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FROM SAFETY NETS TO SUPPORT NETWORKS: BEYOND 'VULNERABILITY' IN PROTECTION FOR CONSUMERS WITH COGNITIVE DISABILITIES

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This article considers the significance of the obligations in the United Nations Convention on the Rights of Persons with Disabilities ('CRPD') for consumer protection law and policy. The current legal response to consumers who require additional decision-making support is primarily focused on mechanisms to release consumers classified as 'vulnerable' from transactions tainted by concerns about a lack of genuine consent. While these legal responses provide an important safety net of protection against predatory and exploitative behaviour, they are limited in their ability to encourage social participation and equal access to goods and services for consumers with cognitive disabilities. We argue that the CRPD requires an approach to consumer protection that provides more meaningful support for consumers with cognitive disabilities and make suggestions about what this support might entail in terms of changes to both the legislative regime and contracting practices.

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I INTRODUCTION

In 2008, Australia ratified the United Nations *Convention on the Rights of Persons with Disabilities* ('CRPD').¹ The first principle set out in article 3 of the CRPD is '[r]espect for inherent dignity, individual autonomy including the freedom to make one's own choices'. Article 12 of the CRPD sets out that 'States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life'.² As such, 'States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity'.³

Much of the existing research on article 12 of the CRPD has focused on the rights of people with disabilities in regard to medical or mental health treatment,⁴ civil rights⁵ and criminal law.⁶ In its emphasis on support for people with disabilities in exercising legal capacity, article 12 of the CRPD also has considerable significance for consumer protection law.⁷ Indeed, the Australian Law Reform Commission inquiry into *Equality, Capacity and Disability in Commonwealth Laws* identified consumer law as an area in need of further consideration as to how to best ensure that individuals who may require support with decision-making are not denied equal access to goods or services.⁸ Consumer transactions constitute a central form of participation in modern western economies. Increasingly, many essential services in Australia, including banking, utilities, insurance, telecommunications and disability support, have been remodelled as consumer transactions, premised on consumers exercising choice over how and with whom they contract.⁹ Under this market model it is

¹ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

² Ibid art 12(2).

³ Ibid art 12(3).

⁴ See, eg, Bernadette McSherry, 'Legal Capacity under the *Convention on the Rights of Persons with Disabilities*' (2012) 20 *Journal of Law and Medicine* 22; Renata Kokanović et al, 'Supported Decision-Making from the Perspectives of Mental Health Service Users, Family Members Supporting Them and Mental Health Practitioners' (2018) *Australian & New Zealand Journal of Psychiatry* <<http://journals.sagepub.com/doi/pdf/10.1177/0004867418784177>>.

⁵ See, eg, Tina Minkowitz, 'The United Nations *Convention on the Rights of Persons with Disabilities* and the Right to Be Free from Nonconsensual Psychiatric Intervention' (2006) 34 *Syracuse Journal of International Law and Commerce* 405; Eilionoir Flynn and Anna Arstein-Kerslake, 'Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity' (2014) 10 *International Journal of Law in Context* 81.

⁶ See, eg, Linda Steele (ed), 'Enabling Justice: A Report on Problems and Solutions in Relation to Diversion of Alleged Offenders with Intellectual Disability from the New South Wales Local Courts System' (Report, Intellectual Disability Rights Service, 2008); Anna Arstein-Kerslake et al, 'Human Rights and Unfitness to Plead: The Demands of the *Convention on the Rights of Persons with Disabilities*' (2017) 17 *Human Rights Law Review* 399.

⁷ Lynden Griggs, 'The Consumer with an Intellectual Disability – Do We Respond, if So, How?' (2013) 21 *Competition & Consumer Law Journal* 146.

⁸ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws: Final Report*, Report No 124 (2014) ch 11.

⁹ See generally Thomas Wilhelmsson, 'Services of General Interest and European Private Law' in Charles E F Rickett and Thomas G W Telfer (eds), *International Perspectives on Consumers' Access to Justice* (Cambridge University Press, 2003) 149, 153.

assumed that consumers will, through the opportunity to make their own consumption decisions, be best placed to promote their own welfare.¹⁰

Yet these kinds of assumptions about the role of consumer choice in promoting consumer wellbeing must be regarded with some degree of scepticism. A positive outcome is dependent on the active involvement of consumers in the decision-making process and a minimum standard of free and informed consent.¹¹ Studies in behavioural economics have shown that individuals are not the rational decision-makers assumed by some variants of law and legal policy. Most consumers will need support in making some decisions. For consumers with cognitive disabilities,¹² the act of contracting may present even more significant and entrenched risks than for other consumers.¹³ Difficulties with memory, problem solving, concentration, and attention may increase people's risk of entering contracts they do not understand or cannot fulfil for goods and services they do not need, cannot use or cannot afford.¹⁴

The objects of consumer protection law include enhancing consumer welfare through promoting fair trading,¹⁵ including through the protection of so-called 'vulnerable consumers'.¹⁶ The current legal response to consumers experiencing vulnerability is primarily focused on mechanisms for releasing those consumers from transactions that have been tainted by concerns about a lack of genuine consent. While these types of statutory and general law responses provide an important safety net of protection against exploitation, they are limited in their ability to encourage social participation and access to goods and services for consumers requiring decision-making support, including those with cognitive disabilities. In this article, we discuss these limitations.

In particular, we suggest that the label 'vulnerable' to identify consumers needing protection from the law can have the effect of suspending these consumers in a category of 'other', removing the potential for them to make their own purchasing decisions, while at the same time locking all other consumers into a category of self-sufficiency and independence. For this reason, in this article we have chosen not to use the term 'vulnerable' and instead we refer simply to consumers with cognitive disabilities or, more generally, to consumers who require decision-making support.

¹⁰ See generally P S Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, 1979) chs 10–15; Andrew Robertson, 'The Limits of Voluntariness in Contract' (2005) 29 *Melbourne University Law Review* 179, 180–1.

¹¹ See generally Michael J Trebilcock, *The Limits of Freedom of Contract* (Harvard University Press, 1997).

¹² The term 'cognitive disabilities' is a broad term that encompasses all impairments that may affect cognition. The term 'persons with cognitive disabilities' is used in this article to refer to persons with a range of conditions who experience difficulties regarding: the ability to learn, process, remember, or communicate information; awareness; and/or decision-making.

¹³ See also Yvette Maker et al, 'Supporting People with Decision-Making Impairments: Choice, Control and Consumer Transactions' (2017) 24 *Journal of Law and Medicine* 756.

¹⁴ Ibid.

¹⁵ *Competition and Consumer Act 2010* (Cth) s 2.

¹⁶ Productivity Commission, 'Review of Australia's Consumer Policy Framework' (Inquiry Report No 45, 30 April 2008) vol 1, 63 (Recommendation 3.1).

We also argue that safety net consumer protections are only part of the solution to facilitating meaningful market participation for consumers with cognitive disabilities. Such protections are backward-looking and reactive rather than proactive. They inquire into the factors that may have impaired a consumer's consent in the contracting process in order to justify setting aside that transaction. They do not prompt consideration of the unique circumstances of the consumer to identify what might have been done to facilitate meaningful decisions and genuine opportunities for choice. This is precisely the type of approach that is mandated by the *CRPD*.¹⁷

We accordingly make some suggestions about possible pathways in terms of both legislation and business practice toward this participatory approach. These suggestions include duties on traders, at least those supplying necessary services, to inquire into the suitability of products for consumers, to develop simple or 'vanilla' products and to improve disclosure and communication strategies. We suggest that contracting practices might draw on the growing focus among disability advocates on supported decision-making as an expression of the obligations in the *CRPD*. Supported decision-making scholarship provides insight into the principles and practices that might be developed to support consumers with cognitive disabilities in making decisions, particularly those involving the purchase of essential services. Here the inquiry may come full circle, because to the extent that all consumers may have difficulty with decision-making for complex transactions, support mechanisms developed for consumers with cognitive disabilities may improve contractual outcomes for consumers generally.

Part II of this article explores how choice is central to both consumer protection law and policy and outlines some of the barriers faced by consumers with cognitive disabilities. Part III considers existing safety net responses in general law and legislation to circumstances of impaired consent that risk undermining the potential benefits that would otherwise flow from choice in consumer transactions. Part IV considers 'front-end' law reform options for supporting decision-making by consumers with cognitive disabilities, and indeed consumers facing complex or significant transactions generally. Part V turns to possible changes to contracting practice through greater understanding of the role for supported decision-making in consumer transactions.

In our analysis of these issues we also draw on the findings of a pilot study carried out by the Melbourne Social Equity Institute ('MSEI'), in collaboration with Mind Australia (a mental health community support service) and Scope Australia (a disability support service).¹⁸ The qualitative study sought to explore the experience of people 'experiencing challenges' with their cognition or mental

¹⁷ On the application of the *CRPD* in this context see further Yvette Maker et al, 'Ensuring Equality for Persons with Cognitive Disabilities in Consumer Contracting: An International Human Rights Law Perspective' (2019) 19 *Melbourne Journal of International Law* (forthcoming).

¹⁸ Rachel Hale et al, 'Consumer Transactions: Equitable Support Models for Individuals with Decision-Making Impairments: A Pilot Study' (Report, Melbourne Social Equity Unit and Melbourne Law School, February 2017).

health¹⁹ when engaging in consumer transactions in the finance, telecommunications, insurance, and utilities sectors.²⁰ The study involved thematic analysis of interviews with individuals who self-identified as being within this category, community lawyers and consumer advocates based in Community Legal Centres, and representatives from finance and insurance service providers.²¹ Semi-structured interviews were conducted with 19 participants. Although the study surveyed only a small number of participants, we consider it valuable in giving voice to the lived experience of a group that has not traditionally been the focus of research and reform in this field.

