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Lemon Caravans & RVs in Aus

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NCAT Statutory Review
Director, Courts Strategy
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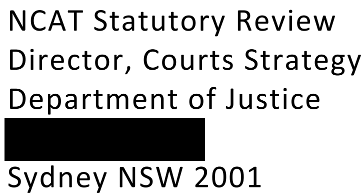
Sydney NSW 2001

SUBMISSION TO THE NCAT STATUTORY REVIEW BY TRACY LEIGH

INTRODUCTION

I am the administrator of Lemon Caravans & RVs in Aus (LCARVIA), a Facebook victim support group with over 47,000 members. Thousands of group members own severely defective 'lemon' recreational vehicles (RVs) and have been unable to directly assert their lawful consumer rights with the supplier or manufacturer of the RV. As a result, many are forced to take private legal action. In NSW, this is invariably in NCAT as damages claims are unlimited for new motor vehicle applications.[1]

The reported experiences by LCARVIA members who have had to undertake litigation in NCAT are invariably negative. The advertising on the NCAT web site makes the Tribunal appear to be a relatively informal place where you just go along, tell your story, present some evidence and get an outcome. Also, that NCAT is 'cheap, quick, just and relatively informal', which has an imputation that there is no risk.[2] Nothing could be further from the truth and applicants are often shocked and confused at what they are confronted with in reality.

I have personally represented three of my group members as a consumer advocate when they have been unable to afford legal representation and/or are disadvantaged in other ways, such as physical and mental disabilities. In two cases, the Tribunal gave leave to the respondent for legal representation, despite the vigorous and legitimate objection of the applicant claiming they would be disadvantaged. Usually the respondents are well resourced corporations. They hire expensive legal teams and complicate what was originally an uncomplicated matter. The quantum of claim doesn't make a matter complicated.

This puts the consumer at risk of adverse costs orders (which can be in the six figure range) as the claim is generally over $30,000 which is the threshold level for

[1] NSW Civil and Administrative Tribunal, 'Motor Vehicles' (web site) <https://www.ncat.nsw.gov.au/Pages/cc/Divisions/Motor_vehicles/motor_vehicles.aspx>.
[2] *Civil and Administrative Tribunal Act 2013* s 3.

consideration of costs.[3] It also lengthens the time to the conclusion of the matter and, if the applicant is successful in any way, invariably leads to an appeal. The Appeal system is open to abuse of process. I will discuss this in more detail in this submission.

I will demonstrate the flaws in the NCAT system through two case studies that I was personally involved with and another case I was involved in as a sounding board. The applicant's stories are as much my stories, as I too suffered at the hands of the Tribunal and so there will be some emotion in the telling of these stories. One story in particular will show the systemic problems with NCAT in the Consumer and Commercial Division, as there were multiple Members involved as well as two registries and the Appeal Panel.

I will then specifically answer the questions in the Factsheet with reference to the two case studies and other matters I am either aware of or have participated in.

I have evidence to verify my claims in this submission, including: hearing audio files; hearing transcripts; orders; submissions and filed evidence; and correspondence. I also have witnesses, being the applicants. If the reviewers would like to see any of this evidence

For the privacy of the applicants, I will abbreviate their names to initials.

CASE STUDY ONE

The first NCAT application

Retiree CO purchased an caravan from in April 2014 at the Rosehill Show in Sydney, for a pre-planned holiday with his wife. He took delivery in late May 2014. Within days numerous defects became apparent, including water ingress. He also didn't believe that it was the correct model of caravan that he had ordered as a newly built caravan. He took the caravan back for repairs and modifications then set off on his holiday. Numerous further defects developed, causing disruptions to his holiday. In September 2014 he rejected the caravan and requested a full refund. He later found out that this caravan was in fact a demo model he saw at the show but didn't inspect or agree to purchase.

When the refund was not forthcoming, he filed his first application in NCAT on 8 October 2014 claiming a full refund of $68,490. The application was heard on 2 March 2015. During this application, the Member stated to CO that his application was premature as the caravan was still under warranty and he had to allow and to conduct further repairs. This is not a correct application of the ACL.

CO tried to assert his *Australian Consumer Law* (ACL) rights but was interrupted by the Member that again he was being premature. The Member then explained to CO that his claim was highly likely to be unsuccessful if he wanted to proceed, coercing him into accepting an agreement for more repairs. CO was also told by the Member that a refund is a very rare award and was highly unlikely in this case. He said it would only apply in

[3] NSW Civil and Administrative Tribunal, 'Costs: Who pays for the costs of running a case?' (web site) [7] https://www.ncat.nsw.gov.au/Documents/ccd_guideline_costs.pdf.

circumstances where a consumer didn't get what they ordered. He used the analogy of ordering a caravan and getting a camel. This is also not a correct application of the ACL.

CO got quite distressed and the matter was briefly stood down for him to recover. The parties made an agreement for some 30 or so defects to be repaired and that the application be dismissed. This was on the grounds that if the repairs had not been properly effected within about six or so weeks, CO could bring another application before the Tribunal. The hearing information is contained in a transcript of the hearing from recordings, which I have listened to. The Orders did not reflect anything other than that the application was withdrawn.

I will allege that the errors in law and procedure made by the Tribunal Member in this application was the cause of a further four years of torment from the respondents and a further 18 months of what can only be described as abuse of both CO and myself at the hands of the Tribunal and the respondents. As I will outline, CO was fortunate to survive the ordeal, although the damage to his health has been irreparable, as is the damage to his finances at a late stage in his life.

The repairs took longer than agreed. After CO took delivery again more defects became apparent, including being locked out of the caravan with a defective door lock. While on the phone to [redacted] arguing about the extent of the defects, CO had a heart attack. He was airlifted from Darwin to Sydney and underwent emergency cardiac surgery. Prior to his heart attack he was given a clean bill of health, including being checked for any arterial blockages, as he had experienced some chest discomfort and anxiety due to the ongoing defects. These health events occurred in June 2016. CO had given [redacted] over a year to remedy the defects in the caravan.

The caravan was returned from Darwin to Sydney in about October 2016. It had developed even more defects, including faulty electricals. CO then had the caravan inspected and quoted for independent repairs. The quotation was over $40,000. He also had it inspected by other experts, including a NSW RTA inspector and heavy vehicle mechanic with over 40 years experience; and a former caravan manufacturer production manager. Both wrote expert reports stating that the defects made the caravan dangerous. The last time the caravan was used, which was to return from Darwin to Sydney, was October 2016. After that it sat in CO's driveway.

The Second NCAT Application

The three-year statute of limitations for making a second claim to NCAT potentially expired in May 2017, depending on what definition of 'rejection period' was favoured by the Tribunal. CO was still recovering from the cardiac surgery in the previous year. It was just prior to this that CO joined my Lemon Caravans group and privately contacted me for some assistance. He was unable to afford to engage a solicitor due to being a retiree of limited means. I helped him to file a second application for a refund and consequential losses of $78,741 in or around May 2017.

In early June 2017 CO applied to the Tribunal for an adjournment of an interlocutory hearing so that he was able to get his documents in order and to have the hearing moved to Liverpool, closer to his residence, and not Penrith, closer to the second respondent's factory. He had been very unwell due to the ongoing stress of this matter and trying to recover from the surgery.

The adjournment was denied, and he was ordered to attend, by phone if he chose. He wanted to attend in person for a number of reasons, and so had to make the trip to Penrith. This was the first of numerous adverse Tribunal decisions for CO that defied reason or fairness and gave no consideration for CO's fragile health.

The final hearing was scheduled for 6 September 2017. CO attended in person with his wife and son. He applied for me to appear by phone from Alice Springs as his [redacted] [redacted]. The grounds were that I had assisted him with his case up to that point and could calm him if he started to get distressed, as he had done in the hearing of 2 March 2015. It could also substitute for him by leave if his health deteriorated so much he was unable to run his case. This was denied on the grounds that he had enough support with his family and by phone I couldn't assist him. I argued that if they allow him to have his mobile phone on I could message him or his wife. The Member then exclaimed that if I thought I was going to be there to lecture her on the ACL then my presence was not required.

