The consumer with an intellectual disability
— Do we respond, if so, how?

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How does a policy of consumer protection assist the person with an intellectual or learning disability? What this article argues is that existing common law and legislative instruments fail to achieve optimal outcomes. What is needed is a mix of common law evolution to encompass a notion that the supplier may, in certain circumstances, be required to take reasonable care when dealing with a consumer when they are in reasonable knowledge of facts that could lead them to query the capacity of the consumer, with this combined with an expansive range of policy instruments outside of the legislative sphere to assist the person who can easily be the subject of exploitation. The recommendations seek to respond in a way that encompasses the contemporary notion that those with an intellectual disability belong in the community and should similarly be encouraged to take risks and be part of the consumerist society.

There is no doubt that one of the consumer laws enduring commitments is in developing a policy response that assists the vulnerable or disadvantaged consumer.¹ The decision whether to assist the consumer make decisions for themselves (eg, through disclosure laws), or legislatively act to protect the consumer through direct means (eg, controls in relation to door to door selling) becomes far more oblique when dealing with people who, for whatever reason, are vulnerable to abuse, exploitation, or perhaps not so strongly worded as this, seeking entry into a transaction that is, on an objective basis, inappropriate for their personal circumstances.² Just at what point should the law step in, and if we intervene too early, are we marginalising or segmenting a group that may not want to be managed in this way? As noted by Brown and Ringma, the perspectives of people with disabilities can ‘often be interpreted by the welfare professionals in such a way that their voice is lost’.

We also know that behavioural economics ‘cautions against the use of paternalistic interventions by illustrating the variety of behavioural patterns

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1 A point made recently by a study commissioned by the state and territory legal aid commissions. People with a disability and single parents were twice as likely to experience a legal problem. The most common problem presented to the commission was consumer in nature (21% of respondents). See <http://www.nationallegalaid.org/home/legal-australia-wide-survey-legal-need-in-australia/> (accessed 13 October 2012).

2 As noted in the Productivity Commission Report on Consumer Policy: ‘[D]isadvantage can be seen as reflecting a set of individual traits — such as . . . disability . . . that increase the risk of a consumer experiencing detriment or and intensify the adverse consequences of that detriment.’ Productivity Commission, Review of Australia’s Consumer Policy Framework, No 45, 2008, p 295.

that exist; these patterns include a recognition that a person with an intellectual disability may suffer from an ‘acquiescence bias’, such that they are more likely to attempt to please those with whom they interact. With an understanding that very few decisions are truly made in isolation; that even for those without disability, reliance on others is not evidence of any fault or incapacity. It is simply a recognition that for most people, for most of the time, our decision-making is interdependent. If this is recognised and understood, then intervention in the name of support of a person with a learning disability is then just part of the social context in which we all live. By this a belief is reached that as a society we should focus on the ability in each of us, rather than the disability, and that benign paternalism can in fact undermine autonomy. [H]owever, designing the public good with perfectly good intentions is easier than implementing those intentions perfectly as a range of public policies from American prohibition of the past right through to the pink batts scheme of today bear as a reminder. But we also know that as the medical model of disability has moved to a rights based outlook, society has intuitively become more complex and more demanding of formal arrangements when dealing with people who may lack capacity. Whereas the social view of inclusion has been cemented, the legal view has sought to counterbalance the practical implications of this with demands for greater formalisation and systemisation.

The focus of this article is one segment of the vulnerable or disadvantaged...
consumer market, the consumer who is intellectually disabled, and how the law balances the sociological and economic aims of consumer protection policy in seeking to attain a sense of social citizenship for this consumer. If economics is about the choices people make, and sociology as to why those choices don’t exist, how do we as a society ensure that the unchallenged ideology of the consumer society is something to which all members of our community, including the intellectually disabled, can participate? The balance that must be drawn between allowing intellectually disabled persons the experience of risk, while minimising the possibility of abuse will never be easy.

The thesis of this article is that the framework needed to assist the intellectually disabled is one that involves a mixture of hard-law (such as direct legislative intervention and judicial interpretation) and soft-law instruments (such as public funding to enable advocacy networks). I will argue that the judicial methodology behind the current legislative and case law developments needs to be tweaked to take account of the problems faced by the intellectually disabled consumer with these advocacy and support services brought alongside to assist. My thesis subtly seeks to move the focus of law and policy in this area away from enforcement of entitlements to responsibility built around relations. It is only by this combination that the right equilibrium will be obtained for the consumer, who, for example, won’t be able to engage in normal consumer services as easily as for most; who will not have the opportunity to understand the contract they enter into, and for whom the digital divide will be a practical and ongoing reality.

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11 See the comments by S Hayes and F Martin, ‘Consumers with an Intellectual Disability and Carers’ (2007) 11(1) Jnl of Intellectual Disabilities 9 at 10: ‘There is a fine line between empowering people with an intellectual disability, so that they may experience the dignity of risk, including the potential risk of entering into financial contracts, whilst at the same time ensuring protection from financial risk situations and exploitation’.

12 ‘There is a need for a balance to be struck in the law between the goal of facilitating persons with limited decision-making ability to live their lives as independently as possible, and the countervailing need to protect both vulnerable adults, and also, good faith suppliers who do not suspect that a customer does not appreciate the implications of a transaction’. Law Reform Commission Ireland, Consultation Paper on Vulnerable Adults and the Law: Capacity, LRC DP 37-2005, p 14.

