21 April 2010

By email: economics.sen@aph.gov.au

Senate Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Sir/Madam

Submission to Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010

The Consumer Action Law Centre (**Consumer Action**) thanks the Senate Economics Committee (the **Committee**) for the opportunity to make a written submission to its Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 (the **Bill**). We apologise for the delay in making our submission.

This submission is also formally endorsed by:

- Consumer Credit Legal Centre NSW;
- Consumer Law Centre of the ACT; and
- Financial and Consumer Rights Council (**FCRC**).

The Bill represents the culmination of a major reform process in Australian consumer law, and for the most part represents a significant advancement of consumer regulation in Australia.

The Bill creates a single, national consumer law, effectively rationalising the complex array of State and Federal based consumer protection regimes that currently exist. In doing so, the Bill completes the process begun by the *Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010* (Cth) (**ACL 1 Act**), and delivers on the commitments made by the Council of Australian Governments (COAG) in July and October 2008 - commitments to simplify, unify and extend Australian consumer law.

From a consumer perspective, some of the most significant features of this reform process are:

- the introduction of a national unfair contract terms law;
- the creation of a national legislative scheme for product safety;
- the creation of a national legislative scheme for consumer guarantees, and;
- the creation of new enforcement and remedies provisions to enable more effective and responsive enforcement of the consumer laws by consumer regulators.

These and other provisions in the Bill are all positive reforms, and reforms that Consumer Action has advocated for many years. Consumer Action strongly supports not only much of the content of the Bill but also the intent that underlies it.

However, when a legislative reform process seeks to integrate pre-existing law from varying jurisdictions, as is the case with much of the Bill, there is always the risk that some beneficial provisions will be lost either in the effort to reach an acceptable political compromise, or because they are simply overlooked. This can occur despite worthy intentions to legislate to a 'best practice' standard. Further, such a process can mean that actual best practice deriving from new learnings and/or from international experience, rather than merely from existing practice in an Australian jurisdiction, is not incorporated because the exercise of harmonising existing laws is difficult enough, and leaves little appetite for new initiatives.

For these reasons, Consumer Action does have some misgivings about some aspects of the Bill. For some consumers (particularly those in Victoria, which has arguably been the legislative trendsetter in Australian consumer protection for at least a decade), some important consumer protections will be either completely lost, or at best weakened.

Consumer Action strongly feels that these deficiencies should be addressed in the Bill.

As the Minister has stated, the Australian Consumer Law is the most far-reaching consumer law reform in at least a generation. Given the importance of the reform, it is imperative that no Australian consumer be left worse off. The history of consumer protection is one of gradual advancement, with much work yet to be done. To fall back at such a juncture would be highly regrettable.

Specifically, Consumer Action urges reconsideration of the legislation as it currently deals with:

(a) requirements of legibility and clarity for consumer documents;
(b) the definition of harassment and coercion, and the degree to which certain activities are prescribed;
(c) the characterisation of unsolicited consumer agreements; and
(d) the requirements for lay-by sales.

Further, Consumer Action reiterates its views on the continuing and unnecessary exclusion of insurance contracts from the unfair contract terms provisions.

In addition to discussing and proposing recommendations on the above key issues, this submission seeks to highlight all areas of the Bill that are of concern to Consumer Action or of particular note from a consumer perspective.

Our comments are detailed below. We do not comment specifically on the provisions relating to country of origin representations or the new national product safety regime, but we support the submissions made by CHOICE on these issues in its submission to the Committee.

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. Amongst other work, in 2008 we published a comprehensive report into the consumer protection provisions of the *Trade Practices Act 1974* (Cth) (the **TPA**) and how they compared with international best practice provisions, looking at developments in the comparable jurisdictions of the United Kingdom, the United States, Canada and the European Union.[1]

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 with changed financial circumstances due to job loss or reduction in working hours, or experiencing mortgage or rental stress as a result of the current economic climate.

Consultation on the Australian Consumer Law

As a preliminary matter we note that, in contrast with the ACL 1 Act, regardless of one's views on the content of the current Bill, in our view the provisions have not been subject to appropriate public consultation.

A consultation draft Regulation Impact Statement (**RIS**) on the Australian Consumer Law was released for comment on Monday, 16 November 2009.[2] This was the first public indication of the proposed details of the content of the new provisions, yet submissions were sought by Friday, 27 November 2009, giving stakeholders less than two weeks to grapple with the details of the over 100 page document. A decision on the content of the new provisions was then made by the Ministerial Council on Consumer Affairs at its meeting on Friday, 4 December, one week later. It cannot be seriously argued that stakeholder views were either properly sought or considered on the basis of this timeline.

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[1] Consumer Action Law Centre, *The consumer protection provisions of the Trade Practices Act 1974: Keeping Australia up to date*, May 2008, available at www.consumeraction.org.au/publications/policy-reports.php.
[2] Australian Government - The Treasury, *The Australian Consumer Law: Consultation on draft Regulation Impact Statements*, 16 November 2009.

Moreover, no exposure draft of the Bill was released for public comment prior to the introduction of the Bill into the parliament and now its referral to the Committee for inquiry. While Consumer Action is very keen to see reforms to national consumer laws progressed promptly, in our view at 394 pages long (and accompanied by an Explanatory Memorandum that runs to over 660 pages) the Bill would have been a prime candidate for some sort of exposure draft consultation process prior to introduction.

In fact, the Implementation Plan to the *National Partnership Agreement to Deliver a Seamless National Economy* expressly commits the Commonwealth to undertake public consultation on the final draft of the Australian Consumer Law and administrative arrangements from April to June 2010 before enacting the legislation by the end of 2010.[3] This commitment has not been adhered to.

A good example of where further consultation would have been useful is in relation to the drafting of the definition of 'consumer'. The definition in s3 of the proposed Australian Consumer Law in Schedule 1 of the Bill defines a consumer principally by reference to whether the goods or services were of a kind ordinarily acquired for personal, domestic or household use or consumption. This is similar to the current definition under the TPA except that the TPA also considers someone a consumer if the price of the goods or services did not exceed $40,000, regardless of their nature. This category of 'consumer' has been removed but the implications have not been publicly scrutinised, for example, whether household consumers buying goods such as trade tools or commercial fridges for personal use will be adequately protected or whether sole traders using goods partly for business and partly for personal purposes will be protected.

Positive reforms in the Bill

As stated above, Consumer Action generally supports the Bill and the intent behind it, including the reforms that were enacted in the ACL 1 Act and are re-included in the current Bill.

One of the new aspects of the Bill is that it changes the title of the TPA to the *Competition and Consumer Act 2010*. We support this name change as an important recognition of current best practice understandings in this area that both competition and consumer protection laws mutually support a well functioning and fair market. The new title also better reflects that the law contains both competition or trade practices provisions and consumer law provisions.

We are also pleased to see important new consumer protection provisions included in national consumer laws for the first time. For example, s42 of the Australian Consumer Law in Schedule 1 proposes a new protection to ensure that consumers provided with unsolicited services are not liable to pay for those services. Such a protection in relation to unsolicited goods has existed in the TPA for some time without the matching protection for unsolicited services.

[3] Council of Australian Governments, *National Partnership Agreement to Deliver a Seamless National Economy*, February 2009, Attachment A – Implementation Plan, updated 2 July 2009, p5.

As another example, we support the adoption of a provision prohibiting multiple pricing in s47 of the proposed Australian Consumer Law, based on the current New South Wales (**NSW**) *Fair Trading Act 1987* (s40) and the Australian Capital Territory (**ACT**) *Fair Trading Act 1992* (s22) provisions. This provision does not currently exist in Victoria thus, in our legal practice, Consumer Action does not have direct experience of applying dual or multiple pricing protections. However, we do receive enquiries from Victorian consumers about their rights in the situation in which two prices are stated to apply to a product. We believe that a clear and easy to apply protection will be of benefit to all Australian consumers.

In a similar vein, Consumer Action supports the provision to require suppliers to provide a receipt for goods and services of $75 or more (s100(1)), or upon request for the purchase of goods or services of less than that amount (s100(2)). These provisions are further bolstered by proposed s101, which allows for the purchaser to request an itemised bill within 30 days of the transaction. These provisions largely replicate s161A of the Victorian *Fair Trading Act 1999* (the **Vic FTA**), although they go further in enumerating what constitutes an acceptable receipt, or '*proof of transaction*' (s 100(4)). Although such reforms may seem minor (and in the vast majority of consumer transactions, will be adhered to as a matter of course), they nevertheless provide important protection of fundamental consumer rights. It is laudable that the Australian Consumer Law has taken such a comprehensive approach to consumer protection.

