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INQUIRY INTO THE CONSUMER CREDIT AND CORPORATIONS LEGISLATION AMENDMENT (ENHANCEMENTS) BILL 2011

SUBMISSION BY THE DIRECT SELLING ASSOCIATION OF AUSTRALIA

1. The Direct Selling Association of Australia (DSAA) was established in 1967 to represent suppliers who use the direct sales channel in retailing consumer products. Some understanding of the Association, its members and their product offerings can be seen at 'www.dsaa.asn.au'.
2. In August 2011, the Commonwealth Treasury released an exposure draft Bill purporting to make enhancements to the National Credit Code. Its draft section 156 is a major concern to the direct selling industry in that it would effectively prohibit certain credit dependent home selling.
3. There was no consultation with the DSAA, representing the direct selling industry, before it became aware of the exposure draft although the Association has been consulted since making a submission to the Treasury.
4. The section 156 proposal is not included in the Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011 before the Parliament.
5. On 7 October 2011, DSAA was included in a Treasury email release that attached a "discussion paper" and amended draft legislation with a two week turnaround for comment. Prior to this release DSAA learnt that this process was designed as further consultation preparatory for a Government sponsored amendment to the Bill before Parliament to restore the proposed section 156.
6. The discussion paper provides no significant further information justifying any legislative change nor does there appear to be any intention for further consultation on potential industry and community impacts.
7. In the circumstances DSAA considers it necessary to make a submission to the Committee advising its strong opposition to the proposal, even though it is not currently in the Bill.
8. Banning the supply or possible supply of regulated credit facilities for an unsolicited supply of products at a residence will effectively prohibit the supply of the products. Hawking credit door-to-door is already controlled so it should be assumed the purpose of this "enhancement" is to ban any credit dependent supply of products.
9. This is inconsistent with the policy objective of Australian governments, including the Commonwealth, in controlling unsolicited product supply through the Australian Consumer Law (ACL), namely to allow these sales subject to stringent conditions and cancellation rights for the sale and related contracts.

10. The proposed section 156 has its origin in a Government Green Paper.¹ It noted that existing provisions prohibiting credit hawking do not apply where the credit is offered incidentally to an unsolicited sale of goods and that there is no specific remedy for a breach of the provision.² DSAA notes the existing section 156 reflects long established regulatory policy at State and Territory levels.

11. The development of this policy may not be in the spirit of the Government's own regulatory review requirements and arguably in its effect, the requirements of the Council of Australian Governments (COAG). Given it substantially alters existing regulatory arrangements, DSAA believes the now published Regulation Impact Statement is inadequate in identifying or properly considering impacts on the direct selling industry.

12. The Green Paper's treatment of the apparent rationale for the proposal lies in a claim that "the practice of selling and marketing credit has evolved since the introduction of this [credit hawking] prohibition and there has been some concern about the limitation of these provisions in relation to...the "door-to-door" sale of linked credit arrangements" (emphasis added).³ The Paper acknowledged the need for consistency with other Commonwealth laws and the Australian Consumer Law.⁴

13. The ACL's unsolicited selling provisions are aimed at protecting consumers and regulating any consumer vulnerability. The "evolution" and "concern" underlying the proposed section 156 are not explained or quantified. It is not evident from published government research including its recent consumer survey.⁵ The proposed section 156 is a sweeping statement of public policy with no weighting to the relativity or proportionality in consumer sophistication, product diversity, individual trader and trading performance, and consumer sentiment. There is no analysis of consumer detriment against consumer benefit, nor is there any mention of the competitive and discriminatory effects of this policy.

14. The ACL regulates unsolicited selling of consumer products by reference to certain transactions conducted away from retail premises. It is not limited to residences and covers most unsolicited consumer purchases outside a fixed retail environment. The ACL has considerable pre-disclosure and point of sale documentation requirements. Of particular importance are its "cooling off" rights. They allow a minimum ten clear business days in which a consumer may cancel a sale for any or no reason. Complementing the ACL, the National Credit Code (s134-5) provides if a purchase of goods or services is cancelled the related credit contract is void.

15. The proposed section 156 is clearly inconsistent with and nullifies a decision of all Australian governments to allow the unsolicited supply of goods under these stringent conditions. It negates this policy for credit dependent purchases regardless of considerations such as the nature of goods, purchase price, credit facilities and pricing, consumer satisfaction, complaints experience, and comparative purchasing. It is possible some businesses will overcome the effect of this policy by providing credit facilities, interest free, with the credit cost factored into the purchase price.