II CONSUMER CHOICE AND BARRIERS FOR PEOPLE WITH COGNITIVE DISABILITIES

A The Centrality of Consumer Choice

Consumer choice is central to the selection of the consumable goods and services necessary for everyday life. Choice now also determines access to many essential services that are key to consumers' enjoyment of a range of fundamental rights, including access to an adequate standard of living, the highest attainable standard of health, and economic and social participation.²² Water and energy are clearly essential to an adequate standard of living and health. Banking has also been characterised as 'an essential service' because many people require direct deposit or other bank services to receive their income;²³ many people also rely on consumer credit services such as credit cards, personal loans, and mortgages to manage living expenses. Numerous social and economic advantages come with access to telecommunications services such as mobile phones and internet connectivity, including access to lower-cost products and payment options as well as social interaction and networks.²⁴

A consumer model also informs the new National Disability Insurance Scheme ('NDIS'), which is premised on persons with disabilities themselves identifying their support needs and deciding on the allocation of their funding

¹⁹ The authors acknowledge that language in this field is important and contested. When referring to impairment and disability, the authors use the meaning established in article 1 of the *CRPD*. It states that '[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.

²⁰ See Hale et al, above n 18.

²¹ Ibid.

²² See *CRPD* arts 3, 19, 25, 28.

²³ NSW Government, 'Submission to Review of Banking Code of Practice' (Submission, August 2000) <<http://www.reviewbankcode.com/pdfs/12.pdf>>.

²⁴ Paul T Jaeger, 'Telecommunications Policy and Individuals with Disabilities: Issues of Accessibility and Social Inclusion in the Policy and Research Agenda' (2006) 30 *Telecommunications Policy* 112, 113; Tony Eardley, Jasmine Bruce and Gerard Goggin, 'Telecommunications and Community Wellbeing: A Review of the Literature on Access and Affordability for Low-Income and Disadvantaged Groups' (SRPC Report 09/09, University of New South Wales Social Policy Research Centre and Journalism and Media Research Centre, July 2009).

packages.²⁵ The NDIS is a national, no-fault insurance scheme which covers people aged under 65 who have a permanent disability.²⁶ The NDIS offers access to individual funding packages to purchase disability services and supports that are ‘reasonable and necessary’.²⁷ It is meant to stimulate a market-based system for care and support services.²⁸ In so doing it characterises people with disabilities as consumers of the care and support services essential for their wellbeing and social integration.

The market model that emphasises consumer choice is premised on political and economic views about the value of individual autonomy and its role in promoting consumer wellbeing. Consumer choice is seen as the best way of promoting fair and efficient outcomes because it is consumers themselves who make the decisions about how best to further their own interests. Respect for the dignity of consumers as members of civil society dictates that consumers should, as far as possible, be free to make their own contracting decisions.²⁹ Such motivations overlap with economic welfare considerations that seek to preserve the opportunities for free and informed consent by consumers when making purchasing decisions in order to promote individually worthwhile outcomes and market competition.³⁰

B Consumers with Cognitive Disabilities and Contracting Challenges

Consumers with cognitive disabilities may experience unique challenges in making decisions in contracting for goods and services. These challenges can arise due to cognitive impairment,³¹ although they are frequently due to legal, social, and structural barriers.³² Focusing on actual or perceived individual decision-making impairment in people with cognitive disabilities is problematic, furthering the already entrenched stigma attached to cognitive disabilities. This stigma extends to assumptions that people with cognitive disabilities are inherently less able to make choices, including consumer choices. This is not the case, as cognitive disabilities come in many different forms. Some people with

²⁵ See further National Disability Insurance Agency, *About the NDIS* <<https://www.ndis.gov.au/about-us/what-ndis.html>>.

²⁶ *National Disability Insurance Scheme Act 2013* (Cth) ss 22, 24.

²⁷ Revised Explanatory Memorandum, National Disability Insurance Scheme Bill 2013 (Cth) 1; *National Disability Insurance Scheme Act 2013* (Cth) ss 4, 24, 34.

²⁸ Productivity Commission, ‘Disability Care and Support: Productivity Commission Inquiry Report’ (Inquiry Report No 54, 31 July 2011) vol 1.

²⁹ Stephen Smith, *Contract Theory* (Oxford University Press, 2004) 56; Rick Bigwood, *Exploitative Contracts* (Oxford University Press, 2003) ch 3; John N Adams and Roger Brownsword, ‘The Ideologies of Contract’ (1987) 7 *Legal Studies* 205, 206–10.

³⁰ Michael J Trebilcock, ‘Rethinking Consumer Protection Policy’ in Charles E F Rickett and Thomas G W Telfer (eds), *International Perspectives on Consumers’ Access to Justice* (Cambridge University Press, 2003) 68, 94.

³¹ Lynn Meltzer, ‘Executive Function: Theoretical and Conceptual Frameworks’ in Lynn Meltzer (ed), *Executive Function in Education: From Theory to Practice* (Guilford Press, 2007) 1, 1–3; Australian Institute of Health and Welfare, ‘Australia’s Health 2008’ (11th Biennial Report, 2008) 37–8. See also, for example, the definition of mental illness set out in mental health legislation such as section 4 of the *Mental Health Act 2014* (Vic).

³² *CRPD* Preamble para (e).

cognitive disabilities may experience difficulty with consumer choices; others may not. Focusing on individual decision-making impairment ignores socially-constructed barriers to participation, such as stigma, discrimination, and inaccessibility, allowing those barriers to remain in place.³³ Tackling these barriers and providing appropriate support for consumer contracting could assist in creating system-wide change and consumer markets that are generally more accessible for all, including people with cognitive disabilities. This is a clear path to achieving equality in consumer transactions for people with cognitive disabilities.³⁴

Legal, structural, and social barriers to consumer contracting for people with cognitive disabilities are rooted in the systemic marginalisation that people with cognitive disabilities face. There is evidence to indicate that people with cognitive disabilities experience higher rates of socioeconomic disadvantage, such as being unemployed or on low income, having a low education level, a lack of access to stable housing, and reliance on social welfare.³⁵ These factors, combined with the prevalence of discrimination and prejudice against people with cognitive disabilities, place consumers with cognitive disabilities at a disadvantage when entering consumer contracts. They hold less social capital and less financial power, which places more power in the hands of the other contracting party.

These factors place consumers with cognitive disabilities at risk of entering into contracts for goods and services that are not advantageous.³⁶ This may be due to the influence of traders or other parties who are actively seeking to exploit the power imbalance through undue pressure, manipulation or misrepresentation.³⁷ But even where overtly exploitative or predatory conduct is not involved, consumers with cognitive disabilities may be disadvantaged by the very inaccessibility of the contracting process. For example, the contract itself may not be presented in language that is accessible or visuals may not be available for those who have difficulty reading. In addition, due to ongoing lack of services to give people with cognitive disabilities choice and control in their

³³ Flynn and Arstein-Kerslake, above n 5; Anna Arstein-Kerslake, *Restoring Voice to People with Cognitive Disabilities: Realizing the Right to Equal Recognition Before the Law* (Cambridge University Press, 2017).

³⁴ For a detailed discussion of the social barriers to participation for people with disabilities, including people with cognitive disabilities, see Mike Oliver, 'The Individual and Social Models of Disability' (Paper presented at the Joint Workshop of the Living Options Group and the Research Unit of the Royal College of Physicians on People with Established Locomotor Disabilities in Hospitals, 23 July 1990) 3; Flynn and Arstein-Kerslake, above n 5.

³⁵ Anne M Kavanagh et al, 'Intersections between Disability, Type of Impairment, Gender and Socio-Economic Disadvantage in a Nationally Representative Sample of 33 101 Working-Aged Australians' (2015) 8 *Disability and Health Journal* 191; Louis Schetzer and Judith Henderson, 'Access to Justice and Legal Needs: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW: Stage 1: Public Consultations' (Report, Law and Justice Foundation of New South Wales, August 2003) xv–xvi.

³⁶ See also Australian Banking and Insurance Ombudsman, 'Disability, Incapacity and Banking Incapacity' (Bulletin No 31, October 2001).

³⁷ See, eg, *Ford by His Tutor Watkinson v Perpetual Trustees Victoria Ltd* (2009) 75 NSWLR 42.

own lives, many people with cognitive disabilities have not had the opportunity to develop decision-making skills and may need support in the actual act of decision-making.

Deborah Warr and colleagues recently explored the extent to which the NDIS is meeting its aims and objectives from the perspective of NDIS participants.³⁸ They found that there were insufficient services and resources to help participants exercise choice and control. There was also a 'huge volume' of information that was difficult for participants to access and understand, as well as complex systems for navigating the NDIS administrative procedures and the service providers.³⁹ Similar experiences were reported in the MSEI pilot study.⁴⁰ Participants in that study identified information asymmetry as a significant barrier to their ability to make effective decisions about complex consumer products:

Even me who appears to do their research still has no idea. And I still don't fully – because I'm more concentrating on the end goal, which is getting my thing at the end of the day, a lot of it is to do with not being cognitively aware of what's happening. As we said it's hard enough ...