Very quickly it was apparent that the Tribunal Member was biased against CO. After rejecting my request to be a [redacted], and before opening the hearing, she addressed the expert reports and his documentation. I had remained on the phone at that stage and listened to the unfolding events. The Member stated that none of it was in the proper form and that she didn't know what weight, **<u>if any</u>**, she would give to the evidence. She stated that the reports were missing a CV. The documents were not paginated correctly. The respondents had not submitted much in the way of evidence at all regarding the ongoing defects. The respondents had not submitted much in the way of evidence at all regarding the ongoing defects but were not similarly chastised for a lack of preparation.

This sent CO into a very distressed state, after now having waited almost three years, since October 2014, for redress. The Member then started to coerce CO into applying for an adjournment, in spite of a medical certificate stating that an adjournment would be detrimental to his health.

CO then stated he was having a heart attack and was sobbing uncontrollably. Knowing his medical history, I suggested to the Member that there needed to be an urgent adjournment and to get a doctor. Instead, she asked CO if he wanted an ambulance. Unfortunately, his son answered for him that he just needed a glass of water and to take medication. It was a critical situation and CO should have been immediately attended to by medical experts. Fortunately, the medication worked and restored his heart to a normal rhythm, however CO was still severely distressed and sobbing. Instead of an immediate adjournment, the Member gave him a few minutes to recover and then reconvened the hearing to sort out an adjournment so CO could get his documents in order. It was at that point I hung up.

After I left the hearing, the Member told CO that he should get any ideas out of his head that he was going to get a full refund. This of course distressed him even further and is yet again an example of Tribunal Members not applying the ACL properly and, in some cases, knowingly distressing a party. A consumer is not a legal expert and should be able to rely on a Tribunal Member to apply legislation and NCAT legislation and rules properly.

CO then made an application for me to represent him on the grounds of ill health. On 20 October 2017, a Senior Member confirmed that I had been appointed to be CO's

representative with 'unrestricted rights to make binding decisions on his behalf'. From that time onwards I was sent all correspondence from the Tribunal regarding CO's application.

At this stage, the new final hearing was still set for 22 January 2018, as previously ordered. However, [redacted] applied for an adjournment due to the unavailability of their authorised representative (by the company, not an authorised legal representative by the Tribunal, as that had not occurred as yet). Available dates for all parties were requested for between February and May 2018, potentially pushing the final hearing out for months.

[redacted] then flagged that they were going to seek leave for legal representation, which would in fact have negated the issue for [redacted] regarding their 'authorised representative'. We decided that we didn't want [redacted] as a second defendant as it was complicating the matter and, under the ACL, CO was only required to sue the dealer, [redacted]. [redacted] were added to the application by the Tribunal at [redacted] request. CO didn't have any say in the matter. We applied for a directions hearing to have [redacted] removed, which was then set for 23 November 2017. The Tribunal expanded the scope of the directions hearing to include 'Reconsider applicants request for leave to be represented by a [redacted]' and to make directions for a formal hearing. I do not recall why a 'reconsideration' occurred as I had already been endorsed as CO's representative but was likely as a result of an objection by the respondents due to my role as a consumer advocate.

We were successful in having [redacted] removed as a respondent because the Member ruled that the Tribunal can't force an applicant to sue a party they don't want to sue. The matter of me representing CO was also dealt with and I was confirmed as his representative. However, this was not written into the orders. This was to cause significant problems and further delays.

[redacted] now being the sole respondent, then applied to have legal representation. They were using the same law firm as [redacted]. In one of the most bizarre orders from the Tribunal to date, on 12 December 2017, the Member ordered that [redacted] be given leave to be represented on the grounds that "[t]he applicant is represented by a woman who, in her own words has "vast experience and [has] had meetings with senior enforcement officers in the ACCC. [Her] information comes directly from the chief regulator themselves" and that the respondent would be disadvantaged. This was in spite of the fact at that stage I had no legal training whatsoever.

In the same document, the Member then stated "Please note the Tribunal has not given [redacted] leave to represent the applicant." So on the one hand [redacted] was granted leave to be represented because CO was represented by me, and then, immediately thereafter, stated that I was not CO's representative and had to make a formal claim, which CO had done on 21 September 2017 and was confirmed on 20 October 2017 and later on 23 November 2017. So a directions hearing was set on 22 January 2018 to hear an application for me to represent CO, yet again. This was yet another apparently biased decision, as the respondent had their application dealt with on the papers yet the applicant had to prepare arguments for a directions hearing to have representation when he was elderly, unwell and financially not well off, especially as the matter had costs him substantial sums in repeated photocopying of documents.

It was becoming more and more apparent that the Tribunal was favouring the respondent in most of its decisions. It had happened too many times in both applications to be coincidental. I made complaints to the President of NCAT and the NSW Minister for Small Business and Innovation, which was then referred to the NSW Attorney General. As a result, CO's file was reviewed and transferred to Sydney to be heard by Senior Members. Little did I realise at the time that making those complaints was going to put me out of favour with the Tribunal even more than I already was. And there was much worse to come.

By this stage, with the hearing now deferred and ████ having leave for legal representation, and hiring a top Australian law firm, CO had become even more distressed and had to have his medications reviewed and increased. Some medications had serious adverse effects on his intellectual capacity at certain times of the day when he took it. His cardiologist told him in no uncertain terms this matter was slowly killing him. Many times when I contacted him about the matter he was in tears and just wanted it all to go away. Unfortunately, he could not withdraw the application without serious adverse consequences, including a potential costs order against him and having a $68,000 caravan that could cost over $40,000 to repair to sell. He was caught between a rock and a hard place and all I could do was do my best against the law firm as CO was unable to afford a lawyer.

I was confirmed as CO's representative at a hearing on 22 January 2018 along with directions for preparing for the final hearing. CO was also given leave to have legal representation at the same time in preparation for trying to crowd fund for his legal fees and hiring a barrister for him. And so the legal complicating and delaying tactics started. At this point the entire proceedings become more akin to a court proceeding than a Tribunal, regardless of the Tribunal knowing that I had no legal qualifications. I did the best I could, but CO was significantly disadvantaged. In addition, all CO's material was compiled with the view that the Tribunal was 'relatively informal'. I was relying on s 38 of the NCAT Act as the reality of the how the Tribunal operates. It became nothing of the sort and we were caught well short in the final hearing against submissions and evidence prepared by solicitors and a barrister.

I wrote and filed CO's Points of Claim and supporting documents by the due date of 19 February 2019. The respondent was due to file their defence by 19 March 2019. They didn't. Instead they wrote to the Tribunal claiming that the Points of Claim contained a claim that was not in the jurisdiction of the Tribunal. They waited until the last minute to do so, rather than addressing it much earlier. I was given leave to amend the Points of Claim to remove the claim in contention, which I reluctantly did as I knew that the claim for unconscionable conduct had been heard by the Tribunal before. This was just one inconsistency in a sea of Tribunal inconsistencies, which I will discuss further on in this submission.

The respondent objected yet again and sought a directions hearing to uplift the matter to the District Court. This would have meant further delays, potentially years, and legal costs that CO could not afford. I sought advice on the Tribunal's jurisdiction from the Tribunal Member. I was told that she couldn't do that and to seek legal advice. I was somewhat shocked that a Tribunal Member would not know their own jurisdiction. The Tribunal Member allowed me one week to seek legal advice and amend the Points of

Claim one last time. I was finally successful in having it accepted and the application kept in the Tribunal, much to CO's relief.

again breached orders, missing a deadline for filing material. I wrote a complaint to the Tribunal and it was noted that they must comply with orders. They then applied for an adjournment of the final hearing. On 3 July 2018 the Tribunal refused that application.

