



30 November 2009

By email: australianconsumerlaw@treasury.gov.au

SCOCA Australian Consumer Law Draft RIS Consultation
Competition and Consumer Policy Division
Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir/Madam

Submission to consultation on Australian Consumer Law draft Regulation Impact Statements

Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to provide a response to the Standing Committee of Officials of Consumer Affairs' (**SCOCA**) on draft Regulation Impact Statements for best practice reform and product safety reform proposals, to be considered for inclusion in the Australian Consumer Law (the **RIS**).

Below we set out some brief comments about the best practice reform proposals and options for the proposals. We are unable to make more substantial comments, and have not made any comments on the product safety reform proposals, due to the unusually short time period provided for consultation by SCOCA.

We appreciate that SCOCA wishes to provide finalised advice to Ministers at the Ministerial Council on Consumer Affairs (**MCCA**) meeting on 4 December 2009 and commend the efforts being made to progress these important reforms. However, our view is that in the circumstances the RIS should have been released earlier (or the matter should perhaps have been scheduled for consideration by the MCCA out of session at a later date) to enable genuine consultation. On the current process, the MCCA will be considering a RIS that has not been subject to full consultation with stakeholders, undermining the purpose of the RIS process which is to apply a rigorous assessment to potential reforms.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

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Since September 2009 we have also operated a new service, *MoneyHelp*, a not-for-profit financial counselling service funded by the Victorian Government to provide free, confidential and independent financial advice to Victorians facing or experiencing job loss or reduced working hours to help them manage their money and debt.

Assessment of benefits and costs

As a general comment, Consumer Action is concerned that the RIS does not always provide a fair and rigorous assessment of the costs and benefits of different options. In general, the costs to business of imposing regulations are often attributed higher values than the costs to consumers of having to deal with unfair practices without any regulations. Even where both consumers and government would benefit from a proposed option but some businesses would not, the overall cost of that option may be assessed as high in comparison with alternatives because of the weighting given to business costs as opposed to consumer and government benefits. Further, the benefits and costs to businesses are often assessed as if all business interests are the same, without considering that reputable businesses stand to benefit if they do not have to compete unfairly with businesses that engage in unscrupulous practices or if they are able to attract additional customers because those consumers are not spending their income on unwanted goods and services or in seeking remedies for unfair practices. The problem is exacerbated by failure to count, or count adequately, the costs of the status quo or the benefits of reform, to the competitive market as a whole.

As one example, in relation to the first proposal on unsolicited selling, Option A may be a blunt tool but the RIS has underestimated the benefits associated with the easier enforcement of Option A in practice. It also assumes that the costs of Option A are high because it does not question if unsolicited selling is, in fact, providing any benefits to consumers. For example, the RIS allocates consumer costs on the basis that the goods and services would no longer be available when all that would be prohibited is the sales method, not the goods or services themselves. If goods and services are genuinely desired by consumers there would presumably still be a market for them as there is for other goods and services that consumers seek out themselves. Business costs seem to be double-counted as it is unclear what the difference is between a cost for the ban on supplying goods and services in this manner and a cost for businesses ceasing to trade or shifting to new supply methods because they cannot supply goods and services in this manner. The potential business benefits for businesses that supply goods and services genuinely wanted by consumers due to consumer income being freed up to make such purchases is not counted. Due to similar (converse) reasons, we also believe that the costs associated with Option B may be underestimated. Further, the assertion that Option B would be of benefit to consumers because it would be 'less costly for consumers to enforce specific legislation than to rely on more general deceptive conduct and unconscionable conduct provisions' bears little relation to the reality, in which clear and specific provisions may be blunt tools but are certainly much easier and less costly for consumers to prove in legal actions than general conduct provisions.

Scope of RIS

As a further comment, we note our disappointment that, in general, the RIS does not propose any new approaches to consumer problems despite considerable learnings in the fields of consumer behaviour and behavioural economics, amongst others. This omission is most

startling in relation to off-business premises sales. We suspect that, as with the very short period for consultation, this is a function of limited time and a desire to progress reforms. Nevertheless, we consider it an opportunity missed.

Unsolicited selling

We see merit in Option A. We note that the RIS favours Option C. However, Victorian consumers would be worse off under any of the proposed options, particularly in relation to high pressure in-home sales where there is some form of invitation.