(Consumer 2)⁴¹

Fluctuations in individuals' mental health may have a significant impact on the decisions they make as consumers. Certainly, when asked what the main challenges were when engaging in consumer transactions, participants in the MSEI study spoke about the relationship between their consumer behaviour and their impairments:

I guess I got myself into trouble partly because of this almost obsessive compulsive thing. And I was getting messages if you like to say that it's 'okay, it's all good, you're doing the right thing, you need this stuff' etcetera, and in reality I didn't ... to explain like I've done all of this but it's not because I'm greedy necessarily or just frivolous or whatever even though it appears that way. It's actually because I've got myself into a mess because I really didn't know what I was getting myself into and the reality of the situation was not part of the deal.

(Consumer 1)⁴²

Participants also reported a lack of confidence in dealing with the market place:

I think the key challenge would be confidence that I would be dealt with properly, you know dealt with like any other person. Confidence that I won't get an immediate knock back. Even not knowing enough about my past to know whether I'm eligible to go and do something, that's really hard.

(Consumer 4)⁴³

³⁸ D Warr et al, 'Choice, Control and the NDIS: Service Users' Perspectives on Having Choice and Control in the New National Disability Insurance Scheme' (Report, University of Melbourne, May 2017) 8, 35, 53 <http://socialequity.unimelb.edu.au/__data/assets/pdf_file/0010/2364499/Choice-Control-and-the-NDIS-Report-Melbourne-Social-Equity-Institute.pdf>.

³⁹ Ibid.

⁴⁰ Hale et al, above n 18.

⁴¹ Ibid 40.

⁴² Ibid 43.

⁴³ Ibid 43.

These factors may mean that consumers with cognitive disabilities that affect their decision-making will struggle with consumer transactions, particularly in complex or high-pressure sales situations or at times of high stress or other profound life events. As set out in the next Part, the existing legal regime is alive to this issue in providing safety net responses for consumers with decision-making impairments who have entered into transactions they did not understand or did not want. We suggest however that the law does not provide incentives for traders to develop upfront support mechanisms for consumers who require decision-making support.

III SAFETY NET CONSUMER PROTECTION

The legal response to perceived consumer vulnerability or reduced capacity for decision-making has focused on strategies for ensuring that consumers are not bound to contracts for which the consumer's consent has been in some way impaired or vitiated. There are a number of general law doctrines and legislative prohibitions that may be invoked by consumers, or their representatives, to either avoid or rescind a contract tainted by a misunderstanding, pressure or exploitation.

- The legal threshold requirement of *capacity*⁴⁴ may release a consumer from a transaction in circumstances where the consumer was incapable of understanding the contract at the time it was made and that the trader was or should have been aware of this lack of mental capacity.⁴⁵
- The doctrine of *non est factum* will render void a contract entered into by a party who is unable to understand the transaction.⁴⁶ Knowledge of the incapacity by the other party to the contract is not required but the requisite standard of incapacity for the application of the doctrine is

⁴⁴ In 2014, the United Nations Committee on the Rights of Persons with Disabilities in its General Comment on Article 12 of the *CRPD* stated that '[u]nder article 12 of the Convention, perceived or actual deficits in *mental capacity* must not be used as justification for denying *legal capacity*': Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014): Article 12: Equal Recognition before the Law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014) para 13 (emphasis added). The Committee pointed out at para 13 that:

the concepts of mental and legal capacity have been conflated so that where an individual is thought to have impaired decision-making skills, often because of a cognitive or psychosocial disability, her legal capacity to make a particular decision is removed ... Article 12 does not permit this discriminatory denial of legal capacity ...

See also Bernadette McSherry, 'Legal Capacity under the Convention on the Rights of Persons with Disabilities' (2012) 20 *Journal of Law and Medicine* 22, 22–7.

⁴⁵ *Gibbons v Wright* (1954) 91 CLR 423, 441 (Dixon CJ, Kitto and Taylor JJ).

⁴⁶ *Petelin v Cullen* (1975) 132 CLR 355; *PT Ltd v Maradona Pty Ltd* (1992) 25 NSWLR 643; *Ford by His Tutor Watkinson v Perpetual Trustees Victoria Ltd* (2009) 75 NSWLR 42 (consumer with cognitive impairment).

relatively high and typically there must not have been a want of care on the part of the consumer.⁴⁷

- *Unconscionable dealing* is an equitable doctrine that may set aside a transaction where a trader knowingly takes advantage of or exploits the special disability of the consumer with whom it is dealing.⁴⁸
- *Undue influence* is concerned with a relationship of influence that affects a dependent party's mind and judgment in entering into a contract.⁴⁹ For a contract between the consumer and trader to be set aside on the ground of undue influence by a third party over the consumer, the trader must have had notice of that influence.⁵⁰
- The *Australian Consumer Law* contains a simple but far-reaching prohibition on conduct in trade or commerce that is *misleading or likely to mislead*.⁵¹ The prohibition is the bedrock of consumer protection law in Australia,⁵² but perhaps less central in this context. This is because the prohibition is directed at misleading conduct, not at attempts to take advantage of a lack of understanding, which is the role of the prohibition on unconscionable conduct.
- The *Australian Consumer Law* contains a broad *prohibition on unconscionable conduct* in trade or commerce.⁵³ Courts have used different expressions for describing the threshold for establishing unconscionable conduct, referring to conduct that shows 'a high degree of moral obloquy',⁵⁴ 'something not done in good conscience',⁵⁵ and

⁴⁷ Elise Bant, 'Incapacity, Non Est Factum and Unjust Enrichment' (2009) 33 *Melbourne University Law Review* 368.

⁴⁸ See, eg, *Lampropoulos v Kolnik* [2010] WASC 193 (estate agent manipulates home owner living with dementia).

⁴⁹ See, eg, *Johnson v Buttress* (1936) 56 CLR 113 (illiterate and unsophisticated property owner); *Hart v O'Connor* [1985] AC 1000.

⁵⁰ See, eg, *Perpetual Trustees Victoria Ltd v Ford* (2008) 70 NSWLR 611, 635 [95] (Harrison J); see also *Buccoliero v Commonwealth Bank of Australia* (2011) 16 BPR 30 333, 30 340–1 [67]–[77] (Young JA).

⁵¹ *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*') s 18.

⁵² On the significance of the prohibition see, eg, Michael E J Black, 'The Federal Court of Australia: The First 30 Years – A Survey on the Occasion of Two Anniversaries' (2007) 31 *Melbourne University Law Review* 1017, 1029.

⁵³ Australian Consumer Law ss 21–2. See, eg, *Knowles v Victorian Mortgage Investments Ltd* [2011] VSC 611 (a person who was illiterate signed a loan agreement); *Australian Securities and Investments Commission v Australian Lending Centre Pty Ltd [No 3]* (2012) 213 FCR 380 (the clients of a lender included a man with an Acquired Brain Injury); *Behjan v Living Budget (General)* [2007] NSWCTTT 302 (appeal dismissed: *Guo v Consumer, Trader and Tenancy Tribunal* [2007] NSWSC 1335) (a consumer with a diagnosis of schizophrenia bought over 800 items from the same shop).

⁵⁴ *A-G (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557, 583 [121] (Spigelman CJ); see also *Violet Home Loans Pty Ltd v Schmidt* (2013) 44 VR 202, 219 [58] (The Court); *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525, 587 [188] (Gageler J); cf *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689, 724 [193] (Besanko and Gilmour JJ) (emphasising the need to focus on the words of the prohibition).

⁵⁵ *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90, [41] (The Court); see also *PT Ltd v Spuds Surf Chatswood Pty Ltd* [2013] NSWCA 446, [105] (Sackville JA).

conduct that offends ‘commonly held community values’,⁵⁶ although none of these concepts should replace a close interpretation of the words of the text.⁵⁷ It appears that, to establish unconscionable conduct, the trader must usually have had knowledge of the circumstances of disadvantage or impairment that affected the consumer in entering into the contract.⁵⁸

- *Unfair practices* such as the use of physical force, undue harassment or coercion by a trader in connection with the supply of goods or services or payment for those goods or services are prohibited under section 50 of the *Australian Consumer Law*.

These equitable doctrines and statutory responses act as transactional safety nets. They set aside contracts that are based on impaired or vitiated consent and which therefore lack integrity as assessed by both social values of autonomy and economic imperatives of market efficiency. The combination of these doctrines may provide an incentive to providers of services to keep a check on their sales practices so as to avoid tactics that are misleading, exploitative, impose an undue amount of pressure on consumers or fail to respond to a patent need for assistance or support.

These general law doctrines and statutory prohibitions are however only a partial response to ensuring greater participation and inclusion in market transactions for consumers with cognitive disabilities and, indeed, all consumers. The doctrines are reactive responses to problems in the transacting process rather than proactive strategies for ensuring support for consumers entering into contracts, which is discussed in the next Part of this article. But even within this safety net response there are features that limit the protection that is provided to consumers with cognitive disabilities. Primarily these are the need for knowledge and the reliance on the concept of vulnerability, with its associations with deficit and need, to establish entitlement to relief.

A Reliance on Knowledge to Trigger Trader Responsibilities

One limitation on the effectiveness of the existing legal framework of vitiating factors in protecting consumers with cognitive disabilities is the requirement of knowledge on the part of the trader that applies to most of the protective doctrines. Predominantly, this group of legal responses is dependent on the trader knowing the circumstances that contribute to the consumer being disadvantaged in the transaction and then failing to respond to those circumstances in a way recognised as appropriate by the law. The difficulty is

⁵⁶ *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90, [23] (The Court); see also *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, 274 [296] (Allsop CJ), 289 [371] (Besanko J agreeing), 295 [398] (Middleton J agreeing).