13 See the comments by Hayes and Martin, above n 11, p 11, who talk of a number of issues in the banking and financial services sector for the intellectually disabled. For example, a person with an intellectual disability may struggle to convince a financial institution that they can successfully operate a bank account, or be able to take out a consumer chattel on consumer credit. House and contents insurance may be more expensive. These examples were highlighted in a 1989 submission to the Australian Human Rights Commission by the National Council of Intellectual Disability, The Rights of People with Disabilities: Areas of Need for Increased Protection, 1989, Ch 6.
intellectually disabled person with the capacity to undertake and have full membership of the consumer society in which we live. The reality will be that if we don’t engage in this development of law and policy, there will exist an ‘uncomfortable fit between [the aspirations of the intellectually disabled], and their abilities to engage in consumption practices’. The institutions that at one time closeted our intellectually disabled may well have been removed and this person placed within the construct of society, but effective choices remain constrained or impeded. Economically, we may see the choice as available, but sociologically, we will be studying why that choice has not been exercised. The institutionalisation will no longer by physical, but metaphysical:

The implication for the constituency of people with intellectual disabilities seems to be that in any society where there is an undue emphasis on material wealth, an individual exhibiting an inability to fully engage with the expectations and mores of society may be regarded as less than a fully fledged citizen.

In essence, the self-determination construct that has enhanced the choices the person with an intellectual disability has within society, must be explicitly brought home to the consumer arena. The present evidence highlighting that vulnerable individuals suffer a significant and severe disadvantage in responding to legal issues within the consumer prism. It is of little utility, and even worse possibly more damaging to the self-esteem of those with an intellectual disability, if we as a society indicate that they have a choice about a consumer service, but we don’t have the mechanisms in place to allow them to safely exercise and understand the choice they are making. In effect, I seek to suggest that the difficulties intellectually disabled face when acting as a consumer emanates from the way in which we order the consumer society in which we live. By focusing on the economically efficient knowledgeable consumer, have we ignored those persons for whom free choice is a difficult construct? These are questions for which there is no easy answer, but for which we must respond. Already, the fact of intellectual disability is a matter

14 McClimens and Hyde, above n 10, p 137.
15 The Productivity Commission recently endorsed the ideal of an independent choice for the delivery of support to people with disabilities. ‘It is based on the view that people with a disability should be recognised as active participants in the community, needing support to achieve their lifetime goals based on their strengths’, Productivity Commission, Disability Care and Support, No 54, Ch 8, 31 July 2011, p 344.
16 McClimens and Hyde, above n 10, p 138.
18 T Sourdin and L Thorpe, ‘How do Financial Services Consumers access Complaints and Dispute Resolution Processes’ (2008) 19 ADJR 25 at 35:
Some particularly ‘vulnerable’ individuals (those with chronic illness or disability) experienced a wide range of legal events and most individuals in those areas reported a substantial rate of inaction in response to their legal events. Around one in three legal events were not responded to, 16% were handled without any help and just over half sought help or advice.
of recognition and importance within the criminal law, tort law, family law, human rights jurisprudence, and guardianship litigation. Consumer law and policy should not be immune.

What is law’s response to date?

The common law has routinely intervened to assist those who are vulnerable. For example, the law developed special rules for minors’ contracts, for dealing with situations where duress, undue influence, or unconscionable conduct were present. Recently, legislative initiatives, particularly in the areas of unfair contracts, unconscionability and unsolicited consumer agreements, have supplemented the common law developments to assist those who may be in a weaker bargaining position. More specifically, in the disability sector, legislation has been put in place to guard against discrimination, and to provide for guardianship services where

at 35: ‘A lurking question with all consumer direction . . . is how to handle the question of agency for people of any age who are incapable of directing their own care.’

Z Toomey, ‘Changing the FCRA Opt-Out into the FCRA Opt-IN: A Proposal for Protecting Mentally Disabled Consumers from Manipulative Credit Card Marketing’ (2009) Jnl of Gender, Race and Justice 621 at 654: ‘The conflict between protecting the mentally disabled while allowing them the freedom to dictate their own lives poses a difficult problem for society’s rulemakers. How much should we interfere in their lives for their own good? How much are we willing to let them be victimized in the pursuit of giving them equal freedom? These are difficult questions without easy answers.’


Eg, Russell v Rail Infrastructure Corporation [2007] NSWSC 402; BC200703017.


Eg, Purvis v Rail Infrastructure Corporation [2007] NSWSC 402; BC200703017.

Eg, Re S (1993) 12 SR(WA) 258.

Some of the standard authority in this area includes: Nash v Inman [1908] 2 KB 1; Roberts v Gray [1913] 1 KB 520; See generally K E Lindgren, Veermeesch and Lindgren’s Business Law of Australia, 12th ed, LexisNexis, 2011, Ch 8.


Johnson v Buttress (1936) 56 CLR 113; [1936] ALR 390; (1936) 10 ALJR 203; BC690016 (plaintiff was mentally unstable, illiterate and of low intelligence — presumption of undue influence); Stivactas Michaletos (No 2) [1994] ANZ ConvR 252; (1993) Aust Contract R 90-031; (1993) NSW ConvR 55-683; BC9301874 (plaintiff elderly, sick and in hospital — transfer to nephew set aside).


See Pt 2-3 of the Australian Consumer Law, (Sch 2 of the Competition and Consumer Act 2010).

See Pt 2-2 of the Australian Consumer Law, (Sch 2 of the Competition and Consumer Act 2010).