Legibility and clarity of consumer documents

The Victorian *Fair Trading Act 1999* (**Vic FTA**) provides for a basic requirement that consumer documents be clear. It states at subsection 163(3):

> (3) A consumer document -
>
> (a) must be easily legible; and
> (b) to the extent that it is printed or typed, must use a minimum 10 point Times New Roman font, or a minimum font of equivalent size; and
> (c) must be clearly expressed.

The Vic FTA goes on to provide an enforcement provision to compel suppliers to comply with the above requirement, which applies to all consumer documents as defined by the Vic FTA. This covers consumer contracts and other notices or documents required to be given to consumers by the Vic FTA such as cooling-off notices (with the exception of consumer credit contracts, which are specifically excluded by subsection 163(2) and are covered by consumer credit laws).

By comparison, the Bill treats consumer contracts and other documents differently. At section *2 – Definitions* of the new Australian Consumer Law proposed in Schedule 1 of the Bill, the Bill defines the term *"transparent"* as:

> transparent:
>
> (a) in relation to a document - means:
>
> (i) expressed in reasonably plain language; and
> (ii) legible; and

(iii) presented clearly; and

(b) in relation to a term of a consumer contract - see section 24(3).

Subsection 24(3) is part of the unfair contract terms provisions. It states:

(3) A term is transparent if the term is:

(a) expressed in reasonably plain language; and
(b) legible; and
(c) presented clearly; and
(d) readily available to any party affected by the term.

For documents, the term "transparent" is applied throughout the Bill. This is because the Bill provides that certain documents required to be given to consumers by the Bill must be “transparent” – in relation to unsolicited consumer agreements (s79(f)), disclosure notices to advise consumers that goods are not of an acceptable quality (s54(5)), lay-by agreements (s96(2)), proof of transaction documents (s100(5)), and itemised bills (s101(5)).

However, it is important to note that consumer *contracts*, by contrast, are not required by the Bill to be transparent. The unfair contract terms provisions provide that an unfair term in a standard form consumer contract is void and this is a question of the substance of the contract term in question, not how it was disclosed. “Transparent” (as defined in s24(3)) is relevant here because, in deciding whether a term of a consumer contract is unfair, a court can take into account any relevant matters and, in particular, must take into account two specific factors – the contract as a whole and the extent to which the term is “transparent”. However, unlike under the Vic FTA, under the new Australian Consumer Law in the Bill there will be no positive requirement to ensure consumer contracts are, in fact, clear or transparent.

It is evident then, that the standards of legibility and clarity applicable to consumer documents under the Bill are lower than the equivalent standards under the Vic FTA.

First, the Bill does not require consumer contracts to be clear or transparent. This is a large drop in protection given that contracts are arguably the most common and important type of document consumers encounter in the general trading context. Secondly, the Bill’s transparency standard for documents is lower than the current Victorian standard.

Most significantly, the Vic FTA prescribes both a minimum font size (size 10 Times New Roman or equivalent size) and that documents be "*easily legible*". By comparison, the Bill simply requires that documents be "*legible*" and "*presented clearly*". Further, the Vic FTA requirement that documents be "*clearly expressed*" is arguably higher than the Bill's requirement that they be "*expressed in reasonably plain language*".

There is no obvious rationale for lowering the legal standards of legibility and clarity for consumer documents. Clear standards provide an effective mechanism to ensure full and proper disclosure of all consumer documents and terms, directly addressing information asymmetry between suppliers and consumers. Information asymmetry limits the capacity of consumers to make informed choices that genuinely reflect their preferences within the limits of their purchasing power.

A minimum font size standard, in particular, provides an objective and measurable criterion by which the appropriateness of a consumer document can be assessed, and is invaluable for enforcement purposes. Nor is it an onerous requirement to ask of suppliers, the practical reality being that if a document is "legible" and "presented clearly", then it will in most cases already meet a minimum 10 point font standard. Requiring documents to meet a specifically defined minimum standard simply makes this easier to objectively assess and enforce.

We assume that this more precise standard has not been adopted in the Bill because of the current trend to prefer regulation that is not “prescriptive”, typically because overly prescriptive regulation is seen as inflexible, imposing unnecessary costs and stifling innovation.[4] While we certainly agree that this can occur, best practice suggests that such concerns should be assessed on a case by case basis. In this instance, the only “innovation” that we can see a “minimum font size or equivalent” standard stifling is innovation in fine print. Such a standard does not prevent the use of electronic communications nor different styles, only unreadably small print.

By contrast, an objective and easy to assess standard substantially lowers costs for government agencies and consumers in seeking enforcement or remedies in relation to poor conduct in this area. Removing the current standard will increase costs for consumers and taxpayers. Far from being a justification for not prescribing this measure, the fact that a minimum font size is prescriptive should in this case encourage legislators to adopt such a minimum standard, as it provides far greater certainty than the terms currently employed by the Bill.

Further, we assume that the more precise font size standard, in particular, has been removed because the Productivity Commission explicitly chose this provision of the Vic FTA to illustrate the potential problem with over-prescriptive regulation in its comprehensive report on Australia’s consumer policy framework. In the report, the Productivity Commission made the point that some font styles could be in less than 10 point font size but be equally or even more readable than other font styles at 10 point size, yet their use would be outlawed because of the prescriptive criterion in the Vic FTA.[5] This would be true except that, unfortunately, the Productivity Commission’s report, published in April 2008, was incorrectly using the **outdated version** of s.163 of the Vic FTA. The previous version of the provision had mistakenly referred only to requiring a minimum 10 point font size but the current version, which came into force in February 2008 (before the Productivity Commission’s final report), clearly provides that the standard is 10 point Times New Roman font *or a minimum font of an equivalent* size. There is nothing unworkable about such a standard so it would be unfortunate if consumers stood to lose an important protection because the drafters of the Bill had not noticed this error.

Consumer Action strongly recommends that the Bill be revised to meet the better minimum standards for legibility and clarity of consumer contracts and documents currently employed by

[4] See, eg, *Rethinking Regulation*, Report of the Taskforce on Reducing Regulatory Burdens on Business, Australian Government, January 2006.
[5] Productivity Commission, *Review of Australia’s Consumer Policy Framework*, Productivity Commission Inquiry Report No. 45, Volume 2 – Chapters and Appendixes, April 2008, pp435-436.

the Vic FTA. Without this amendment, consumers will have no clear right to transparent contracts and a lesser standard of protection regarding the quality of other consumer documents which they must legally be given. This has the capacity to exacerbate the negative impacts of information asymmetry in the market and lead to poor consumer choices, as well as simply being unfair more generally. This would represent a clear rolling back of an important consumer protection, with no clear justification.

Recommendations:

Amend the Bill to require both consumer contracts and other documents required to be given under the Bill to be transparent, and to incorporate the standards of clarity and legibility for consumer documents currently utilised by the Vic FTA.

This could be achieved by amending the definition of *"transparent"* in the Bill to state:

transparent:

(a) in relation to a document - means:

(i) expressed clearly and in plain language; and
(ii) easily legible; and
(iii) presented clearly; and
(iv) to the extent that it is printed or typed, presented in a minimum 10 point Times New Roman font, or a minimum font of equivalent size.

(b) for the purposes of Part 2-3 - see 24(3)."

A provision should then be inserted into Division 4 of Part 3-2 (which deals with miscellaneous obligations relating to consumer transactions) to require consumer contracts to be transparent.

Harassment and coercion

A prohibition on engaging in physical force or undue harassment or coercion is currently contained in section 60 of the TPA and mirrored in the *Australian Securities and Investments Commission Act 2001* (the **ASIC Act**) and the State and Territory fair trading laws. It is retained in the Bill at section 50 of the Australian Consumer Law in Schedule 1.

However, two jurisdictions, Victoria and the ACT, also currently provide for an important additional subsection to the general prohibition.

The Vic FTA states at subsection 21(1):

> A person must not use physical force or undue harassment or coercion in connection with the supply or possible supply of goods or services to another person or the payment for goods or services by another person.

The section then goes on in 21(2) to enumerate a number of forms of conduct that are, prima facie, regarded as breaches of section 21(1) - without limiting the scope of the former clause.

The conduct enumerated by subsection 21(2) relates almost entirely to well known unreasonable debt collection practices, and serves to unequivocally define those practices as harassment or coercion.

The debt collection industry generates a significant number of complaints by often vulnerable consumers. Consumer Action has over a number of years represented a large number of consumers in disputes involving unfair debt collection practices, often directly invoking enumerated sub-clauses of 21(2) on behalf of our clients.

