



19 September 2007

James Latham
Acting General Manager,
Consumer Affairs Victoria,
Department of Justice
Level 24, 121 Exhibition Street
MELBOURNE VIC 3000

Dear Mr Latham

Fair Trading Regulations 1999

Consumer Action Law Centre (**Consumer Action**) is pleased to have the opportunity to submit its views regarding the re-making of the Fair Trading Regulations 1999 (**the Regulations**) that are made under section 165 of the *Fair Trading Act 1999 (the Act)* and that expire on 17 August 2009.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign focused, casework and policy organisation. It was formed by the merger of the Consumer Law Centre Victoria and the Consumer Credit Legal Service in 2006, and builds on the significant strengths of these two centres.

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 throughout the community directly.

Outline of submission

Consumer Action wishes to see the Regulations re-made in a way that ensures the interests of consumers are comprehensively protected.

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Accordingly, Consumer Action recommends:

- (i) That the exemption of certain associations in paragraph 5 of the Regulations be removed;
- (ii) That references in paragraph 6 of the Regulations to certain persons, bodies and Acts of Parliament be changed to reflect legislative changes made since the Regulations were enacted;
- (iii) That some of the exemptions in paragraph 8 of the Regulations of certain kinds or classes of telephone agreement from application of Division 2A of Part 4 of the Act be removed; and
- (iv) That the number of penalty units per offence set-out in Schedule 2 of the Regulations be set at the highest number possible within the limits of Victorian Government policy.

Consumer Action makes no recommendations regarding the embargo notice in Form 2 of the Regulations or the cancellation notice in Form 3 of the Regulations.

Exemption of associations from section 27 of the Act

Consumer Action does not support the exemption in paragraph 5 the Regulations of each member of the Victorian Country Press Association Limited (and the Australasian Religious Press Association Inc. from the application of section 27 of the Act.

Section 27 of the Act protects the interests of consumers by restricting publishers from soliciting advertising business and charging consumers without detailed written instructions from the consumer. As such it protects consumers from aggressive marketing by publishers and ensures that consumers are not charged for advertising unless they give written instructions. The requirement for consumers to give written instructions allows consumers to make considered, rather than rushed, decisions about paying for advertising. Section 27 makes it difficult for publishers to coerce or manipulate consumers into paying for advertising, and reduces the scope for salespeople in the employ of publishers to mislead consumers or attempt to illegitimately attain the consent of consumers to pay for advertising.

Section 27 itself appears to contain anachronous exemptions.¹ The section in its current form exempts large proprietary companies and listed public companies and their subsidiaries, the Crown, and publishers of publications with a circulation of 10,000 copies or more per week. In its initial form section 27 exempted all public companies but not proprietary companies.² This was amended to exclude from exemption unlisted public companies and to include in exemption large proprietary companies.

¹ The Explanatory Memorandum does not clarify the matter (Fair Trading Act (Amendment Bill) Circulation Print, Explanatory Memorandum, Victorian Parliament, Spring 2002 Sitting).

² Fair Trading Act 1999 version as at 1 September 1999.

Consumer Action finds the corporate exemptions in section 27 anachronistic. Nonetheless, Consumer Action confines its suggestions to the Regulations.

Unless there are exceptional reasons for the exemptions given to the members of the Victorian Country Press Association Limited and the Australasian Religious Press Association Inc., Consumer Action believes the members of these associations should be subject to section 27. Consumer Action is not of the view that associations or members of associations should be exempt from consumer protection law merely because they are not-for-profit organisations. Not-for-profit status should not confer on publishers the freedom to use aggressive and manipulative marketing practices

For these reasons, Consumer Action recommends that paragraph 5 of the Regulations be repealed.

Prescribed persons and bodies in section 6 of the Regulations

Paragraph 6 of the Regulations prescribes persons and bodies to which the Director of Consumer Affairs must refer disputes. This paragraph of the Regulations requires amendment to reflect changes in legislation. For example, the Legal Ombudsman has been abolished and the *Legal Practice Act 1996* has been repealed. Instead, relevant disputes should be referred to the Legal Services Commissioner under the *Legal Profession Act 2004*. Consumer Action refers to these drafting matters for the purpose of thoroughly responding to all aspects of the Regulations. Updating references to new acts or bodies is a drafting rather than consumer issue, and Consumer Action makes no further submission in relation to it.

Consumer Action further recommends that consideration be given to the bodies in paragraph 6 to whom Consumer Affairs must refer matters. The experience at Consumer Action has been that External Dispute Resolution schemes (**EDR schemes**) are highly effective ways of dealing with consumer-supplier disputes. Consumer Action recommends paragraph 6 include reference to large industry EDR schemes including:

- (a) Banking and Financial Services Ombudsman;
- (b) Energy and Water Ombudsman (Victoria);
- (c) Credit Union Dispute Resolution centre;
- (d) Financial Industry Complaints Service Limited;
- (e) Insurance Brokers Disputes Limited;
- (f) Insurance Ombudsman Service;
- (g) Superannuation Complaints Tribunal; and
- (h) Financial Co-operative Dispute Resolution Scheme; and
- (i) Telecommunications Industry Ombudsman.

Exemptions from the telephone marketing provisions

Consumer Action has two concerns with the exemptions in paragraph 8 of the Regulations.