See Pt 3-2, Div 2 of the Australian Consumer Law, (Sch 2 of the Competition and Consumer Act 2010). At the time of writing the ACCC has successfully obtained $1 million in penalties against two companies involved in door to door selling of retail energy: ACCC News Release, ‘$1 million in penalties for door-to-door sales’, NR 207/12.

appropriate. On a global perspective, we have also seen the introduction of the United Nations Convention on the Rights of Persons with Disabilities. Most notably in Australia, we have seen the Federal Government endorse the National Disability Insurance Scheme. But what has this plethora of legal and policy initiatives achieved at the practical level in terms of the judicial methodology associated with cases where an intellectually disabled consumer is involved. It is suggested that the legal framework has incrementally advanced, and while there is no doubt the Australian Competition and Consumer Commission (ACCC) has been keen to advance the cause of the intellectually disabled, this glacial progression has emanated from a framework that is ultimately restrictive in nature and confined by its resonance and belief in the underlying values of growth through subtle accretion.

To support this thesis, three cases will be used to highlight both the advantages and limitations that currently exist. It is these limitations that I will focus on as a reason why we need to advance some additional soft-law and/or policy initiatives to gain the full benefit of the consumer economy for the intellectually disabled. These policy initiatives will include enhanced decision-making models for the intellectually disabled alongside expanded resources for advocacy support.

**Australian Competition and Consumer Commission v Lux Pty Ltd**

Lux Pty Ltd was an incorporated company which carried on the business of selling vacuum cleaners. Podger was one of their sales persons. Podger had a conversation with the consumer (Mr Standing) at a McDonald’s restaurant which led Podger to visit the home of Mr and Mrs Standing (Mrs Standing being present) later that afternoon. While there is some dispute about timeframes and precisely what occurred that afternoon, Nicholson J accepted that Podger had a blunt manner, and as an expression of that raised his voice. The judge also accepted that Mrs Standing indicated that she would have trouble filling in a credit application associated with the purchase of the new vacuum cleaner as she could not spell very well. For this reason, Podger was on notice of the substantial illiteracy faced by Mrs Standing. No suggestion was made that Mr and Mrs Standing should get independent advice. When demands for payment were made, and not met by the Standings, the ACCC instituted this action against Lux Pty Ltd alleging that through their agent, they had engaged in unconscionable conduct. Both parties had experts addressing the issue of whether Mrs Standing had an intellectual disability, but given that oral submissions addressed intellectual impairment, whereas pleadings spoke of intellectual disability, the court considered that it was not...
assisted by the expert evidence. However, the court demeanour of Mrs Standing, while not supporting that she had an intellectual disability, was recognised by Nicholson J as something which would allow a judge to conclude that she was a person of some vulnerability. Once this was accepted, and the Federal Court accepted knowledge by Podger of the impairment or disability of Mrs Standing, success for the regulator followed, statutory unconscionability existed (now ss 20–22 of the Australian Consumer Law). Recognising that this expression is not a work of art, it bore its:

ordinary meaning of showing no regard for conscience, irreconcilable with what is right or reasonable . . . It will be relevant whether advantage is taken of an innocent party who, though not deprived of an independent and voluntary will, is unable to make a worthwhile judgement as to what is in his or her best interests.

Podger was on notice that Mrs Standing was substantially illiterate and would fail to comprehend commercial matters — she was not able to 'make a worthwhile judgement as to what was in her best interests in the circumstances'.

By contrast to the success that was had in Lux, the ACCC failed to set aside agreements entered into by an intellectually disabled consumer with Radio Rentals Ltd

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38 Ibid, at [75].
39 Ibid, at [76]. Interestingly, at a directions hearing before trial, Lux had sought to have the matter mediated. One ground on which the ACCC opposed this was that mediation was inappropriate where the consumer has an intellectual disability. 'It is submitted that where the complaint relates to conduct affecting a vulnerable person, being a person with an intellectual disability, mediation is less likely to be appropriate. In my opinion there is no evidence here that this factor would disfavour the continuance of the order for mediation. In appropriate circumstances mediation may avoid a complainant with an intellectual disability being called as a witness and consequently have the potential to reduce the pressure of court proceedings on that complainant'. See ACCC v Lux Pty Ltd [2001] FCA 600; BC200102543 at [13]. See also J Simpson, ‘Guarded participation: Alternative Dispute Resolution and people with disabilities’, (2003) 14 ADJR 31, which outlines a range of strategies that could be used to assist the mediation process where one or more parties is disabled. The National Mediator Accreditation Standards also talk of the need for the interests of vulnerable stakeholders to be taken into account: National Mediation Accreditation Standards, March 2012, cl 9.7.
40 [2004] FCA 926; BC200404429 at [98] (citations omitted).
41 Ibid, at [112].
42 See also ACCC v Lux Distributors Pty Ltd [2013] FCAFC 90; BC201311903 for a discussion on the meaning of unconscionability. Unconscionability was described in the following way, at [41]:

Notions of moral tainting have been said to be relevant, as often they no doubt are, as long as one recognises that it is conduct against conscience by reference to the norms of society that is in question. The statutory norm is one which must be understood and applied in the context in which the circumstances arise. The context here is consumer protection directed at the requirements of honest and fair conduct free of deception. Notions of justice and fairness are central, as are vulnerability, advantage and honesty.
Rentals. In a 6 year period, Groth had entered into 15 rental, two loan, and 19 service agreements with Radio Rentals. The computer records of Radio Rentals would have highlighted in each successive transaction the existence of the earlier purchases. Groth suffered from an intellectual disability as well as schizophrenic illness. His sole source of income was the disability pension. The ACCC alleged that by entering into these agreements and seeking to enforce them, Radio Rentals had engaged in conduct that was unconscionable according to the statutory norm now proscribed by s 21 of the Australian Consumer Law. But could knowledge of the impairment or disability be established. The answer was no. Espousing a strong view that the question was not about the capacity of the consumer, but the perception by the retailer based on the knowledge that it had, Finn J comments:

