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James Cook University

Aboriginal and Torres Strait Islander People and Consumer Law

Heron Loban

LLB, BA, Grad Dip Legal Prac, LLM (coursework)

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Abstract

The literature identifies a number of underlying issues that impact on the consumer protection of Aboriginal and Torres Strait Islander people. These issues arise from locational (remoteness), historical (protection and assimilation policies enacted through the colonial process) and cultural factors (rooted in tradition, customs and relationships to people and place). These factors act as a unique combination of circumstances which require a specific approach to consumer protection – one that addresses these issues and redresses ‘advantage’ and ‘disadvantage’ and ‘power’ and ‘vulnerability’. A significant gap in the literature is an understanding of the role of culture in consumer transactions involving Aboriginal and Torres Strait Islander people; how to address locational issues; and the enduring historical impact of colonisation on the consumer behaviour of Aboriginal and Torres Strait Islander people. This thesis aims to contribute to this knowledge gap.

The case law points to a particular need to look at options such as increased regulation in respect of matters such as unconscionable conduct, and misleading and deceptive conduct. It also indicates a greater need for access to legal education and community awareness about the consumer protections available to them and how best to exercise these legal rights especially for Aboriginal and Torres Strait Islander people living in remote Australia – to address locational ‘disadvantage’. These issues will be explored in depth throughout this thesis including through an analysis of the data collected from semi-structured interviews.

Literacy, numeracy, commercial acumen and financial literacy also appear to impact on Aboriginal and Torres Strait Islander consumers in the same way they did 25 years ago, as evidenced by the analysis in Chapter 2 of the case law over this period. Inequality experienced as a result of socio-economic factors will continue to place Aboriginal and Torres Strait Islander consumers at a ‘disadvantage’ for as long as this inequality (gap) remains.

Positively, there is one area in which change is occurring; this is in respect of young Aboriginal and Torres Strait Islander people. Aboriginal and Torres Strait Islander consumer 'vulnerability' within the new generation has in some ways decreased as a consequence of generational differences and generational change within the Aboriginal and Torres Strait Islander population.

The influence of culture and Aboriginal and Torres Strait Islander values (such as relationality) is strong and continues to contribute to Aboriginal and Torres Strait Islander consumers' 'vulnerability'.

There are challenges present in the consumer protection law that negatively impact on an Aboriginal and Torres Strait Islander person's ability to make informed decisions relate to interpretation and enforcement processes. Rather, the weight of the data together with an analysis of the case law leads to the conclusion that the law is sufficient but that problems lie in the broader themes of discrimination, socio-economic disadvantage and access to justice.

Addressing Aboriginal and Torres Strait Islander consumer 'vulnerability' and 'disadvantage' cannot be attended to by the consumer protection laws alone, nor simply by consumer watchdogs, courts, financial counsellors and lawyers working independently from one another. A combination of all of these is required, pieced together within a broader strategy for improving all aspects of the lives of Aboriginal and Torres Strait Islander people.

Abbreviations

Aboriginal Peak Organisations Northern Territory (APO NT)

Australian Communications and Media Authority (ACMA)

Australian Consumer Law (ACL)

Australian Securities and Investments Commission (ASIC)

Australian Competition and Consumer Commission (ACCC)

Australian Securities and Investments Act 2001 (Cth) (ASIC Act)

Australian Financial Counselling and Credit Reform Association (AFFCRA)

Competition and Consumer Act 2010 (Cth) (CCA)

Corporations Act 2001(Cth) (*Corporations Act*)

Consumer Affairs Australia and New Zealand (CAANZ)

Financial Counselling Australia (FCA)

Indigenous Consumer Assistance Network Ltd (ICAN)

National Consumer Credit Protection Act 2009 (Cth) (NCCP Act)

Northern Territory National Emergency Response Act 2007 (Cth) (NTNER Act)

Trade Practices Commission (TPC)

Trade Practices Act 1975 (Cth) (TPA)

United Nations Declaration on the Rights of Indigenous People (UNDRIP)

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Chapter 1 Background and Need for Research

My interest in the area of consumer law and Aboriginal and Torres Strait Islander people began several years ago while living and working as a solicitor in native title on Thursday Island in the Torres Strait. It was apparent to me that in remote places like Thursday Island, a local community-based solicitor could help you with two problems – a criminal problem and a native title problem. For any other legal problem, you had to seek out the assistance of a solicitor from elsewhere, namely on the mainland, usually from Cairns or Townsville.

It was only when I moved to Brisbane that I fully appreciated the limited access that Aboriginal and Torres Strait Islander people had to solicitors for civil law matters, such as family law, debts, superannuation, consumer contracts and non-native title land matters. When I returned to Thursday Island to work again as a solicitor, this time at the Aboriginal and Torres Strait Islander legal service, I found that little had changed in the five years since I had left. I felt that people were at the mercy of businesses on the island, which dictated the cost of goods and services because there was little or no competition. I felt there was lack of awareness among Aboriginal and Torres Strait Islander people about consumer issues, and that many living throughout the Torres Strait experienced what seemed be measures of ‘vulnerability’ and ‘disadvantage’.

In addition to the cost of goods and services in the Torres Strait, I felt people were still at the mercy of businesses on the mainland, for different reasons. Purchasing goods long distance from places such as Cairns or Townsville did not generally pose the same cost issues prevalent in the Torres Strait, but made it difficult for the person to enforce their consumer rights after they had paid for the goods or services. Evidently, exercising one’s consumer rights from hundreds of kilometres away was challenging. More challenging still was attempting to do it without legal assistance. It felt like a no-win situation in respect of both cost issues and the enforcement of legal rights under the law.

While both Aboriginal and Torres Strait Islander and non-Indigenous people were 'theoretically' equally bound by the same constraints of competition and distance, the reality of life on Thursday Island did not reflect this. Most non-Indigenous people on Thursday Island were there for work, had well-paying jobs and often enjoyed subsidised accommodation. My experience was that it was more likely that non-Indigenous people bought their groceries and other goods and services from the mainland (using the internet and a shipping company) than Aboriginal and Torres Strait Islander people. The literature, which will be discussed later in this chapter, confirmed my feelings and experiences, revealing the differences between Aboriginal and Torres Strait Islander and non-Indigenous consumers on Thursday Island. It was these personal feelings and experiences, as well as my professional work as a solicitor at the Aboriginal and Torres Strait Islander legal service, that engendered my interest in consumer law and its effectiveness in protecting Aboriginal and Torres Strait Islander people's consumer rights.

This thesis aims to aid in the interpretation of the consumer law in Australia, to promote greater clarity, certainty and transparency of the law, and accountability in the law. It will do this in part by developing suggestions for law and government policy reform with respect to Aboriginal and Torres Strait Islander consumers. These suggestions for reform will align with discussions in this thesis which aim to provide a better understanding of how to protect and empower Aboriginal and Torres Strait Islander people in the consumer space. More specifically, my overall research question is to identify the determinants of Aboriginal and Torres Strait Islander consumer 'vulnerability' and 'disadvantage', and, where relevant, their changing nature. I discuss my research question, research aims and methodology more fully later in this chapter. At its heart, this thesis is an analysis of law in its context that investigates the effectiveness of the consumer law's operation and application, and the way Aboriginal and Torres Strait Islander people as consumers experience it – as protective or otherwise.

The primary research question in this thesis is:

- What are the factors that inform, influence and impact upon the decision of an Aboriginal and Torres Strait Islander person to enter into a consumer contract?

The thesis has two secondary research questions:

- Are there any law reforms that can be made to the Commonwealth statutes which govern consumer protection that would better protect Aboriginal and Torres Strait Islander consumers affected by the factors identified pursuant to the primary research question?
- Are there any policy reforms that can be operationalised by Commonwealth, State or Territory consumer protection regulators that would better protect Aboriginal and Torres Strait Islander consumers affected by the factors identified pursuant to the primary research question?

Consumer Protection Law in Australia

In 1975, the Commonwealth Government introduced the *Trade Practices Act 1975* (Cth) (TPA) and established the Trade Practices Commission (TPC). The Act was designed to 'enhance the welfare of Australia's consumers through the promotion of competition and fair trading and provision of consumer protection'.¹ Over time, it came to include protections such as prohibiting unconscionable conduct and misleading and deceptive conduct, which have become the key legislative provisions invoked by the Commonwealth statutory regulators and private litigants to provide remedies and protection for consumers,² including Aboriginal and Torres Strait Islander people.³ The cases in which Commonwealth regulators have taken action against traders on behalf of Aboriginal and Torres Strait Islander consumers will be discussed briefly here in Chapter 1, and in more detail in Chapter 2.

¹ Formerly the s 2 TPA.

² Referred to as 'plaintiffs' if taking legal action as a private litigant. Referred to as 'complainants' where legal action is being taken by the regulator on behalf of the consumer for a contravention of the law.

³ Some parts of the law also impose civil penalties that promote other regulatory objectives such as personal and general deterrence, and act as a punishment for particular behaviours or acts.

It was only in the last several years, and for the first time since the TPA was introduced in 1975, that a large-scale, nationwide review of consumer protection laws were conducted by the Commonwealth. The Commonwealth Productivity Commission undertook the review, and released the results of its research and its recommendations in 2008 in its *Review of Australia's Consumer Policy Framework – Final Report*. A paramount consideration of the report was the development of a national co-operative consumer protection law framework, which could provide more uniform consumer protections across Australia's States and Territories. One legal commentator observed that Australia at the time had a 'relatively fragmented landscape of consumer protection and product liability law', and 'an often consuming patchwork of Commonwealth, State and Territory legislation, and regulations'.⁴ Key features of the proposed new consumer protection law regime were based on the New Zealand model; however, there was a fundamental difference between the two nations, based on Australia's need for a cooperative system to accommodate the federation of States and Territories that could overcome the challenges of the disparate consumer protection laws that existed across Australia's jurisdictions.

In 2010, with an agreement between the States, Territories and the Commonwealth, a co-operative consumer protection law framework was introduced. The Commonwealth government, together with the support of the States and Territories, introduced a new statutory system of uniform consumer protection law to operate across Australia through the *Competition and Consumer Act 2010* (Cth) (CCA) and related Acts.⁵ The system is based on legal and administrative cooperation between the Commonwealth, States and Territories. At its advent, the system marked a considerable change in the way consumer protection law was to be administered at the State level. For example, Queensland adopted Schedule 2 of the CCA – the Australian Consumer Law (ACL) – as State law. Through this process of adoption, the ACL thereby operated as a State law (as opposed to a Commonwealth law) in

⁴ Bruce (2011), p 1.

⁵ Additional consumer protections were introduced into the law, including unsolicited agreements, guarantees, a fairness test and a financial capacity assessment with a view to providing greater protection to all consumers. Aspects of these consumer protections will be considered as part of the case law discussion in Chapter 2.

Queensland. In practice, some regulatory problems remain with the two layers of regulation, as the Commonwealth and State (for example, Queensland) concurrently work to administer and enforce the ACL.⁶

The new legislative scheme separated financial products⁷ and financial services⁸ from all other goods and services⁹ under consumer protection law.¹⁰ The administration of consumer protection with respect to financial products and services was moved from the Australian Competition and Consumer Commission (ACCC) and vested in the Australian Securities and Investments Commission (ASIC). Under the previous legislation (the TPA), the ACCC and its predecessor, the TPC, had sole carriage of consumer protection matters, including unconscionable conduct and misleading and deceptive conduct in respect of all goods and services. Now, both the ACCC (for non-financial goods and services) and ASIC (for financial products and services) have leading roles in the administration and enforcement of consumer protection law in Australia.

Since 2010, the ACCC had administered the ACL in Schedule 2 of the CCA, but it is also enforced by the Office of Fair Trading QLD, where a case involves purely State law matter. The ACL is adopted State law and ASIC administers the *Corporations Act 2001* (Cth) (Corporations Act), the *Superannuation Industry (Supervision) Act 1993* and the *Australian Securities and Investments Act 2001* (Cth) (ASIC Act). The *ASIC Act* and *Corporations Act* have misleading and deceptive conduct provisions

⁶ Though it will not be discussed in detail here as it is outside the purview of this thesis, much has been written of this duplication and the problems it causes for consumers, lawyers and courts as to the correct regulator to which to make a complaint. This confusion can add to delays, costs, complexity and uncertainty. See for example *ACCC v Fisher & Paykel Customer Services Pty Ltd* [2014] FCA 1393; *ACCC v CLA Trading Pty Ltd* [2016] ATPR 42-517; [2016] FCA 377 at [14] and [22]; *Ambergate Ltd v CMA Corporation Ltd (Administrators Appointed)* (2016) 110 ACSR 642; [2016] FCA 94 at [53] – [56]; Rares (2014), p 7.

⁷ Section 12BA (1) is the general definition provision in the ASIC Act. Section 12BAA of the ASIC Act defines ‘financial product’.

⁸ Section 12BA (1) is the general definition provision in the ASIC Act. Section 12BAB of the ASIC Act defines ‘financial service’.

⁹ Section 131A (1) of the CCA states that, with the limited exception of Part 5-5, the ACL does not ‘apply ... to the supply, or possible supply, of services that are financial services, or of financial products’.

¹⁰ Section 51AF (1) of the TPA had previously provided that Part V – Consumer protection, did not apply to ‘financial services’. Section 4 of the TPA defined ‘financial service’ and ‘financial product’ as having the same meaning as in Division 2 of Part 2 of the ASIC Act.

identical to those in s 18 of the ACL. Challenges associated with this situation will be discussed in more detail later in this chapter. Suffice to say, it can cause a duplication of regulatory effort and problems such as confusion about a regulator's jurisdiction. These problems are all evident in recent case law, including cases decided on matters involving the *National Consumer Credit Protection Act 2009* (Cth) (NCCP Act).

States and Territories also have an important function in administering the ACL at a State and Territory level through the relevant fair trading departments and agencies. As above, this too can lead to concerns about the duplication of regulatory effort and confusion for consumers and courts about jurisdiction, which add to costs and cause delays in law enforcement.¹¹ The ten ACL regulators are New South Wales Fair Trading, Consumer Affairs Victoria, Office of Fair Trading QLD, Consumer and Business Services (South Australia), Western Australia Consumer Protection (Department of Commerce), Consumer, Building and Occupational Services (Tasmania), Northern Territory Consumer Affairs, and Access Canberra. These State and Territory departments and agencies have this function in addition to the administration of their own State and Territory consumer legislation, such as the *Sale of Goods Act 1896* (Qld) in Queensland.

Interestingly, the co-operative national scheme has adopted a 'no wrong door'¹² policy for both consumers and traders. It is essential to note that the common law and equity continue to apply to consumer contracts, including those with Aboriginal and Torres Strait Islander parties. While relief is available at common law and in equity, it is a widely-held view¹³ that the protections offered by statute law are much broader, and thus offer broader protections to consumers. For this reason, and to allow a detailed analysis within its confines, this thesis will focus on the Commonwealth statute law, that is – the ACL as the national consumer framework established pursuant to Schedule 1 of the CCA, the ASIC Act, the Corporations Act

¹¹ Often, ASIC, under s 102 ASIC Act, or the ACCC, under s 25 CCA, have to delegate enforcement authority to each other.

¹² Productivity Commission (2107), p 9.

¹³ See for example Fielder (2015); McLeod (2015); Goldberger (2016).

and the NCCP Act. To ensure that the regulatory laws provide complete and holistic protection to Aboriginal and Torres Strait Islander consumers, this thesis will consider the suite of Commonwealth consumer laws, namely:

- ACL, which regulates 'non-financial products' and 'non-financial services', including goods and services acquired for domestic, household and private use and, in some cases, business use. These laws are enforced by the ACCC or State and Territory regulators (such as Office of Fair Trading QLD) and private litigants.
- ASIC Act and the Corporations Act, which regulate 'financial products' and 'financial services' such as banking, insurance, superannuation, financial planning and financial advice. These laws are enforced by ASIC and private litigants.
- NCCP Act, which regulates consumer credit contracts and is enforced by ASIC and private litigants.

Finally, a recent review of the ACL reported in the *Australian Consumer Law Review – Final Report*,¹⁴ published in March 2017, nearly ten years after the Productivity Commission's 2008 review, found that Aboriginal and Torres Strait Islander people remain 'vulnerable consumers'. The 'intent of the review was to assess the effectiveness of the ACL provisions, including the ACL's flexibility to respond to new and emerging issues'.¹⁵ The review was designed to consider the operation of the ACL to date, and any shortcomings or foregoing issues. Specifically, the report stated that:

overall [Consumer Affairs Australia and New Zealand] CAANZ is convinced that consumer detriment and pressure selling occur in at least some sectors and particularly affect vulnerable consumers [and that] this is consistent with the experience of regulators both before and after the introduction of the ACL, including recent experiences with vocational

¹⁴ Consumer Affairs Australia and New Zealand (2017).

¹⁵ Consumer Affairs Australia and New Zealand (2017), p1.

education and training providers targeting indigenous communities and other prospective students.¹⁶

CAANZ's report highlights the continued issue of 'vulnerability' for Aboriginal and Torres Strait Islander people and communities, and supports the ongoing need for research to engage with this issue.

The Watchdogs

As noted above, part of the review of the consumer protection law and the subsequent changes was a separation of watchdog¹⁷ responsibilities between the ACCC and ASIC. As also noted, prior to the legislative changes, the ACCC (and formerly the TPC) had carriage of consumer protection issues relating to financial products and services. Following the legislative changes, ASIC now has responsibility for consumer protection issues in respect of financial products and services, and the ACCC has responsibility for all other goods and services. Relevantly, the earliest legal action taken by the regulator involving Aboriginal and Torres Strait Islander consumers was predominantly in respect of financial services such as funeral insurance and life insurance. Thus, as will be seen, both the ACCC and ASIC have had equally important roles in enforcing consumer protection laws on behalf of Aboriginal and Torres Strait Islander consumers and communities.¹⁸ Despite the addition of these relatively new responsibilities to ASIC, both the ACCC and ASIC have taken a proactive approach to the protection of Aboriginal and Torres Strait Islander people as consumers.

The ACCC has seen the need for a proactive approach to the protection of Aboriginal and Torres Strait Islander consumers. This was recently outlined by

¹⁸ I refer to 'communities' here as the regulators commonly seek and are granted court orders which extend beyond individual Aboriginal and Torres Strait Islander complainants. For example, injunctions are granted which prohibit respondent traders from entering Aboriginal and Torres Strait Islander communities. This will be discussed in greater detail in Chapter 2.

Chairperson Rod Sims of the ACCC in 2016.¹⁹ He specifically identified Aboriginal and Torres Strait Islander people as a consumer group of priority for the ACCC in meeting their regulatory functions under the ACL. The ACCC has viewed the protection of Aboriginal and Torres Strait Islander consumers as a standing priority for some years. In its 2012-2013 annual report, the ACCC reported that Aboriginal and Torres Strait Islander people remained a priority as a vulnerable consumer group.²⁰ Outlined within that report was the ACCC's strategy to protect Aboriginal and Torres Strait Islander consumers, explained as a two-pronged approach, whereby one part was focused on using provisions in the ACL to take legal action against businesses for breaching the ACL in their dealings with Aboriginal and Torres Strait Islander consumers, and the other part was aimed at educating Aboriginal and Torres Strait Islander consumers about their legal rights.²¹

Two practical strategies adopted by the ACCC to realise this approach have included (1) using their powers under the ACL to take legal action against traders for potential breaches of the ACL, and (2) using technology to engage with Aboriginal and Torres Strait Islander consumers about the content of the law. For example, on 3 March 2013 the ACCC outlined its key priorities for 2013, including telecommunications and consumer protection issues that impacted on Aboriginal and Torres Strait Islander communities.²² Following on from this announcement was the creation of the Tiwi Islands' 'ACCC – Your Rights Mob Tiwi Islands' Facebook page, which launched in 2013 and included the production of five short films.²³ Each of the films was presented by a Tiwi Islander in both English and their traditional Aboriginal language. Tiwi Island humour is used as a way to deliver important legal messages. One of the films mirrors the facts of an actual 2012 case. In the film, one woman buys a mobile phone and plan from a telemarketer. She is asked for the details of another person such as a family member or a friend who might also be interested in a new mobile phone and plan. She provides these details to the telemarketer. Her friend is then

¹⁹ Sims (2016).

²⁰ ACCC and AER (2013).

²¹ ACCC and AER (2013).

²² Sims (2013).

²³ <https://www.accc.gov.au/media-release/accc-launches-your-rights-mob-facebook-page-for-indigenous-consumers>

contacted by the same telemarketer trying to sell the same mobile phone and plan. The film thereby acts as a means of educating Aboriginal and Torres Strait Islander people about the ways they may be manipulated by telemarketing companies. In Tiwi Island style humour, one of the woman acts like Tina Turner.

Following reports by the ACCC about the success of their Tiwi Islands Facebook page, in 2014 the ACCC launched a further Facebook campaign titled 'Your Rights Mob'. This Facebook page was aimed at the broader national audience of Aboriginal and Torres Strait Islander consumers.

The success of the Facebook pages has been reported as two-fold.²⁴ First they have had an important educational function in raising awareness amongst Aboriginal and Torres Strait Islander people and communities about their legal rights as consumers. Second, they have acted as a new sources of information about trader conduct that could potentially be in breach of the ACL. The latter is particularly important, because detecting unlawful conduct by traders in remote Aboriginal and Torres Strait Islander communities²⁵ has been notoriously hard in the past due to the isolation of these communities from support services.

ASIC has also taken a proactive approach to Aboriginal and Torres Strait Islander consumer protection, which has grown over time. It established a dedicated Indigenous Outreach Program (IOP) as an acknowledgement of the unique 'vulnerabilities', 'disadvantage' and socio-economic position of Aboriginal and Torres Strait Islander consumers.²⁶ The IOP is a section within ASIC dedicated to the protection of Aboriginal and Torres Strait Islander consumers through the use of court action and consumer rights education. In a dedicated newsletter published in 2016, the ASIC IOP explained its role as assisting Aboriginal and Torres Strait Islander people 'to be confident and informed consumers when making decisions about financial services like banking, credit, insurance and superannuation.'²⁷ The

²⁴ ACCC (2014a).

²⁵ ACCC (2014a).

²⁶ Haslam (2016).

²⁷ ASIC (2016).

IOP newsletter and the ASIC website endeavour to provide useful information targeted at Aboriginal and Torres Strait Islander consumers and the service providers that assist them on matters such as the law and the practical steps a consumer can take to address a consumer issue. It also provides information about the most common complaints made by Aboriginal and Torres Strait Islander consumers, such as those about consumer leases for whitegoods. The website also has 'yarns' with people such as ASIC employees and community-based financial counsellors, who explain their roles in helping Aboriginal and Torres Strait Islander consumers.²⁸ As will be shown in this thesis, despite the positive developments in the work done by ASIC and the ACCC, Aboriginal and Torres Strait Islander consumers remain disadvantaged in exercising their rights, and more still needs to be done to improve their protection under the consumer law.

A Growing Body of Cases

Consumer law touches on every aspect of everyday life, from essentials such as food, electricity and communications through to transport, insurance, superannuation and banking. A person's consumer decisions can affect their quality of life. In Australia, there is a small but growing body of case law developing around the legal protection of Aboriginal and Torres Strait Islander consumers. These cases cover a broad range of goods and services, from education materials to mobile phones to book up.²⁹ Both the ACCC and ASIC have instigated these court matters.³⁰

Two cases instigated by the ACCC, which bookend the decade from 2005-2015, dealt with the sale of educational materials and medical supplies, respectively. In *ACCC v Keshow*,³¹ Keshow sold educational materials to Aboriginal women living in discrete Aboriginal communities in the Northern Territory. The case was decided by a single judge in the Federal Court, and found that Keshow had engaged in

²⁸ ASIC (2016).

²⁹ For decades, store credit, or 'book-up' (sometimes known as 'book-down'), was the way that Aboriginal and Torres Strait Islander people on reserves were taught to be consumers. Book-up has continued as a practice into the current day, and is still a type of informal credit extended by a business to a consumer without interest or fee. Book-up will be discussed in detail in Chapter 4.

³⁰ See for example *ASIC v Channic Pty Ltd (No 4)* [2016] FCA 1174; *ASIC v Kobelt* [2016] FCA 1327.

³¹ (2005) ATPR (Digest) 46-265.

unconscionable conduct in his dealings with the women, as well as misleading and deceptive conduct. His questionable business practices included failing to provide a written contract, failing to provide copies of signed documents and failing to keep records of payments or provide receipts. A second case, *ACCC v Titan*,³² involved, inter alia, the sale of first aid kits to older Aboriginal and Torres Strait Islander people from communities throughout Queensland and the Northern Territory.³³ These are just two examples of the nature of matters involving Aboriginal and Torres Strait Islander people and the consumer law. Further cases will be discussed in detail in Chapter 2.

Mobile phones and communication technology have been the subject of legal action taken by the ACCC on at least four occasions over the past several years. During this period, the Federal Court has heard a number of cases involving breaches of Australia's consumer protection laws with respect to Aboriginal and Torres Strait Islander people. Communications technologies have had a positive impact on Aboriginal and Torres Strait Islander communities, opening up possibilities for education,³⁴ health³⁵ and banking;³⁶ however, at the same time they have facilitated access into remote Aboriginal and Torres Strait Islander communities by unscrupulous businesses using high pressure sales tactics such as telemarketing. The recent cases of *ACCC v EDirect Pty Ltd*³⁷ ('EDirect (No. 1)'), *ACCC v EDirect Pty Ltd*³⁸ ('EDirect (No. 2)') and *ACCC v Excite Mobile Pty Ltd*³⁹ ('Excite Mobile') raise two particular issues regarding misleading and deceptive conduct with respect to Aboriginal and Torres Strait Islander consumers. Each case involved the purchase of mobile phones and plans, and there were two main issues associated with this purchase. The first issue related to problems with coverage, and the second related to consumer knowledge and use of complaints mechanisms. Essentially, mobile

³² [2014] FCA 913.

³³ ACCC (2014b).

³⁴ See examples in Regional Telecommunications Review Independent Review Committee (2012), pp 94-99.

³⁵ See examples in Regional Telecommunications Review Independent Review Committee (2012), pp 99-103.

³⁶ See the work of the Indigenous Financial Services Network of Reconciliation Australia at <http://www.reconciliation.org.au/home/projects/ifsn>.

³⁷ [2008] FCA 65.

³⁸ [2012] FCA 976.

³⁹ [2013] FCA 350.

phones and plans were sold to Aboriginal and Torres Strait Islander people living in remote Australia where there was no coverage and where both the phone and plan were therefore useless, and the consumers felt they had no recourse of action as they were not familiar with complaints mechanisms.

Insurance sold to Aboriginal and Torres Strait Islander people has proven to be an ongoing area of concern. The *Insurance Cases*⁴⁰ involved settlement with the then TPC⁴¹ against three insurers, namely Mercantile Mutual Life Insurance Company Limited, Norwich Union Life Insurance Limited and Colonial Mutual Life Assurance Society Limited. They represented a considerable investment in time and money by the TPC for breaches of the TPA. Instituted in 1992 and 1993, the action included allegations of unconscionable conduct and misleading and deceptive conduct by agents of the three insurers in the sale of insurance policies to Aboriginal and Torres Strait Islander people in remote Aboriginal and Torres Strait Islander communities in Queensland. In the early 1990s, this led to unprecedented legal action against the three insurance companies. A total of 2500 policies had been sold across 22 Aboriginal and Torres Strait Islander communities, leading to refunds exceeding \$1.5 million being paid out in 1993. Ultimately, the litigation was resolved by deed in respect of all three parties, but not before significant investigations had taken place that uncovered a range of concerning and potentially unlawful behaviours. More recently, as a consequence of an administrative decision made by Centrelink, the Commonwealth Government through Centrelink was taken to court by an insurance company that exclusively services Aboriginal and Torres Strait Islander people, called the Aboriginal Community Benefit Fund (ACBF). As a result of an administrative decision, the ACBF was removed from the list of approved businesses that could receive direct deductions from an Aboriginal and Torres Strait Islander person's Centrelink entitlements, via a system called Centrepay. The ACBF successfully appealed Centrelink's decision in the Federal Court.⁴² Centrelink then appealed the decision of the trial judge and was successful in the Full Federal Court;

⁴⁰ Referred to in this way for the purposes of this paper. For an overview of this legal action, see Altman and Ward (eds) (2002).

⁴¹ These insurance complaints would now be dealt with by ASIC if they fell within the definition of 'financial services' under the ASIC Act.

⁴² *ACBF Pty Ltd v Chief Executive Centrelink* [2016] FCA 769.

thereby, the administrative decision by Centrelink to remove the ACBF from Centrepay stood.⁴³ At issue across both sets of legal action was the suitability and affordability of the funeral plans for Aboriginal and Torres Strait Islander consumers as policy holders.

Overall, the cases reveal that Aboriginal and Torres Strait Islander people, as parties to consumer contracts are impacted by consumer-based, trader-based and external factors. Consumer-based factors identified in the cases included lower levels of general literacy and numeracy, a lack of financial literacy, language differences (in instances where the person speaks an Aboriginal or Torres Strait Islander language) and cultural values. Trader-based factors ranged from poor-record keeping to failing to deliver contracted goods. External factors were found to cover matters such as limited access to goods and services, and a lack of financial advice and legal advice services for people living in remote locations. According to the case law, external factors are more acute if a person lives in a remote location. These factors, as they appear in the case law, will be explored in depth in Chapter 2.

National Aboriginal and Torres Strait Islander Consumer Policy Context

A number of government agencies and departments have responsibility for consumer protection legislation. Policy that sits alongside the legislation has been developed by:

- the ACCC;
- ASIC;
- New South Wales Fair Trading;
- Office of Regulatory Services – Australian Capital Territory;
- Northern Territory Consumer Affairs;
- Office of Fair Trading QLD;
- Consumer and Business Services – South Australia;
- Consumer Affairs and Fair Trading – Tasmania;
- Consumer Affairs Victoria; and

⁴³ *Chief Executive Centrelink v ACBF Pty Ltd* [2016] FCAFC 153.

- Department of Commerce – Western Australia.

In the policy environment, Aboriginal and Torres Strait Islander people have as a group been identified as vulnerable consumers. Various reasons have been given for their vulnerability, most clearly articulated in policy documents authored by the Ministerial Council on Consumer Affairs, entitled *Taking action, gaining trust: A National Indigenous Consumer Strategy Action Plan 2017-2019*.⁴⁴ There are benefits of taking a collaborative approach to a national strategy. For instance, regulators across Commonwealth, State and Territory jurisdictions are able to understand Aboriginal and Torres Strait Islander consumer issues in context and in greater depth. Policy assists to ensure like cases are treated alike, which promotes uniform decision-making by regulators over time, and across jurisdictions.⁴⁵ It thereby promotes greater fairness and consistency across Australia for all Aboriginal and Torres Strait Islander consumers, regardless of the jurisdiction in which they reside.

In the past, the role of consumer protection law in safeguarding Aboriginal and Torres Strait Islander people has been examined in different periods and contexts.⁴⁶ Aboriginal and Torres Strait Islander people consistently appear in litigation around unconscionable conduct and misleading and deceptive conduct. Unlawful conduct against Aboriginal and Torres Strait Islander consumers was outlined in *Taking Action, Gaining Trust: A National Indigenous Consumer Strategy Action Plan 2005-2009 – Final Report*, prepared by the Ministerial Council on Consumer Affairs.⁴⁷ Reference was made to action taken by Northern Territory Consumer Affairs against a business to stop it making sales in town camps around Alice Springs and a number of other Aboriginal and Torres Strait Islander communities throughout the Northern Territory. This case involved the termination of 250 contracts to the value of \$720,000 as a result of the action taken by the Northern Territory regulator.⁴⁸

⁴⁴ Legislative and Governance Forum on Consumer Affairs (2017).

⁴⁵ For a detailed exposition of the intersection between policy and administrative decision-making in the Queensland context see O'Callaghan and Howard (2013).

⁴⁶ See Srivastava (1998).

⁴⁷ Ministerial Council on Consumer Affairs (2009).

⁴⁸ Ministerial Council on Consumer Affairs (2009), p 28.

The most recent national triennial strategy is *Taking action, gaining trust: A National Indigenous Consumer Strategy Action Plan 2017-2019*.⁴⁹ Its member agencies are listed on the previous page. In shaping the Action Plan, a preliminary set of guiding principles for each of the forum's member agencies states that:

- the rules regulating traders and service providers need to be fair and responsive to the needs of Indigenous people;
- cultural and operational changes are required within consumer agencies to respond to enquiries from Indigenous consumers in the most effective way;
- employment of Indigenous staff in key positions in consumer agencies needs to occur;
- it is important for consumer agencies to continue to advocate on behalf of Indigenous consumers and empower the community; and
- although jurisdictions have differing priorities, the Action Plan will be a template for action to improve Indigenous consumer awareness.⁵⁰

The agreed priorities for the triennial period 2013-2016 were to be 'trading practices', 'housing', 'consumer awareness' and 'contracts'.⁵¹ Trade practices include unsolicited sales, marketing, debt collection and book up.⁵² Consumer awareness includes financial literacy, consumer rights and knowledge of consumer protection services and complaint processes.⁵³ Contract issues cover 'lack of understanding of rights and responsibilities, terms and conditions and [the] implications of entering into contracts'.⁵⁴ In 2015, Western Australia's Department of Commerce released its own report into Aboriginal and Torres Strait Islander consumer protection, entitled *Indigenous Consumers Count 2015*.⁵⁵ Interestingly, it sought the views of Aboriginal and Torres Strait Islander consumers and other stakeholders, acknowledging that there might be some difference between them. Surveys were used to collect the

⁴⁹ Legislative and Governance Forum on Consumer Affairs (2017).

⁵⁰ Legislative and Governance Forum on Consumer Affairs (2014), p 3.

⁵¹ Legislative and Governance Forum on Consumer Affairs (2014), p 3.

⁵² Legislative and Governance Forum on Consumer Affairs (2014), p 4.

⁵³ Legislative and Governance Forum on Consumer Affairs (2014), p 7.

⁵⁴ Legislative and Governance Forum on Consumer Affairs (2014), p 9.

⁵⁵ Department of Commerce, Government of Western Australia (2015).

data. Money, credit and finance were three common priorities for both the Aboriginal and Torres Strait Islander consumers and the other stakeholders.⁵⁶ Recommendations made by Department of Commerce as a result of the surveys were to:

- Ensure relevant information is delivered to consumers by the most culturally appropriate method;
- Increase data collection and collation of market intelligence – where possible use post codes for identifying locations;
- Deliver targeted education programs and outreach initiatives to regions that show an increase in any type of consumer issues;
- Continue to promote financial literacy programs and services alongside general consumer education;
- Continue to focus community education on the issues around door-to-door selling;
- Continue to expand the network of consumer stakeholders in Western Australia and encourage them to assist Indigenous community members with consumer-related issues;
- Expand the development of educational material that can be accessed on smart phones, including new apps, social media and education and information videos in a format appropriate for Indigenous consumers; and
- Acknowledge that while the use of digital technologies is increasing rapidly, some elements of consumer education will need to continue to be delivered face-to-face, in hard copy and via local and trusted networks within Indigenous communities.⁵⁷

The Action Plan noted the importance of maintaining flexibility in the delivery of consumer protection programs and services to Aboriginal and Torres Strait Islander consumers, and the need to ‘monitor and adapt’ these on an ongoing basis.⁵⁸

⁵⁶ Department of Commerce, Government of Western Australia (2015).

⁵⁷ Department of Commerce, Government of Western Australia (2015), p 32.

⁵⁸ Legislative and Governance Forum on Consumer Affairs (2014), p 3.

Current Research on Aboriginal and Torres Strait Islander Consumer-Related Issues

Research conducted regarding Aboriginal and Torres Strait Islander people in New South Wales has identified consumer law issues either alone or in the context of debt as a high priority for those people.⁵⁹ This finding has been reiterated in recent research on the civil and family law needs of Aboriginal and Torres Strait Islander people living in the Northern Territory.⁶⁰ The Australian Communications and Media Authority (ACMA) found in commissioned consumer research that in one Aboriginal community almost all residents who owned mobile phones had prepaid services rather than post-paid⁶¹ because they ‘did not want to get bills’ and were ‘wary of getting into debt’.⁶²

Less direct impacts can also flow on from consumer choice. Pressures from legal processes such as debt collection as a result of consumer contracts that cannot be met have additional implications for Aboriginal and Torres Strait Islander consumers and their communities. A recent evaluation of the Money Management Program of the Indigenous Consumer Assistance Network Ltd (ICAN) reported that many clients were ‘pretty stressed’ by the actions of debt collection agencies as a result of unaffordable consumer contracts.⁶³ It was further noted that the Money Management Program, a financial literacy program, was able to relieve some of the stress associated with those debt recovery processes.⁶⁴ Staff also recounted ‘high levels of stress induced by invasive and aggressive practices of debt collectors in the communities’ seeking payment for consumer contracts.⁶⁵

⁵⁹ Cunneen and Schwartz (2009), pp 737-739.

⁶⁰ Allison et al (2012).

⁶¹ Australian Communications and Media Authority (2008), p 34.

⁶² Tangentyere Council Research Hub and Central Land Council as quoted in Australian Communications and Media Authority (2008), p 34.

⁶³ Robertson and Clough (2011), p 30.

⁶⁴ Robertson and Clough (2011), p 30.

⁶⁵ Robertson and Clough (2011), p 30.

In a report for the Australian Financial Counselling and Credit Reform Association (AFFCRA) (now Financial Counselling Australia (FCA)) researchers found a link between financial stress and health.⁶⁶ In addition to findings about the risk factors for financial stress, the research identified particular harms that can arise out of circumstances of financial stress, including 'drug and alcohol use ... inadequate nourishment, effects on mental and physical health, and relationship issues including domestic violence'.⁶⁷ These findings accord with previous findings which noted that, in extreme circumstances, financial stress can contribute to substance abuse, relationship problems and family violence.⁶⁸ Research by Livingstone et al also found social and cultural factors are risk factors for financial stress.⁶⁹ Further to this, their research states that:

Such factors appear to predispose some consumers to financial exploitation, and to create conditions in which exploitative products can be offered. This is compounded by a lack of confidence or expertise on the part of many consumers in negotiating what is frequently perceived to be a complex and daunting formal financial services system – making disadvantaged consumers more likely to pursue apparently more accessible, but often very high cost, alternatives.⁷⁰

The research further found that issues such as financial literacy and an individual's level of knowledge of their legal rights and available complaints mechanisms can contribute to financial stress.⁷¹ The social and cultural factors referred to by Livingstone et al are core themes throughout this thesis.

A review of the literature (predominantly cases and secondary resources) identifies a number of underlying issues that impact on the consumer protection of Aboriginal and Torres Strait Islander people. These issues arise from locational factors

⁶⁶ Livingstone et al (2010).

⁶⁷ Livingstone et al (2010), p 55.

⁶⁸ Wesley Mission (2006).

⁶⁹ Livingstone et al (2010).

⁷⁰ Livingstone et al (2010), p 1.

⁷¹ Livingstone et al (2010).

(remoteness), historical factors (protection and assimilation policies enacted through the colonial process) and cultural factors (rooted in tradition, customs and relationships to people and place). Emerging from the literature is the need for a different approach to the protection of Aboriginal and Torres Strait Islander consumers. This need arises because, despite the efforts of the regulators in enforcing consumer protection law against businesses, the court sees repeat offending. Factors such as language,⁷² commercial literacy, remoteness, cultural and historical aspects and market forces all influence whether traders are able to repeat or continue with breaches of the consumer law in their dealings with Aboriginal and Torres Strait Islander consumers. These factors act as a unique combination of circumstances which require a specific approach to consumer protection – one that addresses these issues and redresses ‘advantage’ and ‘disadvantage’, and ‘power’ and ‘vulnerability’. A significant gap in the literature relates to understanding the role of culture in consumer transactions involving Aboriginal and Torres Strait Islander people, how to address locational issues and the enduring historical impact of colonisation on the consumer behaviour of Aboriginal and Torres Strait Islander people.

The case law points to a particular need to look at options, such as increased regulation, in respect of matters such as unconscionable conduct and misleading and deceptive conduct. It also indicates a need for greater access to legal education, increased community awareness about the consumer protections available to them, and how best to exercise these legal rights. This is especially important for Aboriginal and Torres Strait Islander people living in remote Australia, in order to address locational ‘disadvantage’. These issues will be explored in depth throughout this thesis, including through an analysis of data collected from semi-structured interviews.

The Wider Context of Aboriginal and Torres Strait Islander Consumption

⁷² Language difficulties could, under existing law, be recognised as creating a ‘special disadvantage’ whereby the courts can relieve persons from contracts on the ground of ‘unconscionability’. See the leading case of *Australian Commercial Bank v Amadio* (1983) 151 CLR 447.

There is an important, wider socio-economic context to the more detailed examination of Aboriginal and Torres Strait Islander consumer issues within which this study of consumer protection sits. Aboriginal and Torres Strait Islander people are Australia's most socially and economically marginalised group. Government reports and statistical data (discussed below) consistently stress that Aboriginal and Torres Strait Islander people are poorer, sicker and less-educated than any other population group in Australia. Understanding these disadvantages and their impact is central to this thesis.

It is helpful at this juncture to outline the socio-economic circumstances of Aboriginal and Torres Strait Islander people in Australia with reference to a range of recently published data. Statistical data published by the ABS from the 2011 census and the Productivity Commission's most recent biennial *Overcoming Indigenous Disadvantage Report* paints a bleak picture for Aboriginal and Torres Strait Islander people in 2017 across many socio-economic indicators. Briefly, the statistics around income, language, literacy, numeracy and access to telecommunications such as internet, landline and mobile phones will be outlined. All these measures of socio-economic status impact upon Indigenous consumers' experiences and behaviour, as will be discussed throughout this thesis.

The Productivity Commission's most recent reported figures regarding income show that the median weekly household income for Aboriginal and Torres Strait Islander households was \$542, compared to \$852 for non-Indigenous households.⁷³ Moreover, the median weekly household income for Aboriginal and Torres Strait Islander households was found to decrease with remoteness, from \$633 in major cities to \$398 in very remote areas. Additionally, across all remoteness areas, the median weekly household income was higher for non-Indigenous households than for Aboriginal and Torres Strait Islander households.⁷⁴

In terms of Aboriginal and Torres Strait Islander languages, 11.6 per cent of the Aboriginal and Torres Strait Islander population spoke an Aboriginal and Torres

⁷³ Table 4A.10.1.

⁷⁴ Table 4A.10.1.

Strait Islander language at home. Of relevance to this thesis, which focuses on sites in the Northern Territory and Queensland, the highest proportion was in the Northern Territory, with 64.7 per cent speaking an Indigenous language at home.⁷⁵ Additionally, the proportion of Aboriginal and Torres Strait Islander people who spoke an Aboriginal and Torres Strait Islander language at home differed across remoteness areas. Relevant to the discussion to follow in this thesis, very remote areas having the highest proportion of Aboriginal and Torres Strait Islander language speakers sitting at 61.5 per cent. Significantly, one in six Aboriginal and Torres Strait Islander language speakers said they did not speak English well, or at all.⁷⁶

Literacy and numeracy skills see Aboriginal and Torres Strait Islander people trailing behind from an early age. For example, the proportions of Aboriginal and Torres Strait Islander students in Year 3 who were achieving at or above the national standard were 78.7 per cent for reading, 81.2 per cent for writing and 78.2 per cent for numeracy. This is compared to non-Indigenous students, who achieved 95.6 per cent for reading, 96.4 per cent for writing and 95.5 per cent for numeracy. As remoteness increased results declined falling below 49 per cent in very remote areas for reading, writing and numeracy.⁷⁷ Critically, the gap in achievement in numeracy widened most as remoteness increased.⁷⁸

Communications access, whether via internet, landline or mobile phone, continues to place Aboriginal and Torres Strait Islander people at the fringes, both in terms of the availability of communications infrastructure and their digital literacy. According to the Australian Digital Inclusion Index, Aboriginal and Torres Strait Islander people have a low digital inclusion rate of 46.6, which sits 7.9 points below the national average;⁷⁹ however, that data does not include remote Aboriginal and Torres Strait Islander communities, and the index notes that further research needs to be done in order to 'gain a clearer understanding of digital inclusion in these communities'.⁸⁰ Of

⁷⁵ Figure A2.4.

⁷⁶ Figure A2.6.

⁷⁷ Tables 4A.4.1–3, 4A.4.4–6.

⁷⁸ Tables 4A.4.1–3, 4A.4.4–6.

⁷⁹ Thomas et al (2016), p 13.

⁸⁰ Thomas et al (2016), p 13.

concern is that for Aboriginal and Torres Strait Islander people living in Queensland, 'the digital inclusion gap has widened over time'.⁸¹

Relevant to this thesis is published data that included ABS statistical data and National Assessment Program-Literacy and Numeracy (NAPLAN) results,⁸² as referenced in the judgment of the Federal Court in the 2016 decision of *ASIC v Kobelt*.⁸³ Such extrinsic material is not ordinarily found in such judgments. Its inclusion in the court's decision demonstrates the value and importance of contextualising Australian consumer protection issues faced by Aboriginal and Torres Strait Islander people within the reality of the socio-economic setting of disadvantage.

The consumer choices of Aboriginal and Torres Strait Islander people are affected by law and policy in a number of ways. State, Territory and Federal governments have instituted regimes to regulate and control their consumer choices, which determine how and where Aboriginal and Torres Strait Islander people may spend their money. These regimes are most commonly referred to as income management schemes.⁸⁴ The Northern Territory has seen the implementation of the Northern Territory Emergency Response (The Intervention), which includes quarantining Aboriginal and Torres Strait Islander peoples' money as part of its program.⁸⁵ Queensland has seen the introduction of the Cape York Welfare Reform in the form of the Family Responsibilities Commission, which also has powers to manage the income of Aboriginal and Torres Strait Islander people in a number of Aboriginal and Torres Strait Islander communities.⁸⁶ The Northern Territory and Queensland are of direct relevance to this thesis because the interviews with participants were

⁸¹ Thomas et al (2016), p 26.

⁸² NAPLAN is conducted annually by the Australia Curriculum Assessment and Reporting Authority. It tests Years 3, 5, 7 and 9 students on reading, writing and numeracy as part of a national benchmarking process. See further details at their website <http://www.nap.edu.au/naplan>

⁸³ [2016] FCA 1327 at [384].

⁸⁴ An interesting question, which is beyond the scope of this thesis, is whether income management schemes fall within the definition of 'financial services', and thus whether the relevant Commonwealth government department and their decisions or actions could be subject to ASIC's scrutiny under the ASIC Act and the Corporations Act. Government is bound by these laws, unless it has legislated for an exemption.

⁸⁵ Billings (2007).

⁸⁶ Smyth (2011).

conducted in these two jurisdictions. It is noted that income management occurs beyond these two jurisdictions. For the purposes of this thesis, the direct effect of both regimes (in the Northern Territory and Queensland) on the contractual freedom of Aboriginal and Torres Strait Islander people as consumers will be considered.⁸⁷

‘Income management’ is the term used to describe the quarantining of particular welfare payments for particular uses. A more apt expression would be ‘spending management’. Income management is not so much about how much income you receive (everyone receives the same), but how you can spend that income. One commentator has quite bluntly described income management as ‘Australia’s “solution” to problems of consumer choice’.⁸⁸ A cornerstone element of income management is the Basics Card, issued by Centrelink, which is ‘a PIN protected card that allows you to access your income managed money through EFTPOS facilities at approved stores and businesses’.⁸⁹ Centrelink notes on its website that the income managed funds accessible through the Basics Card ‘cannot be spent on alcohol, tobacco and tobacco products, pornographic material, gambling products and services, and homebrew kits or concentrates’.⁹⁰ The Centrelink website further states that that the Basics Card cannot be used ‘for cash out from a store or ATM, book-up [or] gift cards or vouchers that allow access to one of the above excluded items’.⁹¹ Centrelink states that the Basics Card can be used for ‘food, clothes, health items and hygiene products at a variety of approved stores and businesses’.⁹²

Thus, a key issue which must be considered regarding Aboriginal and Torres Strait Islander people as consumers is if and when consumer choice operates in the current legal context of controlled spending. Social policy around Aboriginal and Torres Strait Islander people and money in recent years has been contentious. Broadly speaking, social policy relating to Aboriginal and Torres Strait Islander people and their use of money has been introduced and implemented with a specific

⁸⁷ Bielefeld (2013).

⁸⁸ Humpage (2016), p 563.

⁸⁹ <https://www.humanservices.gov.au/customer/enablers/about-basicscard>.

⁹⁰ <https://www.humanservices.gov.au/customer/enablers/about-income-management>.

⁹¹ <https://www.humanservices.gov.au/customer/enablers/about-basicscard>.

⁹² <https://www.humanservices.gov.au/customer/enablers/about-basicscard>.

focus on the care and protection of children. Policy is intended to ensure parents are using their money to buy goods and services that are deemed necessary for the benefit, health and well-being of their children.⁹³

Substantial criticisms have been made of the Commonwealth government's Northern Territory Emergency Response, which have argued that Aboriginal people have become 'passengers' in their own lives.⁹⁴ Aboriginal Peak Organisations Northern Territory (APO NT) regarded the response as adopting 'top-down measures' that 'wrestled control away from Aboriginal peoples'.⁹⁵ Bielefeld argues that, in general, income management law does not promote or enhance the 'wellbeing' of the Aboriginal people subject to it, but rather diminishes the individual's 'authority' and 'citizenship rights'.⁹⁶ Moreton-Robinson concurs, stating that '[c]itizenship as a racial contract stipulates ... who can and cannot "contract" in to the freedom and equality that it promises'.⁹⁷ Bielefeld further describes the result of the income management regime as framing Aboriginal people as 'subjects of the state rather than full right-bearing citizens'.⁹⁸ Humpage argues that the income management regime in Australia is predicated on '[i]mposing Western ideas on financial management and well-being'⁹⁹ onto Aboriginal and Torres Strait Islander people. Anthony contends that the income management regimes mark 'the re-emergence of a legal void between Anglo-Australia and Indigenous laws that is filled by paternal state policies'.¹⁰⁰ Moreton-Robinson supports seeking to make positive social change for Aboriginal and Torres Strait Islander people, but is critical of using welfare reform as the means to do so.¹⁰¹ Moreover, income management is 'disempowering' rather than 'empowering' for Aboriginal and Torres Strait Islander people.¹⁰² Overall, the concept is counter-intuitive, because it does not teach positive spending habits to create lasting social change, but rather merely temporarily constrains Indigenous

⁹³ For a comparative analysis of Australian and New Zealand income management schemes, and a discussion of racial and cultural discrimination in this context, see Humpage (2016).

⁹⁴ APO NT (2013), p 25.

⁹⁵ APO NT (2013), p 25.

⁹⁶ Bielefeld (2014/2015).

⁹⁷ Moreton-Robinson (2009), p 4.

⁹⁸ Bielefeld (2014/2015).

⁹⁹ Humpage (2016), p 563.

¹⁰⁰ Thalia Anthony (2007a), p 28.

¹⁰¹ Moreton-Robinson (2009), p 6.

¹⁰² Bielefeld (2014), p 290.

spending habits in a punitive way, based on the construct and belief that Indigenous spending behaviour is holistically and fundamentally problematic.

While income management schemes are supported by some Aboriginal and Torres Strait Islander people, and appear to be making improvements in the lives of a number of individuals, a real question remains about whether compulsory income management is increasing the ability of Aboriginal and Torres Strait Islander people to make sound financial decisions and beneficial consumer choices, or whether in fact it hinders that ability.

Research Aim

A number of factors impact on consumer choices. Targeted policy and legal action have sought to address 'vulnerabilities'; however, we do not fully understand what is at the heart of the consumer choices of Aboriginal and Torres Strait Islander people. Why might they make consumer choices that are not beneficial, and how might the law, as an instrument of consumer protection, help them to make choices that do benefit them? This thesis aims to contribute to answering this question. This study of Aboriginal and Torres Strait Islander people and consumer law will investigate how the issues identified in the cases and literature can best be addressed, with a particular focus on the impact of culture in consumer contracts. It will investigate issues that are not currently regulated that have their genesis in 'protection' legislation, including book up. It will explore the connections between history and colonisation and the current status of Aboriginal and Torres Strait Islander people as consumers, as well as recent law and policy changes brought about through income management.

As noted above, the primary research question for the thesis is:

- What are the factors that inform, influence and impact upon the decision of an Aboriginal and Torres Strait Islander person to enter into a consumer contract?

The secondary research questions are:

- Are there any law reforms which can be made to the Commonwealth statutes which govern consumer protection that would better protect Aboriginal and Torres Strait Islander consumers affected by the factors identified pursuant to the primary research question?
- Are there any policy reforms which can be operationalised by Commonwealth, State or Territory consumer protection regulators that would better protect Aboriginal and Torres Strait Islander consumers affected by the factors identified pursuant to the primary research question?

Overall, the study aims to aid in interpreting the law and the development of policy responses with respect to Aboriginal and Torres Strait Islander consumers by attempting to provide a better understanding of how to protect and empower these consumers in this space. Significantly, it will evaluate the role of culture and 'race' as aspects of consumer protection for Aboriginal and Torres Strait Islander people.¹⁰³

Methodology

Cunneen and Rowe describe methodology as 'the process or tools [researchers] use for understanding or describing the world'.¹⁰⁴ In speaking to a research methodology that will facilitate an analysis of 'race, knowledge and colonialism',¹⁰⁵ in Australia, Cunneen and Rowe express the need to utilise 'methodologies that enable voice to be given to Indigenous peoples and their understandings'.¹⁰⁶ Rigney also emphasises the importance of 'privileging Indigenous voices in research'.¹⁰⁷ Cunneen and Rowe highlight a number of primary principles, gleaned from the work of eminent Indigenous research methodologies scholars¹⁰⁸ such as Rigney, that

¹⁰³ 'Race' here is used in the context of race-based laws, policies and practices enacted by various colonial, state and federal governments.

¹⁰⁴ Cunneen and Rowe (2014), p 57.

¹⁰⁵ Cunneen and Rowe (2014), p 53.

¹⁰⁶ Cunneen and Rowe (2014), p 57.

¹⁰⁷ Rigney (1999), p 117.