To give an indication of the protections provided by subsection 21(2), they state that conduct such as using documents made to look like official court documents, threats of disclosure of debt information to third parties and unreasonable communication with a debtor are undue harassment or coercion. The text reads in full:

> (2) Without limiting subsection (1) the following conduct is deemed to be a contravention of subsection (1)—
>
> (a) using a document resembling a court document or a Tribunal document or an official document to mislead a person in connection with a debt or the consequences of not paying a debt;
> (b) making a misrepresentation to a debtor about the consequences of not paying a debt or about the method of recovering a debt;
> (c) serving a summons which has not been issued;
> (d) impersonation of a bailiff or a member of the police force;
> (e) carrying a firearm within the meaning of the **Firearms Act 1996** or a dangerous article within the meaning of the **Control of Weapons Act 1990**;
> (f) use of a letterhead by a person which is liable to mislead the person to whom the letter is sent as to the identity, status or role of the person who used the letterhead;
> (g) disclosure or threat of disclosure of debt information, without the consent of the debtor, to other persons who do not have a clear and legitimate interest in the information;
> (h) unreasonable communication with a debtor;
> (i) any communication with a person under 18 years of age in relation to a debt, if the person is not the debtor;
> (j) doing or threatening to do any act that may intimidate, harass or expose to ridicule a debtor or a member of a family of a debtor;
> (k) refusal to leave a person's private residence or workplace when requested to do so;
> (l) contact with a debtor by a method which the debtor has asked not to be used, unless—
> (i) there is no other method available; or
> (ii) the contact is by way of an action issued through the court or the threat of an action which the person to whom the debt is owed is entitled to issue through the court and which the person intends to take.

These provisions were introduced specifically to deal with known examples of troubling conduct in the debt collection industry, and have proven to be extremely useful for the protection of consumers in debt collection matters in Victoria. The ACT provision includes similar examples of conduct relating to debt collection, although the Victorian provisions includes additional examples.

In the second reading debate on the Vic FTA, the Victorian Minister for Fair Trading noted that the drafting had been modelled where possible on TPA provisions in pursuit of uniform fair trading legislation across Australia, but also noted that the harassment and coercion provision had been modified from the then-existing provision and that it now included a list of examples of what constitutes harassment and coercion.[6] Then shadow Attorney-General, Rob Hulls MP, stated that:

> 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...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.[7]

Regulators have also acknowledged problems with conduct in the debt collection industry. For example, the Australian Competition and Consumer Commission (**ACCC**) and the Australian Securities and Investments Commission (**ASIC**) held a joint national phone-in day for consumer concerns about debt collection in July 2008. In May 2009, the Chairman of the ACCC noted in a speech to the debt collection industry that the continuation of unscrupulous debt collection activities by certain operators in the industry was causing great concern to both the ACCC and ASIC. In particular, harassment and coercion such as subjecting debtors to humiliating or intimidating conduct, contacting them excessively especially during unreasonable hours, and misleading and deceptive conduct such as incorrectly explaining the consequences of non-payment were noted.[8] These are the types of conduct listed in the Victorian provision.

By contrast, the Bill provides for the general prohibition but no specific examples. It states at section 50:

> **50 Harassment and coercion**
>
> (1) A person must not use physical force, or undue harassment or coercion, in connection with:
> (a) the supply or possible supply of goods or services; or
> (b) the payment for goods or services; or
> (c) the sale or grant, or the possible sale or grant, of an interest in land; or
> (d) the payment for an interest in land.

[6] Mrs Jan Wade, Minister for Fair Trading, Victorian Parliamentary Debates, Legislative Assembly, 25 March 1999, pp187-188.
[7] Mr Rob Hulls, Victorian Parliamentary Debates, Legislative Assembly, 21 April 1999, p526.
[8] Graeme Samuel, ACCC Chairman, *Debt collection, the financial downturn and the ACCC: current issues and challenges*, Launch of Australian Collectors and Debt Buyers' Association, 14 May 2009, Melbourne.

There is no further statement as to what conduct may or may not specifically constitute undue harassment or coercion under the Bill - and no explicit mention anywhere in the Bill of debt collection practices.

Whilst Consumer Action notes that existing case law will continue to apply and will inform interpretation of the Bill, it is highly regrettable that such a useful explicit enumeration of common and troubling debt collection practices has been excluded from the construction of "harassment or coercion" under the Bill. Given the regulators' limited practical ability to enforce all potential breaches of the law, in practice this is likely to leave Victorian consumers vulnerable to some practices when they would previously have been protected by the existence of clear and specific prohibitions in the Victorian law.

Again, this appears to be an unnecessary rolling back of consumer protection. Debt collection is an area where rights are finely balanced and the potential for intimidating consumers is clear. Thus rolling back consumer protection does not seem to have an obvious rationale - aside from a general legislative preference for broad terms over specific terms.

In fact, we agree that general prohibitions should be used in consumer protection regulation. However, from our experience, best practice in consumer protection regulation would employ a two-fold approach, using a general provision *coupled with* a non-exhaustive list of examples - a "general-plus-specific" model for regulation. This is best practice because it allows for the flexibility that a general provision brings in being able to address new or changing conditions or practices, but it also incorporates additional clarity because the examples provide guidance in the interpretation of the general provision as well as addressing known current problems.[9]

The debt collection practices highlighted by s21(2) of the Vic FTA are unequivocally undesirable. In broad terms, they speak against conduct designed specifically to intimidate, harass and coerce debtors to "scare" them into paying regardless of whether they have a legitimate reason for not paying or for negotiating alternative repayment arrangements, such as disputed liability or financial hardship. This includes impersonating law enforcement officers, imitating court documents and the wearing of fire-arms. It is perplexing that the Bill should not seek to explicitly maintain those protections.

Recommendations:

Amend the Bill to enumerate common unreasonable debt collection practices under section 50 of the Australian Consumer Law as conduct constituting harassment or coercion.

This could be achieved by importing the text of s21(2) of the Vic FTA into the Bill as a new subsection 50(3).

This would require some amendment of subclause (e), which currently reads:

[9] For further discussion see Consumer Action Law Centre, above n1, pp116-17, 138-41.

"(e) *carrying a firearm within the meaning of the Firearms Act 1996 or a dangerous article within the meaning of the Control of Weapons Act 1990,*"

as the references to State legislation would require amendment.

'Unsolicited' consumer agreements

"In-home" sales are sales conducted in the home of the purchaser, either through a solicited or unsolicited visit by a supplier or their representative.

The Bill purports to regulate in-home sales through provisions relating to "*unsolicited consumer agreements*", which are defined by section 69 of the Australian Consumer Law in Schedule 1 in the following terms:

(1) An agreement is an **unsolicited consumer agreement** if:

- (a) it is for the supply, in trade or commerce, of goods or services to a consumer; and
- (b) it is made as a result of negotiations between a dealer and the consumer:
  - (i) in each other's presence at a place other than the business or trade premises of the supplier of the goods or services; or
  - (ii) by telephone;

  whether or not they are the only negotiations that precede the making of the agreement; and
- (c) the consumer did not invite the dealer to come to that place, or to make a telephone call, for the purposes of entering into negotiations relating to the supply of those goods or services (whether or not the consumer made such an invitation in relation to a different supply); and
- (d) the total price paid or payable by the consumer under the agreement:
  - (i) is not ascertainable at the time the agreement is made; or
  - (ii) if it is ascertainable at that time—is more than $100 or such other amount prescribed by the regulations.

...

(3) An agreement is also an **unsolicited consumer agreement** if it is an agreement of a kind that the regulations provide are unsolicited consumer agreements.

By contrast, the Vic FTA regulates in-home sales through *Part 4 - Off-Business Premises Sales and Other Sales.*

The Victorian provisions provide important protections such as the requirement for in-home salespeople to obtain written permission to stay in the premises for longer than an hour (s62B), and a restriction on the hours during which in-home sales are legally permitted, unless the supplier has obtained prior consent to visit (s62A).

Importantly, and unlike the Bill, the Vic FTA does not distinguish between unsolicited and solicited in-home sales, but instead bases its protection solely on the context in which the interaction is occurring. To appreciate the significance of this distinction it is necessary to understand the nature of in-home sales themselves, which are often poorly understood.

Like debt collection, in-home sales have been a contentious area of consumer law for many years. Consumer Action and its predecessor organisations have acted for numerous consumers in disputes regarding in-home sales, and involving an array of products including house cladding, encyclopaedias, vacuum cleaners, water coolers, debt-reduction schemes and home security alarms.