Before outlining Mr Groth’s condition, capacities and personal history, it is important that I emphasise that this case is not concerned with Mr Groth’s objective circumstances as such. Rather its concern is with how he was, or ought to have been, perceived by the Radio Rentals employees with whom he dealt, or who dealt with this affairs. As will become apparent, this difference is of fundamental importance to the proper resolution of this matter.44

Having made this the threshold test, unconscionability could not be established. The knowledge the individual employees had of Mr Groth was such that they could not be aware of his intellectual disability, and therefore there was no basis for aggregating what had occurred and attaching this to the corporate employer Radio Rentals. The judicial framework and search for an apposite result was never about the capacity to contract,45 rather whether those who came into contact with the consumer would have been aware of his disability. Intriguingly however, Finn J, perhaps as a direction to the ACCC for future matters, indicated that if the case had been pleaded that there was a taking advantage of Mr Groth because it knew of his penurious financial circumstances, the proceeding may have been vastly different:46

In a stand alone case, where all that is seemingly relied upon to prove unconscionable conduct is that the allegedly disadvantaged person overcommits himself or herself, questions of individual autonomy and of the extent of one’s responsibility to one’s neighbour loom large. Such issues have not been seriously agitated in the ACCC’s late discovered case.47

This latter comment opens an avenue by which the judicial methodology can evolve in an incremental and progressive way to support both the norm of empowering consumers, but assisting those for whom intervention can support appropriate risk taking. By contrast, *Ford v Perpetual Trustees* provides a different avenue.

44 Ibid, at [26].
46 Ibid, at [190]. The failure of the ACCC to make this argument in the pleadings was subject to some criticism by M Sharpe and C Parker, ‘A bang or a whimper? The impact of ACCC unconscionable conduct enforcement’ (2007) 15 *TPLJ* 139 at 156.
Ford v Perpetual Trustees Victoria Ltd

The relatively simple facts of this case belie the difficulties in resolution. Ford, a 58 year old illiterate citizen with an intellectual impairment had signed a transaction which provided Perpetual with security over his house. This arrangement had been brought about by manipulation of the son who needed the funds to purchase a cleaning business. The original contractual arrangements were placed by a mortgage broking service who had then passed the loan application to a loan originator, who had passed this onto Perpetual. These third parties were not seen as the agents of Perpetual. The importance of this is that knowledge of the impairment could never be attributed to Perpetual — the corporate machinations of separate entity doctrine preventing any attribution of mental element. The appellant, whose sole income was receipt of a disability income, was unable to repay the loan. Perpetual sought to take possession. In response to this action, Ford put forward three defences:

(i) That he could successfully plea non-est factum (ie, that his mind did not accompany his signature; it was not his deed);
(ii) That he lacked capacity to enter into the loan and mortgage contracts; and
(iii) That pursuant to statute or common law, the agreements were unconscionable, unjust or unfair.

The trial judge held that non-est factum was established. The circumstances of the manipulation by the son led to a conclusion that this was the not the deed of Ford. As noted, the absence of knowledge by Perpetual of Ford’s personal circumstances prevented any finding of lack of capacity or unconscionability. However, Ford was liable in restitution to repay the full sum lent, plus interest, Harrison J considering that by the receipt of the money, Ford had been enriched.

From these holdings, both Ford and Perpetual appealed. The basis of Ford’s appeal was from the order that he was liable in restitution. Perpetual challenged the finding that non-est factum could succeed. On appeal Ford was successful, Perpetual was not. In respect of non-est factum the court stated:

One can infer from the findings about him and his intellectual impairment and incapacity that he did have relevant cognitive function. He had worked, married, visited shops, and led a simple life, generally with assistance. It can be inferred that he knew that he was carrying out the act of signing a document, that is, a piece of paper.

This however, is insufficient to conclude that he knew what he was signing, in the relevant sense . . . in that sense his mind did not go with the pen.

50 Foster v Mackinnon (1869) LR 4 CP 704.
52 (2008) 70 NSWLR 611; [2008] NSWSC 29; BC200800258 at [110]–[126].
53 (2009) 75 NSWLR 42; 257 ALR 658; [2009] NSWCA 186; BC200905872 at [84]–[85].
Ford could not understand the document, no explanation would have given him a true appreciation of what the import of signing these documents meant, and most critically, he had no understanding that he could lose his house. He was ‘in conscious and intellectual terms a stranger to the transaction’.\textsuperscript{54} Non est factum was appropriately applied.

Having made these findings, the court then had to consider the extent of any restitutionary liability for the monies that he received. The appellate courts dissonance with the trial judge was stark. While the receipt of substantial monies would routinely be seen as beneficial to most, the individual circumstances of Ford had to be taken into account. His needs were limited to the essentials (food, shelter, clothing), his wants not extending beyond that. The liability for restitution that is usually informed by notions of liberty and autonomy were to be modified in the scenario where the person is subject to a significant intellectual and cognitive impairment.\textsuperscript{55} This was to mirror the way the common law has reacted to contracts with children; enforcement limited to necessaries.\textsuperscript{56} In essence, the common law stepping in to assist those who may be vulnerable within the community, Ford was only required to repay the monies remaining in his bank account.