¹⁰⁸ Cunneen and Rowe (2014), p 57.

underpin and are 'consistent within all Indigenous [research] methodologies',¹⁰⁹ namely:

- the recognition of Indigenous worldviews, knowledges and realities as distinctive and vital to Indigenous existence, which serves as a research framework;
- the honouring of Indigenous social mores as essential processes in which Indigenous people live, learn and situate themselves in their land and when in the lands of other Indigenous people;
- an emphasis upon the social, historical and political contexts that shape Indigenous peoples' experiences, lives, positions and futures; and
- privileging the voices, experiences and lives of Indigenous people, and recognition of their Indigenous lands.¹¹⁰

A Socio-Legal Analysis of the Aboriginal and Torres Strait Islander Consumer Experience

This thesis takes a deliberately socio-legal methodological approach to considering the experiences of Aboriginal and Torres Strait Islander people as consumers by taking social and legal contexts into account. Socio-legal studies is a well-established area of legal studies and research.

In speaking about socio-legal research, Bankar and Travers state that its value lies in its ability 'to explore how different methods can be used in researching law and legal phenomena, and how methodological issues and debates in sociology are relevant to the study of law'.¹¹¹ Importantly, socio-legal research utilises quantitative data,¹¹² and is deliberately conscious of the 'interplay between the *actual* and

¹⁰⁹ Cunneen and Rowe (2014), p 57.

¹¹⁰ Cunneen and Rowe (2014), p 57.

¹¹¹ Banakar and Travers (2013), p vix.

¹¹² Williams (2009), p 243.

aspirational [emphasis added] aspects of social and legal phenomena'.¹¹³ Bankar and Travers also highlight the tensions that exist within the field of socio-legal research, with approaches running along the spectrum from 'socio-legal studies as an interdisciplinary alternative and a challenge to doctrinal studies of law',¹¹⁴ which 'represents 'an interface with a context within which law exists'',¹¹⁵ through to 'concerns of [the] sociology [of law]'.¹¹⁶ Williams articulates the link between law, social sciences and the humanities, and '[s]peculation about the vulnerabilities of law'.¹¹⁷ Feenan cites legal history research as an example of socio-legal research which 'has achieved a degree of acceptance in the [legal] academy'.¹¹⁸ Sugarman stretches the breadth of legal history to include legal biographies.¹¹⁹ A range of terms have been used to describe socio-legal research, including 'interdisciplinary'¹²⁰ and 'transdisciplinary'.¹²¹ Cunneen and Rowe also see a tension between different forms of knowledge, more specifically 'legal-bureaucratic knowledge and indigenous knowledge',¹²² , which add complexity to working and researching across culturally distinct and discipline-specific knowledge systems. The literature evinces that socio-legal research is both an established area of scholarly inquiry and one which captures a breadth of research approaches and methods intended to study the law and the humanities not as discrete disciplines but as connected, linked or inter-related.

Under these terms, this research has been undertaken as a socio-legal study that investigates the law in context. It will involve an analysis that juxta-positions the written word that is valorised and privileged within Australia's common law system with oral traditions which record the 'law' of Aboriginal and Torres Strait Islander people. The study thereby looks at Aboriginal and Torres Strait Islander peoples' experiences of the legal system with a view to determining gaps in that system. It

¹¹³ Williams (2009), p 243.

¹¹⁴ Banakar and Travers (2013), p xii.

¹¹⁵ Banakar and Travers (2013), p xii.

¹¹⁶ Banakar and Travers (2013), p xii.

¹¹⁷ Williams (2009), p 245.

¹¹⁸ Feenan (2009), p 238.

¹¹⁹ Sugarman (2015).

¹²⁰ Williams (2009), p 243.

¹²¹ Feenan (2009), p 238.

¹²² Cunneen and Rowe (2014), p 57.

thereby analyses the law in its social context. In adopting a socio-legal design, the thesis utilises a mixed-methods approach to research that includes qualitative interviews, historical research and legal research.

Conceptual Framework for Analysis: Frontier Economy

The courts to date take a strict formalist approach in determining consumer protection matters involving Aboriginal and Torres Strait Islander people. While this approach has achieved positive outcomes for a number of Aboriginal and Torres Strait Islander consumers in the courts, the question is whether it has any systemic impact on improving the consumer protection of Aboriginal and Torres Strait Islander people more generally. Would Aboriginal and Torres Strait Islander people and the consumer protection framework derive greater and more enduring benefit from a different approach, such as one that takes historical and cultural contexts into account? Aboriginal and Torres Strait Islander consumers may be disadvantaged by current approaches to interpreting consumer protection law in the courts because these wider questions are not posed.

MacDonnell and Martin argue that Aboriginal people¹²³ are 'informed consumers', but that the values that inform their decision-making on the purchase of goods and services are based on values that may not be the same as those that inform non-Indigenous consumers.¹²⁴ MacDonnell and Martin contend that the value placed on goods and services are often viewed in light of their 'social' value, rather than their cash or monetary value;¹²⁵ ie, there are non-market forces at play.¹²⁶ MacDonnell and Martin further argue that there is a 'cultural logic' that influences and impacts upon Aboriginal people's consumer dealings, not only with other Aboriginal people but also with non-Indigenous people.¹²⁷

¹²³ Only Aboriginal people are included here and throughout this chapter as the work of the referenced authors refers only to Aboriginal people. However, the frontier economy concept and the way it relates to Torres Strait Islander people will be expanded on in Chapter 3.

¹²⁴ MacDonnell and Martin (2002), p 31.

¹²⁵ MacDonnell and Martin (2002), p 31.

¹²⁶ MacDonnell and Martin (2002), p 31.

¹²⁷ MacDonnell and Martin (2002), p 32.

In conceptualising the interaction between parties to a consumer contract, the framework of the 'frontier economy' will be considered in this study. The frontier economy is 'the intersection between specific Aboriginal economic values and practices, and those of the general market-based economy'.¹²⁸ This study will explore the interstitial space in which a contract is negotiated in theory and practice. McDonnell and Martin have conducted research on the topic of Aboriginal and Torres Strait Islander people and consumer law, specifically aimed at developing a conceptual framework for understanding the complex relationship between community stores and Aboriginal and Torres Strait Islander people. The conceptual framework developed by MacDonnell and Martin of the frontier economy¹²⁹ will be adopted for this study.

McDonnell and Martin's frontier economy accounts for two sets of 'economies' or economy value systems. It thereby allows for a conceptualisation of two different economies with two different sets of economic values. This can be applied to an Australian context where we have both Aboriginal and non-Aboriginal 'domains'. These domains do not operate exclusively of each other; being physically co-located they must interact with each other. The situation that commonly arises when these two systems interact can be termed a 'misunderstanding' or a 'miscommunication'. This misunderstanding or miscommunication becomes problematic when a party suffers damage or loss. An Aboriginal and Torres Strait Islander consumer may come off second best as a result of such a misunderstanding or miscommunication; this is a situation that will be investigated in Chapter 3.

Cooter's work on customary law in Papua New Guinea, including the principles that underline land transactions in customary law, complements McDonnell and Martin's approach. Cooter highlights relationships as the basis for customary law. In the Aboriginal context in Australia, relationships (or relationality) form an equally fundamental basis for and understanding of Aboriginal customary law.¹³⁰

¹²⁸ McDonnell and Martin (2002), p 27.

¹²⁹ McDonnell and Martin (2002), p 27.

¹³⁰ The criticism of Kwaymullin and Kwaymullin of the term 'customary law' is noted and the author concurs. Kwaymullin and Kwaymullin (2010), p198.

Kwaymullina and Kwaymullina¹³¹ explain that 'Aboriginal knowledge systems exist within the context of relationships';¹³² that '[i]n Aboriginal systems, the world can only be known by acknowledging and respecting relationships, not by ignoring or denying them';¹³³ '[i]ndeed, a state of being where the individual sought to remove themselves from the system, to sever or suppress their connections to the web of relationships that forms the world, might well be termed exile';¹³⁴ and, even more directly that 'law is also relationships'.¹³⁵ Graham¹³⁶ further explains that 'Aboriginal people's identity is essentially always embedded in land and defined by their relationships to it and to other people'.¹³⁷ Watson¹³⁸ states that 'Aboriginal people's laws, knowledges and philosophies remain relational'.¹³⁹

Moreover, Cooter's work is particularly relevant because of the proximity of Papua New Guinea to the Torres Strait (and Australia) and the kin and cultural connections that exist between the northern-most islands of the Torres Strait and the southern-most parts of Papua New Guinea. This overlap was expressly acknowledged in the Torres Strait native title determination over the sea in *Akiba v Commonwealth*.¹⁴⁰

Cooter's work is further relevant to this thesis because Thursday Island is a site for the research conducted herein and because numerous Torres Strait Islanders were interviewed as participants in this study. Because of its focus on (land) transactions between Papuan (Indigenous) parties according to customary law, Cooter's work reveals the core values that underline the principles applied in customary decision-making and in dealing with land. Cooter's work touches on aspects of Australian law; more importantly for Aboriginal and Torres Strait Islander people, as the Indigenous peoples in Australia, is the overlap between the customary law in Papua New Guinea and the customary law in the Torres Strait. This overlap and connection was

¹³¹ Kwaymullina and Kwaymullina (2010). See also Kwaymullina (2005).

¹³² Kwaymullina and Kwaymullina (2010), p196.

¹³³ Kwaymullina and Kwaymullina (2010), p197.

¹³⁴ Kwaymullina and Kwaymullina (2010), p197.

¹³⁵ Kwaymullina and Kwaymullina (2010), p 203.

¹³⁶ Graham (2008).

¹³⁷ Graham (2008), p187.

¹³⁸ Watson (2014).

¹³⁹ Watson (2014), p 511.

¹⁴⁰ [2013] HCA 33; 250 CLR 209.

recognised by the Commonwealth government in 1978 by the Torres Strait Treaty between Australia and Papua New Guinea.¹⁴¹

Legal Method

The legal methodology employed in this thesis will involve an analysis of the relevant legislation and cases. As very few consumer law cases involving Aboriginal and Torres Strait Islander plaintiffs, or involving ASIC or the ACCC acting for Aboriginal and Torres Strait Islander complainants have been decided, the legal methodology will also include an analysis of a broader pool of legal documents such as deeds of settlement between regulators and others, court documents such as affidavits, and transcripts of hearings. It will also involve an analysis of primary legal literature such as parliamentary materials.

Qualitative Interviews

The study adopts aspects of the social science methodological approach of MacDonnell and Martin, namely case studies with semi-structured interviews, as detailed below. This concept of the frontier economy will be used as a tool primarily to analyse the data collected from the participants, and to understand, explain and analyse the transactions and 'qualities' and 'characteristics' present in those transactions that occur in this 'frontier economy'. The frontier economy concept will also be applied to the law; whether this concept is of value in the construction of legal issues will be determined with a specific focus on case decisions involving both Aboriginal and Torres Strait Islander parties and non-Aboriginal and Torres Strait Islander parties.

The thesis analyses the experiences Aboriginal and Torres Strait Islander people have had with consumer protection law and its effectiveness through qualitative data

¹⁴¹ *Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as Torres Strait, and Related Matters* (Sydney, 18 December 1978) Entry into force: 15 February 1985, Australian Treaty Series 1985 No. 4.

collected from semi-structured interviews with key stakeholders (primarily service providers) in the consumer protection space, and with Aboriginal and Torres Strait Islander consumers themselves. Cultural and historical factors play prominent roles in the nature of these experiences; as such, the collection of the qualitative data will take into account the role these factors play in the individual experiences of Aboriginal and Torres Strait Islander people, as well as those of Aboriginal and Torres Strait Islander people collectively in a specific location. As outlined above, prioritising Aboriginal and Torres Strait Islander voices in the study is consistent with emphasising the importance of noting the experiences of colonised / Aboriginal and Torres Strait Islander peoples,¹⁴² as can be found in both postcolonial theory and Indigenous research methodologies.¹⁴³ Cunneen and Rowe argue directly that '[l]egal bureaucratic forms of knowledge ... have been essential parts of imperial culture'¹⁴⁴ and the colonisation of Australia. As such, the oral component of the thesis that takes shape through the interviews is as integral to answering the questions posed by this thesis as the written 'black letter law'.

This study seeks to create a comprehensive picture of the operation, effectiveness and experience of Aboriginal and Torres Strait Islander people of the consumer protection system in Australia. Locational factors are prominent in the literature, primarily articulated in terms of 'remote' and 'non-remote'. To examine the impact of locational factors (remoteness), three different sites have been selected based on their location and remoteness. The sites selected are Cairns (regional), Alice Springs (remote) and the Thursday Island (very remote). Site selection was based on:

- the presence of significant Aboriginal and Torres Strait Islander populations (because the focus of this study is on sites with a high population of Aboriginal and Torres Strait Islander people);
- access to a cross-section of service levels across legal and financial services (to enable an examination of the impact service has on consumer experience and protection);

¹⁴² Somerville et al (2010).

¹⁴³ Tuhiwai Smith (1999).

¹⁴⁴ Cunneen and Rowe (2014), p 57.

- access to a cross-section of regional and remote locations (to enable an examination of the impact of remoteness on consumer experience and protection); and
- access to a cross-section of predominantly Aboriginal and predominantly Torres Strait Islander populations (to enable an examination of the differences between culturally distinct groups in terms of consumer experience and protection).

Cairns has been selected because it is a major regional centre that is well-served by legal and financial services, allowing data to be gathered on the experiences of those consumers who are able to use face-to-face services. It is also the closest regional centre to many remote Aboriginal and Torres Strait Islander communities. Alice Springs was selected because it is more isolated than Cairns, and is the closest regional centre for many extremely remote Aboriginal communities, therefore providing services to these communities in addition to servicing its own population. Thursday Island has been selected because it is very remote. The services available on Thursday are very limited.

Interviewees comprised two groups, both interviewed at each site:

- Aboriginal and Torres Strait Islander consumers, who interact with, access, are subject to, and use the consumer protection system;
- Key stakeholders in the consumer protection system in Australia, including non-Indigenous and Aboriginal and Torres Strait Islander service providers who provide advice, representation and advocacy services to enforce the legal rights of Aboriginal and Torres Strait Islander consumers (for example, ATSILS and financial counsellors).

To protect the anonymity of participants when quoted participants will be referred to as Consumer 1 or Stakeholder 1 and so on. Additionally, quotes are not attributed to specific site for the same reason.

A purposive sampling approach has been adopted.¹⁴⁵ Participants of the study must provide a consumer advocacy service, perform regulatory functions, or be an Aboriginal and Torres Strait Islander consumer. The study interviewed men and women, Aboriginal and Torres Strait Islander and non-Aboriginal and Torres Strait Islander people, and consumers and services providers. Aboriginal and Torres Strait Islander people, in particular, were interviewed with a view to gaining insights into their personal experiences, and to observe any links between Aboriginal and Torres Strait Islander culture and consumer contracts, and historical impacts and consumer contracts, as well as examining locational impacts on consumer contracts. Non-Aboriginal and Torres Strait Islander people were necessarily interviewed because of their important role in providing advocacy services to Aboriginal and Torres Strait Islander people, and their perspectives of the interactions between consumers and traders which are problematic.

Across the study, the sample size was 12 and 13 participants respectively (25 total) in each of the two groups of Aboriginal and Torres Strait Islander consumers and stakeholders. Half the interviews conducted at each site were with Aboriginal and Torres Strait Islander consumers (referred to as 'Aboriginal and Torres Strait Islander consumers' throughout the thesis), and half the interviews were with stakeholders (referred to as 'stakeholders' throughout the thesis) at each site, including ATSILS, financial counsellors based at community organisations and providers of emergency funding relief. Guest et al¹⁴⁶ conducted in-depth interviews and found that saturation was reached at 12 interviews. This sample size is particularly suited to topics of a narrow nature; the study of Aboriginal and Torres Strait Islander consumer experiences is of that nature. It was anticipated this sample size would allow for the key themes to emerge to saturation at each site.

The use of semi-structured, in-depth interviews with participants was a valuable tool to obtain data-rich information for thematic analysis. The advantage of using semi-structured interviews in qualitative research is that it:

¹⁴⁵ Bryman (2012).

¹⁴⁶ Guest et al (2006).

allows depth to be achieved by providing the opportunity on the part of the interviewer to probe and expand the interviewee's responses ... some kind of balance between the interviewer and the interviewee can develop which can provide room for negotiation, discussion, and expansion of the interviewee's responses.¹⁴⁷

The semi-structured interviews covered issues such as the experiences of Aboriginal and Torres Strait Islander people in buying goods and services, making complaints, managing finances and accessing services, and the impact of history and location on their experiences, as well as the role of relationality within them.

The recorded interviews were analysed thematically. This allowed for the emergence of themes from the data and enabled the categorisation of the research into distinct analytical themes. Such thematic analysis allowed the comparison of data against the existing literature and to discover new themes and issues. Data is to be stored at Griffith University, Nathan Campus.

Ethics approval was granted through the Aboriginal and Torres Strait Islander Human Ethics application and approval process at James Cook University. The study is limited in that data was collected geographically from sites in two jurisdictions, namely Queensland and the Northern Territory, and the relevance of the study's findings to other jurisdictions will be limited by this. The study will be most relevant to those places with similar community profiles.

Thesis Argument and Chapter Outline

The overall argument of this thesis is that a number of factors impact on the consumer decision-making processes and consumer behaviour of Aboriginal and Torres Strait Islander people. More specifically, the thesis argues that there are racial and cultural factors that impact upon Aboriginal and Torres Strait Islander consumers.

¹⁴⁷ Hitchcock and Hughes (1989), p 83.

Chapter 1 has outlined the key aims, objectives, research questions and methodology. Moreover, it discussed the relatively recent but substantial changes to consumer protection law with the advent of the national cooperative consumer law framework. Importantly, it has noted that consumer protection relies not only on the law but the enforcement of the law by regulators, and the policy approach surrounding its enforcement. In this regard, the policy agenda in respect to Aboriginal and Torres Strait Islander consumers is not limited to the operation of consumer protection laws, but is further impacted by the government policies surrounding income management, which function to control spending by Aboriginal and Torres Strait Islander consumers. Finally, current research was explored which identified a clear and current need for further and detailed investigation into the ways in which Aboriginal and Torres Strait Islander consumers can be better protected.

Chapter 2 discusses the law relevant to the protection of Aboriginal and Torres Strait Islander consumers. It begins by outlining in detail the key consumer protection provisions in Australian law relevant to Aboriginal and Torres Strait Islander consumers. It will then focus on an analysis of the cases involving Aboriginal and Torres Strait Islander parties as complainants with a view to considering whether the current law is adequate in protecting Aboriginal and Torres Strait Islander consumers. Within this discussion of the adequacy of the law, the court's application of the law and the outcomes for Aboriginal and Torres Strait Islander consumers will be considered. The core issues raised in this chapter are whether Aboriginal and Torres Strait Islander consumers are viewed within too narrow a frame, and, moreover whether this narrow view fails to comprehend and address the reality of the Aboriginal and Torres Strait Islander consumer's 'vulnerability' as having cultural content.

Chapter 3 defines MacDonnell and Martin's concept of the 'frontier economy', and explores Cooter's notion of 'relationships' as the foundation of customary law. Using elements of both of these, the chapter will develop the idea of an Australian Indigenous jurisprudence. It will explore the concept of 'culture' that sits at the centre

of Indigenous jurisprudence, and will develop a lens through which the consumer protection of Aboriginal and Torres Strait Islander people can be investigated and understood. Relationality will be shown to be central to the way in which Aboriginal and Torres Strait Islander people interact with each other and with non-Indigenous people in context, such as in contracting and consumption.

Chapter 4 explores the historical context and its contemporary relevance. It will be demonstrated that historical matters are perhaps more accurately described as racial matters. Interestingly, racial matters and their impact have been directly and indirectly recognised in the case law; however, there has been either a reticence or a failure to understand them as such. This chapter will show there is a clear and direct link between past law, policy and practices and current impacts. Book-up, an informal credit practice with a decades' long history, will be used as a specific example.

Chapters 5 and 6 analyse, interpret and discuss the data as it relates to external factors. The external factors discussed will include the impact of distance of Aboriginal and Torres Strait Islander consumer decision-making. It will further include a discussion of the impact of trader behaviour on the decision-making processes of Aboriginal and Torres Strait Islander consumers, and these consumers' ability to enforce their legal rights against traders engaging in unlawful behaviour. Within this chapter the limits of the law will be made clear, because the external factors identified in the chapter cannot be remedied by the law. One specific example of this is the practice of price gauging, which occurs commonly in stores servicing predominantly Aboriginal and Torres Strait Islander people; while this practice is exploitative, price-gauging is not unlawful, but is viewed as a market-driven trader behaviour.

Chapter 7 analyses, interprets and discusses the data as it relates to internal factors. The internal factors discussed fall into three distinct themes – identity, financial capability and consumer fitness. Within the theme of identity, the sub-themes of culture and race will be discussed. Within the theme of financial capability, the sub-

themes of poverty and financial literacy will be discussed. Within the theme of consumer fitness, the sub-themes of commercial acumen and self-advocacy will be discussed.

Chapter 8 will discuss law reform and policy options. It will also provide a conclusion to the thesis, including the contribution this study makes to the field of research.

Chapter 2 – Indigeneity Matters for Consumer Protection

The purpose of this chapter will be to demonstrate and show that there is a problematic in the way in which the law characterises Aboriginal and Torres Strait Islander consumers as unduly narrow and through a deficit frame. It will do this firstly by analysing key case decisions to reveal the commonalities that exist across them. This will involve creating a set of indicia of the determinants of Aboriginal and Torres Strait Islander consumer 'vulnerability' and 'disadvantage'. The chapter will then discuss the limits of these indicia, and will argue that the focus on them reflects an approach adopted by the courts to assess 'vulnerability' and 'disadvantage' when dealing with Aboriginal and Torres Strait Islander consumers that ignores the cultural circumstances at play when these consumers deal with traders. I will show that there is a cultural bent that has engendered the 'vulnerability' and 'disadvantage' of Aboriginal and Torres Strait Islander consumers. It should be noted that the terms 'vulnerability' and 'disadvantage' are used throughout this thesis because they are part of the language of law, in relation, for example, to unconscionability.¹⁴⁸ This chapter is premised on the courts' general view that Aboriginal and Torres Strait Islander people are deficient; that is, that Aboriginal and Torres Strait Islander people may lack the characteristics required to be informed and sophisticated consumers who can protect their own interests.¹⁴⁹ The same terminology was used in the Productivity Commission's 2008 review.¹⁵⁰

In part, the purpose of this chapter is to demonstrate that these terms ('vulnerability' and 'disadvantage') do not need to solely represent deficits in Aboriginal and Torres Strait Islander consumers.¹⁵¹ Cultural characteristics can create 'vulnerability' and 'disadvantage' and these characteristics do not necessarily need to be expressed as negative personal traits. This idea will be explored in the second part of this chapter.

¹⁴⁸ See the leading case of *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.

¹⁴⁹ For example, s 22 ACL and s 12CC ASIC Act refer to 'matters the court may have regard to for the purposes of' s 21 ACL or s 12CB ASIC Act respectively.

¹⁵⁰ Productivity Commission (2008).

¹⁵¹ See Loban (2014).

There are legal terms assigned by the law to ‘consumers’; however, when referring to ‘consumer’ throughout this chapter and thesis, I am not referring to the technical meaning of ‘consumer’ within the ACL. Rather, I use ‘consumer’ with reference to its lay meaning. Using the term in this way adopts the ACCC’s and ASIC’s approach to communicating with the wider community about matters of consumer protection via lay language.

One does not need to be a ‘consumer’ to be able to enforce the provisions of ACL, the ASIC Act or the NCCP Act. Rares J, in extra-judicial commentary on the consumer law framework, criticised the complexity of the framework.¹⁵² In particular, he noted the length of the definition of ‘consumer’ in s 3 of the ACL, and stated that ‘the Australian Consumer Law has at least three other definitions or concepts of a “consumer” that are different from that in s 3 and each other’.¹⁵³ Added to this is the meaning of ‘consumer’ in the ASIC Act.¹⁵⁴

Interestingly, the law has changed over time to allow private individuals (and later, businesses) to bring action against traders in respect of certain breaches of the consumer protection law, for example, where there is unconscionable conduct. Such recourse is in addition to the existing powers of the regulator to take action. Thus, while the plaintiffs discussed in the matters in this thesis are the regulators, it is important to note that private individuals (those being Aboriginal and Torres Strait Islander consumers) may bring an action on their own behalf for breaches of the consumer protection law. A detailed discussion about the relevant consumer protection provisions, including standing and remedies, will follow shortly.

The Commonwealth Government’s *Australian Consumer Law Review: Final Report* found that ‘[s]takeholders raised concerns that the interpretation of the provisions leads to some uncertainty about how they apply and whether particular conduct is

¹⁵² Rares (2014), p 11.

¹⁵³ Rares (2014), p 11.

¹⁵⁴ By way of further example, the unconscionability provisions in ss 12CA-12CC ASIC Act and ss 20 and 21 ACL do not require a person to be a ‘consumer’; rather, the ACL uses the term ‘customer’ in the unconscionability section, and the ASIC Act uses the term ‘service recipient’. Section 18 ACL and s 12DA ASIC Act are also not restricted to consumers.

unconscionable according to the principles used by the courts'.¹⁵⁵ In contrast, this chapter finds there are indicia in respect of Aboriginal and Torres Strait Islander consumers that show consistency by the courts in applying the principles of unconscionable conduct to Aboriginal and Torres Strait Islander consumers. Berman alternatively expresses this as 'providing companies with a practical "blueprint" for corporate behaviour'¹⁵⁶ in respect of unconscionable conduct. It will be shown that even amongst the 'cacophony of the current ... "consumer protection" laws'¹⁵⁷ in Australia, that common themes can be found that demonstrate a jurisprudential approach in the way judges determine consumer protection matters in cases involving Aboriginal and Torres Strait Islander consumers. Finding and defining this jurisprudential approach is both helpful for consumer advocates¹⁵⁸ seeking some certainty of a likely outcome for their client, and, contrary to criticism levelled at the consumer protection law for its ambiguity, finds a measure of consistency across jurisdictions in the way the law deals with (protects) Aboriginal and Torres Strait Islander consumers.

This chapter adopts a legal methodology to analyse Aboriginal and Torres Strait Islander consumer issues. It will adopt a doctrinal analysis of the cases, and will analyse documentation associated with some of these cases, including court materials such as affidavits and deeds of settlement. It will begin with an outline of the consumer protection law in Australia. It will then discuss how cases involving the protection of Aboriginal and Torres Strait Islander consumers have used the statutory framework as a means of addressing matters where there are multiple complainants. Significantly, it should be acknowledged that commencing legal action is unaffordable for many Aboriginal and Torres Strait Islander consumers.¹⁵⁹ Moreover, any efforts to agitate for systemic change generally lack an 'economic incentive' for a group or community,¹⁶⁰ and as such, undertaking a cost-benefits analysis is reasonable to determine the financial viability of that group or community

¹⁵⁵ Consumer Affairs Australia and New Zealand (2017), p 48.

¹⁵⁶ Berman, (2010), p 43.

¹⁵⁷ Rares (2014), p 15.

¹⁵⁸ Field (2007) highlights the importance of consumer advocates for both individual complaints and the wider reform process. See Field (2007), p 98.

¹⁵⁹ Rares (2014), p 12.

¹⁶⁰ Field (2007), p 98.

taking legal action.¹⁶¹ The result is that the available case law has relied on regulators rather than individuals or groups taking forward matters involving likely breaches of consumer protection laws involving Aboriginal and Torres Strait Islander consumers. This chapter will discuss matters that have been taken forward by the ACCC or ASIC, and the tendency of the regulators to approach matters involving Aboriginal and Torres Strait Islander consumers using provisions on misleading or deceptive conduct and unconscionable conduct.¹⁶²

With reference to that documentation, I will show that there are two predominant ways in which Aboriginal and Torres Strait Islander consumers and matters of Indigeneity are framed within the law. The first is where Indigeneity is ignored or silenced. The second is where Indigeneity is presented as a 'vulnerability', 'deficit', 'disadvantage' or 'problem'. In the literature on post-colonialism and Aboriginal and Torres Strait Islander people, these representations are viewed as part of the colonial project.¹⁶³ Chapters 3 and 4 will consider Aboriginal and Torres Strait Islander knowledges, values and experiences in the context of colonisation. This chapter is concerned with a doctrinal consideration of the consumer law.

The two ways in which Aboriginal and Torres Strait Islander consumers and matters of Indigeneity are framed within the law create an unhelpfully narrow view of Aboriginal and Torres Strait Islander consumers that disempowers them in the legal framework. Moreover, it denies the Indigeneity of the consumer where it is relevant to the circumstances. It is unclear whether this occurs as a result of the instructions given by an Aboriginal and Torres Strait Islander person to their lawyer; the questions asked by the lawyer; the decision about how to run the case; the interpretation of the courts of the law; the court's decision as to how they decide; or a combination of one or more of these factors.

¹⁶¹ Field (2007), p 100.

¹⁶² Interestingly, Francey (1997) suggests these provisions are significant in the use of consumer protection law in the wider community as well. See Francey (1997), p 162.

¹⁶³ For an explanation of the colonial project see for example Chris Cunneen et al (2017)

Commonalities in cases can be used to create a certain picture of the 'vulnerable' Aboriginal and Torres Strait Islander consumer. From one perspective, this creates precedent upon which the court, financial counsellors, lawyers and consumers can rely. From another, the picture is one of the Aboriginal and Torres Strait Islander consumer as deficient.

This chapter argues that Aboriginal and Torres Strait Islander consumers are seen as deficient in the case law. Different terminology is used within what is generally termed 'deficit discourse', including 'deficit view',¹⁶⁴ 'deficit thinking'¹⁶⁵ and 'deficit perspectives'.¹⁶⁶ These terms have been adopted by scholars, educators, researchers and commentators (predominantly in the field of education) to explain the 'politics of recognition [that] ... leads to a restricted representation of [Aboriginal and Torres Strait Islander people] ... that foregrounds deficit and victimhood'.¹⁶⁷ Bamblett¹⁶⁸ acknowledges that there are particular challenges in striking the balance between highlighting inequality, unfairness and disadvantage when it is experienced, and essentialising Aboriginal and Torres Strait Islander people as deficient and as victims. This point is particularly relevant in the context of this chapter and the broader thesis as the consumer law is literally expressed as 'consumer protection', whereby 'protection' could be used to tackle inequality, but could also be seen as paternalistic. The latter could also occur because provisions of the ACL, such as those relating to unconscionable conduct, are doctrinally foregrounded on 'vulnerability' and 'disadvantage', which could be related to victimhood. While a strong and clear legal argument can be made for the importance of emphasising 'vulnerability' and 'disadvantage' to ensure a successful outcome for Aboriginal and Torres Strait Islander consumers in court, a further argument is that there is a danger in 'reifying'¹⁶⁹ the deficit narrative in court (and policy). In cases where this occurs, cultural considerations are paid less attention, which has the potential to direct the attention of law and policy-makers towards the deficit narrative and away from a

¹⁶⁴ Hogarth (2017), p 21.

¹⁶⁵ Bamblett, (2011/2012), p 5.

¹⁶⁶ Vass (2013), p 93.

¹⁶⁷ Bamblett (2011/2012), p 5.

¹⁶⁸ Bamblett (2011/2012), p 5.

¹⁶⁹ Vass (2013), p 93.

counter-narrative which, if understood and acted on, might produce alternative or better outcomes for Aboriginal and Torres Strait Islander consumers. By way of a comparative examination, in the context of educational outcomes for Aboriginal and Torres Strait Islander people, Vass explains that '[d]eficit thinking potentially leads to lowered expectations of Indigenous students academically and behaviourally ... [and] poor education policies that fail to negotiate systemic concerns'.¹⁷⁰ The evidence that this has occurred is compelling.¹⁷¹ Gorringer et al¹⁷² contend that it is possible to move away from a deficit discourse if there is a shift in thinking that focuses instead on solutions and strengths.

The image created by the courts of Aboriginal and Torres Strait Islander consumers is an incomplete one. In the limited instances where the court *does* consider how the cultures of Aboriginal and Torres Strait Islander impact on their status as consumers, the impact is conceived of as problematic. It must be conceded that over time and with an increasing number of matters being heard by the courts involving Aboriginal and Torres Strait Islander consumers, the court's approach is slowly widening to capture a less deficit-oriented image of Aboriginal and Torres Strait Islander people. This approach accords with the commentary outlined above that argues that 'disadvantage' and 'vulnerability' can be acknowledged while simultaneously presenting Aboriginal and Torres Strait Islander in a more positive, accurate and holistic light that recognises the relevant cultural context.

This chapter will argue that a keener approach to the framing of Indigeneity would involve dealing directly with the role Indigeneity can and does play in Aboriginal and Torres Strait Islander people's consumer transactions. If Aboriginal and Torres Strait Islander people are to be adequately protected by the consumer law applied by the ACL and ASIC respectively to supposedly mutually exclusive (but sometimes overlapping) non-financial and financial transactions in the long term, the law must

¹⁷⁰ Vass (2013), p 88.

¹⁷¹ For a summary of government reporting and research on this over the past decade, see Burgess and Cavanagh (2015).

¹⁷² Gorringer et al (2011), p 11.

consider Indigeneity where it is relevant and avoid ignoring or problematising the 'Indigenusness' of Aboriginal and Torres Strait Islander people.

History of Consumer Protection Laws in Australia

Before the TPA was enacted, 'Australia's relatively small and closed economy was riddled with ... anticompetitive practices and deception in marketing and advertising'.¹⁷³ Samuel states that the TPA '[c]rucially ... provided ... for the first time, for a federal body of consumer protection law'.¹⁷⁴ Senator Lionel Murphy, then Attorney-General, noted that:

The purpose of the Bill [TPA] is to control restrictive trade practices and monopolisation and to protect consumers from unfair commercial practices. ... The Bill will also provide on a national basis long overdue protection for consumers against a wide range of unfair practices. Restrictive trade practices have long been rife in Australia. Most of them are undesirable and have served the interests of the parties engaged in them, irrespective of whether those interests coincide with the interests of Australians generally. These practices cause prices to be maintained at artificially high levels. They enable particular enterprises or groups of enterprises to attain positions of economic dominance which are then susceptible to abuse; they interfere with the interplay of competitive forces which are the foundation of any market economy; they allow discriminatory action against small businesses, exploitation of consumers and feather-bedding of industries. ... In consumer transactions, unfair practices are widespread. The existing law is still founded on the principle known as *caveat emptor* - meaning 'let the buyer beware'. That principle may have been appropriate for transactions conducted in village markets. It has ceased to be appropriate as a general rule. Now the marketing of goods and services is conducted on an organised basis and by trained business executives. The untrained consumer is no match for the businessman who attempts to persuade the consumer to buy goods or

¹⁷³ Samuel (2005), p 38.

¹⁷⁴ Samuel (2005), p 39.

services on terms and conditions suitable to the vendor. The consumer needs protection by the law and this Bill will provide such protection. ... The consumer protection provisions do not necessarily displace State legislation in the same field. Clause 75 expressly states that Part V is not intended to exclude or limit the concurrent operation of any law of a State or Territory. The Bill recognises that in many consumer protection matters there is a need for a national approach, and that the effectiveness of State laws is necessarily limited.¹⁷⁵

In time, from the commencement of the TPA to that of the ACL inter alia the consumer law has seen the relationship between the states and the Commonwealth move from one of obstruction to co-operation.¹⁷⁶ One of the key benefits arising from this co-operation has been the ability for 'national priorities ... to emphasise those consumer protection issues which cross State boundaries or have some national significance'.¹⁷⁷ This situation was not possible previously, at a time when the state, territory and Commonwealth consumer protection laws were not aligned.

One commentator concluded that while the history of consumer law in Australia 'has been politically charged',¹⁷⁸ it has enjoyed 'general bi-partisan support for the principles but divergence on some of the detail'.¹⁷⁹ Berman suggests the particular challenge involved in reforming the unconscionable conduct provisions relates to 'the perennial conflict between economic freedom and the need to protect those unable to protect themselves'.¹⁸⁰

Outline of the Commonwealth Consumer Protection Laws

¹⁷⁵ Murphy (1974), p 1.

¹⁷⁶ Spier (2014), p 136.

¹⁷⁷ Fels and Jones (1999), p 138.

¹⁷⁸ Spier (2014), p 141.

¹⁷⁹ Spier (2014), p 141.

¹⁸⁰ Berman (2010), p 45.

Key consumer protection provisions can be found in ACL and the NCCP Act. Most of the breaches alleged to have involved Aboriginal and Torres Strait Islander consumers¹⁸¹ have been in respect of ss 18-20 of the ACL and Div 2 of the ASIC Act. The strategy of using these provisions has proved extremely successful for the regulator, and a set of indicia have emerged over time which are instructive regarding the likelihood of breaches of provisions in the law relating to unconscionable conduct and misleading and deceptive conducts¹⁸² in respect of Aboriginal and Torres Strait Islander consumers. As a consequence, this strategy may act as an aid to assessing the chances of success of any legal action taken by or on behalf of Aboriginal and Torres Strait Islander consumers against traders pursuant to these provisions.

As noted in Chapter 1, this thesis concentrates on the Commonwealth consumer protection legislation. It has a further primary focus on provisions relating to misleading and deceptive conduct and unconscionable conduct. The reason for this focus is because these matters have been the primary substance of cases involving Aboriginal and Torres Strait Islander consumers to date. That is, cases relating to these provisions are where most of the legal action involving Aboriginal and Torres Strait Islander consumers has historically arisen. General law principles relating to unconscionable conduct, misrepresentation and mistake all have relevance for consumers contracting for goods and services with some common law and equitable principles having been explicitly written into legislation. This is the case with unconscionable conduct, which is specifically provided for in the ACL and the ASIC Act 'within the meaning of the unwritten law' at equity.¹⁸³

¹⁸¹ It is noted that people do not have to be 'consumers' as defined by s 3 of the ACL to use this provision. Section 22 uses the term 'customer'. Section 12CC ASIC Act uses the term 'service recipient'. As noted in Chapter 1, unless otherwise specified, the term 'consumer' is used throughout this thesis as a lay term which is consistent with the way the ACCC and ASIC use it in their communications with the public. See website www.accc.gov.au and www.asic.gov.au

¹⁸² Section 18 ACL and s 12DA ASIC Act do not require plaintiffs to be consumers but rather provide broader protection.

¹⁸³ As noted above, one does not have to be a consumer as defined in s 3 ACL to use s 18 or s 21 ACL. Section 22 ACL refers to 'customer'. The term 'consumer' in this chapter and throughout this thesis, unless otherwise stated, has its ordinary meaning. This is consistent with the way in which 'consumer' is used by the ACCC and ASIC in its communications with the public who access its resources. It is noted that in the context of decided cases, the courts will commonly use the term 'complainants' as the cases involve the regulators taking legal action rather than the Aboriginal and Torres Strait Islander person as a private individual.

The 'misleading or deceptive conduct' and 'unconscionability' provisions for 'financial services' and 'financial products' are found in the ASIC Act, and not the ACL. The ACL provides protection in relation to all other goods and services that do not fall within the definitions of 'financial services' and 'financial products' under the ASIC Act. These terms are defined in ss 12BA and 12BAB ASIC Act to include insurance, banking, and superannuation services and the like. Insurance agents and brokers are now also regulated by ASIC via the *Corporations Act 2001* (Cth).¹⁸⁴ In addition, 'consumer credit contracts' are now regulated by ASIC, as from 2010, by virtue of the *National Consumer Credit Protection Act 2009* (Cth). As all other non-financial products and services fall within the ACCC's jurisdiction, goods and services also fall within the purview of the ACCC's jurisdiction, as can be seen from cases involving a range of diverse products, from educational materials through to mobile phone plans. In both circumstances, a key function of the Commissions in their consumer protection roles is to investigate breaches of the ACL or ASIC Act and, if appropriate, to enforce that legislation.¹⁸⁵ Finally, often these provisions are enforced by private litigants such as the individual complainants or businesses and non-consumer plaintiffs. This frequently occurs where the regulator is not persuaded to take the legal action itself either because it is not an enforcement priority or there is no wider public interest dimension. The regulatory and public interest goals are set out in the ASIC Act and the CCA. Section 1(2)(b) ASIC Act outlines an ASIC function to 'promote the confident and informed participation of investors and consumers in the financial system'. Section 2 CCA cites the object of the Act as 'to enhance the

¹⁸⁴ Changes were made to the Corporations Act regarding the need for providers of banking products, general insurance products, consumer credit insurance or any combination of these to act in the best interests of the client (s 961B). It directs that any resulting advice the provider gives must be appropriate to the client (s 961G). Such reforms are likely to benefit all consumers, including Aboriginal and Torres Strait Islander consumers, but will not be explored in detail in this thesis.

¹⁸⁵ For example, ASIC has published a document which details its approach to enforcement. Amongst other considerations, it assesses the benefits of legal action, available alternative action and 'strategic significance'. Regulators will not always intervene, particularly where there is a willing private litigant, as these laws can also be enforced at a private level. The Commonwealth Government's policy is to encourage private litigation, because it shifts the costs of law enforcement from the public purse to the private purse but still achieves the regulatory goal of law enforcement and compliance. See for example, Australian Securities and Investments Commission (2013) *Information Sheet 151: ASIC's approach to enforcement*.

http://download.asic.gov.au/media/1339118/INFO_151_ASIC_approach_to_enforcement_20130916.pdfpdfdocs.

welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'. Of the breadth of the ACCC's functions, Pengilley condenses these into 'prosecutorial, some adjudicative, some educative and some arbitral'.¹⁸⁶

Issues litigated by the ACCC and ASIC in respect of Aboriginal and Torres Strait Islander people pursuant to the ACL and the ASIC Act have tended to fall within the unconscionable conduct provisions and those related to misleading and deceptive conduct. These are arguably the two provisions that best lend themselves to the particular consideration of factors affecting contract formation between two parties where one is an Aboriginal and Torres Strait Islander person. Misleading and deceptive conduct has been cited by the courts as an oft-used provision for traders' breaches because of 'its simplicity relative to the torts of negligence, deceit and passing off'.¹⁸⁷ Moreover, the test applied to the provisions of the ACL is based on 'inconsistency with the truth' or 'contrary to fact'.¹⁸⁸ In contrast, unconscionable conduct is premised on the existence of unequal bargaining positions and one party to a contractual negotiation being in a stronger position vis-a-vis the other.¹⁸⁹

These provisions tend to be interpreted in a way that focuses on contractual formalities. Most commonly, findings in the courts are based on issues such as the failure to provide copies of contracts and payment records (such as invoices and receipts) and access to goods at better prices. These approaches meet the objectives of the regulator pursuant to their statutory objects and result in successful legal action; however, in respect of Aboriginal and Torres Strait Islander consumers, the evidence presented in relevant cases indicates that the consumer protection laws are being applied in an unduly narrow manner. A wider application of the laws that considers cultural and historical circumstances could better protect Aboriginal and Torres Strait Islander consumers. Regulators have sought out and used experts to provide reports and give expert evidence in court.¹⁹⁰ Equally, the courts have

¹⁸⁶ Pengilley (2004), p 63.

¹⁸⁷ *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 270 ALR 204.

¹⁸⁸ *World Series Cricket v Parish* (1977) 16 ALR 181.

¹⁸⁹ See *Australian Commercial Bank v Amadio* (1983) 151 CLR 447.

¹⁹⁰ The first case was the *ACCC v Keshow* [2005] FCA 558.

indicated a willingness to permit expert evidence on cultural matters, such as from anthropologists¹⁹¹ though this continues to be contested.¹⁹² This shows a preparedness on the part of the regulators to engage experts in the conduct of their matters and a readiness of the courts to consider cultural circumstances as circumstances relevant within the scope of the consumer law. Arguably, this lays the groundwork for such circumstances to form the basis of court decisions. There is an opportunity here to view Aboriginal and Torres Strait Islander culture in a way that is not deficit-based; however, as my analysis of the cases indicates, this is an outcome which is yet to occur.

I will now turn to the indicia. An analysis of the case law involving Aboriginal and Torres Strait Islander consumers reveals common indicia, those being the factors that inform, influence and impact on the decision of an Aboriginal and Torres Strait Islander person to enter into a consumer contract. Some of these factors relate to the characteristics of the consumer, some to the trader and others to the overall transaction. The indicia provide a measure of certainty about a finding of unconscionable conduct by a court pursuant to the unconscionable conduct provisions of the ACL and the ASIC Act. In summary, the indicia are:

- Indicia 1 – Discrete and remote Aboriginal and Torres Strait Islander communities and locational impacts
- Indicia 2 – Little understanding of transaction
- Indicia 3 – Use of direct debit mechanisms
- Indicia 4 – Goods and services unsolicited
- Indicia 5 – Products inappropriate
- Indicia 6 – Language differences
- Indicia 7 – Failure to assess financial situation
- Indicia 8 – Limited commercial experience of the consumer
- Indicia 9 – Product explanation.

¹⁹¹ The most recent case to hear expert evidence from an anthropologist was at the trial of *ASIC v Kobelt* [2016] FCA 1327.

¹⁹² This evidence was considered again in the appellate decision in *Kobelt v ASIC* [2018] FCAFC 18 at [375]. ASIC have now also lodged an application with the High Court seeking leave to appeal the Full Federal Court decision.

Overview of the Key Cases

Before analysing the cases, it is helpful to first give a brief outline of the main facts of the key cases in order to provide context and background. Firstly, there are reasonably few reported consumer cases involving Aboriginal and Torres Strait Islander people. As a result, this chapter will also consider matters in which ASIC or the ACCC has commenced legal action that has been settled before reaching a final determination by the court. These settled matters are equally insightful as they frequently include agreed facts and other publicly available information regarding the circumstances of the matter.

As noted above, legal action by the regulators has primarily centred on unconscionable conduct and misleading and deceptive conduct. More recently, the regulators have sought to use newer consumer protection provisions such as s 69 ACL, which covers unsolicited consumer agreements, and s 23 ACL, which deals with unfair terms of consumer contracts. The types of goods and services involved include insurance, mobile phones, educational materials and consumer credit leases for white goods. The primary approach of the regulators, as extracted from the publicly available material, has been to demonstrate misleading and deceptive conduct and, where the evidence allows, unconscionable conduct. Interestingly, action taken by ASIC has frequently been resolved by the trader entering into an enforceable undertaking¹⁹³ pursuant to ss 93A, 93AA ASIC Act. On occasion, the ACCC has taken the same approach using its power under s 87B CCA.

In 1992, the TPC, acting under the former TPA, commenced its first large-scale investigation and enforcement action on behalf of Aboriginal and Torres Strait Islander consumers. These will be referred to here as the *Insurance Cases*. The *Insurance Cases* laid the foundation for future litigation involving Aboriginal and Torres Strait Islander consumers by both the ACCC and ASIC. The *Insurance*

¹⁹³ An enforceable undertaking is an administrative non-judicial enforcement mechanism. It is a quick and cost-effective way of achieving the regulatory objectives of the regulators, including the protection of Aboriginal and Torres Strait Islander consumers.

Cases¹⁹⁴ involved settlement by the TPC¹⁹⁵ against three insurers, namely, Mercantile Mutual Life Insurance Company Limited, Norwich Union Life Insurance Limited and Colonial Mutual Life Assurance Society Limited. It represented a considerable investment in time and money by the TPC for breaches of the TPA (now covered by NCCP Act) that involved systemic and widespread trader conduct. Spanning the years 1992-1993, the investigation and subsequent court action included allegations of misleading and deceptive conduct and unconscionable conduct¹⁹⁶ by agents of the three insurers in the sale of insurance policies to Aboriginal and Torres Strait Islander people living in remote Aboriginal and Torres Strait Islander communities in Queensland. Ultimately, the court action was resolved by deed in respect of all three parties, but not before significant investigations had taken place uncovering a range of concerning and potentially unlawful behaviours.

As a result of this litigation, the TPC (now ACCC) published a report titled *Taking Advantage*,¹⁹⁷ which set out the details of the allegations against all three insurers and the factual circumstances of each matter. Together with this publication, the formal deeds of settlement/agreement with each of the insurers were published. The insurer's behaviour, when considered in light of the 'vulnerability' and 'disadvantage' of Aboriginal and Torres Strait Islander consumers, meant that the insurer had engaged in unconscionable conduct.

In the *Insurance Cases*, the 'vulnerability' and 'disadvantage' of Aboriginal and Torres Strait Islander consumers was seen to include:

- little formal education;
- no understanding of the nature of insurance;
- no understanding of the rights and obligations imposed upon [the trader];

¹⁹⁴ Referred to in this way for the purposes of this paper. For an overview of the litigation, see Altman and Ward (eds) (2002), a work commissioned by the ACCC.

¹⁹⁵ These insurance complaints would now be dealt with by ASIC if they fell within the definition of 'financial services' in the ASIC Act.

¹⁹⁶ Amongst other allegations of misleading conduct.

¹⁹⁷ TPC (1994).

- not given a relevant explanation of the nature of the policy of insurance or of the rights and obligations imposed by it;
- little experience in commercial aspects of life;
- little understanding of the potential benefits and disadvantages of the policy as compared with other means of investment; [and]
- little comprehension of the terms used in the presentation made by the agents.¹⁹⁸

These agreed facts between the parties in the case of Norwich were scheduled findings of fact by the court. In essence, this set of findings of fact forms the basis of the indicia to be discussed in this chapter. They represented a watershed moment in the TPC's protection of the rights of Aboriginal and Torres Strait Islander consumers and form a neat starting point from which to track the development of the law. It will be shown that courts have repeatedly called on these findings of fact in their decisions, strengthening and cementing their value as persuasive if not precedential.

In *ACCC v Keshow*,¹⁹⁹ Keshow sold educational materials to Aboriginal women living in remote Aboriginal communities in the Northern Territory. The case was decided by the Federal Court, which found that Keshow had engaged in unconscionable conduct²⁰⁰ in his dealings with the women as well as misleading and deceptive conduct. His questionable business practices included failing to provide a written contract, failing to provide copies of signed documents and failing to keep records of payments or provide receipts. These practices and the Aboriginal women's vulnerabilities led the court to conclude that Keshow had engaged in unconscionable conduct and misleading and deceptive conduct.

A number of cases have involved traders selling mobile phones and plans. Two cases involved the same trader, EDirect Pty Ltd, and the third involved Excite

¹⁹⁸ Deed between Norwich Union Life Australia Limited and the TPC dated 1992 at page 10 paragraph 5A of the 'Findings of Facts'.

¹⁹⁹ (2005) ATPR (Digest) 46-265; [2005] FCA 558.

²⁰⁰ This is as well as misleading and deceptive conduct.

Mobile.²⁰¹ All involved the sale of mobile phones and plans to Aboriginal and Torres Strait Islander people living in remote Australia where there was no coverage and where both the phone and plan purchased were useless.

Two further cases, one unsuccessful and one settled by an undertaking to the court, are, respectively, *ACCC v ACN 099814749*²⁰² and *ACCC v FDRA Pty Ltd (ACCC v FDRA)*.²⁰³ The former case centred involved unsolicited consumer agreements under the ACL relating to a tax return service provided to Aboriginal and Torres Strait Islander consumers in remote communities in the Northern Territory, which involved setting up a 'kiosk' or working out of a borrowed office. Following a technical reading of the law by the court, the application by the ACCC was dismissed. As this case was unsuccessful, it will be considered as a contrasting case. In the matter of *ACCC v FDRA*, the ACCC entered into a settlement distribution scheme. The facts of the case involved FDRA and its shareholder and director Jackson Anni selling electronic devices, namely tablets. Another case involving door-to-door sales was *ACCC v Titan Marketing Pty Ltd*.²⁰⁴ This case involved the selling of first aid kits and bench top water purifiers to two particular remote Aboriginal and Torres Strait Islander communities in Queensland. Another trader with a history of case law and unfavourable national media coverage is the Aboriginal Community Benefit Fund (ACBF); see *ASIC v Aboriginal Community Benefit Fund Pty Ltd*,²⁰⁵ *Aboriginal Community Benefit Fund v Chief Executive Centrelink Pty Ltd*²⁰⁶ and *Chief Executive Centrelink v The Aboriginal Community Benefit Fund Pty Ltd*.²⁰⁷

Two of the most recent cases have involved quite protracted court proceedings. The case of *ASIC v Kobelt*²⁰⁸ is the first case taken to court on the informal credit practice

²⁰¹ *ACCC v EDirect Pty Ltd* [2008] FCA 65; *ACCC v EDirect Pty Ltd* [2012] FCA 976; *ACCC v Excite Mobile Pty Ltd* [2013] FCA 350.

²⁰² [2016] FCA 403.

²⁰³ In *ACCC v FDRA Pty Ltd* [2016] FCA 429 the court made interlocutory orders and the case was withdrawn.

²⁰⁴ [2014] FCA 913.

²⁰⁵ [2004] FCA 178.

²⁰⁶ [2016] FCA 769.

²⁰⁷ [2016] FCAFC 153.

²⁰⁸ [2016] FCA 1327.

of book up. In this sense, it is a test case.²⁰⁹ This matter involved proceedings against Lindsay Gordon Kobelt by the ASIC for conduct related to book up.²¹⁰ In the first instance, Mr Kobelt was found to have been in breach of NCCP Act and the ACL's unconscionable conduct provisions. The case was successfully appealed in part as *Kobelt v ASIC*²¹¹ to the Full Federal Court by application of the trader, Mr Kobelt. While Mr Kobelt was still found to have acted contrary to the NCCP Act by charging for the book up credit,²¹² it was determined by the appeal court that he had not engaged in unconscionable conduct in breach of the ACL.²¹³ The other case is *ACCC v Channic*,²¹⁴ a reported case of over five hundred pages that involved the sale of second-hand motor vehicles and the provision of credit facilities in Cairns, regional Queensland. Finally, a number of other matters, including enforceable undertakings and enforcement agreements, will be considered, where legal action was commenced by the regulator but settled prior to a court decision.

Aboriginal and Torres Strait Islander Consumers: Indicia of Vulnerability and Disadvantage

Indicia 1 – Locational Impacts and Discrete and Remote Aboriginal and Torres Strait Islander Communities

Of the indicia, the most apparent relates to the locations in which Aboriginal and Torres Strait Islander consumers live and the nature of their communities. This is thereby Indicia 1. Overwhelmingly in the case law, when an Aboriginal and Torres Strait Islander person entered into the consumer transaction, they were living in a remote Aboriginal and Torres Strait Islander community. In some instances, the

²⁰⁹ The Full Federal Court appellate decision was handed down as this thesis was being submitted. Due to the timing of this, this thesis has acknowledged the recent appeal decision, though it does not include a detailed analysis. It is further noted that ASIC is seeking leave from the High Court to appeal the decision of the Full Federal Court.