16. If the mischief is vulnerable consumers being exploited through high pressure home selling of expensive products then this behaviour is already addressed by ACL provisions that deal with unconscionable dealings, a range of unfair trading practices including false or misleading representations and the use of harassing or coercive tactics, specific regulation of unsolicited selling and a suite of improved law enforcement options.

¹ National Credit Reform: Enhancing confidence and fairness in Australia's credit law. July 2010.

² F. Canvassing of consumer credit at home, at page 89.

³ Ibid, at page 90.

⁴ Ibid, at page 90.

⁵ Australian Consumer Survey 2011. June 2011.

17. The proposed change is unnecessary as existing legislation in the National Consumer Credit Protection Act and the National Credit Code already contains significant consumer protections to prohibit unfair and unconscionable practices as well as a licensing regime for credit providers administered by ASIC. Credit provider licensing offers a discipline for market behaviour. Credit providers carry the onus of establishing that credit facilities are suitable for a consumer's requirements. The proposed section 156 also needs to be assessed against the objectives of credit regulation, namely to ensure truth in lending while recognising that product innovation must be enhanced and encouraged by the development of non-prescriptive flexible laws.

18. While the licensing and credit suitability arrangements in the existing credit laws and the ACL provisions, the consumer is clearly legislatively protected against the hawking of credit under the guise of the sale of goods. There is no "loop hole", the policy objective to prohibit credit hawking is already covered and no new legislation is required.

19. It is clear the proposed policy will affect legitimate and concern free business. For some it will mean closure, for others certain and costly restructuring of business models to avoid its consequences.

20. The proposal is anti-competitive. If the policy position is that vulnerable consumers require additional protection then it is arguable that this protection could be required in other retail sales.

21. This proposal may also cause financial hardship to consumers by forcing purchasers into other credit arrangements which may not be as favourable to them. An attachment is included in this submission that highlights two DSAA members and shows that their linked credit offering are at competitive and lower rates and conditions than many alternative credit sources.

22. Direct selling provides an opportunity to fully demonstrate and show the value of a product. Online or store purchasing may not give the consumer enough information to make an informed decision, and if purchased in these ways there is no regulated mandatory returns policy or cooling off period, which the ACL provides is the case for direct sales.

23. The existing ACL and National Credit Code provisions adequately cover any issues of consumer vulnerability and there is no evidence of widespread consumer complaint or prosecutions that could justify any wholesale policy shift. The DSAA strongly urges that this unsubstantiated provision be rejected, should it be included in any amendment to the current Bill or introduced in the future.

JOHN HOLLOWAY
Executive Director
14 October 2011

Case Studies

1. *A Better Chance* sells educational material:

11% of their customers pay by cash or credit card and 89% of their customers choose to take up their offer of credit.

On average 16% of sales were cancelled by the customer during the cooling off period provided under ACL provisions (demonstrating both the public understanding and the effectiveness of the provisions)

35% of credit applications were declined by the company following it (1) contacting the customer and discussing the contract, (2) conducting a credit check, (3) confirming the customer's employment and income status, and (4) making a responsible decision on whether the customer could meet the terms of the contract without undue hardship,

The company recently introduced an option for customers to pay in 3 monthly instalments with no interest. In 2011, 22.2% have taken advantage of this or paid cash, but 77.8% of customers have still chosen to take longer term credit with interest.

Credit terms are - 30 days interest free - so all amounts paid in the first 30 days attract zero interest, then interest at 21% per annum calculated on the daily unpaid balance of the account. This has been unchanged since 1999.

There are no application or account keeping fees. Customers elect to pay a certain minimum amount each month, however they may pay more, or finalize their account, at any time without penalty, thus saving interest.

This unfounded section 156 enhancement will force this company to close.

2. *Thermomix* supplies a popular kitchen appliance

The product is mainstream-retail unfriendly as in-home demonstrations provide a better opportunity for a consumer to assess the product and decide to purchase.

The product was reviewed by CHOICE in November 2010: "The Thermomix is only available through in-home demonstrations so before you buy you'll have a chance to familiarise yourself with the unit, and you'll find it's easy to use." "After CHOICE tested the latest version, the TM31, our home economist Fiona Mair - a harsh critic - declared it her new favourite appliance."

20% of customers choose to take up their offer of linked credit.

Credit is provided at effective interest rates of 15.9% per annum, below most credit card rates.

Of the finance dependent transactions, 19% of credit applications were declined by the related finance company and another 10% of sales were cancelled by the customer during the cooling off period.

As the products are so well received, of the transactions that did not have linked finance only 0.17% of transactions are cancelled or products returned.

Under the possible new law. The distributor could be subject to criminal sanctions if a homeowner seeks linked credit during a product demonstration.