issues was the impact of dealings between people of different cultures. There were significant gaps in communication and understanding due to obvious language and cultural barriers between the provider and the consumer.⁸ In particular, the Commission identified the tendency for gratuitous concurrence, an aspect of Aboriginal and Torres Strait Islander communication which is well accepted within the criminal law context.⁹ Much has been written in the literature in relation to Aboriginal and Torres Strait Islander witnesses in police interviews and during court proceedings where this tendency for gratuitous concurrence has been recorded and recognised.¹⁰

In its investigations the Commission identified a number disturbing trends with the transactions which it concluded from its interviews. The Commission stated that:

'Policyholders were unable to differentiate between [the different policies they held when discussing the matter with Commission staff. Across the board there was an almost total lack of knowledge of what the policies purchased actually meant. It appeared that the policies had been sold without any detailed explanation of what they provided.'¹¹

... It is of concern that policy holders had such a poor understanding of their policies and what was necessary to maintain them.¹²

When asked by the Commission why policies were taken out and what the policies were for, policyholders answered with statements such as 'I don't know why I took out the policy' and 'I am not sure why'¹³; 'I didn't really understand it, there was too much jargon' ... 'explanation was rushed and too many big words'¹⁴.

One of the insurance companies in its own investigations found that 'Client knowledge of the products purchased was patchy.'¹⁵

An interesting observation reported by the Commission about the consumer behaviour in one particular community was that the community was 'extremely family conscious'.¹⁶ The result of

⁸ Ibid.

⁹ Department of Justice and Attorney General, *Aboriginal English in the courts: a handbook*, (2000).

¹⁰ Dr Diana Eades has written extensively in this area.

¹¹ Trade Practices Commission, above n 1, 7.

¹² Ibid 16.

¹³ Ibid 21.

¹⁴ Ibid 22.

¹⁵ Ibid 10.

this characteristic of the community was that many policyholders had taken up the policies as they saw them as investments for their children for the future.¹⁷ The impact of this on some families in the community was that the main or sole income of the family was being drawn on significantly to service numerous insurance policies in circumstances where there was a real risk of the household being unable to meet basic living expenses and family needs.¹⁸

The Educational Materials Case

The case of the *ACCC v Keshow*¹⁹ in 2005 was the next significant decision involving questions of misleading and deceptive and unconscionable conduct investigations by the Commission in relation to Aboriginal and Torres Strait Islander consumers living in remote Australia. Allegations and ultimately findings were made that Keshow had engaged in misleading and deceptive and unconscionable conduct in his business dealings with Aboriginal people living in remote communities in the Northern Territory. The case involved Keshow who had travelled to a number of remote communities in the Northern Territory to sell a range of educational materials for children to parents. In visiting these communities Keshow secured sales to a number of women of educational materials for their children. The materials were paid for by periodical installments. The amounts paid to Keshow by the women ranged from \$600 - \$10,440 with one woman's payments extending over a six year period. While selling educational products to mothers for their children is not unlawful the transactions between Keshow and the women involved a wide range of disturbing practices which the Federal Court found were misleading or deceptive and unconscionable. These practices included not providing the agreed materials; arranging open-ended periodical payments by the women to him which were often made to coincide with the day of Centrelink payments; and continuing to accept payments for the educational materials beyond the actual value of the materials regardless of whether any or all of the materials had been provided.²⁰ The materials sold and provided were often not age appropriate for the children of the particular woman and in addition, Keshow did not have evidence of the recording of any of the transactions and did not provide to the women a written contract or invoice or receipts for the materials or any payments made by them. To compound these issues in circumstances where the women did not have sufficient funds at the time the installment was deducted from her account the financial institution charged a dishonour fee adding to the cost being paid overall by the women for products.²¹ In the case of

¹⁶ Ibid 22.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ [2005] FCA 558

²⁰ Ibid [3].

²¹ Ibid [27].

one woman her total dishonour fees from the bank as a result of the periodical payments was \$2695.

As with the earlier life insurance cases the Court identified a number of factors which it saw adding to the women ultimately being misled or deceived or dealt with unconscionably.