²¹⁰ As previously explained, store credit, or 'book-up', was the way that Aboriginal and Torres Strait Islander people on reserves had been taught to be consumers for decades. Book-up has continued as a practice into the current day, and is still a type of informal credit extended by a business to a consumer without interest or fee. The legal history of book-up will be discussed in detail in Chapter 4.

²¹¹ [2018] FCAFC 18.

²¹² [2018] FCAFC 18 at [226].

²¹³ [2018] FCAFC 18 at [266]- [268].

²¹⁴ [2016] FCA 1174.

contact was made where the person lived and in other cases the person was visiting another place in a regional centre such as a hospital. In addition to the significance of the remoteness of the places where people lived was the nature of the place. Most of these were 'discrete' Aboriginal and Torres Strait Islander communities, meaning the communities were in some way legally designated as a place for Aboriginal and Torres Strait Islander people to live.

The fact of remoteness and its impact is relatively well understood by the courts. For example, in *ASIC v Kobelt* His Honour White J found:

[t]he remoteness of the communities and, in particular those of Mimili and Indulkana from where the majority of Mr Kobelt's customers came, was not in issue. ... Mintabie being 1,100 km north of Adelaide. ... The communities mentioned in the evidence, including Indulkana, Mimili, Fregon (Kaltjiti), Amata, Docker River, Uluru, Ernabella, Pipalyatjara, Kanypi, and Wingellina are to the north or the northwest from Mintabie and Finke is to the northeast. That is, they are still further from Adelaide. Three communities, Docker River, Finke and Uluru, are in the Northern Territory. Wingellina is in Western Australia.²¹⁵

As noted above in *ACCC v FDRA*, in the court undertaking given by the respondents, reference was made to an agreement by the trader with the regulator not to visit Lajamanu, Kalkarindji, Yarralin, Ngukurr, Jilkminggan, Barunga, Minyerri, Elcho Island, Maningrida and 'any other Indigenous community' for the purpose of selling goods or services.²¹⁶

Similarly, *Tots Images Photography Pty Ltd* also involved remote Aboriginal and Torres Strait Islander communities.²¹⁷ In *ASIC v Channic*, the respondent made a number of admissions including 'that Ms Kingsburra was a resident of the Yarrabah Aboriginal Community' but did not admit to having any 'knowledge of whether, as

²¹⁵ [2016] FCA 1327 at 240.

²¹⁶ *ACCC v FDRA Pty Ltd* [2016] FCA 429 at Schedule A para 1.

²¹⁷ *Tiny Tots Images Photography Pty Ltd Enforceable Undertaking* at paragraph 8.

alleged, Ms Kingsburra had very limited ability to negotiate and to protect her own interests when dealing with people outside of her community'.²¹⁸ In the matter of *Amazing Rentals Pty Ltd*, in excess of '2,500 customers Australia-wide were affected by the conduct, including consumers in a number of remote Aboriginal and Torres Strait Islander communities in the [Northern Territory]'.²¹⁹ All of the consumers involved in these transactions were living in remote Aboriginal and Torres Strait Islander communities at the time the transaction occurred.

In the *Insurance Cases*, the TPC investigator described the communities as 'typically very remote'.²²⁰ In *ACCC v Keshow*, heard in the Northern Territory, each of the Aboriginal and Torres Strait Islander communities were referred to as a 'closed community'.²²¹ This meant that visitors to the community were required to obtain a permit in order enter the community. Mansfield J granted an injunction restraining Keshow from entering the Aboriginal and Torres Strait Islander communities that were the subject of the case for a period of three years for the purposes of trading, as well as Aboriginal and Torres Strait Islander communities on freehold land under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and the *Aboriginal Land Act* (NT). Remoteness is therefore not only a geographical concept, but one that can be given clear expression within the law.

Orders specifically targeting discreteness as a subset of remoteness have been made on a number of occasions over the past ten years, either by consent or following a determination of the court. A recent example is *ACCC v Titan*, where Rangiah J, sitting as the trial judge, made a surprisingly wide-ranging order that Titan:

in respect of any Aboriginal and Torres Strait Islander community which has a requirement that visitors obtain permission from that community's elders or administrators in order to enter that community:

²¹⁸ *ASIC v Channic Pty Ltd (No 4)* [2016] FCA 1174.

²¹⁹ <http://asic.gov.au/about-asic/media-centre/find-a-media-release/2015-releases/15-141mr-asic-accepts-eu-from-amazing-rentals>

²²⁰ Ducret (1993).

²²¹ Another commonly used term is 'discrete communities'.

(a) be restrained for a period of five years from entering such communities for the purpose of selling or attempting to sell any goods, or soliciting customers for any business or company owned, operated or controlled by the first respondent or the second respondent, or with which the first respondent or the second respondent is involved in any manner, unless at least 21 days prior to so entering the community for that purpose, that respondent:

- a.1.1 has requested permission to so enter the community from the elders or administrators as the case may be and given notice of its purpose for doing so;
- a.1.2 at the time of that request, has provided copies of Annexures A, B and D to these Orders to the said elders or administrators;
- a.1.3 has received permission in writing from the said elders or administrators to so enter and remain in the community for the said purpose on specified dates;
- a.1.4 maintains a register comprising complete copies of such requests and the permission granted; and
- a.1.5 provides to the [ACCC] upon request copies of the documents containing such requests and any permission granted.²²²

As in the *Insurance Cases* and *ACCC v Keshow*, contracts with Aboriginal and Torres Strait Islander consumers were made as a result of a trader visiting an Aboriginal and Torres Strait Islander community to gain their business. By way of contrast, other cases where remoteness is a factor involved telemarketing directly to Aboriginal and Torres Strait Islander communities without having to physically travel to remote Australia. The facts of this case show that, while physical remoteness as presented and considered in the cases is a common feature, access into these communities does not always require a physical presence to make a contract. As the result of increasingly available telecommunications in remote locations, oral contracts are more regularly being made through verbal agreements, although door-

²²² [2014] FCA 913 at [9].

to-door sales within remote Aboriginal and Torres Strait Islander communities continue to be commonplace and problematic.

Communications technologies have had, and continue to have, a positive impact on the lives of people living in remote Aboriginal and Torres Strait Islander communities²²³; however, in allowing Aboriginal and Torres Strait Islander consumers access to goods and services remotely (that are otherwise unavailable locally), these communities have also become more accessible, and thus more vulnerable to unscrupulous traders using high pressure sales tactics such as telemarketing which do not require actual travel or face-to-face communication. The courts have directly commented on this issue. The court in the cases of *ACCC v EDirect Pty Ltd*²²⁴ (*EDirect (No.1)*), *ACCC v EDirect Pty Ltd*²²⁵ (*EDirect (No. 2)*) and *ACCC v Excite Mobile Pty Ltd*²²⁶ (*Excite Mobile*) raised two issues regarding misleading and deceptive conduct with respect to Aboriginal and Torres Strait Islander consumers in remote communities. The first issue was coverage due to remoteness. The second issue was knowledge and use of complaints mechanisms. The three cases all involved misleading and deceptive conduct pursuant to s 18 ACL.²²⁷ Two of the cases further raised matters with respect to unconscionable conduct pursuant to s 21 ACL.²²⁸

The first of these cases, *EDirect (No. 1)*, decided in 2008, involved the telemarketing of mobile phones and plans from a call centre overseas. Aboriginal and Torres Strait Islander people were sold mobile phones and plans intended to be used through the Optus network; however, for those Aboriginal and Torres Strait Islander people living in remote areas, the Optus network did not extend to their community – a fact that was misrepresented to them by the EDirect. His Honour Reeves J commented in his judgment directly on this point stating that:

²²³ Telecommunications also deliver essential social services such as communications during severe weather conditions such as the cyclones that occur in Northern Australia. See for example <http://www.abc.net.au/news/2017-12-13/new-wifi-wins-wujal-wujal-vital-communication-link-weather-qld/9252030>

²²⁴ [2008] FCA 65.

²²⁵ [2012] FCA 976.

²²⁶ [2013] FCA 350.

²²⁷ At the time it was the equivalent section of the TPA s 52.

²²⁸ At the time it was the equivalent section of the TPA s 51AB.

[The] most egregious aspect of EDirect's conduct was in it selling its mobile phones and service plans to people living in remote areas of Australia, including remote Aboriginal communities, when the slightest enquiry on its behalf would have disclosed that those mobile phones could not connect to the Optus GSM network because that network did not provide coverage to those remote areas of Australia.²²⁹

Isolation from information, financial services and complaints mechanisms was a second issue raised in *EDirect (No. 1)*. His Honour Reeves J found that:

[t]he likelihood of detection of these sorts of breaches is slight, particularly in remote areas of Australia, and for that reason the full force of the law should be brought to bear in circumstances where, as is in this case, the authorities have managed to detect such breaches.²³⁰

The case was decided against EDirect and they were found to have engaged in misleading or deceptive conduct.

Despite the harsh words of His Honour Reeves J in *EDirect (No. 1)*, EDirect were again before the Federal Court in a decision handed down in 2012 in *EDirect (No. 2)*. Aboriginal and Torres Strait Islander people living in remote communities were telemarketed mobile phones and plans from a call centre overseas for use through the Optus network. The network did not extend to the relevant remote communities and Aboriginal and Torres Strait Islander consumers were left with mobile phones and plans that did not work in their area, despite representations made to them by EDirect that coverage did exist. By the time of the Federal Court's decision, EDirect was in liquidation.²³¹ EDirect was found to have engaged in misleading and

²²⁹ [2008] FCA 65 at [6].

²³⁰ *ACCC v EDirect* [2008] FCA 65 at [32].

²³¹ To protect consumers and give them remedies, orders can be sought against directors for injunctions, compensation or remedial orders if they are 'involved in' the company's contravention. This requires proof that the directors had actual knowledge of the essential facts surrounding the

deceptive conduct. His Honour Reeves J considered whether breaches of unconscionable conduct had occurred, but for a range of reasons found that the matters in respect of unconscionable conduct did not have to be determined.

In the third case, *Excite Mobile*, handed down in 2013, allegations were made that Excite Mobile engaged in conduct similar to that of EDirect with respect to Aboriginal and Torres Strait Islander people. Claims were made by the regulator that Excite Mobile engaged in misleading and deceptive conduct and unconscionable conduct. Excite Mobile represented to Aboriginal and Torres Strait Islander people living in remote areas that the mobile phone and plan they were purchasing from Excite Mobile could be used in their community when in fact there was no coverage in their area. While there were similar facts to the case, the conduct of Excite Mobile went beyond that of EDirect. Excite Mobile created a fictitious debt collector and fictional complaint handling body to create a system wholly overseen by them. In *Excite Mobile*, important evidence was provided by an Aboriginal and Torres Strait Islander organisation, the Aboriginal and Torres Strait Islander Consumer Assistance Network, that was a key to the ACCC's success in prosecuting Excite Mobile.²³² The Central Australian Aboriginal Legal Aid Service also played an important role.²³³ Of significance in these cases is the consistent appearance of third parties that facilitate complaints to the regulator and evidence gathering for regulatory action. It seems such third parties are an important link between Aboriginal and Torres Strait Islander consumers in remote communities and the enforcement of the consumer law and its protections for them.

Aboriginal and Torres Strait Islander customers affected by the operations of Excite Mobile came from across north Queensland, the Northern Territory and Western Australia. Aboriginal and Torres Strait Islander people in remote communities were particularly affected. Excite Mobile were found to have engaged in both misleading and deceptive conduct and unconscionable conduct.

company's contravention. See *Yorke v Lucas* [1985] HCA 65; 158 CLR 661; 59 ALJR 776; 61 ALR 307; (1985) ATPR 40-622; Sections 232, 236 ACL.

²³² <http://consumersfederation.org.au/telco-ruling-a-brilliant-result-for-indigenous-consumer-network/>

²³³ <https://www.accc.gov.au/media-release/court-finds-excite-mobile-acted-unconscionably>

Though the cases discussed above generally involved consumer contracts made in remote Aboriginal and Torres Strait Islander communities, or people from those communities, there have been matters involving Aboriginal and Torres Strait Islander people living in more rural areas. For example, in the matter of *Zaam Rentals*,²³⁴ , which involved consumer credit leases, ASIC viewed Zaam Rentals as wilfully targeting ‘poorer areas in Mildura and surrounding areas in NSW, including Indigenous communities’.²³⁵

A separate action against another rental business was resolved with the *Amazing Rentals Pty Ltd Enforceable Undertaking* (Amazing Rentals EU). In this matter, one of the trader’s relevant locations was Darwin. The EU especially identified that ‘a number of Amazing Rentals’ consumers at the Darwin Store are Indigenous Australians, [and] live in regional or remote locations’.²³⁶ Yet another rental business was investigated in the *Home Essentials Australia Pty Ltd Enforceable Undertaking* (Home Essentials EU). In this matter, it was noted that the regulator was concerned ‘that Sales Representatives had attended Parnapajinya Aboriginal Reserve, outside of Newman, Western Australia and caused a number of persons [on Centrelink benefits] to sign Rent to Own Agreement with Home Essentials’.²³⁷

Of the communities referred to in *ASIC v Kobelt*, the court found that ‘[a]t all relevant times the APY Lands was comprised of remote and impoverished communities’.²³⁸ His Honour White J went on to state that ‘[i]t is plain that these are remote communities’.²³⁹ As to accessibility by motor vehicle, the court further found ‘with the exception of streets in the communities themselves, no other roads in the APY Lands are sealed’.²⁴⁰ Further to this, the court heard evidence ‘that only one community on the APY Lands had

²³⁴ <http://asic.gov.au/about-asic/media-centre/find-a-media-release/2013-releases/13-021mr-asic-takes-action-against-zaam-rentals-cancelling-its-licence-and-banning-its-directors/>

²³⁵ <http://asic.gov.au/about-asic/media-centre/find-a-media-release/2013-releases/13-021mr-asic-takes-action-against-zaam-rentals-cancelling-its-licence-and-banning-its-directors/>

²³⁶ *Amazing Rentals Enforceable Undertaking* at paragraph 2.5.

²³⁷ *Home Essentials Enforceable Agreement* at page 6.

²³⁸ [2016] FCA 1327 at [235].

²³⁹ [2016] FCA 1327 at [245].

²⁴⁰ [2016] FCA 1327 at [241].

mobile phone access'.²⁴¹

Indicia 2 – Little Understanding of Transaction

Indicia 2 references an Aboriginal and Torres Strait Islander consumer's understanding of the consumer transaction to which they are a party. This indicium would be considered by the court under s 22(1)(a) ACL or s 12CC ASIC Act as an example of 'inequality of bargaining power', and also s 22(1)(c) ACL as to 'whether the customer was able to understand any documents relating to the supply or possible supply of the goods or services'. In *ACCC v Keshow*, the court spoke of Keshow's 'preparedness to take advantage of the customers and of the respondent's customers by securing open-ended periodical payment forms in those circumstances',²⁴² which, in the court's judgment:

illustrates more than the relevant strengths of the bargaining positions [for example, s 22(1)(a) ACL] of the respondent on the one hand and of the complainants and of the respondent's customers on the other ... were it otherwise, his record keeping would have been quite different.²⁴³

The court continued, stating that Keshow ought to have realised that the Aboriginal women he contracted with did not have the 'normal commercial acumen'²⁴⁴ a trader would expect of a consumer. Within His Honour's judgment, Mansfield J found that Keshow's customers 'did not fully understand the nature of the transactions they entered into [and] did not have a full understanding of that document'.²⁴⁵ The court ultimately found that none of the complainants 'fully understood the nature of the transactions into which they entered', as also considered in s 22(1)(c) ACL.²⁴⁶ Equally, in the *Insurance Cases*, the ACCC (then TPC) argued 'the [insurance]

²⁴¹ [2016] FCA 1327 at [244].

²⁴² [2016] FCA 1327 at [241].

²⁴³ *ACCC v Keshow* [2005] FCA 558 at [102].

²⁴⁴ *ACCC v Keshow* [2005] FCA 558 at [102].

²⁴⁵ *ACCC v Keshow* [2005] FCA 558 at [101].

²⁴⁶ *ACCC v Keshow* [2005] FCA 558 at [101].

agents [took] gross advantage of the weaknesses of the consumers'²⁴⁷ and, furthermore, 'took advantage of the ignorance and trust of these people'.²⁴⁸

Interestingly, notwithstanding that the court in *ACCC v Keshow* found that some of the Aboriginal women complainants did not understand the documents while others did, His Honour Mansfield J nevertheless found there had been unconscionable conduct in relation to all of them. This is important, because the fact situation reflects the reality of Aboriginal and Torres Strait Islander communities, where community members have a range of educational backgrounds and differing levels of literacy and numeracy. In terms of the law, this demonstrates that in many if not all cases, Aboriginal and Torres Strait Islander people affected by the conduct of traders will possess a varying range of skills and competencies relevant to them as consumers. Some Aboriginal and Torres Strait Islander people will have a higher level of English literacy and numeracy while others will have a more limited proficiency. His Honour refers to each of the Aboriginal women complainants, and states that although they may have 'differing degrees of commercial exposure to commercial and business transactions and differing facility in communication in English',²⁴⁹ Keshow's 'way of operating led to the conclusion that his conduct in relation each of the respondent's customers was unconscionable'.²⁵⁰

His Honour Mansfield J identified that one of the complainants in *ACCC v Keshow* had no understanding of the form she was signing, which was a direct debit form in favour of Keshow and without any end date. Similarly, in the *Insurance Cases*, Aboriginal and Torres Strait Islander consumers had 'little understanding of either the concept or detail'²⁵¹ and 'in most cases they had no understanding of what they had purchased'.²⁵² In discussing the role of the trader in *ACCC v Titan*, the court made similar findings in respect of Titan, stating that they:

²⁴⁷ Ducret (1993), p 6.

²⁴⁸ Ducret (1993), p 6.

²⁴⁹ *ACCC v Keshow* [2005] FCA 558 at [107].

²⁵⁰ *ACCC v Keshow* [2005] FCA 558 at [107].

²⁵¹ Ducret (1993), p 6.

²⁵² Ducret (1993), p 6.

took no, or no reasonable, steps to ascertain whether the consumer with whom its sales representatives was negotiating understood or was capable of understanding the dealings with the sales representatives, including as to what the consumer was to receive, when the consumer was to receive it, how much it would cost the consumer and how the consumer was to pay for it.²⁵³

Consistent with this theme, in *Home Essentials EA* the consumers from Parnapajinya Aboriginal Reserve were said by the regulator to have ‘had limited or no ability to read or understand a legal or contractual document’.²⁵⁴

Indicia 3 – Use of Direct Debit Mechanisms

The issue of direct debit and deductions was another common and concerning feature within the facts of the cases, and is therefore Indicia 3. In the *Insurance Cases*, payroll deductions were set up whereby the local council, as the employer and the administrator of the work-for-the dole program, were directed to deduct payments as payroll deductions before the Aboriginal and Torres Strait Islander workers received their pay. In *ACCC v Keshow*, direct debits were made through electronic funds transfer through each of the Aboriginal and Torres Strait Islander consumer’s accounts. One of the complainants in *ACCC v Keshow*, an Aboriginal woman, was approached twice and signed two direct debit forms, even though the second form did not have any particular purpose as there was no second transaction.

Open ended periodical payments have been viewed ‘as the imposition of conditions by the respondent that were not reasonably required for the protection of the legitimate interests of the respondent’.²⁵⁵ Moreover, as a consequence of the intentional or unintentional failure by Keshow to properly monitor the automatic periodical payments deducted from his customer’s bank accounts, ‘the amounts paid

²⁵³ *ACCC v Titan Marketing Pty Ltd* [2014] FCA 913 at [5].

²⁵⁴ *Home Essentials Enforceable Agreement* at page 7.

²⁵⁵ *ACCC v Keshow* [2005] FCA 558 at [102].

by way of periodical payments in a number of instances well exceeded the amount for which (for example) television or DVD sets could have been procured'.²⁵⁶ Additionally, the court found that 'payment authorities went beyond that amount which the transactions with consumers at the time enabled' and thus were 'an additional feature leading to the unconscionability of the respondent's conduct'.²⁵⁷

Direct debit mechanisms, whether through a financial institution or through Centrepay, continue to be a common feature of the business of traders being investigated by both the ASIC and the ACCC. In *Home Essentials EU*²⁵⁸ the undertaking referred to the use of direct debit requests to electronically deduct funds from customers' accounts.²⁵⁹ In respect of the matter of *ACCC v FDRA*, His Honour White J accepted the respondent's undertaking that they would cease accepting all ongoing payments including any scheduled or automatic deductions and 'payments already in place'.²⁶⁰

Indicia 4 - Goods and Services Unsolicited

Another similarity in the cases is that the goods and services were unsolicited. This is therefore Indicia 4. The insurance policies sold in the *Insurance Cases* were sold using door-to-door sales techniques. This is not an issue in itself; however, such sales must be made in accordance with the consumer law.²⁶¹ In *ACCC v Keshow*, Keshow was not invited to visit the women at their homes, nor had he sought or obtained the permission from the community to visit the community. Such permission was required by law. The use of high pressure sales tactics in both these matters is significant, as it highlights an important aspect of the consumer transaction relating to real consent being given at the time of the sale, a matter reinforced by the litigation against EDirect by the ACCC, where in *EDirect (No.1)* His Honour Reeves J enquired about the recording of verbal agreements as evidence of a contract in this

²⁵⁶ *ACCC v Keshow* [2005] FCA 558 at [104].

²⁵⁷ *ACCC v Keshow* [2005] FCA 558 at [104].

²⁵⁸ *Home Essentials Enforceable Undertaking*.

²⁵⁹ *Home Essentials Enforceable Undertaking* at page 2.

²⁶⁰ [2016] FCA 429 at Sch A at [2].

²⁶¹ See now ss 39-42 ACL.

context ‘whether there was any regulatory regime in place that required telemarketing calls of the kind involved in this case to be recorded, especially where they involve oral contracts’,²⁶² and that such a regime would aid in ‘future detection’.²⁶³ Whilst unsolicited sales are not prohibited by law, the ACL and its State predecessors consider the nature of dealings in door-to-door sales to be high pressure, and provide cooling-off periods and other additional protections in recognition.

A counterpoint to the argument that door-to-door sales in remote Aboriginal and Torres Strait Islander communities are problematic and potentially exploitative is that traders who invite people in remote areas to buy their goods or services arguably provide access to products which might otherwise be unavailable. This might also include goods and services those people are not familiar with because the remoteness of their location limits their exposure to the consumer market. Despite the potential soundness of this argument, an important balance needs to be struck here, whereby consumers’ access to goods and services always occurs with protection from unscrupulous or predatory traders.

Indicia 5 – Products Inappropriate and/or Overvalued

Product appropriateness was another common denominator in the cases, and thus comprises Indicia 5.²⁶⁴ In the *Insurance Cases*, the sale of insurance to Aboriginal and Torres Strait Islander consumers did not give primacy to the needs of the individual in the transaction. Rather, ‘it appears that the agents simply sold policies which provided them with the largest commissions, not policies which were suitable for the clients’.²⁶⁵ There was ‘[no] consideration of the most appropriate product’.²⁶⁶ Similarly, the educational materials and other goods provided by Keshow to the complainants were ‘products of little value’ and the ‘materials not needed or

²⁶² [2008] FCA 65 at [33].

²⁶³ [2008] FCA 65 at [33].

²⁶⁴ Relevantly, there are now ss 961E and 961G of the Corporations Act which require consideration of the best interest of the client and appropriate advice to the client, respectively.

²⁶⁵ *ACCC v Keshow* [2005] FCA 558 at [115].

²⁶⁶ Ducret (1993), p 6.

useful'.²⁶⁷ In *ACCC v Keshow*, educational materials provided to one of the women were entirely inappropriate for the age of her child, who at the time was only eight months old. His Honour in fact states that 'It is self-evident that the educational material had no immediate relevance to [her] child, and that most of it would be of no use for some years'.²⁶⁸

The *Insurance Cases* investigation further revealed an 'inadequate examination of consumer needs'²⁶⁹ and a failure on the part of the agent to explore each person's individual needs in purchasing insurance.²⁷⁰ Significantly, there has been a change to the law since these cases with the introduction of s 961B Corporations Act. That section outlines the requirements regarding financial advice, which includes insurance. Specifically, pursuant to s 961B (1), the trader has a duty to 'act in the best interests of the client in relation to the advice'. The trader will only be taken to have satisfied this if they can prove that they have per s 961B (2), inter alia:

(a) identified the objectives, financial situation and needs of the client that were disclosed to the provider by the client through instructions;

(b) identified:

(ii) the objectives, financial situation and needs of the client that would reasonably be considered as relevant to advice sought on that subject matter (the ***client's relevant circumstances***);

...

advice on the subject matter sought and, if not, declined to provide the advice;

...

(e) if, in considering the subject matter of the advice sought, it would be reasonable to consider recommending a financial product:

(i) conducted a reasonable investigation into the financial products that might achieve those of the objectives and meet

²⁶⁷ *ACCC v Keshow* [2005] FCA 558 at [115].

²⁶⁸ *ACCC v Keshow* [2005] FCA 558 at [115].

²⁶⁹ *ACCC v Keshow* [2005] FCA 558.

²⁷⁰ Ducret (1993), p 6.

those of the needs of the client that would reasonably be considered as relevant to advice on that subject matter.

More recently, in *Home Essentials EA*, the consumers from Parnapajinya Aboriginal Reserves were said by the regulator to have no knowledge, awareness or ‘opportunity to ascertain the fair market value of the Goods prior to entering into a Rent to Own Agreement’.²⁷¹ In *Amazing Rentals EU*, it was noted that the trader conduct at its Darwin store failed to ‘make reasonable inquiries about the consumer’s requirements and objectives in the consumer lease’.²⁷²

Indicia 6 – Language Differences (s 22(1)(c) ACL)

Indicia 6 relates to language differences in both verbal and written communication. Many of the cases that have come before the courts involve Aboriginal and Torres Strait Islander consumers for whom English is their second or third language. While a form of English was spoken by most if not all of the consumers in these cases, it is not Standard Australian English. In remote Aboriginal and Torres Strait Islander communities, different forms of English are spoken. Literature in the field of linguistics clearly recognises the existence of Aboriginal English spoken in remote Aboriginal communities and Torres Strait Creole spoken in remote Torres Strait Islander communities. These forms of English incorporate traditional languages and in some cases other languages present in the region such as Malay, Indonesian and Japanese. Consequently, any discussions between traders and Aboriginal and Torres Strait Islander consumers could quite easily lead to talking at cross purposes, or at the very least having a somewhat different understanding of the discussions which had taken place. This is clearly evidenced by the words of one Aboriginal man interviewed by the ACCC when he states:

Aboriginal languages are very different from English. This makes it hard for the people to understand the English. They use the negative differently. If

²⁷¹ *Home Essentials Enforceable Agreement* at page 7.

²⁷² *Amazing Rentals Enforceable Undertaking* at paragraph 2.5.

they are asked “Did you or did you not do that”, they will say ‘Yes” meaning, “Yes, I did not do it”.²⁷³

In relation to language in the *Insurance Cases*, the ACCC found that in respect of a number of the Aboriginal and Torres Strait Islander consumers, English was not the first language, and that ‘a significant number are completely unable to read and write’.²⁷⁴ In *ACCC v Keshow*, His Honour Mansfield J found that the Aboriginal and Torres Strait Islander consumers commonly ‘have poor English skills’²⁷⁵ and that in case of one consumer, ‘English is her second language’.²⁷⁶ The court in its findings stated that the women’s ‘oral evidence convinces me each of the complainants reacted to the respondent’s approaches with diffidence and passive acquiescence’.²⁷⁷

In the case of *ACCC v Titan*, the court found that Titan ‘took no, or no reasonable, steps to ascertain whether the consumer with whom its sales representatives was negotiating was capable of reading and understanding the agreement documents’.²⁷⁸ In *Home Essentials EA*, the consumers from Parnapajinya Aboriginal Reserves were said by the regulator to have ‘had a limited ability to understand written English’.²⁷⁹ In *Amazing Rentals EU*, it was noted that Aboriginal and Torres Strait Islander customers from remote communities who visited the trader’s Darwin store generally did not have English as their first language.²⁸⁰ Moreover, the trader ‘did not use an interpreter when speaking to consumers’ where English was not the consumer’s first language.²⁸¹

Indicia 7 – Failure to Assess Financial Situation

²⁷³ Ducret (1993), p 6.

²⁷⁴ Ducret (1993), p 6.

²⁷⁵ [2005] FCA 558 at [30].

²⁷⁶ [2005] FCA 558 at [30].

²⁷⁷ [2005] FCA 558 at [30].

²⁷⁸ [2014] FCA 913 at [5].

²⁷⁹ *Home Essentials Enforceable Agreement* at page 7.

²⁸⁰ *Amazing Rentals Enforceable Undertaking* at paragraph 2.6.

²⁸¹ *Amazing Rentals Enforceable Undertaking* at paragraph 2.8.

Indicia 7 relates to the ongoing issue of the failure of traders to properly assess a person's financial situation.²⁸² In *ACCC v Keshow*, there was 'no apparent consideration of [the consumer's] financial position'.²⁸³ Moreover, Keshow was found to be 'targeting ... people who were not in a solid position to enter into long term financial commitments'.²⁸⁴ In *ASIC v Kobelt*, the court found Kobelt's customers were at all relevant times Aboriginal and Torres Strait Islander residents of the APY Lands, and in the overwhelming majority of cases 'had very limited or no net assets' and 'very limited net income'.²⁸⁵ As confirmation of this, Counsel for Kobelt acknowledged in putting Kobelt's case to the court that it would be reasonable for it to find that the majority of Kobelt's customers 'had very limited, or no, assets and had limited or very limited net incomes'.²⁸⁶ Even more critical still of his behaviour, the court found that Kobelt 'was indifferent as to whether his customers could, having regard to their financial position generally, afford the commitment to him'.²⁸⁷ Similar problems have been identified around consumer credit leases and the trader's failure to assess the Aboriginal and Torres Strait Islander consumer's financial situation. In *Amazing Rentals EU*, it was noted that the trader at its Darwin store failed to 'make reasonable inquiries about the consumer's financial situation [and] take reasonable steps to verify the consumer's financial situation'.²⁸⁸

Indicia 8 – Limited Commercial Experience of the Consumer

²⁸² Since 2011, s 117 of the NCCP Act requires reasonable inquiries about, inter alia, the consumer's requirements and objectives in relation to the credit contract and their financial situation, and must take reasonable steps to verify the consumer's financial situation. Section 961B Corporations Act sets out a number of reasonable steps that the provider may take to discharge this duty. The providers are required to prove that they identified the type of advice sought by the client and the relevant objectives, financial situation and needs of the client. The providers must have made reasonable inquiries to obtain the relevant information. They must only give the advice if they have the relevant expertise. They must conduct a reasonable investigation into the financial products that might meet the client's needs and achieve their objectives. They must base their advice on all of the client's relevant circumstances and take all steps in providing the advice that would reasonably be regarded as acting in the client's best interest according to s 961B Corporations Act. Furthermore, s 961G states that the provider has a statutory duty to provide advice that is appropriate to the client.

²⁸³ Ducret (1993), p 6.

²⁸⁴ Ducret (1993), p 6.

²⁸⁵ [2016] FCA 1327 at [235].

²⁸⁶ [2016] FCA 1327 at [237].

²⁸⁷ [2016] FCA 1327 at [621].

²⁸⁸ *Amazing Rentals Enforceable Undertaking* at paragraph 2.6.

Also common to the cases to date is the limited commercial experience of Aboriginal and Torres Strait Islander people in consumer transactions. In summary, Indicia 8 means that the Aboriginal and Torres Strait Islander consumers involved had little to no commercial experience and low levels of financial literacy compared to the wider community.²⁸⁹ One of the agreed facts as noted in the Norwich Deed was that the 'residents are unfamiliar with commercial transactions other than those of a simple and basic kind'.²⁹⁰ Along similar lines, the court in *ACCC v Keshow* found that Keshow 'took advantage of the lack of ... commercial experience of those in the communities'.²⁹¹ In limiting the way in which this indicia might be interpreted, the court went on to explain that limited financial and commercial literacy alone is not enough to amount to unconscionable conduct.²⁹² It qualified this by highlighting that the 'literacy and numeracy skills ... [of the Aboriginal women] was typically very low'.²⁹³ A related issue, affected by both geographical factors and access to services and justice issues more widely, is that Aboriginal and Torres Strait Islander consumers living in remote places (such as in the *Insurance Cases*) often have very limited or no access to independent financial or legal advice before entering into a consumer contract.²⁹⁴ For reference to financial services/products now see ss 961B-961E Corporations Act, discussed above.

In *ASIC v Kobelt*, His Honour White J found that most of Kobelt's book up customers had low levels of financial literacy. His Honour White J further found that:

[b]y reason of the limitations on their literacy, numeracy and ability to communicate in English, the Anangu [people] do not have the competence of most Australians in the wider community to make informed decisions concerning the use of financial services.²⁹⁵

²⁸⁹ Ducret (1993), p 6.

²⁹⁰ Deed between Norwich Union Life Australia Limited and the TPC dated 1992 at page 4 paragraph 14 of the 'Agreed Statement of Facts'.

²⁹¹ [2005] FCA 558 at [3].

²⁹² [2005] FCA 558 at [3].

²⁹³ Ducret (1993), p 6.

²⁹⁴ Ducret (1993), p 6.

²⁹⁵ [2016] FCA 1327 at [419].

Within its submissions, ASIC sought to highlight the connection between remoteness and commercial experience, arguing that many of Kobelt's customers, who were predominantly Aboriginal people from the APY Lands, 'had low levels of financial literacy' and 'mainstream banking services are not available on the APY Lands'.²⁹⁶ ASIC went on to explain that:

An Anangu [Aboriginal person from APY Lands] wishing to do business with a bank will have to travel to Coober Pedy, Port Augusta or Alice Springs, each of which would involve a journey of considerable distance. This makes it difficult for APY residents to develop familiarity with the use of financial institutions. The lack of ready access to mainstream banking facilities may in part be an explanation for an absence of financial awareness of some residents.²⁹⁷

An extraordinary example of the limits of people's commercial experience was one of Kobelt's customers who, through an interpreter, said that they did not know of any other means of purchasing a car with credit except for book up. The customer had no knowledge of the existence of bank loans, and that they could be used to buy a car or any other type of goods.²⁹⁸

However, in light of the recent Full Federal Court decision in *Kobelt v ASIC*, the court has taken a turn in its consideration of this indicium in the context of book up in that case. Specifically, Besanko and Gilmour JJ found that 'the fact that Nobbys' customers understood the basic elements of the book-up (sic) arrangements and voluntarily entered into them is a powerful consideration against a finding of unconscionable conduct'.²⁹⁹ Moreover, Besanko and Gilmour JJ were 'not satisfied that [Mr Kobelt's] conduct was predatory in the relevant sense'.³⁰⁰ Wigney J agreed that there was no unconscionable conduct on the part of Mr Kobelt in this matter.³⁰¹

²⁹⁶ [2016] FCA 1327 at [246].

²⁹⁷ [2016] FCA 1327 at [247].

²⁹⁸ [2016] FCA 1327 at [316].

²⁹⁹ [2018] FCAFC 18 at [266].

³⁰⁰ [2018] FCAFC 18 at [267].

³⁰¹ [2018] FCAFC 18 at [387].

Other matters though investigated by the regulators have found Aboriginal and Torres Strait Islander consumers involved in the cases to have limited commercial experience. In *Home Essentials EU*, the consumers from Parnapajinya Aboriginal Reserves were said by the regulator to have ‘had limited or no commercial experience in commercial matters’.³⁰² Similarly, in *Amazing Rentals EU*, it was noted that Aboriginal and Torres Strait Islander customers from remote communities visiting the trader’s Darwin store generally ‘have limited access or exposure to other mainstream retail and/or credit services’.³⁰³ *ACCC v Titan* found that the trader for their part ‘took no, or no reasonable, steps to ensure that the consumer with whom its sales representatives was negotiating was informed of, or understood, their ... rights under the ACL in relation to unsolicited consumer agreements’.³⁰⁴

Indicia 9 – Product Explanation

Indicia 9 covers the product explanation given by the trader to the Aboriginal and Torres Strait Islander consumer. Product explanation was an issue that arose in the *Insurance Cases* and in *ACCC v Keshow*. In this respect, it was found in the *Insurance Cases* that there was ‘minimal explanation of product’,³⁰⁵ while in *ACCC v Keshow*, Keshow ‘did not explain how much the folders or educational material would cost or how they would be paid for’.³⁰⁶ In *ACCC v Keshow*, there was not even a written contract to provide a description of the product or any detail regarding the material being purchased, with the court finding there had been ‘minimal explanation of product’.³⁰⁷

In the cases, the court found that the traders’ circumstances were the polar opposite of those of the Aboriginal and Torres Strait Islander consumers. This is explained succinctly in the Norwich Deed, where a trader’s circumstances made them:

³⁰² *Home Essentials Enforceable Undertaking* at page 7.

³⁰³ *Amazing Rentals Enforceable Undertaking* at paragraph 2.5.

³⁰⁴ [2014] FCA 913 at [5].

³⁰⁵ Ducret (1993), p 6.

³⁰⁶ *ACCC v Keshow* [2005] FCA 558.

³⁰⁷ Ducret (1993), p 6.

- an experienced insurance agent;
- well versed in the meaning of the terms and conditions of insurance policies and in the rights and obligations under;
- a literate and articulate person who had a reasonable level of education;
- a financial interest in securing the entry into policies of insurance by residents of the [Aboriginal and Torres Strait Islander] Community; [and]
- took advantage of the inequality of bargaining power and the position of relative disadvantage of the [Aboriginal and Torres Strait Islander] consumers.³⁰⁸

Conclusion: Court Conceptions of Aboriginal and Torres Strait Islander Consumers

Importantly, the nine indicia outlined above have developed over time and have delivered positive outcomes for the individual Aboriginal and Torres Strait Islander consumers involved in the relevant cases. More broadly, they have also created an image externally of Aboriginal and Torres Strait Islander consumers as deficient. While this negative perception has been used to successfully prove breaches against traders in their dealings with Aboriginal and Torres Strait Islander people, this is unduly limiting.

The law does not solely require the court to look at ‘deficiencies’ in the consumer, but rather can also consider ‘circumstances’. Courts over the past fifteen years have received evidence that cultural circumstances impact the consumer contracts made by Aboriginal and Torres Strait Islander people. Despite this, courts have continued to determine Aboriginal and Torres Strait Islander consumer complaints based on the deficit indicia outlined above. Going forward, I will argue that the courts should continue to receive evidence of cultural circumstances, and rely on it where it is relevant. Arguably, ‘cultural circumstances’ could be considered under the new s 961E Corporations Act as a possible place to consider cultural factors. For

³⁰⁸ Deed between Norwich Union Life Australia Limited and the TPC dated 1992 at page 11 paragraph 5C of the ‘Findings of Facts’.

example, it would reasonably be regarded as in the best interests of the client to take a step if a person with a reasonable level of expertise in the subject matter of the advice sought by the client, who exercised care and objectively assessed the client's relevant circumstances, would regard it as in the best interests of the client, given the client's relevant circumstances, to take that step. A law reform option might be to expressly require 'cultural circumstances' to be considered in such provisions.

Such determinations would require a more complex assessment of the facts, and would thereby present a truer reflection of the actual circumstances that impact Aboriginal and Torres Strait Islander consumers. A keener approach is needed because the court's current approach is limited, in that it ignores and thus obscures the racialised and cultural aspects of the problem, which restricts the potential protection available to Aboriginal and Torres Strait Islander consumers. This will be discussed in more detail in Chapter 3.

In the context of criminal matters involving Aboriginal and Torres Strait Islander defendants, Eades argues:

a focus on problems experienced by Aboriginal people can sometimes connect to a deficit view of Aboriginal identity and social practice. This can result in a situation in which the court may be prevented from engaging in effective intercultural communication.³⁰⁹

She further contends that in contemporary courtrooms at times 'judicial officers [are] fundamentally misapprehending the nature of [Aboriginal and Torres Strait Islander] identity in a post-colonial society'.³¹⁰ Key to a judicial officer's understanding of Aboriginal and Torres Strait Islander identity, culture and day-to-day living is that 'Aboriginal Australians who live in an urban environment do not lose their Aboriginal identity' because they live in an urbanised location.³¹¹

³⁰⁹ Eades (2016), p 472.

³¹⁰ Eades (2016), p 474.

³¹¹ Eades (2016), p 475.

In making these statements, Eades is emphasising the importance of knowing that Indigeneity should be considered as potentially relevant in all cases.

The narrow approach that I have indicated above focuses on a 'type of circumstances' (such as limited levels of education, literacy, numeracy and the like) and not 'all relevant circumstances' (such as cultural considerations). An unnecessarily narrow approach negatively impacts on the effectiveness of the existing consumer protection legislation. Such interpretation does a disservice to Aboriginal and Torres Strait Islander consumers by routinely/consistently including some considerations (namely the nine indicia) and excluding others (such as cultural factors and language factors); thus, the potential for the consumer law to protect Aboriginal and Torres Strait Islander consumers is much greater than its current application.

This chapter started with a succinct set of key findings of fact which were identified as the starting point for the development of the indicia outlined above. Twenty-five years later, the findings of the court in matters involving Aboriginal and Torres Strait Islander consumers do not look that much different. For example, in *ACCC v Titan*, the court found in respect of one Aboriginal and Torres Strait Islander consumer that:

- the consumer was a resident of the Wujal Wujal Home and Community Care Centre;
- the consumer had a limited ability to read, write or understand English;
- the sales representative of the First Respondent called upon the consumer unsolicited at his place of residence in the Wujal Wujal Home and Community Care Centre;
- the sales representative called upon the consumer for the purpose of negotiating an unsolicited consumer agreement for the supply of a first aid kit and a bench top water filter to him;
- the sales representative presented contractual documents, including a pro forma contract and a form authorising direct debit payments from his bank account, to the consumer to sign, which he did;

- the consumer was not able to understand the contractual documents for the supply of the first aid kits and the water filter ... ; and
- the consumer was not capable of understanding the dealings with the sales representative without assistance.³¹²

In respect of another Aboriginal and Torres Strait Islander consumer, it was found:

- the sales representative called upon the consumer unsolicited at her place of residence in the Imabulk Centre Aged Care facility within the Belyuen Community for the purpose of negotiating an agreement for the supply of a first aid kit to her;
- the consumer was not able to read or write English;
- the sales representative did not inform the consumer, before starting to negotiate, or at all, that the sales representative's purpose of calling on her was to seek her agreement to a supply of a first aid kit;
- the sales representative did not inform the consumer, before starting to negotiate, or at all, that he was obliged to leave her premises immediately on her request;
- the sales representative did not inform her how much the goods would cost in total;
- the sales representative did not inform the consumer what she was buying or when she would receive the goods;
- the sales representative was informed by the consumer that she could not read English;
- the sales representative filled in contractual documents for the consumer to sign;
- the sales representative presented the contractual documents, including a pro forma contract and a form authorising direct debit payments from her bank account, to the consumer to sign, which she did;

³¹² [2014] FCA 913 at [5].

- the sales representative did not ask whether the consumer required assistance to sign the contract or whether she understood the dealings with the sales representative; and
- the consumer was not able to understand the contractual documents for the supply of the first aid kit.³¹³

Continuing to formulate findings in respect of Aboriginal and Torres Strait Islander consumers in this way entrenches stereotypes of ‘disadvantage’ as the primary reason for consumer ‘vulnerability’. In doing this, the courts ignore the relevance of circumstances relating to culture or race-based laws and policies that could provide important insights into consumer ‘vulnerability’. There is a black elephant in the room. It is suggested that courts take a more substantive approach that is informed by the expertise of linguists and anthropologists in the way it prioritises facts and sees the circumstances. Some courts are trying to take a more substantive approach but fail; others should be taking a more substantive approach but do not. In a sense, Aboriginal and Torres Strait Islander consumers’ Indigeneity in the case law is being equated with ‘disadvantage’. The nine indicia listed above are not the essence of Indigeneity. They never have been and they never will be. This chapter argues that if the courts can see Indigeneity as Aboriginal and Torres Strait Islander people see it, that the consumer protection law will be able to better protect Aboriginal and Torres Strait Islander consumers.

In responding to the *Insurance Cases*, the Chair of the TPC at the time expressed his views on approaches to protect Aboriginal and Torres Strait Islander people as consumers as including ‘consumer education’, ‘working with Aboriginal and Torres Strait Islander communities’ and a non-mandatory ‘Storecharter’ for stores operating in Aboriginal and Torres Strait Islander communities to alleviate the impact of book up.³¹⁴ His view of ‘working with Aboriginal and Torres Strait Islander communities’ included awareness raising, investigations, research, community visits, a dedicated phone number for Aboriginal and Torres Strait Islander people to contact the regulator, cultural-awareness training for regulator staff dealing with Aboriginal and

³¹³ [2014] FCA 913 at [5].

³¹⁴ Fels (2002), p 1.

Torres Strait Islander people, and targeted communication and publications.³¹⁵ These approaches remain options worth considering. Strategies for improved consumer protection of Aboriginal and Torres Strait Islander people will be discussed in the final chapter (Chapter 8).

Regulators may also need to consider the way litigation is run. As private litigants can run their own litigation under ACL and the ASIC Act, private litigants' lawyers should be considered here too. An Aboriginal and Torres Strait Islander plaintiff has a better opportunity to relate vulnerabilities to their own private lawyer rather than to the regulator's lawyers, who are employed and instructed by the regulator. Levels of knowledge, understanding and insight into the cultural circumstances of Aboriginal and Torres Strait Islander consumers, whether as plaintiffs or complainants, will depend of the nature, type and quality of information being relayed by the consumer to the regulator or lawyer. Judges can only respond to the evidence and submissions presented to them in court. Thus, in this regard, the Chair's suggestion seems apt. Educating staff who work for the regulators and the lawyers of Aboriginal and Torres Strait Islander complainants about cultural matters, and gathering information from those complainants for litigation may help to address this 'deficit' discourse and redress the imbalance.

³¹⁵ Fels (2002), p 2.

Chapter 3 – Priority of Values: Relationships Come First

This chapter explores the conceptual approaches of McDonnell and Martin³¹⁶ and Cooter³¹⁷ as a way of theorising how Aboriginal and Torres Strait Islander consumers prioritise their values and how such values might inform Aboriginal and Torres Strait Islander consumer decision-making. This chapter comprises three parts. The first part discusses McDonnell and Martin's concept of the 'frontier economy' in respect of Aboriginal and Torres Strait Islander consumers, and Cooter's work on relationships as the foundation of customary law. The second part analyses how the law in Australia has an established jurisprudence which recognises that relationships play a fundamental socio-cultural role in Aboriginal and Torres Strait Islander people's day-to-day decision-making processes, as well as a legally relevant role in Australia's common law system. In the third part of this chapter, the case of *ACCC v Keshow* will be examined through the lens of McDonnell and Martin's frontier economy and Cooter's customary law relationships to show that the theory can be seen in practice. The chapter will conclude by showing that the values of Aboriginal and Torres Strait Islanders, which are based on cultural norms and obligations, influence their consumer decision-making. Moreover, it will demonstrate how relationships derived from these cultural norms and obligations – what can be termed 'relationality' – can be a powerful determinant of Aboriginal and Torres Strait Islander consumer behaviour.

Drivers of consumer behaviour have long been studied. Cultural assumptions which underpin work on consumer behaviour have been informed by 'Western' ideas about consumer behaviour such as 'possessive individualism',³¹⁸ 'the rational, economic man',³¹⁹ self-seeking, and weighing up the cost against benefit outcomes. Such cultural assumptions cannot simply be applied to Aboriginal and Torres Strait Islander communities, because the same types of consumer behaviour cannot be expected to exist if and when there are different and potentially competing cultural

³¹⁶ McDonnell and Martin (2002), p 25.

³¹⁷ Cooter (1989).

³¹⁸ Cunneen and Rowe (2014).

³¹⁹ Cunneen and Rowe (2014).

interactions. Such cultural interactions and their influence on the behaviour of Aboriginal and Torres Strait Islander people within the consumer context is an area which has seen limited consideration and thus forms the basis of the discussion in this chapter.

Related to this is the incompatibility of Aboriginal and Torres Strait Islander laws and the common law system in Australia. This challenge has perhaps been most prominently debated in the area of native title law and the recognition of native title rights through the framework of the common law system in case law and in statute - though the issues of incompatibility applies system-wide. On this point, the Australian Law Reform Commission found that:

There is only very limited scope in Australia for courts to take judicial notice of particular Aboriginal rules or customs, or to rely on previous decisions on these matters. The reasons for this include:

- the variability of Aboriginal customary laws between different groups;
- their differing application depending on the circumstances of each case;
- the court's incapacity directly to develop or control them;
- the need for flexibility; and
- the fact that they are generally not recorded in writing.³²⁰

Competing Values and the 'Frontier Economy'

One of the key research publications in Australia specifically considering Indigenous consumer issues is *Competition and Consumer Issues for Indigenous Australians*.³²¹ It is an edited collection of works by academics focused on Aboriginal and Torres Strait Islander people and economics. Within the collection, McDonnell and Martin present a framework to understand Aboriginal and Torres Strait Islander views of money and the business behaviour of Aboriginal and Torres Strait Islander consumers through the concept of the 'frontier economy'. Their conceptual

³²⁰ Australian Law Reform Commission at [622].

³²¹ Altman and Ward (eds) (2002).

framework endeavours to provide broad insights into the interaction between Western economic values and what could be equated as the economic values of Aboriginal and Torres Strait Islanders. In doing so, it compares and contrasts the economic values of both Aboriginal and Torres Strait Islander people and non-Indigenous people.³²²

The concept of the frontier economy is defined by McDonnell and Martin as ‘the intersection between specific Indigenous economic values and practices, and those of the general market-based economy’.³²³ To illustrate the concept they use two overlapping circles.

The frontier economy model is centred on intersecting values. It has a non-Indigenous domain and an Aboriginal and Torres Strait Islander domain.³²⁴ Each domain contains distinct cultural economic values that overlap, resulting in a frontier economy.³²⁵ Pearson³²⁶ explored the overlap between Aboriginal and Torres Strait Islander and non-Indigenous domains and presented his own view on it in terms of what he named the ‘recognition space’. He defined this as ‘the space between two systems [of law]’.³²⁷ Nakata has taken a similar conceptual approach to understand the place where Aboriginal and Torres Strait Islander and non-Indigenous ‘knowledge, systems and practices’ overlap, which he terms the ‘cultural interface’.³²⁸ He defines the ‘cultural interface’³²⁹ as the:

³²² A limitation of McDonnell and Martin’s work is that it is applied specifically to remotely-located community stores and the stores’ interactions with the community, and not more broadly across different locations; however, it does touch on the portability of cultural values as the values attached to the person not the place.

³²³ McDonnell and Martin (2002), p 27.

³²⁴ It should be explained at this point that the use of the term ‘Aboriginal’ here reflects the work of MacDonnell and Martin in their study involving Aboriginal participants specifically, and not Aboriginal and Torres Strait Islander participants. In the context of examining cultural issues in this thesis it is important to acknowledge the cultural distinction where relevant and appropriate. In the discussion that follows some quotes may specifically contain the alternative terms ‘Aboriginal’ or ‘Indigenous’.

³²⁵ McDonnell and Martin (2002), p 27.

³²⁶ Pearson (1997).

³²⁷ Pearson (1997).

³²⁸ Nakata (2007a).

³²⁹ He expands on this concept in his work *Savaging the Disciplines: Disciplining the Savages*. See Nakata (2007b).

contested space between the two knowledge systems ... things are not clearly black or white, Indigenous or Western. In this space are histories, politics, economics, multiple and interconnected discourses, social practices and knowledge technologies which condition how we all come to look at the world, how we come to know and understand our changing realities in the everyday, and how and what knowledge we operationalise in our daily lives. Much of what we bring to this is tacit and unspoken knowledge.³³⁰

Rigney's work on 'Indigenist' research theorises that 'cultural assumptions throughout dominant epistemologies [in] Australia are oblivious of Indigenous traditions and concerns'.³³¹ He emphasises that 'Indigenous Peoples think and interpret the world and its realities in different ways from non-Indigenous Peoples because of their experiences, histories, cultures, and values'.³³² These three Aboriginal and Torres Strait Islander scholars (Pearson, Nakata and Rigney) agree that differences between Aboriginal and Torres Strait Islander values and non-Indigenous values exist and that they must necessarily be acknowledged and engaged with to truly understand the worldview of Aboriginal and Torres Strait Islander people.

Legal plurality relates to the existence of two or more legal systems occupying the one space and can therefore be used as a lens through which to examine these differences. In perhaps a paradoxical take in support of the notion that Australia is a legal pluralist state, Kelly³³³ argues that Aboriginal and Torres Strait Islander people in Australia actually lived in a pluralist state prior to British colonisation, as neighbouring Aboriginal and Torres Strait Islander groups concurrently maintained local legal systems. Neighbouring systems were able to exist side-by-side as each had sufficient flexibility for interaction with bordering groups' systems to maintain a

³³⁰ Nakata (2007a), p 9.

³³¹ Rigney (1999), p 113.

³³² Rigney (1999), p 113.

³³³ Kelly (2014).

balance of order and harmony.³³⁴ Consistent with this view, Briggs further contends that:

There is also no Pan-Indigenous paradigm and Indigeneity is pluralistic and diverse. However, it is possible to have some shared elements, partly because Indigenous peoples tend to share a strong orientation to land and place, often as the first peoples of a place and as people tightly bound to it. Other connections are important too, leading to tendencies to emphasise multiple connection among land, ancestors, human kin, generations to come and beings and processes of the wider world.³³⁵

Lechleitner concurs with this contention. His approach explores differences and similarities in the laws used by different Aboriginal and Torres Strait Islander groups, such as the concept and practice of punishment, noting that these laws are based on the 'environmental setting'.³³⁶

Each domain in the frontier economy contains cultural values. In this case, these domains are the Aboriginal and Torres Strait Islander domain and the non-Indigenous domain. McDonnell and Martin focus on the values that sit within each of these domains,³³⁷ and argue that these values can and do differ.³³⁸ They contend 'the particular understandings and values that [Aboriginal and Torres Strait Islander] people bring to bear in their engagement with the wider economy are more significant than their geographical location'.³³⁹ Equally, they note that "remoteness" ... may nevertheless be a contributing factor to the specific characteristics of that economy in remote Australia'.³⁴⁰ McDonnell and Martin's concept extends to 'Aboriginal [and Torres Strait Islander] people, in their choices and actions as

³³⁴ Kelly (2014), p 45.

