Australian Direct Marketing Association

Submission to Senate Economics Committee Inquiry into *Trade Practices Amendment (Australian Consumer Law) Bill No. 2 2010*

April 2010

OFFICE Level 6, 50 Carrington Street Sydney NSW 2000 POSTAL GPO Box 3895 Sydney NSW 2001
T (02) 9277 5400 F (02) 9277 5410 E info@adma.com.au W adma.com.au ABN 34 002 909 800

1. About the Australian Direct Marketing Association

ADMA is the peak industry body of the Australian direct marketing industry.

ADMA was formed in 1966 and has during its 44 years of operation has been involved in the formulation of law relevant to the direct marketing industry. Predominantly our focus has been the *Privacy Act 1988,* the *Spam Act 2003*, the *Trade Practices Act 1974* and the *Do Not Call Register Act 2006.*

ADMA has also been involved in co-regulatory and self-regulatory solutions over many years.

ADMA operates a Direct Marketing Code of Practice which is a self regulatory code. Compliance with the Direct Marketing Code of Practice is a pre-requisite of our membership. The Direct Marketing Code of Practice is overseen by an independent Code Authority.

ADMA's primary objective is to help companies achieve better marketing results through the enlightened use of direct marketing.

ADMA has over 500 member organisations including major financial institutions, telecommunications companies, energy providers, travel service companies, major charities, statutory corporations, educational institutions and specialist suppliers of direct marketing services.

Almost every Australian company and not-for-profit organisation directly markets, including unsolicited selling in one form or another, to its current and potential customers as a normal and legitimate part of its business activities and the ability to continue to conduct this activity underpins a good proportion of Australia's economic activity.

OFFICE Level 6, 50 Carrington Street Sydney NSW 2000 POSTAL GPO Box 3895 Sydney NSW 2001
T (02) 9277 5400 F (02) 9277 5410 E info@adma.com.au W adma.com.au ABN 34 002 909 800

2. Introduction

ADMA welcomes the opportunity to comment on the *Trade Practices Amendment (Australian Consumer Law) Bill No. 2 2010* (the Bill).

ADMA has for many years called for harmonisation of the state and territory fair trading legislation as a rational approach to reducing the regulatory burden on business and improving consumer protection.

However our support for a national Australian Consumer Law is conditional on this new code not unnecessarily restricting business and the law not imposing additional restrictions other than those that currently apply under various state and territory fair trading laws.

In ADMA's view the Bill in its current form, by seeking to address the significant variability in quality in the area of unsolicited sales, will in certain areas unnecessarily have the effect of over-regulating those areas of the industry that will need to implement additional robust compliance systems to comply with the requirements without providing any significant improvement in consumer protection.

Whilst ADMA supports the approach taken with respect to the treatment of permitted telemarketing calls, there are several major key areas where the Bill, in its current form, will unnecessarily restrict business and ADMA strongly urges amendments in these areas prior to the Bill being passed.

The key issues that ADMA raises in relation to the Bill are:

1) Permitted hours of negotiating an unsolicited consumer agreement
2) The timing of disclosure of the requirement to leave premises
3) Definition of consumer
4) Liability of Suppliers for Contraventions by Dealers
5) Timeframes for the provision of agreement documents
6) The length of the Termination Period
7) The inability to use PO Boxes for written Termination Notices
8) No requirement for the form or content of a Notice
9) Prohibition on supplies etc for 10 business days

ADMA has also identified a few internal inconsistencies within the Bill. Our submission outlines these for the committee's consideration.

OFFICE Level 6, 50 Carrington Street Sydney NSW 2000 POSTAL GPO Box 3895 Sydney NSW 2001
T (02) 9277 5400 F (02) 9277 5410 E info@adma.com.au W adma.com.au ABN 34 002 909 800

3. A Single National Law must not be eroded by Unilateral State and Territory Interference

A single, national law will increase productivity, reduce compliance costs on business resulting in positive flow on effects to consumers by way of better consumer outcomes and lower prices and, through a vastly simpler regime, promote better consumer outcomes by providing a regulatory framework that is easier for business to understand.

The benefits however can only be achieved if, and only if, a single national law is permitted to emerge unencumbered by the persistence of state and territory laws. In fact, if a national consumer law goes ahead with state and territory laws continuing to persist the whole exercise will result in more not less regulation than currently applies. If this was to occur then the only conclusion that could be sensibly reached would be that the introduction of a single consumer law was a failure.

