TONY DAVIS & ASSOCIATES
Solicitors & Attorneys

Department of the Senate
Economics Legislation Committee
PO Box 6100
Parliament House
Canberra
ACT 2600

20 October 2011

Dear Committee Members,

Re: Discussion Paper on Uninvited Canvassing.

We, Tony Davis & Associates, are a law firm that has specialised in consumer protection matters since 1974 and have provided advice to hundreds of alternative marketing companies. As a stakeholder, we wish to participate in the Discussion Paper on Uninvited Canvassing.

We acknowledge that for some years in the past "fringe finance" companies sought to circumvent both State and Federal laws prohibiting credit hawking by offering commissions and rebates and attractive terms to alternative marketing companies. We believe this practice has been totally eliminated by the combined introduction of the Australian Consumer Law ("ACL") and the National Consumer Credit Protection Act ("NCCPA"). Under the NCCPA a finance company must now only use representatives that meet stringent requirements including character, police checks and credit law knowledge. In addition, finance companies must now engage in responsible lending and many of their executives must be trained to meet stipulated standards. We have been informed by finance companies that already the quality of loan applications has improved dramatically and the numbers rejected have declined, demonstrating the NCCPA is working as intended.

Under the ACL companies are now responsible for the adequate training of their representatives. Representatives can not engage in unconscionable conduct, must identify themselves and the purpose of their visit, have restricted hours of operation, must advise the consumer they must leave immediately when requested, and must provide a statutory notice to the consumer. Consumers have 10 business days in which to change their mind and can cancel the contract and up to 6 months for certain breaches. It is hard to imagine why more consumer protection that this is required.

Nonetheless, section 156 of the Draft Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011 aims to further address the risk to consumer from uninvited sales presentations. In

particular, consumers are said to be at greater risk of entering into unsuitable credit/lease contracts due to high-pressure sales tactics. Such risk is heightened in disadvantaged sectors of the community. The Discussion Paper mentions direct sellers using unethical practices such as increasing the price of goods dependent on the negotiating ability of the consumer. We have not heard of this practice in over 30 years.

Questions 1.1. and 1.2

While we support the principle of protecting vulnerable consumers, the section 156, even as redrafted, is a dramatic overkill. The objective of protecting vulnerable consumers is greatly disproportionate to the impact the proposed section would have on certain business within the alternative marketing industry. In particular, proposed section 156 has a wide ambit that will adversely impact on direct sellers offering high-quality products where finance is normally required. These include, but are not limited to, the following business types:

(1) Solar panel suppliers;
(2) Educational products;
(3) Home improvements;
(4) Water filter equipment;
(5) Vacuum cleaners;
(6) Energy suppliers;
(7) Security systems;
(8) Telecommunications;
(9) Computers;
(10) Massage equipment;
(11) Sports and health equipment;
(12) Cookware.

Implementation of the proposed section is likely to jeopardise the financial security of such businesses as it practice it effectively prohibits the unsolicited supply of goods and services in the home that are higher end priced goods. The result is likely to be increased unemployment. This is because, in many cases, the above businesses generate between 80 – 100% of their income from sales that would be prohibited by section 156.

Section 156 is also contrary to the consumers right to choose goods. Ideally, consumers should be able to choose products based on their personal taste, quality and price. Consumers should be at liberty to choose which business they purchase goods from – this includes the way goods are marketed.

We bring to the Committee's attention that alternative marketing provide many consumer benefits over traditional retail stores. For example:

Using alternative marketing techniques:

(a) Customers can examine and test the products in the privacy of their own home with the assistance of a fully trained demonstrator.
(b) Customers save time and money by not having to travel long distances to examine products. Customers do not need to leave their home unattended or arrange childcare etc. These features are particularly attractive in remote communities.
(c) Consumers can cancel all unsolicited consumer contracts within 10 business days, although in practise, all of our clients will accept cancellations for vastly longer periods.
(d) Often other members of the family can join in the decision to purchase a product or not;
(e) The sales agent will take as long as the consumer wishes to demonstrate and answer questions.

In contrast, in retail outlets:

a. Salespeople are often not trained in the all the products as there are too many.
b. To save costs, often only have check outs and minimal young inexperienced sales help.

c. Sales people often have limited time for each customer.
d. Often the product cannot be demonstrated in the store.
e. Customers can not test the product in the home environment until it is paid for and unpacked;
f. Customers are not given statutory rights to cancel within 10 business days. Businesses often impose restrictions on returning goods simply because customers change their mind.
g. Sales people may receive commission from retail sales.
h. If products are to be delivered there can be costs and other inconveniences involved.
i. Do not have authorised representatives that are required by law to be trained in the NCCPA and be registered with ASIC.