In recent times, the most prominent good being sold through in-home sales has been maths educational software. As has been the case with previous waves of in-home sales, financially vulnerable consumers purchase the good for thousands of dollars - money they can often not afford - and usually with expensive finance. Consumers then seek assistance from Consumer Action when they are unable to make the required payments and wish to cancel the sales contract. The prices paid for the software packages often seemed quite inexplicable (particularly when related to the financial circumstances of the consumer), yet the purchases themselves are surprisingly common. In most cases, these in-home sales are 'solicited' by the purchaser, who has usually been approached from a supermarket booth, or has provided their details in a competition, and then been 'followed up' by the supplier for the purpose of arranging a time to visit.

In response to a spate of complaints regarding in-home sales of maths software, Consumer Action commissioned a report by Dr Paul Harrison - a behavioural psychologist based at Deakin University. The report is entitled *Shutting the Gates - An analysis of the psychology of in-home sales of educational software* (**Shutting the Gates**).

In *Shutting the Gates*, Dr Harrison concludes that allowing a trader into the home places the consumer at a significant psychological disadvantage to the supplier, and renders them uniquely vulnerable to manipulative marketing techniques. Surprisingly, this disadvantage can actually be exacerbated if the visit is 'solicited'. In effect, consumers may actually be *more* susceptible to high pressure sales techniques when the consumer has extended an invitation for the sales person to visit, than when they knock on the door unannounced.

Psychological defences that usually accompany an interaction between a supplier and a consumer are naturally weakened in the home environment, and the offer of an 'invitation' can result in an even greater blurring of the supplier/consumer relationship. This in turn can lead to poor purchasing decisions that are damaging to the consumer and which can appear quite irrational to the outside observer.

No consumer law can effectively legislate against all irrational consumer behaviour. However, consumer law can - and should - protect consumers in circumstances where suppliers take advantage of identifiable and systematic behavioural responses that result in manifestly poor and sometimes damaging consumer choices.

There is a danger then, that the Bill will expose consumers to undesirable supplier conduct by mistakenly distinguishing between 'unsolicited' and 'solicited' in-home sales scenarios, and assuming that if the interaction is 'solicited', then the consumer does not need protection.

Unfortunately, this false dichotomy has been assumed throughout the consultative process, which in turn makes significant redrafting difficult at this late stage. For example, the consultation draft Australian Consumer Law RIS discussed in-home sales almost entirely in terms of unsolicited direct selling, with an extensive discussion of the capacity for an unsolicited sales approach (in any context) to create an information asymmetry between trader and consumer, but did not even contemplate the scenario of in-home sales following a consumer 'invitation'.[10]

When the factors identified in this discussion are considered in relation to in-home sales, it becomes apparent that many of the features identified as characteristic of unsolicited selling[11] also apply to solicited in-home sales.

These include:

- that consumers cannot walk away from the situation;
- that traders use moral pressure to try to create an obligation for reciprocity;
- that the relationship between the trader and the consumer is not ongoing so the consumer has to make a decision quickly (i.e. they cannot simply leave the shop, and come back later), and;
- that in-home traders commonly play on the scarcity principle to encourage the sale - i.e. the goods are not available elsewhere.

Despite Consumer Action's misgivings surrounding the maintenance of a dichotomy between 'solicited' and 'unsolicited' in-home sales (and preference for the Victorian approach), we are aware that it is unlikely to be abandoned at this late stage. Accordingly, we suggest an alternative option to ensure that 'solicited' in-home sales remain effectively regulated by the Bill.

Defining "unsolicited"

Consumer Action is aware that Treasury is currently considering draft regulations to apply under the new *National Consumer Credit Protection Act 2010* (Cth).

The *National Consumer Credit Protection Act* regulates lending to consumers at a national level for the first time. It will generally require lenders and intermediaries to be licensed, but does include some exemptions. Probably the most common exemption will be the retail store credit scenario, whereby traders and stores arranging credit for retail purchases will be exempted from the requirement to be licensed, on the basis that the credit provider will be responsible for their actions.

Importantly, the draft regulation proposes that:

> The exemption [to be licensed] does not apply to a person if the supplying of goods or services to the consumer is the result of unsolicited contact with the consumer.

[10] Australian Government – The Treasury, above n2, pp16-25.
[11] Consumer Affairs Victoria (2009) *Cooling-off periods in Victoria: their use, nature, cost and implications*, Research Paper no. 12, 12.

The draft regulation goes on to state:

> ...unsolicited contact includes circumstances in which:
>
> (a) a consumer is contacted in relation to the supply of goods or services after providing his or her name or contact details to a person, and:
>   (i) the consumer did not provide his or her name or contact details for the predominant purpose of being contacted in relation to the supply of those goods or services; or
>   (ii) the consumer is not contacted within a reasonable period after making an inquiry in relation to the provision of those goods or services; or
>
> (b) a consumer is contacted, in relation to the supply of goods or services, on or from business premises that are not physically separate from premises regularly used by consumers for purposes other than being contacted in relation to the provision of those goods or services.

The above definition of an "unsolicited" contact would, under 'a', capture the scenario in which a consumer discloses their contact details by entering a competition. Under 'b', the scenario in which a trader obtains a consumer's contact details at a booth in a supermarket or similar location would also be caught.

Consumer Action strongly recommends that the Australian Consumer Law define the term "unsolicited" to include the above formulation as an effective method to cover many in-home sales scenarios which might otherwise be regarded as "solicited" - yet which nevertheless involve a high degree of information asymmetry.

As a separate issue in relation to telephone sales, we also strongly recommend that a third category or ‘c’ be included, that would cover circumstances in which it is the consumer who calls the dealer but this is in response to a ‘missed call’ on their telephone – left by the dealer as part of a series of marketing calls to consumers. “Missed call marketing” is known to occur in Australia and it would be unreasonable if a consumer unknowingly responding to a missed call that represented a unsolicited marketing contact and then entering into an agreement for the supply of goods or services was not entitled to the same level of protection as if they answered the initial unsolicited marketing call.

As outlined above, subsection 69(3) of the Australian Consumer Law in the Bill states:

> (3) An agreement is also an **unsolicited consumer agreement** if it is an agreement of a kind that the regulations provide are unsolicited consumer agreements.

This subsection provides an effective and straightforward administrative mechanism to incorporate the proposed *National Consumer Credit Protection Act* formulation into regulations for the Bill.

Consumer Action does emphasise, however, that this remains a second best approach which - despite significantly improving on the current Bill - will inevitably fail to capture all scenarios.

Other options for providing protection

In addition to the types of transactions covered by the "unsolicited" provisions, we have two comments to make in relation to the type of protection that could be provided.

Section 86 of the Australian Consumer Law in the Bill provides for a ten day "cooling-off" period for unsolicited consumer agreements. We have a view that cooling-off periods are usually limited in the protection they can offer, as consumers are often reluctant to admit a mistake and often seek assistance well after the end of the period. We believe that an "opt in" process that requires the consumer to confirm a contract (say within 2-3 days) would be more effective in preventing consumer detriment.

Second, we strongly support the requirement under section 62B of the Vic FTA for a salesperson to obtain written permission to stay in the consumer's home for over one hour, and then for each additional half hour. This requirement can provide a "break" in the sales process and provide the consumer with an opportunity to decide not to proceed and should not be underestimated as an effective measure against high-pressure sales techniques in the home. However, it has not been included in the Bill. We are unaware of any explanation for this absence.

Recommendations:

Amend the Bill to broaden the definition of "unsolicited consumer agreement" to incorporate in-home sales visits which may be regarded as "solicited" under the current Bill, but which nevertheless place the consumer at a significant disadvantage.

This could be achieved by regulation, making use of subsection 69(3) of the Australian Consumer Law in the current Bill and adopting the measures currently being considered in the draft regulations to the *National Consumer Credit Protection Act*, as discussed above.

Amend the Bill to broaden the definition of "unsolicited consumer agreement" to incorporate agreements made after a consumer responds to "missed call marketing", which may otherwise be regarded as "solicited" under the current Bill.

Amend the Bill to incorporate an opt-in process for in-home sales.

Adopt the Vic FTA measures requiring sales people to obtain written permission to stay in the consumer's home for over one hour.

Lay-by agreements

Consumer Action strongly supports the inclusion in the Australian Consumer Law of adequate provisions regulating lay-by agreements. Unfortunately, we do not believe that the current provisions in Part 3-2 Division 3 of the Australian Consumer Law in the Bill are adequate.

There are two reasons why we have strong views in relation to lay-by protections. First, it is critical that consumers, particularly lower and middle income consumers, have an alternative purchasing method to buying on credit (finance). Lay-by provides a means for consumers to afford a more expensive purchase through paying by instalments without having to become a borrower, so long as there is consumer confidence in the safety and fairness of paying using this method.