The final hearing was set down for two days, 12 and 13 September 2018. The next ploy by the respondent to disadvantage CO was to request that I been removed as CO's representative under s 45(3)(b) of the NCAT Act on the grounds that I was not a fit and proper person and would not be honest with the Tribunal. This was only about five weeks out from the final hearing. On 6 August 2018, in a 17 page decision, the Tribunal dismissed application to have me removed as CO's representative. The tide appeared to have turned since the application was transferred to the Sydney registry and interlocutory hearings were heard by Senior Members, or so we thought.

There was however more obfuscation to come from There was also abuse of process by the Tribunal Member at the final hearing. In fact myself, CO and our expert witnesses received verbal abuse and derision from the Tribunal Member at the final hearing on a scale that defies any sense of procedural fairness or good conscience.

next ploy was to apply for an adjournment of the final hearing. They wanted to inspect the caravan again, having already done so in October 2017. The adjournment was denied but the inspection request was granted, in spite of objections by CO. There was the potential that evidence could be tampered with. I had had stories from my group members where this had happened in their cases. The Member disagreed and allowed the inspection.

had do the inspection. They were supposed to take the caravan on a tilt tray as the electric brakes were not working. They turned up with a ute to tow it. CO told them the brakes were not working and it was dangerous to tow. They ignored him. As part of their evidence they stated that it towed very well and with no problems, neglecting to also tell the Tribunal about the warnings they had received and that the brakes were not working. This was very dangerous. They towed it back to CO's residence when the inspection was completed. CO immediately checked the fuse for the brakes and it was still blown and had not been replaced. This is a demonstration of the disregard that had for safety.

At this stage I believed that I was not competent to run a two day hearing against an experienced barrister and two solicitors. I crowd fund enough to engage a junior barrister to run the hearing. In the face of the assertiveness and relentlessness of barrister, he was overwhelmed on many occasions.

The final hearing finally

So to the two day final hearing, at last. It was one of the worst experiences of my life, and that is saying something. I witnessed the use of the judicial system as a tool of punishment and abuse by both the respondent and the Senior Member presiding.

It was run like a court trial, with the two barristers and the Senior Member all legally qualified. I am very glad I was able to hire a barrister for CO as I would have had no hope

in that highly legalistic environment. Also, during the hearing and in the final decision, the Senior Member was very derisory of me as a 'lay advocate' with no legal qualifications. According to s 3 and s 38 of the NCAT Act, this should not happen in the Tribunal. But there was nothing to stop it as the Senior Member has total authority over how a hearing is run. I had already learnt the hard way, beware objecting to a Tribunal Member about just about anything.

The Senior Member was scathing of the preparation of Co's application, stating: 'I have to say with the greatest respect to Ms Leigh, and I'm not sure at what stage she carried on, but the preparation for this matter has been a dog's breakfast, it really is an awfully prepared application'. This was just lip service and there was no 'due respect' at all. That became apparent later on in the reasons for the final decision. The respondent's legal team also seized on this at a later stage to claim that I was incompetent. The application was in files, numbered and I had any submissions and points of claim I wrote reviewed by one or two retired solicitors who were helping me meet the Tribunal's requirements properly. The volume of correspondence and multiple Points of Claim were as a result of the respondent's legal team making ambit claims which needed responses. As the non-lawyer in the room, I became the scape goat.

We had made an application for CO to attend by phone, but in an interview room in the Tribunal not a hearing room. This was so he could be observed as he gave evidence, be handed documents if needed, but stay out of the hearing room that has twice previously triggered an adverse reaction detrimental to his health. As previously stated, he had the start of a heart attack in a previous hearing due to the stress, after having a heart attack and then cardiac surgery. He was also unwell in the first application hearing. Being in a hearing room distressed him so much it triggered his PTSD. We were incredibly worried it would also trigger another cardiac event and potentially kill him, knowing the pressures and stresses that would occur in a two day hearing with an aggressive respondent. We supplied five medical reports to the Tribunal in evidence, the most recent from his GP a week prior saying that if he attended in person there was the real risk he could die; the other four were older reports but CO had ongoing medical conditions. The respondent challenged the application vigorously, much to the chagrin of the Senior Member, who at first stated that due to the medical reports he was inclined to grant the application, but then ceded to the insistence of the respondent's barrister that there be argument heard. However the Senior Member's chagrin diminished as the arguments progressed. We wasted about an hour or so on arguments, not the three or four claimed by the Senior Member. The Senior Member dismissed four medical reports as irrelevant and too old, in spite of the fifth more recent report showing that the conditions were ongoing.

The respondent in their argument against allowing CO to appear by phone cited an authority that the Member came to believe he must comply with and ordered that CO couldn't appear by phone. He thought that was the end of it and we would move on to the rest of the hearing. He did this in the full knowledge that all CO's own evidence would be given no weight, as he had previously dismissed other reports of experts who were unable to attend the hearing, rather than weighting them accordingly. The Senior Member made an error in applying that authority, but we only found out after the hearing when we could look it up, as we were not given a copy by the respondent. CO's medical certificate complied exactly with the requirements in the authority. It was as if the Senior Member hadn't even read it or, if he had, he had another agenda in mind, perhaps in shortening the hearing timeframe. This is also evidenced by the multiple

attempts he tried to get a settlement between the parties, using coercion and even fear tactics on the second day.

We then said to the Senior Member that CO will now have to appear in person. The Senior member became quietly incensed. He stated that we had falsely claimed that CO was unable to attend in person and this would go to credibility. He was very annoyed with us, claiming we wasted 3-4 hours of the Tribunal's time (which was nowhere near true) and that he could have appeared all along, which was also not true. So we got CO on his zimmer frame and he shuffled into the hearing room. He had a carer with him to assist.

Later, when under cross examination by the respondent's barrister, the medical application was raised. CO stated that he was defying medical advice to appear, which was true. However, he had come this far and after four years was not willing to lose his case because he didn't at least try to appear and suffer the consequences. He was placed in a no-win situation by the Senior Member that had an impact on his health and potentially jeopardised his life. There was no need for his application to be rejected, as the Senior Member had given leave to two experts to appear by phone due to remoteness from the Tribunal. Another one was granted leave on the grounds of being ill on the day of the hearing. However, CO was not accorded the same courtesy. Once again, the Senior Member did not properly apply both the letter and the intent of ss 3 and 38 of the NCAT Act.

From the moment CO appeared at the hearing, in defiance of medical advice, the bias against us was palpable. CO was only supposed to be in the witness box for one and a half hours. He was there for four and a half hours over two days. It was clear that the Senior Member did not believe CO's extensive medical evidence and therefore did not make any allowances for him. CO had to take his heart medication during the hearing. He was shaking like a leaf and could barely hold the cup of water. He started winding himself up as the barrister attacked and attacked and called him a liar. The Member not only let this happen, but berated CO when he got upset and was very firmly and loudly saying, "I take umbrage of that sir because I do not tell lies I'm a very devout Christian and I do not tell lies why I am saying is the absolute truth". Fortunately the hearing wrapped up for the day shortly after and CO was able to wind down.

On 13 September we asked for the summonsed documents. We were handed one piece of paper that was an email and of no use at all. We knew that the respondent had substantial documents regarding CO's caravan. It only stood to reason as there were warranty repairs, correspondence and Service Bulletins, yet they didn't provide any of it. We were unable to do anything about this as the Senior Member opened the hearing for the day and started straight into CO's second day of cross-examination.

After CO was finished, the Senior Member then allowed the respondent to destroy our experts credibility and experience and not give their evidence. One expert said it was the worst experience in a tribunal or court he had ever had. He was highly qualified and experience and had given expert evidence multiple times. He said he felt bullied by both the Senior Member and the respondent's barrister. This was the same for the other two expert witnesses. One was elderly and retired now, having written his report some four years earlier.