⁵⁷ See, eg, *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689, 724 [193] (Besanko and Gilmour JJ); *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd* (2018) 329 FLR 149, 187 [195]–[199] (Bathurst CJ), 204–5 [275]–[278] (Leeming JA).

⁵⁸ See further Jeannie Marie Paterson, ‘Unconscionable Bargains in Equity and under Statute’ (2015) 9 *Journal of Equity* 188.

that traders may not be equipped to recognise ‘incapacity’, ‘special disability’, ‘impairment’, ‘special disadvantage’ or other relevant conditions that may invoke the vitiating factor.

In *Australian Competition and Consumer Commission v Radio Rentals Ltd*⁵⁹ the consumer, Mr Groth, had diagnoses of an intellectual disability and schizophrenia. Mr Groth was in receipt of a disability pension, which was his sole source of income. In the period between November 1996 and October 2002, Mr Groth entered into 15 rental, two loan and 19 service agreements with Radio Rentals. These all related to electrical goods. The payments he made under those agreements totaled \$20 700.43. The Australian Competition and Consumer Commission (‘ACCC’) argued that Radio Rentals knew or ought to have known that Mr Groth was unable to protect his own interests and that the agreements with Radio Rentals would result in financial hardship for Mr Groth. Finn J accepted that Mr Groth was ‘able to present himself in a manner which did not immediately suggest he was markedly intellectually disabled’. Accordingly, Mr Groth’s ‘disabilities and incapacities’ were not sufficiently evident to the sales people who dealt with him to provide Radio Rentals with knowledge of Mr Groth’s special disadvantage and thus to find that Radio Rentals had engaged in unconscionable conduct.⁶⁰ The ACCC also attempted to argue that Radio Rentals and Walker Stores took advantage of Mr Groth because they knew of his financial circumstances and, in particular, that he had an inadequate monthly surplus after paying the moneys owing to those companies to cover his living expenses. This argument was raised too late in the proceedings to be pursued. Moreover, the ACCC had not made out a case of financial hardship experienced by Mr Groth.⁶¹

The issue illustrated in this case, of the trader’s employees not understanding the impacts of cognitive disability and indeed the precarious financial circumstances affecting the consumer, is not uncommon. Many people in the community do not understand the nature of cognitive disabilities. Moreover, traders and their employees may lean against making assumptions about a person’s abilities or capacity to contract in order to avoid discrimination.

Some participants in the MSEI study observed that identifying a person’s disability may be necessary to facilitate transactions, but is difficult, especially if consumers do not disclose it:

We can all talk about respecting people with disability and people with mental health issues, but not everybody walks into a branch or into a telco shopfront with a sign on their forehead or a sign on their chest, whatever it is, saying ‘I identify as having a mental health issue. Can you please treat me with respect?’ And that exists for so many people in society. You can’t necessarily walk in somewhere and have someone know that you speak English as a second language. None of us wear signs on our forehead or our chests, to be honest.

(Consumer 7)⁶²

⁵⁹ (2005) 146 FCR 292.

⁶⁰ Ibid 324–5 [169]–[172], 330–1 [201].

⁶¹ Ibid 328 [187]–[190].

⁶² Hale et al, above n 18, 34.

Identifying customers and their accessibility needs is sometimes a challenge because also customers don't necessarily open with that or even admit or acknowledge that they have a disability. That's probably where we find a lot of challenges, and we find that internally with our people as well. Some people not necessarily identifying themselves with having a disability. So in that case, you can't then be having a file on them ... there's that real challenge around knowledge.

(Bank representative)⁶³

The limits of relying on knowledge of mental incapacity, special disadvantage, or another relevant condition as a trigger for a proactive response are exaggerated in the online world.⁶⁴ Even applications for complex products such as insurance, credit and telecommunications are taking place through online applications or handled through call centres with no face-to-face or personal interaction:

What you'll find is there are examples where there are local relationships, and there are individuals, so customers that are supported with a local team that know this person and their needs really well. But quite often what you'll find is that outside of that probably local branch environment, if you think call centres, so you're talking to any individual, they might not necessarily know the customer. We're not necessarily identifying unless that customer has specifically requested what their accessibility needs are.

(Bank representative)⁶⁵

B Reliance on the Category of 'Vulnerability' as the Basis for Relief

A second, and related, limitation on the effectiveness of the vitiating factors in responding to the needs of consumers with cognitive disabilities is the tendency in the consumer law and policy to describe the threshold requirement for relief from unfair transactions in terms of vulnerability, and to distinguish that state from the position of ordinary or average consumers. The distinction is enshrined in European Union ('EU') consumer law. Case law from the European Court of Justice⁶⁶ describes the 'average' consumer as a consumer who is 'reasonably well-informed, reasonably observant and circumspect'.⁶⁷ The EU Directive on Unfair Commercial Practices recognises the need for protective concessions for any 'clearly identifiable group of consumers who are particularly

⁶³ Ibid 35.

⁶⁴ See further Organisation for Economic Co-operation and Development, 'Consumer Protection in E-commerce: OECD Recommendation' (2016); United Nations Conference on Trade and Development, *Consumer Protection in Electronic Commerce: Note by the UNCTAD Secretariat*, 2nd sess, Provisional Agenda Item 3(e), UN Doc TD/B/C.I/CPLP/7 (24 April 2017).

⁶⁵ Hale et al, above n 18, 36–7.

⁶⁶ *Gut Springenheide GmbH v Oberkreisdirektor des Kreises Steinfurt* (C-210/96) [1998] ECR I-4657; see also *Verbraucherschutzverein eV v Sektellerei G C Kessler GmbH und Co* (C-303/97) [1999] ECR I-513; *Estée Lauder Cosmetics GmbH & Co OHG v Lancaster Group GmbH* (C-220/98) [2000] ECR I-117.

⁶⁷ *Council Directive 2005/29/EC of 11 May 2005 concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council* [2005] OJ L 149/22, art 18.

vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee'.⁶⁸ Vulnerable consumers under this dichotomy warrant special levels of protection in transacting. Average consumers by contrast should be encouraged to take measures to protect their own interests.

Vulnerability is also commonly invoked as the threshold requirement for protective relief in Australian case law, particularly dealing with the prohibition on unconscionable conduct,⁶⁹ and in regulatory guidance.⁷⁰ Conversely, case law on the statutory prohibition on misleading conduct has drawn a distinction between categories of 'ignorant' or 'gullible' consumers and 'ordinary' or 'reasonable' consumers in determining whether conduct directed at a class of consumers is misleading or likely to mislead, with the reaction of the gullible excluded from consideration.⁷¹

This reliance on the label 'vulnerable' to identify consumers in need of protection from the law, and conversely on ideals of 'average', 'ordinary' or 'reasonable' consumers as warranting lesser levels of protective scrutiny, raises a shortcoming of prevailing approaches to consumer protection for consumers with cognitive disabilities. Disability studies scholars have argued that labelling and treating people with disabilities as 'vulnerable' or 'dependent' has resulted in laws and policies that deny individuals' practical and legal agency and place them in positions of dependency on others.⁷² At best, this approach treats persons with disabilities as subjects of a benevolent protective scheme rather than holders of rights (including the right to recognition and exercise of their legal capacity)⁷³

⁶⁸ Ibid arts 5(3), 2(5)(a); *Consumer Protection from Unfair Trading Regulations 2008* (UK) SI 2008/1277, reg 2(5).

⁶⁹ See, eg, *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] 15 BPR 29 699, 29 765 [291] (Allsop P); *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, 274 [296] (Allsop CJ), 289 [371] (Besanko J agreeing), 295 [398] (Middleton J agreeing); *NRM Corporation Pty Ltd v Australian Competition and Consumer Commission* [2016] FCAFC 98; *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421, 437 [60] (Allsop CJ); *Australian Competition and Consumer Commission v Ford Motor Company of Australia Ltd* [2018] FCA 703, [29] (Middleton J).

⁷⁰ Australian Competition and Consumer Commission, 'Business Snapshot: Don't Take Advantage of Disadvantage: A Compliance Guide for Businesses Dealing with Disadvantaged or Vulnerable Consumers' (Brochure, 2011) <https://www.accc.gov.au/system/files/217_%20BS%20Don%27t%20take%20advantage%20_FA_Web_Nov-2014.pdf>; Consumer Affairs Victoria, 'Discussion Paper: What Do We Mean by "Vulnerable" and "Disadvantaged" Consumers?' (2004).

⁷¹ See, eg, *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45, 85 [102]–[103] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ); *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435, 443 [6]–[9] (French CJ, Crennan and Kiefel JJ); *Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd (in liq)* [No 2] [2017] FCA 709, [26] (Beach J). The restrictions in this formulation in assessing misleading conduct are somewhat offset by the insight of the High Court in *Australian Competition and Consumer Commission v TPG Internet* that deliberate stratagems by traders to induce reliance by focusing on some facts and omitting (or underplaying) others are more likely to be found to have induced reliance in the intended audience and hence be found to be misleading or deceptive: (2013) 250 CLR 640, 657 [55]–[57] (French CJ, Crennan, Bell and Keane JJ).

⁷² See, eg, Anita Silvers, 'Reconciling Equality to Difference: Caring (f)or Justice for People with Disabilities' (1995) 10 *Hypatia* 30.