³³⁵ Brigg (2015), p 196.

³³⁶ Lechleitner (2013), p 7.

³³⁷ Altman has conceived of the concept of the 'hybrid economy', which is distinct from the 'frontier economy' concept used in this thesis. Altman's hybrid economy has as its focus economic development in the context of Aboriginal and Torres Strait Islander communities. For a comprehensive discussion of Altman's body of work on the hybrid economy see Curchin (2013).

³³⁸ McDonnell and Martin (2002), p 25.

³³⁹ McDonnell and Martin (2002), p 29.

³⁴⁰ McDonnell and Martin (2002), p 29.

consumers, [that] bring to bear values and practices that derive their forms and meanings from the Aboriginal [and Torres Strait Islander] domain', and argue that such values differ from the values of non-Indigenous people.³⁴¹ In particular, McDonnell and Martin outline matters they view as illustrative of these differences including 'the contextualisation of money' and 'demand sharing'.³⁴² Each of these will be discussed in turn.

In citing 'the contextualisation of money' within their research, McDonnell and Martin refer to the work of Sansom.³⁴³ Sansom argues that Aboriginal and Torres Strait Islander people have not fully embraced the 'monetisation of the mind'.³⁴⁴ The contention is that despite the process of colonisation, the coloniser's economic values have not fully overtaken and replaced those of Aboriginal and Torres Strait Islander people. Aboriginal and Torres Strait Islander people continue to have a set of values distinctive to them and founded on their priorities. Sansom argues that such values do not mirror a 'monetisation of the mind' that focuses on financial (economic) pursuits above all others. Whilst Sansom's work was conducted in the 1980s, the more recent work of Petersen³⁴⁵ finds this situation has remained unchanged, that is to say, that Aboriginal and Torres Strait Islander people continue to be, at least in some measure, resilient against the 'monetisation of the mind'. In Peterson's view, this means that 'market values have still not strongly penetrated the Aboriginal [and Torres Strait Islander] domain'.³⁴⁶

Both Sansom's and Peterson's work supports the argument that economic values in the non-Indigenous domain are not the same as economic values in the Aboriginal and Torres Strait Islander domain. Indeed, 'economic' values may not be paramount in the minds of Aboriginal and Torres Strait Islander people at all when contracting for goods and services; rather, their primary considerations may involve the 'social' value of the consumer contract. Consequently, when an Aboriginal and Torres Strait

³⁴¹ McDonnell and Martin (2002), p 27.

³⁴² McDonnell and Martin (2002), p 27.

³⁴³ Sansom (1998).

³⁴⁴ McDonnell and Martin (2002), p 31; Sansom (1998).

³⁴⁵ Peterson (2013).

³⁴⁶ Peterson (2013), p 169.

Islander person is contracting for goods or services, they are more likely to be looking to its social utility first and foremost, and the financial (or economic) benefits of contracting as ancillary, if at all. The rationalisation that occurs in this process thereby relates to an assessment of the social value of the contract rather than its economic value.³⁴⁷ Schwab³⁴⁸ refers to this process as 'social calculus'³⁴⁹, and it is this that informs the formula of decision-making by an Aboriginal and Torres Strait Islander person and their consumer behaviour and choice.

The observations of Rowse³⁵⁰ are noteworthy here also. In his work with the Tangentyere Council in the 1990s he documented and discussed the council's efforts to introduce rent into the town camps surrounding Alice Springs. Rowse argues that:

[h]owever reasonable in[-]principle to expect town campers to pay rent and other house bills, their doing so requires a significant change in their behaviour. Self-management, as political adaptation, entails some cultural change, a movement ... towards idealised white Australian habits of budgeting and financial responsibility.³⁵¹

Moreover, such change would be accompanied by a 'transition strain' which could be minimal or considerable.³⁵² Rowse further refers to the work of another scholar who describes an 'Aboriginal sub-economy'³⁵³ where 'cash circulates among adult members of these [Aboriginal] communities in a continual process of lending, borrowing and paying back'.³⁵⁴ Another study, this time by Sercombe³⁵⁵, involved Aboriginal and Torres Strait Islander consumers and the 'customary economy'.³⁵⁶ It focused in the same way on the disjuncture between the 'mainstream economy' and

³⁴⁷ McDonnell and Martin (2002), p 31.

³⁴⁸ Schwab (1995).

³⁴⁹ McDonnell and Martin (2002), p 32.

³⁵⁰ Rowse (1998).

³⁵¹ Rowse (1998), p 55.

³⁵² Rowse (1998), p 55.

³⁵³ Rowse (1998), p 55.

³⁵⁴ Rowse (1998), p 55.

³⁵⁵ Sercombe (2008).

³⁵⁶ Sercombe (2008).

the 'customary economy' and the way in which Indigenous people could or would straddle the two 'economies'.³⁵⁷

In discussing the meaning or workings of 'demand sharing', McDonnell and Martin cite examples which describe demand sharing as the demands made by one Aboriginal and Torres Strait Islander person to another Aboriginal and Torres Strait Islander person to share material objects such as cars.³⁵⁸ In the 2016 case of *ASIC v Kobelt*,³⁵⁹ the court referred to an expert anthropological report prepared by Martin (of McDonnell and Martin). ASIC tendered about demand sharing as evidence in the court proceedings. In this case, White J explained demand sharing as:

An embedded social obligation of the Anangu and of other indigenous communities [that] requires members in a community to share their resources with specific categories of kin. Dr Martin described demand sharing as part of the "foundational principles of reciprocity, exchange and sharing within a hunter gatherer society". The practice is such that the giver has a responsibility to share and the recipient the right to share, even to the point of demanding a share. Although the tradition developed long before money become known in Aboriginal communities, it is commonplace for money to be the subject of demand sharing. There was evidence in the proceedings, which I accept, that the cultural practice can give rise to the importuning of those perceived to have available money, to the extent on occasions, to the bullying of those persons, and to the exploitation of community members.³⁶⁰

Whilst this extract from White J's judgment identifies a problematic aspect of demand sharing in respect of money, this type of behaviour nevertheless sits within the broader context of social balance. Peterson's³⁶¹ explanation of demand sharing – that 'much informal sharing is contingent, strategic and pragmatic and may in part be

³⁵⁷ Sercombe (2008).

³⁵⁸ McDonnell and Martin (2002), p 32.

³⁵⁹ [2016] FCA 1327.

³⁶⁰ [2016] FCA 1327 at [575].

³⁶¹ Peterson (2013).

focused on establishing/maintaining the state of a relationship'³⁶² – highlights the absolute complexity of this social balance. Much knowledge and effort is required on the part of Aboriginal and Torres Strait Islander people to work to help maintain its equilibrium. He further describes demand sharing as being 'at the core of the [[Indigenous domestic moral economy]'.³⁶³ This 'involves members investing much of their day-to-day income in producing and reproducing social relationships outside the domestic group'.³⁶⁴ Expressing a similar view on the role of sharing between bordering groups, Lechleitner explains that:

Aboriginal society ... functions in a framework of reciprocity ... in almost every human activity within everyday-living, exchange takes place. Each group is dependent on each other for humanity and social goodwill between neighbouring tribal groups.³⁶⁵

Behaviour of the type outlined by White J in *ASIC v Kobelt* above, whereby persons viewed as having available money can be hassled, bullied or exploited by other persons within the community, is commonly referred to by Aboriginal and Torres Strait Islander people as 'humbugging'. Humbugging has elements that are similar to demand sharing, but when used to describe a person (humbugger) or their behaviour (humbugging) is intended to be unflattering, and has a negative connotation compared to the positive way in which demand sharing is considered as a socially-valued cultural obligation. For example, 'family humbug' has been defined as 'arguments and stress [that are] related to [demand] sharing and family obligations'.³⁶⁶

Because humbugging involves money and spending it is not unusual for it to appear in research findings centred on income management and financial health. In a study conducted in Northern Australia, which focused on Aboriginal and Torres Strait Islander mental health workers, it was reported that Aboriginal and Torres Strait

³⁶² Peterson (2013), p 171.

³⁶³ Peterson (2013), p 172.

³⁶⁴ Peterson and Taylor (2003), pp 106-110.

³⁶⁵ Lechleitner (2013), p 7.

³⁶⁶ Nagel and Thompson (2010).

Islander people adopted a number of different strategies to deal with ‘family humbug’.³⁶⁷ These strategies included ‘avoiding’ family members, and attempting to ‘control’ their own ‘spending’ as well as their ‘lending’ and ‘borrowing’.³⁶⁸ Interestingly, the study concluded that in order to effect change in Aboriginal and Torres Strait Islander people’s behaviour around ‘family humbug’, it was essential that service providers develop a better knowledge of ‘family humbug’ and the important part families play in supporting each other in Aboriginal and Torres Strait Islander communities.³⁶⁹

Importantly, humbugging has ‘notoriety’ amongst Aboriginal and Torres Strait Islander people nationally. As indicated in the studies outlined above, humbug is known to occur in the Northern Territory. Meanwhile, *ASIC v Kobelt* showed the existence of humbug in South Australia. A further illustration of the commonality of humbug amongst Aboriginal and Torres Strait Islander people Australia-wide is found in another interesting case study published in 2008 about Aboriginal and Torres Strait Islander people living in the Goldfields region of Western Australia. Here, Sercombe³⁷⁰ sought to outline the strategies Aboriginal and Torres Strait Islander people in that region used to balance their financial health with their cultural obligations, namely through demand sharing. Aboriginal and Torres Strait Islander participants were selected according to what were perceived as financially healthy circumstances, based on indicators such as income, assets and budgeting skills.³⁷¹ Twenty (20) participants were interviewed about their strategies for their ‘concurrent participation in the customary economy and the mainstream economy’.³⁷² The key strategies found in the study were summarised as ‘making conscious decisions’,³⁷³ drawing distinctions between kin in an ‘inner circle’ and an ‘outer circle’³⁷⁴ and strong ‘communication between partners (meaning spouses)’.³⁷⁵ Demands were made for

³⁶⁷ Nagel and Thompson (2010).

³⁶⁸ Nagel and Thompson (2010), p7.

³⁶⁹ Nagel and Thompson (2010), p 9.

³⁷⁰ Sercombe (2008).

³⁷¹ Sercombe (2008), p 22.

³⁷² Sercombe (2008), p 23.

³⁷³ Sercombe (2008), p 23.

³⁷⁴ Sercombe (2008), p 23.

³⁷⁵ Sercombe (2008), p 23.

food, alcohol, accommodation, cash and time.³⁷⁶ The study concluded that the '[Aboriginal and Torres Strait Islander] household economy is radically different to typical Western households'.³⁷⁷

In *ASIC v Kobelt*, His Honour White J also made observations about humbugging in reference to the use of book up by the Indigenous complainants in that matter, namely:

I am not overlooking that it suited some customers to have Mr Kobelt take the whole of the available balance and that some may have asked for this to occur. In some cases, it helped the customers deal with humbugging.³⁷⁸

Seeing and appreciating the nature of demand sharing and humbugging is to accept that behaviours that might be perceived as negative or harmful in one sense are a part of a greater set of behaviours based on relationships which contribute to the overall positive functioning of Aboriginal and Torres Strait Islander families, communities and cultures.

Understanding the 'frontier economy' concept, the existence of different sets of economic values, demand-sharing and the importance of the social value of consumables, goods and services to Aboriginal and Torres Strait Islander people is essential in determining the drivers of their consumer behaviour. The rationale for entering into a consumer transaction is not necessarily an economically rational one, but is 'rational' within the relevant particular social and cultural contexts. These contexts will be different too depending on time and place. For example, increasing levels of home ownership by Aboriginal and Torres Strait Islander people has been cited as one indicator that has seen change over time.³⁷⁹ Arguably, this is a Western value or economic ideal and ideological contests fill this debate.³⁸⁰ Thus, values held

³⁷⁶ Sercombe (2008), p 25.

³⁷⁷ Sercombe (2008), p 28.

³⁷⁸ *ASIC v Kobelt* [2016] FCA 1327 at [532].

³⁷⁹ Peterson and Taylor (2003), p 110.

³⁸⁰ For a critical discussion of the views of commentators in this space see Austin-Broos (2012).

in common cannot be attributed in a dogmatic or inflexible way or as a one size fits all that ignores nuances. This would be so in respect of any linguistic or cultural group.

The 'frontier economy' is therefore a framework through which to understand the existence of variances between the economic and social/cultural values of Aboriginal and Torres Strait Islander people and non-Indigenous people. McDonnell and Martin's work and that of other scholars shows a resistance by Aboriginal and Torres Strait Islander people to the 'monetisation of the mind' and the process of 'social calculus', and also shows that the 'economic' values of Aboriginal and Torres Strait Islander people are characterised by their distinctly 'un-economic' nature, at least as defined within the frame of non-Indigenous society. Rather, the 'economic' values of Aboriginal and Torres Strait Islander people, for the purposes of an analysis of competing values in a commercial or consumer context, are more accurately characterised and described as social values. Cooter, whose work will be discussed shortly, takes a similar approach, stressing that transactions that occur in the customary law context do so along social (relational) lines. While McDonnell and Martin's concept of the frontier economy is helpful in creating a conceptual framework for visualising the commercial interactions and legal dealings between Aboriginal and Torres Strait Islander consumers and traders, Cooter's work is instructive in filling in the content of the domains that underpin Aboriginal and Torres Strait Islander people's decision-making.

Customary Law Principles and Relationships

At the beginning of his 1989 work, *Issues in Customary Land Law in Papua New Guinea*,³⁸¹ Cooter opined, '[t]he problem is not to declare what people know, but to discover what is implicit in what they do'.³⁸² At the end of his introductory chapter, he concluded that addressing customary land law issues in Papua New Guinea was

³⁸¹ Cooter (1989).

³⁸² Cooter (1989), p 5.

about 'adjudication not legislation'.³⁸³ While Cooter's work centred on land issues, he drew a number of general conclusions about relevant approaches to customary law, and it is these that have wider relevance to the consideration of customary law and Aboriginal and Torres Strait Islander people. His work has particular relevance and application to Australia and customary law in the Torres Strait as there are strong kinship and cultural ties between Papuans in southern Papua New Guinea and Torres Strait Islanders in the top-western islands of the Torres Strait. Most importantly for the purposes of the analysis in this chapter, he found that what drives decision-making according to customary law are relationships. Relationships between kin and with outsiders underlined all the dealings discussed in his study.

To follow, in analysing the difference between customary land ownership and freehold land ownership, Cooter expresses the difference in terms of such relationships.³⁸⁴ As he explains:

In Australia ... most land transactions are between people whose only relationship to each other is commercial. Buyers and sellers, tenants and landlords, often have no dealings with each other outside the commercial setting, so there is no basis for prior obligations. The absence of obligations is a type of freedom. To illustrate, if a stranger offers to buy land that I own freehold, I am free to sell or not to sell, and my choice is not constrained by obligations that I owe him. I can follow my own best advantage, which is what he expects me to do. In Papua New Guinea, in contrast, many transactions involving customary land are between relatives. A kin network brings people together in a web of mutual obligations that constrain a person's freedom to pursue his own best advantage.³⁸⁵

³⁸³ Cooter (1989), p 7.

³⁸⁴ Cooter (1989), p 12.

³⁸⁵ Cooter (1989), p 12.

Cooter argues that 'kinship is unimportant to economic life in Australia'.³⁸⁶ He expresses kin relations in customary law in Papua New Guinea as creating 'feelings of interdependency and mutual obligation'.³⁸⁷ As Cooter sees it, '[c]ustomary law can be understood as an incentive structure that enhances coordination and cooperation among kin'.³⁸⁸ With reference to land law, '[c]ustom is a law of long-term relationships, and freehold is a law of market exchange'.³⁸⁹ Cooter's broad statement of customary law in relation to land is that it 'creates an incentive structure for cooperation and coordination among kin in the production and distribution of goods [and] includes a network of mutual obligations, which restricts everyone's freedom'.³⁹⁰ Generally, in commercial and consumer dealings as understood in non-Indigenous Australia, a transactional focus primarily comes to the fore, whereas in adopting Cooter's approach in the case of Aboriginal and Torres Strait Islander people in Australia in similar contexts, there is more likely to be a strong relational focus, which reflects the relationships that are fundamental to the healthy functioning of Aboriginal and Torres Strait Islander families and communities. Therefore, the starting position of the common law system for viewing commercial and consumer transactions in non-Indigenous Australia is starkly different when compared to Aboriginal and Torres Strait Islander customary law.

Cooter makes the interesting observation that '[k]in groups in Papua New Guinea provide better security against destitution than government bureaucracies are able to deliver',³⁹¹ , and that in Papua New Guinea 'the most important form of social control ... is customary authority, not police power'.³⁹² This is a point that could have particular resonance for Australia in terms of understanding the broader context for relations between Aboriginal and Torres Strait Islander people and government, and Aboriginal and Torres Strait Islander people's perceptions of the importance of kin versus welfare as a social safety net.

³⁸⁶ Cooter (1989), p 12.

³⁸⁷ Cooter (1989), p 12.

³⁸⁸ Cooter (1989), p 13.

³⁸⁹ Cooter (1989), p 13.

³⁹⁰ Cooter (1989), p 15.

³⁹¹ Cooter (1989), p 29.

³⁹² Cooter (1989), p 29.

In connecting Cooter's work to the meaning of customary law as it is interpreted in Australia, and at the end of an extensive community consultation process, the Western Australian Law Reform Commission highlighted in a report on customary law that the definition of customary law as given by an Aboriginal and Torres Strait Islander community member was 'connect[ing] people in a web of relationships with a diverse group of people; and with our ancestral spirits, the land, the sea and the universe; and our responsibility to the maintenance of this order'.³⁹³

Relationships and relationality have been considered in the context of customary law in Australia. Relationality here is 'a concept that emphasises the intricate and intimate webs of social connection and relationships as the primary constituent of the self';³⁹⁴ however, despite the significance of this concept, the common law system in Australia, which operates from a non-Indigenous perspective, has sought to create a distinction between the relationships that exists between Aboriginal and Torres Strait Islander kin and customary law. It has sought to excise the foundations of relationality in customary law from the customary law itself. For example, the Western Australian Law Reform Commission report on customary law found a distinction between 'customary law' and relationality, or kinship, stating:

while there may be some utility in the distinction between the extent to which remote Aboriginal people and urban Aboriginal people engage with (and accept the authority of) Aboriginal customary law, there is less of a distinction between remote and urban Aboriginals in relation to conceptions of kinship and acknowledgement of the obligations imposed by the kinship system.³⁹⁵

By way of further example of this perspective, Riley J refers differentially to 'customary law and cultural practice'.³⁹⁶

³⁹³ Law Reform Commission of Western Australia (2006), p 64.

³⁹⁴ Armstrong (2015), p 203.

³⁹⁵ Law Reform Commission of Western Australia (2006), p 66.

³⁹⁶ Riley (2013), p 186.

In contrast, Lechleitner, writing about traditional punishment, refers to customary law as 'customary (kinship) law', drawing no distinction between 'customary law' and 'kinship law'.³⁹⁷ His expression of Aboriginal and Torres Strait Islander law is substantially more complex than ordinary understandings and interpretations found in the wider legal community and relevantly reflects the concept of 'relationality'. Lechleitner details a pyramid structure of law, which very briefly summarised the first part of the law as ensconced in the Dreamtime, the second flowing on as ceremonial, and the third part flowing on again as customary kinship law, which is the law of man.³⁹⁸

A fitting conclusion to this section is found in the work of Brigg,³⁹⁹ who powerfully explains the force of relationality and the consequences built into it as follows:

Behaving in ways that rupture or contravene normative expectations around the good-functioning of these relationships is often seen as a cause of conflict. One result is that individuals navigate and manage conflict, whether through personal reflection and self-regulation or the guidance and direction of senior people, by attempting to maintain, renew or balance relationships.⁴⁰⁰

Common Law Expressions of Aboriginal and Torres Strait Islander Relational Values

The differing values evinced in discussions of the concept of the 'frontier economy', and the centrality of relationships in decision-making in customary law, as evinced by Cooter, have appeared in Australia's common law jurisprudence over many decades and across many jurisdictions. In particular, looking to the relational circumstances of a crime committed by an Aboriginal and Torres Strait Islander person, there is clear judicial precedent. Within the case law in Australia there is an extensive history of

³⁹⁷ Lechleitner (2013), p 7.

³⁹⁸ For the detail of this work and the law see Lechleitner (2013), p 7.

³⁹⁹ Brigg (2015).

⁴⁰⁰ Brigg (2015), p 196.

the courts taking Aboriginal and Torres Strait Islander values and relationships into account. Numerous examples, which will be discussed below, can be found in the reported decisions of Australian courts where they have acknowledged the broader existence of customary law as well as recognising Aboriginal and Torres Strait Islander values and priorities as distinct, relevant and important. This existing body of case law evidences the court's understanding that Aboriginal and Torres Strait Islander values inform Aboriginal and Torres Strait Islander people's behaviour and interactions with the legal system, and will therefore be explored in detail. It is noted that in some cases, the court expresses values as 'ways'. At other times, the court explicitly uses the term 'values'. More commonly, the values acknowledged by the courts are termed as the 'customary law' of Aboriginal and Torres Strait Islander people – proof that the courts themselves have tended not to discuss relationships and customary law, arguably because the courts themselves understand that to do so would betray the true nature of customary law as Aboriginal and Torres Strait Islander understand and practice it. The examples to follow illustrate this point.

Whilst there has been a modest amount of recognition of customary law in civil law, the jurisprudence around customary law has predominantly developed in the area of criminal law. In the criminal law context there is decades' long history which has laid a solid jurisprudential and doctrinal foundation in the recognition of customary law. It is for this reason, that whilst civil law matters will be considered, the weight of the criminal law cases provided the clearest and strongest basis upon which to explore the themes in this chapter.⁴⁰¹

From a practical viewpoint, where the courts have heard evidence of the relevance of Indigeneity in certain matters, they have traditionally taken two approaches to appraise Aboriginal and Torres Strait Islander people's customary law and connected values. The first approach has been to use Aboriginal and Torres Strait Islander people as witnesses to their customary law. The second approach involves the use of anthropologists as expert witnesses on Aboriginal and Torres Strait Islander 'society'. In most of the cases discussed below, one of these approaches

⁴⁰¹ An interesting proposition here, which is beyond the scope of this thesis, is that criminal matters require a higher standard of proof than civil matters.

has been adopted, and in some cases, the court hears evidence from both Aboriginal and Torres Strait Islander people and anthropological experts.

In *Walden v Hensler*,⁴⁰² the High Court discussed how Walden, an Aboriginal man, took turkeys from the bush. The turkeys were protected fauna pursuant to the *Fauna Conservation Act 1974-1979* (Qld). In the decision Brennan J states:

According to Aboriginal law, he should not kill more than is needed for food for his family. According to Aboriginal law, he or his family may capture a young bird for a pet but, when it grows up, it has to be let go because it belongs to the bush. He abided by that law. The question is particularly difficult when the fact-finder is not a member of the “community” in question, and that community consists of persons whose backgrounds and cultural values are different to his and are recognised by the law as relevant matters.⁴⁰³

The court has acknowledged the difference between ‘traditional Aboriginal ways’ and ‘non-Aboriginal ways’, and has noted that such ways (or values) are not mutually exclusive and that there can be adaptations that occur over time. In this regard, Brennan J found that:

The appellant has had considerable contact with non-Aboriginal ways. Like many Aborigines, he appears not to have abandoned traditional Aboriginal ways but rather to have adjusted Aboriginal ways to the exigencies of life in a predominantly non-Aboriginal society.⁴⁰⁴

As part of the case in *Walden v Hensler*, an anthropologist, Mr Trigger, gave evidence that within this (Aboriginal) society, a member of a clan had the right to take bush resources within and beyond the clan's own country, and that the practice of taking bush tucker was never forbidden, and indeed was sometimes encouraged

⁴⁰² (1987) 163 CLR 561.

⁴⁰³ *Jabarula* (1989) 42 A Crim 479 per Kearney J.

⁴⁰⁴ *Walden v Hensler* (1987) 163 CLR 561 per Brennan J.

by 'white authority'.⁴⁰⁵ He said that people would find it extraordinary to be told that it is wrong or illegal to take bush resources.⁴⁰⁶ The judgment states:

In this case, the appellant's keeping of the carcass and the chick was clearly consistent with his honest belief that he was entitled to do so. As the right claimed does not have to be a right recognised by the law of Queensland, the appellant's belief in his entitlement according to Aboriginal law and tradition to keep the carcass and the chick would have sufficed to raise an honest claim of right in the absence of any knowledge that the entitlement claimed had been overridden by the law of Queensland.⁴⁰⁷

It was submitted that the court should arrive at a penalty which reflected matters in mitigation arising from the appellant's personal situation and which recognised the structure and operation of this (Aboriginal) society.⁴⁰⁸

In the case of *Njanji*, the expertise of an anthropologist was called on in respect of the customary laws relevant to a Aboriginal man in the Northern Territory.⁴⁰⁹ In his report, the anthropologist and linguist Professor R.M. Berndt informed the court that the defendant, Njanji, 'would be regarded as an innocent person by the majority of his social equals'.⁴¹⁰ He claimed his innocence before the eyes of his law – Aboriginal law.⁴¹¹

In the case of *Milpururru v Indofurn Pty Ltd*⁴¹² although the key focus of the courts was on matters of copyright with some consideration of the TPA it made an interesting statement about customary law in the context of 'cultural harm' and the

⁴⁰⁵ *Walden v Hensler* (1987) 163 CLR 561 per Brennan J.

⁴⁰⁶ *Walden v Hensler* (1987) 163 CLR 561 per Brennan J.

⁴⁰⁷ *Walden v Hensler* (1987) 163 CLR 561.

⁴⁰⁸ *Re Jacky Anzac Jadurin v R* [1982] FCA 215.

⁴⁰⁹ Toussaint (1993), p 312.

⁴¹⁰ Toussaint (1993), p 312.

⁴¹¹ Toussaint (1993), p 313.

⁴¹² [1994] FCA 1544.

payment of compensation to Aboriginal people for such harm, including harm indirectly perpetrated by another Aboriginal person. The court stated that:

If unauthorised reproduction of a story or imagery occurs, under Aboriginal law it is the responsibility of the traditional owners to take action to preserve the dreaming, and to punish those considered responsible for the breach. Notions of responsibility under Aboriginal law differ from those of the English common law. If permission has been given by the traditional owners to a particular artist to create a picture of the dreaming, and that artwork is later inappropriately used or reproduced by a third party the artist is held responsible for the breach which has occurred, even if the artist had no control over or knowledge of what occurred. The evidence of Ms Marika, which I accept without hesitation, illustrates the severe consequences which may occur even in a case where plainly the misuse of the artwork was without permission, and contrary to Australian statute law. In times past the "offender" could be put to death. Now other forms of punishment are more likely such as preclusion from the right to participate in ceremonies, removal of the right to reproduce paintings of that or any other story of the clan, being outcast from the community, or being required to make a payment of money; but the possibility of spearing was mentioned by Mr Wangurra as a continuing sanction in serious cases.⁴¹³

Reference to relevant Aboriginal and Torres Strait Islander relational values is likely to be most commonly made by the lay person in respect of criminal sentencing and the practice of 'payback', as it often receives widespread media coverage. In *Re Jacky Anzac*, in consideration of 'payback' in sentencing⁴¹⁴ an Aboriginal person, it was found that:

In the context of Aboriginal customary or tribal law questions will arise as to the likelihood of punishment by an offender's own community and the

⁴¹³ [1994] FCA 1544 per Von Doussa J.

⁴¹⁴ See also *R v Neal* [1982] HCA 55; (1982) CLR 305 and the judgment of Brennan J in outlining the consideration of mitigating factors as a result of a person belonging to a particular group.

nature and extent of that punishment. It is sometimes said that a court should not be seen to be giving its sanction to forms of punishment, particularly the infliction of physical harm, which it does not recognise itself. But to acknowledge that some form of retribution may be exacted by an offender's own community is not to sanction that retribution; it is to recognise certain facts which exist only by reason of that offender's membership of a particular group.⁴¹⁵

Another case, *Munungurr v The Queen*, involved a cultural offence that led to assault charges against an Aboriginal man. The court considered that the views of the community ought to act as mitigating factors in the sentence and relevantly ordered that on his release Munungurr 'attend and participate in the proposed meeting of [the two] clans for the purpose of sealing the peace in the traditional aboriginal way and that he makes the peace and keep the peace accordingly'.⁴¹⁶ Cited in *R v A Minor*, the court further stated that, 'in this case, the infliction of payback would be of benefit to a community which possessed a philosophy that, once inflicted, payback wiped out all feuds arising from the respondent's actions'.⁴¹⁷

Embedding the legal relevance of Aboriginal and Torres Strait Islander values further into the common law system, the courts have recognised the cultural (relational) norms by which Aboriginal and Torres Strait Islander people live, and have noted that these norms ought to be applied in cases involving Aboriginal and Torres Strait Islander people when before the court. For example, in the ordinary person test applied to an Aboriginal man⁴¹⁸ in *Jabarula*, Kearney J stated:

I consider that an "ordinary person" for the purposes of s 34(1)(d) of the Code means, in the circumstances of this case, an ordinary Aboriginal

⁴¹⁵ *Re Jacky Anzac Jadurin v R* [1982] FCA 215.

⁴¹⁶ *Munugurr v R* (1994) 4 NTLR 63 at 20.

⁴¹⁷ *R v R (A Minor)* per Asche CJ at 2.

⁴¹⁸ I note the criticisms of the problematic way in which Kriewaldt J interpreted, shaped and applied the 'ordinary Aboriginal person' test in his judgments as made by Douglas (2002) and Douglas (2006).

male person living today in the environment and culture of a fairly remote Aboriginal settlement, such as Ali Curung.⁴¹⁹

In another case, reference to Aboriginal and Torres Strait Islander norms surrounding communication were used to inform the court of the cultural context, relevance and meaning of the facts to be determined by the court. In *R v William Davey*, the court stated that:

The court has for many years now considered it should, if practicable, inform itself of the attitude of the aboriginal communities involved, not only on questions of payback and community attitudes to the crime, but at times to better inform itself as to the significance of words, gestures or situations which may give rise to sudden violence or which may explain situations which are otherwise incomprehensible. The information may be made available to the court in a somewhat informal and hearsay style. This is unavoidable as it will often depend on consultation with aboriginal communities in remote areas.⁴²⁰

At this juncture, it is worth noting that more recently in the Northern Territory, a provision was introduced by the Commonwealth to prohibit the consideration of customary law in respect of criminal offences relevant to the operation of the *Northern Territory National Emergency Response Act 2007* (Cth) (NTNER Act).⁴²¹ Goldflam⁴²² suggests that the judiciary, in response, has been highly critical of this prohibition.⁴²³ The legislation limits the courts' discretion. As Goldflam states, '75 years previously, judges had been directed to have regard to customary laws for sentencing purposes; 25 years previously, they had been left to work it out for themselves'.⁴²⁴ This represents the nature of one hundred years of history of the

⁴¹⁹ *Jabarula* (1989) 42 A Crim 479.

⁴²⁰ *R v William Davey* [1980] FCA 134; (1980) 50 FLR 57.

⁴²¹ See s 91 NTNER Act (now repealed).

⁴²² Goldflam (2013).

⁴²³ Goldflam (2013), p 72.

⁴²⁴ Goldflam (2013), p 72.

courts in Australia having regard to customary law in their deliberations and determinations.

The reality of customary law and its practice by Aboriginal and Torres Strait Islander people is that it does not bend to statute or the common law. Moreover, Aboriginal and Torres Strait Islander people in urban settings have become remarkably adept at adapting customary law so that they can continue to observe customary laws and adhere to the core value of relationality. Sercombe explains culture in its contemporary context, stating:

Culture needs to be understood as a dynamic process. The surface differences between Aboriginal persons in the bush and the city should not be allowed to obscure the active shaping of Aboriginal culture in response to the often violent pressures and demands of an alien, dominant social system. It is this historic process of social and economic adaptation that has resulted in Aboriginal cultural forms in town and city, which, although different from their origin, are still recognisably Aboriginal. Under a consensus that devalues urban Aboriginal adaptations, the cultural effort that has been required to survive and maintain a growing population needs to be recognised.⁴²⁵

Internationally, the United Nations Declaration on the Rights of Indigenous People (UNDRIP) further emphasises that the protecting rights of Indigenous peoples involves recognising and respecting difference and is not about treating indigenous peoples the same. Acknowledging cultural difference is essential in ensuring the protection of the rights of Aboriginal and Torres Strait Islander people in Australia.

Domestically, the importance of relationships and the social values of parties in the area of family law has started to gain greater prominence. This suggests that, rather than these matters receding in their role in the common law system, they are moving beyond their long history in criminal law and into other areas. Specifically, the term

⁴²⁵ Sercombe (2008), p 28.

‘relationality’ has started to gain traction in the area of family law, particularly in family law meditations. In a discussion of the emergence of this, Brigg explains:

The language of relationality is emerging in law ... as it becomes increasingly prominent in a great number of fields across the social sciences and the humanities. A core proposition of this ‘relational turn’ is that much Western-dominated scholarship and professional practice has given too much emphasis to the figure of the autonomous and sovereign person (individual of the liberal philosophy), and it needs to pay rather more attention to how each of us is, before all else, is fundamentally in relation with others.⁴²⁶

Therefore, there is precedent in Australian law for referencing Aboriginal and Torres Strait Islander values and relationships when deciding matters before the court. More significantly, the courts do go beyond merely accepting evidence, and determine cultural context and underpinning values to also be relevant factors. This has important implications for our understanding of how the law accounts for Aboriginal and Torres Strait Islander values and relationships in a common law context.

Relationality, Communications and Aboriginal and Torres Strait Islander Consumer Behaviour

Apart from the contextual reference above in *ASIC v Kobelt*, the case of the *ACCC v Keshow*,⁴²⁷, also discussed in Chapter 2, gives a glimpse into the potentially important impacts of cultural factors on Aboriginal and Torres Strait Islander consumer behaviour, as evidenced in case law. Indeed, the evidence tendered in the case suggests that the cultural element that has been presented in the litigation to date only scratches the surface. Sitting beneath the surface is a vast and unseen set of relationships and social values that arguably have the greatest impact on Aboriginal and Torres Strait Islander consumer behaviour and contract formation.

⁴²⁶ Brigg (2015), p 188.

⁴²⁷ [2005] FCA 558.

Briefly, to recount the key facts of *ACCC v Keshow* from Chapter 2, Mr Keshow was a non-Indigenous man and the respondent in the case. He sold educational materials to Aboriginal women in discrete communities in the Northern Territory. The court was presented with evidence of language differences, limited commercial experience and lower levels of education, as well as the respondent's failure to keep records, deliver the goods and provide copies of contracts. These matters formed the basis of the court's decision. The judge in that case further accepted evidence of a non-Indigenous anthropologist – Dr David Martin (of MacDonnell and Martin). Evidence from Dr Martin highlighted additional cultural issues that had factored into the contract formation between the women and Mr Keshow. In particular, the anthropologist's expert evidence showed the importance of relationality – that of or arising from kinship – as bringing together (in this case) Aboriginal values and relationships and the cultural aspect of consumer contracts.⁴²⁸

In the anthropologist's evidence tendered in court, relationships to outsiders and factors of gender and age were prominent in terms of their influence on the women's behaviour and their decisions to enter into consumer contracts with Mr Keshow. Relationality in particular was evident as part of the cultural context that existed within the communities visited and between the parties to the consumer contracts. The anthropologist gave evidence that significant complexities exist in the relationships between women and men, between Aboriginal people (in this case) and non-Indigenous people, and between people in positions of perceived authority or power and those who are not.⁴²⁹ Mansfield J noted that the cultural aspects referred to in the anthropologist's report were the likely reasons the women entered into the contracts, but he did not base his decision on this fact. Rather, the judge found unconscionable conduct and in favour of the women complainants on the basis of more procedural matters such as the failure to keep adequate records and provide receipts to the women.

⁴²⁸ Affidavit of David Fernandes Martin dated 6 January 2005.

⁴²⁹ [2005] FCA 558.

Within his report, Dr Martin explained that Indigenous people may have a 'diffidence in dealing with outsiders'.⁴³⁰ He contended that there were two additional intersecting elements relating to this diffidence for at least one of the complainants in dealing with Mr Keshow. Citing the example of Deanne Williams (one of the complainants), he noted that both her gender and her young age amplified her diffidence because she was a young Aboriginal woman and he was an older non-Indigenous man.⁴³¹ Similar circumstances applied to the other complainants in their dealings with the respondent, including Ingrid White, Muriel Palmer and Rosina Dickson.

The expert evidence given by Dr Martin referenced the role of non-verbal aspects of communication in these dealings. Non-verbal communication can be as significant as spoken words when conversing with an Aboriginal and Torres Strait Islander person. Critically, even if an Aboriginal and Torres Strait Islander person is communicating in Standard Australian English, non-verbal aspects of communication are present and influence their behaviour, including their verbal communication with the other person. Spoken words are therefore only one part of the whole of the interaction. Importantly, for matters of proof, these non-verbal aspects of communication will still be evident to and easily observable by a non-Indigenous person. For example, in the anthropological expert evidence presented in *ACCC v Keshow*, Dr Martin explained that:

It is also my experience that not responding, especially but not only when dealing with strangers, is a common mechanism to avoid difficult or embarrassing questions amongst Aboriginal people in remote or traditionally-oriented communities.⁴³²

Peterson and Taylor contend that a direct and overt 'no' in response to a request to share is viewed by other Indigenous people as 'egotistical and confrontational', and is akin to a termination or rejection of the relationship between the person asking and

⁴³⁰ Paragraph 199 of the Affidavit of David Fernandes Martin dated 6 January 2005.

⁴³¹ Paragraph 199 of the Affidavit of David Fernandes Martin dated 6 January 2005.

⁴³² *ACCC v Keshow* [2005] FCA 558 at [86].

the person asked.⁴³³ This element of Aboriginal and Torres Strait Islander communication has been given the term 'gratuitous concurrence' by Liberman.⁴³⁴ Gratuitous concurrence describes the circumstance whereby a person will answer 'yes' to questions regardless of whether the question is open or closed, whether the person understands the question or not, and whether or not the person in reality wishes to respond to the question with a 'no'.⁴³⁵ The Queensland government's *Aboriginal English in the Courts*⁴³⁶ defines gratuitous concurrence as a 'common feature of Aboriginal conversations throughout Australia, and is customarily used to indicate a readiness for cooperative function, or resignation to the futility of the situation'.⁴³⁷ Riley J has also noted the role of gratuitous concurrence in the giving of evidence in court and that poorly framed questions can reduce the 'weight' given to aspects of evidence.⁴³⁸ Gratuitous concurrence as it relates to Aboriginal and Torres Strait Islander people has been traced back as far as the mid-1800s.⁴³⁹

Difficulties posed by language differences in cases involving Aboriginal people specifically in the Northern Territory were considered extensively by Kriewaldt J in his decisions as a Supreme Court judge.⁴⁴⁰ Douglas and Chesterman⁴⁴¹ referred to communication errors and misunderstandings between Aboriginal people in the Northern Territory and census counters during a 1950s census,⁴⁴² when the Aboriginal residents were speaking English to the census counters.⁴⁴³ Later, in the 1970s, a famous case, *R v Anunga*,⁴⁴⁴ led to the well-known and well-used Anunga Rules. In the decision, the court explains the way in which gratuitous concurrence operates in conversations between Aboriginal people (in this case) and non-Indigenous people, whereby:

⁴³³ Peterson and Taylor (2003), p 110.

⁴³⁴ Liberman (1980).

⁴³⁵ Eades (1995), p 10.

⁴³⁶ Eades and Department of Justice and Attorney-General (2000).

⁴³⁷ Eades and Department of Justice and Attorney-General (2000), p 9.

⁴³⁸ Riley (2013).

⁴³⁹ Eades (2012), p 476.

⁴⁴⁰ Douglas (2002), p 212.

⁴⁴¹ Douglas and Chesterman (2008).

⁴⁴² Douglas and Chesterman (2008), p 382.

⁴⁴³ Douglas and Chesterman (2008), p 382.

⁴⁴⁴ (1976) 11 ALR 412.

most Aboriginal people are basically courteous and polite and will answer questions by white people in the way in which they think the questioner wants. Even if they are not courteous and polite there is the same reaction when they are dealing with an authority figure such as a policeman.⁴⁴⁵

Eades' considerable socio-linguistic work on gratuitous concurrence provides further insight as to the way in which the 'dissonance' referred to by Dr Martin in *ACCC v Keshow* manifests in communication between Aboriginal and Torres Strait Islander people and non-Indigenous people in range of contexts. As in the court's decision in *R v Anunga*, Eades⁴⁴⁶ argues that gratuitous concurrence 'makes many Aboriginal people suggestible, or highly suggestible, in police interviews and courtroom questioning'.⁴⁴⁷ Her work on the use of Aboriginal English in court settings advocates strongly for the need to acknowledge the relevance of Indigeneity in cases involving Aboriginal and Torres Strait Islander people.⁴⁴⁸ Further to this, she suggests 'Indigenous identity'⁴⁴⁹ ought to be considered on a case by case basis because variances do exist as to how and when people use Aboriginal English⁴⁵⁰ and Torres Strait Creole.⁴⁵¹

Significantly, Eades⁴⁵² draws a distinction between two types of considerations the courts might typically engage with when dealing with Aboriginal and Torres Strait Islander parties to a case. The first type involves the consideration of and reliance on evidence of, or submissions relating to, socio-economic disadvantage such as lower levels of literacy, numeracy, education and financial means. The second type of consideration is of the sort discussed in the cases above, which relies on Aboriginal and Torres Strait Islander experts or non-Indigenous experts providing evidence to the court about relevant cultural contexts. Both considerations are intended to

⁴⁴⁵ *R v Anunga* (1976) 11 ALR 412 at 414.

⁴⁴⁶ Eades (2012).

⁴⁴⁷ Eades (2012), p 476.

⁴⁴⁸ Eades (2012), p 473.

⁴⁴⁹ Eades (2012), p 473.

⁴⁵⁰ Eades (2012), p 473.

⁴⁵¹ See for example <http://www.slq.qld.gov.au/resources/atsi/languages/word-lists/torres-strait-everyday-words>

⁴⁵² Eades (2012)

introduce the matter of 'Indigeneity' into the court and its decisions. On such considerations, Eades contends:

while such disadvantage may be common to many Aboriginal people who have not learned general Australian English, they are not necessarily relevant to the way that a person speaks English, which depends on the much richer fabric of socialisation ... and patterns of social networking, interaction and residence. That is, it is a person's experiences as a member of one or more social groups that most influences their ways of communicating.⁴⁵³

Eades⁴⁵⁴ further states that 'particular attention should be given to the [Aboriginal and Torres Strait Islander] person's educational standards, knowledge of the English language, or any gross cultural differences'.⁴⁵⁵ Importantly, Eades⁴⁵⁶ highlights that the use of English across Aboriginal and Torres Strait Islander communities is not standard and that courts must be mindful of the fact that an Aboriginal and Torres Strait Islander person may be 'using English [but] in an Aboriginal way'.⁴⁵⁷ Moreover, '[u]sing English in an Aboriginal way may not sound like difficulty in communication, and indeed may not comprise difficulty in communication [but] it can contribute to miscommunication'.⁴⁵⁸ Equally, 'apparent similarity of lifestyle with non-Aboriginal people could well mask distinctively Aboriginal features of communicative practice'⁴⁵⁹ in regional centres and metropolitan areas. Again, the same observations are made of Torres Strait Islanders where Torres Strait Creole is sometimes referred to and viewed by outsiders as a Pidgin English.

Eades further points to Aboriginal and Torres Strait Islander people often being 'too suggestible in the ... use of leading questions'.⁴⁶⁰ This point is made by Eades with

⁴⁵³ Eades (2012), p 475.

⁴⁵⁴ Eades (2012).

⁴⁵⁵ Eades (2012), p 479.

⁴⁵⁶ Eades (2012), p 473.

⁴⁵⁷ Eades (2012), p 480.

⁴⁵⁸ Eades (2012), p 485.

⁴⁵⁹ Eades (2012), p 485.

⁴⁶⁰ Eades (2012), p 481.

reference to cross-examination in the court setting; however, in broader contexts, outside of court, leading questions have the potential to be met with the same suggestibility, such as those relating to consumer transactions. This was found to be the case by Ducret who was the TPC's chief investigator in the *Insurance Cases* discussed in Chapter 2. On point here in relation to the similarities in communication between Aboriginal people and Torres Strait Islander people living in remote communities, the *Insurance Cases* involved remote communities in the Northern Territory and Queensland, including the Torres Strait region. Ducret⁴⁶¹ was of the clear view in the *Insurance Cases* that the suggestibility of the Aboriginal and Torres Strait Islander consumers increased their risk and 'vulnerability' in relation to traders using high pressure sales tactics.⁴⁶² Importantly, a key mitigating experience in this context is Eades'⁴⁶³ assessment that in terms of communicating with outsiders (such as non-Indigenous traders), '[o]f greatest relevance is the extent to which the [Aboriginal and Torres Strait Islander] person has had socialisation opportunities ... in social groups in which English is used in typical mainstream ways'.⁴⁶⁴

While Eades' body of work, as referred to in this chapter, has predominantly explored criminal law and courtroom contexts, the anthropological evidence in *ACCC v Keshow* aligns with that work, as it contends that the same non-verbal aspects of Aboriginal people's communication (as in that case) with traders such as Mr Keshow in Aboriginal English (or Torres Strait Creole) bear the hallmarks of gratuitous concurrence. Supporting this contention, in 2010 it was reported⁴⁶⁵ that Aboriginal and Torres Strait Islander people were particularly vulnerable to door-to-door salespeople, such as those investigated in *ACCC v Keshow*, because of language issues, and in particular gratuitous concurrence. A worker at an Aboriginal and Torres Strait Islander community-based consumer advocacy organisation in Northern Australia reported that he believed traders:

⁴⁶¹ Ducret (1993).

⁴⁶² Ducret (1993).

⁴⁶³ Eades (2012).

⁴⁶⁴ Eades (2012), p 483.

⁴⁶⁵ <http://www.abc.net.au/news/2010-05-14/remote-consumers-ripped-off/829174>

come in and target Indigenous communities [and] are aware that there are cultural aspects that they can take advantage of where ... [the person does not] want to offend. And they know that if they give the hard sell they know a lot of Indigenous people will just agree and go along with what they say, and ultimately they'll say "aw yeah" just to get rid of them.⁴⁶⁶

This is another illustration of gratuitous concurrence in the consumer context. Door-to-door sales and unsolicited contracts are therefore specifically problematic in terms of gratuitous concurrence in communication between Aboriginal and Torres Strait Islander people and traders. Helpfully, *ACCC v Keshow* and *ASIC v Kobelt* show that the courts have gone some way in dealing with consumer protection law matters and that they recognise issues with verbal and non-verbal communication, as well as cultural factors that might impact unduly or unfairly on Aboriginal and Torres Strait Islander consumers.

Conclusion

This chapter has used the 'frontier economy' as a conceptual framework together with insights from the work of Cooter and others on customary law to look for the cultural reasons behind particular consumer behaviours. Using this work, and with reference to Australian cases, I have shown that, for Aboriginal and Torres Strait Islander people, consumer contracts have a strong relational aspect which mirrors their cultural values. In the eyes of Aboriginal and Torres Strait Islander people, consumer contracts are not merely a commercial transaction. There is an important relational aspect involved that is central to Aboriginal and Torres Strait Islander people's consumer choices and motivations. As such, consumer contracts involving Aboriginal and Torres Strait Islander parties cannot be viewed as purely transactional or purely commercial – they must also be viewed as relational. The relational aspects of the consumer contract can be as important to the Aboriginal and Torres Strait Islander consumer, if not more important, within the contractual process as transactional and commercial elements.

⁴⁶⁶ <http://www.abc.net.au/news/2010-05-14/remote-consumers-ripped-off/829174>

McDonnell and Martin's frontier economy concept of values and Cooter's focus on (kinship) relationships underpinning customary law were discussed. The concept of relationships was shown to be a central (social) value for Aboriginal and Torres Strait Islander people, and can be used to understand and interpret Aboriginal and Torres Strait Islander consumer decisions. Aboriginal and Torres Strait Islander parties and non-Indigenous parties may view consumer transactions through very different lenses; namely, where economic values are prioritised by non-Indigenous traders, social values are prioritised by Aboriginal and Torres Strait Islander consumers. The sum effect is that while all parties to the consumer transaction appear to be negotiating on the same basis, in reality the two forms of negotiation could be polar opposites. Having established this, it has further been shown that these differences are not inconsequential, and that the financial outcome for Aboriginal and Torres Strait Islander consumers can be dire.

Responses in law and government must therefore be based on an elevated understanding of the centrality of relationships to consumer contracts for Aboriginal and Torres Strait Islander people if they are to provide adequate consumer protection. To follow Cooter, if case law aims 'to discover what is implicit in what [people] do',⁴⁶⁷ it can provide glimpses into the influence relationships have on the experiences of Aboriginal and Torres Strait Islander consumers. With the *ACCC v Keshow* as a case in point, it is essential courts recognise that relationships can be a pivotal factor in Aboriginal and Torres Strait Islander consumer decision-making.

The concept of frontier economy values, when considered together with relationality, as explained by Cooter and others, can help in understanding that 'economic capital' does not necessarily hold the same importance for Aboriginal and Torres Strait Islander consumers as 'social capital'. Courts in Australia do understand that there are differences between Aboriginal and Torres Strait Islander values and non-Indigenous values. The common law has also come to recognise the importance of relationality for Aboriginal and Torres Strait Islander people. Some understanding

⁴⁶⁷ Cooter (1989).

and expression of this recognition is found in the consumer case law; however, the case law needs to go further to have a more meaningful impact on Aboriginal and Torres Strait Islander consumer protection. Specifically, relational aspects need to be made more explicit in judicial decision-making, and a more fulsome consideration of and reliance on expert evidence of cultural factors needs to be undertaken by the courts to emphasise that Aboriginal and Torres Strait Islander people view consumer contracts through the prism of relationships.

Insights into culture and the role it plays in Aboriginal and Torres Strait Islander consumers' interactions with traders can inform the development of strategies beyond traditional education and awareness campaigns. By appreciating the existence of different value sets and the content of those values sets, Australian courts can gain a clearer picture and a better understanding of the cultural aspects of consumer transactions involving Aboriginal and Torres Strait Islander consumers, and the factors that influence and drive their behaviour. A comprehensive understanding of all the factors that influence Aboriginal and Torres Strait Islander consumer behaviour will lead to the most useful and (culturally) appropriate measures for Indigenous consumer protection.

Chapter 4 – Controlled Consumers: What’s the Colour of Money?

The circumstance that Nobbys’ Book-up customers so willingly hand over their key cards and disclose the PINs is, in my opinion, a marker by itself of their lack of financial literacy. That lack of literacy is not to be explained away solely by reference to “cultural differences” or to trust of Mr Kobelt. Whatever the explanation for the willingness to hand over the card and to disclose the PIN may be, it seems to reflect a lack of understanding of the basis upon which key cards and PINs are issued, and of the steps which the customers should take in their own self-interest. The customers thereby put themselves in jeopardy of misconduct by those who have access to the key cards and the PINs at Nobbys.⁴⁶⁸

White J’s use of words such as ‘cultural differences’, ‘financial literacy’, ‘understanding’ and ‘self-interest’ direct us to factors which, in his view, created the environment that resulted in troubles for Aboriginal and Torres Strait Islander people using Mr Kobelt’s book up. This chapter responds to White J’s ‘explanation for the willingness’ to handover bank cards and money by arguing that the discriminatory and racialised treatment of Aboriginal and Torres Strait Islander people as consumers throughout much of Australian legal history has led to contemporary issues faced by Aboriginal and Torres Strait Islander consumers such as those associated with the practice of book up.

It will be shown that there are racialised elements evident in the practice of book up which cannot be explained away solely by reference to ‘challenges’ such as poverty or remoteness. Garner⁴⁶⁹ defines racialisation⁴⁷⁰ as involving a process whereby “race” [becomes] a salient element of social relationships, frequently as a normal part of the actions of the State and its agencies with other social actors’.⁴⁷¹ It will be

⁴⁶⁸ *ASIC v Kobelt* [2016] FCA 1327 at [422].

⁴⁶⁹ Garner (2013).

⁴⁷⁰ For a detailed consideration of racialisation in the context of income management in Australia and New Zealand see Humpage (2016).

⁴⁷¹ Garner (2013), p 22.

further shown that Australia's legal history, particularly during the Protection period of the late nineteenth and twentieth centuries, and the control of Aboriginal and Torres Strait Islander people's money and spending, have directly contributed to the contemporary and catastrophic financial marginalisation of Aboriginal and Torres Strait Islander people in Australia. Book up will be used as an example to show that Aboriginal and Torres Strait Islander consumer issues such as those seen in *ASIC v Kobelt* are indeed the outcome of generations of financial control, and that undoing the legacy of that financial control will require an equally long-term approach. A fundamental shift in the current thinking of government around Aboriginal and Torres Strait Islander people, consumption and money is needed. Until contemporary consumer problems are understood as remnants of Australia's legal history by law and policy-makers, and until such understanding is used to inform consumer protection measures designed for Aboriginal and Torres Strait Islander people,⁴⁷² cases such as *ASIC v Kobelt* will continue to arise.

In the case law discussed in Chapter 2, frequent references were made to the financial literacy and commercial acumen of Aboriginal and Torres Strait Islander consumers. Such issues tended to be viewed as symptomatic of low levels of formal education amongst Aboriginal and Torres Strait Islander people and limited access to goods and services, particularly in remote areas. These circumstances are viewed by the courts as restricting Aboriginal and Torres Strait Islander people's understanding of and exposure to commercial situations, and limiting their exposure to valuable and useful financial skills and commercial experience. Building on the earlier arguments of this thesis, this chapter argues that in addition to the factors identified in Chapter 2, and the cultural factors shown to be at play in Chapter 3, there is a deep historical context that must be taken into account when considering these issues. It also shows that the historical treatment of Aboriginal and Torres Strait Islander people as consumers continues to have an enduring effect.

⁴⁷² The community sector has taken a strong lead in this area. For example, Financial Counselling Australia has been leading a program of increasing financial literacy and financial equity in remote Aboriginal and Torres Strait Islander communities for several years. See www.financialcounsellingaustralia.org.au.