(i) Paragraph 8(2)

The exemption in subparagraph 8(2) of the Regulations is unclear, and is capable of interpretation contrary to the interests of consumers. The provision exempts suppliers of services supplied on a continuing basis from the application of section 80 of the Act. Section 80 of the Act prohibits suppliers from accepting payment for services during the 10 day cooling off period.

Subparagraph 8(2) exempts agreements that are “supplied to a purchaser on a continuing basis...”. Potentially, many common contracts fit within this description. For example cable television and insurance services may be viewed as services supplied on a continuing basis. The example given in subparagraph 8(2) is not clear, and does not make it easier to determine the intended scope of subparagraph 8(2).

Consumer Action recommends that paragraph 8(2) of the Regulations be repealed, or if there is good reason for its retention, that it be re-worded in consultation with stakeholders to make clearer its scope.

(ii) Paragraph 8 (1)(a)

Consumer Action is concerned that the exemption in subparagraph 1(a) of paragraph 8 of the Regulations creates a gap because of the limitations of the anti-hawking provisions in the *Corporations Act 2001* (Cth) (**the Corporations Act**).

Table 1 (below) sets-out the relevant anti-hawking provisions in the Corporations Act.

Section	Applies to	Protection	Exemptions
992A	Financial products other than securities or interests in managed investment schemes	No unsolicited telephone calls except between hours of 8am – 9pm and not on Sundays and certain public holidays, offeror must maintain do-not-contact list	None relevant
992AA	Interests in managed investment schemes	No unsolicited telephone calls	Offer of a listed managed investment scheme made by a financial services licensee OR offer made by a financial services licensee with whom client has dealt with in last 12 months
736	Offers of securities	No unsolicited telephone calls	Offer of a listed security made by a licensed securities

			dealer OR offer made by a licensed securities dealer whom client has dealt with in last 12 months
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Consumer Action submits that Division 2A of Part 4 of the Act should apply to financial products because the relevant sections of the Corporations Act do not provide levels of consumer protection equivalent to protection provided in the Act.

The restrictions on hours for cold calling in section 992A of the Corporations Act are set-out in Regulation 7.8.22 of the Corporations Regulations 2001 and are slightly different from the hours set-out in section 67C of the Act.

The application of section 992A of the Corporations Act is unclear.³ However, the Australian Securities and Investments Commission (**ASIC**) confirmed in Class Order 02/641 that section 992A(3) does not apply to securities or interests in managed investment schemes (ie. financial products to which sections 992AA and 736 of the Corporations Act apply).⁴ This means telephone marketing in relation to managed investment schemes and offers of securities is only regulated by sections 992AA and 736 of the Corporations Act respectively.

Sections 992AA and 736 of the Corporations Act exempt financial services licensees and licensed securities dealers respectively from the prohibition on making unsolicited telephone calls. As the Corporations Act requires persons who offer interests in managed investment schemes to be a financial services licensee and anyone who offers securities to be a licensed securities dealer,⁵ all individuals who can lawfully offer interests in managed investments and securities will be exempt from the anti-hawking provisions in the Corporations Act.

This gap clearly has the potential to harm consumers. Those with the appropriate ASIC licence can currently cold-call consumers at inconvenient times in the morning or night, on weekends, and on public holidays. Consumers currently have no protection under the Act or the Corporations Act from ASIC licensees who may cold-call them without their consent and who may apply aggressive sales techniques.

Ensuring suppliers of financial products are subject to the Act would not interfere with the federal financial services regulation scheme in the Corporations Act. Rather it would remove the scope for Victorian consumers to be disadvantaged by removing the current exemption from the application of Division 2A of Part 4 of the Act.

Because of the gaps in consumer protection under the Corporations Act (offers of securities and interests in managed investment schemes by licensed offerors) Consumer Action recommends that paragraph 8(1)(a) of the Regulations be repealed.

³ "FSR and you – what happens now?", Focus, Issue 6, April 2002, Allens Arthur Robinson, page 2.

⁴ "ASIC Regulator Guide 38: The hawking provisions", Reissued as at May 2005, paragraph 8.

⁵ *Corporations Act 2001* (Cth) s. 911A.

(iii) Other exemptions in paragraph 8

Consumer Action submits that the exemptions in paragraph 8 of the Regulations other than those contained in paragraphs 8(1)(a) and 8(2) are appropriate and should be retained.

Penalties in infringement notices

Schedule 2 of the Regulations sets-out penalty units for infringement notices issued to natural persons and bodies corporate. Consumer Action recognises that infringement notices are an efficient way of dealing with offences against the Act. Consumer Action believes the offences to which Schedule 2 of the Regulations relate (eg. failure to comply with ban orders, ss.28 & 44 – and failure to comply with recall notices, s. 53) have the potential to cause serious harm to consumers. Because of the potential harm the offences pose to consumers, it is important that infringement notices that are issued include large fines in order to deter repeated contravention (specific deterrence) and in order to deter offending conduct generally (general deterrence).

For these reasons, Consumer Action recommends that Schedule 2 of the Regulations be amended to increase penalty units in column 2 thereof to the highest number possible within the limits of Victorian Government policy.

Should you have any questions about this submission, please contact Neil Ashton on 03 9670 5088.

Yours sincerely

CONSUMER ACTION LAW CENTRE

Neil Ashton
Policy Officer