⁷³ *CRPD*, art 12.

and people with individual experiences and expertise who are entitled to full social and economic inclusion.⁷⁴ Less benevolently, ‘designating only certain individuals and groups as vulnerable transforms our shared vulnerability into a personal liability and renders the individuals so designated susceptible to alienation, stigma or demonization’.⁷⁵

For instance, while a determination that a consumer with cognitive disabilities did not have the requisite capacity to enter a contract may enable them to avoid the consequences of a problematic or undesired transaction, such a determination risks perpetuating the stigma, discrimination, and denial of legal personhood of the individual because of their (perceived or actual) impairment or disability. As already noted, it also does nothing to equip that person with the skills or support to enter further transactions in the future, and is unlikely to result in outcomes that respect the autonomy and dignity of the individual.⁷⁶

Consumer protection responses based on distinguishing between vulnerable and non-vulnerable consumers are not only problematic for those labelled vulnerable. Paradoxically, the dichotomy between average and vulnerable consumers results in both a marginalisation of consumers experiencing disadvantage, hardship or vulnerability to exploitation in consumer transactions and an artificial standard for assessing the welfare of all consumers.⁷⁷ As Martha Fineman asserts, ‘human vulnerability is universal, constant and complex, it is also particular’.⁷⁸ First, labelling particular groups of consumers as necessarily or intrinsically vulnerable ignores the potential for all consumers to be vulnerable in certain circumstances.⁷⁹ Again, to quote Fineman: ‘[t]he very idea of vulnerable populations situates and validates an opposite binary ideal – a population of autonomous, self-sufficient, and independent liberal subjects’.⁸⁰

As has been frequently pointed out by scholars and commentators, few real consumers are likely to meet the demands of the identified standard of the ‘reasonable’ person.⁸¹ If some consumers are treated as inevitably vulnerable, then the difficulties potentially faced by all other consumers in market dealings

⁷⁴ United Nations Department of Economic and Social Affairs, Division for Inclusive Social Development, *Convention on the Rights of Persons with Disabilities* <<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>>.

⁷⁵ Martha Albertson Fineman, ‘Beyond Identities: The Limits of an Antidiscrimination Approach to Equality’ (2012) 92 *Boston University Law Review* 1713, 1750.

⁷⁶ See Eliza Varney, ‘Redefining Contractual Capacity? The UN Convention on the Rights of Persons with Disabilities and the Incapacity Defence in English Contract Law’ (2017) 37 *Legal Studies* 493.

⁷⁷ On this theme see further Mayo Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (Oxford University Press, 2003).

⁷⁸ Martha Albertson Fineman, ‘The Vulnerable Subject and the Responsive State’ (2010) 60 *Emory Law Review* 251, 268.

⁷⁹ Martha Albertson Fineman, ‘“Elderly” as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility’ (2012) 20 *Elder Law Journal* 71, 85–6.

⁸⁰ Fineman, ‘Beyond Identities’, above n 75, 1713, 1751.

⁸¹ Rossella Incardona and Cristina Poncibò, ‘The Average Consumer, the *Unfair Commercial Practices Directive*, and the Cognitive Revolution’ (2007) 30 *Journal of Consumer Policy* 21.

risk being ignored.⁸² All consumers may be vulnerable in some transactions, if what is meant by this concept is being at considerable disadvantage compared to the position of the trader with whom they are dealing. Consumers will usually have less information about the product than the trader does.⁸³ Where these circumstances are combined with emotional or social instability – family disruption, illness, financial hardship or simply time pressures – then consumers may be in a position of considerably reduced bargaining power.⁸⁴ It is increasingly widely recognised that consumers do not act in a perfectly rational manner as assumed by classical economic theory.⁸⁵ Instead, all consumers are constrained by limitations of information, time and experience. All consumers are also subject to a variety of cognitive biases, identified by studies in behavioural economics, that limit their ability to make choices that will produce the most beneficial outcomes.⁸⁶

For consumer protection law and policy this insight suggests convenient labels such as ‘vulnerable’ to identify those in need of protection should be avoided. The label perpetuates the undesirable distinction between ordinary and other types of consumers. It therefore risks diverting attention from what should be the substantive inquiry into the circumstances of consumers at the time of transacting. The difference between these approaches can be illustrated by considering the way in which the threshold requirement for relief from the equitable doctrine threshold has been treated in the case law. In assessing the existence of a special disadvantage that enlivens the doctrine of unconscionable dealing in equity, courts commonly refer to the statement of Fullagar J in *Blomley v Ryan*, listing ‘poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary’.⁸⁷ However, Fullagar J prefaced this list with the statement that ‘[t]he circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified’.⁸⁸ As the High Court reiterated in *Kakavas v Crown Melbourne Limited*, an assessment of unconscionable conduct ‘calls for a precise examination of the particular facts, a scrutiny of the exact relations established between the parties and a consideration of the mental capacities, processes and idiosyncrasies of the [parties]’.⁸⁹ The key focus of the inquiry into

⁸² Fineman, ‘The Vulnerable Subject’, above n 78, 251.

⁸³ On bounded rationality and the insights of behavioural economics see, eg, Robert A Hillman and Jeffrey J Rachlinski, ‘Standard-Form Contracting in the Electronic Age’ (2002) 77 *New York University Law Review* 429; Russell Korobkin, ‘Bounded Rationality, Standard Form Contracts, and Unconscionability’ (2003) 70 *University of Chicago Law Review* 1203.

⁸⁴ See Paterson, above n 58, 188.

⁸⁵ Fineman, ‘The Vulnerable Subject’, above n 78, 251, 259.

⁸⁶ See generally Melvin Aron Eisenberg, ‘The Limits of Cognition and the Limits of Contract’ (1995) 47 *Stanford Law Review* 211; Korobkin, above n 83.

⁸⁷ (1956) 99 CLR 362, 405.

⁸⁸ Ibid.

⁸⁹ (2013) 250 CLR 392, 426 [122] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ), citing *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113, 118–19 (Dixon CJ, McTiernan and Kitto JJ).

unconscionable conduct in equity should on this approach be the factor identified by Fullagar J, namely ‘lack of assistance or explanation where assistance or explanation is necessary’,⁹⁰ and ideally the same perspective would flow through to the other protective doctrines in determining who is worthy of protective relief.⁹¹

These insights also suggest a more proactive approach to consumer protection than is available through safety net provisions that relieve consumers from transactions on the ground of impaired consent. Article 12 of the *CRPD* obliges states to both recognise the legal personhood and legal capacity of all persons and provide individuals with the support they may require to exercise that capacity.⁹² This approach would focus on how to remove barriers to social participation rather than merely providing protective strategies to alleviate the adverse consequences of perceived difference. Recognition of innate vulnerabilities in all individual consumers should prompt a shift in focus from the special protection of discrete ‘vulnerable’ groups to a recognition of the need for the state, the courts and traders to focus on improving equality of access and participation.⁹³

IV ‘FRONT-END’ REGULATORY RESPONSES TO CONSUMER PROTECTION

If a vulnerability approach is not optimal for either those labelled ‘vulnerable’ or those presumed to be reasonable or ordinary, it is time to consider new strategies. Although the existing legal doctrines’ responses to vitiated consent may protect the consumer who has been exploited by a predatory trader, it is not clear that they provide strong incentives to implement more inclusive practices by traders in dealing with some consumers to avoid needing to challenge the validity of the transaction *after it has been made*. The focus is on sanctioning the trader for continuing to contract with a consumer in the face of an apparent lack of knowledge or understanding through the loss of the deal rather than on support in contracting for consumers who may require it. An earlier or front-end response could promote good decision-making for all, rather than merely unwinding the consequences of a transaction tainted by impaired consent. Here we might draw on Duggan and Ramsay’s metaphor of responses to the danger posed by a crumbling cliff top edge close to a popular walking path – the

⁹⁰ (1956) 99 CLR 362, 405.

⁹¹ See also Robyn Honey, ‘Renovating the Concept of Consent in Contract and Property Law’ in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (Australian National University Press, 2017) 337.

⁹² *CRPD* art 12(1)–(3).

⁹³ Cf the vulnerability theory of Fineman, ‘The Vulnerable Subject’, above n 78, 25 (‘one way to understand the vulnerability approach is to see it as an articulation of a duty for the state to actively assume broad societal responsibility in regard to ensuring equality for citizens and others to whom it owes some obligation’); see also Fineman, ‘Beyond Identities’, above n 75, 1755.

best response to protect walkers from falling is a fence at the top not an ambulance at the bottom.⁹⁴

It is suggested that a change in the law, policy and contracting practice is required so that the standard responses to incapacity or vulnerability are replaced by a better, more extensive response to building contracting capacity in all consumers, including those with cognitive disabilities. An approach premised on universal inclusion, drawing particularly on some of the principles expressed in the *CRPD*, may offer a solution. One purpose of the *CRPD* is to correct the tendency to focus on individual deficit when addressing the circumstances of persons with disabilities, and instead emphasise the social causes of disability, which in the context of consumer activity includes inaccessibility of information and services,⁹⁵ and a lack of support to make decisions and live independently in the community.⁹⁶

A Responding to Inaccessible Information

Reliance on disclosure as a consumer protection mechanism has been undermined by empirical work that suggests consumers make little meaningful use of written information about the goods and services they are purchasing.⁹⁷ It is perhaps an overreaction to abandon disclosure entirely as a mechanism for consumer protection; it might be possible to use these insights to make the disclosure regime more effective. The effort is consistent with an underlying but important premise of consumer protection law, which is that the role of regulation in this context is not to make decisions for consumers but to facilitate the optimal conditions for consumers to make worthwhile decisions about managing their own lives. For consumers with cognitive disabilities, clear communication assumes even greater significance, particularly in contracting online where there may be no human communication from the trader.