\textbf{Reflection on the cases}

At its heart, the central question asked here is how we can develop a policy framework that enhances the decision-making of the person with an intellectual disability, without placing them in a position of undue risk. Central to our thinking must be an understanding of how we define risk for the consumer with an intellectual disability. \textit{Ford} represents such an evolution on the axis of intervention in the name of consumer protection. The consumer could not on any objective measure be seen to have taken the risk of losing the property, and, as he received no objective benefit, nor had he a need for the receipt of the funds, no liability for restitution could be made in respect of monies that had already been dispersed. In effect, he had not voluntarily consented, or taken the risk of the transaction. \textit{Lux} is a similar tale — Mrs Standing could not be said to have undertaken, or understood that risk. And in some respects, this is the central focus in \textit{Radio Rentals}. In Finn J’s view, the perceptions of the salespersons and their lack of knowledge as to Groth’s disability led to a result where the risk was borne by the consumer. There was no reason to impugn the transaction as there was nothing to displace the inherent risk inherent in consumerism that this was something to which the consumer neither wanted nor needed. But if the focus had been on the consumer, could it be said that Groth had understood and appreciated the risk of entering into 30+ transactions for rental of electronic items when he was on a disability pension. The lack of an appropriate hard law response mandates a policy accompaniment that would have provided Groth with the support and advocacy that he needed. The failure of the hard law evolution to consider capacity, and focus on outcome, led to an inappropriate outcome in \textit{Radio Rentals}, an outcome that may well have been different, if as Finn J

\textsuperscript{54} Ibid, at [85].
\textsuperscript{55} E Bant, ‘Incapacity, Non Est Factum and Unjust Enrichment’ (2009) 33 \textit{MULR} 368 at 378.
\textsuperscript{56} Ibid, at 384.
suggested, the matter had been differently pleaded. Further to this, we also can see and understand that online and telephone shopping presents a particular difficulty for the person with an intellectual disability. The difficulty of establishing unconscionable conduct in this scenario is borne out by the Federal Court decision of Australian Competition and Consumer Commission v EDirect Pty Ltd, where the court was unable to find as a matter of fact that the respondent had used a high pressure and relentless telemarketing sales system that would see conduct directed towards individuals on disability pensions, who were cold-called, as being unconscionable. It was not possible to demonstrate a sense of urgency, pressure, or confusion that was foundational to the regulator’s claim.

As can be seen from these cases, the most significant limitation or restriction on the operation of common law developments, specifically in the domain of unconscionability, stems from the requirement that the provider of the goods or services have knowledge (of some description) of the intellectual disability within the consumer. It was fatal to the plaintiff’s case in Radio Rentals, dismissive of the unconscionability claim in Ford, and central to success in Lux. While unconscionability does not require actual knowledge, objective knowledge being sufficient, a lack of objective awareness is undoubtedly fatal to a successful claim. For example, in addition to the previously mentioned cases, we see in Kakavas v Crown Melbourne Ltd that a pathological gambler could not succeed in a claim of unconscionability as there was no knowing victimisation of the plaintiff. But knowledge on its own appears an unwieldy instrument. Even though objective awareness may suffice, it presupposes a level of intent that is necessary to garner the common law’s intervention. And, with scenarios like Ford, where knowledge cannot be attributed from the coalface level of the transaction, unconscionability becomes a weapon without a target. But to deflate or remove knowledge, undermines the workings of the unconscionability doctrine. As Finn J opined in Radio Rentals:

The more attenuated is the level of knowledge required, it is said, the more the doctrine [of unconscionability] itself becomes disconnected from its animating purpose of proscribing advantage or exploitation, the more it becomes a device for correcting defective consent, or contractual imbalance.

Is there a better way? Ford provides some direction. The expansive use of some doctrines which seek to correct defective consent (such as non-est factum) could become a doctrine of choice for correcting contractual imbalance. But for this we are reliant on factual scenarios that are largely divorced from the norm, and inapplicable for many scenarios involving the intellectually disabled. Factually Ford is different from Lux and Radio Rentals as the manipulation was brought about by a third party, with judicial

57 See comments in text that relate to n 47.
59 Ibid, at [104].
60 Commercial Bank of Australia v Amadio (1983) 151 CLR 447 at 467 per Mason J; 479 per Deane J (with whom Wilson J agreed); 46 ALR 402; [1983] HCA 14; BC8300072.
methodology seeking to overcome the rights of a party arguably innocent of wrongdoing. For consumer scenarios, Lux and Radio Rentals represent far more the norm.

An augmented solution proposed by some, though not specifically addressed to the intellectually disabled consumer, is to argue that the appropriate level of intervention for unconscionability, and perhaps allied doctrines such as undue influence, lies where not only ‘active exploitation’ is apparent, but where there exists ‘transactional neglect’. In other words, supplement the judicial focus of the knowledge or perception of the supplier with awareness of facts that relate to the intellectual impairment that a retailer or supplier observes in respect of a consumer. It is merely an incremental step from reliance on knowledge of disability to access to information that would objectively put the supplier on enquiry. In the context of taking out a loan, Paterson comments: ‘The concept of “transactional neglect” does not impose responsibility on lenders for every vulnerable borrower. The concept is premised on the on the lender having, through the loan application, access to facts that should reasonably have alerted it to the need for care in dealing with the borrower’. That is, should the ethos behind responsible lending obligations extend to the traditional retail experience with the intellectually disabled? The view of this author is a qualified yes with my reservations stemming from a reluctance to impose paternalistic interventionist measures on the person with an intellectual disability. In this context, consider the scenario outlined in Radio Rentals. The supplier had knowledge through its financing means that the consumer was on a disability pension. Further, they knew that the consumer had entered into a large number of contractual agreements. In the words of Paterson, they had access to information which arguably should have alerted them to the need for care.