Before exploring the history of the law and its treatment of Aboriginal and Torres Strait Islander people and their money, it is worthwhile briefly exploring the meaning and benefits of financial literacy. White J's judgment indirectly found that the book up users' 'lack' of financial literacy placed them in a position of vulnerability vis-à-vis Mr Kobelt's conduct. Financial literacy has been said to have two key purposes, namely, 'to re-educate individuals about credit and debt' and 'to educate people about the financial market and the nature of risk'.⁴⁷³ The former is seen as especially important in managing 'financial exclusion'.⁴⁷⁴

Teaching financial literacy through training can facilitate behavioural change.⁴⁷⁵ According to ASIC, individuals who are financially illiterate are more likely to have difficulty budgeting, determining which goods and services best meet their needs and provide value for money, and are more prone to 'scams'.⁴⁷⁶ A study that specifically focused on Aboriginal and Torres Strait Islander people and money highlighted the potential benefits of financial literacy training.⁴⁷⁷ It found that a lack of experience and a lack of education about money in childhood had resulted in limited knowledge of finances and financial literacy into adulthood.⁴⁷⁸ Consistent with this study, Bin-Sallik, Adams and Vemuri highlight the need for financial literacy training in schools, stating that many Aboriginal and Torres Strait Islander people are 'financially illiterate'.⁴⁷⁹

Historically, the income of Aboriginal and Torres Strait Islander people has been controlled by the government and other institutions (including missionaries and private employers). It is arguable that this has created the problem of financial illiteracy. This form of financial control has occurred since colonisation and has become a function of State and Territory governments created in the federation of Australia with the cooperation or at least the tacit approval of the Commonwealth government. The Protection period in Australia legally marked a strong and clear

⁴⁷³ Pearson (2008).

⁴⁷⁴ Pearson (2008), p 46.

⁴⁷⁵ Pearson (2008), p 52.

⁴⁷⁶ https://www.moneysmart.gov.au/media/528357/mst_teacher_guide_with_ncflf.pdf

⁴⁷⁷ Demosthenous et al (2006).

⁴⁷⁸ Demosthenous et al (2006), p 11.

⁴⁷⁹ Bin-Sallik et al (2004).

beginning to the implementation of this form of financial control, as will later be shown. Broadly speaking, and depending on the colony or relevant jurisdiction, this period stretched from the late 1800s to the mid-1980s. The Protection period was a time when the movements,⁴⁸⁰ money and even the marriages of Aboriginal and Torres Strait Islander people in Australia were controlled. Regulation and control of Aboriginal and Torres Strait Islander people's wages and work conditions were also a central feature of the Protection period.

In Queensland, the law which provided the framework for controlling the lives of Aboriginal and Torres Strait Islander people commenced with the *Sale of Opium and Protection of Aborigines Act 1897* and endured until the enactment of the *Community Services (Aborigines) Act 1984* and *Community Services (Torres Strait Islanders) Act 1984*.⁴⁸¹ Comparable legislation was introduced in the Northern Territory and across Australia,⁴⁸² although Queensland was said to be 'the most recalcitrant State in conferring citizenship rights upon [Aboriginal and Torres Strait Islander people]'.⁴⁸³ Australia's workforce during this time was segregated based on race in both a legal and practical sense.⁴⁸⁴ Aboriginal and Torres Strait Islander people were also, in many cases, wards of the state. Queensland's recent *Queensland Stolen Wages Reparation Taskforce Report – Reconciling Past Injustice*, published in 2016, argues the need for governments to acknowledge:

past acts of dispossession, settlement and discriminatory policies such as the Stolen Wages ... and ... the cumulative acts of colonial and state governments since the commencement of colonisation which have left an

⁴⁸⁰ This regulation of movement included the forcible removal of Aboriginal and Torres Strait Islander children, which was documented in detail in *Bringing Them Home*, the Report of the National inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, published in 1997 by the Human Rights and Equal Opportunity Commission.

⁴⁸¹ In Queensland, this period was bookended by the *Sale of Opium and Protection of Aborigines Act* of 1897 and the *Community Services (Aborigines) Act 1984* and *Community Services (Torres Strait Islanders) Act 1984*.

⁴⁸² Senate Standing Committee on Legal and Constitutional Affairs (2006).

⁴⁸³ Chesterman and Galligan (1997), p 31.

⁴⁸⁴ McCorquodale (1985), p 6.

enduring legacy of economic and social disadvantage that many Aboriginal [and Torres Strait Islander] people experience.⁴⁸⁵

The analysis to follow will examine the historical relationship between Aboriginal and Torres Strait Islander people, money and consumption. It will then demonstrate that expressions of colonial artefacts remain in the contemporary discourse of consumer law regarding Aboriginal and Torres Strait Islander consumers. Discourse of this nature has existed in the criminal context for decades. More recently, a number of criminal cases and commentary on these cases has centred on ‘the role of the criminal sentencing courts to account for the postcolonial experience of Indigenous peoples [as] of critical significance ... [as] reflecting its incidence as a feature of [current] Indigenous circumstance’.⁴⁸⁶ To date, there has been little discussion of contemporary consumer issues in relation to Aboriginal and Torres Strait Islander people in the context and as an outcome of colonial history.

Regarding consumer protection, this chapter will discuss three dominant, contemporary issues arising out of Australia’s legal history that continue to have an effect upon Aboriginal and Torres Strait Islander people as consumers. These three issues are book up, financial literacy and commercial acumen. Throughout this chapter, these three issues will be shown to place Aboriginal and Torres Strait Islander people in a position of ‘vulnerability’ as consumers. I will argue that these issues are in large part due to discriminatory, race-based legislation enacted and administered from the 1800s to the 1900s by successive State, Territory and Commonwealth governments, and that Aboriginal and Torres Strait Islander people have developed views about money and consumption that are directly linked with their specific experiences of this racially discriminatory legislation.

It should be noted here that the specific issues in this chapter relate to the race-based laws, policies and practices of state and federal governments in a strict sense. Race is being dealt with here as a process of imposed racialisation, as distinct from

⁴⁸⁵ Queensland Stolen Wages Reparation Taskforce (2016), p 6.

⁴⁸⁶ Anthony et al (2015), p 48.

the cultural issues discussed in the preceding chapter, which arise in the context of Aboriginal and Torres Strait Islander cultures. This distinction is important.

So far, this thesis has discussed the deficit narrative of Aboriginal and Torres Strait Islander consumers that has predominantly been adopted by the courts (Chapter 2), and the significance of the different (cultural) values of Aboriginal and Torres Strait Islander people and non-Indigenous people in trader-consumer interactions (Chapter 3). This chapter will demonstrate that a consumer problem which appears to apply predominantly to Aboriginal and Torres Strait Islander people should not automatically be assumed to exist only for reasons of socio-economic disadvantage, or cultural reasons, or both combined. As White J alluded in *ASIC v Kobelt*, there is more to the story, those being the race-based differences created by government laws and policies.

Early Inequality of Access

One of the prevailing features of the laws during the Protection period was inequality. This inequality was based on race and discriminated against people of Aboriginal and Torres Strait Islander descent. The regulation of Aboriginal and Torres Strait Islander money, whether derived from wages or social security, had the potential to be subject to the management, control and discretion of the Protectionist regime. In essence, Aboriginal and Torres Strait Islander people in Queensland 'were denied basic citizenship rights'.⁴⁸⁷ The impacts of the Protectionist regime were felt by those Aboriginal and Torres Strait Islander people who fell within its scope; however, Aboriginal and Torres Strait Islander people who fell outside of the Protectionist regime by application of the law were not immune from its harmful, ill effects, because the very existence and operation of the Protectionist regime meant it tacitly promoted an attitude of general contempt for Aboriginal and Torres Strait Islander people. This attitude had concrete consequences for the welfare of Aboriginal and Torres Strait Islander people and saw a disregard for the legal rights of Aboriginal and Torres Strait Islander workers and families.

⁴⁸⁷ Chesterman and Galligan (1997), p 33.

Despite comments in recent years about ‘lifestyle choices’⁴⁸⁸ in respect of Aboriginal and Torres Strait Islander people and communities, access by Aboriginal and Torres Strait Islander people in Australia to the welfare system has historically trailed behind that of non-Indigenous people. This has occurred largely because of prevailing views over this period that were fundamentally racially discriminatory. Prior to the introduction of the *Racial Discrimination Act 1975* (Cth) (RDA), discrimination based on race was lawful and, as such, for decades an Aboriginal and Torres Strait Islander person’s ability to access money and gain the necessities of life was dictated and curtailed by racially-defined law and policy.

These practices began shortly after federation with the enactment of several pieces of legislation relating to invalid, aged and widow pensions, unemployment and sickness benefits, and child endowment and maternity allowances. It began with the Commonwealth government enacting the *Invalid and Old-Age Pensions Act 1908* (Cth). This Act was intended to be a safety net for the aged. Section 6 of the *Invalid and Old-Age Pensions Act 1908* (Cth) was express in its ambit, providing that the aged pension was to specifically exclude ‘aboriginal natives of Australia’;⁴⁸⁹ thus, welfare entitlements as provided for under the Act were not to be extended to Aboriginal and Torres Strait Islander people.⁴⁹⁰

A distinction was made between an Aboriginal and Torres Strait Islander person deemed to be a ‘half-caste’ and an Aboriginal and Torres Strait Islander person who was ‘predominantly of Aboriginal descent’, which affected their treatment under the law.⁴⁹¹ This distinction was consistent with other legislation at the time. In Queensland, a system of categorising Aboriginal and Torres Strait Islander people

⁴⁸⁸ See for example <http://www.abc.net.au/news/2015-03-11/abbott-defends-indigenous-communities-lifestyle-choice/6300218>; <http://www.smh.com.au/federal-politics/political-news/lifestyle-choice-tony-abbott-stands-by-controversial-comments-despite-indigenous-leader-backlash-20150310-140mn5.html>; <https://www.theguardian.com/australia-news/2015/mar/10/remote-communities-are-lifestyle-choices-says-tony-abbott>.

⁴⁸⁹ Though this legislation and much of the legislation of that period referred to ‘aboriginal’ people, in most circumstances that term also included Torres Strait Islander people. ‘Aboriginal’ tended to be used as a general noun meaning ‘native’ or ‘indigenous’ rather than a specific noun.

⁴⁹⁰ Gunstone explains that in reality this was not always strictly adhered to by those who administered the pensions. See Gunstone (2014), p 34.

⁴⁹¹ Murphy (2013), p 209.

was already in place. The Commonwealth legislation simply mirrored the Queensland Parliament's approach in the *Aborigines Protection and Restriction of the Sale of Opium Act 1897* (Qld). Federally, it was argued by the Attorney-General that such a distinction was made between people deemed 'half-caste' and people deemed 'predominantly of Aboriginal descent' as a matter of statutory interpretation because of the term 'aboriginal native' in the Australian Constitution.⁴⁹²

This racially discriminatory approach continued with the introduction of maternity allowances by the Commonwealth Government in 1912 with Maternity Allowance Act 1912 (Cth) which contained a similar provision to the earlier *Invalid and Old-Age Pensions Act 1908* (Cth). The maternity allowance was not to apply to 'women who are ... aboriginal natives of Australia'.⁴⁹³ In responding to criticisms about the exclusion of Aboriginal and Torres Strait Islander women from being eligible to receive maternity allowances, the Commonwealth Government expressed 'a clear constitutional division'⁴⁹⁴, whereby matters relating to Aboriginal and Torres Strait Islander people fell within the residual powers of the States pursuant to the Commonwealth Constitution. One justification made by the Commonwealth Government was that Aboriginal and Torres Strait Islander people living in urbanised areas would be able to meet the criteria and thereby be entitled to the social security benefits⁴⁹⁵; however, this was not always the case. For example, when pleas for granting exemptions were made to the authorities to enable individuals to receive the benefits under the Commonwealth legislation, they were frequently rejected. It was stated that the position as clarified was that '[t]he legislation excluded those in whom "aboriginal blood predominates"; Aborigines were "a responsibility of the States", and a half-caste who "elects to reside on ... a state reserve" could not expect to receive both state and Commonwealth support'.⁴⁹⁶ This was in direct contradiction to the assurances of the Commonwealth Government that Aboriginal and Torres Strait Islander people living in towns and cities would be able to satisfy the eligibility criteria and receive social security.

⁴⁹² Murphy (2013), p 209.

⁴⁹³ Gunstone (2104), p 36.

⁴⁹⁴ Murphy (2013), p 210.

⁴⁹⁵ Murphy (2013), p 216.

⁴⁹⁶ Murphy (2013), p 217.

The caste system which categorised Aboriginal and Torres Strait Islander people and their associated rights was a legal instrument that divided families, kin and community. Chesterman and Galligan note that at the time, in Queensland and Victoria, the bulk of administrative decisions made about the operation of the 'caste' provisions deemed Aboriginal and Torres Strait Islander people to be 'half-castes',⁴⁹⁷, making it almost impossible for Aboriginal and Torres Strait Islander people to free themselves from the regulation and control of the government.

The situation changed little in 1941 with the introduction of child endowment legislation. As passed, the legislation did not cover all children. It expressly excluded 'nomadic' children and those who were 'wholly or mainly dependent upon the Commonwealth or a state for support'.⁴⁹⁸ In Queensland, of those children who were eligible for the endowment, the State agreed to 'receive the payment on the endowees' behalf and arrange for its distribution'.⁴⁹⁹ A few years later, the *Unemployment and Sickness Benefits Act 1944* (Cth) was even more explicit in excluding Aboriginal and Torres Strait Islander people, providing an exception only where 'by reason of the character, standard of intelligence and development of the aboriginal native' the Aboriginal and Torres Strait Islander person should benefit.⁵⁰⁰

Changes to the old age, invalid and widow's pensions were introduced but were accompanied by changes to eligibility based on exceptions pursuant to State Protectionist regimes. In Queensland, where a certificate and exemption system operated, the decisions made at the State level determined eligibility for the Commonwealth benefits.⁵⁰¹ One commentator has since observed that Queensland's Protection system 'was so repressive it is unlikely many [Aboriginal and Torres Strait Islander people] were exempted'.⁵⁰² The last vestiges of the systems that excluded Aboriginal and Torres Strait Islander people from eligibility for

⁴⁹⁷ Chesterman and Galligan (1997), p 54.

⁴⁹⁸ Gunstone (2014), p 39.

⁴⁹⁹ Murphy (2013), p 221.

⁵⁰⁰ Murphy (2013), p 224.

⁵⁰¹ Murphy (2013), p 222.

⁵⁰² Murphy (2013), p 223.

Commonwealth benefits disappeared from legislation in 1966.⁵⁰³ Thus, it was only in 1966 that these racially discriminatory aspects of the social security statutes were removed.⁵⁰⁴

Though in time formal equality grew for Aboriginal and Torres Strait Islander people in accessing social security benefits, during the same period another issue ran parallel. Aboriginal and Torres Strait Islander people were being maligned in the workforce in the same way as in the society security system. Chesterman and Galligan contend that 'one of the chief aspects of the 1897 [Protection] Act was its regulation of Aboriginal employment'.⁵⁰⁵ The law's approach to the payment of equal wages to Aboriginal and Torres Strait Islander people was also racially-discriminatory and excluded or diminished people's workplace entitlements and benefits.

The early experiences of Aboriginal and Torres Strait Islander people in the labour market have been described as slave labour.⁵⁰⁶ Workplace abuses were common and took advantage of Aboriginal and Torres Strait Islander people and their labour. Among questionable workplace practices were payments made in alcohol, opium, rations and blankets.⁵⁰⁷ This spanned the range of industries in which Aboriginal and Torres Strait Islander people were employed both on the land and at sea. The Torres Strait pearling industry, for example, was viewed as in particular need of regulation for the way it treated its Aboriginal and Torres Strait Islander workers.⁵⁰⁸

On pastoral stations, the employment of Aboriginal and Torres Strait Islander people as stockmen has frequently been referred to as a form of 'slavery'.⁵⁰⁹ One of the protectors (employed to oversee the Protection legislation) strongly objected to the practice of employers paying Aboriginal and Torres Strait Islander workers with

⁵⁰³ Murphy (2013), p 225.

⁵⁰⁴ Gunstone (2014), p 42.

⁵⁰⁵ Chesterman and Galligan (1997), p 43.

⁵⁰⁶ Gray (2007).

⁵⁰⁷ Castle and Hagan (1997), p 67.

⁵⁰⁸ Castle and Hagan (1997) p 67.

⁵⁰⁹ de Plevitz (1996), p 5.

'items ... instead of wages'.⁵¹⁰ The same protector explicitly advocated for 'an end to this slave system'⁵¹¹ as a reference to both the failure of employers to pay workers and the working conditions endured by Aboriginal and Torres Strait Islander people on the pastoral stations and in the private residences situated on the pastoral stations. Attwood⁵¹² found that '[t]aking Aboriginal children and training them as a labour force was a common practice on the pastoral frontier'.⁵¹³ Similarly, the *Bringing Them Home*⁵¹⁴ report, concerning the Australian Stolen Generation, concluded that during this period 'Aboriginal and Torres Strait Islander children were kidnapped and exploited for their labour'.⁵¹⁵ Many employers shared the attitude that Aboriginal and Torres Strait Islander workers were 'chattel'; that is, their property rather than people with equal (or any) legal rights.⁵¹⁶ The prevalence of this attitude was acknowledged by the Chief Protector of Queensland at the time.⁵¹⁷

Regulations were passed in 1903 in Queensland in an early attempt to regulate the employment of Aboriginal and Torres Strait Islander people. They aimed to right the imbalance in the bargaining position held by Aboriginal and Torres Strait Islander workers with respect to their non-Indigenous employers by seeking to 'protect' those workers from unscrupulous individuals.⁵¹⁸ The regulations in Queensland required employers of Aboriginal and Torres Strait Islander people to enter into employment contracts with their employees. Employment contracts needed to outline the conditions of work, including wages and the transference of a portion of those wages into a trust account that was to be held on that employee's behalf and for the employee's benefit.⁵¹⁹ Thus, Aboriginal and Torres Strait Islander people were not paid their full cash wage. A series of deductions were made, including the money to be held in trust, resulting in Aboriginal and Torres Strait Islander people receiving

⁵¹⁰ Chesterman and Galligan (1997), p 45.

⁵¹¹ Chesterman and Galligan (1997), p 45.

⁵¹² Attwood (1989).

⁵¹³ Attwood (1989), p 68.

⁵¹⁴ Human Rights and Equal Opportunity Commission (1997).

⁵¹⁵ Human Rights and Equal Opportunity Commission (1997), p 2.

⁵¹⁶ de Plevitz (1998), p 145.

⁵¹⁷ de Plevitz (1998), p 145.

⁵¹⁸ Castle and Hagan (1997).

⁵¹⁹ Castle and Hagan (1997).

only between 30 and 80 per cent of their wages during this period.⁵²⁰ Deductions made included those for goods and services; this will be discussed in greater detail shortly. In this way, even Aboriginal and Torres Strait Islander people who worked under employment contracts were not immune from the government's control of their money.

Despite the Queensland government's action to require employment contracts be made with Aboriginal and Torres Strait Islander workers, it has been said that Aboriginal and Torres Strait Islander people actually 'had no bargaining powers over their work conditions' at all.⁵²¹ This was because in practice, it was not Aboriginal and Torres Strait Islander people who negotiated their employment conditions; rather, it was the protectors who brokered the employment contracts.⁵²² These contracted approximately half of the Aboriginal and Torres Strait Islander people who worked in the pearling industry in the Torres Strait on pearl luggers controlled by the Queensland government.⁵²³

The landmark wages case of *Harvester* was decided shortly after the introduction of regulations in Queensland in 1907.⁵²⁴ *Harvester* set down a minimum wage and minimum standards for labour in Australia. Generally, it was viewed as a win for working Australians. Despite the decision in *Harvester*, Aboriginal and Torres Strait Islander workers continued to be subject to the same working conditions, not because Aboriginal and Torres Strait Islander workers were 'specifically excluded in the judgment, [but because] they were assumed to be outside its coverage'.⁵²⁵ To affirm this view, legislation was then passed regarding the sugar industry, which referred to its sugar as 'white grown' and insisted on 'fair and reasonable' working conditions for the production of 'white sugar', which, by definition, excluded the

⁵²⁰ Ros Kidd (2010) 'Who paid for the lucky country?' <http://roskidd.com/who-paid-for-the-lucky-country-2/>

⁵²¹ Anthony (2007b), p 7.

⁵²² de Plevitz (1998), p 147.

⁵²³ de Plevitz (1996), p 5.

⁵²⁴ *Ex parte H. V. McKay* (1907) 2 CAR 1.

⁵²⁵ Norris (1998), p 29.

efforts of the majority of Aboriginal and Torres Strait Islander people – with the exception of ‘quadroons’.⁵²⁶

In the Northern Territory, the situation was the same. McCorquodale contends that ‘[t]he Northern Territory in its *Wards’ Employment Ordinance* from 1953 to 1971 created a great edifice of bureaucratic oversight and control of the minutiae of employment for Aborigines, and always below white norms’.⁵²⁷ Rowley’s⁵²⁸ view is that Aboriginal and Torres Strait Islander people’s involvement in World War II acted as a catalyst for change by calling attention to the shameful treatment of pastoral workers by contrasting their poor wages with the parity of employment benefits between Aboriginal and Torres Strait Islander officers and non-Indigenous officers⁵²⁹; however, change was slow-moving.

Eventually, in 1965 the law was changed to grant Aboriginal and Torres Strait Islander workers equal pay.⁵³⁰ Unhappy with this proposed change to the law, the pastoral industry lobbied the government strongly for a proviso within the legislation. The government conceded. In its final form, the legislation provided for ‘slow workers’. ‘Slow workers’ were Aboriginal and Torres Strait Islander workers who required additional training to make them sufficiently skilled, at which point they were considered worthy of being paid at the full and equal rate of pay as non-Indigenous workers.⁵³¹ This proviso in the legislation gave the pastoral industry a further period of time during which they could continue to pay less than equal wages for the work of Aboriginal and Torres Strait Islander people. Shortly after the passage of the legislation came the *Cattle Station Decision*,⁵³² which again tested the matter of equal wages for Aboriginal and Torres Strait Islander workers. The cattle industry reiterated its long-held position on the need for a period of grace to implement the equal wages requirement. Time, it was said, was needed to allow employers to

⁵²⁶ McCorquodale (1985), p 6.

⁵²⁷ McCorquodale(1985), 5.

⁵²⁸ Rowley (1978), p 96.

⁵²⁹ Rowley (1978), p 96.

⁵³⁰ Norris (1998), p 29.

⁵³¹ Norris (1998), p 29.

⁵³² In the Northern Territory the industry was referred to as the ‘cattle industry’, compared to Queensland where it was referred to as the ‘pastoral industry’, which included both cattle and sheep. See McCorquodale (1985), p 12.

‘adjust’ and ‘rationalise’ its workforce.⁵³³ In real terms, this meant terminating Aboriginal and Torres Strait Islander workers from its employment⁵³⁴ to avoid paying equal wages.

Most recently, on the matter of wages taken from Aboriginal and Torres Strait Islander workers to be held in trust accounts, the Queensland Stolen Wages Reparations Taskforce reported that:

[h]istorical government records show that Aboriginal and Torres Strait Islander peoples’ wages and savings were regularly used by the Department of Native Affairs (and its successor agencies responsible for Aboriginal and Torres Strait Islander peoples) to offset government and departmental revenue by providing debentured loans to other agencies and corporate bodies. In doing so, it also enabled the development of Queensland through the building of infrastructure across the state, particularly the establishment and expansion of hospitals ... Records also show that the number of loans funded each financial year specifically depended on the amount of money available in Aboriginal and Torres Strait Islander accounts.⁵³⁵

Because Aboriginal and Torres Strait Islander workers were limited in their ability to bring legal action at the time against either individuals or the government, the courts across Australia have recently seen a raft of cases brought by and on behalf of Aboriginal and Torres Strait Islander workers in respect of their money. For example, a group of Aboriginal and Torres Strait Islander workers has instituted a class action against the Queensland government.⁵³⁶ Other litigation is also being considered by Aboriginal and Torres Strait Islander people in the Northern Territory.⁵³⁷

⁵³³ McCorquodale (1985), p 11.

⁵³⁴ McCorquodale (1985), p 11.

⁵³⁵ Queensland Stolen Wages Reparation Taskforce (2016), p 23.

⁵³⁶ *Hans Pearson v State of Queensland* QUD714/2016.

⁵³⁷ <https://nit.com.au/stolen-wages-legal-cases-underway/>

Legal action being taken against the state by Aboriginal and Torres Strait Islander people in Australia mirrors that taken by indigenous peoples in other jurisdictions such as Canada and the United States of America.⁵³⁸ The fact that litigation remains on foot demonstrates that the Australian government's responses to claims for compensation and reparation have been totally inadequate. Withholding money from Aboriginal and Torres Strait Islander workers and their families perpetuates the poverty and economic disadvantage of these people and their communities. Significantly, Senate Standing Committee on Legal and Constitutional Affairs cited earlier, highlighted the challenge of law and policy reforms to redress past wrongs against Aboriginal and Torres Strait Islander people when the long term effects of economic control and economic disadvantage are evident but not acknowledged by all levels of government.

Control of Consumption

Discriminatory limits on Aboriginal and Torres Strait Islander people's access to social security began soon after federation, and different employment conditions existed dependent on race. Even as changes were made to their eligibility for social security and their working conditions began to improve, discrimination against Aboriginal and Torres Strait Islander people continued, whereby their use and consumption of their income were controlled. Stolen Wages is one example of a form of income control; however, many of the forms of control went beyond that prescribed by Stolen Wages. In the context of Aboriginal and Torres Strait Islander consumer issues, one of the most damaging aspects of the Protection regime was the lawful (and unlawful) control of Aboriginal and Torres Strait Islander people's money. Namely, it was the system of regularly taking a series of deductions from Aboriginal and Torres Strait Islander peoples' wages that has cemented and continues to create consumer issues for many Aboriginal and Torres Strait Islander people across Australia. This chapter now turns to the way this system of control operated and its contemporary manifestations.

⁵³⁸ Kidd (2006).

Controlled Consumption Centralised through the Community and Station Stores

One commentator has described the system that has historically controlled the money of Aboriginal and Torres Strait Islander people as one that 'operated on the border-line between a cash economy and rationing, which Rowse described (for Central Australia) as a regime of managed consumption; [with] rationing allowed for a balance between tutelage, entitlement and governance by state officials'.⁵³⁹ In some cases, this was perpetrated by the protectors, acting on behalf of the state, and in other cases by the owners of pastoral stations. In both cases, Aboriginal and Torres Strait Islander people's money and their access to and use of it would be determined by another person with different priorities and interests. The aforementioned issues relating to access to social security, payment of award wages and work conditions had a critical influence on the disempowerment of Aboriginal and Torres Strait Islander people in relation to their income. Importantly, it is the control of that money (or income) that has engendered the 'vulnerability' of Aboriginal and Torres Strait Islander consumers both historically and in the current consumer context. This history of controlled consumption based on race has resulted in entrenched behaviours and 'vulnerabilities' that still affect some Aboriginal and Torres Strait Islander consumers and are evident within their communities. It is this essential idea that bridges the past to the present.

Operating between 1943 and 1966, the Aboriginal Welfare Fund, as it was called in Queensland, saw 'a percentage of Aboriginal workers' wages'⁵⁴⁰ garnished into the fund. Contributions required to be made from Aboriginal and Torres Strait Islander workers' wages ranged from '2.5 per cent, 5 per cent or 10 per cent ... depending on family circumstances and their location'.⁵⁴¹ Other money that went into the fund included 'money from the operations of retail stores, cattle, farming and other activities'⁵⁴² carried out on the reserves.⁵⁴³

⁵³⁹ Murphy (2013), p 220.

⁵⁴⁰ Queensland Stolen Wages Reparation Taskforce (2016), p 22.

⁵⁴¹ Queensland Stolen Wages Reparation Taskforce (2016), p 22.

⁵⁴² Queensland Stolen Wages Reparation Taskforce (2016), p 22.

⁵⁴³ Queensland Stolen Wages Reparation Taskforce (2016), p 22.

Within the architecture of the Protection regime there was a rule that goods not supplied as rations to Aboriginal and Torres Strait Islander people would need to be bought. For Aboriginal and Torres Strait Islander people within the Protection regime in Queensland, almost the entirety of their income was controlled in accounts held by the Queensland government. The only means by which Aboriginal and Torres Strait Islander people could access cash, permissible only in small amounts, was by a request to the protector, who provided it at their discretion.⁵⁴⁴ Access to money and cash was not an Aboriginal and Torres Strait Islander person's right at that time. A by-product of this micro-management of money and cash meant that Aboriginal and Torres Strait Islander reserves effectively became cashless environments, meaning goods sought by Aboriginal and Torres Strait Islander people living on the reserves were transacted using credit at the reserve store.

Store credit was not given as a specified sum. It operated as an access point to the money being compulsorily held in Aboriginal and Torres Strait Islander people's savings accounts. This left people living on reserves with only one option for purchasing the goods they needed beyond the basic rations provided by the protector – the reserve store – to which Aboriginal and Torres Strait Islander people as consumers were thereby tied. In the reserve store system, '[the] purchase was effected by signing a chit as proof of purchase [and the] amount was then debited from the person's personal savings account and credited to the store'.⁵⁴⁵

In the early 1900s, the Queensland Government identified the practice of giving Aboriginal and Torres Strait Islander workers credit at the station store in lieu of cash wages. It was a practice that, in theory, was not sanctioned by the government; however, the practice was allowed to continue despite the knowledge of authorities. The practice was problematic for a number of reasons. First, it was in direct contravention of the methods provided for in the industrial awards for the payment of wages.⁵⁴⁶ Second, the goods being offered at the station store were sold at 'inflated

⁵⁴⁴ de Plevitz (1996), p 7.

⁵⁴⁵ de Plevitz (1996), p 7.

⁵⁴⁶ de Plevitz (1996), p 5.

prices'.⁵⁴⁷ Third, the offering of store credit to obtain goods at the store merely replaced a system of no wages and rations with a system of wages being converted to store credit to 'buy' the 'rations' at the station store.⁵⁴⁸ An effort was made by the government to eliminate these activities at pastoral stations by passing legislation specifically aimed at stamping out the practice.

The Queensland Government introduced provisions into the *Wages Act 1918* (Qld), which were legislative amendments specifically aimed at outlawing the practice of paying wages in store credit at the station store. The amendments to the *Wages Act 1918* (Qld) provided that 'any employment contract that sought to deduct wages of an Aboriginal and Torres Strait Islander worker was illegal and void'⁵⁴⁹ pursuant to the legislation. It further provided that if wages were not 'actually paid',⁵⁵⁰ an Aboriginal and Torres Strait Islander person could apply to a magistrate for actual payment. Notably, the changes to the *Wages Act 1918* (Qld) applied only to those workers who were not employed within the Protection system.⁵⁵¹

Fraud by government workers such as storekeepers and reserve clerks was commonplace,⁵⁵² and fraudulent behaviour has even been said to have extended to police officers.⁵⁵³ Enforcement of the law in this area was therefore a challenge, and despite the legislative changes, a system of 'work for no pay' continued,⁵⁵⁴ as did the cashless economy.

As late as the 1970s, Queensland government audits repeatedly highlighted the need for the government to undertake proper checks on the accounts of Aboriginal and Torres Strait Islander people in cases where the money was held by the government, because the opportunities for fraud were troubling.⁵⁵⁵ These were

⁵⁴⁷ de Plevitz (1996), p 5.

⁵⁴⁸ Anthony (2007), p 8.

⁵⁴⁹ de Plevitz (1996), p 5.

⁵⁵⁰ de Plevitz (1996), p 6.

⁵⁵¹ de Plevitz (1996), p 6.

⁵⁵² de Plevitz (1996), p 7.

⁵⁵³ Huggonson (1990), p 367.

⁵⁵⁴ Anthony (2007), p 8.

⁵⁵⁵ Kidd (2003), p 14.

necessary to minimise the potential for fraud, to identify any fraud that had occurred and to make any necessary changes to tighten up the system.

At the same time, similar issues had arisen for Aboriginal and Torres Strait Islander people in the Northern Territory. The underlying rationale for the control of their income in Queensland had always been about the 'protection' of Aboriginal and Torres Strait Islander people; in contrast, historical records for the Northern Territory show they were more direct in expressing the belief that Aboriginal and Torres Strait Islander workers lacked financial skills and therefore needed to have their money controlled. Anthony⁵⁵⁶ explains that the Northern Territory 'rationale for the denial of money was that Indigenous people could not be trusted with money, or would have no use for money'.⁵⁵⁷ At one particular reserve in the Northern Territory, workers' wages were necessarily garnished for an amount for 'food' and 'board'.⁵⁵⁸ The system left Aboriginal and Torres Strait Islander workers open to exploitation and created dependency practices, such as the practice of book up.

Arguably, legislative change in the Northern Territory in 1949 contributed significantly to the practice of book up (as a form of store credit) in that jurisdiction. As in Queensland, the law was amended to require Aboriginal and Torres Strait Islander workers to be paid in cash rather than in rations resulted in stores on cattle stations giving store credit to the value of the wage, instead of a cash wage.⁵⁵⁹ According to the literature, the term 'book up' came into parlance sometime in the 1950s.⁵⁶⁰ The exact origins of this term are not known, but it is evident that the system known as 'store credit' later also came to be known as 'book up'. Consequently, Aboriginal and Torres Strait Islander workers were tied to the store of the cattle station on which they worked. This left no option for them to take their custom elsewhere, or to seek the best value for their money. Government officials in the Northern Territory knew that this system was in operation and that it was open to abuse; nonetheless, it

⁵⁵⁶ Anthony (2007), p 29.

⁵⁵⁷ Anthony (2007), p 29.

⁵⁵⁸ Gray (2007), p 13.

⁵⁵⁹ Anthony (2007), p 8.

⁵⁶⁰ Anthony (2007).

remained essentially unpoliced.⁵⁶¹ Government officials viewed book up as a tool that 'assisted Aboriginal and Torres Strait Islander people who were unable to manage their money'.⁵⁶²

Further complicating the relationship between employer and employee on cattle stations was that in many cases Aboriginal and Torres Strait Islander people remained on those stations to continue living and working on their traditional land. According to Attwood, Aboriginal people in the Northern Territory who 'wanted to be close to their land and kin as they generally did' were particularly vulnerable to exploitation as 'cheap and expendable' labour.⁵⁶³ Consequently, in circumstances where a station was paying the whole or a majority of an Aboriginal and Torres Strait Islander person's wage in store credit rather than in cash, that person was arguably 'bonded' to the station because of their cultural connection to the land.⁵⁶⁴

This practice of store credit continued well into the 1960s, partly because Aboriginal and Torres Strait Islander people were fearful of challenging the practice.⁵⁶⁵ One Northern Territory study in the 1970s noted that people were worried about questioning their wages with the station for fear of the consequences.⁵⁶⁶ De Plevitz noted that the threat of being taken from the station and back to the reserve was enough to keep many Aboriginal and Torres Strait Islander workers quiet.⁵⁶⁷ Furthermore, although the government in the Northern Territory knew about the system used by stations to pay Aboriginal and Torres Strait Islander people in store credit, instead of cash as the law required, no legal action was taken by the government on the behalf of the Aboriginal and Torres Strait Islander workers.⁵⁶⁸ This is despite such legal action being permissible pursuant to Northern Territory ordinances in operation at the time.⁵⁶⁹

⁵⁶¹ Anthony (2007), p 8.

⁵⁶² Anthony (2007), p 8.

⁵⁶³ Attwood (1989), p 73.

⁵⁶⁴ Anthony (2007), p 6.

⁵⁶⁵ Anthony (2007d), p 16.

⁵⁶⁶ Bell (1978), p 40.

⁵⁶⁷ de Plevitz (1998), p 148.

⁵⁶⁸ Anthony (2007b), p 5.

⁵⁶⁹ Anthony (2007b).

In Queensland, criticism of station store credit persisted. Practices such as reconciling pocket money due with deductions of items purchased from the station store worked in such a way that no cash ever needed to be paid out at the end of an employment contract.⁵⁷⁰ Aboriginal and Torres Strait Islander people were particularly vulnerable to any questionable account-keeping of stores because of their lower levels of English literacy. The Northern Territory system was plagued by the same criticisms of fraud because of the illiteracy or lower levels of English literacy of Aboriginal and Torres Strait Islander workers, coupled with the limited checks undertaken by government of records kept by station stores.⁵⁷¹

It became widely known across jurisdictions that wages were not being paid in cash and that Aboriginal and Torres Strait Islander people had their wages disbursed in the form of store credits by station owners. At times, government administrators who oversaw the legislation and reserves were frustrated with the lack of enforcement of the law. For many, including government administrators and the Aboriginal and Torres Strait Islander workers, the legislative changes to halt book up were made in vain. Administrators often felt paralysed to make the state-wide checks required and undertake the auditing needed to ensure Aboriginal and Torres Strait Islander people were being paid in accordance with the legislation.⁵⁷²

The practice of book up varied between jurisdictions. Variations appear to have been due to attitudinal differences at a local level,⁵⁷³ at a higher administrative level,⁵⁷⁴ or both. Enforcement action, it seems, was subject to cost⁵⁷⁵, physical remoteness and the ability to conduct checks.⁵⁷⁶ Moreover, it was completely reliant on political will deciding to make available the staff and funding necessary to carry out regular audits and instigate any remedial action on the stations⁵⁷⁷ (or reserves).

⁵⁷⁰ Ros Kidd (2002) *Black Lives Government Lies*, Self-Published, p 40.

⁵⁷¹ Altman and Nieuwenhuysen (1979), p 68.

⁵⁷² Kidd (2010).

⁵⁷³ See for example Bell (1978), p 39.

⁵⁷⁴ Kidd (2003), p 14.

⁵⁷⁵ Kidd (2003), p 14.

⁵⁷⁶ Bell (1978), p 39.

⁵⁷⁷ Kidd (2010).

Pastoral and cattle stations flouted the law for decades in both Queensland⁵⁷⁸ and the Northern Territory, until at least the 1960s. Attitudes were centred on 'white' superiority.⁵⁷⁹ A number of Aboriginal and Torres Strait Islander people continued to be paid in rations for their work with a meagre amount of cash referred to by workers as 'pocket money' to spend in 'town'.⁵⁸⁰ Contrary to legislation in both jurisdictions, the practice of store credit given in lieu of cash wages continued to operate without the consent of Aboriginal and Torres Strait Islander people.

A series of studies investigating Aboriginal and Torres Strait Islander economies edited by Young and Fisk in 1982 captured data from Aboriginal and Torres Strait Islander communities across Australia, including in the Northern Territory and Queensland.⁵⁸¹ From data collected in the 1970s, Young and Fisk showed that despite the repeal of the harsher and more controlling aspects of the Protection period legislation, book up as a system of store credit did not disappear. It remained as it was the only way that Aboriginal and Torres Strait Islander people on reserves and stations knew to be consumers. They had been taught to be consumers in this way for decades, receiving no wages, only store credit and 'pocket money'.

One of the studies in Young and Fisk's edited collection was of an Aboriginal and Torres Strait Islander community in Queensland. The study found that:

In 1977-79 some [Aboriginal and Torres Strait Islander people] used all three stores for credit – that is a person would 'book' up to their limit at one store, not pay the bill for a long time and then go to one of the other stores and start over again. ... Prices in 1978 were 34 per cent higher than Brisbane prices. The mark-up is 40 per cent which includes 15 per cent for freight – a profit which does not go back into the community.⁵⁸²

⁵⁷⁸ de Plevitz (1998), p 148.

⁵⁷⁹ Nielsen (1998), p 86.

⁵⁸⁰ Bell (1978).

⁵⁸¹ Young and Fisk (eds) (1982).

⁵⁸² Anderson (1982), p119.

In the same study it was further found that while the majority of community members had their social security cheques cashed at the reserve store, and bought their goods from there, a few people bought their goods at a nearby store owned and run by a non-Indigenous person.⁵⁸³ It was observed that the reason for this was, in part, because of the 'looser credit' options.⁵⁸⁴ The study showed that store credit (book up) was a normalised way of being a consumer and it was the default approach for many people who knew nothing else. Aboriginal and Torres Strait Islander people in reserves and on stations had been taught and learnt that 'to buy' meant to 'book up'.

Rowse explains one of the key challenges in transitioning Aboriginal and Torres Strait Islander people from book up to 'user pays' systems.⁵⁸⁵:

It is not necessary to consider the sociological subtleties of 'paternalism' to understand one of its features: Central Australian Aborigines did not have to pay for the meagre services provided by missions, settlements and pastoral properties. Food, clothing, shelter, bedding and small luxuries were standard issue in these institutionalised rationing regimes, and Aboriginal people were not given much opportunity to handle and to budget cash incomes until the late 1960s. Accordingly, one of the major themes of criticism and reform during the assimilation period was to demand that, as a civil right, Aborigines should spend money according to their own desires. Reforms in the welfare system, complete by the late 1970s, have given Aboriginal people the chance to practice "user pays".⁵⁸⁶

Whilst the history of store credit, as discussed above, is known, it has ordinarily been considered in the context of Stolen Wages⁵⁸⁷ rather than as an Aboriginal and Torres Strait Islander consumer issue. An argument of this thesis is that the historical links between controlled income, store credit and book up need to be clearly understood

⁵⁸³ Anderson (1982), p119.

⁵⁸⁴ Anderson (1982), p119.

⁵⁸⁵ Rowse (1988), p53.

⁵⁸⁶ Rowse (1988), p53.

⁵⁸⁷ See for example Senate Standing Committee on Legal and Constitutional Affairs (2006), p 59.

in the context of consumer protection law. This is because even with the repeal of the protection legislation in both Queensland and the Northern Territory, which created the environment for it to take root and flourish, book up remains and Aboriginal and Torres Strait Islander consumers continue to use it. Its prevalence has diminished over time; however, it is clear from the case of *ASIC v Kobelt* (currently on appeal to the Full Federal Court) that book up still operates in Aboriginal and Torres Strait Islander communities, and that it is still problematic.

A Remnant Practice – Book Up (Book Down)

Book up has continued into the current day and is a primary area of activity for ASIC in respect of Aboriginal and Torres Strait Islander people.⁵⁸⁸ Book up is still a type of informal credit extended by a business (usually a store) to a consumer without interest or fee. In 2002, ASIC commissioned a study entitled *“Book Up”: Some Consumer Problems*.⁵⁸⁹ The study involved community consultation, submissions and the collection of available statistical data on the location and level of the practice of book up. In seeking to identify the advantages and disadvantages of book up, the report outlines examples of book up, its relative beneficial and detrimental aspects, the state of the law surrounding it and recommendations for policy reform. The report cites historical and cultural factors as having the primary impact.⁵⁹⁰ It also summarised some of the problematic aspects of book up, those being that it ties consumers to one retailer for all purchases, that it offers opportunities for price exploitation and that excessive credit may be advanced to a consumer.⁵⁹¹

In 2006, in media commentary on the matter, the Northern Territory Commissioner for Consumer Affairs raised several issues regarding book up. They noted that Aboriginal and Torres Strait Islander people were ‘captive’ to a store or stores where they used book up, and that those stores kept poor records. They also highlighted

⁵⁸⁸ The term ‘book up’ is used by the Aboriginal community and the ASIC in relation to the practice, but amongst Torres Strait Islander people the practice is referred to as ‘book down’. Therefore, whilst the terms are interchangeable in having the same meaning, they are culturally specific.

⁵⁸⁹ Renouf (2002).

⁵⁹⁰ Renouf (2002).

⁵⁹¹ Renouf (2002), p 6.

the need for a mandatory code coupled with education for Aboriginal and Torres Strait Islander consumers.⁵⁹² The Commissioner further noted the absence of legislation to specifically regulate book up and thus the law's allowance of the practice.⁵⁹³

In 2006, as part of a shared responsibility agreement program, the Western Australian government entered into an agreement with an Aboriginal community in respect of its community store. The agreement had as a shared responsibility – that Aboriginal community members would 'abide by a no book up rule, and agree that all threats or attempts to influence store workers will be dealt with by the Governing Council'.⁵⁹⁴ In the same year, the Northern Territory government sought submission from the public in response to a discussion paper released by the Department of Justice on the practice and regulation of book up. Many stakeholders were forthcoming in providing comment. In 2011, in South Australia, it was reported that book up and the practice of holding Aboriginal peoples' debit cards continued in the APY Lands. The State Aboriginal Affairs Minister Grace Portolesi said book up was 'unacceptable' and the Federal Aboriginal and Torres Strait Islander Affairs Minister Jenny Macklin sought an 'investigation' into the practice.⁵⁹⁵ A follow up news story was published in 2012 about book up in the APY Lands in South Australia. That news story reported book up in 'at least three stores' that also 'held the bankcards and PINs of about 100 Aboriginal customers'.⁵⁹⁶ Again, Federal Aboriginal and Torres Strait Islander Affairs Minister Jenny Macklin criticised book up, commenting that it should be 'outlawed', as should 'unscrupulous credit practices' generally in the APY Lands.⁵⁹⁷

Book up is a striking example of the continuing historical impacts of the Protection period on Aboriginal and Torres Strait Islander consumers. Created by monopolies of station stores and government-owned stores and enabled by the Protection laws,

⁵⁹² Everingham (2006).

⁵⁹³ Everingham (2006).

⁵⁹⁴ Kalumbra 'Community Store' Shared Responsibility Agreement 2 February 2006.

⁵⁹⁵ Schliebs (2011).

⁵⁹⁶ Martin (2012).

⁵⁹⁷ Martin (2012).

book up took on a number of descriptors beginning with ‘store credit’ and then moving into variations of ‘book up’, ‘book down’, ‘booking up’ and ‘booking down’. It was and is in essence the same practice, whereby an Aboriginal and Torres Strait Islander person was given store credit in lieu of wages or social security entitlements, and took on the complexion of rations. It is important to note that book up still affects many Aboriginal and Torres Strait Islander people today. Station stores continue to offer store credit; however, instead of withholding wages, stores now withhold the bank cards of Aboriginal and Torres Strait Islander people.⁵⁹⁸ The 2016 case of *ASIC v Kobelt*⁵⁹⁹ (discussed in Chapter 2) is irrefutable evidence of the continuing impacts of financial control on remote Aboriginal and Torres Strait Islander communities, whereby Aboriginal and Torres Strait Islander people are controlled consumers. As noted in Chapter 2, ASIC was ultimately successful in its action against Mr Kobelt in proving that his book up practices and his actions in respect of his Aboriginal customers amounted to unconscionable conduct.

On the face of it, book up could be a helpful alternative to credit for an Aboriginal and Torres Strait Islander person living in a remote Aboriginal and Torres Strait Islander community where there can be limited access to banking and credit facilities. Nonetheless, book up as a practice is based fundamentally on a history of inequality and is a symptom of the systemic, discriminatory treatment of Aboriginal and Torres Strait Islander people in Australia. The view of many in the financial sector and a number of people in government is that book up is unhelpful and should be strongly discouraged. Notably, the inherently problematic issues of fraud and accountability that were found to exist in the store credit systems in Queensland and the Northern Territory during the Protection period are the same issues that still occur in current book up practices. The store credit scheme was outlawed due to abuses for want of accountability, yet book up continues without a clear legal framework.⁶⁰⁰

Book up both in the past and in its current form has and is based on a power imbalance brought about during the Protection era and founded on unequal rights. It

⁵⁹⁸ See for example *ASIC v Kobelt* [2016] FCA 1327.

⁵⁹⁹ [2016] FCA 1327.

⁶⁰⁰ Anthony (2007b).

has been sustained because of an ongoing inequality of power which in great part continues to contribute to the 'vulnerability' of Aboriginal and Torres Strait Islander consumers who use book up. An informal credit system that has its foundation in laws designed to deny the basic human rights of Aboriginal and Torres Strait Islander people will by its nature reinforce that denial. In finding its historical foundations in the legally-constructed relationship between employer and employee and/or state and ward based on the control of Aboriginal and Torres Strait Islander people's wages and social security, the practice of book up is race-based and racially discriminatory.

Protection era systems of store credit were operated by government reserve stores and privately-owned and run station stores. In the past, book up has been demonised by politicians and used as a punitive measure against Aboriginal and Torres Strait Islander communities; however, the formulation of workable law and policy solutions and alternatives to civil legal proceedings for relief will only come about with knowledge and understanding of the historical context of book up. This is important in combatting future assumptions about book up's 'blackness' and instead recognising its origin in the 'white' legal system.

As mentioned at the outset of this chapter, financial literacy and commercial acumen are other contemporary consumer issues with Protection era roots. Kidd has described systems of financial management formerly employed by the Queensland government throughout this period to manage Aboriginal and Torres Strait Islander people's money, including in private accounts, as fraudulent, injurious and deplorable. Key themes within Kidd's work are that the 'government tells [Aboriginal and Torres Strait Islander people] they are unable to manage their own money' and that the government then 'takes control of that money' as a result.⁶⁰¹ The impacts of wages control endure, and have been both direct and indirect.⁶⁰² In making connections between the control of the financial affairs of Aboriginal and Torres Strait Islander people in Queensland, and those people's disadvantage, Kidd argues that:

⁶⁰¹ Kidd (2008).

⁶⁰² Senate Standing Committee on Legal and Constitutional Affairs (2006), p 59.

all appearances pointed to a liberalising and normalising of the paralysing administrative straightjacket that had immobilised Aboriginal choices and responsibilities ... in negotiating social expectations and constraints, in the delegation of authority and in the custodianship of the land.⁶⁰³

The inquiry report of the Senate Standing Committee on Legal and Constitutional Affairs, published in 2006,⁶⁰⁴ referred to the serious disadvantage created across generations by government practices, such as those permitted by the *Aborigines Protection and Restriction of the Sale of Opium Act 1897*, as 'disabling'.⁶⁰⁵ Kidd's findings concur with those of the inquiry, as do Humpage's. Kidd argues that '[s]pecial funding is a tithe towards the black hole of the material negligence of governments; it does not address deficits in Aboriginal experiences and potential'.⁶⁰⁶ Similarly, in a comparative analysis of Australia and New Zealand, Humpage is critical that 'while [both Australian and New Zealand] governments ... articulated a concern with the economic disadvantage and benefit dependence amongst [their] Indigenous peoples, they did not explicitly acknowledge the state's role in creating and perpetuating such disadvantage'.⁶⁰⁷ Kidd's point about the importance of commercial acumen is critical, for it is the lack of financial experience, in part, that has led to many cases involving Aboriginal and Torres Strait Islander consumers to be brought before the Federal Court (as discussed in Chapter 2). All of this is evidence that the Protection system to which Aboriginal and Torres Strait Islander people were subjected created 'vulnerable' and 'disadvantaged' consumers.

Conclusion

This Crucial to its positioning in the wider context of Indigenous research methodology (as discussed in Chapters 1 and 3), this chapter has examined both

⁶⁰³ Kidd (1998), p 13.

⁶⁰⁴ Senate Standing Committee on Legal and Constitutional Affairs (2006).

⁶⁰⁵ Senate Standing Committee on Legal and Constitutional Affairs (2006), p 68.

⁶⁰⁶ Kidd (1998), p 17.

⁶⁰⁷ Humpage (2016), p 566.

issues of 'the ongoing political [and legal] struggle for reparations and compensation for historical wrongs'⁶⁰⁸ through wages litigation, and the wider 'understanding [of] the manifold impacts of colonialism on the contemporary position of Indigenous people'.⁶⁰⁹ Cases in point were Stolen Wages and book up. This chapter has presented evidence of historical practices that have persisted through time and that continue to manifest in the consumer behaviour of Aboriginal and Torres Strait Islander people. In the case of book up, the practices of the past look strikingly similar to those of the present. This chapter has shown that Australia's legal history has majorly contributed to Aboriginal and Torres Strait Islander consumers' 'vulnerability' and 'disadvantage', with the Protection period remaining generationally ingrained within many of the contemporary experiences of Aboriginal and Torres Strait Islander consumers.

A troubling observation is that notwithstanding the weight of evidence of the social and economic harm done to Aboriginal and Torres Strait Islander people as a result of the Protection period, current law and policy continues to move in this same direction. There is little doubt that 'income management parallels former policies that saw many Indigenous people denied all or some of the wages they earned'.⁶¹⁰ Managing the income of Aboriginal and Torres Strait Islander people, such as with the Basics Card, will ensure that as consumers, Aboriginal and Torres Strait Islander people will continue to have only superficial consumer choices and shallow commercial experiences. If the government is seeking a positive change in circumstances for Aboriginal and Torres Strait Islander consumers, then the law and policy it creates must be different and produce a different outcome. For this to happen, the government must break its addiction to 'protection'.

This chapter has shown that changes to the law are not enough. Combatting the legacy of the law will require law, policies and programs that promote active strategies for internalising protective consumer behaviour. If Aboriginal and Torres Strait Islander people are to move from being 'vulnerable' consumers to being

⁶⁰⁸ See for example Cunneen et al (2017), p 8.

⁶⁰⁹ See for example Cunneen et al (2017), p 8.

⁶¹⁰ Humpage (2016), p 566. See also Bielefeld (2012); Billings (2007).

'savvy' consumers, they must swim against the tide of Australia's legal history. In quelling the tide, both the law and policy have a role to play, as will be discussed further in Chapter 8.

Chapter 5 – External factors affecting Aboriginal and Torres Strait Islander Consumer Decisions

Introduction

Using Indigenous research methodologies is a core element of this thesis (as discussed in Chapters 1 and 3). In keeping with this, the interview data that forms the foundation of the next three chapters will privilege the voices of Aboriginal and Torres Strait Islander people.⁶¹¹ This will be achieved by allowing participants to speak for themselves through the selection and use of direct quotes from the interviews. All consumer quotes will therefore be the direct words of an Aboriginal or Torres Strait Islander person. Shorter quotes are used to capture the essence of an issue spoken about by the participants. Longer quotes are used when the words tell a story and that story gives context to the experiences of Aboriginal and Torres Strait Islander people as consumers. Using these narratives aligns with approaches to Indigenous research methodologies because it raises the voices of the Aboriginal and Torres Strait Islander participants and reflects the way Aboriginal and Torres Strait Islander people communicate and share knowledge.

Moreover, the use of the confidential, semi-structured interviews facilitated story-telling and the opening-up by the participants. This was a helpful method given the topic of this thesis centres on such personal matters such as finance, money and the experience of being ‘ripped of’ which was a challenging starting point.