At the hearing of 6 September 2017, we were told we had to amend the expert reports to include their CVs and statement of compliance with the rules for expert reports. We were not directed where to find those rules. So I found some rules that I thought were universal and supplied those to the witnesses. It was only later that I discovered NCAT Procedural Direction 3: Expert Evidence (PD3). I didn't believe that this applied to motor vehicle claims as it was not listed in the document, where other types of applications were. This was later confirmed to me by the Tribunal, so the Member seriously erred in the hearing of 6 September 2017 in stating that the reports were not in the proper form and that she may give no weight to them. The consequences of that error was another year of suffering for CO.

The rules I gave the witnesses are almost identical to those in PD3, however they applied to courts. This was used by the respondent against the witnesses to discredit them. The Senior Member also erroneously applied PD3 to the expert reports and, in doing so, gave little to no weight to any of our expert evidence.

One witness had forty year's experience as a heavy vehicle mechanic and was an RTA heavy vehicle inspector. He had worked for the State Transit Authority on the buses, including articulated buses. He also had many years experience towing his own caravans. He was easily discredited by the respondent's barrister as having no qualifications in caravan repairs, being a heavy vehicle mechanic and inspector. This showed up the Senior Member's lack of technical expertise in this field because at that time there were no such qualifications in caravan repair and manufacturer. These have only been very recently introduced and only in one Victorian TAFE. The witness tried to explain that an articulated bus was a trailer, just like a caravan was a trailer, and had many similarities such as the electric brakes and electrical wiring, the body cabin, chassis and running gear. However the barrister focused on the lack of expert qualifications rather than his experience and was successful in not having his evidence given weight.

Even worse, another witness was deliberately confused by the respondent's barrister, with a reference to his recent report that in fact was his CV and expert witness statement, not his report. He was retired and in his 70s, having done the inspection of the caravan in 2014, some four years earlier. The barrister then made him admit he didn't write that document dated October 2017, which is not unusual as solicitor's would often prepare those sorts of statements for expert witnesses. However, characterising it as his 'report', and that he didn't write it, meant that the claim was open to the respondent that the evidence had been tampered with by CO. At the end of his cross-examination the witness said:

> What about the report I wrote… But there's nothing here for me to mention the report that I wrote that was wrong with the caravan. You haven't asked me any questions about what I wrote. Are you people playing tricks?' What happened to the report I wrote.?

The Senior Member said to him that he needed to take that up with us, with the imputation that we had sought to deceive the Tribunal by substituting his actual report. This was later explicitly claimed by the respondent in submissions. It was absolutely untrue, but just one example of the way in which the respondent was given great latitude by the Senior Member and did not allow us to properly present the evidence we had.

The third witness was a highly experienced automotive engineer who was giving evidence about the incorrect weights and tyre information. He attempted to give his evidence, and was told by the Senior Member:

> ███ just stop for a moment. We are not having a round table chat here so you don't get a chance to say anything that comes into your head. ███ will ask you a question.

█ was only responding to questions put to him by the barrister and with quite short answers. It was clear that the Senior Member was not interested in listening to this evidence after the other two witnesses were discredited. This witness was also discredited because, in spite of decades of experience in the recreational vehicle industry, he had not maintained caravans. He was accused of having negative feelings towards the manufacturer of the caravan, which he strenuously denied. As a member of the Institut of Engineers, Australia and the Society of Engineers Australian and the US, he is held to a strict code of conduct which includes impartiality.

He had also only done a desk review of documents and photographs, and not inspected the caravan himself. He didn't need to as photographs of the vehicle plate, the ratings on the tyres and the weigh bridge certificates were all that was required for him to make his calculations and provide his expert opinion. Unfortunately the copy of the weigh bridge certificate in his report was not legible due to pixelisation when printed. This was used against him to claim that he would not have been able to read the document, when in fact he was supplied with a very clear copy.

Again, the Senior Member's lack of technical understanding of caravans and the RV industry meant that he was not able to evaluate the evidence properly and came to erroneous conclusions about this evidence and the limited weight he gave it.

Our case was now looking hopeless, with the exception that we knew what was in ███ evidence, which would support CO's claim. This included admissions of multiple warranty repairs at least 13 times between 2014 and 2016, including repeated repairs for water ingress.

At lunch on this the second day of the hearing, the Senior Member decided he had heard enough even before we had cross examined their witnesses. He called a conference with the legal teams. He kicked me out as a non-lawyer after objections by the respondent's legal team that I could not be trusted to keep anything confidential, which was offensive to me. I had not published anything about the proceedings at all.

The Senior Member told our barrister that CO had better make a genuine and reasonable offer that the other side would accept or face a six figure costs order. He had therefore already made his decision without even hearing the respondent's evidence. It was apparent that he had not read much of the filed material. This was about the third attempt he had at coercing CO into negotiating a settlement that was less than his lawful consumer rights.

At this stage I become very distressed and run out of the building crying. I had no idea what had passed between the Senior Member and the legal teams, except I knew that it was not good for us. I calmed down in about 15 minutes and went back into the Tribunal, only to find that CO had offered for ███ to repair seven agreed minor defects and each

party bear their own costs. The potential impact of this decision was that CO would lose about $40,000 as the caravan would still be leaking and non-compliant to standards and need extensive repairs to sell, or have a substantial loss to sell 'as is', now being four years old as well.

I was very upset that our barrister had allowed CO to do this in my absence, as I had been his advisor and representative for nearly two years. I asked the barrister if he thought we had a good case in cross examination, and he said yes. I asked him if there are any down sides to going to the end of the day, trying out best and if it doesn't look good then ████ can make the offer. He said no down sides. ████ was beside himself thinking he was going to lose his house. His wife wanted to fight on. I convinced him to withdraw the offer. The barrister went racing down the corridor to the other party who was just on the phone getting instructions to accept the offer. He was just in the nick of time and it was withdrawn.

We went back in and the Senior Member asked if there had been a settlement. When the barristers said no, you could see the frustration in his manner.

The entirety of the respondent's case rested on a claim that CO had not properly serviced and maintained the caravan and that was the cause of the ongoing defects, which they claim were properly repaired during in 2016.

Our barrister was able to discredit all three of the respondent's witnesses completely, and even got some admissions from one witness who was an employee of ████ about the nature and extent of the defects. However, their expert witness who had inspected the caravan refused to concede anything without a real fight. This undermined his credibility as an independent witness.

At the end of the second day the Senior Member was curt but did not encourage parties into more settlement negotiations. Parties were allowed to file submissions as time had run out for certain arguments such as the quantum of damages and misleading and deceptive conduct. Our submission was emailed to the respondent on the due date, being a Friday evening, but we could only file with the Tribunal the following Monday morning, making the submission seem like it was a day late when in fact there was no inconvenience to the Tribunal at all. This had never been a problem for the respondent throughout the entire matter; they were treated with great leniency whenever they were late in filing documents.

The respondent then requested an extension of time by consent to file their submission, due to a death in the barrister's family, which we agreed to on compassionate grounds. This would then push out the date that our submission in reply was due by a week. The Senior Member granted the extension of time to the respondent but not to us. This reduced our time for submissions from two weeks to one week. The Senior Member claimed that he had set aside specific dates to write his decision and they were inflexible. This was not procedurally fair in any regard and, if this was the case, should never have approved the extension of time for the respondent. As it turned out, it appears that this was yet another ploy, as the submission was written by the solicitor and never settled by the barrister at all.

I objected to this decision and asked the Senior Member if he had made an error in calculating the due dates for submissions. I explained that our barrister had prior

commitments for that week and was expecting two weeks to file the submission in reply. I was told in no uncertain terms that no error had been made. The Senior Member also stated that we had known since October the dates for the submissions and should have made arrangements accordingly. He paid no regard at all to having taken a week from us and given it to the respondent, disadvantaging the applicant.

The submission by the respondent contained serious allegations against CO, including misleading the Tribunal and tampering with evidence. As a result, our submission in reply was critically important to refute those allegations. It also had our damages claims. Our barrister worked furiously on it as best he could, given that he was tied up in court for most of the week. It was emailed to the respondent and the Tribunal on the due date, being a Friday, but after close of business. It was the best we could do under the circumstances and we advised the Tribunal in the email the situation.