What I am confident in saying is that the incremental nature of the common law, its reliance on judicial evolution and methodology will not deliver an optimal outcome for the intellectually disabled consumer. It is too costly, too slow, and ultimately unsatisfactory that an intellectually disabled person, often with limited resources, seeking to live in a community where disability can be said to be a construct of how society is modelled, is required to pursue formal litigious measures to assist their place and their rights within a consumerist society. The doctrinal evolution of our common law must be matched by the introduction of appropriate policy-oriented instruments to assist the intellectually disabled.

63 That is, you might impose responsibilities on the suppliers to take reasonable care when transacting with people with whom they ought to see as vulnerable. See J M Paterson, ‘Knowledge and neglect in asset-based lending: When is it unconscionable or unjust to lend to a borrower who cannot repay?’ (2009) 20 JBFLP 18.

64 Ibid, at 36.

65 See Ch 3 of the National Consumer Credit Protection Act 2009 (Cth).

66 As discussed by M B Musumeci, ‘Modernizing Medicaid Eligibility: Criteria for Children with Significant Disabilities: Moving from a Disabling to an Enabling Paradigm’ (2011) 37 Am JL & Med 81 at 118. ‘[T]he constraints faced by people with disabilities are a function of the way society is ordered rather than unavoidable results of the physical or mental limitations caused by a particular medical condition.’
The soft law and policy instruments

Our search for soft law instruments that can assist and complement an evolution of judicial methodology starts with the idea, and the ideal, that nothing should occur or impact on the intellectually disabled without their input. It is a point that underlies the principles emanating out of the United Nations Convention on the Rights of Persons with Disabilities. Article 4 of this Convention mandates that states are required to ‘consult with and actively involve’ persons with disabilities. But what is encompassed within this principle, and how should this occur? First we must recognise that the consumer with an intellectual disability has been given the power to exercise their voice as a consumer, and from this we need to identify the relational factors that are central to the use of this power.\(^{67}\) Once we accept this power as given, and I would suggest this is incontrovertible, then the next element is support in the use of that power — the relational aspects that will deliver the empowerment that we are seeking, but with the interventionist support so that, when the risk accompanying that action by the consumer is inappropriate, the law can respond. ‘There is consistent evidence that [active support] results in increased engagement in activities by people with [intellectual disability].’\(^{68}\) The third element to accompany power and support is advocacy. With a legal system and society that oils the wheels of those who articulate the most ferociously and persuasively, the voice of those who may not have the capacity to argue must still be heard. ‘The ready availability of independent advocacy is a necessary safeguard for those people with disabilities who are facing complex, challenging or intractable issues about their rights or well-being, and for those who find it difficult to advocate for themselves and do not have strong family member advocates.’\(^{69}\)

Why are these elements of power, support and advocacy so important?

Power

There is no doubt that empowerment has been a key focus in the sociological literature relating to the person with an intellectual disability for some time. Its essence is about legitimising the actions taken by each of us, in support of our own best wishes. It seeks to enhance our individual governance and supports a notion that we individually can express or articulate the level of risk that we seek to embrace:

\(^{67}\) C Brown and C Ringma, ‘New Disability Services: The Critical Role of Staff in a Consumer-directed Empowerment Model of Service for Physically Disabled People’ (1989) 4(3) Disability, Handicap and Society 241 at 245. The consumers were trained as part of the deinstitutionalisation process to assume responsibility. They were not trained first and then given power. They are given power from the inception and this praxis was integral to their training. Praxis and understanding were seen as one and the same process’. (NB. These comments were made in the context of physically disabled people.)


\(^{69}\) Disability Advocacy Network Australia, Independent Advocacy and the NDIS — Position Statement June 2012, p 1.
While definitions vary, the essence of empowerment is about enhancing, securing and/or legitimating the power of oneself, another, or a collective. For people who have been labelled as having a learning disability this is indeed a profound change — and challenge — to a society and service system which have on many occasions either inadvertently or actively sought to diminish, delegitimate, oppress and control those so labelled.  

Choice for all is now seen as central, if not an imperative for all. The person with an intellectual disability is to be given the power and right to determine the choices they make for themselves. Our first hard law normative response was in the negative, entities could not discriminate, either passively or actively on the basis of disability (Disability Discrimination Act 1992), but the more current direction sees the role as one of enhancing the positive. The question is now one of capacity and not outcome. This ideal represented by modern guardianship legislation which seeks to ensure that the freedom of decision-making and the actions of the intellectually disabled are to be impinged as little as is feasibly possible. It’s not enough to say that an intellectually disabled person has the choice to undertake their own banking transactions, or that they can choose to enter into a mobile phone contract, the question is whether they have the capacity to understand the risk associated with that choice. Power to the intellectually disabled consumer is undoubtedly a positive, but it must be tempered with the idea that if the risk to the consumer of entering that transaction is too great, then there is no effective choice at all. If Groth could understand or appreciate the risk of the Radio Rental contracts, then the choice he makes should undoubtedly be vitiated. And given the continuum of intellectual disability will vary significantly, the response in terms of providing equal capacity must amount to an argument for the same relative capacity for participation.