We propose two improvements to apply to both unsolicited and solicited sales.

First, the Victorian law requires that the trader obtain written permission from the consumer to stay in the home for longer than one hour, and thereafter for each additional half hour. We believe that such a requirement can be an effective “break” in a high-pressure presentation, allowing the consumer to “cool down”. We note significant breaches of this provision by high-pressure sellers in Victoria, however, we believe this is precisely because the requirement is effective. Such a provision supports effective enforcement, and together with remedies for consumers for a breach, could be useful in addressing problems with high-pressure selling.

Secondly, it is our view that an “opt-in” requirement could be more effective for consumers, and may also be of benefit to reputable sellers that do not use high-pressure techniques by providing certainty within a shorter period.

In relation to the high pressure in-home selling of mathematics software, Dr. Paul Harrison, senior lecturer in consumer behaviour and marketing at Deakin University, notes:

Consumers are more likely to be able to make a rational decision, that takes into consideration more highly involved cognitive assessments (e.g., ability to pay, likelihood of educational success with the program, ability to pay a credit agreement), when given a day or two to reflect on the offer. In the context of in home sales, a traditional “cooling-off” period (where the consumer signs an agreement, but must cancel the agreement within a certain time-frame) is not adequate, because it requires cognitive effort for the consumer to initiate the withdrawal, resulting in a rejection of previous choices, and high ego costs. This could be solved by consumers making a lesser form of commitment (e.g., “I am interested”), but a requirement that they are given a period of one to three days to formally reinforce that commitment by contacting the sales company to advise that they wish to “go ahead” (nb. It is important in this context that the consumer contacts the sales company, as opposed to the sales company contacting the consumer).¹

(The Executive Summary of Dr. Harrison’s forthcoming report, from which this quote is taken, is attached to this submission.)

We propose that businesses that enter into contracts in the consumer’s home (whether unsolicited or 'invited') should conform to an opt-in process, whereby the consumer conditionally signs the sales agreement, which is only binding if the consumer “opts-in” to the agreement sometime between 12 – 48 hours after first signing the agreement, by contacting the company,

¹ Paul Harrison, Marta Massi, Kathryn Chalmers and Consumer Action Law Centre, *Shutting the Gates - An analysis of the psychology of in-home sales of educational software*, due to be published in January 2010.

and confirming that they wish to proceed with the sale. It would be critical that the consumer initiates this contact and that the company is restricted from doing so.

We propose that for off business premises sales, such a process replace the current cooling off period of up to 10 days.

Finally, the RIS suggests that Option C would involve the power to grant exemptions from the protections. Without any details, it is impossible to assess the potential costs of this proposal. However, we suggest that as a general rule, the idea of exempting some sellers if an industry self-regulatory regime existed is fraught. It is likely that reputable businesses in the relevant industry would take on the costs of complying with the self-regulation whereas unscrupulous businesses would not yet would disproportionately account for problems for consumers. This leads to the double negative outcome that consumers would be left without protection or remedies if they fell victim to unfair practices, while there would be pressure on businesses to succumb to worse practices in order to remain competitive.

High pressure in-home sales (or “solicited selling”)

A significant number of problems arise from high pressure sales in the home resulting from a "solicited" visit. In fact, principles of behavioural economics and our own research (conducted in partnership with Deakin university) suggests the actual "invitation" for the business to visit the home, which is often orchestrated or coerced, appears to increase the vulnerability of the consumer to high pressure selling techniques.

Most recently, consumer problems arising from the selling of expensive mathematics software in the home have caused concern to consumer advocates and Consumer Affairs Victoria. However, in the past, a range of products have been sold using high pressure selling techniques in the home, including security alarms, vacuum cleaners, water purifiers, encyclopaedias and mortgage reduction schemes. In most of these cases the visit is “solicited”. These types of agreements are often high-cost, the consumer is often coerced into inviting the salesperson, may be unaware about the type of sales presentation or the cost, and in many cases enters into an expensive finance contract late at night after a long presentation. Excluding these consumers from specific protections is not “best practice”.