Contracts governing the supply of online services are commonly difficult to read and understand. They are usually provided in PDF documents printed in capitals with no white space and are of excessive length.⁹⁸ Greater use might therefore be made of simple strategies such as ratings, diagrams and standardised disclosure of key features.⁹⁹ Simple warnings might be used to alert consumers to products that are high risk.¹⁰⁰ New technologies offer potential here. Online tools

⁹⁴ See Anthony Duggan and Iain Ramsay, 'Front-End Strategies for Improving Consumer Access to Justice' in Michael J Trebilcock, Anthony Duggan and Lorne Sossin (eds), *Middle Income Access to Justice* (University of Toronto Press, 2012) 95, drawing on a metaphor used by Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford University Press, 2008) 231.

⁹⁵ *CRPD* arts 9, 21.

⁹⁶ *CRPD* arts 12, 19.

⁹⁷ See generally, Australian Securities and Investments Commission, 'Financial Literacy and Behavioural Change' (Report No 230, 2011); Eisenberg, above n 86; Korobkin, above n 83; Hillman and Rachlinski, above n 83.

⁹⁸ Christopher Groskopf, 'Apple Fans Have Click-Signed More than 100,000 Words of Legal Contracts', *Quartz* (online), 5 November 2016 <<https://qz.com/797928/apple-fans-have-click-signed-more-than-100000-words-of-legal-contracts/>>; 'Nine Hours of "Conditions Apply"' *CHOICE* (online), March 2017 <<https://www.choice.com.au/about-us/media-releases/2017/march/nine-hours-of-conditions-apply>>.

⁹⁹ See also United Nations Conference on Trade and Development, above n 64.

¹⁰⁰ Commonwealth Treasury, 'Financial Systems Inquiry: Final Report' (November 2014) 195.

are now available to allow better navigation by consumers and tailoring of information to their preferences instead of navigating cumbersome documents.¹⁰¹ Such information can be presented in different formats, pop up boxes and embedded videos, playing to the best learning style of the recipient. Guidelines like the ‘Web Content Accessibility Guidelines’ provide detailed practical guidance on making content, particularly online content, accessible to people with disabilities.¹⁰²

B Responding to Inaccessible Services

A significant part of the issue for consumers contracting for essential services such as banking, telecommunications, utilities and insurance is the sheer complexity of the options available. Products are often offered in a range of different bundles or with numerous add-ons which increase the complexity of the choice for consumers and impose a much higher cost, which can be especially significant for those on low incomes. In this way products that are on their own acceptable and effective may prove to be unsuitable for consumers on the grounds of cost or complexity, or at least at risk of significant overservicing. In its Rank the Telco report, the Financial and Consumer Rights Council reported that:

[Telco] providers are frequently upselling bundles, accessories and multiple contracts; conducting bare-minimum credit assessments; and offering scant information about the financial implications of expensive post-paid services. Thus, low-income customers are signing complex contracts for unnecessary and unaffordable products, setting them up for future hardship.¹⁰³

Hence there is an important role for traders themselves to be responsive to the needs of all consumers by developing ‘vanilla’ product bundles suitable for consumers with a need or desire for a straightforward service and also ensuring that sales staff are trained to understand the imperative of informing consumers of these options.¹⁰⁴

1 Mandatory Requirements of Suitability

As already noted, a regime that depends on a trader having knowledge of consumer vulnerability does little to prompt a general process of inquiry into the suitability of the product for the needs of the consumer. Yet without knowledge, many of the protective responses to those consumers in need of assistance or support in a transaction under the existing law are not triggered. As Finn J

¹⁰¹ Ibid.

¹⁰² World Wide Web Consortium, ‘Web Content Accessibility Guidelines’ (W3C Recommendation, version 2.1, 5 June 2018) <<https://www.w3.org/TR/WCAG21/>>; see Sven Schmutz, Andreas Sonderegger and Juergen Sauer, ‘Implementing Recommendations from Web Accessibility Guidelines: Would They Also Provide Benefits to Nondisabled Users’ (2016) 58 *Human Factors* 611.

¹⁰³ Financial and Consumer Rights Council, ‘Rank the Telco’ (Report, April 2017) 6.

¹⁰⁴ See also *ibid* 26.

commented in *Australian Competition and Consumer Commission v Radio Rentals Ltd*.¹⁰⁵

As I earlier indicated, it is not to the point that, with different risk management practices, the respondents may have been able to detect Mr Groth's circumstances and to take steps to assist him. That is not the case before me although it has faint echo in the ACCC's written closing submission where it is said that corporate businesses and their sales agents 'have a responsibility to ensure that they do not take unfair advantage of customers'. This responsibility, it is said 'requires businesses to be alert to the fact that some of their customers may be vulnerable'. All I would say of this is that the positive, neighbourhood-like, obligation implicit in this stands apart from the law of unconscionable dealing as it has been conceptualised to date and it appears to be distinctly tort like in character, conjuring up as it does a negligent failure to discharge this claimed 'responsibility'.¹⁰⁶

A more direct response to concerns about consumers entering into unsuitable, complex transactions would be the imposition of a statutory obligation on traders to make some basic inquiries into the ability of the consumer to afford the transaction and the suitability of the product for their needs.¹⁰⁷ Clearly this would not be an appropriate obligation to attach to all consumer products, but it may have merit in high-cost, complex or long-term contracts, especially those involving essential services.

A model for this kind of response to the risk of financial over-commitment is provided by the responsible lending obligations imposed under the *National Consumer Credit Protection Act 2009* (Cth). Chapter 3 includes obligations of responsible lending, which oblige credit licensees to assess that a credit contract or lease is not unsuitable for the consumer's requirements and that the consumer has the capacity to meet the financial obligations under the credit contract or lease.¹⁰⁸ The possibility of extending this type of protection more generally was considered by the Australian Law Reform Commission in its 2014 report on *Equality, Capacity and Disability in Commonwealth Laws*.¹⁰⁹ Certainly such an approach may have addressed the concerns raised in *Australian Competition and Consumer Commission v Radio Rentals Ltd*, discussed above.¹¹⁰ A similar model might be usefully utilised for purchasing decisions for complex, financially significant and increasingly essential mobile and internet services.

2 Understanding Discrimination

We have suggested that in some cases a better outcome for both contracting parties would be produced if the trader had a better understanding of the consumer's disability or needs for decision-making support. Yet traders may be

¹⁰⁵ (2005) 146 FCR 292.

¹⁰⁶ Ibid 331 [201].

¹⁰⁷ The Financial and Consumer Rights Council has suggested the need for more rigorous assessments of customers' capacity to afford some telecommunications services at the point of sale: Financial and Consumer Rights Council, above n 103, 26.

¹⁰⁸ See, eg, *Australian Securities and Investments Commission v Financial Circle Pty Ltd* (2018) 353 ALR 137.

¹⁰⁹ Australian Law Reform Commission, above n 8, 292 [11.20].

¹¹⁰ (2005) 146 FCR 292.

anxious about making the inquiries that would clarify their understanding and consumers may be hesitant to discuss their disability with the trader.¹¹¹ This was certainly a concern identified by participants in the MSEI study:

We accommodate people the best we can, unfortunately we're not fully aware of some people's personal circumstances and we need to be extremely careful about that, we can't make accusations about someone's state of health; we've got to respect them and respect their privacy ...

(Bank representative)¹¹²

With our front-line staff, a lot are trained to assist, but to look even further, I don't know whether we'd be suitably trained or qualified to make that judgement, because we don't want to discriminate [sic] our customer or anything like that.

(Bank representative)¹¹³

The potency of concerns about privacy and discrimination is reduced in circumstances where the inquiries are genuinely directed to allowing production of adequate advice on suitable products and support to consumers. Alternatively, at least in high-cost transactions, a prompt could be directed to all consumers as to whether they need further assistance or an option of a simplified product. Such universal approaches would further recognise that vulnerability can be the norm for all consumers at some times and in some circumstances, dissolving the problematic distinction between vulnerable and average consumers discussed.

For consumers with cognitive disabilities, the suggestion of disclosure of the need for assistance or support in the transaction in question may raise legitimate concerns that they will be discriminated against. Certainly, there is a risk that if traders are aware of a person's disability or diagnosis they may deny access to goods or services to avoid the impact of the protective doctrines, regardless of whether it is relevant to the consumer's understanding of the transaction in question. This may constitute unlawful disability discrimination¹¹⁴ and a denial of a person's human right to recognition of their legal capacity.¹¹⁵ Alternatively, traders may decline to deal with the person directly, instead seeking authorisation from a formally appointed substitute decision-maker (such as a guardian).¹¹⁶ In some circumstances this may also be discriminatory and, as outlined below, would be contrary to the Committee on the Rights of Persons with Disabilities' interpretation of article 12 of the *CRPD*.¹¹⁷ Both forms of conduct are contrary to

¹¹¹ This was also found in a 2006 study of telecommunications contracts in which companies stated that 'they often could not tell if a prospective customer had a disability, that it may cause offense to ask, and that to create specific policies for customers with a disability may place them in breach of the *Disability Discrimination Act*': Chris Atmore, Derek Wilding and Elizabeth Beal, 'Not So Special: Telecommunications Contracts, Disability and Unfair Practices' (Report, Communications Law Centre, January 2006) 7.

¹¹² Hale et al, above n 18, 38.

¹¹³ Ibid 53.

¹¹⁴ *Disability Discrimination Act 1992* (Cth) s 24.

¹¹⁵ *CRPD* art 12.

¹¹⁶ Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) 46 [4.77].

¹¹⁷ Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014): Article 12: Equal Recognition before the Law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014) para 7.

the current emphasis in Australian society on self-determination, social inclusion and access for people with disabilities.