OFFICE Level 6, 50 Carrington Street Sydney NSW 2000 POSTAL GPO Box 3895 Sydney NSW 2001
T (02) 9277 5400 F (02) 9277 5410 E info@adma.com.au W adma.com.au ABN 34 002 909 800

4. Other Key Concerns

This section is divided into the following parts:

Part A Marketing Approaches
Part B Liability
Part C Post Contractual Conduct
Part D Inconsistencies within the Legislation

Part A Marketing Approaches

4A.1 Permitted Hours for Negotiating an Unsolicited Consumer Agreement

4A.1.1 In relation to Telemarketing Calls

ADMA welcomes the confirmation that permitted calling hours will not be duplicated in the revised Trade Practices Act as this is already dealt with in the *Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard 2007.*

4A.1.2 In relation to hours where a dealer may call on a person

Section 73 of the Bill prohibits calling on a person after 6pm on a weekday, 5pm on a Saturday and not at all on a Sunday or public holiday unless consent exists.

Should this provision be adopted, the effect of this Bill will profoundly impact the door-to-door marketing channel.

ADMA notes that, with the exception of Queensland, every other state and territory currently permits a dealer to call on a person until 8pm at night on a weekday.

In many instances, residents are simply not home until 6pm, and the prohibition of calling after 6pm will limit the viability and effectiveness of the channel.

Whilst noting the concerns that arise in relation to interruptions at dinner time, it is vital that the consequences for business if permitted negotiating hours are significantly restricted are fully understood before this change is enacted.

Door-to-door selling is an important channel for reputable Australian companies. It is a channel that produces significant amounts of revenue.

Further, in facilitating the sale of significant volumes of goods and services, this sales channel underpins the employment of many Australians. Not only are those Australians in the employ of door-to-door sales providers provided with employment through the sales generated by this channel. There are also many people employed by the companies that produce these products as well as companies that supply those companies that produce those products.

OFFICE Level 6, 50 Carrington Street Sydney NSW 2000 POSTAL GPO Box 3895 Sydney NSW 2001
T (02) 9277 5400 F (02) 9277 5410 E info@adma.com.au W adma.com.au ABN 34 002 909 800

Further, door-to-door selling allows the efficient operation of markets by facilitating the face-to-face explanation of the benefits of sometimes complicated products to potential customers.

Door-to-door selling is an important tool that is often employed by new entrants to markets where it is vital to the economic sustainability of a company to rapidly build market share.

ADMA submits that the permitted hours for negotiation revert to 8pm on weekdays, as permitted currently by most states and territories.

4A.2 Section 73 (2) Consent

ADMA is concerned with the unnecessary restrictiveness of Section 73 (2) that specifies that consent to be visited outside permitted negotiating hours may not be provided to the dealer face to face.

So long as consent is provided freely, without coercion or harassment, a person should be free to make an arrangement to be called outside permitted negotiating hours if this is agreeable to them. In some cases, a person may be interested in an offer and want the dealer to return at a time more convenient for them so that the dealer can explain the terms of an offer more fully. If this time is outside the permitted calling hours, it would be a very poor customer experience if the dealer would need to tell the person that they were unable to return at the requested time until the dealer contacted them from their office by phone to confirm the appointment.

ADMA submits that Section 73(2) (a) should be deleted so as to provide that consent for visits outside the permitted hours of negotiation can be given face to face.

4A.3 Section 74 Disclosing Purpose and Identity

Section 74 of the Bill requires that a dealer that calls on a person for the purpose of negotiating an unsolicited consumer agreement must as soon as practicable and in any event before starting to negotiate clearly advise the person that the dealer is obliged to leave the premises immediately on request.

Provisions requiring a dealer to advise the person, before starting the negotiation, that they must leave the premises immediately on request will unfairly prejudice the ability of the dealer to initiate discussions about the product.

The Bill already contains substantial consumer protections with respect to requests to leave the premises including:

a) section 75 (1) which makes it an offence for a dealer not to leave the premises on request;
b) section 93 which makes consumer agreements unenforceable should an agent fail to leave the premises on request;
c) section 171 which specifies individual fines of up to $10 000 and penalties of up to $50 000 for bodies corporate.