Many of the problems identified in relation to unsolicited selling, also arise in relation to “solicited” high-pressure selling in the home. The RIS quotes a report by Consumer Affairs Victoria which identifies that the risk that high pressure sales will result in poor choices by consumers is greatest in situations characteristic of unsolicited selling, including when:

- consumers do not expect to be approached by the trader, or cannot walk away from the situation;
- traders use moral pressure or try to create an obligation for reciprocity by, for example, providing free gifts;
- the goods are unique so that exactly the same product cannot be purchased elsewhere;
- the goods are complex or unfamiliar so that the consumer has more difficulty relying on their own judgement;

- the relationship between the trader and the consumer is not ongoing because the product is an infrequent purchase and/or the trader is not local; and
- the consumer is in a situation in which they are vulnerable or disadvantaged.²

Apart from the fact that consumers who extend some form of invitation expect to be approached, all the other characteristics listed above apply to all in-home high pressure selling, including being unable to walk away, the use of moral pressure and the existence of a situation in which the consumer is vulnerable.

We also note that while the survey that Consumer Affairs Victoria undertook for this report focused on “door to door” sales, some of the case studies of high pressure in-home sales included in that report involve, in fact, an invitation by the consumer.

In Victoria, laws that apply to contracts entered into in the home apply whether or not the visit was solicited. The laws provide protections to Victorian consumers who suffer detriment due to all forms of high pressure selling in the home. We are not aware of these laws causing any problems for businesses that enter into contracts in the home, other than those who use high pressure selling techniques. Unfortunately, Victorians consumers will lose these protections under the proposed national regime.

We therefore strongly recommend that the Australian Consumer Law adopt Victoria’s “contact sales” provisions, amended to include the opt-in framework outlined above and not the NSW approach under which protections do not apply if the consumer “invited” the dealer to call.

Alternatively, if Option C is adopted without being applied to solicited selling, regulators should be given the power to make an order that a particular trader (or possibly a particular industry) is bound by the laws applying to unsolicited selling. Such a declaration could be based on a range of factors, including:

- complaints made to regulators;
- the selling techniques used;
- the extent to which invitations are orchestrated or coerced;
- the type of goods or service; and
- the cost and whether finance is provided.

This would be a second-best approach because regulators could take some time to make such an order, and consumers would suffer detriment in the meantime. However, this would be considerably better than failing to provide any protections to these consumers at all.

Information standards

Consumer Action supports extending the ability to prescribe information standards to services as well as goods. As the RIS notes, any specific proposal for an information standard would still need to be assessed and agreed on by the jurisdictions, and at present there are a limited number of standards in force across Australia, showing that this power is used only sparingly.

² Consumer Affairs Victoria, *Cooling-off periods in Victoria: their use, nature, cost and implications*, Research Paper no. 12, 2009, p12.

The capacity to make an information standard for services should be available for cases in which there would be benefits from doing so.

Unsolicited services

We support Option B, which we agree would provide consistency with the provisions prohibiting a supplier from asserting a right to payment for either unsolicited goods or unsolicited services by ensuring the consumer is not liable for payment in either circumstances.

Standards for consumer documents

Consumer Action strongly supports including a basic minimum standard for consumer documents in the Australian Consumer Law. In our experience it is an unfortunate fact that consumer documents are not always designed to be clear and legible precisely because if consumers are aware of important information this may change their decision about whether to enter into a contract with a supplier or to exercise other rights. In Victoria, the mandatory basic standard for contracts and other documents under section 163 of the *Fair Trading Act 1999* at least ensures that consumers have remedies in this situation and/or the regulator can take appropriate action against a trader engaging in unfair practices facilitated by unclear documents.

We agree that in adopting a similar requirement nationally, prescribing a minimum font size is not necessarily required if 'clear and legible' is appropriately defined and enforced.

However, we do not agree that Option B is preferred over Option C. The RIS asserts that Option C would create some regulatory duplication because it would cover standard form contracts, which will also be covered by the proposed national unfair contract terms law. There are several flaws in this analysis.

First, the unfair contract terms law does not apply to all consumer contracts, only to standard form contracts. Basic standards of clarity and legibility should apply to all consumer contracts. Option B would not cover any consumer contracts.

Secondly, the current Victorian law on which this proposal is based is also the only law to currently have unfair contract terms provisions and the two sets of provisions complement, rather than duplicate, one another. The RIS notes that Consumer Affairs Victoria has advised that section 163 of the Victorian *Fair Trading Act* is often used in conjunction with the Victorian unfair contracts terms provisions.