In the Senior Member's decision on 23 November 2019, he stated that he refused to read our submission in reply because it was late, yet he read our first submission and the respondent's submission, which were also late. He claimed that we made no submissions as to why it was late, when in fact we did. He claimed he received our submission in reply after he had started writing his decision but he hadn't completed it, so it was open to him to review and amend. He could also have accessed it electronically if he so chose first thing Monday morning, when he started writing his decision. It is likely that he was made aware of the electronic submission on Friday evening. It was just one of what was to be many examples of the bias he had against us and the punishment he meted out.

The facts of the case were very evident, just from the respondent's evidence. There were multiple defects in the caravan starting from within days of purchase, as put into evidence by the respondent in the form of warranty invoices and a spreadsheet of warranty claims. The caravan was misleadingly branded a when it wasn't, as had been ordered to stop using that brand by the Federal Court. CO relied on that branding as a sign of quality. The caravan was also not a new caravan as CO had ordered, but a demonstrator that was missing many of his contracted options and that he had not even inspected at the show. CO was awarded a full refund as there was no real choice in doing so based on the facts. He also found that had engaged in misleading and deceptive conduct by supplying a demonstration caravan, not a new caravan as contracted.

However not one other claim for damages and consequential losses was awarded. In fact, the Senior Member even stated that we had not claimed such damages, when in fact we clearly had and repeatedly; in the amended Points of Claim and in submissions. So, after a four-year battle, CO only got a refund for his caravan, which had now depreciated due to increases in caravan prices, and was left thousands out of pocket due to consequential losses including repairs, photocopying for the hearing and inspection reports.

The Senior Member also ordered that CO return the caravan at his own cost, from , which is not the proper application of s 263(2) of the ACL. This cost CO yet another $800 on top of all his other expenses that were not awarded.

I was also castigated in the decision as the primary cause of all the delays in the proceedings that caused it to take over 18 months to conclude. The Senior Member was very concerned with 'service standards', moreso than procedural fairness and allowing

the parties to reasonably argue their full case. When I saw that in the decision, I suspected another agenda. I was right.

Parties were invited to make submissions on costs. CO's costs claim was about $22,000, much of which was paid by my crowd funding, which was unknown to the Tribunal. However, the Senior Member used the claim that I was responsible for the delays in proceedings to reduce the costs award by 50% and not award any disbursements that were properly claimed according to the Tribunals costs advisory.[4] This is in no way true, as I have outlined in this case study. All the delays, bar one which was due to CO's medical conditions, were at the hands of the respondents. It is all in black and white in the interlocutory decisions, yet the Senior Member claims the evidence was against me. So, through no fault of his own, CO was penalised the huge sum of over $11,000 from his refund amount for my alleged actions, in the full knowledge that CO was a retiree with limited means. This in turn meant that 50% of the crowd funding was not repaid so I could help others. The crowd funding agreement with CO was that any moneys paid for legal fees are to be returned to the fund if costs are awarded, in the proportion of that award.

I believe that this was punishment against both CO and myself for incurring displeasure of the Senior Member during the hearing, on many counts, including: the proper application for CO to appear by phone but being accused of lying about the seriousness of his medical condition; the claim that the application was a 'dog's breakfast' when it was no such thing in terms of the alleged relative informality of a Tribunal and by lay people; our witnesses made to appear unqualified when they were all highly qualified; the claim of evidence tampering and misleading the tribunal; and CO's apparent lack of cooperation in settling the matter without the hearing, rather than press for his full consumer rights, being the actual purpose of the hearing.

What also was apparent after this ordeal was that the Tribunal as a whole was less interested in enabling the full facts of the matter to be revealed, or with access to justice and procedural fairness, and more interested in legal technicalities. It also didn't apply the ACL properly or with the intent that it is beneficial legislation for consumers, not supplier protection legislation. This is expressly in breach of s 38(4) of the NCAT act, which states:

> The Tribunal is to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.

The Appeal and Counter Appeal

The respondent filed an appeal against the decision and a stay of the orders. After four years, CO's ordeal was not over yet. We were emotionally prepared for this to happen due to their previous behaviour. However financially was another matter.

To file an appeal in NCAT, an appellant has to state if there are errors in law, which doesn't require leave to appeal, or other errors, which does require leave to appeal. The problem is that **the question of leave is heard at the same time as the final appeal hearing**. So, a respondent to the appeal has to prepare an entire appeal defence and

[4] NCAT n3.

attend the final hearing in order to find out whether there were any grounds of appeal in the first place.

The Appeal division makes it very clear that they expect parties to have legal representation. I have been told more than once that it is 'more formal' than the lower tribunal and it is best to get legal representation. After having no choice but to get legal representation in the lower Tribunal at a cost of over $22,000, CO was now facing more legal fees through no fault of his own. The appellant was claiming errors in law. These errors would have been made by the Senior Member if proved. So I have to ask, why isn't the Senior Member defending their decision rather than the applicant who won the case having to defend it on his behalf and at his expense?

The Appeal Panel also brings appeals to a final hearing relatively quickly. So the respondent has to hope that his legal representative has time to write the submissions and appear at the final hearing. However, the final Appeal Panel decision usually takes months, with one appeal taking over eight months to receive a final decision.

The appellant (the former respondent who lost) claimed six errors in law. The alleged errors in law were clearly an ambit claim. Any solicitor or barrister with any degree of expertise in the ACL would know that the claims were not going to be successful. For example, they were claiming that the caravan was not defective under s 54 of the ACL and yet had admitted in evidence to repairing it under warranty at least 13 times. They were also claiming that the applicant should have returned the caravan to them in spite of the fact that they had repeatedly refused to pay the requested refund.

CO decided to file a counter claim for reimbursement of his consequential losses, which included the fees for expert reports and the $800 to return the caravan. These claims are clearly identified as legitimate consequential costs in the ACL at ss 263 and 272. He also claimed damages for the finding of misleading and deceptive conduct. I asked the barrister to also appeal the original costs decision and to clear my name. He refused, stating that CO would risk having a worse costs decision. There were numerous other errors in the original decision that could have been appealed but the barrister chose to limit it to the main errors that had the most chance of success.

The Appeal Panel hearing was conducted on 6 March 2019. After it concluded, our barrister stated that he felt that we had good prospects in retaining the refund but that the Appeal Panel favoured the arguments of the appellant on this cross appeal for damages and consequential losses. He was right.

The Appeal Panel published its decision on 21 May 2019, some 10 weeks after the appeal hearing. The appellant's appeal was dismissed. The result was that CO could retain his refund but was not awarded one cent more for the four years of suffering and fighting to assert his lawful rights. There was no penalty at all for ████ and previously ██████ for taking this action except to pay CO's costs in their appeal. These costs were around $9000 for the single barrister.

The Appeal Panel rejected COs claim for consequential losses, stating that they didn't arise from the major failures in the caravan, even though there were invoices and receipts tendered in evidence. I truly scratch my head at this decision. Where else did they arise from in that case?

CO claimed for inspection reports, which is described as a 'reasonably foreseeable loss' under s 272 of the ACL. Even though this section pertains to damages against the manufacturer, it is as relevant to inspecting the caravan for action against the supplier. CO also claimed for repairs he did to the roof to stop it leaking while he was waiting to get an outcome in his case. He paid over a thousand dollars in printing and photocopying for the hearings after being ordered to redo all his submissions to the lower Tribunal because they were not in the correct format. Returning the caravan is covered under s 263(2) and he should never have been ordered to pay for that by the Senior Member and should have had that decision overturned on appeal. The Appeal Panel failed to consider it even though arguments were made in submissions and at the hearing. The claim for damages for misleading and deceptive conduct was withdrawn due to our barrister agreeing that the damages are limited to the refund. He had previously flagged this. I disagreed with him strenuously and had supplied him with some citations that he could have argued. He capitulated on this point to try and strengthen the argument for the other points and not expose CO to a costs order on that point.