Social Issues

Firstly, the Court stated that Keshow 'took advantage of the lack of education ... of those in the communities'.²² In relation to one of the women the Court stated that 'She speaks English well, but can write and read it only slightly.'²³

Economic Issues

Secondly, the Court found that Keshow 'took advantage of the lack of ... commercial experience of those in the communities'.²⁴ The Court found in relation to the woman who paid over \$10,000 that she was not in paid employment with her primary source of income for the relevant period being welfare payments. It identified that 'she had little or no experience in business dealings or with commercial documents, and had limited exposure to such transactions' and that 'She did not fully understand the consequence of the signing forms ... would be the regular and indefinite withdrawal of money from her account on a fortnightly basis'.²⁵ Disturbingly, it was only with the help of police from the nearest regional centre that she was able to have the deductions ceased. The judge stated generally that the women had 'limited commercial sophistication'.²⁶ It was found that generally the incomes of residents of the relevant communities were very low.²⁷

Geographical Issues

While the Judge's reasoning did not make any specific reference to the role of location, access or geography in these proceedings all the women lived in Aboriginal communities in the Northern Territory. For one of the women, it was only when she travelled to Alice Springs and sought the assistance of police that she was able to have her periodical payments stopped.

²² Ibid [4].

²³ Ibid [6].

²⁴ Ibid [3].

²⁵ Ibid [30].

²⁶ Ibid [84].

²⁷ Ibid.

Cultural Issues

In relation to the woman who paid the \$10,440 the Court found that the residents in her community, which was an Aboriginal community, 'Generally ... have poor English skills and in [her] case English is her second language'.²⁸ The judge in his findings stated that the women's 'oral evidence convinces me each of the complainants reacted to the respondent's approaches with diffidence and passive acquiescence rather than any apparent enthusiasm or informed judgement or understanding about the transaction proposed by the respondent'.²⁹ He further found that 'Most [residents] in [the] communities lacked the language skills in English to dealing in an informed way with a commercial transaction, even a relatively simple one' and that 'most [residents] ... would not have understood the full consequences of signing the open-ended periodical payments forms'.³⁰ Importantly, in addition, His Honour found that 'each of the complainants as young Aboriginal women for cultural reasons would not directly question the respondent to elicit information from him'.³¹ However, in his reasoning in relation to these cultural factors the Judge states:

I think it is likely to be true, to varying degrees, of each of the respondent's customers simply because any degree of financial sophistication would have lead any of those customers to decline to sign an open-ended periodical payment form, or indeed to conclude a transaction with no written record of it. The explanation for the respondent's customers having done so probably lies in the cultural factors identified by [the anthropologist] but (as I have noted above) I have concluded that the respondent's conduct contravenes S51AB in all circumstances without having regard to [the anthropologists] evidence about those cultural factors and without attributing to the respondent an understanding of those cultural factors.³²

His Honour also later commented:

As I have said, I have not had regard to the evidence of [the anthropologist] in reaching [my] conclusions. His evidence explains why the complainants entered into such disadvantageous arrangements. They were each, to differing degrees, vulnerable by reason of their personal circumstances to succumb to the unsolicited proposal of someone such as the respondent to sign an open-ended periodical payment form. They were each indigenous female persons living in relatively poor circumstances dependent

²⁸ Ibid [30].

²⁹ Ibid [78].

³⁰ Ibid [84].

³¹ Ibid [85].

³² Ibid [87].

primarily upon government welfare payment, and who had limited commercial experience. They had a natural reticence and diffidence in firmly refusing to accede to such a proposal as the respondent presented.³³

The Mobile Telephones Case

Finally and most recently, those matters brought to light in preceding cases have shown themselves again in the *ACCC v EDirect Pty Ltd*³⁴ a case involving misleading or deceptive conduct in the telemarketing and sale of mobile telephones to Aboriginal and Torres Strait Islander people living in remote and regional areas across Australia. This case decided in 2008 involved EDirect Pty Ltd trading as VIPtel Mobile (VIPtel) which sold mobile telephone and service plans through direct telemarketing. Its call centres were based in India. VIPtel came to the attention of the Commission because it sold mobile telephones and plans to people living in remote Aboriginal and Torres Strait Islander communities where the mobile telephones had no service rendering them and the associated plans totally useless to the purchaser.