Non-Aboriginal and Torres Strait Islander participants were interviewed because of the important role they play in providing advocacy services to Aboriginal and Torres Strait Islander consumers. Thus, their perspectives have a different importance because of their ‘outsider’ view of the problematic interactions between Aboriginal and Torres Strait Islander consumers and traders. They are able to give an ‘outsider’ perspective though their interests are vested in advocating for their Aboriginal and Torres Strait Islander consumer client.

⁶¹¹ See, in particular, references in Chapter 3 to Rigney (1999), p 117.

This chapter (Chapter 5) and the following two chapters (Chapters 6 and 7) will discuss and analyse the data collected from interviews with 25 participants (twelve Aboriginal and Torres Strait Islander consumers and thirteen non-consumer stakeholders).⁶¹² A thematic analysis of the interviews was conducted and the key themes regarding the factors that impact the decisions made by Aboriginal and Torres Strait Islander consumers emerged. Broadly, the themes and factors can be divided into three categories. These are:

- (1) factors which are external being beyond the control of both parties, that is, external to the trader and external to the Aboriginal and Torres Strait Islander consumer;
- (2) factors which are attributable to the trader; and
- (3) factors which are attributable to the Aboriginal and Torres Strait Islander consumer.

This chapter will discuss the findings relating to the first category, those being factors that are external to both the trader and the Aboriginal and Torres Strait Islander consumer. Chapter 6 will cover the findings in respect of the second category of factors relating to traders. Chapter 7 will discuss the findings in respect of the third category of factors attributable to Aboriginal and Torres Strait Islander consumers themselves. The reason for categorising the themes and factors in this way is because understanding each category aids in identifying the core factors that impact the decisions made by Aboriginal and Torres Strait Islander consumers, who is best-placed to remedy an issue, and to whom action ought to be directed. Discussion of the interview material will also necessarily involve reference to the socio-legal context discussed in Chapters 1-4.

Findings arising out of the interviews about external factors

⁶¹² See attachment to this thesis which provides additional information about the 25 participants.

Location is the single most important external factor which influences decisions made by Aboriginal and Torres Strait Islander consumers. Location refers to both remoteness and distance. 'Remoteness' relates to the distance of a community from a major serviced centre (such as Cairns or Alice Springs) and the distance thereby travelled by a person located in a remote community to reach that centre. 'Distance' refers to the distance a person located in a major serviced centre (such as Cairns, Alice Springs, Darwin or Brisbane) must travel to reach the town centre (or CBD) from home. Importantly, an Aboriginal and Torres Strait Islander person could experience the influence of both types of these locational factors at different times if they have lived in both a remote Aboriginal and Torres Strait Islander community and a major serviced centre, which is not uncommon.⁶¹³

Location and Remoteness

Regarding location and remoteness, participants in the interviews highlighted a distinction between remote Aboriginal and Torres Strait Islander communities and the closest regional centre to those communities. Participants talked about 'town' and people's travel into and out of town from the remote Aboriginal and Torres Strait Islander community in which they lived. They highlighted the challenges of using transportation to travel from the communities into town. As one Aboriginal and Torres Strait Islander consumer participant explained:

but some don't and they have to come into a town like Alice Springs and things like that. ... They can't get into town; they can't get to [department store]K-Mart. ... Some of them don't have cars and some cars are broken and the only other way to get into town is by bush bus.⁶¹⁴

Generally, participant responses showed that remoteness had a negative effect on the decisions of Aboriginal and Torres Strait Islander consumers. Specifically, because of the circumstance of remoteness, a person could not access the same goods and services as others who were not geographically remote. Conversely, a

⁶¹³ See for example Prout (2008); Memmot et al (2006); Australian Bureau of Statistics (2010).

⁶¹⁴ Consumer 5.

person could only choose (or decide) to buy goods and services made available to them in their remote community. Most commonly, this was described in terms of the availability of and access to goods and services that were more competitively priced, as well as being of a wider variety than those available in remote locations. For example, one participant explained that ‘people in [the] community [would] prefer to go to Alice Springs if they could, because of more variety’.⁶¹⁵

Interestingly, one of the participants noted that remoteness had a protective element for Aboriginal and Torres Strait Islander people. It reduced the likelihood of traders pushing for unsolicited agreements and reduced Aboriginal and Torres Strait Islander people’s potential exposure to high-pressure sale tactics simply because of the limited opportunities for face-to-face contact. The challenges faced by traders in physically accessing remote communities was viewed as positive in this sense. In this way, distance was found to have a safeguarding effect for Aboriginal and Torres Strait Islander consumers. This was noted by one of the stakeholders interviewed in the following terms:

You tend to find that the closer a community is to Alice Springs the more issues there are going to be. ... For instance, if you’ve got somewhere like Kintore which is out near the West Australian border about 500 kilometres away, they’re not likely to have something with Radio Rentals. They’re probably not likely to have a mobile phone issue and it depends on their phone coverage as well. They’re not likely to get involved with the stuff that can happen in town like a door-to-door salesperson. Whereas the ones that live fairly close quite often come into town once a week, once a fortnight. The more chance you get of seeing stuff or having somebody approach you to sell you stuff the more chance you’re going to have of being caught up in it.⁶¹⁶

Clearly, remoteness does not eliminate opportunities for traders to exploit Aboriginal and Torres Strait Islander consumers entirely (the cases in Chapter 2 are testament to this); however, it does diminish the likelihood of their occurrence.

⁶¹⁵ Stakeholder 7.

⁶¹⁶ Stakeholder 11.

Location, Distance and Transport

Location as distance is an issue, not due to remoteness but rather because of limited access to affordable transport. It was also viewed as a negative factor affecting consumer decision-making by participants in the interviews. Distances both short and long were seen to have similar outcomes for Aboriginal and Torres Strait Islander people that led to them being marginalised. Critically, money (or perhaps more specifically, poverty) was an issue that amplified the impact of distance. The tyranny of distance here is therefore associated with more than remoteness alone. For example, on the face of it, it might seem that a person who lives in a regional centre where a reasonable level of services exists should easily be able to access those services; however, an analysis of the interview data indicates that this is frequently not the case. This is especially so if the person lives in a discrete Aboriginal and Torres Strait Islander community located within that regional centre. The reason for this is two-fold. First, these discrete Aboriginal and Torres Strait Islander communities are quite literally located on the margins (or limits) of the township. One participant noted the impact of distance on their access to goods:

If you go to [supermarket]Coles, you've got to walk from here way up into town ... that's a long way.⁶¹⁷

Another participant highlighted their limited access to private or public transport.

I think it's too much hassle walking back to the shop. ... Yes. I've got no car.⁶¹⁸

Issues involving transportation discussed in the interviews related to both private and public transportation. Participants cited the need to walk into the town centre because they had no access to a car and taxis were prohibitively expensive. The

⁶¹⁷ Consumer 3.

⁶¹⁸ Consumer 4.

only viable option to access the large supermarkets with the lowest prices on goods and services was to walk a long distance. Consequently, Aboriginal and Torres Strait Islander people shopped at the stores that were within walking distance. In turn, the participants stated that the shops that were within walking distance of their community were the most expensive in the regional centre and much more expensive than the large supermarkets in the town centre.

A By-Product of Location – Enforcing Breaches of Consumer Contracts

The interviews showed that while location affected Aboriginal and Torres Strait Islander consumers at the contract formation stage, it also impacted them at the contract enforcement stage. Participants said that Aboriginal and Torres Strait Islander people living in remote areas could find it difficult to return items when they purchased them in town, and took them out of town and into a remote community. Thus, even when a person may have overcome the challenge of remoteness or distance to access areas and shops providing greater consumer choice, a further challenge may have arisen. It is apparent that when there are problems with goods or services post-contract formation, Aboriginal and Torres Strait Islander consumers affected by location can find it hard to enforce their legal rights. One participant, an Aboriginal and Torres Strait Islander consumer, explained his decision not to return an item that had stopped working shortly after he had bought it from a store in Alice Springs and had returned to his home community in a very remote part of the Northern Territory, some hours' drive out of town. He stated:

Was too far out bush I didn't worry about it.⁶¹⁹

The same sentiment appeared in another interview with an Aboriginal and Torres Strait Islander person who was not remote but was affected by distance and access to transport. He explained that:

⁶¹⁹ Consumer 1.

if I have to take something back I'll go and take it back ... sometimes it's just a waste – you go there and get worked up for nothing and if they're not going to give you anything so I don't bother, plus you need to find the car to get the place where you have to go. It's too much.⁶²⁰

This response was similar to that of one of the stakeholders interviewed, who said:

People go into town, into Alice Springs and get a TV or something, and it doesn't work, well a lot of those people don't go back in town and they're stuck with it ... they've got no transport to take it back. It's a vicious circle out there in communities. Our community is pretty good ... [w]e've allowed a layby system and it works really well. ... a lot of people use that layby system. ... It was successful ... Because you're on the community and if that thing had stopped once we purchased that stuff, if it doesn't work that they had the opportunity to take it back and hand it back and get their money, or get a replacement.⁶²¹

The above findings align with the existing literature about the correlation between remoteness and access to services. The role of remoteness as a locational issue features strongly in the literature in both the case law and research studies.

Remoteness in the context of the interviews and associated factors relates to geographical remoteness. It is noteworthy that the ABS categorises its Remoteness Areas across Australia 'on the basis of their relative access to services';⁶²² ; associated with this geographical remoteness is reduced access to public and private services such as medical services, education services and goods. The significance of remoteness in accessing goods and services parallels the emphasis the government and wider community place on remoteness in terms of understanding Aboriginal and Torres Strait Islander communities, which creates an

⁶²⁰ Consumer 1.

⁶²¹ Stakeholder 7.

⁶²² Australian Statistical Geography Standard (ASGS)

[http://www.abs.gov.au/websitedbs/D3310114.nsf/home/Australian+Statistical+Geography+Standard+\(ASGS\)](http://www.abs.gov.au/websitedbs/D3310114.nsf/home/Australian+Statistical+Geography+Standard+(ASGS))

automatic association that Aboriginal and Torres Strait Islander people are 'remote'. Additionally, when the government discusses remote Australia it is generally understood to be referring to remote Aboriginal and Torres Strait Islander communities. This association is helpful in one sense in examining the impact of remoteness within the consumer context as it is a useful shorthand that reflects the reality of Aboriginal and Torres Strait Islander people's lives. In another sense, it proves unhelpful in the same context as regulators and government may immediately resort to the shorthand understanding of remoteness when considering issues of location for Indigenous consumers, when, according to the data, the problem goes beyond location.

The Significance of External Factors

As described in Chapter 2, the impact of location, including remoteness and discreteness, was an indicia commonly found across the case law.

Affirms the Courts' Present Understanding of the Impact of Remoteness.

In the context of Aboriginal and Torres Strait Islander consumer issues, location tends to refer to remoteness and discreteness, and more specifically to remote Aboriginal and Torres Strait Islander communities. With respect to remoteness (as discussed in Chapter 2), His Honour White J explained in plain terms that '[t]he remoteness of the communities and, in particular those of Mimili and Indulkana from where the majority of Mr Kobelt's customers came, was not in issue. ... Mintabie being 1,100 km north of Adelaide'.⁶²³ The *Insurance Cases* also referenced remoteness as well as discreteness (as discussed in Chapter 2). This affirmation of the impact of location is important because it tells us that the cases brought before the court are representative of wider Aboriginal and Torres Strait Islander consumer experiences, and that such instances are not 'one-off' or isolated incidents.

⁶²³ [2016] FCA 1327 at [240].

Discreteness, as a term and concept (as discussed in Chapter 2), has generally been explained by the courts as operating according to the relevant State or Territory legislation. For example, in *ACCC v Keshow*, Mansfield J ordered an injunction in respect of traders:

entering ... indigenous communities located on freehold land pursuant to s 6 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and for which an entry permit is required pursuant to s 4 of the *Aboriginal Land Act (NT)* [and] town camps for which the Tangentyere Council Directorate require a person to obtain permission to enter.⁶²⁴

Another illustration, this time from Queensland, is the case of *ACCC v Titan Marketing Pty Ltd*, where Rangiah J made orders against the trader specifically ‘in respect of any Aboriginal and Torres Strait Islander community which has a requirement that visitors obtain permission ... in order to enter that community’.⁶²⁵ Interestingly, Rangiah J went one step further in *ACCC v Titan Marketing* and also included circumstances where permission from community elders is required.⁶²⁶ In this way, courts have directly dealt with remoteness as an influencing factor, but not ‘distance’ more broadly.

Courts have discussed ‘isolation’, but they have taken the concept more as one of geographical remoteness than socio-economic isolation or socio-economic marginalisation. The courts have tended to characterise issues around ‘location’ as relating either to remoteness or discreteness, or to both, not as distance generally or a problem associated with a lack of reliable and affordable transportation. One exception is found in the judgment of Honour White J, who insightfully expressed that ‘remoteness has a number of consequences of present relevance. First, travel from one community to another involves journeys over significant distances. Public transport between the communities is not available’.⁶²⁷

⁶²⁴ [2005] FCA 588 at [3].

⁶²⁵ [2014] FCA 913 at [5].

⁶²⁶ [2014] FCA 913 at [5].

⁶²⁷ *ASIC v Kobelt* [2016] FCA 1327 at [245].

Generally, the understanding courts have of locational impacts is correct, but it is somewhat limited in the way it reflects the experiences of Aboriginal and Torres Strait Islander consumers. Current representations and discussions of location in the case law are narrow. The experiences of Aboriginal and Torres Strait Islander consumers affected by distance who do not live in remote areas are, so far, invisible to the courts and in the case law. Given the number of Aboriginal and Torres Strait Islander consumers who do not live in remote communities, this invisibility is problematic. In one sense, the words of Reeves J quoted earlier also ring true here – that the courts only tend to hear the most ‘egregious’ examples of bad trader behaviour, most of which appear to relate to remote communities.

More than one in five Aboriginal and Torres Strait Islander people live in remote or very remote communities, and the number of Aboriginal and Torres Strait Islander people living in remote and very remote communities is ten times that of non-Indigenous people;⁶²⁸ however, the majority of Aboriginal and Torres Strait Islander people in Australia live in regional or metropolitan centres.⁶²⁹ Therefore, when the data suggests that Aboriginal and Torres Strait Islander people living in regional areas can be equally affected by location, the impact is potentially greater because of the higher number of Aboriginal and Torres Strait Islander people living in locations that are not considered remote. Importantly, indicators of ‘vulnerability’ and ‘disadvantage’ affecting Aboriginal and Torres Strait Islander consumers as a result of location should not only be measured by remoteness, but also in terms of the distance people living in non-remote locations must travel to reach town centres and shopping centres.

An Expanded Definition of Location – Distance Plus Transportation

⁶²⁸ 7.7% of Aboriginal and Torres Strait Islander people live in remote areas and 13.7% in very remote areas. As a comparison, 1.2% of non-Indigenous people live in remote areas and 0.5% in very remote areas, according to the latest ABS data 3238.0.55.001 – Estimates of Aboriginal and Torres Strait Islander Australians, June 2011.

⁶²⁹ Major city areas 34.8%, inner regional 22.0% and outer regional 21.8%, according to the latest ABS data 3238.0.55.001 - Estimates of Aboriginal and Torres Strait Islander Australians, June 2011.

Physical marginalisation can engender problems for Aboriginal and Torres Strait Islander consumers. The impact of transportation on the ‘vulnerability’ and ‘disadvantage’ of Aboriginal and Torres Strait Islander people living in non-remote settings has not previously been highlighted in the case law in the way it was expressed in the interview data. As noted above, Aboriginal and Torres Strait Islander people’s consumer choices are more limited if they do not have transport, even if they live within a regional centre. When their consumer choice is limited, Aboriginal and Torres Strait Islander people are not able to choose the goods or services which best suit their needs. Rather, they can only choose from the goods and services made available to them by the corner or community store. In some instances, where an Aboriginal and Torres Strait Islander consumer might be viewed as having made a ‘bad’ consumer choice, it is not actually the consumer who is making the ‘bad’ choice, but rather the store that chooses the stock.

Location, as a factor which affects decisions made by Aboriginal and Torres Strait Islander consumers, and which negatively impacts on these consumers’ choices, is connected to the issue of distance (as physical marginalisation), including access to transportation, and can be understood in various cultural, historical and economic contexts. Each of these contexts will be expanded on here and can be considered in terms of (1) people’s lives on traditional lands (cultural context), (2) dislocation and relocation (historical context) and (3) poverty (economic context).

Culture plays a particular role in relation to location. Aboriginal and Torres Strait Islander people have a strong spiritual relationship to the land and sea;⁶³⁰ ; connections to particular areas and living ‘on country’ are important parts of the social and cultural well-being of the individual, their kin and community. For many Aboriginal and Torres Strait Islander people, their country in contemporary Australia is ‘remote’. For other Aboriginal and Torres Strait Islander people, their country is part of or near densely populated and well-serviced parts of Australia such as regional towns or capital cities.

⁶³⁰ For precedent Australian cases on spiritual connection to land and sea respectively see *Mabo v Queensland* (1992) 175 CLR 1 and *Akiba v Commonwealth* (2013) 250 CLR 209.

The location of Indigenous communities is in some cases a greater function of the legal history of the colonisation of Australia, as discussed in detail in Chapter 4. During the processes of Aboriginal and Torres Strait Islander people being moved, contained, regulated and separated by the government, many were forced to live elsewhere than their traditional lands. The operation of discriminatory, race-based laws and policies that dictated where Aboriginal and Torres Strait Islander people could and could not live affected matters of remoteness and discreteness and the important indicators of 'vulnerability' and 'disadvantage' for Aboriginal and Torres Strait Islander consumers within the cultural context. The location of discrete Aboriginal and Torres Strait Islander communities was frequently decided by the government, church or pastoral industry, and while some communities were located on country, others were not. This remains the case.

As shown in Chapter 4, the corralling of Aboriginal and Torres Strait Islander people into remote communities to control or 'protect' them occurred Australia-wide. In particular, there was and still is a problematic correlation between the location of these discrete communities at the physical margins of town, as dictated by statute, and the negative consequences for Aboriginal and Torres Strait Islander consumers as a result, in that their location limits what people can buy, where they can buy, and how much they have to pay. It also limits people's ability to enforce their consumer rights by returning faulty goods. These points will be discussed in further detail in the context of trader behaviour in the next chapter (Chapter 6).

There are a number of important implications arising from the factor of location that informs, influences and impacts on the decisions made by Aboriginal and Torres Strait Islander people in entering into consumer contracts. It is evident that people who can least afford it pay more for services or goods, and that this is directly linked to location. ABS data (as discussed in Chapter 1) shows that the mean average income of an Aboriginal and Torres Strait Islander person living in a remote location is lower than that of a non-Indigenous person in the same location. This has been the case for decades.⁶³¹ A study by Taylor found that in places like Alice Springs

⁶³¹ See for example Taylor (1992).

which are remote but have both Aboriginal and Torres Strait Islander and non-Indigenous populations, a two-market economy could potentially and effectively be created.⁶³² Whether inadvertent, unintentional, or entirely intentional, this market segregation occurs along racialised lines, whereby there are stores that serve predominantly Aboriginal and Torres Strait Islander customers and stores that serve predominantly non-Indigenous customers. It is apparent that those that mostly serve Aboriginal and Torres Strait Islander customers are more expensive. An example of one such store appears in the book up case of *ASIC v Kobelt*, where White J found that from 'late 2011, residents of the APY Lands (the Anangu) comprised about 80% of the [Nobbys] store's patronage', whether they were users of book up or not.⁶³³ Data shows that corner stores and stores in remote Aboriginal and Torres Strait Islander communities are on average more expensive than supermarkets.⁶³⁴ This segregation of stores and of customers who use those stores creates an informal system based on racial demarcation that means the consumer experiences of Aboriginal and Torres Strait Islander people are marked by inequality.

As shown in Chapter 1, poverty is endemic in remote Aboriginal and Torres Strait Islander communities across Australia, and in places with high populations of Aboriginal and Torres Strait Islander people, such as town camps. Regarding poverty, the literature generally suggests that a connection exists between the poverty and financial stress experienced by Aboriginal and Torres Strait Islander people living in remote communities.⁶³⁵ Here, the interview data shows that poverty has flow on effects for Aboriginal and Torres Strait Islander consumers in respect of their access to and use of transport, and that these effects are a part of an entrenched cycle that affects consumer decision-making.

Issues with transport are effected by many interconnected factors. One of the most significant is that Aboriginal and Torres Strait Islander people on Centrelink have traditionally been unable to afford to buy and maintain a working motor vehicle

⁶³² Taylor (1992).

⁶³³ *ASIC v Kobelt* [2016] FCA 1327 at [21].

⁶³⁴ See for example Department of Health, Northern Territory Government (2015).

⁶³⁵ See for example Hunter (2006), p 55; Loban (2011).

because the payments they receive are insufficient for this to be affordable. This has meant that people have had to rely on public transport; however, in some locations such as Alice Springs and Thursday Island there is no public transport, making the issue of transport particularly significant. In this study, Cairns was the only site where there was public transport in the form of buses. In some circumstances, buses are not sufficient transport, for example, where an adult has the care of several young children and a large amount of shopping. When public transport is not appropriate, taxis are generally the only remaining option; however, taxis are often unaffordable, particularly for Aboriginal and Torres Strait Islander people on Centrelink (including those using the Basics Card).

It should be noted that additional problems with taxi services have been identified that affect consumers and are related to the 'vulnerability' and 'disadvantage' of Aboriginal and Torres Strait Islander consumers such as racial discrimination.⁶³⁶

When a person has no access to private transport or public transport, and cannot afford a taxi, their only option is to buy goods from the local store. As mentioned above (and as discussed in detail in Chapter 7), goods offered in local stores are much more expensive, frequently of a lesser quality and represent less value for money. The interviews showed that poverty, access to safe and affordable transport, and the frequency of use of corner stores are connected, and that these connections operate as a cycle. A visual representation of this cycle is set out below in Figure 2:

⁶³⁶ See for example <http://www.abc.net.au/news/2015-04-21/taxis-decision-not-to-pick-up-aboriginal-singers-unlawful/6408168>

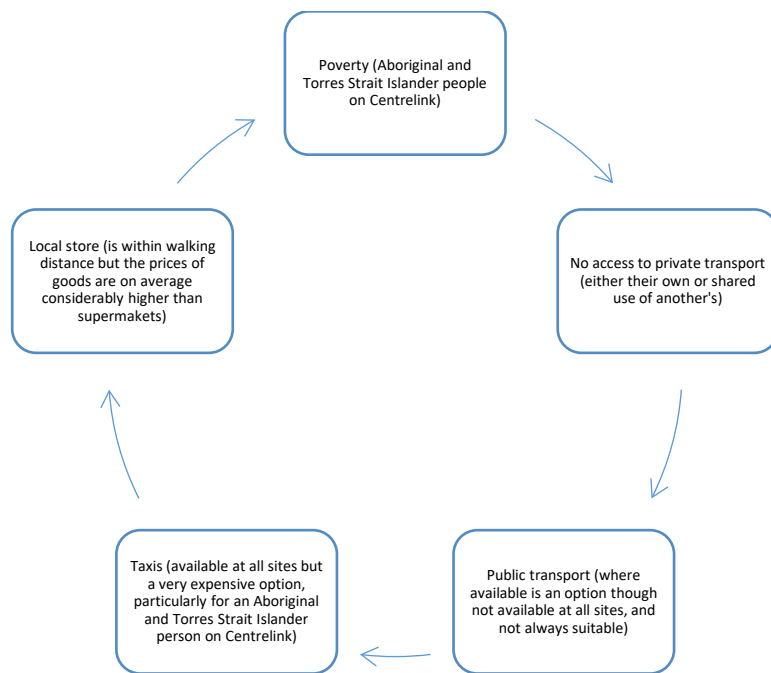


Figure 1.

In relation to poverty and reliance on Centrelink benefits, one participant explained:

it can be just simply that when you live in a remote community there's a shortage of jobs and so your main income is a Centrelink payment which may not go anywhere near what you need to meet the cost of living.⁶³⁷

Transport-related costs such as bus fares, taxi fares, buying a motor vehicle and maintaining that motor vehicle are difficult for impoverished individuals and families to meet; this is the situation for many Aboriginal and Torres Strait Islander people living in Aboriginal and Torres Strait Islander communities. Some of the statements made by participants on this topic included the following:

So the car wasn't just about having a car, you know, it was, like, you know, like for all of us, it's access to all kinds of things.⁶³⁸

⁶³⁷ Stakeholder 10.

⁶³⁸ Stakeholder 2 and stakeholder 4.

One of the biggest problems there is motor vehicles. Our people, that's all that they live for mainly. When they get a lump sum, like the tax return, straight away. They won't buy anything else but vehicles. ... I think because of transport.⁶³⁹

In acute circumstances requiring complex forms of transportation, such as when an Aboriginal and Torres Strait Islander person needs to travel between the Torres Strait and Cairns by aircraft, that person, in one participant's words, may not be able to 'come back [to the Torres Strait] so they go there [to a payday lender] to try and loan for the airfares'.⁶⁴⁰ When such travel costs cannot be met because of a lack of funds, options for travel become limited, and an Aboriginal and Torres Strait Islander person who needs to travel to a different location may find themselves unable to.

A reliance on the local store for food creates a localised monopoly between the store and the adjacent Aboriginal and Torres Strait Islander community. Issues of distance coupled with those of access to transport impact both remote communities and those that are in regional centres such as Cairns or Alice Springs. Aboriginal and Torres Strait Islander people may go to great lengths to avoid buying from these local stores at inflated prices. One example of this was cited by one of the stakeholder's interviewed, who was:

working with a fellow who lives in the outer islands and he was able to access a fridge and he had – I'm talking about what he was currently using – and the story came out that he had actually gotten a fridge, he said it was off the side of the road. When we unpacked that a bit more, it was actually off the side of the road in Cairns and he freighted that up. ... Because he needed a fridge and he saw it there and it was free. ... It wasn't working. ... when we started delivering NILS [No Interest Loan Schemes], he was saying, you know, stuff was spoiling, they weren't able to keep the food overnight so basically they were backwards and forwards to the shop.⁶⁴¹

⁶³⁹ Stakeholder 7.

⁶⁴⁰ Stakeholder 1.

⁶⁴¹ Stakeholder 2 and stakeholder 4.

Mitigating Against the Impact of Remoteness

Give a Wide Meaning of Location as a Circumstance

Understanding location as a determinant of ‘vulnerability’ and ‘disadvantage’ and a consequence of cultural, historical and economic factors is essential to appreciating its influence on the decisions made by Aboriginal and Torres Strait Islander consumers. It also allows for reflection as to the ways the law might safeguard against and mitigate the negative consequences for Aboriginal and Torres Strait Islander consumers. Regulators need to focus their efforts on tackling issues associated with the ‘vulnerability’ and ‘disadvantage’ of Aboriginal and Torres Strait Islander consumers in remote communities as well as those living in discrete communities situated within towns or next to towns. This means government policy must look at ways to reduce the cost of living in a discrete community by examining the problems caused by the tyranny of distance, which has a negative impact on consumer decision-making because it determines what people can buy, how much they pay, and whether they can return faulty goods.

In interpreting and assessing the circumstances of Aboriginal and Torres Strait Islander consumers regarding location, courts and regulators use a basic two-step ‘formula’. This is the best measure of location as a determinant of ‘vulnerability’ or ‘disadvantage’. Using this formula helps widen the meaning of location to capture the ‘vulnerability’ and ‘disadvantage’ faced by Aboriginal and Torres Strait Islander consumers living in both regional centres and remote communities. Step one involves measuring the walking distance from a person’s place of residence to the centre (CBD) of the person’s closest major regional town. Step two involves assessing the availability and affordability of transport options from the person’s place of residence to the town centre (CBD). Where the distance is too long to walk to buy goods and services on a daily basis, *and* there are limited transport options, the ‘vulnerability’ and ‘disadvantage’ of the Aboriginal and Torres Strait Islander consumer will be higher relative to their location. Therefore, a person living in a

remote Aboriginal and Torres Strait Islander community will be at a high risk. Moreover, a person living 40 minutes' walk from the town centre (CBD) with no access to private transport or public transport apart from taxis will also be at a high risk. If a person lives within five minutes' walk of the CBD, the impact of location as a factor will be low, and the person deemed at low risk. Similarly, if a person lives 40 minutes' walk from the town centre but has access to private or public transport such as buses, the impact of location as a factor will be low and the person at low risk. An assumption built into this two-step formula is based on income relative to residence as discussed earlier with reference to ABS reported data.

The two-step formula is useful for assessing the impact of location on Aboriginal and Torres Strait Islander consumers; however, there is a very important caveat on its use, that being that it does not account for racial discrimination by traders operating in the CBD and/or the role of any cultural factors in dictating trader preference away from one trader and towards another. This is an area which requires further research, which is beyond the scope of this thesis.

Future Directions

Given the significance and implications of the findings, there a number of recommendations going forward. Geographical location as related to remoteness and distance is a reflection of both cultural and historical factors; given this, the easiest fix is arguably to improve public transport to and from discrete Aboriginal and Torres Strait Islander communities including those that are remote and those that sit at the margins of towns. This one step alone could potentially wholly or partly alleviate the issues discussed in this chapter. This course of action is supported by the wider literature on the relationship between transport and disadvantage, as well as real life examples.⁶⁴²

⁶⁴² See for example the National Aboriginal and Torres Strait Islander Corporation, Community Transport Network (NATSICCTN), which 'aims to advocate for Aboriginal and Torres Strait Islander communities and transport providers on reducing transport disadvantage and brokering flexible, affordable, accessible and culturally appropriate solutions', <http://natsicctn.com.au/what-we-do/>. See also Tennant Creek Transport, <https://www.ntcoss.org.au/tennant-creek-transport/>.

The Northern Territory Council of Social Service (NTCOSS) notes that the ‘limited availability of public and community transport in the Northern Territory means that many low income people rely on other more expensive forms of transport’.⁶⁴³ In respect of remote Aboriginal communities in the Northern Territory, NTCOSS cites these populations as ‘increasing at a much greater rate than the larger regional centres, making it imperative that planning for remote public and other transport infrastructure to ensure timely and affordable transport services be given the highest priority’.⁶⁴⁴ Currie and Senberg emphasise the need for culturally appropriate forms of transport to be developed to service Aboriginal and Torres Strait Islander people;⁶⁴⁵ these could pave the way for the future and provide Aboriginal and Torres Strait Islander people with greater access to goods and services.

In summary, the key drivers which create and heighten the negative impacts of location on Aboriginal and Torres Strait Islander consumers are:

- poverty, driven by economic marginalisation, particularly in remote areas;
- physical marginalisation, as a representation of social and economic regulation (discreteness) and historical remnants of social policy and laws – as seen in the sites of former reserves and camps;
- limited or no access to private transport, which is a product of poverty; and
- limited or no access to affordable public transport (excluding taxis, which are a form of public transport but are unaffordable).

Distance and transport are key factors that impact the decisions made by Aboriginal and Torres Strait Islander consumers when entering into consumer contracts. Critically, whilst remoteness is one measure of distance, there are others measures that can have similarly negative impacts on Aboriginal and Torres Strait Islander consumers. Measuring the likelihood of location as a factor of ‘vulnerability’ requires a two-step process, those steps being (1) measuring the distance between the Aboriginal and Torres Strait Islander person or household and centres (hubs) of goods and services, and (2) looking at the accessibility and affordability of private

⁶⁴³ NTCOSS (2014), p 3.

⁶⁴⁴ NTCOSS (2014), p 14.

⁶⁴⁵ Currie and Senberg (2007).

and public transport options between the Aboriginal and Torres Strait Islander person or household and centres (hubs) of goods and services. Where there are accessible and affordable transport options, the impact of location will be lessened. Where there is an absence of or limited access to affordable transport, the impact of location will be heightened. As long as the distance is one which prohibits walking as a viable option, it will be a factor which will impact on the decisions made by Aboriginal and Torres Strait Islander consumers.

Conclusion

In conclusion, location was a key theme across the data. Determining that location was a fundamental issue was not surprising, as its impact has been addressed in many cases involving Aboriginal and Torres Strait Islander consumers in remote Aboriginal and Torres Strait Islander communities. The data expands upon the determining factors in these cases because it shows that location as an issue in relation to access to goods and services affects Aboriginal and Torres Strait Islander people living in regional centres just as consistently as it does Aboriginal and Torres Strait Islander people living in remote communities. Ultimately, location is not about remoteness – it is about marginalisation.

Aboriginal and Torres Strait Islander people in both regional and remote areas have limited or no consumer choice. ATMs are one example of this,⁶⁴⁶ as explained by one of the stakeholder participants:

One of the things they do of course is use the local ATM rather than the bank – they may not be close to a major shopping centre or major bank so they'll go down to the local one and of course there's always fees for that, and of course there was something in the paper recently about that. I gather it's something that they're looking at ... the last lot of legislation was supposed to reduce the ATM fees and they said it hasn't really done that at all. I had a lady yesterday,

⁶⁴⁶ Australia Financial Counselling & Credit Reform Association (2010).

in one month she had \$67 worth of fees. That's a lot of money when you're not getting much.⁶⁴⁷

Charging a higher price than the recommended retail price is not in itself unlawful, but, as prescribed by the ACL, paying this higher price in the context of certain circumstances can give rise to unconscionable conduct.⁶⁴⁸ The data collected shows that paying more is a regular occurrence for Aboriginal and Torres Strait Islander people affected by location. As their consumer choices are limited due to locational issues, the goods and services Aboriginal and Torres Strait Islander people can physically access are not necessarily those that are preferred or the most beneficial. According to one of the stakeholder participants, this is particularly evident regarding consumer credit leases:

Our funding is very much ad hoc and we can't meet the capacity for our communities, and there's a whole heap of areas throughout even the far north that don't have access. So for the Step Up⁶⁴⁹ you have to be able to come for a face to face interview. So the need is huge but the access still isn't there. ... the rental companies ... who'll go within driving distance. So they've got a huge presence in Wujal and Hopevale.⁶⁵⁰

Consumer credit leases have been the subject of a number of legal actions taken by ASIC in matters such as *Zaam Rentals* (discussed in Chapter 2). In some locations, there were alternative means of obtaining household items, such as through NILS.⁶⁵¹ Although currently limited in their reach, as identified in the data, schemes such as

⁶⁴⁷ Worker 3/4.

⁶⁴⁸ See s 18 ACL.

⁶⁴⁹ The Step Up Loan Program gives 'eligible low income earners access to loans of up to \$3000 [that] can be used for the purchase of essential household, educational and medical equipment, and second hand cars and repairs. Interest is charged at a rate of 5.99%'. It is product provided by the National Bank of Australia and administered by not-for-profit organisations. <http://www.shac.org.au/microfinance/shac-s-microfinance-program/8-microfinance-programs/10-step-up-personal-loan.html>.

⁶⁵⁰ Stakeholder 2 and Stakeholder 4.

⁶⁵¹ The No Interest Loans Scheme (NILS) is provided by Good Shepherd Microfinance. It provides 'individuals and families on low incomes with access to safe, fair and affordable credit [with] [l]oans ... available for up to \$1,500 for essential goods and services such as fridges, washing machines and medical procedures'. <http://nils.com.au/>.

NILS overcame a number of consumer dilemmas created by location. This is supported by the recent opening of a new NILS store in Cairns.

In the *Tiny Tots Undertaking*, the ACCC spoke directly to the problem of location, which it identified as involving ‘the challenges facing Indigenous consumers in seeking a refund from a business that is not located in their local area’.⁶⁵² So did the court in *EDirect No. 1* in respect of remote Aboriginal and Torres Strait Islander communities where there was the reference to the ‘likelihood of detection’, suggesting an important correlation between remoteness and the probability of complaint. In *Excite Mobile*, the telco created a fictional independent complaints body where individuals took consumers’ complaints about Excite Mobile rather than the dedicated Telecommunications Industry Ombudsman, an independent industry-funded complaints body that receives and seeks to resolve complaints about telecommunications businesses. The involvement of the Indigenous Consumer Assistance Network (ICAN) and Central Australian Aboriginal Legal Aid Service (CAALAS) further demonstrates that access to information about making complaints and advocacy services, as well as an individual’s awareness of consumer protection laws are essential to ensuring the proper enforcement and enjoyment of Aboriginal and Torres Strait Islander people’s rights. These services have been found to be desperately lacking in remote Aboriginal and Torres Strait Islander communities.⁶⁵³

The courts have found that both Aboriginal and Torres Strait Islander people living *in* Aboriginal and Torres Strait Islander remote communities, and Aboriginal and Torres Strait Islander people *from* remote communities have been targeted by traders at places such as hospitals and hostels in order to leverage their ‘locational’ vulnerabilities and to gain an advantage. In the case of *ACCC v FDRA*,⁶⁵⁴ the FDRA, Mr Anni and the ACCC entered into a settlement distribution scheme whereby funds gained by the trader from Aboriginal and Torres Strait Islander consumers were redirected towards raising the awareness of Aboriginal and Torres Strait Islander consumers and providing them with legal education training to be

⁶⁵² *Tiny Tots Enforceable Undertaking* at paragraph 8.

⁶⁵³ Allison et al (2012).

⁶⁵⁴ [2016] FCA 429.

conducted either by Aboriginal and Torres Strait Islander communities themselves, or by a third party organisation such as ICAN or CAALAS. The terms of the settlement distribution scheme between the parties were described thus:

[i]f any funds remain in the trust account after all refunds have been paid to the Eligible Consumers, those funds will be used ... in the promotion of consumer protection laws within Aboriginal and Torres Strait Islander communities.⁶⁵⁵

This case is evidence of the unscrupulous behaviour of traders towards Aboriginal and Torres Strait Islander consumers, but also shows how reparations might be made that educate and train Aboriginal and Torres Strait Islander people to make more beneficial decisions when entering into a consumer contract. In combination with systems being put into place to improve Aboriginal and Torres Strait Islander people's access to goods and services, such education and training could pave the way for reducing the cost of living for Aboriginal and Torres Strait Islander people and improving their financial situation.

⁶⁵⁵ *Australian Competition and Consumer Commission v FDRA Pty Ltd* [2016] FCA 429 at Sch A.

Chapter 6 – Trader Factors

This chapter explores the second category of factors that influence and impact the decisions of Aboriginal and Torres Strait Islander consumers, which are attributable to traders. Many of the examples of breaches of Australia's consumer protection laws that were found in the case law in Chapter 2 reflected the experiences of interview participants, particularly by the Aboriginal and Torres Strait Islander consumers themselves. This is significant as it shows that the matters brought by the regulators before the courts are not 'one-off' behaviours by rogue traders; rather, they are common trader behaviours experienced by Aboriginal and Torres Strait Islander consumers. If such behaviour by traders is a common experience for Aboriginal and Torres Strait Islander consumers, real questions must be asked about the effectiveness of litigation as a deterrent.

Key Trader Behaviours that Impact on Consumer Decision-Making

The main trader factors impacting on Aboriginal and Torres Strait Islander consumers in this context are:

- high prices in remote places;
- traders capitalising on consumer vulnerabilities around knowledge and enforcement of consumer rights; and
- unsolicited approaches with high pressure sales tactics.

Trader factors are outside the consumer's control but influence consumer decisions, and reflect the behaviour of the trader rather than that of the Aboriginal and Torres Strait Islander consumer, although in some circumstances trader behaviour may be in response to consumer behaviour. High prices in remote areas and traders capitalising on Aboriginal and Torres Strait Islander consumers' vulnerabilities around their lack of knowledge about their rights and inability to enforce them are very closely connected to the factor of location raised in the previous chapter (Chapter 5). Unlike location, as an external factor, the factors considered here are within the control of the trader, as the trader makes an active choice to behave in a

certain way and to treat Aboriginal and Torres Strait Islander consumers in a certain way. In aiming to create a different outcome for Aboriginal and Torres Strait Islander consumers in dealing with traders, based upon the factors identified in this chapter, change must come from the traders themselves.

It is noted from the outset of this chapter that the kind of trader behaviour discussed herein may be unlawful, or it may be unethical. The challenge of drawing a line between law and ethics will become evident in this chapter, as a thread running through it. Such matters will be considered to the extent possible; however, there are limitations on the scope of this discussion because, as previously discussed, legal action taken by the regulators, and consequently the case law arising from such action (as evidenced in Chapter 2) tends only to focus on the most egregious types of trader behaviour. The result is that only the clearest and cleanest examples of breaches of the consumer law such as misleading and deceptive conduct and unconscionable conduct tend to be taken to court and are successful within it. This is in large part a result of the regulators' policy around commencing legal action.⁶⁵⁶

Enforcement policies are shaped, *inter alia*, by the need to be accountable for the spending of public monies and to act when there is 'conduct of public interest or concern'⁶⁵⁷ and in the 'wider public interest'.⁶⁵⁸ As discussed in Chapter 1 and at further points throughout this thesis, poverty is a real issue for Aboriginal and Torres Strait Islander consumers, and litigation is very expensive. The likelihood then of the grey areas being further clarified by the courts is slim. Moreover, the law is technical. In the recent case of *ACCC v ACN 099814749*,⁶⁵⁹ which was lost by the ACCC, the regulator was shown the perils of legal action when the interpretation of the consumer law as found by the court does not accord with that of the regulator. Interestingly, the current Commonwealth publication on ACL enforcement states that a regulator 'is less likely to pursue matters that ... involve contraventions that are

⁶⁵⁶ See ASIC (2013).

⁶⁵⁷ Commonwealth of Australia (2017), p 12.

⁶⁵⁸ ASIC (2014), p 2.

⁶⁵⁹ [2016] FCA 403.

technical in nature'.⁶⁶⁰ Both the ACCC and ASIC were part of the development of the publication.

Importantly, as seen with the external factor of location, trader behaviour impacts both the consumer's decision to enter into the contract and the enforcement of their rights. The disempowering effect of trader behaviour on Aboriginal and Torres Strait Islander consumers is evident not only in the negative experiences they recount, but also in the language those consumers use to express their feeling of powerlessness, which can be connected to 'vulnerability' and 'disadvantage'. Aboriginal and Torres Strait Islander consumers know when they are being 'ripped off', but they either do not know or do not have the means available to individually address the trader's behaviour.

High Prices in Remote Places

According to the interview data, the practice of price gouging (profiteering) was the most common concern for Aboriginal and Torres Strait Islander consumers. Price gouging in itself is not unlawful; however, when aspects of price gouging amount to unconscionable conduct it can be found to be unlawful. Wilson acknowledges that in addition to the legal dimension, price gouging has economic and ethical dimensions.⁶⁶¹ The interviews revealed that when the Aboriginal and Torres Strait Islander participants felt they had been 'ripped off', that this had occurred in response to the ethical dimension. Equally, the stakeholder participants questioned the ethical dimension of price gouging, which they viewed as traders taking advantage of the consumer's circumstances. Economic commentators simply view price gouging as a market equation of demand and supply, this being a response to the economic dimension. Even in the market context, the law does still regard some instances of price gouging as outside of the law, and such conduct to be unconscionable in certain circumstances.

⁶⁶⁰ Commonwealth of Australia (2017), p 12.

⁶⁶¹ Wilson (2014), p 54.

The interview data showed that Aboriginal and Torres Strait Islander consumers felt the ethical dimension of price gouging very personally. The data further showed that Aboriginal and Torres Strait Islander consumers know that price gouging occurs and the traders who are engaging in it. The issue then is not that the Aboriginal and Torres Strait Islander consumer is not aware that the prices are higher, but rather that their choices about buying goods at those high prices are affected by other factors. For example, one participant stated:

I think [the supermarkets]Coles are better, they're cheaper prices. [The corner store]Milner Road is the worst shop. ... We went there today to get a bit of stuff and my daughter just wanted milk and I told her that two litre milk is \$5. I said we can go to [the supermarket]Coles and get \$2 one and the three litre ones are \$7 and you can go to [the supermarket]Coles and get them for \$3.⁶⁶²

A number of participants believed there was a racial element to traders' price gouging practices. Because Aboriginal and Torres Strait Islander consumers were affected by transportation issues, traders in close proximity to Aboriginal and Torres Strait Islander communities took advantage of the demand created by this circumstance. Related to this element (which will be discussed later in this chapter) was the selling of substandard or low quality products to communities.

The participants provided examples of pricing issues related to different types of goods and services, and each of their experiences had the common theme of traders taking advantage of the 'disadvantage' of Aboriginal and Torres Strait Islander people. Goods and services the participants described as subject to price gouging ranged from motor vehicles to milk, with one illustration as follows:

I know most of these car yards, the small ones around town ... get most of their cars from interstate, get them cheap down there and bring them up here and sell them for thousands of dollars. ... For what they're getting them down

⁶⁶² Consumer 5.

there spending a couple of hundred on a car to bring it back here and put a couple of grand on it. ... one bloke was telling me he wouldn't even buy cars from the car yard he was working at.⁶⁶³

Participants also felt there was a racialised element to the price gouging. The same stakeholder participant had an interesting view on this that seemed to suggest the existence of a divided market, namely, one market that sold to Aboriginal and Torres Strait Islander people and one that sold to non-Indigenous people. As he explained:

[I]t's mainly all the Aboriginal people that go to the second hand car dealers. I think most of the people that are working and all that when they want to buy cars they just go ... to Adelaide and buy a car. But seeing that these mobs are here, most of the Aboriginals down here they've probably got no family so they've got no choice but to buy a car here.⁶⁶⁴

According to this participant, familial (or social) networks in places like Adelaide (a capital city) are more likely to exist for non-Indigenous people than Aboriginal and Torres Strait Islander people. This is a relevant social factor because the lack of familial networks can limit an Aboriginal and Torres Strait Islander person's knowledge and confidence in travelling to somewhere like Adelaide to purchase an item that might cost less than it would in their area of access. Moreover, this situation is likely to be further underpinned by the limited means of Aboriginal and Torres Strait Islander consumers which makes it harder to travel. There is therefore an added economic element.

The participants' beliefs about the high cost of goods and services in their communities are well-founded. In considering the cost of living and improving the health of Aboriginal and Torres Strait Islander people in remote communities, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs found that goods and services cost more in remote Aboriginal and

⁶⁶³ Consumer 1.

⁶⁶⁴ Consumer 1.

Torres Strait Islander communities than elsewhere.⁶⁶⁵ Freight was advanced as a reason for the higher costs of food, with the Torres Strait singled out as especially vulnerable because of its reliance on marine freight services to deliver the bulk of goods to the islands in the region.⁶⁶⁶ Higher fuel prices was also discussed as a contributor to the higher cost of food.⁶⁶⁷

Substandard products were another related issue. In one sense, it is hard to separate substandard products from overpriced products; however, while the two are related they are commonly observed as distinct. For example, one stakeholder participant talked about a trader who was selling televisions that were in the process of being phased out Australia-wide. This was because technology was changing from analogue to digital, yet the trader continued to sell the outdated goods:

[T]he [rental company]Rental Gurus from Victoria ... were going around the town camps in South Australia and they were signing people up for goods ... what it would be is that you'd sign up for three months before goods were delivered. What was happening was people were getting old technology like the old CRT TVs, which you could buy at [department store]K-Mart for a couple of hundred dollars and then they were charging about \$60 a month and then after three months they virtually would have covered their costs. From there they would send out the goods and then be on a two-year contract to keep renting those goods.⁶⁶⁸

Similarly, another stakeholder participant recounted the problem of overpriced goods in the context of consumer credit leases for whitegoods:

Things like washing machines, dryers, those sort of items ... a washing machine I looked up you can go and buy for about \$500 but by the time

⁶⁶⁵ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (2009), p 78.

⁶⁶⁶ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (2009), p 82.

⁶⁶⁷ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (2009), p 87.

⁶⁶⁸ Stakeholder 11.

someone rented it they would have paid \$1400. It was just really over the top exploitation. ... and there was another company which I think had some of the same directors. So exploitation has been fairly common.⁶⁶⁹

As previously mentioned, while price gauging is not unlawful per se, it is an ethical issue in respect of Aboriginal and Torres Strait Islander consumers. Frustratingly, it is a factor they can do little about practically and legally at this time.

Traders Capitalising on Limited Consumer Knowledge and Enforcement Processes

In addition to price gouging, the interviews showed that traders capitalise on Aboriginal and Torres Strait Islander consumers' 'vulnerabilities' in three main ways. The first involved a failure by traders to provide accurate information about the legal rights of Aboriginal and Torres Strait Islander consumers. The second involved traders ignoring complaints made or questions asked by Aboriginal and Torres Strait Islander consumers. The third involved the trader providing incorrect or inadequate information about the goods or services themselves.

Failure to Provide the Correct Information About Legal Rights

The interview material identified a common trader behaviour, whereby traders would fail to provide the correct information about the legal rights of Aboriginal and Torres Strait Islander consumers after the goods or services had been purchased. When an Aboriginal and Torres Strait Islander consumer sought to return the goods because there was a problem with them, the traders provided people with inaccurate or misleading information about their consumer rights under the law. In certain circumstances, this type of conduct could be determined as misleading and deceptive conduct under the consumer law. In some of the circumstances discussed by the interview participants, trader conduct would likely amount to a breach of the

⁶⁶⁹ Stakeholder 11.

law. Illustrative of this type of behaviour, as seen in the case law (discussed in Chapter 2), are those involving telcos that were either dismissive of Aboriginal and Torres Strait Islander consumers' complaints or deliberately misled them as to legitimate complaints processes.⁶⁷⁰

In several situations described in the interviews by Aboriginal and Torres Strait Islander consumers, trader behaviour appeared blatant and brazen. Worse still was that often the Aboriginal and Torres Strait Islander consumer knew that the trader was trying to avoid giving them a refund. This served to compound the consumer's feelings of frustration and disempowerment. As one participant explained:

[When it breaks] I feel like going there and throwing it back in their face ... I have brought gaming systems that haven't worked either like PlayStation 3, the last one I bought was \$270, I took it out bush with me and it was working perfectly and then a couple of days later ... for some reason it didn't work, wouldn't play any games. Mainly the game part wasn't working, it would play movies through a USB and all that but it wouldn't play games. ... Was too far out bush I didn't worry about it. ... I told myself I would never go buy a game from that shop again so the next time I went to one of the bigger shops like [department stores]Harvey Norman.⁶⁷¹

Stakeholder participants described situations in which traders perceived Aboriginal and Torres Strait Islander consumers to lack essential knowledge about their legal rights, and who often took advantage of them as a result. In one instance, a stakeholder described their experience assisting an Aboriginal and Torres Strait Islander person in a situation of this sort. When the stakeholder spoke to the trader and learned of the sort of information the trader was giving to the Aboriginal and Torres Strait Islander consumer they thought it to be concerning and questionable. Moreover, the stakeholder felt the trader changed their attitude and the information later given when speaking to the stakeholder rather than the consumer. Interestingly,

⁶⁷⁰ *ACCC v EDirect Pty Ltd* [2008] FCA 65; *ACCC v EDirect Pty Ltd* [2012] FCA 976; *ACCC v Excite Mobile Pty Ltd* [2013] FCA 350.

⁶⁷¹ Consumer 1.

the stakeholder in this case was a Torres Strait Islander person, who recounted the situation:

Once that person, the dealer, he has a different voice, got some idea of fair trading and so forth, that's when everything changes. When they speak to our people themselves they can turn around and said, "No, that's your car". When they find out someone else on the phone that's got some sort of status, they're knowing about vehicles arrangements etc., then they will back off and say "No, we've got this other car, we meant to send this photo". All this stuff.⁶⁷²

This experience highlights the different ways two Aboriginal and Torres Strait Islander consumers may be treated by a trader when one person has a greater awareness and understanding of their consumer rights than the other. With knowledge, the consumer outcome is better and fairer. Failure by a trader to deal with complaints and queries appropriately can have a detrimental impact on Aboriginal and Torres Strait Islander consumers, but is, again, potentially unlawful. This includes Basics Card approved traders, as one of the participants explained:

If they can't put it back on your [Basics] Card they just make you buy something in the shop, something different. ... they give you either store credit or something like that because they can't refund the money back onto your [Basics] card ... it's too much of a hassle or something like that. ... but when the people know how to talk up for themselves, like some indigenous people know to say, "No, we want our money back", they give them the money back. But the people that don't really know how to speak up for themselves ... probably just take the store credit and get something else.⁶⁷³

A situation such as this is contrary to the basic information published on Centrelink's website about the Basics Card. Specifically, Centrelink states that '[i]f you get a refund for items you bought using your Basics Card, the money will be refunded

⁶⁷² Stakeholder 7.

⁶⁷³ Consumer 1.

back onto your Basics Card'.⁶⁷⁴ It is further concerning because the Basics Card can only be used at 'approved stores and businesses'.⁶⁷⁵ By tying a person to certain stores, and then having that store not give refunds (only store credit), the consumer becomes captive to that store, one which appears to be in breach of Centrelink's policy and potentially also in breach of Australia's consumer protection laws.

The participants explained that traders often provided Aboriginal and Torres Strait Islander consumers with no information, inappropriate information or insufficient information. A common approach employed by traders was to state that the warranty had run out or had been made void. Aboriginal and Torres Strait Islander consumer participants explained that they did not take matters further once they were told this. In the words of one participant:

I bought plenty of things, I bought a speaker box sort of thing, it only worked for about a week or two then it started playing up. ... Just left it, didn't know what to do. I was going to take it back but it's because I bought it from the local hockshop. It was brand new; they said it was brand new, so I don't know what happened to it. They might have said it was our fault; we did something to it if I was trying to take it back or not. ... I know I've tried to take stuff back before and they said it was my own fault. I've gotten TVs where they've said they had warranty on it and we tried to ring up and see if they could repair it because it had warranty on it but because of what happened to it ... for an example we had a big TV we got from [Christmas hamper business]Chrisco and my youngest son threw something, he hit the corner of the TV and it cracked. It should have still worked but the whole thing stopped and they said it was supposed to be under warranty but because of that they couldn't do nothing. So after that happened I just didn't worry about it once it broke or played up I didn't worry about taking it back to the shops. ... Even the shop said it would cost less just to get another TV, when we went to the repair shop

⁶⁷⁴ <https://www.humanservices.gov.au/customer/enablers/about-basicscard>

⁶⁷⁵ <https://www.humanservices.gov.au/customer/enablers/about-basicscard>

to see if they would [repair it]. So we just left it at the shop so they could use the parts for it and didn't worry about it.⁶⁷⁶

Not Responding to Complaints by Aboriginal and Torres Strait Islander Consumers

The second trader behaviour cited in the data related to traders not responding to complaints or questions from Aboriginal and Torres Strait Islander consumers. It involved instances where consumers had contacted traders to complain or ask questions about goods or services purchased, and were dismissed or completely ignored.⁶⁷⁷ Given the important external factor of location, it is troubling when an Aboriginal and Torres Strait Islander consumer has managed with some difficulty to contact the trader in person or by phone to raise an issue, that the problem is not dealt with appropriately or fairly. As one participant explained:

I had it on finance, hire purchase, but I couldn't keep up with the payments. I told them to take my money out of my bank when I had it but they ended up doing it the wrong days and all that and it ended up getting repossessed ... They didn't fix it, I had money in bank waiting for it, I get paid one week, the week after when I don't get paid that's when they take the money out for the car. ... I was ringing up people over in Perth. ... I did try to get it all fixed up and nothing happened. When I rang them up I told them my next pay is on this date [and] I want the money to be taken out on this date ... waited for that date to come and the money didn't go out that week, so I must have thought they still haven't done it. ... In the end I just stopped paying for the car and they came and got it.⁶⁷⁸

Providing Incorrect or Inadequate Information About the Goods or Services to Aboriginal and Torres Strait Islander Consumers

⁶⁷⁶ Consumer 1.

