

Submission to Senate: Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010

Legal Aid Queensland's ("LAQ") civil law services seek to make legal rights a reality for disadvantaged people. We provide community legal education, legal information, legal advice, extended assistance and casework services in relation to consumer issues.

We provide advice to approximately 50,000 people each year across all legal areas. Around 30% of those advices are in relation to civil law issues. We also have a specialist Consumer Protection Unit (CPU) with a focus on consumer credit which is staffed by 3 full time lawyers. That unit provides direct advice to over 1000 Queenslanders each year and conducts limited casework to the extent our resources permit. The unit gives priority to matters where there may be a more wide-ranging beneficial effect for all consumers and where clients have been victims of consumer injustices.

LAQ and the CPU welcomes the opportunity to comment on the proposed Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 ("the Bill") and have focused on Division 2 of the Bill relating to door to door sales and telemarketing as these provisions provide critical protection to the vulnerable consumers we assist.

Division 2

Unsolicited consumer agreements

LAQ strongly supports the inclusion of prescriptive provisions relating to door to door and telemarketing sales because the prescriptive door to door provisions that have been operating in Queensland for many years have proven very accessible and effective to obtain relief for vulnerable consumers from high pressure door to door sales.

In particular we support the longstanding provisions which are currently law in Queensland and replicated in the new law set out in the Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 ("the Bill"):

- A definition of "door to door" sales that is based on the location of the formation of the contract. ("away from business premises of the supplier");
- 10 day cooling off period for all door to door sales;
- Prescriptive written requirements that must be provided as part of any door to door sale. These requirements include warning that the person is entering into a contract and notice about the cooling off period that applies;
- Requirement to give cancellation forms. These forms allow cancellation within 10 days and/or within 3 or 6 months depending on the circumstances;
- Cancellation of the contract within 6 months if consumer states that they were induced to enter the contract as a result of a misrepresentation by the supplier.

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- The goods or services purchased cannot be supplied during the cooling off period; and
- No payment can be taken by the seller during the cooling off period.

The effect of the supplier breaching any of these prescribed obligations is:

- The consumer has 6 months to cancel (for significant breaches) and 3 months to cancel (for less significant breaches); and
- Where the consumer cancels within 3 or 6 months, the supplier or related lender cannot take legal action to recover payment unless they first take legal action to challenge the validity of the rescission of the contract and the consumer's view that the contract was a door to door sale.

Under the Fair Trading Act (Qld) 1989, where a door to door sale is cancelled, any tied continuing credit or loan contract is also deemed to be cancelled. This provision ensures that consumers are not only protected from the effects of high pressure door to door sales and marketing but are also protected from the financially debilitating effects of loans that they take out to pay for door to door products and services. The relief this provision brings consumers is highlighted by case Study 3 set out below and points out why the protections offered by section 83 and 88 of the proposed Bill should extend to tied credit contracts.

For this reason **LAQ does not support** excluding a tied continuing credit or loan contract within the meaning of section 127(2) and section 127(3) of Schedule 1 to the National Consumer Protection Act 2009 from the operation of section 83 of the proposed bill.

LAQ is concerned that the definition of "unsolicited agreements" in section 69 is not wide enough to capture agreements signed at home where suppliers have included in the terms and conditions of, for example, a competition entry to win a computer, an invitation by the entrant to visit them in their home for the purpose of selling a product.

It is critical that the regulations provide that agreements signed as a consequence of such practices are regulated under Division 2 of proposed bill. These practices designed to avoid protection are prevalent in Queensland eg recently some Queensland state school principals sent home forms for 'student assessment' to be returned to the class teacher which, if completed, allowed a supplier of math's software solicited entry to the student's home.

Door to Door and Telemarketing Sales

In our previous submission to An Australian Consumer Law – Fair Markets – Confident Consumers., we used a number of case studies to illustrate the harm to consumers of door to door and telemarketing sales and the critical need for prescriptive regulation to assist consumers exercising rights of cancellation. Further, we refer the Committee to the recent research paper *Shutting the Gates: an analysis of the psychology of in-home sales of educational software* released in March by Dr Paul Harrison of Deakin University. This research paper also highlights many of the issues we have raised.

The following case study of a person recently seeking assistance illustrates how the importance of these provisions are in protecting vulnerable consumers, who are otherwise unable to protect themselves from the marketing that targets them.

Case Study 1

Multiple door-to-door contracts

Ms K is a 45 year old single parent who is suffering from depression and is unable to work as a result. In the past 12 months she has welcomed at least 4 door-to-door salesperson into her home. She has signed up 4 separate energy contracts as a result of these calls. She has no idea who her current energy provider is. She is being pursued for non payment of a couple of different providers' unpaid accounts.

It seems likely that she will sign another contract if she is approached by another door to door salesman.