In an even further insult, CO was then ordered to pay 25% of [redacted] costs in the cross appeal. As previously stated, they only considered four of the five appeal grounds in the final decision. Three of the grounds were only open for a decision if [redacted] was successful in their appeal. They were not, so the other three grounds weren't heard. CO was also unsuccessful in getting anything of over $12,000 in consequential losses awarded. So, the Appeal Panel calculated that he had been 25% unsuccessful. Ordering 25% of the costs of an experienced barrister, a senior counsel and an instructing solicitor would likely be the equivalent of CO's entire costs, perhaps more. This was also in error as the quantum of CO's counter appeal was less than $30,000, so costs should not have been contemplated.

The only appeal from the Appeal Panel is to the Court of Appeal. The only other course of action was to petition the Tribunal that an administrative error had been made, but the barrister advised against this course of action as it might 'backfire'. There was fear of retribution and consequences outlined to CO by his barrister every step of the way.

The total cost to CO of finally getting the $68,490 refund for his severely defective caravan will end up being about $30,000 when the wash up is done. As at today he still hasn't received a cent. He immediately applied to the Tribunal to have the refund money released and received no response. He applied again and still hasn't had a response. [redacted] has not paid his costs from the lower Tribunal. There has been no costs assessment from the Appeal. The saga continues on.

The physical and emotional impact on him, his wife and myself cannot be quantified. His cardiologist doesn't know how he is still alive. His wife also became ill. I have suffered severe depression and will never represent a group member again. Even writing this submission has brought all those terrible feelings back overwhelmingly. But it has to be put into the public domain what the Tribunal did to us.

And there is worse.

And all this was done to CO—who is an elderly, critically unwell man of limited financial means—in the full knowledge that the leaks and other defects were known manufacturing defects affecting many other customers.

The respondent and [redacted] misled the Tribunal in claiming that the ongoing leaks were caused by a lack of maintenance and servicing. Members of my group have told me that have repeatedly used this against their customers to avoid their ACL and warranty obligations. The leaks in CO's model of caravan, the [redacted], as well as another model the [redacted], were a known systemic problem and were described in a [redacted] The leaks apparently continued right through until 2017. There had been an almost identical case before NCAT in 2016, where the applicant was awarded a full refund and consequential losses, without leave being given for legal representation. I cited this case in the Points of Claim, but it was ignored.

I knew this all along, which was why I was so committed to helping CO with his claim and take it all the way. [redacted] had behaved appallingly. However, I was unable to obtain admissible evidence. I couldn't get the Service Bulletin from anyone. This was supposed to be remedied by the summons; however, [redacted] didn't return anything except one minor document and there was no opportunity at the hearing to challenge them on the lack of complying with the summons. I wanted to do that after the hearing, but our barrister advised against it, as it would potentially further delay a decision and open CO to a costs order if unsuccessful. I was also unable to get the other almost identical NCAT case considered, which it should have been if NCAT was to be consistent in their decisions, as per s 3(e) of the NCAT Act.

This case study demonstrates that NCAT has fundamental flaws in its systems. It has Tribunal Members who do not know the legislation they are supposed to be applying. Applicants are not lawyers, and so rely on the expertise of the Tribunal Member to be giving them accurate information and make accurate decisions.

I will soon be lodging a formal complaint on behalf of CO and myself and potentially seeking compensation for both of us for what we both endured, as well as an apology.

CASE STUDY TWO

I will outline this case very briefly, just to highlight further key failures of the Tribunal.

[redacted] purchased an [redacted] [redacted] caravan on 25 November 2015. It was delivered filthy. Upon delivery [redacted] discovered that the caravan was actually a demo [redacted] older caravan. The '0' in the [redacted] stickers on the caravan had been replaced with a '2'. However, they missed one sticker under the front stone guard. Six days later they replaced this caravan with an [redacted] as ordered. Upon using the caravan, [redacted] discovered it was full of defects, some very serious.

[redacted] gave [redacted] multiple opportunities to repair the ever-growing list of defects over a period of almost two years. There were two very serious, major failures. The first was the constant and apparently unrepairable water ingress through the roof that caused waterfalls in the caravan in heavy rain. [redacted] had been unable to repair the water ingress properly, as each time after repairs it leaked again, ruining the family holidays.

The other even more serious and potentially dangerous defect was the solar panel inverter 'frying' the solar system. This could have started a fire in the caravan when in use, potentially with catastrophic consequences. [redacted] took the caravan to an expert auto electrician, who contacted the manufacturer of the inverter. He was advised that the inverter was too small for the installed electrical system by a significant amount. The

installed unit was 25 amps and the required unit was at least 40 amps. The auto electrician advised ████, who refused to supply a larger system, and sent the same 25A system as was installed and failed. The auto electrician had to install a 'work around' to ensure its safety. We later discovered that the contract included a 50A inverter, which was never supplied.

The last time ██ used the caravan was in October 2017 after discovering more leaks and defects. She tried to make a claim on her insurance, but this was rejected because the defects were deemed manufacturing failures. In November 2017 she rejected the caravan, requested a refund and filed a claim in NCAT.

██ lives in rural NSW. Instead of the registry being assigned closest to her, it was assigned closest to the place the contract was made, at the respondent's showroom in ██████. This meant that she lost time from work when she needed to attend the Tribunal. ██ had medical issues that meant she needed representation but was of limited financial means so couldn't afford a lawyer. I was given leave to represent her as a consumer advocate. The respondent was given leave to have legal representation in spite of our objections that this would create disadvantage as I did not have legal training at that stage.

The respondent inspected the defective caravan in February 2018. They considered the time and effort to repair the defects and offered ██ a replacement caravan. She did not want a third caravan from them but also didn't want to fight them anymore. All she wanted to do was have holidays with her family, especially her grandchildren. She agreed to accept the offer of the caravan and gave a few terms, being that it came with one year of registration and that it had all the same features as her current caravan. She asked them to agree that if defects are found in this, the third caravan, they would provide her with an immediate refund. She agreed to wait 10 weeks for delivery.

In reply, she got a letter from their solicitor. They would agree to her first two terms, but not the third. However, she was now told that to get her replacement caravan she had to sign a Deed of Settlement with non-disclosure and non-disparagement clauses. The Deed as onerous and contained numerous other unfair clauses. ██ had a solicitor look over it and recommended changes. ████ refused to make the required changes. ██ refused to sign it. She said she was a person who could never be gagged for life from talking about a significant life experience. She was also aware that a Deed was illegal when it was enforced on a consumer who was only getting their lawful ACL rights upheld.[5] So she decided to continue with her application in NCAT.

Once again there were interlocutory shenanigans by the respondent's legal team. The most serious was an application for an extension of time to file documents. This was granted in spite of objections that they had three months already and had breached orders. They were given until 10 May 2018 (a Thursday) to file documents for a hearing on 14 May 2018 (a Monday). I received the documents in digital form on the morning of 11 May 2019. There were 700 pages, including expert reports and multiple other documents. The documents were not filed with the Tribunal until the morning of the hearing. It is very clear that the Tribunal did not expect this volume of documents when

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[5] *Australian Competition and Consumer Commission v Thermomix in Australia Pty Ltd* (2018) FCA 556 [6]–[7].

granting the extension. We had two experts and I sent the expert reports to them for a review. Of course we had no time to prepare any submissions in reply to these documents.

The hearing was heard in the afternoon of 14 May 2018. I was representing ██. She attended with her daughter in law assisting with the huge files of documentation, including over 500 pages of documentation for ███ application and evidence. ███ was represented by a barrister and instructing solicitor. ███

We objected to the 700 pages of material being admitted into evidence on the grounds that it was procedurally unfair, and we were disadvantaged. The Member said he would reserve his decision, but then went on to allow the respondent to refer to them throughout the hearing. Instead of offering an adjournment, he railroaded us through a three hour hearing that should have taken at least a day, if not more.

From then on the hearing went from the procedurally unfair to the ridiculous. I was bullied and badgered and unable to properly give my submissions or make the oral arguments I had prepared. I was told I would have 45 minutes to speak and I had 15 when he cut me off. I was not finished and was unable to show any photos or videos we had prepared.