⁶⁷⁷ This was seen in the telco cases discussed in Chapter 2.

⁶⁷⁸ Consumer 2.

The third trader behaviour identified from the data involved the trader providing incorrect or inadequate information about goods and services to Aboriginal and Torres Strait Islander consumers. As an illustration of this, one stakeholder participant stated:

They've been taken for a ride a lot of times, especially that mob of Canteen Creek, to get vehicles from Adelaide. They would actually keep sending the money down and they've got no idea what's the state of the vehicle, the bloke will send a picture. Once they got caught out because they sent the picture to this couple, then in the same community they sent the same picture to another person. This one was paying for this car here, and this one here was paying for it also. Then when we put them together and said, "Hang on, this is the same vehicle, how can it be? You paying for that car, and that person paying for that car". These are the [situations] that people get caught up in.⁶⁷⁹

It was evident that traders exploit the fact that Aboriginal and Torres Strait Islander consumers often have to buy items 'sight unseen' because of their remoteness. This means they can supply goods that do not match the descriptions they provide to the consumer. As one stakeholder participant explained:

They do take advantage because once they see the car on the picture it looks good [but] when the delivery comes then you got no spare tyres and the tyres aren't any good and all that. Then we would have to go through it again, say "Hang on, these tyres are baldy, as when you see the picture these tyres got a lot of tread on it", and so forth.⁶⁸⁰

Other Issues

Failure to adequately assess affordability was a further issue. This was explained by a stakeholder participant:

⁶⁷⁹ Stakeholder 7.

⁶⁸⁰ Stakeholder 7.

I think too with the payday lenders; I know there's been some changes with the legislation around the affordability but I don't know that that's necessarily tested at court is my understanding. ... But I think their assessment is really lacking, and it's really obviously that had they actually done a thorough assessment or even a basic assessment that it wouldn't have been affordable ... they're actually putting people's housing and ... their ability to feed themselves at risk. ... Because there's no requirement really. I don't think it's been tested in court.⁶⁸¹

Instalment plans do make goods and services more accessible; however, it also usually makes them more expensive. Unhelpfully, instalment plans can thereby create a false sense of cost for the consumer. It was clear from the interview data that people often tend only to see the small weekly amount payable rather than focusing on total cost of the contract. Stakeholder participants cited this as occurring particularly in relation to loans, consumer credit leases and hampers. For example:

I don't think [payday lenders] actually say if you don't do this, this would happen or this would go to a debt collection agency and be referred to someone else. I don't think they get down to the nitty gritty stuff, just about you repaying it back and so and so a month, and you've got ... X amount of months to pay it back, and that's all they need to know, but [they're] not telling them the consequences.⁶⁸²

As another stakeholder participant explained:

[W]hen they send out their brochure and all that, it'll say it'll cost you \$2.20 a week or something like that, you know. So people see this little, I can afford \$2.20 a week but then they accumulate all these different things out of the brochure that they want to get where it works out some of them are at \$60 a week by the time they add it all up, you know. They've bought the swing set,

⁶⁸¹ Stakeholder 2 and stakeholder 4.

⁶⁸² Stakeholder 1.

they've bought the surround system, they've bought this, they've bought that.⁶⁸³

A related point is the decline in remote and face-to-face services. This issue is not directly a form of trader behaviour, but frequently has the same outcome. It is perhaps better characterised as an omission, rather than a deliberate failure to provide information. Consumers are increasingly directed online to access goods and services, to access records about their purchases, and to access their money.⁶⁸⁴ As one stakeholder participant explained:

There's this real push for everybody to do stuff online and there's so many people where that falls down, and there's a lot that's lost with that face-to-face stuff that happens with Centrelink and the banks and with housing, where people behind the counter can actually identify things for their own customers that are amiss. That doesn't happen anymore and I think more and more it's community organisations like ourselves that are having to pick up on the work of Centrelink – the banks, housing, we could keep going, you know. There isn't that interface that happens anymore or it's very limited or you have to pay for it.⁶⁸⁵

Interview material revealed that Aboriginal and Torres Strait Islander people find this online approach increasingly difficult to use. It is also clear that it has a marginalising effect. Moreover, the cost of countering this marginalising effect has shifted to the not-for-profit sector and the government, with workers from these two sectors having to assist Aboriginal and Torres Strait Islander people in filling out forms and navigating online services. One stakeholder participant stated:

I think what's happened as the banks have streamlined themselves over the years is effectively all these money management services are supporting people's access to banking but it's being funded by the government. So in my

⁶⁸³ Stakeholder 1 and Stakeholder 4.

⁶⁸⁴ See for example Townsend (2014); Nicholls (2013).

⁶⁸⁵ Stakeholder 2 and stakeholder 4.

view ... I really think the banks should be contributing to this work, because people would struggle to access banking if we weren't there. So yeah, I really think that the banks should have some responsibility because there's absolutely [nothing] ... out there they operate through community representatives who can sort of sign forms and ID people and do transfer forms and all that sort of thing, but there's no bank branch that they can walk into – everything has to be done via the phone or a computer. So really the banks are still getting the benefit ... perhaps they don't see it as a benefit, maybe it's a cost to them, but they have these customers [and] they're providing really very little infrastructure, providing really nothing.⁶⁸⁶

The same stakeholder raised the particular issue of accessing and using automatic teller machines (ATMs). They explained that Aboriginal and Torres Strait Islander people need to use ATMs for a range of bank services such as checking bank account balances, withdrawing cash and receiving bank account statements. Certainly, the banking sector has been moving away from face-to-face services and towards online services for decades and this continues to be an increasing trend.⁶⁸⁷ In the case of Aboriginal and Torres Strait Islander consumers in remote areas, the cost of this online approach has arguably shifted from the bank onto them. Such costs include ATM fees, internet access fees (where internet is available) and travel costs to a bank in person when necessary. As the same stakeholder observed:

Even the ATMs out there are independent ATMs. So I know that the major banks have agreed to waive ATM fees for a period of time, but you know, there's no post office so people can't even go to the post office and do their banking.⁶⁸⁸

Unsolicited Approaches with High Pressure Sales Tactics

⁶⁸⁶ Stakeholder 10.

⁶⁸⁷ See for example Argent and Rolley (2000); McDonnell and Westbury (2002).

⁶⁸⁸ Stakeholder 10.

Unsolicited agreements between Aboriginal and Torres Strait Islander consumers and door-to-door traders who enter Aboriginal and Torres Strait Islander communities uninvited continue to be a problem. This is well known to the courts, with much of the legal action (discussed in Chapter 2) taken by the regulators against traders involving unsolicited aspects of trader behaviour.⁶⁸⁹ Examples such as the one below, described by a stakeholder participant, are evidence of traders 'humbugging' Aboriginal and Torres Strait Islander people until they sign a contract:

She said the original guy who harassed her to get the photos taken in the first place, she didn't much like him, but he'd approached her three times so for him to go away she agreed to do the photos.⁶⁹⁰

Of concern, the same Aboriginal and Torres Strait Islander consumer can be approached (as discussed in Chapter 2) repeatedly by the same trader represented by the same or different salespeople and contracted for the same goods. Pop-up shops, which are temporary stalls set up in the middle of thoroughfares in shopping centres, were problematic for both their unsolicited, high pressure sales tactics and their temporariness, which make it more difficult for people to say 'no' and to follow up on purchases or complain about them. This situation was exemplified by the same stakeholder participant as follows:

But then what happens is they come back three or four weeks later, they say "Come and sign up to get your photos", and so she was talking to this really nice lady. So she signed and when I said, "You actually got 23 not just three," she was horrified, and she thought it was \$400 not \$4,950.⁶⁹¹

High pressure sales tactics were coupled with statements of enticement, which participants felt misled Aboriginal and Torres Strait Islander consumers as to the true cost of the goods or services and the actual total cost of the contract:

⁶⁸⁹ See for example *ACCC v Keshow* [2005] FCA 558; *ACCC v Titan Marketing Pty Ltd* [2014] FCA 913.

⁶⁹⁰ Stakeholder 9.

⁶⁹¹ Stakeholder 9.

What most people come in and say [that] starts it off [is], “Would you like a free photo taken?” There’s that sales push or that introduction of “free”, and then once it starts it then snowballs from there. We have had people say “I thought it was free and now I’ve got this in front of me to pay”.⁶⁹²

Another way traders approach Aboriginal and Torres Strait Islander people is through unsolicited mail sent into remote Aboriginal and Torres Strait Islander communities. As a stakeholder participant explained:

[P]eople put a huge amount of faith in the story that they’re being told by someone, that [it’s] a true story or a genuine story or the information that’s being given can be relied upon, and so when that person is not coming from a good place people can be really easily ripped off. Even when it is, even the example that I gave you of the [charity]Heart Research Institute. I can’t imagine that they would have set out to cause financial hardship for a remote indigenous person, but you know, through the fact that they’re so far away ... I don’t know if they know who their fundraising letters are ending up with.⁶⁹³

There are evidently three main strategies used to sell to Aboriginal and Torres Strait Islander people, those being face-to-face contact, and contact by phone and post. Addressing the issue of door-to-door sellers will therefore act only as a partial solution to the problem of unsolicited agreements.

The Significance of these Trader Behaviours

The interview data and the research more generally tell us that price gouging is an ongoing and endemic issue for Aboriginal and Torres Strait Islander people living in remote and discrete Aboriginal and Torres Strait Islander communities. Price gauging appears to occur so often and with such consistency that the behaviour of

⁶⁹² Stakeholder 11.

⁶⁹³ Stakeholder 10.

traders selling to Aboriginal and Torres Strait Islander consumers is not unlike cartel or price fixing behaviour, though apparently more informal. It affirms the findings of the courts in respect of Aboriginal and Torres Strait Islander consumers (and complainants) in the case law (discussed in Chapter 2); however, it is evident the law and/or the way it is currently administered is evidently not a sufficient deterrent for traders. The reward outweighs the risk when it comes to traders capitalising on consumer vulnerabilities around their knowledge of their consumer rights and the enforcement of those rights. It tells us that certain trader behaviours are problematic as they pressure Aboriginal and Torres Strait Islander people into contracts they would not otherwise enter into. Banning such behaviours would aid in reducing the number of contracts made unlawfully due to unconscionable conduct, for example.

Level and Extent of Price Gouging

As discussed in the preceding chapter, location was a strong indicator of the likelihood of price gouging. This is consistent with recent studies on the high price of food and drinks in the Northern Territory. The *Northern Territory Market Basket Survey*⁶⁹⁴ is a report published annually by the Northern Territory Government's Department of Health. It was introduced as part of a health policy to 'monitor food cost, availability, variety and quality in remote community stores' and has been conducted every year from 2000-2015.⁶⁹⁵ The survey works by comparing the same basket of basic food items purchased from different stores across the Northern Territory, and is based on a six-person household.⁶⁹⁶ Significantly, the survey found that the average cost of the market basket in remote stores was \$817, compared to \$577 in 'district centre' supermarkets.⁶⁹⁷ A study published in 2016 by Ferguson et al similarly found that food and drinks in remote Aboriginal community stores cost 60 per cent more than in supermarkets in Darwin.⁶⁹⁸ Ferguson et al further found that Aboriginal community stores in the Northern Territory were only cheaper than

⁶⁹⁴ Department of Health, Northern Territory Government (2015), p 5.

⁶⁹⁵ Department of Health, Northern Territory Government (2015), p 5.

⁶⁹⁶ Department of Health, Northern Territory Government (2015), p 5.

⁶⁹⁷ Department of Health, Northern Territory Government (2015), p 7.

⁶⁹⁸ Ferguson et al (2016), p 24.

Darwin's supermarkets five per cent of the time.⁶⁹⁹ Thus, for a person buying twenty items at an Aboriginal community store, nineteen of those items would cost 60 per cent more than if the person bought the same twenty items at a supermarket in Darwin. Of further concern is that the gap in 'food affordability' between remote Aboriginal communities in the Northern Territory and Darwin is widening.⁷⁰⁰

In Alice Springs, the average cost of the market basket in a supermarket was \$534;⁷⁰¹ the same market basket bought from a corner store in Alice Springs cost \$663.⁷⁰² This overall picture is troubling given arguments relating to freight and high fuel prices do not apply when both the stores are in the same location. This disparity supports the participants' views that corner stores are engaging in price gouging and profiteering because of the circumstances of Aboriginal and Torres Strait Islander consumers with respect to transportation. As one consumer participant noted:

These shops where you go buy smokes they're ripping people off for too much money for smokes. ... the corner stores are charging more.⁷⁰³

This was particularly the case where public transport is limited.

Yeah because when they go to Tennant Creek ... the shops are rip offs there. ... They're selling the prices over the limit. ... they buy it. ... They can't get into town ... Some of them don't have cars and some cars are broken and the only other way to get into town is by bush bus.⁷⁰⁴

Ferguson et al noted in their study that poverty has been found to affect consumer behaviour and consumer decision-making.⁷⁰⁵ Again, as found in the preceding chapter, the price-gouging issue might be mitigated by better access to

⁶⁹⁹ Ferguson et al (2016), p 23.

⁷⁰⁰ Ferguson et al (2016), p 24.

⁷⁰¹ Department of Health, Northern Territory Government (2015), p 7.

⁷⁰² Department of Health, Northern Territory Government (2015), p 7.

⁷⁰³ Consumer 3.

⁷⁰⁴ Consumer 5.

⁷⁰⁵ Ferguson et al (2016), p 21.

transportation, which would give Aboriginal and Torres Strait Islander consumers access to a broader range of stores, choice and competition.

The NT Government should continue to conduct their market basket surveys, and these should be adopted and carried out by the other Australian states and territories to determine the extent of the disparity nationally. Alternatively, a similar measure should be rolled out by the Commonwealth as a national annual survey to track the breadth and depth of this practice across Australia.

Substandard and Poorer Quality Products

Related to price gauging is the problem of traders selling substandard or poorer quality products for premium prices. The issue of the sale of substandard products was observed by Mansfield J in the case of *ACCC v Keshow*, where the trader sold cassette tapes to the Aboriginal women complainants when it was essentially an obsolete technology. Legally significant here is the fact that Mansfield J found that engaging in such conduct was relevant to the court's finding of unconscionable conduct.⁷⁰⁶ The matter of overpriced goods and services was also an issue found by the court in *ACCC v Keshow* to be a relevant circumstance in its finding of unconscionable conduct, being that a DVD player comparable to the one sold by the trader to the Aboriginal women complainants was available at a much lower price from Alice Springs.

Other Issues

Not responding to complaints is another form of trader behaviour that has been the subject of several cases, including those involving telcos (as discussed in Chapter 2). Affordability has also been considered several times by the Courts (as discussed in Chapter 2). The participants' observations about ATMs accord keenly with the issues outlined in the 2010 Financial Counselling Australia (FCA) report,

⁷⁰⁶ More specifically, s 18 ACL provides that '....' is a relevant circumstance for the court to consider in determining whether a trader has engaged in conduct that is unconscionable in the circumstances.

ATM Fees in Indigenous Communities,⁷⁰⁷, and the recommendations of the *ATM Taskforce – Report on Indigenous ATM Issues*, published in 2011.⁷⁰⁸ Undertaken by the Reserve Bank of Australia and the Commonwealth Treasury, the report found that ‘typically, remote consumers only have access to one independently owned ATM and, therefore, have no alternative to paying direct fees for balance enquiries and cash withdrawals’,⁷⁰⁹ and that a ‘typical consumer in a very remote location spends much more in aggregate on ATM fees than their urban counterpart’.⁷¹⁰ As a result of the ATM Taskforce’s report, a fee-free scheme was established for a period of five years, starting from 2012. The ACCC is currently seeking submissions on the scheme as it is due to expire,⁷¹¹ but has made an interim decision for its continuation.⁷¹²

While it would be hoped that such situations are isolated incidents, this does not appear to be the case. For example, in *ACCC v Keshow* (as discussed in Chapter 2), the court found that on more than one occasion, a number of the Aboriginal women complainants had signed multiple direct debit forms with the same trader – each time not fully understanding the nature of the form they were signing or the total cost of the contract. The stakeholder participants emphasised the way salespeople related to Aboriginal and Torres Strait Islander consumers such as whether they had been ‘nice’ or were ‘humbugging’; this affected the decisions made by Aboriginal and Torres Strait Islander consumers when entering into a contract. For example, an observation that can be taken from the above example is the reference to ‘this really nice lady’. This reflects the way the Aboriginal and Torres Strait Islander consumer felt about the salesperson. It suggests that the consumer was persuaded by the

⁷⁰⁷ FCA was at that time the Australian Financial Counselling and Credit Reform Association. See Australian Financial Counselling and Credit Reform Association (2010).

⁷⁰⁸ Australian Government the Treasury and the Reserve Bank of Australia (2001).

⁷⁰⁹ Australian Government the Treasury and the Reserve Bank of Australia (2001), p 3.

⁷¹⁰ Australian Government the Treasury and the Reserve Bank of Australia (2001), p 3.

⁷¹¹ <https://www.accc.gov.au/media-release/draft-decision-on-fee-free-atms-in-remote-indigenous-communities>

⁷¹² Draft Determination and Interim Authorisation Application for revocation of A91312 and the substitution of authorisation A91593 lodged by Australian Bankers Association Inc. in respect of the continuation of an arrangement to provide fee-free ATM balance enquiries and withdrawals in selected very remote Indigenous communities, 26 October 2017, Authorisation number: A91593 Commissioners: Sims, Rickard, Schaper, Court and Featherston. This was subsequently re-authorised <https://www.accc.gov.au/media-release/remote-indigenous-communities-to-remain-atm-fee-free>

‘niceness’ of the salesperson and appears to have related ‘niceness’ to ‘honesty’. Without the benefit of speaking directly to that specific consumer, it is difficult to extrapolate from the experience much further, but relationality and gratuitous concurrence (as discussed in Chapter 3) seem to have played a part.

Consumer Rights, Complaints and Enforcement Action

While most stakeholder participants stated that they generally relied on consumer rights as an instrument to advocate for Aboriginal and Torres Strait Islander clients and resolve their consumer problems, one stakeholder referenced land law as a way to mitigate a trader’s behaviour. The stakeholder described a government business manager’s immediate action to remove a trader from a community, and then use the consumer protection law to deal with the contracts by falling back on the permit system in place at the time. The outcome shows the importance of thinking laterally about protecting Aboriginal and Torres Strait Islander consumers:

[A rental company]Mr Rentals went through about maybe 12 to 18 months ago and had managed to kind of get through a few communities and sign up a whole lot of people before one of the government business managers I think stopped them in their tracks and said, “Hang on a sec.” Luckily, they didn’t have a permit so they were able to kick them out reasonably easily, and then I think he was able to identify most of the people and get the contracts waived. So yes, some people do get stuck with [the rental company]Radio Rentals.⁷¹³

This too is consistent with the orders made by courts (as discussed in Chapter 2) which ban directors from entering discrete Aboriginal and Torres Strait Islander communities for a period of time.

Law and Policy Implications

⁷¹³ Stakeholder 10.

The law needs to re-evaluate and give consideration to the gap in the law that allows for unique circumstances to arise in which price gauging operates in relation to remote and discrete Aboriginal and Torres Strait Islander communities. The high cost of basic items sold to Aboriginal and Torres Strait Islander people living in remote and discrete communities cannot continue without long-term consequences for the social, physical and economic health and well-being of these communities. History (Chapter 4) has played a part in creating this gap, because of the artificial 'colonial' economies created by governments in remote Australia for Aboriginal and Torres Strait Islander people. Through establishing, regulating and controlling Aboriginal and Torres Strait Islander peoples' consumption and financial freedom on 'reserves' successive governments promoted and entrenched the monopolies that now underpin the high cost of basic goods in remote communities.

The primary implication of this chapter about trader behaviour is that even if the law provides protection for a consumer in the circumstances, if a trader misleads an Aboriginal and Torres Strait Islander consumer as to their rights at law, and the consumer does not know differently, then the law is useless. The ancillary implication then is that traders are prepared to risk a complaint and legal action by an Aboriginal and Torres Strait Islander consumer or regulator because the law is not a deterrent. Consequently, if traders are not inclined to abide by the law, then the onus shifts to the consumer to enforce the law. This poses a challenge in light of the impact of location outlined above. Moreover, the challenges outlined earlier (Chapter 3) in respect of relationality are not easily addressed. Nor should the value placed on relationships by Aboriginal and Torres Strait Islander consumers be seen as a challenge to be overcome by Aboriginal and Torres Strait Islander consumers themselves or by any consumer protection framework. Rather, strategies and law reform ought to facilitate the co-existence of social and economic values, and co-practice of both. It is worth mentioning at this point that because of this fact, the concluding chapter (Chapter 8) will have a strong focus on empowering Aboriginal and Torres Strait Islander consumers.

The law must become a stronger financial deterrent – both directly and indirectly. The regulators must become a more active and visible force in remote and discrete Aboriginal and Torres Strait Islander communities. Operating in tandem, they have the potential to help shift the balance of (financial) risk and (financial) reward from the trader's side closer to that of the Aboriginal and Torres Strait Islander consumer.

Lastly, it is clear that trader behaviour can only be changed by the trader. Where a trader is inclined to take unlawful advantage of a market or of a group of 'vulnerable' consumers such as Aboriginal and Torres Strait Islander people affected by locational and other issues, the regulators must act quickly to bring the trader's behaviour in line with the law. To dissuade traders from taking advantage, there must be sufficient risk of loss as a result of legal action such that the regulator's approach militates against trader misconduct. Acting short of this will not be a sufficient deterrent for traders to meet their obligations under Australia's consumer protection laws.

In summary, the conditions that are likely to give rise to trader misbehaviour are location, market failure (namely, a monopoly), the Aboriginal and Torres Strait Islander consumer's lack of knowledge of their legal rights, and a trader's fearlessness regarding the consequences of their conduct due to a lack of enforcement by the consumer, the law or its watchdogs. High penalties for breaches may assist in this matter; however, the operation of the market that is based on supply and demand will in all likelihood continue to remain a challenge for some time.

Looking Forward

ASIC and the ACCC should continue but increase their various outreach and communication programs. They should also continue to maintain their relationships with community-based organisations that provide legal and financial counselling services to Aboriginal and Torres Strait Islander consumers and into remote and discrete Aboriginal and Torres Strait Islander communities. They should also look to

ways they can build the capability of community-based organisations to identify and respond to potentially unlawful behaviour without relying on or resorting to using the regulators in certain circumstances. This might result in:

- a quicker response for Aboriginal and Torres Strait Islander consumers and/or communities;
- unlawful behaviours being detected or detected earlier;
- better cost-benefits outcomes for the regulators in terms of investigation and legal costs associated with court action; and
- a greater proportion of time and resources being put into difficult test cases, or into additional preventative and educational programs such as consumer awareness training and campaigns.

The law needs to re-evaluate and give consideration to the gap in the law that brings about unique circumstances that allow for price gauging to operate in a way that affects remote and discrete Aboriginal and Torres Strait Islander communities. The cost of basic items sold to Aboriginal and Torres Strait Islander people living in those communities cannot continue without long term consequences for the social, physical and economic health and well-being of these communities.

The law must become a stronger financial deterrent – both directly and indirectly. The regulators must become a more active and visible force in remote and discrete Aboriginal and Torres Strait Islander communities. Operating in tandem, they have the potential to help shift the balance of (financial) risk and (financial) reward away from the trader and closer towards the protection of Aboriginal and Torres Strait Islander consumers.

Ferguson et al believe more research is required into the reasons for the higher costs (specifically, in their work, of food and drinks) to be able to properly inform Aboriginal and Torres Strait Islander health policies⁷¹⁴ and reach targets such as the

⁷¹⁴ Ferguson et al (2016), p 25.

those associated with the current Commonwealth government policy of *Closing the Gap*.⁷¹⁵

There is also a tendency in the case law to focus on 'big ticket items' and one-off consumer contracts on goods and services such as mobile phones, whitegoods, electronic devices such as tablets, cars and the like, yet there are hundreds of smaller transactions an Aboriginal and Torres Strait Islander consumer is likely to enter into every year, including for basic items such as food and clothing. With unconscionable conduct set at such a high bar within the law, another legal option needs to be established that will protect Aboriginal and Torres Strait Islander people in all types of consumer transactions.

⁷¹⁵ The current target cited in this report is to '[c]lose the gap in life expectancy between Indigenous and non-Indigenous Australians within a generation (by 2031)'. Department of the Prime Minister and Cabinet (2018).

Chapter 7 – Factors Attributable to Aboriginal and Torres Strait Islander Consumers

This chapter is focused on factors that impact or influence Aboriginal and Torres Strait Islander consumers that rest with the consumer. The chapter will define the factors that facilitate consumer protection and those that inhibit or prevent it, with the aim of informing future law, policy, training, programs and services aimed at Aboriginal and Torres Strait Islander consumer protection. The interview data showed that cultural practices such as demand sharing had a clear and strong influence over Aboriginal and Torres Strait Islander people's behaviour around money and consumption. This had flow-on effects, giving rise to a range of creative strategies adopted by Aboriginal and Torres Strait Islander people to respond to demand sharing, but also entrenching a reliance on problematic practices such as book up and other forms of short-term credit. This finding about the importance of relationality is consistent with Martin and McDonnell's frontier economy concept (as discussed in Chapter 3).

Using the frontier economy concept as an explanation for this finding, it can be understood that the prominence of relationships and kin (that is, relationality) and Aboriginal and Torres Strait Islander values are distinct, non-negotiable and highly influential. Using an extension of Cooter's idea of relationships (as discussed in Chapter 3) as the foundation Aboriginal and Torres Strait Islander (customary) law, this finding sits equally well, as kin and relational values (relationships) take priority over individual interests, even if it means moving from a situation of 'feast' to 'famine' for an Aboriginal and Torres Strait Islander person. Finally, a related finding is that the importance of adhering to values of kin and demand sharing with kin, and fulfilling the obligations tied to those relationships, are more important to Aboriginal and Torres Strait Islander people than saving. The consequence of having no money is less important than building social capital, and can be easier to manage than the repercussions of refusing to participate in demand sharing and meeting Aboriginal and Torres Strait Islander cultural (relational) obligations.

Consumer Behaviour is Multi-Faceted

Three key themes arose out of the interview data. The first of these is **identity**, which comprises the subcategories of culture and the effects of racialised laws, policies and practices. The second theme is **financial capacity**, which comprises the subcategories of financial literacy and poverty. The third theme is **consumer fitness**, which comprises the subcategories of commercial acumen and self-advocacy.

Identity

Humbugging was referred to in an example given by one participant:

I suppose with humbugging you hear stories of older people that have had their key cards taken off them and the grandkids know the PIN ... and go and take their money. You've only got to see it after the banks have opened here at 9:30, people humbugging for money.⁷¹⁶

Another impact of demand sharing on Aboriginal and Torres Strait Islander consumers evident in the data was expressed by one participant as a 'feast and famine' cycle. This phenomenon was described by stakeholder participants in various ways:

We think, "Oh no, we need this money for tucker tomorrow". Today they'll go in and they'll buy it and they will go without for the next fortnight until they get paid again.⁷¹⁷

The money's in, the money's gone.⁷¹⁸

They've got that money in their hand, they have to spend it.⁷¹⁹

⁷¹⁶ Stakeholder 11.

⁷¹⁷ Stakeholder 7.

⁷¹⁸ Stakeholder 8.

A reason given by one of the participants for this behaviour was that spending in a cycle of boom and bust avoided humbugging. That is, a person who has no money and no resources cannot be humbugged.

Another stakeholder participant explained this idea further with respect to culture:

But then on the cultural aspect, “Because I’ve come into all this money I have to share it with my family. Not only do I have to share it with my family but I have to share it with my deceased partner’s family and they dictate a certain amount and then I have what’s left over”. ... for some people it’s all too much that they would prefer to give it all away like they’re supposed to culturally with that obligation and looking after people ... So that cultural thing is very, very real for people ... and it doesn’t fit into what we want.⁷²⁰

An excellent example was given by one of the stakeholder participants of the ‘truck and trailer effect’. This had been described to them by Aboriginal and Torres Strait Islander people themselves:

They talked about ... the “truck and trailer effect”, it’s like if you walk into the casino and you’ve got the money in your hands and you haven’t got to the machine – you’re the truck. The family members that have been there for quite a while, have lost their money or have turned up and never had any money all jump on the trailer. Then it’s like, say you’re on the pokies and you win \$40 quite often, you might pull some money out and give \$4 to this one to go buy themselves a Coke or \$10 to that one to go and get something to eat. So it’s a bit like a form of humbugging in a way. Then if you have a reasonable sized win and then you go to the cashier’s desk then other families seem to know about it and ... more people jump on the trailer as

⁷¹⁹ Stakeholder 7.

⁷²⁰ Stakeholder 9.

such. The thing is from that is once you ... do your money you're no longer the truck – you then become part of someone else's trailer.⁷²¹

The Effects of Racialised Laws, Policies and Practices

As has been previously discussed, book up is problematic, particularly when traders fail to provide basic information to Aboriginal and Torres Strait Islander consumers about the credit they are giving them. Using book up for high-cost items such as cars was seen as especially fraught for Aboriginal and Torres Strait Islander consumers. As one participant explained:

Some of the storekeepers I think are more willing to say, "Yeah, okay, we'll give you some credit," but they'll kind of give you a running tally on how much you owe and how much you've got left, whereas from what I can gather of what happens at Mintabie is just that people have absolutely no idea the extent to which they're in debt, they leave their key cards, every time a payment goes in there's someone sitting there with that key card that just pumps in the PIN ... and takes the payment straight out. ... sometimes they travel for hours to get there, and they can leave their key card and take a car away. So we're talking stuff, big stuff that they can just kind of go, "Yeah I want a car. I'm going to leave my key card with you" [and] drive the car away.⁷²²

One of the stakeholder participants expressly linked the contemporary practice of book up, as seen in *ASIC v Kobelt*,⁷²³ and the historical practice of book up through station and reserve stores:

I think a lot of that comes about from days of where the payments go into the community store, it's all kept on cards, and people go and buy stuff. So there's not actually any real transacting going on. It's a bit like – they're not

⁷²¹ Stakeholder 11.

⁷²² Stakeholder 10.

⁷²³ [2016] FCA 1327.

actually handing over \$50 and getting your \$30 change, a lot of it has just all been done behind the scenes.⁷²⁴

Issues recounted by the participants highlight concerns that apply specifically to Basics Card users. Echoing the broader concerns of critics of the Basics Card, one of the consumer participants observed that while the Basics Card controls spending and curbs the consumption of particular goods, it does not help an Aboriginal and Torres Strait Islander person develop financial literacy:

Yes, like certain shops and all that, if you go into certain shops you have to look if they do accept Basics Card, because if they don't you just walk out of there and there might be good clothes in the shop or something, good things in that shop but you can't buy it because they haven't got a Basics Card in there, you can't use your Basics Card.⁷²⁵

Problematic aspects of both book up and the Basics Card emerged from the interview data. Ironically perhaps, both systems, which have their origins in racially-based 'beneficial' laws, are independently and together stunting opportunities for Aboriginal and Torres Strait Islander people to develop and build the financial literacy skills they need to protect themselves as consumers. Directly on this point, one consumer participant explained what would happen if the Basics Card system ended and they could have the whole of their income:

I reckon it would be a bad thing for me because I don't know how to handle it, control money; it would be gone straight away.⁷²⁶

From the data it was found that learning financial literacy could occur by learning from family, or through formal education, or both. Significantly, according to consumer participants, financial literacy can be taught successfully by family members who have an existing knowledge of the subject, and it can also be taught

⁷²⁴ Stakeholder 11.

⁷²⁵ Consumer 2.

⁷²⁶ Consumer 2.

through formal training mechanisms such as TAFE and financial counsellors. Stakeholder participants gave broad-ranging examples to illustrate the ways they have taught financial literacy with success, some of which will be discussed in this section.

One Aboriginal and Torres Strait Islander consumer explained that they had learnt financial literacy from both their family and through formal training. It was apparent that family can have a strong influence on the level of financial literacy held by an Aboriginal and Torres Strait Islander person when financial skills were passed from parent to child. This was expressed in one of the interviews, as follows:

Consumer 2: Yes. I take a long time, when I'm shopping for food I'll take a long time just looking at the prices and all that.

Heron: Why are you looking at the prices? What are you looking for?

Consumer 2: I'm looking for the cheapest prices so I can get more stuff and have more food.

Heron: So where did you learn that?

Consumer 2: I learned that doing that training and when I used to go shopping with my mum she used to teach me too.

Heron: What did your mum do? What did she teach you?

Consumer 2: Just looking at the prices, the different products and prices and all that.

Heron: What did she teach you to look for?

Consumer 2: The quality and the cheapness of it, just the cheapest thing. She said even if it's cheap it's still food. ... It's the same thing anyway, what you're going to get for the other product. I learnt this myself ... like, say Fruit Loops – the home brand of Fruit Loops is cheaper because you're not paying for the name of the company.⁷²⁷

Moreover, the interviews revealed that Aboriginal and Torres Strait Islander people can actively use the knowledge gained from both family and formal training to inform

⁷²⁷ Consumer 2.

the decisions they make as consumers on an ongoing basis. That is, once they learn basic financial literacy skills, they are able to put those skills into practice in real-life settings such as shopping at the store or supermarket for food.

Stakeholder interviewees cited different strategies used to teach and support Aboriginal and Torres Strait Islander consumers in developing their financial literacy skills. One strategy was to use a 'money map':⁷²⁸

In that fortnightly budget you've got \$20 for insurance. Well, people have that hard concept of ... it's their \$20, but I don't spend \$20 this week on insurance, they slam in next week and they take out \$120 from my bank account, so how does that all work out? So a money map just kind of puts it in [perspective].⁷²⁹

One stakeholder participant highlighted the value of making connections between money and other essential services that Aboriginal and Torres Strait Islander consumers use:

I think I always liked that model of financial counselling and financial support, you know, not as a stand-alone but not just as a stand-alone, like a model of ... embedding it in housing, or embedding it in health, or embedding it ... in other services.⁷³⁰

Another stakeholder participant explained a strategy they found to date had been unsuccessful that involved the practice of using separate bank accounts for spending and saving:

We do encourage – or, when I'm talking to the client, I'm encouraging them to open up another account where it's a direct debit account to pay your bills. I

⁷²⁸ Using a teaching tool such as the 'money map' is consistent with Indigenous ways of knowing, which are not generally linear. See for example the Torres Strait Islander expression of ways of knowing about kinship through the 'coconut palm tree [as] a metaphor for islander family life' in Mam et al (1993).

⁷²⁹ Stakeholder 9.

⁷³⁰ Stakeholder 4.

try to give them some sort of idea, but I think it's just too much for them, like it's too much tracking, trying to keep track of what account ... has what funds in it. So it becomes more hard work.⁷³¹

It was found in the data that the most common and pressing level of financial literacy training needed for Aboriginal and Torres Strait Islander consumers was basic and functional, as explained by a stakeholder participant:

[T]hey set up these money management services to go out into communities and try and teach people about budgeting and understanding sort of financial things, but not at a really high level like a financial planner, but just enough to get through their day-to-day existence more safely.⁷³²

Point-in-time financial counselling was also seen as a particularly important strategy for stakeholders to adopt in supporting Aboriginal and Torres Strait Islander consumers to build their financial literacy skills. As stakeholder participants expressed:

It gives us that platform to work off as well as a focused goal, [if] someone comes in with financial problems, with our clients we know that their goal is to reduce the risk of homelessness, ... to get a house. So we've actually got a goal and a target that's workable, you know you can actually hit it.⁷³³

Generally, when people are experiencing some sort of difficulty or crisis or shock, that's when they're most open to learning things. So [it's] trying to talk to people at that point where they go, "But I didn't think that much was coming out of my account and now I've got nothing," [or] "Well is there a different way that we can do this?" and just combining that with education around why bodies like ASIC or programs like ours don't think book up is a great idea, because of some of the consequences that we've seen for people. But yeah,

⁷³¹ Stakeholder 2.

⁷³² Stakeholder 10.

⁷³³ Stakeholder 6.

you've got to do that at the right time and in the right context. So I don't think there's necessarily one sort of blanket solution – there's different things for different situations.⁷³⁴

[I]t's a really good opportunity to do some of that early intervention or that screening for people and, as you've heard today, like, there's lots of that ... So we screen income statements and ... we're looking at rental stuff, we're looking at debt, we're looking at how people are – their money management systems, we're looking at their banking stuff, and all of that is part of when they come in here because they're looking for housing or they come in here because they're looking for a fridge. They haven't walked through the door of a financial counsellor as yet because they don't necessarily see that they're at crisis point, or they don't know what they do, or they're ashamed to go that way, or whatever the reason is, ... or that you have to wait a really long time to get in because there aren't enough financial counsellors on the ground.⁷³⁵

Moreover, the participants explained that learning financial literacy requires dedicated opportunity, time and resources.

I think it's about recognising that skill development around this stuff takes time. You can't changee...⁷³⁶

Yeah, you need to resource the development of those skills⁷³⁷

The example of one of the Aboriginal and Torres Strait Islander consumer participants who received formal training as part of a job skills program is a further illustration of this:

⁷³⁴ Stakeholder 10.

⁷³⁵ Stakeholder 4.

⁷³⁶ Stakeholder 10.

⁷³⁷ Stakeholder 10.

Heron: Is there anything that you have ever bought that didn't work or that broke?

Consumer 2: Nothing really, because I make sure I look at it before I buy it and all that. I have a good look at it and see if it's working so I don't have to worry about taking it back ...

Heron: So who taught you to have a good look at it?

Consumer 2: I did training in retail.

Heron: Did you? Where did you do that?

Consumer 2: I did that here at Alice Springs ... at IAD. So I did Cert 1, I think it was, and they taught us how to do look at the products and all that.

Heron: So you've studied your Cert 1 ...

Consumer 2: Yes.

Heron: How did you come to do your retail?

Consumer 2: Well, this was last year I think it was, and they just didn't have any jobs and there was these courses going so I put my name down for it and did it. After we did that course and everything, then after that they put us in work placements.

Heron: So they taught you how to look at the product, what else did they...?

Consumer 2: The pricing, how to budget your money, even a bloke came in from, what's it called, it's an organisation in Alice Springs ... he came in and did this money management course with us about the Basics Card and what you can do with the Basics Card and all that.

Heron: Did you find it helpful?

Consumer 2: Yes, I found it really helpful because budgeting and all that ... I don't spend my money, I've got on the Basics Card, half of my pay goes in the bank and half goes into the Basics Card from Centrelink. The money that's in the Basics Card I just use that for food and all that, and it's easier for me to use that money for the food instead of looking for money out of my cash, and just use the basic card.

Budgeting was viewed by both the stakeholders and consumers as an ongoing challenge, with one stakeholder stating '[t]hey don't know how to budget. Budget is

one of the biggest things'.⁷³⁸ Teaching Aboriginal and Torres Strait Islander consumers about budgeting and related financial literacy skills was viewed by the stakeholder participants as an area where there was the greatest potential to improve the lives of Aboriginal and Torres Strait Islander consumers. The small but significant insights into the ways in which Aboriginal and Torres Strait Islander consumers had developed their financial literacy skills through learning informally from family, and through structured learning environments such as TAFE, are a positive finding from the data.

Highlighted alongside the potential benefits of teaching budgeting and related financial literacy skills, the data also showed that there are limits to the impact of such education and learning. These limits need to be acknowledged. For example, generational differences mean that the benefits experienced by an older Aboriginal and Torres Strait Islander consumer may not be the same as those experienced by a younger Aboriginal and Torres Strait Islander consumer. One stakeholder participant commented that generational differences exist between younger and older groups of Aboriginal and Torres Strait Islander consumers. The participant believed that the younger generation has an increased level of financial literacy skills compared to the older generation:

I suppose you need to factor into the younger generation and depending on the age of the person. So for kids that are still in school I think it's important to get all that financial literacy education going through the schooling system, so they understand what mobile phones can cost, what going and getting a personal loan [means], when you buy your first motor car it's more than the loan repayments, it's insurance that can be expensive, it's repairs, tyres, petrol, etc. So getting these younger people coming through so that when they're in their late teens to early 20s they're fairly savvy consumers, they've been taught in a school environment.⁷³⁹

⁷³⁸ Stakeholder 7.

⁷³⁹ Stakeholder 11.

Stakeholder participants found Aboriginal and Torres Strait Islander consumers' understanding and application of future planning and immediacy to be a challenge in terms of them developing financial literacy;⁷⁴⁰ however, it was unclear from the data whether this was an issue with knowledge or a cultural issue. To determine this would require further study and investigation. Teaching financial literacy skills is, again, a part of the solution. Stakeholder participants described why this is so essential:

[T]he clients involved ... have the inability to have foresight further than the week or two ahead, which explains that even if they were given the total sometimes of what they will cost them, they struggle to really comprehend the effect of that across the years.⁷⁴¹

I think it's part of the thing with the money management stuff, with a lot of our clients you've got to get the essentials paid, and then when you say, "This is what is left over, this is what you can do, whether you share it with family or you go and do whatever, it's entirely up to you". So, it's that education that you've got to pay the rent, you've got to pay your mobile bill, if you've got your pay-TV you've got to pay that, if you've got a car you pay that, just make sure all of that is done and then whatever is left over is entirely up to you.⁷⁴²

It's not like a crystal ball thing, but it's like, "What's your understanding of money? Do you want to know more about money?" Just get a general feel of what their financial literacy levels are and see what sort of tools or avenues [there are for] providing information for them.⁷⁴³

In the absence of strong financial literacy skills, Aboriginal and Torres Strait Islander people have adopted pre-paid options for paying for goods and services to aid in managing their money. Over time, through experience, and where available,

⁷⁴⁰ A similar issue around planning was recognised in a health study looking at disease management by Aboriginal and Torres Strait Islander people.

⁷⁴¹ Stakeholder 6.

⁷⁴² Stakeholder 11.

⁷⁴³ Stakeholder 11.

Aboriginal and Torres Strait Islander consumers have opted for pre-paid options. A stakeholder participant explained how a pre-paid option works to help manage money:

It's a budgeting tool; people have probably had a family member that's been hit with bills. Once your credit runs out and people will say, "I've got no credit," they understand that once your money is gone you've got to recharge and you can't make those phone calls until [then] ... it's the same for a lot of places with power. Town camp houses are on pre-paid meters, some of the Territory housing places are too. So rather than getting a three-monthly bill, and certainly as a financial counsellor, you prefer as much as possible can be prepaid. So if your rent is all paid for on your pay day, your power is on a power card and your telecommunication is prepaid, then for a lot of people it's just general living expenses and food shopping and they're pretty much covered.⁷⁴⁴

Pre-paid payment options for goods and services are most commonly used by Aboriginal and Torres Strait Islander consumers for utilities such as electricity and telecommunications. They have therefore become an essential part of maintaining ongoing access to basic services such as utilities. Pre-paid options allow continued access to these basic services even where an Aboriginal and Torres Strait Islander person may otherwise have no available funds. Further, pre-paid options help Aboriginal and Torres Strait Islander people understand the cost of these basic services as one unit that costs 'x' and lasts for 'y' amount of time. Generally, the parameters and terms of these pre-paid consumer contracts are considerably clearer and simpler to understand than their post-paid counterparts, and therefore easier for Aboriginal and Torres Strait Islander consumers to work within and around. One stakeholder participants explained their experience with pre-paid options:

Pretty much everyone is on pre-paid now. Very rarely do I get people on plans now. Because we had Telstra vouchers, so [to] everyone I saw we said, "Do

⁷⁴⁴ Stakeholder 11.

you have any Telstra accounts attached to a mobile?” and they said “No, we’re prepaid,” because I think too many people have been burned. ... Some women will say, “I only ring after 7 o’clock,” or “I only ring after 6 o’clock and I talk then,” ... and “I don’t ring Centrelink,” and “I don’t ring...”, because those numbers of course are charged at higher rates the whole entire duration of the phone call. So I think some people have kind of wised up and have learnt.⁷⁴⁵

Poverty and Instalment Plans

According to the interview data, poverty bears heavily on Aboriginal and Torres Strait Islander consumers. This was tied to the difficulty of budgeting when you have very limited income, as one stakeholder participant explained:

I haven’t come across too many clients that have saved up a lot of money. If you’re on a low income it’s very hard to survive as it is, let alone saving up money.⁷⁴⁶

It seemed that a way many Aboriginal and Torres Strait Islander consumers sought to manage their poverty and affordability issues with high cost items such as furniture, white goods and electronics was to enter into instalment plans. Consequently, instalment plans posed a particularly significant challenge for the Aboriginal and Torres Strait Islander consumers interviewed, as well as for the stakeholders, who cited many examples where the consumer did not appreciate the consequences of instalment-based contracts for goods or services and that the contracts required regular periodical payments usually spanning over a number of years:

I had a lady the other day ... and I told her that she didn't have the [money] because when we go through ... the whole of their budget with ... the Step Up loan, they've got to have X amount of dollars at the end before [a bank]NAB will look at it. This lady had, like, four advance payments, sort of thing, and then she had [a pay-day lender]Cash Converters, and she tried to tell me that

⁷⁴⁵ Stakeholder 9.

⁷⁴⁶ Stakeholder 11.

she had all this money left over. I said, “But have a look at it on paper here, you don't have that money left over.” And she had [Christmas hamper business]Chrisco, that's another big one.⁷⁴⁷

I think it's that people see it as ... a method where you can actually pay in instalments and so there's things that people want and they go, “Great, I can pay for this a little bit at a time,” but again the kind of cumulative cost of – you might be paying five bucks a week for a bed and then another five for an Xbox, or whatever it is in their catalogue, but by the time you've got 10 things, you're paying a substantial amount of your income. Plus, then if you miss a payment I think the instalments kind of rise for each payment that you miss.⁷⁴⁸

NILS can offer instalment plans without high interest and complex contracts, and works on a non-commercial basis, thereby operating in a completely different way to other instalment plans. One stakeholder participant explained their experience with NILS:

And, you know, through the NILS, like the microfinance stuff, we're not funded to provide financial counselling or financial support necessarily, we're funded to deliver loans ... the incentive is that people need a fridge or a washing machine. So people are willing to walk through the door with their bank statements and their income statement and they know that having a conversation around money is part of that. So there aren't a lot of other services where people will willingly just walk through the door without necessarily being in crisis either.⁷⁴⁹

Commercial Acumen

⁷⁴⁷ Stakeholder 3.

⁷⁴⁸ Stakeholder 10.

⁷⁴⁹ Stakeholder 4.

A correlation was found in the data between distance and commercial acumen that operated in two different but related ways and represented a double-edged sword for both Aboriginal and Torres Strait Islander consumers living in urban areas and those living in remote areas. First, increased exposure to consumer transactions in a wide variety of settings generally enhanced an Aboriginal and Torres Strait Islander consumer's commercial acumen; however, a consequence of that increased exposure is an equally increased likelihood of financial problems due to the consumer falling victim to unscrupulous traders and contracting for unwanted or unaffordable goods and services. Ideally, Aboriginal and Torres Strait Islander consumers would be able to enhance their own consumer acumen through increased dealings with traders while also practising protective and proactive strategies aimed at contracting for 'good deals' and avoiding 'bad deals'. Moreover, where an Aboriginal and Torres Strait Islander consumer finds themselves party to a 'bad deal', they would have the ability to terminate the contract and enforce their legal rights regarding that 'bad deal'.

Second, the data showed that Aboriginal and Torres Strait Islander consumers who live in very remote communities have more limited commercial experience, as one stakeholder participant explained:

I think it means that people don't have the life experience to know that "If this proposal is being made to me that I need to check out X, Y and Z range of things" ... I mean we did some evaluation work and we tried to touch on people's level of checking out products before they bought them, and they didn't have a great sense of that, and I think partly because in some ways there's not that much to buy down there.⁷⁵⁰

A positive consequence of remoteness was that Aboriginal and Torres Strait Islander consumers were less likely to have multiple or severe financial problems as a result of dealing with multiple traders. In this circumstance, remoteness acted as a protective factor when an Aboriginal and Torres Strait Islander person resided in a

⁷⁵⁰ Stakeholder 10.

remote community; however, as stakeholders explained, the same person would have an increased vulnerability in a regional or town centre where commercial experience is vitally important to navigating traders, especially unscrupulous ones:

I think the literacy levels in Alice Springs are a lot higher, and the commercial savviness ... and also it's on people's doorsteps here. Like photos, if people want to get something in [department store]Target they get harangued by the photo people, whereas if you're out bush you only get harangued if you're in town during holidays type thing. So they're exposed to a lot more.⁷⁵¹

I think when you live in a remote community and your major experience of the economy is through the community store as opposed to when you live in a bigger urban centre where you probably have to pay market rent for your house, you can acquire more stuff and so then you end up wanting insurance for your contents, for your house that you may have purchased yourself, for your car, you have a range of options about how you can be buried or cremated and so you've got different funeral providers, if you want to ... have more than the standard level of health cover you can purchase health insurance – all of that is kind of non-existent down there. ... Yeah, there's that multiplier effect of being in a town. They can't even go into a bank and see that, "Okay I could get this credit card versus this credit card versus that loan versus..." ... there's not that exposure to a range of different experiences where people can learn about, "Okay, I can actually do this, that and the other thing with money and that these are all the steps that I need to go through to do that thing, to buy insurance or to [etc]".⁷⁵²

One aspect of commercial acumen that has arisen on numerous occasions in the case law (discussed in Chapter 2) is the skill of product comparison. Another way of expressing this is the ability to secure a 'good deal'. One consumer participant made a 'good deal' by providence rather than skill:

⁷⁵¹ Stakeholder 9.

⁷⁵² Stakeholder 10.

Consumer 2: I'm pre-paid ... , this thing that I'm on it's called "Boost", and you recharge \$40 and you get free text, free calls and data for a whole month and you can ring up anyone anytime. ... For me it is I can ring up people and don't have to worry about credit every week. I had Telstra phones before and every week just money on credit. ... It's pre-paid and it's pretty good too.

Heron: Where did you find it or how did you find out about it?

Consumer 2: I just went to the shop one day because I didn't have a phone and I bought a phone ... , it was Optus Boost, bought [the service]it and activated it, I didn't know anything about it and recharged it, and when I was recharging it they said, "You've got unlimited calls, unlimited text for a whole month".

Heron: So you didn't know, you just got lucky?

Consumer 2: It was just needle in a haystack.⁷⁵³

For other consumer participants, the inability to compare goods and services was due to their limited choices. Often, these choices were limited by the Aboriginal and Torres Strait Islander consumer's financial circumstances. In such circumstances, the impact of financial literacy is likely to be somewhat limited. Income was also found to limit access to credit, which is a common means by which the wider Australia population buys a car, or a boat, or a home, for instance.

Stakeholder participants explained that patience in working with Aboriginal and Torres Strait Islander consumers is important. Not all people will learn at the same pace; some Aboriginal and Torres Strait Islander people will be able to learn more quickly than others:

[A] lot of the time [the assistance is] for the same issue. But it's good. So we have hard conversations around that. "What did we do last time?" "Okay well I did this so what do I have to get?" So yeah, people are learning a bit more.⁷⁵⁴

⁷⁵³ Consumer 2.

⁷⁵⁴ Stakeholder 9.

Well, I've had one woman recently where she's been in a situation, through no fault of her own, struggling to pay the bills, and she didn't know that you could tell your creditors, "This has happened." I helped her with one – "Okay this is what's happened," and we did ... financial hardship. She's gone and done it to two more creditors by herself. She just asked me to have a little look at the paperwork and work out the payslips, because they're just a nightmare. So I've just done that and I haven't heard from her for ... a couple of weeks, and I think, "Well great, she's done it by herself". So I suppose once people get hold of that little bit of information that's going to help them – and I think for her it was a pride thing too. "I can do this".⁷⁵⁵

Self-advocacy

The data showed that negative experiences did not necessarily build resilience, though they did often change behaviour. Frequently, Aboriginal and Torres Strait Islander consumer participants internalised negative experiences and developed an apathy about enforcing their consumer rights into the future as result, as is illustrated in the following example:

Consumer 5: We bought a washing machine from [the retail store] ... a shop called Murray Nicks here, and bought one of those front loader ones and we only had it for maybe a month or a couple of months and it broke down on us, water was coming out and everything. We told them to fix it and they never fixed it and it was still leaking. ... They said they fixed it but it was still... the water was still coming out.

Heron: Did you ask them to fix it properly?

Consumer 5: Yes.

Heron: And did they?

Consumer 5: I don't think it got fixed properly because it was still leaking, so we just chucked it out because they didn't fix it properly.

⁷⁵⁵ Stakeholder 9.

Heron: Did you buy another washing machine?

Consumer 5: We ended up buying another one, a top end one now.

Heron: The top loader ones.

Consumer 5: Yes, the top loader because the one we bought ... from [the retail store]Murray Nicks kept leaking.

Heron: Did you go back to [the retail store]Murray Nicks...?

Consumer 5: We went back there and told them, and they couldn't give us a new one.

Heron: Why did they say they couldn't give you a new one?

Consumer 5: Because they reckon the warranty ran out and all that stuff. ... Now when we buy things we just buy it straight out. We don't buy it on that ... payment thing.

Heron: So did you buy that front loading washing machine on a payment plan?

Consumer 5: Yes. Then they reckoned that warranty ran out and they couldn't fix it.

Heron: So did you still have more that you had to pay?

Consumer 5: Yes.

Heron: And did you keep paying?