For consumers, there may also be a concern that disclosure will simply be too personally confronting, with a lack of education or understanding on the part of the trader or its staff leading to inappropriate responses to disclosed needs. This was identified as an issue by participants in the MSEI study:

It's too hard to deal with people. You know if you make a mistake or miss a payment because you've had personality switches, you're the biggest monster in the world and even if you say 'Well look it's because I have an illness' they're more inclined to just dump you, than help you sort it ... for a long time I was very sick and didn't look like a regular other person. So I didn't want to go in and again get that poor treatment. I've even had people kind of laughing going 'Are you sure you really want this?' And things like that ... sometimes I would forget things and I would get a little bit muddled up, so I'll need to ask more questions at that time and they'll

laugh or they'll just look at me like I'm an alien or something like that, you know what I mean.

(Consumer 4)¹¹⁸

These concerns about invasion of privacy and discrimination might be lessened by being very clear about the type of disclosure being sought and the purpose of collecting the disclosed information.

I know that it's difficult because there's privacy and all the rest of it, but if they can get a picture of how many devices you've already got and whether you actually – and I know there's the argument why should they be responsible for you, if you want the product and you can afford it then fine ... it doesn't have to be about you personally, they don't have to know about what medications you are or aren't on or what your lifestyle is ...

(Consumer 2)¹¹⁹

V DEVELOPING A CULTURE OF SUPPORTED DECISION MAKING IN CONSUMER TRANSACTIONS

Against the backdrop of current contracting practices, the most radical suggestion for enhancing decision-making for consumers, including those with cognitive disabilities, is to explore ways of providing decision-making support. Even where a disability or impairment that may impact on decision-making is identified by a trader, the law gives very little guidance about how support for that consumer should be provided. Often the legal response to consumers with cognitive disabilities is to impose formal hurdles to transacting or to deny legal capacity entirely. In cases where mental capacity is doubted it may result in the appointment of a substitute or alternative decision-maker for the person deemed vulnerable.

¹¹⁸ Hale et al, above n 18, 37.

¹¹⁹ Ibid 38.

In equity, support is often premised in sending consumers for legal or financial advice.¹²⁰ But the aim in this context of support for decision-making should not be to create additional hurdles or to deny the right of people with cognitive disabilities to make consumer decisions, but to recognise the need for assistance in navigating specific aspects of transactions. In the words of a participant in the MSEI study:

How about stopping with the forms and let me speak to a person who will navigate through working something out, because all this trying to pigeonhole people, especially people with Asperger's into one category, into one nice pigeonhole, it's not going to work.

(Consumer 5)¹²¹

There are some precedents in law for a more proactive approach to providing decision-making support in consumer transactions. Both English and Australian law have developed detailed and replicable frameworks for banks on their obligations in advising and protecting potentially unduly influenced volunteers who are prepared to guarantee their spouse or close partners' business debts.¹²² In the context of most consumer transactions the need is not always for legal or other expert advice but rather for decision-making support, with expertise potentially scaled to the significance of the transaction. The need will commonly be not to walk consumers through the details of the contract but to ensure that the consumer understands the commitment and any unusual features, and that it is financially viable.¹²³

Clearly, this model is not one to be replicated in all or even most significant consumer transactions. But it is in this general idea of support for consumers in making decisions that perhaps the most potential lies for an inclusive response to market participation.

A General Models of Supported Decision-Making

Article 12(3) of the *CRPD* requires states to take 'appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity'.¹²⁴ Supported decision-making is based on a strengths-based human rights model, where individuals are assisted to make their own decisions with the support of others. The central tenet of the supported decision-making approach is that all people can make their own decisions with the appropriate support. Crucially, the supported person retains his or her right to make decisions and is supported to exercise this right.¹²⁵ According to the United

¹²⁰ See further Mark Sneddon, 'Unfair Conduct in Taking Guarantees and the Role of Independent Advice' (1990) 13 *University of New South Wales Law Journal* 302.

¹²¹ Hale et al, above n 18, 41.

¹²² See *Yerkey v Jones* (1939) 63 CLR 649; *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395.

¹²³ Consumer Affairs Victoria, above n 70.

¹²⁴ *CRPD* art 12(3).

¹²⁵ Terry Carney and Fleur Beaupert, 'Public and Private Bricolage – Challenges Balancing Law, Services and Civil Society in Advancing *CRPD* Supported Decision-Making' (2013) 36 *University of New South Wales Law Journal* 175.

Nations Committee on the Rights of Persons with Disabilities' interpretation of article 12, this means that laws or practices that draw a line between people who do have the capacity to make decisions (either in general, or in a specific situation) and those who do not are not permissible under the *CRPD*.¹²⁶

The degree and nature of support that any person requires will of course differ depending on their disability and other circumstances. It may include support to understand options and consequences, providing information in plain language (discussed above), or providing extra time for the individual to make decisions.¹²⁷ Support may focus on interpretation and communication. It may include gathering and obtaining information for individuals, explaining it to them, helping them to understand the consequences of decisions and assisting them to communicate their preferences.

Decision-making support may include natural, informal supports such as family or friends, as well as more formal arrangements, such as formal 'representation agreements'.¹²⁸ Terry Carney notes that informal supported decision-making merely recognises what is a widely-utilised, everyday process;¹²⁹ most people (regardless of whether they have a disability) commonly seek out support to make decisions in their day-to-day lives. They draw on their family members, friends, colleagues, and professionals to obtain opinions and advice on the best or wisest option. One common model of supported decision-making is referred to as a 'support circle'.¹³⁰ This circle involves family members, friends, or those who are close to the person providing support for them to interpret and make decisions. Members of the circle have an intimate understanding of supported individuals' circumstances, including their life history, communication methods, and their preferences and wishes – a relationship of reciprocal trust and respect is therefore intrinsic to this approach.

More formal recognition of supported decision-making has been developing in the guardianship context. Guardianship laws have traditionally been based on notions of a lack of mental capacity and appointing substitute decision-makers to act in the 'best interests' of those considered unable to make their own decisions.¹³¹ In light of the shift away from substitute decision-making regimes

¹²⁶ Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014): Article 12: Equal Recognition before the Law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014) para 12; but see Bernadette McSherry and Kay Wilson, 'The Concept of Capacity in Australian Mental Health Law Reform: Going in the Wrong Direction?' (2015) 40 *International Journal of Law and Psychiatry* 60 for a discussion of alternative interpretations of article 12 and the permissibility of substitute decision-making.

¹²⁷ See further Michael Bach and Lana Kerzner, 'A New Paradigm for Protecting Autonomy and the Right to Legal Capacity' (Research Discussion Paper, Law Commission of Ontario, 2010) <<https://www.lco-cdo.org/wp-content/uploads/2010/11/disabilities-commissioned-paper-bach-kerzner.pdf>>.

¹²⁸ Michelle Browning, Christine Bigby and Jacinta Douglas, 'Supported Decision Making: Understanding How Its Conceptual Link to Legal Capacity Is Influencing the Development of Practice' (2014) 1 *Research and Practice in Intellectual and Developmental Disabilities* 34.

¹²⁹ Terry Carney, 'Participation Rights, Family Decision-Making & Service Access: A Role for Law' (Legal Studies Research Paper No 12, Sydney Law School, April 2012) 4.

¹³⁰ Jo Watson, 'Supported Decision Making: Are Everyone's Voices Being Heard?' (Paper presented at the Supported Decision Making: From Theory to Practice Conference, Victoria University, October 2013).

¹³¹ See, eg, *Mental Health Act 2016* (Qld) ss 12(1)(b), 18(1), (3); *Mental Health Act 2013* (Tas) s 40(e); *Mental Health Act 2014* (WA) s 25(c).

mandated in the *CRPD*, supported decision-making in the context of guardianship arrangements has been trialled in a number of states and territories,¹³² generally with positive results.¹³³ However, the small scale and other features of the trials mean that ‘firm conclusions cannot be reached about program logics, costs or outcomes’.¹³⁴ The pilots demonstrate the feasibility of providing support for decision-making rather than resolving issues involved in delivering support.

In Victoria, the outcomes of a supported decision-making trial were used in the development of educational material for ‘supportive attorney’ legislation enacted in the *Powers of Attorney Act 2014* (Vic). This enables some individuals to legally appoint a person to support them to make and act on decisions, including accessing information about and dealing with banks, utilities and other service providers.¹³⁵ The Australian Law Reform Commission, and law reform authorities in several other jurisdictions including New South Wales and the Australian Capital Territory, have expressed support for the introduction of some form of formal supported decision-making in legislation.¹³⁶

B Supported Decision-Making in Consumer Transactions

Consumer transactions are complex. It therefore seems unrealistic to expect ‘lay-person’ supporters to guide those with cognitive disabilities through the legal labyrinth of terms and conditions to choose between intricate and varied product bundles, again suggesting that distinguishing between vulnerable and non-vulnerable consumers is fallacious. Equally, it might seem naive to suggest that telecommunications, finance, insurance, and utilities sectors can or should

¹³² See generally Christine Bigby et al, ‘Delivering Decision Making Support to People with Cognitive Disability – What Has Been Learned from Pilot Programs in Australia from 2010 to 2015’ (2017) 52 *Australian Journal of Social Issues* 222.

¹³³ See Margaret Wallace, ‘Evaluation of the Supported Decision Making Project’ (Report, November 2012) <https://www.adhc.nsw.gov.au/_data/assets/file/0003/279039/SDMP_fact_sheet_Oct2013.pdf>; Office of the Public Advocate (Vic), *Project Description: Supported Decision-Making Pilot Project* (2013) <<http://www.publicadvocate.vic.gov.au/advocacy-research/supported-decision-making>>; see also Bigby et al, above n 132.