Secondly, past experience demonstrates that, in the absence of appropriate safeguards, there can be a lack confidence in lay-bys, and with good reason. For example, the report done in 1994 into lay-bys in Victoria by the Consumer Advocacy and Financial Counselling Association of Victoria (now the FCRC), *Why Layby?*, which preceded the current Victorian regulation, demonstrated that both consumers and suppliers were often confused about the specific terms and conditions of their lay-by agreement because there were no minimum standards and thus terms relating to cancellation and refund rights for both consumers and suppliers varied greatly from supplier to supplier. Traders faced problems in dealing with customer defaults and extra administration costs. Consumers also faced a range of problems, including being unable to obtain a refund and thus losing deposit and instalment payments, suppliers going into liquidation and contracts being cancelled without notice. Consumers who experienced financial hardship and thus became unable to complete payment of remaining instalments could also be left unfairly stuck – between being unable to complete the agreement and unable to cancel and obtain a refund of payments already made.[12]

The Bill's provisions lack the content necessary to adequately cover these sorts of issues – ones that we know, from experience, occur in relation to lay-by sales in the absence of appropriate regulation. Victoria, NSW and the ACT have legislated for more detailed requirements for lay-by sales agreements than the Bill provides, thus a majority of Australian consumers will be losing current protections if the Bill's provisions are passed without amendment.

Further, the consultation draft RIS explicitly proposed that more requirements for lay-by sales would be mandated,[13] but much of this detail has simply not been included in the Bill and there has been no explanation for this absence. The Explanatory Memorandum to the Bill merely states that at its December 2009 meeting the Ministerial Council on Consumer Affairs agreed to include provisions relating to the formation of lay-by agreements, and that the provisions now in the Bill draw on the ACT, NSW and Victorian approaches, 'but are expressed in principles-based form, in keeping with the remainder of the [Australian Consumer Law]'.[14] The final RIS for the Bill is incorporated at the end of the Explanatory Memorandum and has changed the preferred option for lay-bys from one that includes specific requirements to a 'principles-based' option without properly disclosing that this is, in fact, different to the option consulted on in the draft RIS.[15]

Again, while we agree that principles-based regulation is often preferable to over-prescriptive regulation, an unthinking bias in all circumstances against regulation that provides for some

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[12] Consumer Advocacy and Financial Counselling Association of Victoria, *Why Layby? A Report into Layby in Victoria*, December 1994.

[13] Australian Government – The Treasury, above n2, pp55-58.

[14] Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010: Explanatory Memorandum, p234.

[15] As above, p529.

prescriptive requirements is not helpful, and in this case is done without any apparent analysis of the costs and benefits of the current requirements, without public consultation and without regard to past experience.

In our view, several amendments should be made to bolster the lay-by provisions in the Bill.

Requirements for lay-by agreements

First, the Bill requires lay-by agreements to be in writing and "transparent" (as defined in section 2 of the Australian Consumer Law) and for the consumer to be given a copy of the agreement. We agree that these should be core requirements (subject to our concerns about the adequacy of the transparency requirement discussed earlier).

However, the provisions should also require lay-by agreements to include certain essential information:

- a description of the goods being purchased;
- the total price payable;
- the deposit paid and the balance outstanding;
- the dates when instalment payments are due;
- any cancellation charges;
- the rights of the consumer; and
- the supplier's details.

Each of these items of information is required to be included in a lay-by agreement in two or more of the jurisdictions that currently regulates lay-by sales (except for the supplier's details, required only in Victoria). These are also the items of information that the consultation draft RIS proposed should be required to be included in a lay-by sales agreement. They provide an appropriate minimum standard for lay-by sales agreements, responding to the confusion that can arise about terms and conditions otherwise, as highlighted in the *Why Layby?* report.

Cancellation of lay-by agreements

Secondly, the Bill sets out the requirements for termination of a lay-by agreement by either the consumer or the supplier, including the effect of termination.

Consumers can terminate at any time before delivery and are then entitled to a refund, except that the supplier can keep or charge a termination charge as long as the supplier has not breached the agreement. The supplier must ensure that the amount of any termination charge provided for in a lay-by agreement 'is not more than the supplier's reasonable costs in relation to the agreement' (s97).

Suppliers can only terminate in limited circumstances, reflecting the current Victorian provision (Vic FTA s86), and cannot keep a cancellation charge if they terminate. Section 98 of the Australian Consumer Law in the Bill states:

98 Termination of lay-by agreements by suppliers

> A supplier of consumer goods who is a party to a lay-by agreement must not terminate the agreement unless:
> (a) the consumer who is a party to the agreement breached a term of the agreement; or
> (b) the supplier is no longer engaged in trade or commerce; or
> (c) the consumer goods to which the agreement relates are no longer available.

However, under the Victorian, NSW and ACT laws, there are more requirements around cancellation rights and responsibilities than in the Bill, which better address the sorts of issues noted in the *Why Layby?* report relating to both trader problems and consumer problems.

For supplier cancellations, the Vic FTA goes on to state that the supplier must give the consumer notice if they intend to cancel because of a breach (for example being late with a payment) or because they are going to stop trading. The supplier must give a consumer 14 days to rectify a breach before cancelling. If stopping trading, they must give the consumer 7 days to complete the lay-by or must cancel the lay-by (meaning the consumer must be refunded).

The NSW laws only allow a supplier to cancel if the consumer breaches the lay-by agreement. They also require the supplier to give the consumer notice so that the consumer has an opportunity to rectify the breach, in this case 7 days. The ACT laws do not limit the reasons why a supplier may cancel a lay-by agreement but still require the supplier to give the consumer notice (14 days) so that the consumer can pay the balance owing, in which case the supplier must deliver the goods.

By contrast, the Bill does not require a supplier to give the consumer notice before termination. The consultation draft RIS for the Australian Consumer Law had proposed that suppliers must give consumers notice in writing of cancellation with 7 days to rectify a breach or cancel or complete the lay-by.[16] However, this requirement has been excluded in the Bill without explanation.

This means that, in future, consumers may be given no opportunity to deal with a cancellation of a lay-by ahead of time. In our view, cancellation without notice, one of the specific problems identified in the *Why Layby?* report, is patently unfair and a backward step for consumers. The Bill should require suppliers to give a consumer notice of cancellation and an opportunity either to rectify a breach or complete the lay-by agreement as relevant.

The existing jurisdictional lay-by laws also provide more guidance about what can be retained by the supplier as the reasonable costs of cancellation of a lay-by agreement by a consumer.

Both the Vic FTA (s90) and the NSW *Fair Trading Act* (s60L) state that the cancellation charge must not exceed an amount that reimburses the supplier for reasonable selling costs (including storage costs and administrative expenses) and any loss of value of the goods between the time when the lay-by was entered into and cancelled. The ACT laws allow a supplier to keep or charge an amount for storage costs, selling costs and any loss in value of the goods.

[16] Australian Government – the Treasury, above n2, p56.

The Victorian and NSW laws also link the right to a cancellation charge to the upfront requirements around the lay-by agreement. A supplier cannot charge or keep a cancellation charge at all unless they gave a copy of the lay-by agreement to the consumer and the agreement complied with the requirements, for example setting out any cancellation charges. Also importantly, the Victorian and NSW laws provide that the onus is on the supplier to establish reasonable selling costs and any loss of value of the goods.

The Bill, by contrast, does not provide any specification as to what are a supplier's reasonable costs, and worse it does not place the onus on the supplier to establish that the costs they are claiming are indeed reasonable. This will put a consumer bringing a claim for a lay-by refund in the virtually impossible position of being the party bearing the onus of proof even while they cannot be in a position to know or prove what the other party's costs are. It is also unfair that suppliers can charge a cancellation fee under s97 of the Australian Consumer Law even if they have breached s96 by not meeting the requirements for a lay-by agreement in the first place.

Recommendations:

Amend the Bill to require lay-by agreements also to include essential information, being a description of the goods being purchased, the total price payable, the deposit paid and the balance outstanding, the dates when instalment payments are due, any cancellation charges, the rights of the consumer and the supplier's details.

Amend section 97(3) of the Australian Consumer Law in the Bill to specify what costs constitute a supplier's reasonable costs for the purposes of a termination charge and that the supplier bears the onus of establishing what are reasonable costs.

This could be done drawing on the current Victorian and NSW provisions that incorporate reasonable selling costs, including storage costs and administrative expenses, and any loss of value of the goods between the time when the lay-by was entered into and terminated, and that set out the onus of proof in this regard.

Amend section 98 of the Australian Consumer Law in the Bill to add a requirement that a supplier, before terminating a lay-by agreement, must give the consumer notice in writing of their intent to terminate and 7 days to rectify the breach (if proposing to cancel for a breach) or to cancel or complete the lay-by (if proposing to cancel because of stopping trading).