While EDirect Pty Ltd made admissions in relation to its conduct the reasons of the Court include the detail of the transactions and the issues surrounding them.

Geographical Issues

His Honour noted that in the States and Territories affected including Northern Territory, Western Australia and Queensland that the coverage of VIPtel was such that 'it did not extend to the vast majority of the remote Aboriginal townships or communities'.³⁵

Cultural Issues

The orders further gave recognition to the fact that communication is a significant issue in relating information to consumers about their legal rights. It is acknowledged that Aboriginal people throughout the Northern Territory who would have been affected speak English as a second language with an order being made for community services broadcasts about the case to be made in one of four Aboriginal languages spoken in the Northern Territory.

The above cases relating to Aboriginal and Torres Strait Islander consumers reveal a number of common themes, in particular, the behaviour of traders in their dealings with the Aboriginal and Torres Strait Islander consumers. Of concern are the admissions by the traders after court intervention that it was clear at the time of selling the product that the person did not understand the contract either in terms of their obligations or their rights.

³³ Ibid [108].

³⁴ [2008] FCA 65

³⁵ Ibid [14].

The following part outlines a number of recent real life cases which provide the consumer's experience of the transaction with respect to issues of unfairness and unconscionability. As only a snapshot of the client's ICAN assists, a picture starts to develop of systemic issues especially in mobile telephone and motor vehicle industries.

PRESENTING CASES

The real life presenting cases which follow are summaries of interviews with Aboriginal and Torres Strait Islander consumers from both remote and regional North Queensland. The cases have been written in a way which follows as closely as possible the manner in which they were presented to the interviewer. In this way they may better reflect the experiences of the consumers.

Case 1

Jed lives in a remote Indigenous community. He bought a motor vehicle from a motor vehicle dealer in the nearest regional centre for \$15,000. Only five months after buying the vehicle it broke down and needed repairs. He freighted it back to his nearest regional centre and was told by the motor vehicle dealer it needed a new engine and he needed to pay more money to get it fixed. He did not want to pay them any more money and arranged for another mechanic in the area to fix the motor vehicle. He sent the mechanic \$5,500. He said it would be ready in three weeks. It has now been approximately three years and Jed is still waiting for his motor vehicle to be fixed. The mechanic is now demanding \$3000 more. Jed felt 'he was being ripped off' and involved authorities. Authorities visited the vehicle and on observing that it appeared to be being worked on advised Jed that there was no breach of the fair trading laws in Queensland and there is nothing they can do.

Case 2

Jed was contacted by a telemarketer about buying a mobile telephone plan. The telemarketer said it was a good telephone and a good plan and said it would be good for him. However, Jed found that once he received his telephone, it had no coverage in his remote community. After being sold this mobile telephone plan Jed was contacted again by another telemarketer who again advised that the telephone would work in his area. He received his second telephone only to find it also did not work in his remote community. He was told both mobile telephones would work and both did not. He said he 'never used the telephones, not one little bit'.

Case 3

Because Jed's motor vehicle was being 'fixed' he was after a motor vehicle worth around \$2000-3000 and rang a motor vehicle dealer in his nearest regional centre to ask if they had any in this price range. The dealer said 'yes' he had two motor vehicles. Because of the difficulties

involved in having an unregistered and unroadworthy motor vehicle registered once it is in a remote community Jed asked the dealer about its roadworthiness. The dealer advised Jed that it was not registered but it was roadworthy, meaning that it could easily be registered. Jed sent through \$2000 for the motor vehicle. When Jed later rang the motor vehicle dealer he said it was not roadworthy and he had been given the wrong information about the true state of the motor vehicle. Jed asked for his money back.

He was told if he signed a paper which was sent through by facsimile he would get his money back. The paper (document) was in fact a contract to buy the motor vehicle. Jed said that the police in his community know about this dealer and his trading behaviours. Jed knew Indigenous people from another remote Indigenous community who were buying cars from the same dealer with the same registration issues. A person will buy a motor vehicle without knowing the difficulties associated with registration in a remote place and because of this the person could only leave the motor vehicle to 'waste' away.