OFFICE Level 6, 50 Carrington Street Sydney NSW 2000 POSTAL GPO Box 3895 Sydney NSW 2001
T (02) 9277 5400 F (02) 9277 5410 E info@adma.com.au W adma.com.au ABN 34 002 909 800

On this basis ADMA submits that appropriate consumer protection outcomes can be achieved by the Bill without this additional disclosure requirement which is not consistent with existing disclosure obligations under the majority of current consumer protection laws. Alternatively, the requirement to state this prior to the negotiation starting should be removed.

OFFICE Level 6, 50 Carrington Street Sydney NSW 2000 POSTAL GPO Box 3895 Sydney NSW 2001
T (02) 9277 5400 F (02) 9277 5410 E info@adma.com.au W adma.com.au ABN 34 002 909 800

Part B Liability

4B Section 77 Liability of Suppliers for Contraventions by Dealers

Section 77 specifies that if a dealer contravenes a provision of Subdivision B, the supplier of the goods and services will automatically be taken to have contravened the provision.

ADMA notes that similar provisions of the Bill that carry criminal penalties, such as section 208, allow a defendant (in this case, the supplier) to use as a possible defence the fact that it took reasonable precautions and exercised due diligence to avoid the contravention. This defence recognises that dealers act autonomously and that dealers may ignore the instructions of the supplier in relation to compliance.

Similarly, suppliers should also be permitted to use as a possible defence that it took reasonable precautions and exercised due diligence against allegations of breaches of section 77.

OFFICE Level 6, 50 Carrington Street Sydney NSW 2000 POSTAL GPO Box 3895 Sydney NSW 2001
T (02) 9277 5400 F (02) 9277 5410 E info@adma.com.au W adma.com.au ABN 34 002 909 800

Part C Post Contractual Conduct

4C. 1 Section 3 Definition of Consumer

The definition of consumer as specified in section 3 is too broad.

The unsolicited selling regime should only extend to protecting individuals acquiring goods or services for the purpose of personal, domestic or household use or consumption and not persons acquiring good or services for the purpose of business use. That is, whether or not a person is considered to be a "consumer" for the purposes of the unsolicited selling regime should be determined by the purpose for which the goods or services are acquired and not the "ordinary" purpose of those goods or services.

Such a change will ensure that there is no consumer detriment where consumers actually acquire goods or services for personal, domestic or household use which may ordinarily be used for business use. In addition, goods or services acquired for business use don't need and aren't intended to receive, the protection of the unsolicited selling regime.

4C.2 Section 78 Requirement to give document to consumer

The timeframe of a maximum of five business days for a supplier to provide the agreement document as specified in section 78 (2) of the Bill is too short and highly impractical.

Australia Post service levels guarantee delivery within one to four business days which only leaves the supplier one business day to prepare a document and have it in the mail. In organisations that handle large volumes of transactions, this will not be possible.

The Bill should be amended such that dealers and/or suppliers should be provided with five business days to send an agreement document to a consumer and that this activity should be considered complete when the agreement document has been provided to Australia Post or some other postal carrier. We don't believe that there is any consumer detriment in making this change since the termination period will only begin once the customer receives the documentation.

4C.3 Section 82 (3) The Length of the Termination Period

The termination period of 10 business days, as specified by Section 82 of the Bill is significantly longer than any of the termination periods specified in existing State and Territory regimes which are currently 10 days (Vic, Qld, NT, WA, ACT, SA, TAS) or 5 clear business days (NSW).

An extended termination period will impose undue cost to business and introduce uncertainty as to the actual length of the termination period available to a particular customer.

Currently there is already delay imposed by the fair trading regimes of 5 clear business days and 10 days, which imposes significant cost on business.

OFFICE Level 6, 50 Carrington Street Sydney NSW 2000 POSTAL GPO Box 3895 Sydney NSW 2001
T (02) 9277 5400 F (02) 9277 5410 E info@adma.com.au W adma.com.au ABN 34 002 909 800

Moving to a regime that means that the effective termination period could now be up to 18 days (depending on when certain public holidays fall) will impose an unreasonable burden on business.

A termination period of 10 days is sufficient for consumers to consider an agreement and take action to terminate the agreement should they chose with no penalty or consequence.

The Bill should be amended so that the termination period is 10 days and not 10 *business* days.

4C.4 Sections 82(4) and 79 (d)(iv) The inability to use PO Boxes for written Termination Notices

ADMA submits that in addition to those methods specified in these sections, for the delivery of cancellation notification in writing, the Bill should be extended to allow cancellation notices to be provided to PO Boxes. It will not be effective for large organisations to receive termination notices at the business address currently required to be listed on the termination notice. In addition, there is no consumer detriment in organisations being able to direct customers to send a termination notice to a PO Box.