Thirdly, while there is a difference between the current Victorian unfair contract terms law and the proposed national unfair contract terms law in that the Victorian provisions do not contain a concept of "transparency", the RIS mischaracterises the national unfair contract terms law when it states that this proposed law 'requires terms in relevant contracts to be "transparent", which is a similar concept to "clear and legible"'. The proposed national unfair contract terms law does *not* require standard form contract terms to be transparent at all. It merely requires a court to take into account the extent to which a term is transparent in determining whether that term is unfair pursuant to the separate definition of 'unfair'. If a term was not considered unfair under that definition, which relates to the content and effect of the term not its disclosure, the fact that

the term was not transparent would give consumers and regulators absolutely no remedies whatsoever.

We have previously raised our concerns about the inclusion of a transparency test in the national unfair contract terms law (as have various others) given that law is directed at substantive unfairness whereas transparency is a disclosure issue.³ The transparency test is one of two parts of the definition of unfair under the national unfair contract terms law that were not in the MCCA-agreed model and were not foreshadowed in the February 2009 consultation and information paper on the Australian Consumer Law. Thus it was not properly considered. We now see another example of how a poorer outcome may be reached by confusing the two issues.

Bills and receipts

We support Option B or Option C, as they ensure that consumers (and regulators) can access important information, and thus evidence, about what they have been charged for goods and services. We agree that Option C may be preferable given it reduces the overlap with the goods and services tax laws requirements requiring tax invoices to be provided.

Lay-by sales

We strongly agree that Option B is the preferred option. As the RIS notes, lay-by is an important purchasing option for consumers - it provides a means for consumers to afford a more expensive purchase through paying by instalment without having to use credit (finance). It is important that the Australian Consumer Law continue to facilitate a market for lay-by sales by providing a legal framework that enables consumers to enter into lay-by agreements with confidence that their basic rights are protected and they will not have to fear surprise requirements or unreasonable charges. We would be concerned if the Victorian laws were removed that the problems for Victorian consumers experienced prior to the introduction of the lay-by sales legal requirements would re-emerge.

Dual pricing

We agree that the benefit of dual pricing laws is that they are largely self-enforcing because they are easy to remember and apply. It is the practical benefits of such a rule (as opposed to their overlap in theory with general conduct obligations such as the prohibition on misleading and deceptive conduct) that makes them beneficial.

While we do not have experience of these particular laws in our Victorian consumer legal practice, we do receive enquiries from consumers about their rights in the situation in which two prices are stated to apply to a products. If this occurs in the supermarket context, the Scanning Code of Practice may apply and we are able to give straightforward advice to consumers about their rights and how to pursue them. We can see the value in a similar dual pricing law applying in the broader context than merely supermarket scanning.

³ Consumer Action Law Centre, *Australian Consumer Law – submission on national unfair contract terms provisions*, 22 May 2009; Consumer Action Law Centre, *Submission to Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill 2009*, 30 July 2009.

Offering gifts and prizes

Consumer Acton agrees that the offering of gifts and prizes without then supplying them is a significant concern, and we are pleased that in this area the RIS recognises that this practice is not just unfair and costly for consumers but undermines consumer confidence in the marketplace more generally and distorts outcomes by giving some businesses an unfair advantage over other business that are attempting to compete for customers on the basis of genuine offers.

Relying solely on an intent-based requirement to protect consumer rights in this area can lead to enforcement problems in practice, as the consumer or regulator must be able to gather evidence about the trader's subjective state of mind at the time the items were offered. We therefore support Option C because it provides the benefits of both the intent and reasonable time requirements (with the relevant defences). Reputable businesses which genuinely offer prizes and gifts do not strike any difficulties in meeting both sets of requirements simultaneously.

Accepting payment without intent to supply

As with the situation above, we agree that Option C is preferred. It provides the benefits of both an intent and a reasonable time requirement and reputable traders meet these requirements as a matter of course.