¹³⁴ Bigby et al, above n 132, 222.

¹³⁵ *Powers of Attorney Act 2014* (Vic) ss 85–8; Office of the Public Advocate (Vic), *Information for Supportive Attorneys* (March 2018) <<http://www.publicadvocate.vic.gov.au/our-services/publications-forms/enduring-powers-of-attorney/supportive-attorney-appointments/advice-for-supportive-attorneys/506-information-for-supportive-attorneys/file>>; see also the proposed changes to the *Guardianship and Administration Act 1986* (Vic) in the *Guardianship and Administration Bill 2018* (Vic).

¹³⁶ Australian Law Reform Commission, above n 8, 11 (Recommendation 3-1); New South Wales Law Reform Commission, *Review of the Guardianship Act 1987: Draft Proposals* (2017) 5 (Proposal 1.1) <<http://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Guardianship/Draft%20Proposals/Draft%20Proposals.pdf>>; Australian Capital Territory Law Reform Advisory Council, ‘Guardianship Report’ (29 July 2016) 10–11 (Recommendations 1–2) <http://cdn.justice.act.gov.au/resources/uploads/JACS/Reviews/submissions/Guardianship_review/Guardianship_Report-Final.pdf>.

introduce a costly comprehensive model of advice and assistance.¹³⁷ This was a concern expressed by participants in the MSEI study:

Well we're a major bank. We're exceedingly complicated. We've been around for 175 years. We've got hundreds of products, thousands of processes and literally 20 or 30,000 front line staff in Australia alone. So nothing's easy, which is why it's important to start with the right points in the process, and the people that are designing our front-line processes or our systems. And again, there's multitude of systems and some of them work differently in different channels and some of them work differently in different sectors of customers, so a retail customer or commercial customer, if you're a deposit customer or a home loan customer. It's different systems, with different purposes.

(Bank representative)¹³⁸

[We've been talking to one bank in the UK] about some of the great work that they do around accessibility, and they have what they call 'care markers' on their systems, which essentially is a flag on the database if a customer which basically says 'okay, this person's got vision impairment or is mentally disabled' or whatever it might be, and that helps them make choices about things that they do. So they won't outbound phone call someone that's deaf, or they won't write to someone with a letter who's blind. That's quite good. We've talked about that and we've love to be able to do, but we're talking millions of dollars for us to be able to implement that solution.

(Bank representative)¹³⁹

However, these objections overstate the role of supported decision-making and underestimate the benefit that even relatively minor changes to contracting practice might have. It should be noted that the role of support persons is not to make the decisions but, where desired, to guide the consumer through the decision-making process. This may sometimes mean suggesting questions for the consumer to ask the trader, supporting consumers in slowing down a transaction by taking the time to shop around and consider alternative options and flagging the need to access expert advice. For example, a participant in the MSEI study suggested that:

A good analogy might be the buyer's advocate, when you go buying a house, someone that does the bidding for you. It's that kind of idea, that you say 'look I want to go out in to the marketplace, I need a new phone, I need a new fridge'. So you've got someone to say, 'well I know which businesses are going to do the right thing by you'. It's about getting on the front foot and meeting needs, before the person goes out spontaneously to try and meet their own needs.

(Lawyer)¹⁴⁰

This suggests that what is required is a tailored, multifaceted approach to supported decision-making that recognises that support can come from close family and friends, specialist support services, such as community legal centres and disability support groups, and from traders themselves.¹⁴¹ Indeed, in a

¹³⁷ Cf C Bigby, B Bowers and R Webber, 'Planning and Decision Making about the Future Care of Older Group Home Residents and Transition to Residential Aged Care' (2011) 55 *Journal of Intellectual Disability Research* 777.

¹³⁸ Hale et al, above n 18, 52.

¹³⁹ Ibid 49.

¹⁴⁰ Ibid 47.

¹⁴¹ See also the suggestions for support in making decisions about credit in Christine Long, 'How People with Mental Illness Can Weather-Proof Finances for Bumpy Spending Patterns', *The Age* (online), 4

consumer context, we propose four complementary models that might be used to build supported decision-making capacity.¹⁴²

1. *Consumer-led support*, which entails developing the knowledge and self-advocacy skills of people with disabilities and their informal or individual supporters such as family members, disability support workers and carers.
2. *Provider-led support*, which involves developing the capacity of the traders that provide services, such as banks and telecommunications service providers, to support consumers with decision-making impairments, including developing non-discriminatory support and referral mechanisms for the contracting process.
3. *Service-led support*, which means developing the capacity of community-based disability and mental health service providers. This could involve hosting a dedicated support person or team or building the capacity of existing staff.
4. *Advocate-led support*, which would involve increasing the capacity of community legal centres or consumer advocacy organisations to provide support.

What must be envisaged is a cooperative approach whereby support possibilities are recognised as coming from informal supporters, being embedded in community groups and being internalised by traders, possibly through dedicated specialist inquiry channels. Involving a mix of support networks may increase the ‘messiness’ of the arrangement but also mirrors the reality of social life and, importantly, can create checks and balances that reduce the risk of abuse by those in a trusted position. Community awareness of supported decision-making must also be built to ensure that traders and others do not treat supporters as substitute decision-makers and prioritise supporters’ views over those of the person being supported.¹⁴³

C Why Change?

Supported decision-making primarily requires a change in contracting practice, with traders being willing to make inquiries about the necessary supports required and recognising the role for support persons in assisting in decision-making. Traders may be nudged towards this practice by ideals, similar to those informing corporate social responsibility, of community leadership and good citizenship, and also by an understanding that the strategies may avoid liability under the existing law.

A responsive approach to consumers who are in some way disadvantaged or marginalised, such as consumers with cognitive disabilities, should not be

September 2017 <<http://www.theage.com.au/money/planning/help-for-people-with-mental-illness-to-smooth-spending-patterns-20170904-gya3zg.html>>.

¹⁴² Maker et al, ‘Supporting People with Decision-Making Impairments’, above n 13, 761.

¹⁴³ Carney and Beaupert, above n 125.

regarded as an undue imposition on corporations but as a natural and necessary requirement of providing services to the whole community. Participants in the MSEI study suggested that cultural shifts more broadly across companies would be beneficial:

It's equipping our staff around their values, and so they respect people regardless of their situation, and I actually think that's a huge part of this. Whether it's a disability, whether it's cultural needs and what have you; they would walk into a branch as a consumer, have that staff respond to that, and I think that is a really big part where we can have a significant impact in the community.

(Bank representative)¹⁴⁴

Understanding the specific information and support requirements of consumers with cognitive disabilities is not only potentially beneficial to the individuals concerned, but can also be advantageous to the company's reputation as a leader in accessibility and inclusion.

There is also a pragmatic reason for nudging traders closer to strategies of support for consumers with cognitive disabilities. This is the reduction in disputes and a reduced risk of liability under existing legal consumer protection frameworks. As we have seen under the safety net consumer protection rules, the identification of a vulnerability typically leads to a need for support. Supported decision-making models can fill precisely this function, particularly when combined with educational and training initiatives for identifying decision-making support requirements, tailored information materials, and perhaps even a pathway to categories of suitable products.

VI CONCLUSION

It has long been recognised that a fair and inclusive legal system needs to provide protection to consumers in their market dealings. This imperative has become even more important as the services essential for full participation in civil society are increasingly offered to citizens through a private contracting model. Current consumer protection law provides an important safety net against behaviour that vitiates the contractual consent of consumers and undermines the welfare enhancing opportunities provided by free and informed consumer choice. However, commonly, the model for identifying those consumers in need of protection by this body of law is premised on a distinction between those consumers who are 'vulnerable' and those who are not. Scholars and advocates interested in disability and disadvantage have argued that dichotomies of this nature are outdated and provide little benefit to any consumers. A richer perspective on when and why consumers may require support in decision-making is needed.

The current body of consumer protection law also does not necessarily prompt a proactive response for supporting consumers with cognitive disabilities in building the capacity to make meaningful market-place decisions. Human rights law emphasises the importance of participation of persons with disabilities

¹⁴⁴ Hale et al, above n 18, 55.

in all areas of social, economic and cultural life. Thus, the default outcome of the various legal devices for consumer protection for people with cognitive disabilities should not be the denial of the opportunity to participate in the decision-making necessary for consumer transactions. Rather the aspiration should be greater awareness of the barriers to transacting for consumers with cognitive disabilities which can then lead to greater understanding of the opportunities that can be provided to such consumers through appropriate support. We have explored a number of more upfront responses to supporting consumers with cognitive disabilities, including obligations to inquire into the suitability of a product for consumers, a better understanding of discrimination among traders' staff, the availability of simple or vanilla products and clearer communications strategies.

We have further argued that there is a strong case for exploring the application of supported decision-making principles championed by disability rights activists and mandated by the *CRPD*. The aim would be to build expertise and tools for wider industry participation in supporting people with disabilities to be fully included as economic actors, as well as building informal supporters' and specialist agencies' capacities to provide this support. The exploration of new practices and support networks in this context may also have wider impacts. As noted earlier, people with disabilities are often faced with other circumstances that create a position of disadvantage in contracting, particularly low socio-economic status. Support for people with cognitive disabilities may also lead to insights for the types of supports that will assist other disadvantaged and excluded groups to participate meaningfully in the marketplace and indeed has insights for the better protection of all consumers, regardless of their presumed 'vulnerability'.