Case 4

Lisa lives in a remote Indigenous community. She was experiencing financial difficulties and sought information from the telephone directory about organisations which could assist her with managing her debts. She contacted a debt consolidation company whose details she found in the telephone directory. After making enquiries over the telephone Lisa was sent the relevant paperwork by the debt consolidation company which she then filled out and sent back. The paperwork referred to bankruptcy. Lisa was confused about whether she was becoming bankrupt or not. While her application was being considered and on reflection Lisa decided she did not want to go ahead with the debt consolidation because she believed the fees were too high. She advised the debt consolidation company of this. However, shortly after advising the company of this decision Lisa was told that her application for debt consolidation had been approved.

Throughout all of these communications Lisa did not fully understand the nature of the agreement she was entering into or the implications, nor was it fully explained to her by the debt consolidation company. She states she replied 'yeh, yeh, yeh' because she wanted to sort out all her debts and wanted to stop the harassing calls she was receiving from debt collectors. She saw this as a break from this relentless harassment. She understood some of the agreement but most of it she did not understand she just 'wanted to get it over and done with'. She is angry with herself that it has cost her more money and she will now find it difficult to get a loan.

Case 5

Jenny lives in a remote Indigenous community. A company which sells mobile telephone plans was ringing around the community using telemarketing. They were contacting one person using telemarketing and then requesting the details of family members that they could also contact about their services. The company obtained her details from her cousin. She bought a mobile telephone plans and received her telephone but the SIM card was not working. She rang to see if she could send the telephone back and cancel the contract. The company advised they would send a new SIM card. Jenny contacted the company again and again asked to cancel the contract. She was told she would have to pay a cancellation fee. This was despite the fact that she had never activated the telephone. She said the company was ringing a lot of people and people did not understand what was going on and so gave other people's telephone numbers including home telephone numbers. She said one of her cousins got a telephone while another did not. She already had a mobile telephone which she did not use much but still 'got caught up in the moment' and bought the telephone. She now has a prepaid mobile telephone and learnt her lesson 'big time' and would now only get a prepaid telephone after that experience.

Case 6

Door to door salespeople came to Penny's door one evening and asked if she wanted to buy a water cooler. They had said it was good for the children and better in the long run for them. Penny said that they had been drinking the water for years and nothing had happened to the children. She said the door to door salespeople just turned up without any warning and were trying to talk her into buying the water cooler by saying it was good for the children and could help prevent diseases. They also turned up at her mother's door and had sold her mother a water cooler. She says her mother bought a water cooler because no one was at home and she did not really understand what she was agreeing to. She says her mother realizes that although she said yes at first, she now sees she cannot afford it. She did not really need it because it uses electricity and as it is she does not have enough money left over after her rent and current electricity costs. To her knowledge, in the community, the door to door salespeople seemed to be coming in the evening after 4pm to try to catch you off guard when you are doing something. She believed they should ban door to door sales in her community because everyone is on Centrelink benefits.

Case 7

Michelle went into a telephone shop and told the salesperson she was after a home telephone which they arranged for her. She was then asked if she was interested in a mobile telephone. She did not sign up then but went back three weeks later and signed up for a mobile telephone. She agreed for \$200 to be paid fortnightly by direct debit against her mobile telephone account.

Her first bill was \$800. Her second bill was \$1200. Her next bill was \$2000. These bills were far beyond Michelle's income and capacity to repay in time. At this time Michelle was asked if she wanted to suspend her service until she paid for the bills to which she said 'yes'. This way she could still receive incoming calls. Michelle said she was surprised that the telephone company did not call her early to suspend her line, put her on a more suitable plan or change her cap to meet her needs as reflected in her usage. Part of the reason for her high bills was the fact that she used her telephone to access the internet because she did not have a home computer. Her telephone was reactivated without any notice. Her next two mobile telephone bills were \$3000 and \$5000. Part of the reason for her high bills was because she believed a chat room attached to the service provider was supposed to be free because it was under a free browser. In fact, every time you chat it costs \$1.