Telemarketing Sales

In our view the best strategy for preventing problems for vulnerable people who are entering telemarketing contracts, like the one highlighted below, is for similar requirements to those which apply to door to door sales to apply to telemarketing sales. As a consequence we strongly support the increase in consumer protections for telemarketing sales.

Case Study 2

Telemarketing contract

Mr Y is a 48 year old man who lives at home with his ageing parents who are in their seventies. One of his parents requires a high level of support because they are suffering from a terminal illness.

Mr Y has an intellectual disability. Phone Company Z calls on a regular basis and offers him different phone products that he is unable to afford. The parents do not become aware of the new contracts Mr Y has entered into until the new bill arrives.

The periodic phone bills have been more than \$1000.00 at times. Even though the parents have been able to negotiate cancellation of some services without penalty, this has caused all of them enormous stress. It has also taken significant amounts of time to deal with the issue and placed a large financial burden on Mr Y and his parents because a large sum of money has been required to be paid out.

The capture of telemarketing contracts in the proposed legislation is very welcome.

Exclusion of tied continuing and loan contracts and Unsolicited Consumer Agreements

In this brief submission we rely on the case studies from our submission to An Australian Consumer Law – Fair Markets – Confident Consumers and new case studies to demonstrate the harm of excluding tied continuing credit and loan contracts from the operation of section 83 of the proposed bill.

We also highlight the need for regulations to define more broadly what is an unsolicited consumer agreement.

Exclusion of tied continuing and loan contracts

Section 127(2) and section 127(3) of Schedule 1 to the National Consumer Protection Act 2009 defines a tied continuing credit and loan. Sections 135 of the National Consumer Protection Act 2009 gives the borrower a right to terminate the loan contract if the sales contract is terminated.

The issue is whether the Bill provides the same protection as is currently provided by section 135 of the National Consumer Protection Act 2009 and section 69 of the Queensland Fair Trading Act 1989.

This is best illustrated with the following case study

Case Study 3

Purchase of Holiday Credits

Mr and Mrs B were visited in their home by an unsolicited representative of Credit Holidays at 6.15pm on a Friday night. He was selling holiday credits, which entitled the owner to reserve holidays at designated resorts in the Asia Pacific. Mr and Mrs B were not provided with Forms 1 and 2 as required by the Fair Trading Act in Queensland.

Mr and Mrs B could not afford to buy the credits outright from Credit Holidays, so they entered into a finance agreement with Company L for \$10,000, which allowed them to purchase access to their dream holidays. The repayments on the loan were \$300 per fortnight over a number of years.

After 4 weeks, Mr and Mrs B attempted to book a holiday using their credits and discovered that their access to their dream resorts was far more restricted than was originally made out.

Because the sales representative and Credit Holidays had breached the provisions of the Queensland Fair Trading Act and it was less than 6 months since the purchase was made, Mr and Mrs B were able to cancel their holiday credits contract. Under the Queensland legislation the related credit contract with Company L was void and company L could not continue to pursue Mr and Mrs B for the unpaid amounts under the finance contract. .

If the finance contract offered by Company L was a “related contract or instrument” under Section 83 of the Bill then Company L could take not legal action to recover the money, nor harass the person to pay nor list a default with a credit reporting agency under section 88.

However as currently drafted this provision will not assist Mr and Mrs B as their loan is a tied continuing credit or loan contract that is excluded from the operation of sections 83 and 88.

If, as in this case, the contract is regulated by the National Consumer Protection Act 2009, Company L can take legal action to recover the money, harass the person to pay and default list with a credit reporting agency. The consumer’s rights are dependant on the consumer defending any legal action and showing that the sales contract was validly cancelled and that Company L is a “tied credit provider”.

The process as set out in the National Consumer Protection Act 2009 can only be accessed effectively if the consumer is able to obtain assistance from a lawyer. If the consumer has not sought assistance from a lawyer or made a complaint to an external dispute resolution scheme,

before legal action is commenced by the financier, they would be required to run a very complex argument in Court about the relationship between the provisions of the legislation and those sections dealing with tied agreements under the National Consumer Protection Act 2009. In our experience many consumers do not seek assistance until legal proceedings have issued. In addition many of these claims are undefended because: consumers have limited access to legal representation; they are unaware of the issue of proceedings; they do not have access to an external dispute resolution scheme; and they believe there is nothing they can do about the claim.

It is very important that consumers have a right to cancel the sales contract and that any related instrument, including tied and continuing credit contracts, are also void.

This may raise the argument that the sections contained in the National Consumer Protection Act 2009 are unnecessary if the “tied contracts” were included in the definition of “related contract or instrument” in the proposed bill. There are other contracts regulated by Sections 125 to 135 of Schedule 1 to the National Consumer Protection Act 2009 that will benefit from those protections, for example contracts to buy cars where a “tied credit provider” provides finance for the purchase. For this reason the protections in both the Bill and the National Consumer Protection Act are required in order to adequately protect consumers.