The right to choose and to make informed decisions are generally understood as necessary consumer rights and ultimately underpin the goal of protecting vulnerable consumers. These rights may be protected, and the objective achieved, in a manner that balances the interests of small businesses and our economy. They are not mutually exclusive.

2. What additional or different criteria would result in a more targeted application of the prohibition while still allowing these businesses to operate?

Protecting vulnerable consumers in a sustainable manner has already been achieved by the recent introduction of ACL and the NCCPA. In addition to the above registration requirements and enormous penalties and the transfer of jurisdiction to the Commonwealth.

<u>For the reasons expressed above, we believe for that section 156 is unnecessary and should be abandoned.</u>

In the alternative, we would recommend that the Committee consider:

(a) Amending the NCCPA to include a cooling-off period such as that found in corresponding New Zealand legislation. Section 27 of the New Zealand Credit Contracts and Consumer Finance Act 2003 grants consumers the statutory right to cancel a credit contract within 3 working days of receiving disclosure documents. The timeframe extends to 5 working days if disclosure documents are provided electronically, and 7 working days if sent by post.

If the above suggestion was adopted, it is submitted that for the sake of clarity in consumer understanding, the most a suitable cooling off period would be 10 business days beginning the next business day after the contract was entered. This would ensure consistency between the NCCPA and the ACL.

Further, consumers do not always understand the existing linked credit provider provisions such as clause 134 and 135 of the National Credit Code. Introduction of the suggested cooling off period would provide clarity to consumers.

(b) Requirement to inform customer of their cooling off rights, right to redress and provide a notice of cancellation.

We suggest it appropriate that customers cancel credit/lease agreements by providing the supplier/credit provider/lessor with written notice. We suggest that no statutory form in mandated under the NCCPA as this would leave room for a consumer to use the cancellation notice under the ACL and avoid unnecessary duplication and customer confusion.

(c) We also note that the section 156 (3) (a) is completely unrealistic as no consumer contacts a finance company predominately for the purpose of borrowing money unless they have already decided on the product they wish to acquire. In the case of alternative marketing, in practice, people must view the product first. Therefore, if this section was to remain there should be a requirement that the consumer

agrees for a demonstration of a product and understands that they will be offered the option of a credit facility with a cooling off period as to the products and finance.

Based on the above observations, if section 156 is to be inserted, we propose the following provisions and amendments be made:

- After the final sentence of s 156 (1) (c) insert the words:

  "Unless the provisions of s 156 (1A) are satisfied".

Section 156:

(1A) Section 156 (1) does not apply where a credit provider, a prospective lessor under Part II consumer lease or a supplier who has a linked credit provider or a linked lessor (personally or through an employee or representative):

(a) As soon as practicable after making an appointment and before first arriving at a persons place of residence, informs the customer that the goods or services to be supplied may be obtained using a credit or lease facility; and

(b) Before the agreement is made, gives information as to the following:

(i) the person's right to terminate the agreement and credit/lease sale during the termination period;
(ii) the way in which the persons may exercise that right.

We further suggest that the following provision be inserted into the NCCPA/Code:

Right to cancel consumer credit contract and consumer, notice of cancellation

(1) In relation to s 156, a debtor under a credit contract or Part II consumer lease may cancel the contract by providing written notice of the cancellation to the credit provider, consumer lessor under Part II consumer lease or a supplier of goods within 10 business days beginning the next business day after the credit agreement was entered ("termination period").

(2) Written notice of cancellation may be expressed in any way that shows the intention of the debtor to cancel or withdraw from the consumer credit contract or Part II consumer lease.

(3) Written notice of cancellation may be given -
(a) by giving it to the creditor, lessor or any agent or employee or representative of the creditor or lessor; or
(b) by posting it to the last known place of residence or business of the creditor or lessor or their representatives.

(4) Written notice of cancellation may be given in electronic form, whether by means of an electronic communication or otherwise, if the creditor or lessor consents to notices or other communications from the debtor being given in electronic form and by means of an electronic communication, if applicable.

Sincerely,

Tony Davis & Kelly Tudhope
Barristers/Solicitors
Tony Davis & Associates