Support

With power as a key element, and relative capacity as critical, the focus within policy design must be about the support for the consumer with an intellectual disability. But as we know from the report of the Productivity Commission on Disability Care and Support, the current system is ‘underfunded, unfair, fragmented, and inefficient, and gives people with a disability little choice and no certainty of access to appropriate supports’. Given this, costly and interventionist support options will find it difficult to gain traction. For this reason, we have seen organisations such as the Intellectual Disability Rights Service provide information sheets outlining consumer protection issues for the consumer with an intellectual disability.

71 Guardianship and Management of Property Act 1991 (ACT) s 11; Adult Guardianship Act 1988 (NT) s 4(a); Guardianship Act 1987 (NSW) s 4(b); Guardianship and Administration Act (2000, Qld) s 6, s 5(d); (1993, SA) s 5(d); (1995, Tas) s 6(a); (1986, Vic) s 4(2)(a); 1990, WA) s 4(2)(c).
72 Stainton, above n 70, at 291.
73 Productivity Commission, Disability Care and Support, Overview and Recommendations, No 54, 31 July 2011, p 2.
the person with an intellectual disability,\textsuperscript{74} and the ACCC produce a compliance guide for businesses dealing with disadvantaged or vulnerable consumers. In this it states, and perhaps with some resonance towards a view of ‘transactional neglect’:

However, if it is apparent that a potential customer may not have the capacity to make a voluntary or informed decision about the implications and/or benefits of their purchasing or contractual decisions, then businesses need to act responsibly and take extra care in their dealings to ensure that no unfair advantage is taken.\textsuperscript{75}

The ACCC also claimed to the Productivity Commission report on \textit{Consumer Policy} that it fast-tracks consumer matters involving the vulnerable and disadvantaged, as well as implementing a strategy whereby community organisations could refer matters to the regulator.\textsuperscript{76} But it is at the local level where support for the intellectually disabled will originate.\textsuperscript{77} Because of this, I suggest that community based support is the key. And what are the critical elements that underpin this? First, a recognition that the relationship of trust between the person with an intellectual disability and others will be foundational.\textsuperscript{78} Often this will sit at the family level, but where this is not available, community based support must exist, and as will be argued below this may involve legislative change. Again, looking at the context of the consumer in \textit{Radio Rentals}, if there was no family support available to assist that individual, then community based support such as presently exists within group home facilities for the intellectually disabled, should be introduced to assist that consumer.

The second critical element is big picture orientated. A publicly funded advocacy service for those with disabilities (including intellectual disabilities), separate from the funding services that support people with disabilities.

To augment the first stage, legislation would be enacted to provide a framework for support by those personally connected with the individuals, focusing on the capacity of that person in an expanded sense. A model for this can be seen in guardianship legislation from overseas, but which has also been recommended for Victoria. For example, the Representation Act 1996 of British Columbia, with its somewhat softer focus than modern guardianship legislation, (which seeks to put in place a tribunal mandated relationship to take account of the decisions of the intellectually disabled), allows individuals to enter into arrangements with support networks that allow the individual to


\textsuperscript{76} Productivity Commission, above n 2, pp 298–9.

\textsuperscript{77} It should also be noted that Apps have been increasingly used to support the independent living of people with disabilities. Examples include Prologquo2Go (assisting people with difficulty speaking), and Coin Math to assist with money handling, ibooks with Voice Over (for reading difficulties), and iComm (speech difficulties).

provide authority to this network to assist that individual with dealings with service organisations, consumer suppliers, and financial groups. Two levels of agreement are envisaged. One operates between the person with an intellectual disability and the supporter which is brought about by trust between the two parties, rather than an emphasis on competency. This has a lower level of responsibility than a s 9 agreement which must be made in conjunction with legal advice and can incorporate decisions about medical treatment. Somewhat similar is the Alberta Guardianship and Trustee Act 2008 which has both supported and co-decision making, with the latter allowing the co-decision maker to sign contracts for the person with an intellectual disability, but with the signer absolved of legal responsibility. The United Kingdom also has options under their Mental Capacity Act 2005 whereby community based advocates can assist in supporting decision-making by those with disabilities, and which has five key principles lying behind it:

(i) Mental capacity must be assumed;
(ii) Give the right support to allow the individual to make the decision;
(iii) People can make unwise decisions;
(iv) When intervention occurs, such intervention must be in their best interests; and
(v) The best interests’ intervention must be the least restrictive of their basis rights.

These principles can also be seen in the Victorian Law Reform Commission recommendation for the introduction of co-decision and supported decision-making options for people with intellectual disabilities. The recommendation of the commission, in line with previously noted legislation, was to encourage individuals to make personal appointments of supporters, who would be a trusted individual to assist with making decisions when the person is unable to do so themselves. A supported decision-making appointment would see a person appointed by way of something similar to a power of appointment, or by order of the tribunal. This supporter would not have the capacity to legally bind the supported person, but could obtain information on their behalf, communicate with others and assist the person to make a decision in line with the information that is obtained. A person with a supporter could still make a legally binding decision themselves. A co-decision making model could be made by tribunal order, with the difference between this and supported decision-making being that under a co-decision making model both parties would need to agree to the decision for it to have legal effect.