I was not allowed to cross examine their experts or call my experts to give evidence. The Member claimed that as there was no affidavit of material from ██ and that the evidence of ██ would not be admitted unless she could be cross examined. She agreed, but had a panic attack on the stand under the intense allegations made against her personally by the respondent's barrister. She too was accused of lying and inappropriate behaviour, as was I. ██ was the victim of this company and yet was discredited for rejecting the offer of the replacement caravan. She was then accused of doing this for some ulterior agenda of mine, rather than it being her own decision.

On our side, we had a forensic engineer of some 40 plus years experience who invented the dual drive rubbish truck and had been an expert witness for decades. He had inspected the caravan and in a written report stated that the defects were present, were dangerous and were manufacturing failures. His report was written for the insurance company but was given to ██ to assist her NCAT claim when they rejected her insurance claim. Our other expert was an auto electrician who had repaired the solar system.

One of their experts owned a caravan repair business and was flown from South Australia to Newcastle to do an inspection, which was very odd considering there would have been numerous caravan repairers they could have hired locally. This expert was also involved in my own caravan case and I believe him to be an 'expert for sale'. In other words, he would write a favourable report for the respondent as he had business dealings with them as a repairer and so was not independent. The other expert was an electrician who did not physically inspect the caravan. In their reports they claimed that the caravan could easily be repaired for a cost of about $3400.

In concluding I was told by the Member not to make an argument that the caravan was unsafe, as he wouldn't listen to it. I was told to stick to s 260(a) of the ACL. He was also uninterested in the misleading and deceptive conduct claim for the first supplied caravan. I claimed that a consumer was not required to accept multiple repairs to a new

caravan and that no reasonable consumer knowing the extent and nature of the defects would have purchased the caravan at full price.

The respondent argued that even though it had had multiple repairs, they just weren't done properly and it was an easy fix for a more expert repairer.

In the decision handed down on 29 June 2019, the Member agreed with the respondent and ordered repairs to the caravan or a cash sum for █ to conduct her own repairs. He rejected our expert evidence in favour of the expert evidence of the respondent. He admitted their 700 pages into evidence. He claimed that a reasonable consumer would have purchased this caravan knowing of the defects if they knew it would eventually be fixed. This was very clearly an improper application of the ACL.

The Appeal

█ had no choice but to appeal. The respondent had the caravan in their possession since February 2018. It would still be leaking. She had no idea what condition it was in. Not all of the defects were addressed in the quote from their expert so she would still have been left with an unusable caravan.

I initially wrote the appeal submission but was encouraged to get legal representation by the Appeals division. We hired the same barrister as for CO's case and I paid some of his fees through crowd funding. █ used almost the entirety of her meagre savings to pay for the rest of the fees. The barrister was aghast at the Member's behaviour and reasoning in the hearing after listening to the recording. We claimed multiple errors in law and procedure.

The appeal was heard on 18 October 2018. The decision was published on 26 March 2019. This was a wait of over five months for the decision. We were entirely successful in the appeal. However, the Appeal Panel referred the application back down to the lower Tribunal to be heard all over again.

During the waiting period, █ and her husband both became very ill. The stress of the previous two years also had a serious adverse impact on them. After the appeal decision █ started to prepare for a new hearing and had retained a solicitor and the barrister to represent her, scrabbling together some money and me paying for some fees out of crowd funding. Unfortunately, her husband became so ill that he was faced with potentially not being able to work again. This was the straw that broke the camel's back. They instructed their solicitor to just 'make this go away'.

I do not know the outcome of the discontinuance negotiations. █ has not communicated with me in spite of me writing emails and private messages. I believe █ was finally gagged, something she fought so hard to avoid. One thing is for certain, she would have lost a lot of money through no fault of her own. She also lost the enjoyment of camping with her family, something which was a family tradition for decades.

In conclusion, this case is yet again a demonstration of serious and multiple errors in law made by a Tribunal Member. The outcome was the applicant and her family suffering financially, physically and emotionally. It is likely she will be damaged for life. I heart is broken for her.

OTHER CASES WITH IMPROPER APPLICATION OF THE ACL

The applicant claimed a full refund. The Tribunal ordered a replacement caravan. The applicant did not want a replacement caravan as they did not want to deal with this company any more after what they had already done to them. Under s 263(4) of the ACL it is the consumer who has the right to choose the remedy if a major failure is found.

The applicant claimed a full refund. There was evidence of multiple defects including the weight of the camper trailer being misrepresented, causing to have to upgrade his tow vehicle. Under the ACL, this would be a major failure under s 260(a). The fact that multiple minor defects cumulatively constitutes a major failure was later clarified by the Consumer Affairs Forum on 26 October 2018 as part of the ACL review. Rather than a full refund and consequential losses totally around $91,000, the Tribunal ordered the respondent pay a total sum of $25,585 to effect his own repair. He also ordered costs be paid for legal fees as he was represented, however not the full costs, meaning that damages claim was reduced by almost half.

Prior to the hearing, there had been some without prejudice negotiations that had previously failed because, once again, a Deed of Settlement with non-disclosure and non-disparagement clauses was a requirement. and refused and preferred to have their claim heard at NCAT. The Tribunal Member indicated that she was going to find in favour of the applicants based on their evidence. The respondent retorted that he would appeal the decision. The Member, to her credit, conciliated an agreement by consent for the full refund. However, there were two conditions demanded by the respondent that were not in line with the ACL. The first was that the applicant had to return the caravan at their own cost. The second was that the Tribunal ordered that '[t]he Applicant agrees not to disparage the Respondent by any means whatsoever'. The applicant strenuously objected but was ignored. As previously stated, according to ACCC v , this is misleading and deceptive conduct as it implies that a consumer is not entitled to their consumer law rights unconditionally.

This case is still an active matter. In brief, is a young man who purchased an older motorhome to go on tour as a musician. It allegedly had major failures including rust and brakes failures. At the first hearing was successful and awarded a full refund. The respondent appealed and applied for a stay of the orders. They were required to pay into the Tribunal an amount of the refund. was required to return the Motorhome to the respondent. The Appeal Panel upheld the appeal and referred the matter back down to the lower Tribunal for another hearing.

lost and was ordered to pick up the motorhome from the respondent. He was unable to do so because the motorhome was unroadworthy and unlicensed. He filed an appeal and a stay of orders. The orders were executed by the Tribunal in spite of the stay

application and advisor contacting the Tribunal and being assured that the refund amount paid into the Tribunal in trust wouldn't be released before the stay application. However, it was. Group had since been purchased by another entity and so the refund amount went to the new entity that has no relationship with the proceedings. There is a potential that they may not release those funds back to the Tribunal if is successful in his appeal. It is still possible that this might be referred back down to the lower Tribunal for a third hearing. is still awaiting the appeal decision after the hearing on 26 June 2019. This matter has taken years and left without transport or a tour vehicle and without any financial means to purchase another one.

and applied for a full refund as they had multiple defects with the caravan. This included that the caravan swayed, had electric brakes issues and was in for repairs for over five months. The application was dismissed with no other orders. The Member did not apply the ACL properly in a number of regards. In the written decision, the Member stated:

> I brought to the attention of the applicants that a refund is the most extreme remedy fo cases where there is early recognition of a major fault. appeared to appreciate this and chiefly relied on the sway issue but also on the brake problem as major matters justifying a refund.

This is an error in law. A refund is available to a consumer regardless of when major failures are discovered as long as the rejection period has not expired and it is within the reasonable life of the product. Applicants rely on Tribunal Members to know the law and believe them completely.

The Member also gave more weight to the evidence of an employee of the respondent, who cannot be independent, rather than an expert report, which she discredited on somewhat spurious grounds in my opinion. Additionally, the respondent, rather than just inspecting the caravan, tampered with it and stated that they had easily repaired some of the claimed major failures. They also alleged the swaying of the caravan was not a defect but due to incorrect setup by the applicants.