Consumer guarantees

The Bill contains a significant reform in setting out a new national law for consumer guarantees. These provisions, contained in Part 3-2 Division 1 and Part 5-4 of the Australian Consumer Law in Schedule 1 of the Bill, replace the existing inconsistent TPA and State and Territory laws for statutory implied conditions and warranties.

While Consumer Action strongly supports this new, consistent and clearer national consumer guarantees law, we have some specific concerns about certain provisions of the law which we set out below. As the Bill represents the first time that the consumer guarantee law has been publicly available and given its importance, our comments in relation to inadequate consultation particularly apply here. We recommend some amendments to the provisions to improve the law.

We do recognise the many benefits to the new law. Apart from the benefits of harmonisation in itself, which should allow for easier and better communication of guarantee rights and responsibilities to both consumers and traders, we specifically note that the new law makes a number of improvements upon the content of the existing laws.

One of the most important implied conditions in this area has always been that goods will be of 'merchantable quality', but 'merchantable quality' has never been defined. Section 54 of the Australian Consumer Law will replace this with a guarantee that goods will be of 'acceptable quality' and goes on to define 'acceptable quality' in more detail. We support both the new terminology, which should be easier for lay persons to understand, and the setting out of clarification about what acceptable quality entails.

As noted above, the new provisions also extend consistent guarantee rights in relation to services to all Australian consumers and treat sales by way of an auction consistently with direct sales. It is an extremely welcome development that traders supplying goods will owe the same guarantee rights regardless of which sale method they use.

In addition, Part 5-4 of the Australian Consumer Law sets out clearly and comprehensively for the first time what remedies are available to a consumer if a trader fails to comply with a guarantee. A clearer distinction has been made between when a consumer is entitled to a refund or replacement (at their choice) and when a trader may first attempt to repair or rectify a problem, and obligations in relation to returning rejected goods are also specifically set out. Further, these consumer guarantee rights have been explicitly extended to people who are given goods as a gift under section 266. We support all of these reforms.

Exemptions from the consumer guarantees law

In the Productivity Commission's final report on its comprehensive review of Australia's consumer policy framework, the Productivity Commission specifically recommended against carve-outs for any sector of the economy from the new national generic consumer protection law.[17]

The Productivity Commission also recommended that a more detailed review of statutory implied conditions and warranties laws be undertaken. This occurred last year when the Commonwealth Consumer Affairs Advisory Council (**CCAAC**) undertook a review on the request of the Minister, including conducting a public consultation process, and provided a final report to the Minister in October 2009.[18] CCAAC also found that exemptions for specific industries were not justified. It

[17] Productivity Commission, *Review of Australia's Consumer Policy Framework*, Productivity Commission Inquiry Report No. 45, Volume 2 – Chapters and Appendixes, April 2008.
[18] Commonwealth Consumer Affairs Advisory Council (**CCAAC**), *Consumer rights: Reforming statutory implied conditions and warranties*, Final report, October 2009.

specifically recommended that the existing exemption for architects and engineers be removed, and that no exemption be made for electricity, gas or telecommunications.[19]

The Bill's consumer guarantee provisions have removed the exemption for architects and engineers, which we support. However, section 63(b) of the Australian Consumer Law provides that guarantees relating to services do not apply to insurance contracts, and section 65 provides that guarantees do not apply to gas, electricity or telecommunications services that are of a kind specified in regulations.

As a matter of general principle, Consumer Action strongly disagrees with carve-outs from the general consumer law for any specific industry. If they are to occur, it should be on the basis of clear and compelling evidence. In contrast, there is little to no evidence offered in support of these exemptions, in circumstances in which the exempted industries provide key or essential consumer goods and services.

In terms of the arguments in favour of a carve-out for electricity and gas supplies in particular, it is often claimed that energy services can fail because of events outside the control of the supplier, including catastrophic events, and it would not be fair to penalise the supplier in such circumstances. It is lucky then that the consumer guarantee laws clearly do not apply to such circumstances – the guarantees are only breached if the supplier has done something wrong such as not exercising due care and skill or not providing safe goods and services. Failures beyond a supplier's control are, by their nature, not required to be compensated for by the consumer guarantees.

Further, we agree that there are existing industry-specific energy retail laws and a proposed new national energy consumer law (the National Energy Customer Framework, or NECF), in the development of which Consumer Action has been heavily involved. None of these laws provide for basic standards for energy goods and services. In fact, in several areas the draft NECF does not propose to legislate precisely because general consumer protection laws will apply, including not only on this issue but also in relation to unfair contract terms and various marketing and unsolicited selling obligations.

It is inevitable that in developing generic consumer or market laws, governments are faced with special pleadings from industries seeking exemptions. We are unaware of any compelling reason for any of these exemptions and recommend that they be removed from the Bill. Further, it is concerning that section 65 allows the exemptions for electricity, gas and telecommunications services to be turned on or off by the Minister through regulations without further legislative change and the scrutiny this entails.

The Bill has also failed to make the current statutory implied conditions and warranties provisions in the ASIC Act (which apply to financial services) consistent with the new consumer guarantees provisions. Thus, for financial services the old and inadequate implied warranties regime will continue to apply. We discuss this further below.

[19] As above, pp120-122.

Extended warranties

The new consumer guarantees law does not address issues relating to extended warranties.

Extended warranties are described by CCAAC in the Issues paper for its review last year:

> Many people will be offered an extended warranty by a salesperson when they purchase a product. An extended warranty is an additional warranty some retailers sell to consumers to cover against product faults for a certain period of time. An extended warranty is a contract separate from the contract of sale for the product, which provides for the repair or service of the product. It is generally entered into at the same time, or very soon after, the contract for the sale of the product. A separate price or fee is payable for the extended warranty. Extended warranties are being offered for a wide range of products, including whitegoods, electrical goods and cars.
>
> The extended warranty may provide for repair, replacement or refund subject to its implied terms. If the implied terms of the warranty have not been satisfied, the consumer may not be entitled to claim on the warranty. For example, the warranty may only be valid for a certain period after the date of purchase; it may not cover accessories; it may not cover the fair wear and tear of the product; special requirements may first need to be satisfied (for example, regular servicing or maintenance); additional charges may apply (for example, call-out fees, labour costs, costs for additional parts and freight charges); there could be a limit on the number of claims that can be made; and there could be other exclusions or restrictions.
>
> The extended warranty may or may not be in addition to any manufacturer's warranty for the product. Neither an extended warranty nor a manufacturer's warranty can replace, restrict or modify the basic statutory warranties and remedies that are provided to consumers when purchasing goods and services.[20]

CCAAC recognised a range of problems with extended warranties, including around the sales environment for extended warranties and consumer awareness of their statutory rights.[21]

Consumer Action agrees. We believe that many consumers are paying a high price for extended warranties without the opportunity to consider the product's costs and benefits, because they are offered at the last minute in the retail sales process, just as the consumer is about to pay for goods. The warranty or cost of the warranty is rarely mentioned during the sale process and very little, or inaccurate, information is provided by sales staff. Consumers are focussed on purchasing the item and pay little attention to the cost of the extended warranty, which the salesperson is often very eager to sell. There seems to be little competition in the extended warranties market and we believe that commissions paid to retailers to sell the product can be considerable. We suspect that higher cost warranties could actually be more attractive to retailers because the commissions are likely to be higher, leading to reverse price competition.

However, the Bill does little to address these issues. The Explanatory Memorandum to the Bill states that CCAAC found that Australia does not need special laws dealing with extended

[20] Commonwealth Consumer Affairs Advisory Council (**CCAAC**), *Consumer rights: Statutory implied conditions and warranties*, Issues paper, July 2009, p25.
[21] CCAAC, Final Report, above n18, pp81-89.

warranties and that improved awareness of statutory consumer guarantees will enhance the ability of consumers to make informed decisions regarding extended warranties.[22]

What CCAAC actually found was, first, that the evidence suggests extended warranties may not be justified in some cases and greater consumer awareness of statutory consumer guarantees should, in many cases, reduce consumer perceptions about the need for extended warranties where they are not justified, but also secondly that the issues around extended warranties needed further review. CCAAC proposed that they be reviewed further by the consumer protection regulators as part of their review of the enforcement and administrative of the Australian Consumer Law agreed under the *Intergovernmental Agreement for the Australian Consumer Law*,[23] or earlier if required. CCAAC also found that the ACCC should consider a closer examination of the extended warranties market, in particular, the way in which extended warranties are sold.[24]

One new provision has been included in the Bill that relates to extended warranties. Section 29 of the Australian Consumer Law incorporates the specific prohibitions against false or misleading representations in relation to goods or services. The current prohibition against making ‘a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy’ has been retained as subsection 29(1)(m) and now includes a specific reference to this including the new statutory consumer guarantees under Part 3-2 of the Australian Consumer Law. A new prohibition has also been added at subsection 29(1)(n) to prohibit making:

> a false or misleading representation concerning a requirement to pay for a contractual right that:
>
> (i) is wholly or partly equivalent to any condition, warranty, guarantee, right or remedy (including a guarantee under Division 1 of Part 3-2); and
>
> (ii) a person has under a law of the Commonwealth, a State or a Territory (other than an unwritten law).