We would be very concerned if the Victorian prohibition against accepting payment and then failing to supply within a reasonable time were removed. While it is true that delays and failures to supply are also a matter of contract giving rise to potential legal remedies for consumer, these can be difficult for an individual consumer to enforce and they do not allow a regulator to act to tackle systemic conduct by a trader affecting a number of consumers. By contrast, the clear Victorian requirements can be very effective in negotiating better outcomes between consumers and traders in practice and, as the RIS notes, in practice the Victorian provision has been used effectively by the regulator to address systemic conduct by traders.

False testimonials

We support Option C. Testimonials can play an influential role in a consumer decision, thus the risk of a false testimonial distorting consumer decision-making is high. However, Option B is not adequate as, in practice, we agree that regulators would have great difficulties in gathering the evidence to positively prove that a testimonial is false. By contrast, the trader is in the best position to adduce evidence about a testimonial. Given that traders using a genuine testimonial should have little difficulty in proving that the testimonial is real, the burden of placing the onus of proof on the trader is low.

Harassment and coercion

The RIS does not consider any proposals relating to harassment and coercion.

Section 60 of the *Trade Practices Act 1974* (Cth) contains a general conduct provision prohibiting the use of physical force or undue harassment or coercion in connection with the supply of goods

or services or the payment for goods or services. This provision is mirrored in the state and territory fair trading legislation.

However, Victorian consumers benefit from an additional provision in the Victorian *Fair Trading Act* (s.21(2)), which follows the general conduct provision (s.21(1)). The additional provision gives a non-exhaustive list of types of conduct that are deemed to be harassment or coercion under the general provision. The ACT legislation has a similar structure, although its list of specific types of conduct constituting harassment or coercion is shorter.

We have noted in previous submissions - on the proposed national unfair contract terms provisions - that a two-fold approach to consumer law obligations represents best practice in consumer protection regulation. The use of a general provision coupled with a non-exhaustive list of examples follows a “general-plus-specific” model for regulation. This allows for the flexibility that a general provision brings in being able to address new or changing conditions or practices, but also incorporates additional clarity by addressing known current problems as well as providing guidance in the interpretation of the general provision or obligation.⁴

In our experience through our consumer legal practice, the existence of clear examples of unlawful harassment or coercion in the Victorian law has benefited many consumers in resolving complaints with businesses about aggressive and unfair practices, because it provides a fast and efficient means for consumers to show that a trader has overstepped the bounds of reasonable trading conduct. In this way, it has similar practical benefits to the benefits of the dual pricing provision noted by the RIS, in that it is easier for consumers to prove specific examples than a general conduct obligation and easier for businesses to recognise and respond to their legal obligations. Further, the examples listed in the Victorian law are based on known problem behaviours in the market.⁵

Consumer Action is very concerned that Victorian consumers may lose the benefit of section 21(2) of the *Fair Trading Act*. We strongly advocate that it be included in the best practice reform proposals for the Australian Consumer Law.

We welcome further consultation on the matters raised in this submission or discussed in the RIS. Please contact us on 03 9670 5088 or at ceo@consumeraction.org.au if you have any questions.

⁴ For further discussion see Consumer Action Law Centre, *The consumer protection provisions of the Trade Practices Act 1974: Keeping Australia up to date*, May 2008, pp116-17, 138-41.

⁵ See also from the second reading debate on the Victorian Fair Trading Bill 1999: ‘The bill also revamps the harassment and coercion provisions of the existing legislation. The provisions are designed to penalise any person who uses physical force, undue harassment or coercion in connection with the supply or possible supply of goods or services. The bill specifically lists a number of situations that will be deemed to be in breach of the legislation. It is again necessary to express the clear intention of Parliament to make certain practices illegal. They include impersonating a bailiff or a member of the police force...to impersonate a member of the police force will be illegal, as will carrying a firearm, refusing to leave private premises when asked or using fake legal documentation. This list is not exhaustive, and the general test will still be applied; however, these are clear examples of undue harassment and coercion that need to be specifically detailed to leave no doubt as to Parliament's intent.’ Rob Hulls MP, Fair Trading Bill 1999 Second reading debate, Hansard, 21 April 1999, page 526.

Yours sincerely

CONSUMER ACTION LAW CENTRE

A handwritten signature in black ink, appearing to be 'C. Lowe'.

Catriona Lowe
Co-CEO

A handwritten signature in black ink, appearing to be 'N. Rich'.

Nicole Rich
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