In the circumstances we strongly recommend that tied continuing credit or loan contracts within the meaning of section 127(2) and section 127(3) of Schedule 1 to the National Consumer Protection Act 2009 are not excluded from the operation of section 83 and consequently section 88 of the proposed bill.

Definition of unsolicited consumer agreement

The definition of “unsolicited agreements” in section 69 of the Bill is not wide enough to capture all agreements signed at home where suppliers have not been invited specifically to sell a particular product.

We understand that it may be difficult to capture all agreements that are, from the consumer’s viewpoint, “unsolicited” but think it critical that there is a commitment to stamping out these avoidance practices that have been used by suppliers under the state regimes.

An updated case study used in our submission to An Australian Consumer Law – Fair Markets – Confident Consumers illustrates this point

Case Study 4 – Unsolicited Consumer Agreement

Consumer attempts to verbally cancel the contract

Mrs Smith enters into a contract at home to purchase china. She had been to a homeshow and filled in a competition to win a cookbook. The terms and conditions of entry include an invitation by her to the supplier to arrange a time to demonstrate cookware in her home. The china sales representative attends at her home to demonstrate the cookware.

Subsequently she signs a contract for thousands of dollars to purchase the cookware.

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Mrs Smith rings the company the next morning after she does her sums and realises she cannot afford to pay for the product. She tells the customer service officer that she wants to cancel as she can't afford the repayments. The customer service officer tells her that she needs to speak to a manager before she can cancel. She rings 3 or 4 times over the next 10 days but the manager is never available. In desperation she seeks legal advice and a letter cancelling the contract is sent within 10 days, but she does not keep a copy and the lender disputes receiving the cancellation.

Its clear from Mrs Smith's documents that she has received a cooling off warning but that the forms allowing her to cancel were not provided.

The china sales company argued that Mrs Smith had given an unsolicited invitation to them when she completed the competition entry.

The preferable legislative response is that all contracts negotiated away from the business premises of the supplier are subject to the door to door provisions. In our view the pressure on consumers is no less if the consumer has "invited" the supplier (arguably applicable in the example outlined above) and when the consumer has not solicited the meeting.

Alternatively these types of invitations should be viewed as solicited invitations and defined as such in the regulations.

Companies selling maths software have used schools to send out surveys to parents which asked parents to give name and address details that were used to make follow up appointments in the person's home. This practice has arisen in the past and again recently in Brisbane. The modus operandi of one company is to:

1. Facilitate an envelope enclosing a letter from the principal and a brochure being sent home with the student. The envelope asks the parents to respond within 48 hours.
2. The letter suggests that all students would benefit from this type of tutoring and asks parents to sign a form if they are interested in having a **free** home demonstration.
3. As a consequence of the return of the brochure accepting the offer families are contacted by the company offering to attend at their home to demonstrate the product.
4. The company then demonstrates the product in the home and the company aim is to have parents enter into a binding contract for the online tutoring product. Because the online tutoring product has a very high upfront cost, these costs are typically financed by another company. (the cost in some cases exceeds \$10 000 including the cost of credit)

The harm to parents includes finding themselves in long term financial hardship. The concern is the avoidance of the door-to-door consumer protection legislation as a direct result of the school's involvement in the marketing of the product.

Whilst arguably the definition of "unsolicited consumer agreement" in section 69 may include these circumstances as the invitation is for the purposes of a home demonstration rather than purchase of the product it would be preferable that these agreements are clearly regulated so vulnerable families have legislative protection from high pressure sales.

Case Study 5

Maths software

Mrs C a mother of three teenage children appears to have given her name to a maths software representative that had a display at a local supermarket.

Soon after a representative visited and as a result of the visit Mrs C and her husband signed a contract for \$10,000 maths software financed by a third party.

There were problems with the software from the beginning and the children never used the software. The parents made payments over 18 months as they were told a month after signing the contract that there was a separate finance contract and that they could not cancel that contract.

They could not afford the repayments as they had relatively low incomes and very high expenses, including three teenagers to provide for, mortgage and car repayments

Recently the finance company took legal to recover \$8,000.00.

Arguably Mr and Mrs C had cancelled the contract.

The sales company did not provide the cancellation notices.

If the finance company were successful, Mr and Mrs C's house was at risk of being seized and sold for the payment of this debt.

Contracts signed in the home need the protection of the provisions in Division 2 regardless of whether the invitation was "solicited" or "unsolicited", otherwise it is critical that the regulations provide that agreements signed as a consequence of such practices are regulated under Division 2 of the Bill.

Conclusion

Vulnerable consumers in Queensland will greatly benefit from the telemarketing and door to door reforms and if these minor amendments are made to the current form of the Bill those protections will be significantly enhanced.

Solicitors, Loretta Kreet, Catherine Uhr or Paul Holmes in our Consumer Protection Unit are able to elaborate on our submission or case studies if required on (07) 3238 3232.