However, this would prevent only claims that a consumer had to pay for their existing statutory rights, which is conduct likely to be covered by s29(1)(m) in any case. It does not cover the typical extended warranties situation in which statutory rights are simply not mentioned at all. Instead, a salesperson will typically only talk about the extended warranty and the little information that may be given to the consumer may not necessarily be inaccurate, it will simply not include all of the information and time the consumer would need to make an informed decision.

In our submission to CCAAC we recommended that the Australian Consumer Law also require suppliers to give consumers a quote for an extended warranty valid for up to 30 days after the purchase and written information about the interaction of the extended warranty and statutory guarantee rights.

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[22] Explanatory Memorandum, above n14, p178.

[23] Council of Australian Governments, *Intergovernmental Agreement for the Australian Consumer Law*, 2 July 2009.

[24] CCAAC, Final Report, above n18, p89.

We also recommended that suppliers be required to disclose the commission they receive for the sale of the extended warranty and that a maximum cap be placed on those commissions. This would be a similar approach to that taken in relation to the sale of consumer credit insurance, which is also sold at the point of sale and was subject to similar problems. Since 1995 the sales commission for consumer credit insurance has been capped at 20% of the premium.[25]

We understand that these recommendations are unlikely to be incorporated into the Bill at this time. The Bill does not, however, represent an adequate attempt to address concerns relating to extended warranties and further work on these issues will be needed.

Enforcement

As a final point on consumer guarantees, CCAAC noted that consumer problems with the current approach to statutory conditions and warranties are significant and are likely to cost consumers billions of dollars each year.[26] It is also clear that the problems with statutory implied terms are not merely large, they are also systemic and embedded in the marketplace.[27]

In our submission to the CCAAC review, we pointed out that the problems in this area have two main causes. We agreed that the current laws lack clarity and this could be improved – the Bill tackles this cause. However, we also believe that there is a second and more important issue – a failure by regulators to take enforcement action to tackle widespread non-compliance with consumer rights in relation to products and services.

The Bill does not tackle this issue. The consumer guarantee provisions continue to rely largely on individual consumers taking individual legal action if a supplier fails to comply with their obligations. Experience shows that consumers, rationally, do not generally launch legal actions over small-value disputes. This approach also does not encourage improvements in systemic practices. Even if an individual consumer successfully enforces their contractual rights, this does not benefit other affected consumers or provide any incentive to traders to change their overall practices.

To address this problem, we recommended to CCAAC that:

- the regulators undertake a more active and strategic approach to enforcing traders' guarantee obligations including through better use of the prohibitions on misleading conduct and misrepresentations; and

- the guarantee rights, which the Bill provides are enforceable by consumers as individual rights, also be stated to be conduct obligations so that the regulators can undertake enforcement action in relation to breaches of guarantee obligations as they might for other breaches of the Australian Consumer Law.

[25] See National Consumer Credit Protection Act 2009, National Credit Code s.145.
[26] CCAAC, Issues paper, above n20, pp6-7.
[27] Consumer Affairs Victoria, *Warranties and Refunds in the electronic goods, white goods and mobile telephone industries*, Research Paper No. 17, May 2009, p65.

However, the Bill's provisions only allow for remedies to be sought by affected consumers (or people given the goods as a gift). In our opinion, further reforms to the national consumer guarantee law might be required in the future once the current provisions are in operation, if it is proven that the lack of a realistic threat of enforcement action leads to ongoing and widespread lack of trader compliance with their guarantee obligations.

Recommendations:

Remove sections 63(b) and 65 from the Australian Consumer Law in Schedule 1 of the Bill.

This will remove the carve-out from the general consumer guarantees law for insurance and utilities.

Recommend that the ACCC lead a review of the extended warranties market.

Unfair contract terms and the exemption for insurance contracts

The Bill includes the unfair contract terms provisions originally enacted by the ACL 1 Act. The Committee is aware that the only consumer contracts in Australia exempted from the unfair contract terms provisions are insurance contracts.

This is not achieved through a specific provision of the Bill. Instead, section 15 of the *Insurance Contracts Act 1984* (Cth) (the **ICA**) provides that a contract of insurance is not capable of being made the subject of relief under any other piece of legislation on the ground that it is harsh, oppressive, unconscionable, unjust, unfair or inequitable, and the Bill does not expressly amend or override this provision.

In your inquiry last year into the bill which became the ACL 1 Act, the Committee considered this issue in detail. The Committee ultimately agreed that consumers are not provided with adequate protection in insurance contracts under existing law. The final recommendation was that the government ensure that the ICA provides an equivalent level of protection for consumers to that provided by the unfair contract terms law, either by amending the ICA to achieve a harmonisation with the unfair contract terms law or by amending the unfair contract terms law to apply to insurance contracts.[28]

The Committee will note that the Bill does not address this recommendation by amending the unfair contract terms provisions. On the same day as the Bill was introduced into the parliament, a bill to amend the ICA was also introduced. Despite purporting to implement the 2003-5 ICA Review's recommendations (a claim that should be closely examined), this bill also does not address the Committee's recommendation, in this case by amending the ICA to achieve harmonisation with the unfair contract terms law.

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[28] The Senate Economics Legislation Committee, *Trade Practices Amendment (Australian Consumer Law) Bill 2009 [Provisions]*, September 2009, p68.

Instead, the Government has delayed in addressing the issue by releasing yet another options paper to consider the issue. One of the options is to permit the unfair contract terms provisions of the ASIC Act to apply to insurance contracts. We strongly urge the Committee to reiterate its support for ensuring that equivalent unfair contract terms protection for consumers is provided in relation to insurance contracts.

Recommendation:

Recommend that the Government extend equivalent unfair contract terms protections to insurance contracts.

Enforcement and remedies

The Bill sets out the enforcement and remedies provisions relation to the Australian Consumer Law in Chapter 5 of the Australian Consumer Law and largely remakes the current provisions (including the new provisions enacted by the ACL 1 Act). The infringement notice regime will remain in the primary legislation and is found in Schedule 2 of the Bill.

Consumer Action commends the drafters for remaking the general enforcement and remedies powers in a way which sets them out more clearly and in a logical and easy to follow manner.

We have only a few comments and recommendations to make in relation to the general enforcement and remedies powers, which are set out below. However, we also have some stronger concerns about the continued failure to apply an infringement notice regime to industry codes made under Part IVB of the TPA.

General enforcement and remedies provisions

The ACL 1 Act provided for pecuniary penalties to be available for contraventions of specified consumer protection provisions of the TPA by inserting a new section 76E into the TPA. The Bill remakes these pecuniary penalty provisions as a new section 224 of the Australian Consumer Law.

Under TPA s76E, the maximum pecuniary penalty amounts were expressed in terms of numbers of penalty units. This means that they are indexed to increase with inflation as the standard Commonwealth penalty unit amount is increased from time to time.

However, s224 of the Australian Consumer Law, in the Bill, the maximum pecuniary penalty amounts are now listed as fixed amounts – ones that use the current penalty unit amount. This means that, over time, their deterrent effect will diminish as they fail to keep pace with inflation.

This is not best practice in relation to legislation for civil pecuniary penalties. For example, the recent *National Consumer Credit Protection Act* expresses civil penalties in terms of penalty units. It will also make the provisions inconsistent with their mirror provisions in the ASIC Act under new section 12GBA, inserted by the ACL 1 Act, that will continue to express the maximum penalty amounts in terms of number of penalty units. Further, the infringement notices regime set out in Schedule 2 of this Bill sets out infringement notice penalty amounts for the same pecuniary penalty provisions, and continues to express these amounts in terms of number of penalty units.

We therefore recommend that s224 be amended to express all of the listed maximum pecuniary penalty amounts as the relevant number of penalty units.