Case 8

Dan lives in a remote Indigenous community. Three months after Dan had bought his motor vehicle the clutch broke. Fortunately, he had enough pressure to drive the motor vehicle to his nearest regional centre eight hours away to have the clutch fixed at a cost of about \$800. After he had brought the motor vehicle back to his community the brakes then broke. He paid for new parts to be delivered to his community and fixed the brakes himself. Shortly after that the engine broke and it had to go back to his nearest regional centre. He was told the warranty would not cover the broken engine and he would have to pay. When he rang the mechanic to arrange for it to be fixed at his own cost the mechanic said they would get back to him. The next day they rang to say that his motor vehicle had been stolen. Two months later his motor vehicle was found stripped and burnt out on the side of the highway. The man then decided to make some enquiries through his insurer. He filled out the forms. The insurer rang him and asked for a copy of his criminal history though he was unsure of the need for this as, apart from other matters, at the time the motor vehicle was stolen he was in his community and the motor vehicle was in a regional centre seven hours drive away or two hours plane trip away. In fact, the motor vehicle when he delivered it to the mechanics was not even drivable. He had had to pay for the motor vehicle to be freighted from his community to the regional centre. In addition to these issues with the vehicle, what followed were then issues with his finance.

Case 9

Dan and his wife Tracy had bought the motor vehicle in Case 8 using a motor vehicle finance company. They came to get finance through this company as a result of an unsolicited letter. Dan was sent a one page letter and asked if he would like to get a motor vehicle loan. He does not know how they got his name or address but they had all of his personal details including his address in the community. He decided to make enquiries about getting the motor vehicle loan because he has sons who he likes to take fishing and camping out of the community on the

weekends and holidays. He bought a motor vehicle through the motor vehicle finance company in his capital city. He said 'when you look at the motor vehicle, it looks good so you think it is good, but it isn't'. He previously bought a second hand motor vehicle for cash from a private seller in his nearest regional centre for \$5000 and this motor vehicle is still going six years later. While on the telephone about the finance and motor vehicle he felt 'conned into it' by the dealer who said it was a good deal. He said in situations like this when the dealer is far away and you are in a remote place you cannot pick which motor vehicle you want you can only get what they want to sell you or show you. He said 'they do up the motor vehicle and make it look nice and you think you have a good motor vehicle'.

Case 10

Harry lives in a remote Indigenous community. He paid \$3000 for a second hand motor vehicle in his closest regional centre. Harry tried repeatedly calling the motor vehicle dealer about transporting his motor vehicle to his place of residence or alternatively if the motor vehicle had been sold a refund of his monies. He left it for a period of about twelve months until a family member suggested he follow it up. He rang again and told the motor dealer he still had not got his motor vehicle and demanded his money back so that he could go and buy elsewhere. He was told he had to speak to one person. He then spoke to that person who put him back onto the previous person. When he rang he was told that the two people he had been speaking to were very busy people. He came to know about the motor dealer through other people in the community who had bought cars from them. In a final effort to secure a motor vehicle he asked if they had any other cars and was told 'yes' one for \$4500 that would meet his 4WD needs. At that time he was unable to raise the additional funds to buy that motor vehicle. He contacted the motor dealer six months later when he had the additional money. At that time he was told there was no motor vehicle. Since this time he has trying to get a lift to the regional centre to go to the motor dealer to show the paperwork with his payment of \$3000 and to get a refund.

Case 11

Kenny lives in a remote Indigenous community. On a visit to a regional centre he went into a shop to buy a mobile telephone. He had previously only ever had a pre-paid mobile telephone and did not understand the difference between a pre-paid mobile telephone and a plan or post-paid mobile telephone. The salesperson was not easy to understand. She spoke about a 'cap' but he did not understand what this 'cap' was. He was in the store for a total of about ten minutes. He felt that the sales person was sort of speeding things up.

Case 12

Kelly is from a remote Indigenous community. Kelly paid \$5000 to a mechanic to fit a secondhand motor in her motor vehicle. He told her he had fixed the motor vehicle but that she still owed him \$2500 more. She drove the motor vehicle to test it but it kept stopping and starting. She then complained to him and said she wanted her \$5000 back because the motor vehicle still did not work. She took the motor vehicle and left it at a family member's and returned home to her community. She had the motor vehicle towed to another mechanic to try to get it fixed again. The first mechanic then took Kelly to court and mediation was ordered. Kelly says that she did not understand the process and felt 'harassed' into a repayment arrangement to pay the \$2500.