4C.5 Section 82 (6) No Requirement for the form or content of a Notice

Section 82 (6) specifies that there is no requirement in relation to the form or content of a notice provided under section 82 (1) of the Bill.

The broadness of this clause will lead to significant practical problems in implementation.

In its current form, section 82 (6) could permit a consumer to call, write to or email an organisation without identifying themselves advising that they wish to cancel a transaction and this would be considered sufficient notice of cancellation.

Organisations that deal with millions of transactions per month cannot be expected to cancel a transaction arising from an unsolicited sale unless at least a sufficient level of information that identifies the transaction and the customer is provided to the organisation.

ADMA submits that the Bill be amended such that the same information that is required to be provided in a termination notice under the current legislation be required under the new regime. The legislation should require that the same information be provided regardless of whether the cancellation is provided orally or by written notice.

4C.6 Prohibition on supplies etc for 10 business days

Section 86 of the Bill, specifies that a supplier may not, under an unsolicited consumer agreement, supply goods or services, accept any payment or consideration, require any payment during the 10 business days from when the agreement was made.

OFFICE Level 6, 50 Carrington Street Sydney NSW 2000 POSTAL GPO Box 3895 Sydney NSW 2001
T (02) 9277 5400 F (02) 9277 5410 E info@adma.com.au W adma.com.au ABN 34 002 909 800

This approach is overly restrictive and unnecessary given the protections that will be provided by the Bill to a consumer to terminate at any time during the termination period.

It is not sensible to adopt these provisions in the case of an agreement that provides for the supply of a good or service on a continuing basis, for example when re-contracting occurs. In fact it would be to a consumer's detriment, especially in the case of the provision of basic services such as electricity, gas, telephone. Even in the case of non-essential services the break on continuity could cause significant disruption to a consumer's lifestyle and routine.

Organisations that choose to provide services during the cooling off period carry the risk and cost of consumers asserting their right to cancel the agreement at any time during the statutory termination period and not being able to recover the cost of services provided during this time.

To remedy this problem, ADMA submits that the Bill should be revised such that consumers should be able to exercise choice on whether they receive goods and services within the termination period and that organisations should be entitled to charge for goods and services provided during the cooling off period.

OFFICE Level 6, 50 Carrington Street Sydney NSW 2000 POSTAL GPO Box 3895 Sydney NSW 2001
T (02) 9277 5400 F (02) 9277 5410 E info@adma.com.au W adma.com.au ABN 34 002 909 800

Part D Inconsistencies within the Legislation

Section 85(6) provides that where an agreement is terminated in accordance with section 82 then the termination does not affect the liability of the consumer under the agreement to provide consideration for the service. Section 87 also provides that where an agreement has been terminated (in accordance with section 82) the supplier must immediately refund to the consumer any payment that the consumer makes to the supplier after the termination.

ADMA understands that this section is saying that where a consumer terminates under section 82(3)(c) or (d), which provides for 3 and 6 month termination periods, then where a service is provided during those months the customer must pay for goods and services received. ADMA notes that this is supported by the Explanatory Memorandum, specifically paragraph 8.66, that this is 'minimise the potential for consumers to game the unsolicited selling provisions and ensure that consumers pay for the goods and services that he she use prior to terminating the agreement'.

However, sections 88 (1) and (2) provide that where an agreement is terminated in accordance with section 82, a person must not bring or assert an intention to bring legal proceedings against the consumer or take any other action against the consumer nor, for the purpose of recovering an amount alleged to be payable, place the consumer's name on a list of debtors. In addition, section 83(1)(a) provides that if an agreement is terminated in accordance with section 82, then it is taken to have been rescinded by mutual consent. If the contract has been 'rescinded' in accordance with section 83, then technically there can be no consideration payable after termination – and therefore no refund due under section 87.

In light of the above, it seems that even if a consumer is liable to pay under sections 85(6) or 87 a supplier cannot actually enforce the payment under sections 83 and 88, which seems inconsistent.

ADMA submits that this inconsistency should be considered and clarified prior to the passage of the Bill.

OFFICE Level 6, 50 Carrington Street Sydney NSW 2000 POSTAL GPO Box 3895 Sydney NSW 2001
T (02) 9277 5400 F (02) 9277 5410 E info@adma.com.au W adma.com.au ABN 34 002 909 800