Legislation and proposals of this nature stem from a recognition that communication between an intellectually disabled person and with those they

80 See Pt 2 Divs 1 and 2 of the Guardianship and Trustee Act 2008 (Alberta).
81 For a summary of the overseas options, see Office of the Public Advocate, above n 78, pp 13–15.
trust may not always be found in traditional mechanisms, and a belief that incapacity is often the result of the social construct which, by focusing on entitlements, sees capacity and will as expressed in a particular way, rather than as simply resulting from a lack of support or understanding of how that will is being expressed. What it brings to the fore is how we may well see capacity in a different way — the medical profession concerned with comprehension, the legal professions consequences, and the 'social perspective . . . the more general issue of maintaining adequate levels of social functioning'. As Stainton comments: 'the state is increasingly recognizing the structural necessity of independent support for articulating wants and needs and the importance of unpaid personally bonded and committed individuals in the lives of people with learning disabilities. Traditional ideas about competence and capacity are, however, proving difficult to reverse.' What it does in effect is rely more on the informal protections and safeguards, as against formalised systems such as tribunal mandated guardianship.

Advocacy

Concomitant with the above elements lays effective advocacy. As to what this means, a commonly accepted definition is as follows:

advocacy for people with disability can be defined as speaking, acting or writing with minimal conflict of interest on behalf of the interests of a person or group, in order to promote, protect and defend the welfare of and justice for either the person or group by:

1. Being on their side and no one else’s;
2. Being primarily concerned with their fundamental needs; and
3. Remaining loyal and accountable to them in a way which is empathic and vigorous.

Having put the power of choice in the minds of intellectually disabled, with appropriate support networks, and if necessary enhanced legislative powers, all will come to nought if there does not exist the independent community based support to argue their case in a system inherently and historically based around adversarial dispute resolution. For this reason, an adequately funded and supported advocacy network to assist the intellectually disabled is a necessity. Proposed by Disability Advocacy Network Australia, and supported by this author is the notion of a National Statutory Advocacy Authority. This would be publicly funded and provide the third key element in the soft law policy development that would yield immeasurable benefits to the person with an intellectual disability in their quest to have the same relative capacity to make the choices that most of us take for granted. While the Productivity Commission recommended that funding not directly come

84 Ibid, at [7.15].
85 Stainton, above n 70, at 294.
87 Productivity Commission, Disability Care and Support, No 54, Ch 10, 31 July 2011, p 524.
88 Disability Advocacy Network Australia, above n 69, p 3.
from the National Disability Insurance Scheme,\textsuperscript{89} the importance of funding for non-government organisations to continue this vital role cannot be underestimated and the separation between the service and funding responsibilities seen as vital.\textsuperscript{90}

## Conclusion

[Work] needs to be undertaken to understand the consequences of constructing the person with intellectual disability as a consumer in a marketplace of goods and services where that individual has limited rights and resources. Here we can see the structural and ideological imperatives that maintain the differences between those who are labelled with intellectual disability and those who label them; between those who have and those who have not.\textsuperscript{91}

The proposal suggested here has multi-faceted elements. First, an evolution in the thinking of the hard law as represented by the common law, particularly unconscionability. What we need is a subtle move away from a focus on the knowledge of the supplier, and a move towards transactional responsibility, or to establish liability, transactional neglect. Radio Rentals were aware that Groth was on a disability pension, yet he was entering into a large number of rental transactions that should have alerted the staff to make further inquiries. The cost of intervention here would have been minor, yet the result significant. Similarly, in Ford where Perpetual could not have had knowledge, reliance on somewhat obscure and little used doctrines such as non est factum places the person with an intellectual disability in a precarious position of uncertainty. The hard law of the common law should also be complemented by the introduction of something akin to representation agreements as has occurred in Canada, with this acknowledging the need for a person-centred approach\textsuperscript{92} to assist the individual with an intellectual disability. These improvements providing a mechanism by which an individual is able to have a trusted family member provide the support necessary to make lifestyle decisions without the accompanying formality of guardianship orders. With this accompanied by the funding necessary for independent advocacy, the intellectually disabled will have the support mechanism and legal protections in place that will give this person the best opportunity to be an inclusive and fully participating citizen in the consumer society. Doing what is best\textsuperscript{93} for the person with an intellectual disability has paternalistic overtones in itself, and our language will influence

\textsuperscript{89} Productivity Commission, \textit{Disability Care and Support}, No 54, Ch 10, 31 July 2011, Recommendation 10.4

\textsuperscript{90} Stainton, above n 70, p 295. The Productivity Commission’s Report into the Consumer Policy Framework also suggested that there be additional public funding to assist the networking and policy functions of general consumer advocacy groups. The commission considered that this could assist those persons that were vulnerable or disadvantaged: Productivity Commission, above n 2, p 300.

\textsuperscript{91} McClimens and Hyde, above n 10, at 141.

\textsuperscript{92} As noted in Social Inclusion Board, \textit{Strong Voices}, October 2011, at <www.socialinclusion.sa.gov.au> (accessed 10 December 2012), p 39: ‘Each person is different, with unique gifts, strengths, passions, dreams, limitations and weaknesses. As a starting point we all want to live an ordinary, dignified and satisfying life that allows us to inspire and achieve.’

\textsuperscript{93} Toomey, above n 20, at 641:
the relationship. It’s time the institutions of change within our society are able to put in place the architecture of reform. My proposal here aims to begin that discussion.

When searching for a way to protect the mentally disabled, most people recommend doing ‘what is best’ for them. However, what is ‘best’ for the mentally disabled is a heavily debated topic. Some argue that even the severely mentally disabled should be able to make harmful decisions without interference. Although this is a minority view, it would maximize individual freedom, but leave them vulnerable to victimization.