Issues Identified in Relation to Aboriginal and Torres Strait Islander Consumers

The case studies reveal a number of common issues in relation to Aboriginal and Torres Strait Islander consumers, particularly people living in remote communities in Queensland.

Gratuitous Concurrence – The 'yeh, yeh, yeh' factor

An issue which has been highlighted in law, though primarily limited to criminal law matters, is what is termed 'gratuitous concurrence' - the tendency to agree. We see this aspect of Aboriginal and Torres Strait Islander communication manifest itself in a number of different ways in our transactions. In one transaction it was identified explicitly by the consumer as saying 'yeh, yeh, yeh'.

Marketing strategies used by traders

An interesting comment was made that it is a deliberate strategy used in the direct marketing context of the door to door sales, whereby the trader catches you 'off guard'. Consumers are marketed at a time when they are dealing with other matters in the home and are not in a frame of mind to be making any significant purchases, nor entering into legally binding contracts, let alone buying products which they do not need and cannot afford.

Telemarketing one person and asking them for the contact details of family members was another serious issue raised in the interviews. This is particularly concerning, in view of the extent and proximity of extended families of Aboriginal and Torres Strait Islander people in remote communities.

As with the cases that went before the courts we see similar comments by interviewees around economic issues such as Centrelink benefits being the only or primary source of income. Reference is also made to the fact that non-essential products are sold to family members who cannot afford them. In these cases, the traders are not making any real assessment of whether the person has any, some or no capacity to meet the payment obligations.

Interviewees also made comments such as feeling 'conned' and rushed through the transaction.

Agreement and understanding

In making agreements with Aboriginal and Torres Strait Islander consumers it is clear from the people interviewed as part of this project that they commonly did not understand:

- The full extent of their liability;
- The fundamental nature of the transaction; and
- Their obligations under the agreement.

In particular, it is clear that there was not a real agreement or true consent to the contract. Furthermore, the traders did not put in place any systems or mechanisms to ensure that they struck a bargain with the person. When looking at factors such as the time spent, the language of the contract and whether codes of conduct and legislation were adhered to it is evident in all these cases that one or all of these were present.

Understanding of the terms of the agreement was a serious issue raised in a number of the cases.

The presenting cases highlight similar issues to those considered in the cases above and of concern is that these issues appear to be systemic and will not begin to be resolved in a substantial way without significant and concentrated effort by regulators.

Recommendations

Recommendation 1

The establishment of financial counseling services in remote communities with both male and female financial counselors available and preferably Indigenous counselors. Ideally, an Indigenous financial counselor would be trained and based in each community.

Recommendation 2

Further research is required into trader behaviour in relation to Aboriginal and Torres Strait Islander consumers. Some generalisations can be made, however, much more research is required to determine the depth and breadth of these issues across regions and across Australia.

Recommendation 3

Culturally appropriate and specific communication and education strategies need to be developed and implemented by the major government service providers. Many of the interviewees learned about their rights and the law only after the experience outlined in the presenting cases. This is too late. Furthermore, the individuals interviewed were those who sought the assistance of ICAN, an advocacy organisation, but it is likely there are many more individuals who do not know about or seek this type of assistance.

Improved coordination between the services of government, industry and community organisations is required to effect a more cohesive service delivery model for people living in remote areas. There needs to be a greater presence by regulators in remote communities to enable them to adequately and properly identify gaps in consumer protection.

Recommendation 4

Because telecommunication traders are essentially extending people a line of credit they should be required to do a financial health check with the consumer prior to entering into a contract with them. If an issue is seen to arise after the contract has been entered into whereby for example, a person's usage is well beyond their plan the telecommunication trader should send a message to notify them to make them aware of this and make contact with the consumer to renegotiate the contract.

Recommendation 5

A common category of misconduct by traders involves the sale of motor vehicles that break down shortly after they are purchased. Whilst statutory warranties may be available in many of these cases Aboriginal and Torres Strait Islander consumers, particularly in remote communities, are either not aware of their rights or cannot realistically enforce them.

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