The length of time to effect repairs being five months was not addressed at all. This alone would entitle the applicant to reject the caravan and claim a refund under s 259(2) of the ACL.

The applicants walked away with nothing but their still defective caravan. They were so distraught that they couldn't bear to go through an appeal process. I understand it was repaired by them and sold at a loss as they couldn't bear the sight of it any more in their driveway.

The applicant was awarded a full refund, however the Tribunal applied depreciation of $5000 for use. The ACL requires that a consumer is entitled to a full refund of any monies paid and any other consideration.

The $200,000 motorhome leaked and caused mould and mushrooms to grow. The applicant's wife and dog became ill. There were multiple other defects including the slide out not working properly. They attempted repairs repeatedly, with some defects not repairs. The applicant claimed a full refund. Instead, the Tribunal ordered that the mould be eradicated. Mould is a biotoxin and cannot ever be fully remediated in an enclosed environment such as a motorhome. It can be potentially deadly in susceptible people. The symptoms described by the applicant's wife are consistent with mould toxicity and infection. There has been a Senate inquiry into the dangerous of biotoxins including mould, concluding that Chronic Inflammatory Response Syndrome (CIRS) is a serious problem.[6] The Tribunal member erred on many counts. The seriousness and danger of the mould, the expectation that a $200,000 motorhome would be relatively defect free and of high quality, meaning that no reasonable consumer would have purchased it for that price knowing of the extent and nature of the defects. There was also the length of time in repairs enabling a rejection and refund under s 259(2) of the ACL.

In conclusion, these are just a few examples of numerous errors made by the Tribunal in procedure and application of the ACL. Applicants either have to wear these mistakes or take the risk of appealing, with all the consequent costs, risks and delays. There needs to be a better system for consumers to alert the Tribunal to errors, but not be required to pay for the Tribunal to investigate those errors. It should be up to the Tribunal to ensure that it acts properly and applies all legislation properly.

THE ABUSE OF THE NCAT APPEALS SYSTEM

All three cases I was involved in went to appeal, two by the respondent and one by the applicant. I also assisted a member defending an appeal by a respondent. The NCAT Appeals process is open to abuse by well-resourced respondents who want to punish the complaining customer further, under the guise of a legitimate appeal claim. According to my discussions with many in the industry, they are generally well aware of the ACL and that they are in breach of the consumer guarantees but will fight to the death against giving a refund or replacement to the consumer.

The ACCC conducted a study of the new car retailing market. In that study they found that there was a 'culture of repair' and an aversion to fully complying with the ACL.[7] The report noted that there were multiple significant difficulties for consumers in asserting their lawful rights.[8] The RV industry is almost identical in this regard, predominantly because it is also a vehicle manufacturing and retailing industry and the two industries share a culture. Motor dealer licenses are required to sell a second hand caravan in most of Australia. These dealers have generally come from the car industry in search of the much more lucrative gains to be made in the RV industry.

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[6] Commonwealth of Australia, *Report on the Inquiry into Biotoxin-related Illnesses in Australia* < https://www.aph.gov.au/Parliamentary_Business/Committees/House/Health_Aged_Care_and_Sport/BiotoxinIllnesses/Report/section?id=committees%2Freportrep%2F024194%2F26442>

[7] Australian Competition and Consumer Commission, *New Car Retailing Industry –a market study* 7.

[8] Ibid 46.

As stated in CO's case study, leave for the appeal is heard at the same time as the appeal hearing, forcing the consumer, who is now the respondent, to prepare full appeal defence documents. Where there are claimed errors in law, no leave is required, even if those claims have no hope of success and in some cases are simply ridiculous and frivolous. Vexatious litigants can appear legitimate. Consumers end up paying for Tribunal errors in so many ways, including by having little choice but to hire a barrister to represent them and then risking an adverse costs order against them as well.

ANSWERING THE REVIEW QUESTIONS

In addition to the information above, which I believe provides some answers to the questions asked, I will make some brief points directly relating to the questions.

Is it easy or difficult for people to work out whether NCAT is the right body to resolve their legal issue?

It is very difficult in some circumstances. For example, in CO's case I was unable to get any clarification of whether s21 and s 236 of the ACL was in the jurisdiction of NCAT. In another case, the contract was made over the phone by a consumer in NSW, with the supplier in SA and the manufacturer in Victoria. She was unable to determine if NCAT was the correct jurisdiction as she resided in NSW, and neither were her lawyers, so she ended up filing in the Federal Circuit Court, with all the additional expenses involved.

Is NCAT accessible and responsive to its users' needs?

In my experience, and that of many of my members, in addition to the above case studies, the answer is a resounding no. It is not cheap, quick, just or relatively informal. Consumers feel abused and intimidated by the process, especially where the Tribunal allows the respondent to have legal representation. This serves to further entrench disadvantage and power imbalances. It also opens up the consumer to the risk of an adverse costs award.

Consumers report little guidance by the Tribunal through the maze of the procedures they have to comply with. They then report being castigated for their documentation not being correct, or relevant, or in the right form. They complain they weren't able to tell their full story and felt frustrated. Also that evidence that they regarded as proper was given little to no weight, or not even viewed, including photos and videos of defects.

I have personally been castigated by the Tribunal on a number of occasions. I expected to be accorded respect in the Tribunal but was denigrated. I don't believe that this was warranted in any of the cases. It was as if the Tribunal felt threatened by me as a consumer advocate. I also made some complaints and believe that I was punished for doing so.

Are there things that NCAT could do to make it easier for people appearing in the Tribunal to understand the process and participate?

The Tribunal needs to write a comprehensive guide for consumers so that they can be properly prepared as expected by Tribunal Members. I am planning on doing this for my group members, as I am finding I am assisting so many individuals. The ACL is fundamentally flawed, regulators cannot enforce it, so consumers are being driven to

take legal action in NCAT. It shouldn't be a place of further abuse such as that they have been at the receiving end by a recalcitrant supplier, refusing to honour their ACL obligations with impunity.

Does NCAT resolve legal disputes quickly, cheaply and fairly?

Not in my experience. Vehicle disputes generally aren't resolved in under a year. If there is an appeal it can drag out to closer to two years. If it is then referred back to the Tribunal for a rehearing, it can drag out even longer.

The Tribunal invariably gives leave for representation respondents in motor vehicle claims because of the quantum of the claim and the technical nature of the evidence. This renders the process as expensive as going to court, without having the certainty in court of how the case will be run and how costs will be awarded. The Tribunal is not bound by the rules of evidence. There is a rule that says any rule can be suspended:

> 'The Tribunal, the President or a Division Head may dispense with compliance with any requirement of these rules, either before or after the occasion for compliance arises..[9]

In other words, the Tribunal is a law unto itself and can do whatever it wants.

I have personally witnessed and been subjected to the unfairness of the Tribunal processes and decisions. The two case studies are evidence, but there are so many more examples.

Should NCAT resolve some matters just by looking at the documents submitted by the parties, without a hearing in person?

Given that documents submitted are often criticised, I believe in some circumstances there is a danger of making incorrect decisions on the papers without the parties being able to make oral submissions.

Does NCAT need additional powers to be able to enforce its decisions?

A consumer should not need to file in a court to enforce a decision of the Tribunal and pay the costs of doing so. The Tribunal needs some sort of enforcement authority for the decisions it makes, particularly monetary decisions.

CONCLUSION

There is much more to discuss and I have run out of time and emotional energy after telling these stories. It is evident that there are significant cultural problems in the NCAT Commercial and Consumer Division. It is also evident that Tribunal Members apply legislation inconsistently, producing inconsistent outcomes for consumers. The Tribunal does not comply with the NCAT Act ss 3 and 38, to the detriment of consumers simply trying to get redress for their 'lemon' vehicle. The lack of technical expertise in this area also leads to erroneous decisions.

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[9] Civil and Administrative Tribunal Rules 2014 5.

I would welcome an opportunity to expand on these claims I have made at the round table consultations.