Consumer 5: I think we paid it off and then they reckoned that warranty ran out and we couldn't get it fixed from them, so we didn't buy any more stuff from that shop anymore.⁷⁵⁶

Solutions must Acknowledge the Cultural and Racial Dimensions of the Problem

Identity

The first theme identified in respect to the factors discussed in this chapter is identity. In Chapter 3, the concept of the frontier economy was discussed at length. In summary, the discussion highlighted the relevance of cultural values that influence

⁷⁵⁶ Consumer 5.

the behaviour of Aboriginal and Torres Strait Islander consumers. In particular, 'demand sharing' and 'humbugging' were expressed as core values that bear heavily on the decisions made by Aboriginal and Torres Strait Islander consumers. The interview data supports the frontier economy concept of differing values existing in the non-Indigenous and Aboriginal and Torres Strait Islander domains, in that the Aboriginal and Torres Strait Islander value of sharing was found in the data to be a non-negotiable value. Thus, if a demand to share was made according to Aboriginal and Torres Strait Islander values then it could not be refused. This was expressed most directly by one stakeholder participant, who stated, '[t]hey can't say no'.⁷⁵⁷

It is important to note that social values rather than economic values underpin demand sharing. More specifically, and to use the work of Cooter (as discussed in Chapter 3), demand sharing was noted as occurring between Aboriginal and Torres Strait Islander people in a kin relationship, whereby the source of the authority to demand was the pre-existing kin (social) relationship. One consumer participant explained that '[t]he culture is to share, what's mine is the family's. So, if I've got money now and the other family don't then my culture is to share that money'.⁷⁵⁸

Identity here is broken down into two parts relating to (1) the effects of culture, and (2) the effects of colonial and contemporary racialised laws, policies and practices. This distinction is necessarily made because, in context of Aboriginal and Torres Strait Islander people's consumption, cultural factors and factors based on race have different foundations. That is, cultural issues emerge from the cultural laws, customs and norms of particular Aboriginal and Torres Strait Islander groups, whereas issues of race emerge from a history of discrimination and inequality imposed on Aboriginal and Torres Strait Islander people as consumers, originally by colonial authorities and later by State and Commonwealth governments. Unlike cultural issues, issues of race do not have their genesis in Aboriginal and Torres Strait Islander laws, customs and norms.

⁷⁵⁷ Stakeholder 8.

⁷⁵⁸ Stakeholder 11.

Culture

By way of review, in the case of *ASIC v Kobelt* and as quoted earlier in Chapter 3, the court defined demand sharing as:

An embedded social obligation of the Anangu and of other indigenous communities [that] requires members in a community to share their resources with specific categories of kin [and] demand sharing as part of the “foundational principles of reciprocity, exchange and sharing within a hunter gatherer society”. The practice is such that the giver has a responsibility to share and the recipient the right to share, even to the point of demanding a share. Although the tradition developed long before money become known in Aboriginal communities, it is commonplace for money to be the subject of demand sharing.⁷⁵⁹

This is supported by the commentaries of others (as discussed in Chapter 3) that ‘life choices are, in a cultural tradition which privileges the social over the individual, ones that take account of the need to engage in certain social interactions in order to remain “in social credit” with significant others’;⁷⁶⁰ that ‘every Warlpiri person is pressured daily to share and reciprocate food items’;⁷⁶¹ and that demand sharing ‘is essential to the maintenance of familiar relationships and hence an integral part of the Indigenous worldview’.⁷⁶²

The interview data shows that the social value of kin relationships is a core influence on Aboriginal and Torres Strait Islander consumer decision-making and spending. Significantly, this means that when kin are involved, Aboriginal and Torres Strait Islander consumer decision-making will not be in accordance with Western economic, individualistic values, but rather will accord to social, familial and relational values. This is a confirmation of the frontier economy concept and a clear

⁷⁵⁹ *ASIC v Kobelt* [2016] FCA 1327 at [575].

⁷⁶⁰ Heil and Macdonald (2008), p 305.

⁷⁶¹ Dussart (2009), p 204.

⁷⁶² Furber-Gillick (2011), p 81.

demonstration of the difference between non-Indigenous values and Aboriginal and Torres Strait Islander values as they apply in a consumer context. In this regard, those values that influence and impact Aboriginal and Torres Strait Islander consumer decision-making are not necessarily the same as for non-Indigenous consumers. Cultural factors such as demand sharing borne out of relationships bear very strongly on decision-making. Moreover, these values are embedded culturally within the Aboriginal and Torres Strait Islander individual's worldview, their familial group and the community, and their influence is considerable, if not overwhelming.

Demand sharing seems to impact on the decision-making of Aboriginal and Torres Strait Islander consumers in two distinct ways, namely, through humbug and a cycle of 'feast and famine'. Because there is an underlying familial relationship with obligations tied to it, it can be difficult for the person being asked for money or resources to deny the request because social consequences will flow on from a refusal to share. As a consequence, the request is usually met, the cultural and relational bonds remain strong and intact, and cultural obligations have been fulfilled. This occurs at the financial expense of the Aboriginal and Torres Strait Islander person to whom the demand is made. Their money and resources are depleted, frequently in an unexpected and unplanned way. This can create a shortage of funds for that person. One way of addressing this shortage can be to humbug another person who has cultural obligations to you, and so the cycle continues. Other means by which people do address this shortage is by seeking credit, for example, through book up.

Consistent with the 'feast and famine' cycle identified in the data, in *ASIC v Kobelt*⁷⁶³ this process was referred to as a cycle of 'boom and bust'. White J made a number of references to humbugging the context of the case, which support the findings in the data:

⁷⁶³ [2016] FCA 1327 at [565].

the cultural practice can give rise to the importuning of those perceived to have available money, to the extent on occasions, to the bullying of those persons, and to the exploitation of community members⁷⁶⁴

...

it [may have] suited some customers to have Mr Kobelt take the whole of the available balance and that some may have asked for this to occur. In some cases, it helped the customers deal with humbugging.⁷⁶⁵

Humbugging is also likely a contributor to the 'feast and famine' cycle, but is not the only contributing factor. Conversely, demand sharing can play an important role in cushioning any negative effects of the 'famine' part of the cycle.

This phenomenon of 'feast and famine' appears to resonate strongly with the qualities identified (in Chapter 3) as relating to demand sharing and humbugging amongst Aboriginal and Torres Strait Islander people. That is, demands to share resources can be made on those with a relevant kin relationship. Demands are ordinarily made when one person has a lot and another person has little. As a cycle rotates, the person who has a lot will soon have little as they meet the multiple demands made upon them by kin. This person, in turn, uses their kin relationships to make demands on relevant kin who have a lot to share because they now have little. The cycle continues, so on and so forth. The 'feast and famine' cycle and the 'truck and trailer effect' can both be said to exemplify the reality of relationality for Aboriginal and Torres Strait Islander people, and represent demand sharing at work. In abiding by demand sharing and relationality, and by participating and engaging in the 'feast and famine' cycle and the 'truck and trailer effect', Aboriginal and Torres Strait Islander people are reinforcing their cultural values, building their social capital and creating and maintaining a social safety net for their kin.

The racialised aspects of law, policy and practice relating to Indigenous consumption were discussed at length in Chapter 4. In summary, it was found that there is a clear

⁷⁶⁴ [2016] FCA 1327 at [575].

⁷⁶⁵ [2016] FCA 1327 at [575].

link that can be traced from Australia's historical treatment of Aboriginal and Torres Strait Islander people and their money to contemporary consumer issues. As also noted in Chapter 4, the practice of book up has its roots in Australia's legal and policy history. In some communities, those roots have taken a strong hold and the practice of book up has continued beyond the repeal of the Protection Era laws. *ASIC v Kobelt* is a case in point of the existence of a social lag that follows legislative change. Interestingly, Wood,⁷⁶⁶ with reference to French J⁷⁶⁷, has written about a perception 'gap'.⁷⁶⁸ This is the 'gap between the legal effect and the popular perception of what was achieved'.⁷⁶⁹

Corroborating the historical analysis of the law in Chapter 4, the interview data revealed that Aboriginal and Torres Strait Islander consumer issues relate to some extent to colonialist policies of control and paternalism. These include the contemporary practice of book up, which remains problematic in some contemporary Indigenous communities. Interview participants also highlighted the Basics Card as presenting particular problems for Aboriginal and Torres Strait Islander consumers that parallel the historical control of Indigenous people's money within the laws and policies of the Protection Era.

The Basics Card is intended by the Commonwealth Government to be beneficial for Aboriginal and Torres Strait Islander people; however, it may in fact be stunting the development of good spending habits and financial literacy in Aboriginal and Torres Strait Islander people, in the same way as the store credit system did during the Protection Era. It merely guides and constrains spending, rather than educating Aboriginal and Torres Strait Islander people in matters such as budgeting or exercising consumer choice. These decisions about spending are made by the Commonwealth Government, and not by the individual Aboriginal and Torres Strait Islander consumer. Thus, from the perspective of providing consumer protection for Aboriginal and Torres Strait Islander people, the Basics Card cannot be viewed as a

⁷⁶⁶ Wood (2012).

⁷⁶⁷ French (2003).

⁷⁶⁸ Wood (2012), p 157

⁷⁶⁹ Wood (2012), p 157.

substitute for sound financial literacy training. Moreover, the consumer participant's comment about the impact of the Basics Card on his long term spending habits and budgeting skills (quoted above) is particularly striking as it counter-intuitive to another of the key themes that emerged from the interview data, namely, the need to provide basic financial literacy skills for Aboriginal and Torres Strait Islander people. This theme will be discussed in detail in the next section.

In practice, the Basics Card and book up share many similarities. Both are forms of income management systems; one is informal, and the other is formal. Both are also predominantly used by Aboriginal and Torres Strait Islander people. Moreover, both were specifically designed by governments and imposed on Aboriginal and Torres Strait Islander people.⁷⁷⁰

Financial Capacity

Another important theme is that of financial capacity. In this section, the role of financial literacy as a factor that impacts Aboriginal and Torres Strait Islander consumers will firstly be discussed. Following this will be a discussion of the interaction between poverty (discussed in Chapter 1 and Chapter 5) and the use of instalment plans as a means for Aboriginal and Torres Strait Islander people to buy goods and services. The use of instalment plans as a function of financial literacy will be considered.

Financial Literacy

Financial literacy is essential to empower Aboriginal and Torres Strait Islander consumers and to act as a protective factor against rogue traders. Lower levels of financial literacy were a consistent theme in the court cases discussed in Chapter 2. This theme was also central to the interviews, and was striking in the experiences of both stakeholder and consumer participants. Stakeholders stated that many Aboriginal and Torres Strait Islander people need to gain more basic financial skills.

⁷⁷⁰ Billings (2009).

Consumers equally identified the challenges they faced in managing their finances. The flow-on effect of this in terms of its impact on consumer decision-making is that the Aboriginal and Torres Strait Islander consumers made choices about goods and services that helped to do the budgeting for them. Most commonly, this involved paying for goods and services by instalments, and adopting pre-paid options where available, even if they were more expensive. In the latter situation, the pre-paid aspect of the product was its main attraction. In summary, this led to the conclusion that Aboriginal and Torres Strait Islander people will benefit from learning basic financial literacy.

Financial literacy also exists on a spectrum, with the Aboriginal and Torres Strait Islander consumer participants appearing to span that spectrum. Further, an Aboriginal and Torres Strait Islander consumer may excel in one area of financial skills and find another challenging. For example, some Aboriginal and Torres Strait Islander consumer participants knew how to be frugal in buying food, but did not know how to compare mobile phone products or services, or that shopping around could help you get a better deal.

Consumer Fitness

Commercial experience or commercial acumen have been common indicia in the case law (as discussed in Chapter 2). Consistent with this, the data showed that Aboriginal and Torres Strait Islander consumers learned from experience, and that both positive and negative consumer experiences can enhance commercial acumen; however, it was also found that negative consumer experiences can dissuade Aboriginal and Torres Strait Islander consumers from engaging with traders about their consumer rights under the law where it would likely give rise to a further negative experience or outcome for the consumer. One stakeholder participant gave an example:

A portable electric oven with the hotplates on top, I brought him that for Christmas, I took it out bush to him, he had it on for about a week, then all of a

sudden there was faults all through the house, the power was flicking and all that. When an electrician actually came out it was the little oven creating all the faults in the house ... I told him it was brand new ... Couldn't take it back because the bloke cut the cord, the electrician cut the cord saying, "You can't use it anymore," ... plus [the store] is 400 kilometres away. ... A long way to come back and try because they could say anything. ... It's not worth going there and getting banned from the shop or whatever for going off at them. ... I actually go to the shops where they offer you warranty on whatever, you pay a bit extra but you get warranty and so if it does get faulty you can take it back.⁷⁷¹

In this way, negative consumer experiences can defeat rather than build commercial acumen. Across the interview data it was found that commercial acumen had to be learned, but that not all lessons were good, and that lessons could be taught but they might not always be followed. Commercial experiences could be viewed as 'good' and protective, or 'bad' and unhelpful, thereby further entrenching Aboriginal and Torres Strait Islander consumers' 'disadvantage'.

It cannot be assumed that Aboriginal and Torres Strait Islander consumers will learn protective behaviours from bad experiences, or that those Aboriginal and Torres Strait Islander consumers will advocate for themselves when they feel they have been wronged. Negative experiences may adversely affect an Aboriginal and Torres Strait Islander consumer's view of how or when they can seek to enforce their legal rights as a consumer.

Future Direction - Empowerment

The interview data and discussion in this chapter show that future programs aimed at enhancing commercial acumen must incorporate elements of self-advocacy. Moreover, to avoid the apathy expressed by the Aboriginal and Torres Strait Islander consumer participants who felt their complaints were roundly rejected by traders, any

⁷⁷¹ Consumer 1.

effective self-advocacy training must include dealing with rejection, positive persistence and the steps that can be taken to have their consumer rights enforced or their complaints heard. Empowering individual Aboriginal and Torres Strait Islander consumers is likely to have a much wider effect in protecting them than having financial counsellors and legal services as the only means of effective advocacy. The tools needed for successful self-advocacy are a basic, clear knowledge and understanding of their legal rights as a consumer. Based on the findings from the interview data, training on self-advocacy and knowledge of legal rights should cover:

- returns;
- refunds;
- faulty goods;
- goods that do not match the description;
- goods that are not fit for purpose;
- problems with items bought through Chrisco;
- problems with items bought online;
- problems with items bought on the Basics Card;
- a reasonable amount of time;
- when a warranty can be used;
- when a warranty cannot be used;
- when a warranty is void;
- when a warranty runs out;
- additional insurance;
- problems after items have been repaired or serviced;
- what to say and how to say it; and
- what to do if the trader will not listen, including the next steps to be taken and who else to complain to after reasonable attempts are made.

Knowledge of legal rights can transform Aboriginal and Torres Strait Islander consumers into self-advocates. Very few Aboriginal and Torres Strait Islander consumer participants knew about their legal rights as consumers. In other cases, when people had some knowledge of their legal rights and sought to assert them,

but were unsuccessful, this dissuaded them from asserting themselves again in the future. Rather, the Aboriginal and Torres Strait Islander consumer participants created ways to avoid finding themselves in the same situation again. While many Aboriginal and Torres Strait Islander consumers devised highly creative ways to do this, this behaviour would substantially limit the usefulness of consumer protection laws if consumers are reluctant to use those laws and prefer avoidance instead. The result is both the disempowerment of Aboriginal and Torres Strait Islander consumers and a strengthening of the position of the trader, who is now dealing with a consumer who is cautious to complain even when there is a legitimate complaint to be made under the consumer law.

The Basics Card added a further layer of complexity that was not well-understood by consumers who used Basics Cards. As a result, where an Aboriginal and Torres Strait Islander person had a consumer problem with goods bought using the Basics Card, it was unclear to that person whether the same legal rights applied as if the goods and services were bought with cash or using an electronic payment method. The following experience of a consumer participant illustrates this:

[T]hey probably don't know how to really talk to take it back there. ... I suppose another thing you're buying it with the Basics Card most of the time anyway and I don't know how they put the money back onto the Basics Card if you try and return stuff too. ... they give you either store credit or something like that because they can't refund the money back on to your [Basics] Card. It's too much of a hassle or something like that. ... My partner's taken clothes back and stuff that she's bought ... on the Basics Card, they just gave her store credit or something like that, because she purchased it from the card. ... I don't think they want to do the leg work. ... Even when they've bought stuff sometimes with cash, they always want to give them store credit because they don't want to give them the cash back.⁷⁷²

⁷⁷² Consumer 1.

Numerous participants had suggestions for increasing Aboriginal and Torres Strait Islander people's consumer fitness and improving methods of delivering information and training aimed at raising the awareness of people living in remote, regional and urban areas of Australia of their consumer rights. An important statement was made by one of the consumer participants about the use of Facebook as a means of disseminating information to Aboriginal and Torres Strait Islander people about their legal rights under the consumer law. As the consumer explained:

I don't have [Facebook] ... But if I did, probably it would be a good thing to have for the people that are on Facebook. Then again, I'm thinking about all the people that aren't on Facebook, like all the Aboriginal people that are out bush – they don't even have phones, most of them. How are they going to find it, because they buy stuff like the cars I was saying ... they buy cars that don't even last them that long and they pay thousands of dollars.⁷⁷³

The consumer participants expressed feeling a sense of power when they were able to advocate for themselves in dealing with traders on matters such as refunds. Knowing your legal rights about such matters was viewed as an important part of being able to advocate clearly, strongly and confidently for yourself and your family.

Conclusion: Competing and Inter-Related Determinants

Issues associated with demand sharing issues will persist in Aboriginal and Torres Strait Islander communities. Cultural practices of this sort are deeply embedded, and while cultural practices may change over time, to effectively address consumer protection matters now, demand sharing must be acknowledged and accepted as an unequivocal part of the Aboriginal and Torres Strait Islander consumer behaviour schema.

Equally, poverty will not change, at least in the short term. The fiscal reality of poverty within the Aboriginal and Torres Strait Islander population in Australia will not

⁷⁷³ Consumer 1.

be immediately redressed. Thus, the success and impact of any financial literacy training and education aimed at building awareness of the legal rights of Aboriginal and Torres Strait Islander people must be understood in the context of the constraints created by poverty. Moreover, the success of such training and education must be realistically measured against the socio-economic circumstances of many Aboriginal and Torres Strait Islander consumers. While poverty cannot be quickly overcome, the effects of it can be somewhat ameliorated by widening the types and number of safe choices available to Aboriginal and Torres Strait Islander consumers and their access to affordable goods and services.

Acknowledging what cannot be easily or quickly changed will help to direct potential solutions to the point where the greatest gains can be made for Aboriginal and Torres Strait Islander people in terms of consumer protection. Based on an analysis of the data, the areas that can be best leveraged to create positive change for Aboriginal and Torres Strait Islander consumers are:

- financial literacy;
- commercial acumen – weighing up a good deal;
- knowledge of consumer rights;
- assistance to provide support when enforcing consumer rights; and
- pre-paid options for the purchase of goods and services.

Lastly, changes in the areas identified above will help alleviate the impacts of some of the factors that influence Aboriginal and Torres Strait Islander consumer decision-making and behaviour, but not all. They will not be able to impact greatly on cultural factors such as demand sharing and humbug, or locational issues such as a lack of accessible and affordable transport, or the racialised operation of Commonwealth government frameworks such as the Basics Card. This chapter highlights the importance of empowerment in addressing Aboriginal and Torres Strait Islander consumer issues.

Chapter 8 – Strategies for Change

This chapter will begin by outlining the factors that inform, influence and impact upon the decision of an Aboriginal and Torres Strait Islander person to enter into a consumer contract as found through this study. It will then discuss law and policy reform considerations based on the findings about relevant factors as a way of moving towards greater consumer protection of Aboriginal and Torres Strait Islander people. Suggested strategies for change will be informed by the qualitative data findings (Chapters 5-7) and the doctrinal analysis (Chapter 2) in this thesis – a holistic approach will be required if improvements are to be seen and felt by Aboriginal and Torres Strait Islander consumers. This chapter will also look to the wider context of law and policy reform in respect of Aboriginal and Torres Strait Islander law and justice issues as much of the changes needed in this area are reliant on the funding and efforts of third parties such as government, regulators and legal service providers. Finally, in looking to the future it will reflect upon gains made in recent times as a result of the efforts of Aboriginal and Torres Strait Islander people working with others which provide hope for change and can act as exemplars for Aboriginal and Torres Strait Islander consumers and communities in need of greater consumer protection.

Research Questions

The thesis therefore has a primary research question of:

What are the factors that inform, influence and impact upon the decision of an Aboriginal and Torres Strait Islander person to enter into a consumer contract?

The thesis has two secondary research questions of:

- Are there any law reforms that can be made to the Commonwealth statutes that govern consumer protection that would better protect Aboriginal and Torres Strait Islander consumers affected by the factors identified pursuant to the primary research question?

- Are there any policy reforms that can be operationalised by the Commonwealth, State or Territory consumer protection regulators that would better protect Aboriginal and Torres Strait Islander consumers affected by the factors identified pursuant to the primary research question?

Factors that Inform, Influence and Impact upon the Decision of an Aboriginal and Torres Strait Islander Person to Enter into a Consumer Contract

In summary, the factors discussed in this thesis that inform, influence and impact upon the decisions made by Aboriginal and Torres Strait Islander consumers are:

- culture as kin and relationships;
- a history of controlled consumption;
- location, as the walking distance from centres of competitive markets as opposed to monopolies or ‘unofficial’ cartels;
- poverty and the related Basics Card;
- high pressure sales tactics;
- the financial literacy of the individual;
- commercial experience and acumen; and
- consumer rights knowledge coupled with personal advocacy skills.

It is difficult to rank these factors in any ascending or descending order of influence because, as the research in this study has shown, for most Aboriginal and Torres Strait Islander people these factors interact and act together, meaning at any given time during the course of making a consumer decision an Aboriginal and Torres Strait Islander person will be influenced and impacted by a multitude of these factors, which act in concert to create a deeply ‘disadvantaged’ and highly ‘vulnerable’ consumer. This set of factors affects Aboriginal and Torres Strait Islander consumers for the following reasons. Firstly, Aboriginal and Torres Strait Islander people have a specific history as a colonised people within Australia, and continue to be affected as controlled consumers within an ongoing colonial project (for example, through the use of the Basics Card). Secondly, as Australia’s First Nations peoples, Aboriginal and Torres Strait Islander people have cultural values which prioritise social relations

above economic relations, in direct contrast to the Western capitalist ideology of individual wealth, which underpins Australia's political and legal systems. Thirdly, Aboriginal and Torres Strait Islander people are the most economically disadvantaged group in Australian society. Finally, only Aboriginal and Torres Strait Islander people who live on their traditional lands in remote Australia are unequally affected by market monopolies that seek to operate on these lands. No other group of consumers can lay claim or argument to being so deeply and deliberately affected as consumers by such a uniquely disturbing multitude of marginalising factors.

The strongest pull on Aboriginal and Torres Strait Islander people that affects their decision making as consumers appears to be culture, and the depth of social value placed on maintaining kin relationships in accordance with cultural expectations. Social value sits above any competing economic value that might otherwise influence decisions made by Aboriginal and Torres Strait Islander consumers.

Recognition of the historical roots of contemporary practices such as book up, as well as the enduring impact of colonial history, both of which have contributed to low levels of financial literacy amongst Aboriginal and Torres Strait Islander people, particularly those living in remote communities, is also needed. Moreover, it is important to recognise that an unwinding of these historical circumstances will take time; these will remain a moral burden on the 'Crown' (being the State, Territory and Commonwealth governments) which must be remedied. An acknowledgment of the contemporary impacts of the legacy of laws and policies relating to Aboriginal and Torres Strait Islander people and money has been expressed in some areas. These include Australia's Senate Standing Committee on Legal and Constitutional Affairs report, entitled *Unfinished Business: Aboriginal and Torres Strait Islander Stolen Wages*,⁷⁷⁴ and Queensland's *Stolen Wages Report*.⁷⁷⁵

Despite the release of these reports, there remains a fundamental lack of acknowledgment by the current State, Territory and Commonwealth governments of the disabling and disempowering effect of these previous laws and policies on the

⁷⁷⁴ Senate Standing Committee on Legal and Constitutional Affairs (2006).

⁷⁷⁵ Senate Standing Committee on Legal and Constitutional Affairs (2006).

financial literacy and consumer behaviour of Aboriginal and Torres Strait Islander people today. Consequently, governments continue to legislate for and administer legislation that undermines the ability of Aboriginal and Torres Strait Islander people to increase their financial literacy, to build their commercial acumen, to protect themselves from rogue traders, and to make positive, beneficial, sound consumer choices for themselves, their families and their communities. Limitations imposed on Aboriginal and Torres Strait Islander consumers through methods of financial control such as the Basics Card will continue to have effects long after the legislation is repealed.

The thesis has two secondary research questions. The first of these is:

- Are there any law reforms that can be made to the Commonwealth statutes that govern consumer protection that would better protect Aboriginal and Torres Strait Islander consumers affected by the factors identified pursuant to the primary research question?

A broader interpretation of circumstances that capture the cultural and social factors that can reasonably be considered and weighed up against trader behaviour in respect of the 'disadvantage' and 'vulnerability' of Aboriginal and Torres Strait Islander consumers will better reflect these factors and create strong precedent.

As outlined in Chapter 2, the courts are adopting a narrow, though slowly widening approach to the law relating to unconscionable conduct in their findings against traders in respect of Aboriginal and Torres Strait Islander consumers. Yet the law does allow for a wider approach to be taken. In its most recent review of the ACL, Consumer Affairs Australia and New Zealand found that, in respect of the unconscionable conduct provisions, the law was sufficiently accommodating:

the broad, principles-based law is working as intended and should remain unchanged. This would maintain a level of flexibility in its application and allow the courts to continue developing the law on a

case-by-case basis in line with society's changing norms and values.⁷⁷⁶

In a 'rewriting' of the judgment in *ACCC v Keshow*⁷⁷⁷ from a feminist perspective,⁷⁷⁸ the circumstances referred to in the unconscionable conduct provisions⁷⁷⁹ can be seen to privilege the voices of the Aboriginal women complainants. The rewritten judgment focused on the cultural and familial circumstances of the Aboriginal women in order to find unconscionable conduct based on sound legal principles and precedent. It is argued that a similar approach could be used by the regulators and courts into the future.

To facilitate this approach, it is recommended that the internal investigators and lawyers of the ACCC and ASIC undergo cultural awareness training that is tailored to their investigative and litigation work. In order for the court to make findings and orders in respect of the relevant circumstances pursuant to the ACL, ASIC Act or the NCCP Act, such circumstances must be brought before the court by the ACCC or ASIC respectively. The court cannot make determinations on matters that do not come before it. Such cultural awareness training should cover:

- taking instructions from Indigenous consumers (complainants);
- the use of interpreters in explaining the court processes and taking instructions;
- the historical context of the community or region in which the investigators are based; and
- the cultural practices, traditions, customs and nuances of that community, people or region generally, and specifically those relevant to the work of the commissions, investigators and lawyers.

The use of experts and the presentation of expert evidence will continue to give the courts valuable insight into the circumstances relevant to unconscionable conduct and other conduct between traders and Aboriginal and Torres Strait Islander

⁷⁷⁶ Consumer Affairs Australia and New Zealand (2017), p 48.

⁷⁷⁷ [2005] FCA 558.

⁷⁷⁸ See Naylor (2014).

⁷⁷⁹ The TPA was in force at the time and thus the relevant provisions were unconscionable conduct provisions in that Act under s 52.

consumers. Regulators should continue to use expert anthropological evidence; however, expert evidence in cases appears to have greater weight if it is focused on the individual and the situation in that individual's community, rather than being presented in a broad brush manner. In this regard, an important lesson that can be taken from *ASIC v Kobelt*⁷⁸⁰ is that any expert reports and evidence must adduce and evince the circumstances of Aboriginal and Torres Strait Islander individuals and the Aboriginal and Torres Strait Islander community in point. The court in *ASIC v Kobelt* did not consider generic statements about Aboriginal and Torres Strait Islander consumers more broadly to have sufficient relevancy as to warrant specific findings of cultural circumstances in that case. Where specific statements have been made by an expert about individual complainants and their home communities, this expert evidence has been more persuasive, though has still not formed the basis of specific findings as to cultural circumstances. In this regard, the same expert witness was used by the regulators in the cases of *ACCC v Keshow* and *ASIC v Kobelt*, though there was a distinct difference in the way the expert evidence was presented to the court. This had a clear impact on its persuasiveness with the court.

In the *ACCC v Keshow*, the expert report included the expert's opinions on cultural factors based on face-to-face interviews he conducted with individual or pairs of Aboriginal women complainants. As a result, his expert findings were specific and unique to each of the individual complainants and their personal circumstances. By contrast, the expert report tendered into evidence in *ASIC v Kobelt* contained more generic findings and opinions about Aboriginal and Torres Strait Islander people in Australia and in the relevant APY Lands communities. The court found this approach informative but not persuasive. It failed to consider the individual circumstances of the complainants that were relevant to Kobelt's conduct, and that created 'disadvantage' for the purposes of the ACL. This was again seen as problematic in the *Kobelt v ASIC*⁷⁸¹ appeal.

⁷⁸⁰ [2016] FCA 1327.

⁷⁸¹ [2018] FCAFC 18.

It is not clear why a different approach was taken by the same expert in otherwise fairly similar proceedings involving Aboriginal and Torres Strait Islander consumers. Notably, the ACCC was the regulator in one matter and ASIC in the other. This may explain this difference, but it is unclear if this is definitely the case. Nevertheless, a comparison of the expert evidence presented in these two matters highlights the essential need for regulators to provide expert opinion and findings about each of the individual Aboriginal and Torres Strait Islander complainants involved in the case, and their particular circumstances. It is only by engaging in this kind of process that the regulator will be able to demonstrate the social, economic and cultural circumstances which created the Aboriginal and Torres Strait Islander person's disadvantage vis-à-vis the trader. This is essential if the expert evidence is to have any meaningful impact on the outcome of the case.

A cost-effective resolution for all parties has been shown to be the use of enforceable undertaking pursuant to s 87B CCA or ss 93A, 93AA ASIC Act. The benefit of such undertakings in the past has been (as touched on in earlier chapters) the inclusion of terms to provide for an amount of money to be given by the trader to an organisation for the delivery of financial literacy services to Aboriginal and Torres Strait Islander people and communities. The regulators should continue to include such terms in their enforceable undertakings with errant traders. Under the consumer protection laws, this has occurred on numerous occasions. Two examples that demonstrate this can be found in the case law:

Amazing Rentals undertakes to, within 60 days of the Commencement Date, pay a total of \$10,000; consisting of a payment of \$5,000 to the North Australian Aboriginal Justice Agency and a further \$5,000 to Top End Women's legal service for the purposes of funding ongoing civil legal advice and services to Aboriginal consumers in the Northern Territory.⁷⁸²

[a]ny residual amount of money remaining after the Applicant has provided redress to consumers may be used by the Applicant in the promotion of

⁷⁸² Enforceable Undertaking Amazing Rentals Pty Ltd dated 26 May 2015 at paragraph 4.8

consumer protection laws within indigenous communities, including by funding a third party organisation to undertake such activities.⁷⁸³

The precedent for such a term was set in the landmark legal action taken by the TPC (now ACCC) pursuant to the TPA in the *Insurance Cases*⁷⁸⁴ discussed in Chapter 2. In the deeds of settlement for two of the three insurance companies, the following terms were agreed to by Colonial Mutual Life Assurance Society Limited and Norwich Union Life Australia Limited respectively:

[s]ettle the sum of Aust.\$715,000.00 on the Aboriginal Assistance Trust Fund ... to be applied in accordance with the provisions of the Trust deed ... towards the advancement of education and the furtherance of eleemosynary purposes in the communities;⁷⁸⁵

and:

funding the employment by the [Wujal Wujal] Council of a Community Consumer Adviser for a period of five years ... to a maximum of \$30,000.00 for each year of the five years.⁷⁸⁶

In *Home Essentials Australia EU*,⁷⁸⁷ the trader also undertook to 'pay a total of \$250,000 for the purpose of funding ongoing community legal services and financial assistance services', of which \$125,000 was to be paid to the Pilbara Community Legal Service Inc. and \$125,000 to ICAN.⁷⁸⁸ Curiously, the ACCC has also taken the approach in at least one instance of requiring a trader to undertake ongoing cultural awareness training, that being 'practical training relating to Indigenous cross cultural

⁷⁸³ *ACCC v FDRA* NTD70/2015 at 5.

⁷⁸⁴ Referred to in this way for the purposes of this paper. For an overview of the litigation, see Altman and Ward (eds) (2002), a work commissioned by the ACCC.

⁷⁸⁵ Colonial Mutual Life Assurance Society Limited deed dated 9 April 1992 at page 5.

⁷⁸⁶ Deed between Norwich Union Life Australia Limited and the TPC dated 1992.

⁷⁸⁷ *Home Essentials Enforceable Undertaking*.

⁷⁸⁸ *Home Essentials Enforceable Undertaking* at page 13.

matters'⁷⁸⁹, and for such training to be 'delivered by an appropriate organisation or person with demonstrated knowledge of Indigenous cross cultural matters'.⁷⁹⁰

Protection Mechanisms

The thesis has two secondary research questions. The second of these is:

- Are there any policy reforms that can be operationalised by the Commonwealth, State or Territory consumer protection regulators that would better protect Aboriginal and Torres Strait Islander consumers affected by the factors identified pursuant to the primary research question?

A key theme deriving from the research is the importance of advocating for proactive approaches. Helping Aboriginal and Torres Strait Islander consumers to avoid detrimental consumer contracts and a reliance on enforcing the consumer law in the courts is the preferred approach. This approach is adopted in part because enforcement was flagged as an issue in the data. The policy and law reforms described in this chapter are intended to combat the negative framing of Aboriginal and Torres Strait Islander consumers, and to empower them to be buyers with awareness of consumer matters, including their legal rights. Importantly, the policy and law reforms reflect the fact that there is more than one way to be a consumer in Australia.

Two changes that would benefit Indigenous consumers, including those using the Basics Card, are (1) increasing financial fitness, and (2) raising consumer rights awareness amongst Aboriginal and Torres Strait Islander people. There are, and have been, a number of programs available for increasing the financial literacy of Aboriginal and Torres Strait Islander consumers. In central Australia, covering both the Northern Territory and South Australia, there is MoneyMob; in Queensland there is ICAN;⁷⁹¹ and in Victoria there is My Moola.⁷⁹² These diverse programs are

⁷⁸⁹ *Tiny Tots Undertaking* Annexure A at paragraph 3.

⁷⁹⁰ *Tiny Tots Undertaking* Annexure A at paragraph 4.

⁷⁹¹ <http://ican.org.au/programs/yarnin-money/>

designed for Aboriginal and Torres Strait Islander consumers in a way that is relevant to the participants. The financial literacy programs will and should vary, reflecting the diversity of the Aboriginal and Torres Strait Islander consumer population and the differing access to and availability of goods and services in a given area. For example, book up exists in the APY lands,⁷⁹³ but may not operate in Alice Springs. Common themes stemming from evaluations of these financial literacy programs were the continued need for such programs,⁷⁹⁴ and the need for 'more workers'⁷⁹⁵ to deliver the programs face-to-face to Aboriginal and Torres Strait Islander consumers, including into remote Aboriginal and Torres Strait Islander communities.

Increasing financial fitness needs to be undertaken using culturally-appropriate and relevant financial literacy training for Aboriginal and Torres Strait Islander consumers delivered by Aboriginal and Torres Strait Islander people in person on an individual and family basis. Training must factor in cultural practices that influence behaviour, and cultural factors must be worked into the budgeting framework because culture is a strong influencing factor on the decisions made by Aboriginal and Torres Strait Islander consumers. Training must be practical, and (as outlined in Chapter 7) should cover the topics of:

- returns;
- refunds;
- faulty goods;
- goods that do not match the description;
- goods that are not fit for purpose;
- problems with items bought through Chrisco;
- problems with items bought online;
- problems with items bought on the Basics Card;
- a reasonable amount of time;

⁷⁹² <http://www.fnf.org.au/mymoola.html>

⁷⁹³ *ASIC v Kobelt* [2016] FCA 1327 and *Kobelt v ASIC* [2018] FCAFC 18 relate to people from APY Lands.

⁷⁹⁴ Moodie et al (2014), p 30.

⁷⁹⁵ Garner and Pryor (2015), p 84.

- when a warranty can be used;
- when a warranty cannot be used;
- when a warranty is void;
- when a warranty runs out;
- additional insurance;
- problems after items have been repaired or serviced;
- what to say, how to say it; and
- what to do if the trader will not listen, including the next steps to be taken and who else to complain to after reasonable attempts are made.

This training needs to include building commercial acumen through mock exercises (or vignettes) based on real-life scenarios. The need for this type of training was evinced in both the case law and in the data where it was found that a lack of commercial experience was a contributor to Aboriginal and Torres Strait Islander 'vulnerability' and 'disadvantage'. This is one way to overcome this by creating artificial or 'mock' scenarios (experience) for Aboriginal and Torres Strait Islander consumers to strengthen their commercial acumen in a safe and supported learning environment. While it will not perfectly mirror the real-life situation of a consumer transaction, training through the use of hypothetical situations is a commonly-used approach to teaching problem solving in the law. Such training would be particularly important where commercial acumen would not ordinarily be built up through life experience, such as in remote Aboriginal and Torres Strait Islander communities.

The Norwich Deed made with the TPC (now ASIC's remit) gave an excellent and succinct summary of the key skills Aboriginal and Torres Strait Islander consumers need to master to become financially fit consumers, namely:

- procedures involved in purchasing or acquiring goods and services, including obtaining quotes from alternative suppliers, negotiating best prices, obtaining warranties on products, arranging transportation for products, trading in used products, and arranging credit transactions for hire purchase;

- legal rights and obligations of consumers including contracts, and statutory rights; and
- how to assess the relative merits and value of competing goods and services, and making informed decisions to purchase or otherwise.⁷⁹⁶

The source of funding for services to teach the types of skills outlined in the Norwich Deed is frequently a contentious issue. One source of non-government funding has come from enforceable undertakings between errant traders and regulators. For example, in the case of *ACCC v FDRA*, the agreement between the parties directed that:

[a]ny residual amount of money remaining after the Applicant has provided redress to consumers may be used by the Applicant in the promotion of consumer protection law within Aboriginal and Torres Strait Islander communities, including by funding a third party organisation to undertake such activities.⁷⁹⁷

The influence of culture on Aboriginal and Torres Strait Islander consumer decision-making must be recognised, including the importance (of the value) of relationships. Extensive anthropological work in respect of Aboriginal and Torres Strait Islander people and ‘the economy’ has been done; aspects of this work were discussed in Chapter 3. The cases of *ACCC v Keshow* and *ASIC v Kobelt* expressly referred to the evidence of an anthropological expert, who noted that culture has a central role in the thoughts and behaviour of Aboriginal and Torres Strait Islander consumers; however, the court is yet to commit to defining this role. Nevertheless, whether defined by the courts or not, culture plays a crucial role in Aboriginal and Torres Strait Islander consumer decision-making. Thus, while the court arguably should endeavour to define the legal role of cultural factors, a simultaneous non-legal approach can be undertaken to examine the practical role culture plays in consumer decisions and the means of recognising this in the case law. Numerous financial

⁷⁹⁶ Deed between Norwich Union Life Assurance Limited and the TPC at page 15.

⁷⁹⁷ *ACCC v FDRA* NTD70/2015 at 5.

literacy programs recognise the role of culture. For example, the My Moola program covers 'cultural obligations and money, how to set goals and achieve them and teach about financial products and services'.⁷⁹⁸

Delivering information aimed at increasing awareness of legal rights that individuals can exercise with confidence, immediately and for free is another important strategy. Cubillo notes that 'Aboriginal and Torres Strait Islanders have reported that, for the most part, Aboriginal people in regional and remote areas are almost entirely unaware of their civil law rights'.⁷⁹⁹ The training should include both pre-contractual and post-contractual guidance and legal rights. Training should also include information about racial discrimination, a person's legal rights in cases where they feel they have been discriminated against, and the ways a person can enforce their rights in the face of such discrimination. Many of the Aboriginal and Torres Strait Islander consumer participants in this study described feeling like they were treated differently and less favourably because they were Aboriginal and Torres Strait Islander. This was a very strong theme within the data and one that must be addressed in some way. One way of empowering Aboriginal and Torres Strait Islander consumers is to arm them with knowledge of the law and avenues for complaint or legal recourse. This aligns with the findings of Schwartz, Allison and Cunneen in their study of civil and family law issues for Aboriginal and Torres Strait Islander people across several Australian jurisdictions. In their study, a recurring theme was the experience of racial discrimination in obtaining goods and services.⁸⁰⁰ Training about legal rights in respect of racial discrimination will aid Aboriginal and Torres Strait Islander consumers, but will also help them to challenge the discrimination they face as individuals and communities affected adversely by racist treatment, whether by traders, laws and policies, or society more broadly.

A strong undercurrent of racism continues around Aboriginal and Torres Strait Islander people and their money. This creates a financial environment in which

⁷⁹⁸ <http://www.fnf.org.au/mymoola.html>

⁷⁹⁹ Cubillo (2014), p 15.

⁸⁰⁰ Schwartz et al (2013), p 44; Allison et al (2014a), p 41; Cunneen and Schwartz (2009), p 735. Cunneen et al (2014), p 32; and see generally Allison et al (2013).

legacy practices such as book up have strong foundations, and where contemporary programs such as the Basics Card exist, which give tacit approval to the treatment of Aboriginal and Torres Strait Islander people as second-class consumers who cannot make 'good' decisions regarding their money. This is highly problematic, and appears to lead, at a minimum, to covert discrimination. Advice, guidance and training for all users of the Basics Card, being both Aboriginal and Torres Strait Islander consumers and providers of goods and services, should be rolled out, or redone if this training has already occurred. Confusion around how and when the consumer law applies to Basics Card transactions appears to have arisen from the system's abuse by traders at the expense of Aboriginal and Torres Strait Islander consumers and their families. Despite clear direction on Centrelink's website against traders' inappropriate use of the Basics Card system, the participants' experiences show that money is often not refunded to the Basics Card, even though traders are required by law to do so. The Aboriginal and Torres Strait Islander consumer participants in this research who were forced to use the Basics Card were unsure about characteristics shared between the Basics Card and a bank-issued card, and as such those consumers found themselves vulnerable to unscrupulous or indolent traders because of their lack of knowledge.

Centrelink must ensure that Aboriginal and Torres Strait Islander consumers who are issued the Basics Card (by requirement of law) understand that funds spent can be refunded back onto the Basics Card. This information should be added to the information pack provided to the Basics Card owner when it is issued and, if possible, on the reverse of the Basics Card as a warning or direction to traders. Given that income management and the Basics Card are mandatory for many Aboriginal and Torres Strait Islander consumers, there is arguably a mutual obligation on the part of the Commonwealth government that administers the compulsory income management scheme to ensure Aboriginal and Torres Strait Islander consumers' legal rights under the ACL or ASIC Act are not inadvertently and negatively impacted by the operation of the Basics Card.

Book up continues to be a challenging practice, and no immediately obvious solutions to the problems associated with the practice arose from the data, except those that are advanced more generally as improving financial capacity and consumer fitness.

Solutions are still needed to tackle the issues arising from the behaviour of door-to-door traders. One solution created by the community of Wujal Wujal, and followed by Yarrabah,⁸⁰¹ was the posting of signage at the entrance to the community. Wujal Wujal was one of the Aboriginal and Torres Strait Islander communities in the *Insurance Cases* and *ACCC v Titan*. The media reported the solution used in Wujal Wujal as:

An Australia-first community partnership ... with the unveiling of roadside signage designed to minimise consumer harm from unlawful door-to-door trade. The signage, placed on both entrances into the Far North Queensland Aboriginal and Torres Strait Islander community, reminds door-to-door traders they have legal obligations to consumers and can't approach houses displaying do-not-knock notices. It is also hoped that the signage helps to empower Wujal Wujal residents to understand and assert their rights under the Australian Consumer Law.⁸⁰²

Given that many discrete Aboriginal and Torres Strait Islander communities have existing signage on entry to the community regarding alcohol management, one strategy could be the posting of signage about unsolicited sales in the same location. This could be funded by the respective State, Territory or Commonwealth governments that post the alcohol management signage. This might be an effective deterrent to door-to-door traders, operating as a pre-contractual and proactive measure that shifts the onus from the consumer to the trader, and will potentially avoid otherwise problematic traders and any associated unsolicited contracts.

⁸⁰¹ <https://www.accc.gov.au/media-release/yarrabah-community-takes-a-stand-against-unlawful-door-to-door-traders>

⁸⁰² <https://www.accc.gov.au/media-release/wujal-wujal-community-puts-door-to-door-traders-on-notice>

Post contract solutions are also needed. Financial counselling is one solution that has proven successful in being able to provide 'information, support and advocacy for people in financial difficulty'.⁸⁰³ On their website, ASIC points to financial counsellors as providing a free but valuable service to assist people in financial difficulty.⁸⁰⁴ Financial counselling services specifically targeted at Aboriginal and Torres Strait Islander people are provided by a number of organisations across Australia. Service providers range from small to large. For example, in New South Wales, financial counselling services are delivered by the Kempsey Neighbourhood Centre Inc. as the Mid North Coast Indigenous Financial Counselling Service with the aptly phrased catchcry, 'Deadly Dollars; Deadly Deals; Deadly Debts'.⁸⁰⁵ In Queensland, ICAN delivers financial counselling services to Yarrabah, Cairns, Palm Island and as far north as the Torres Strait.⁸⁰⁶

Another much needed post-contract solution involves the support of legal services through advice and/or legal representation. Much work is already being undertaken in this vein, but it remains a critically underfunded area of service provision to Aboriginal and Torres Strait Islander people.⁸⁰⁷ Schwartz, Allison and Cunneen make this observation in their study of civil and family law issues affecting Aboriginal and Torres Strait Islander people across several Australian jurisdictions.⁸⁰⁸ Following cuts to the Aboriginal and Torres Strait Islander Legal Services (ATSILS) funding in 2016, views aired in the media and in public commentary were intense. Subsequently, the ATSILS funding was reinstated in 2017. The 2015 Finance and Public Administration References Committee's report, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* gives some insight into the ferocity of the backlash from Aboriginal and Torres Strait Islander people and lawyers at the time relating to these funding cuts:

⁸⁰³ Financial Counselling Australia, *Financial Counselling in a Nutshell*, <https://www.financialcounsellingaustralia.org.au/getattachment/Corporate/Publications/financial-counselling-infographic.pdf>

⁸⁰⁴ <https://www.moneysmart.gov.au/managing-your-money/managing-debts/financial-counselling>

⁸⁰⁵ http://www.kempseynyc.org.au/files/IFC%20Brochure%20of%20Financial%20Service%20Outreach%20Oct%202012_pub%20-%20_pub%202.pdf

⁸⁰⁶ www.ican.org.au

⁸⁰⁷ See also Schwartz (2017), p 269.

⁸⁰⁸ Schwartz et al (2013), p 44; Allison et al (2014), p 41; Cunneen and Schwatz (2009), 735; Cunneen et al (2014), p 32; and see generally Allison et al (2013).

Evidence to the committee reiterates what has been found in previous inquiries: the funding for legal assistance services is inadequate. This means not only is more funding needed for the Indigenous-specific services of Indigenous legal service providers ... but also for Legal Aid and Community Legal Centres which also offer valuable assistance to Aboriginal and Torres Strait Islander people.⁸⁰⁹

The current breadth and depth of unmet legal needs for Aboriginal and Torres Strait Islander people is completely unsatisfactory. As the committee heard, in large areas of Australia, Aboriginal and Torres Strait Islander people have no access to any legal assistance for civil and family law matters.⁸¹⁰

ATSILS can help Aboriginal and Torres Strait Islander consumers to access legal remedies they might not practically be able to access themselves. Importantly, ATSILS and its employees possess the requisite level of ‘cultural competency’⁸¹¹ and ‘cross-cultural’⁸¹² awareness to deliver culturally appropriate legal services to Aboriginal and Torres Strait Islander consumers. This cultural element is relevant not only because of issues such as language,⁸¹³ but also because of their understanding and knowledge of Aboriginal and Torres Strait Islander laws, customs, traditions, protocols, values and kinship networks, which intersect with Aboriginal and Torres Strait Islander people’s experiences as consumers (as discussed in Chapter 3). Schwartz and Cunneen argue that additional ‘economic development’ benefits may flow from Aboriginal and Torres Strait Islander people being better informed and having an increased awareness of their civil legal rights.⁸¹⁴ The limitation of courts are acknowledged in terms of their ability to provide recourse for a broad range of consumers; however, this only further emphasises the importance of

⁸⁰⁹ Senate Finance and Public Administration References Committee (2015), p 115.

⁸¹⁰ Senate Finance and Public Administration References Committee (2015), p 115.

⁸¹¹ Cubillo (2014), p 17.

⁸¹² Schwartz and Cunneen (2009), p 19.

⁸¹³ Schwartz and Cunneen (2009), p 19.

⁸¹⁴ Schwartz and Cunneen (2009), p 22.

having a multi-pronged approach to Aboriginal and Torres Strait Islander consumer protection.

Conclusion

The aim of this study was to explore and define the changing nature of Aboriginal and Torres Strait Islander consumer 'vulnerability' and 'disadvantage'. In achieving this aim, the thesis comprises eight discrete chapters, each dealing with a different aspect of Aboriginal and Torres Strait Islander consumer 'vulnerability' and 'disadvantage'. In concluding this thesis, a number of statements can be made regarding the changing nature of Indigenous consumer 'vulnerability' and 'disadvantage'. To begin with, the adage comes to mind – 'the more things change the more they stay the same'. That is, while change has occurred in some respects, in others it has not. An illustration of this is the community of Wujal Wujal and the problem of door-to-door salespeople entering Aboriginal and Torres Strait Islander communities. In 1991, a door-to-door trader selling insurance walked into the 'old folks (sic) home'⁸¹⁵ and sold a resident insurance. In 2011, a door-to-door trader selling first aid kits and water filters walked into the Wujal Wujal Home and Community Care Centre and sold as resident a first aid kit and a water filter. In 2016, a sign was erected at the entrances to Wujal Wujal as part of a collaborative effort by the ACCC, the Queensland Office of Fair Trading (QOFT) and ICAN, together with Wujal Wujal Aboriginal Shire Council to mitigate again the harm caused to the people of Wujal Wujal as a result of rogue door-to-door traders. For these people, the passage of time alone did not reduce the harm caused to their community and its members, nor did it increase their resistance. Unscrupulous door-to-door traders continue to enter the community.⁸¹⁶

Literacy, numeracy, commercial acumen and financial literacy also appear to impact on Aboriginal and Torres Strait Islander consumers in the same way they did 25 years ago, as evidenced by the analysis in Chapter 2 of the case law over this

⁸¹⁵ Deed between Norwich Union Life Australia Limited and the TPC dated 1992 at page 7.

⁸¹⁶ *ACCC v Titan Marketing Pty Ltd* [2014] FCA 913; Deed between Norwich Union Life Australia Limited and the TPC dated 1992.

period. Inequality experienced as a result of socio-economic factors will continue to place Aboriginal and Torres Strait Islander consumers at a 'disadvantage' for as long as this inequality (gap) remains. Unless this socio-economic divide can be bridged through a general increase in educational attainment levels, such matters will continue to have an ongoing impact on Aboriginal and Torres Strait Islander consumer 'disadvantage'. Importantly, laws aimed partly at closing this gap, such as compulsory income management and the Basics Card, may in fact only widen it.

Positively, there is one area in which change is occurring; this is in respect of young Aboriginal and Torres Strait Islander people. Aboriginal and Torres Strait Islander consumer 'vulnerability' within the new generation has in some ways decreased as a consequence of generational differences and generational change within the Aboriginal and Torres Strait Islander population. The reasons for this are unclear from this study and would require further investigation.

Finally, the influence of culture and Aboriginal and Torres Strait Islander values (such as relationality) is strong and continues to contribute to Aboriginal and Torres Strait Islander consumers' 'vulnerability'. The impact of relationality and obligations such as demand sharing have undergone incremental change over time; however, the influence of obligation to kin and the connections created and reinforced through practices such as demand sharing are particularly evident in remote Aboriginal and Torres Strait Islander communities.

Based on the research conducted in this thesis, there are no obvious gaps or problems in the consumer protection law that negatively impact on an Aboriginal and Torres Strait Islander person's ability to make informed decisions. Rather, the weight of the data together with an analysis of the case law leads to the conclusion that the law is sufficient but that problems lie in the broader themes of discrimination, socio-economic disadvantage and access to justice. The preceding chapters included discussions about factors that impact and influence the decisions made by Aboriginal and Torres Strait Islander consumers. Emphasis here needs to be on 'factors' – plural. Addressing Aboriginal and Torres Strait Islander consumer 'vulnerability' and

'disadvantage' cannot be attended to by the consumer protection laws alone, nor simply by consumer watchdogs, courts, financial counsellors and lawyers working independently from one another. A combination of all of these is required, pieced together within a broader strategy for improving all aspects of the lives of Aboriginal and Torres Strait Islander people, for, as it has been shown in this thesis, the 'disadvantage' and 'vulnerability' of Aboriginal and Torres Strait Islander consumers does not come down to one circumstance, but many.

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Participant (Interviewee) Information

Stakeholder Group	Location	Indigeneity
Support Worker	Thursday Island	Torres Strait Islander
Support Worker	Thursday Island	Torres Strait Islander
Consumer	Thursday Island	Torres Strait Islander
Consumer	Thursday Island	Torres Strait Islander
Consumer	Thursday Island	Torres Strait Islander
Consumer	Thursday Island	Torres Strait Islander
Lawyer	Cairns	Non-Indigenous
Support Worker	Cairns	Non-Indigenous
Support Worker	Cairns	Non-Indigenous
Support Worker	Cairns	Non-Indigenous
Support Worker	Cairns	Non-Indigenous
Consumer	Cairns	Aboriginal
Consumer	Cairns	Aboriginal and Torres Strait Islander
Consumer	Cairns	Torres Strait Islander
Financial Counsellor	Alice Springs	Non-Indigenous
Financial Counsellor	Alice Springs	Non-Indigenous
Financial Counsellor	Alice Springs	Non-Indigenous
Support Worker	Alice Springs	Non-Indigenous
Consumer	Alice Springs	Aboriginal
Consumer	Alice Springs	Aboriginal
Consumer	Alice Springs	Aboriginal
Consumer	Alice Springs	Aboriginal
Consumer	Alice Springs	Aboriginal
Council worker	Alice Springs	Torres Strait Islander
Council worker	Alice Springs	Aboriginal