S224 also lists new maximum pecuniary penalty amounts for contraventions of various new provisions in the Australian Consumer Law. Many of these are much lower than the existing general maximum amounts for other contraventions, which are $1.1 million for body corporates and $220,000 for individuals. We agree that the maximum penalty amount for provisions relating to lesser contraventions such as on multiple pricing, display notices, lay-bys and the provision of receipts do not need to be as high. However, we do not agree that breaches of the new unsolicited consumer agreement provisions in Part 3-2 Division 2 warrant lesser maximum penalty amounts than general. Further, they are substantially lower – only $50,000 for a body corporate and $10,000 for an individual, as compared with over 20 times that much for other unfair consumer practices. We recommend that the maximum pecuniary penalty amount for Division 2 of Part 3-2 be raised to equate with the general maximum amount.

We have also noticed a small drafting issue with section 237 of the Australian Consumer Law. Current section 87 of the TPA allows for the court to make orders to compensate, prevent or reduce loss or damage suffered:

> by conduct of another person that was engaged in (whether before or after the commencement of this subsection) in contravention of a provision of Part IV, IVA, IVB, V or VC...

Section 237 of the Australian Consumer Law will replace TPA s87 as it applies to consumer protection contraventions. However, in the redrafting a tiny change has been made – replacing the second 'in' above with an 'a' – and this changes the meaning of the provision. S237 now states:

> **237 Compensation orders etc. on application by an injured person or the regulator**
>
> (1) A court may:
>
> (a) on application of a person (the injured person) who has suffered, or is likely to suffer, loss or damage because of the conduct of another person that:
>
> (i) was engaged in a contravention of a provision of Chapter 2, 3 or 4; or
>
> (ii)...; or
>
> (b) on the application of the regulator made on behalf of one or more such injured persons;
>
> make such order or orders as the court thinks appropriate against the person who engaged in the conduct, or a person involved in that conduct.

The difference is that TPA s87 requires the specific conduct to have been conduct engaged in, in contravention of the law, but s237 mistakenly provides that the remedy is available if the loss or damage is suffered because of conduct by a *person that was engaged in a contravention*, in other words, any conduct by a person who engaged in any contravention We recommend that this be amended.

Infringement notices and enforcement of industry codes

Consumer Action supported the insertion of an infringement notices regime into the TPA by the ACL 1 Act. We believe that an appropriate infringement notices regime provides for a more useful and proportionate option to address minor breaches of consumer laws that might not justify large public expenditure and/or court action, but may have caused some consumer detriment justifying a response to encourage better conduct in future. Otherwise, a business can engage in these sorts of breaches with relative impunity, given that the likelihood of any enforcement action being undertaken to address them is very low.

However, the infringement notice regime does not apply to contraventions of any provision of an industry code made under Part IVB of the TPA.

Schedule 4 of the Bill is dedicated to inserting new enforcement provisions into the TPA to deal with contraventions of industry codes and we strongly support the provisions of this Schedule. However, this Schedule also does not insert an infringement notice regime into the TPA for industry codes.

Consumer Action continues to strongly advocate that an infringement notice regime is required for contraventions of industry codes under the TPA.

Industry code obligations are precisely the type of provisions that might be subject to minor breaches that do justify a proportionate enforcement response but do not necessarily justify full court action by the regulator.

For example, the relatively new national unit pricing laws for grocery prices are contained in an industry code made under Part IVB – the Retail Grocery Industry (Unit Pricing) Code of Conduct. If a supermarket displays incorrect and misleading unit prices on some shelves or uses the wrong standard units of measure, this may lead to consumer harm and does justify a response by the ACCC, but action to obtain injunctions and damages may be over the top in many circumstances. Without an infringement notices regime, the reality is that the likelihood of enforcement action for such breaches is low and grocery retailers are likely to be aware of this and act accordingly.

As another example, the Horticulture Code of Conduct is an industry code under Part IVB. This is the code that regulates trading between fruit and vegetable growers and wholesale traders such as supermarket businesses. The ACCC expressly recommended in its 2008 retail grocery prices inquiry that infringement notices should be made available under the TPA to enable this code to be more effectively enforced.[29]

Recommendations:

Amend section 224 of the Australian Consumer Law to express all of the listed maximum pecuniary penalty amounts in terms of the relevant number of penalty units.

Amend item 5 in the table of maximum pecuniary penalty amounts in s224(3) of the Australian Consumer Law to raise the amount from $50,000 and $10,000 to $1.1 million and $220,000.

Amend section 237 of the Australian Consumer Law to correct the drafting error in remaking TPA section 87.

Amend Schedule 4 of the Bill to include provisions inserting new provisions into Part IVB of the TPA providing for an infringement notices regime for industry codes.

Application of the Australian Consumer Law to financial products and services

The model of consumer protection regulation in Australia gives ASIC responsibility for financial services regulation, including consumer protection. The consumer protection provisions in the TPA (and soon to be Australian Consumer Law) are therefore mirrored in the ASIC Act to apply to financial products and services. These consumer protection provisions are contained in Part 2 of the ASIC Act. There are also some provisions in Chapter 7 of the *Corporations Act 2001* (Cth), which regulates financial services and markets generally, that are also relevant.

The Bill creates a new Australian Consumer Law and in Schedule 3 it makes corresponding amendments to the ASIC Act and the *Corporations Act* to ensure that the consumer protection provisions applying to financial products and services remain consistent with the new Australian Consumer Law provisions.

However, Schedule 3 makes no amendments to the ASIC Act in relation to the Australian Consumer Law's new Part 3-2 Division 1 provisions on consumer guarantees, or to the ASIC Act or the *Corporations Act* in relation to the Part 3-2 Division 2 provisions on unsolicited consumer agreements. It also does not make amendments to the definition of 'consumer' under section 12BC of the ASIC Act to render it consistent with the new definition under section 3 of the Australian Consumer Law.

We do not understand why this is the case and no explanation has been given.

On consumer guarantees, the ASIC Act's consumer protection provisions do currently contain provisions implying warranties into contracts for the supply of financial services to consumers.

[29] ACCC, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008, p400.

These are contained in Part 2 Division 2 Subdivision E of the ASIC Act. Schedule 3 of the Bill makes no amendments to these provisions, meaning that they will not be consistent with the new national consumer guarantees law.

In fact, the Bill currently recognises the difference but does not fix it. For example, schedule 3 item 15 of the Bill amends s12DB(1) of the ASIC Act, which is the mirror provision prohibiting false or misleading representations. In the Australian Consumer Law, the two prohibitions on false or misleading representations in relation to any condition, warranty, guarantee, right or remedy (discussed above in the section on consumer guarantees) specifically include any guarantee under the consumer guarantees law. In the ASIC Act, the Bill will have them specifically include any implied warranty under section 12ED of the ASIC Act. Similarly, section 278 of the Australia Consumer Law provides for supplier and linked credit provider liability based on either a failure to comply with a consumer guarantee *or* a breach of an implied warranty under the ASIC Act. Thus, the Bill is aware of the inconsistency but has not remedied it.

We strongly recommend that Schedule 3 of the Bill be amended to make all the necessary amendments to the conditions and warranties provisions of the ASIC Act to ensure they are consistent with the rest of the national consumer guarantees law. Otherwise, the old and inadequate implied conditions and warranties regime will continue to apply solely to financial services.

On unsolicited consumer agreements, the door to door selling of financial products is generally banned outright by the anti-hawking provisions in Part 7.8 Division A of the *Corporations Act* (and in relation to consumer credit by s156 of the National Credit Code under the *National Consumer Credit Protection Act 2010*).

However, telemarketing and other unsolicited selling methods are allowed and are regulated in a similar but less detailed vein to existing State and Territory unsolicited selling provisions, which are being harmonised by the Australian Consumer Law. Financial products and services can carry huge implications for consumers and we believe that the regulation of their unsolicited selling by methods other than door to door selling should be regulated consistently with the new Australian Consumer Law Part 3-2 Division 2 provisions.

Recommendations:

Amend Schedule 3 of the Bill to include provisions replacing the current Part 2 Division 2 Subdivision E of the ASIC Act relating to conditions and warranties in consumer transactions with new provisions mirroring the relevant provisions of the consumer guarantees law in Part 3-2 Division 1 of the Australian Consumer Law in the Bill.

Amend Schedule 3 of the Bill to include provisions replacing the current provisions in the *Corporations Act* regarding the hawking of financial products via unsolicited telephone calls or contact (other than a meeting) with new provisions in either the ASIC Act or the *Corporations Act* mirroring the provisions relating to unsolicited consumer agreements in Part 3-2 Division 2 of the Australian Consumer Law in the Bill for all financial products and services including consumer credit, for non-door to door unsolicited sales.

Thank you again for inviting submissions on the Bill. Please contact us on 03 9670 5088 or at nicole@consumeraction.org.au if you have any questions about this submission.

Yours sincerely
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