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16 April 2010

Mr John Hawkins
Committee Secretary
Senate Standing Committee on Economics
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

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

Dear Mr Hawkins

Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010

Please find attached our submission to the Senate Economics Committee's inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010.

We would very happy to discuss our views with the Senate Economics Committee further. Please contact Bill Gallagher on (07) 3455 2347 if you have any queries.

Yours sincerely,

(...)

Jane van Beelen
Acting Executive Director – Regulatory Affairs
Public Policy and Communications

TELSTRA CORPORATION LTD

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

1 Introduction

We welcome the opportunity to comment on the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 ("**Bill**") and the associated Explanatory Memorandum ("**EM**").

We are committed to providing our customers with the highest levels of service delivery and customer satisfaction. To fulfil this commitment, we aim to comply with the spirit and intent of all consumer protection laws and have been following and participating in law reform in this area for many years. We have always been a strong supporter of nationally consistent consumer protection laws in Australia and believe that streamlining rights and obligations will foster greater certainty and confidence for consumers and businesses and will reduce the compliance cost of doing business.

However, it is important that the new framework does not seek to interfere with legitimate business activities or adopt provisions that are uncertain or will have unintended consequences. There are some provisions in the Bill that, in our view, represent a disproportionate response to the perceived issues and create the potential for regulatory overreach or consumer detriment.

2 Summary

As noted above, we support a uniform national consumer regime and the measures sought to be taken to protect consumers under the Australian Consumer Law ("**ACL**"). The suggested changes and comments set out in this submission are intended to reduce the prospect of uncertainty arising from the drafting of the ACL provisions for both consumers and businesses, prevent unintended consumer detriment, address inconsistencies with existing laws which may result in significant compliance costs or regulatory overreach, and strike the appropriate balance between the interests of consumers and businesses.

We submit that:

(a) Unsolicited consumer agreements

- the Bill be amended to include a clear statement that the regime only applies to individuals actually acquiring goods or services for personal, domestic or household use or consumption and excludes any person acquiring good or services for business use;
- States and Territories not be able to adopt different permitted hours for negotiating unsolicited consumer agreements and the permitted hours for door-to-door activities

on weekdays should align with the permitted hours for telemarketing and be 9am to 8pm (consistent with most existing regimes);

- where suppliers are held liable for contraventions by dealers, the defences available to criminal liability should also be applied to the civil penalty provisions;
- the 10 business day timeframe relating to the termination period should be changed to 10 days (consistent with most existing regimes);
- suppliers not be prohibited from supplying goods or services during the termination period (consistent with most existing regimes);
- oral and written notices be subject to the same informational requirements as termination notices, oral notices be directed to readily available numbers or locations nominated by the supplier and customers be allowed to send written notices to PO boxes;
- the supplier's obligation to give the customer the agreement within 5 business days be amended so that the obligation is focussed on the physical act of delivering, posting or emailing the agreement (rather than "giving") to the customer, which is consistent with how the customer may give termination notice to the supplier;
- existing State and Territory exemptions be included in the Bill directly or in accompanying regulations;

(b) Consumer guarantees

- a good or service should only be automatically rejected if it is used with a rejected good or a terminated service obtained from the same supplier and it was mandatory for the customer to use the good or service with the rejected good or terminated service;
- the obligation to provide refunds in respect of rejected goods and terminated services should be limited to the amounts already paid by consumers for services they have not used;
- there be greater clarity of new and unfamiliar terms (such as "major failure");
- suppliers be able to nominate where customers must direct their notice of intention to terminate a contract for beach of a consumer guarantee, provided that the nominated contact be readily available to consumers;

(c) Information standards

- the provisions relating to product information standards be limited to goods or services intended to be used, or likely to be used by consumers, consistent with the existing provisions; and

(d) Unfair practices

- businesses that use catalogues or other broad advertising be able to retract prices by means that are reasonable in the circumstances, rather than the inflexible retraction requirements currently stated.

We would be pleased to provide further input into the Committee's inquiry and to discuss the issues raised in this submission in further detail.

3 Unsolicited Consumer Agreements

General comments

We welcome a nationally consistent approach in relation to unsolicited consumer agreements - a view that we have expressed throughout previous rounds of consultation on the ACL.

Consumers should be protected against unscrupulous and invasive door-to-door and telemarketing practices. At the same time, the significant amount of legitimate business conducted today through door-to-door and telemarketing activities should not be unduly impacted by any changes.

We put forward the following suggestions that would both protect consumers and enable legitimate business activities to continue for the benefit of consumers.

Application of the regime to individuals and the supply of goods or services for business use

The definition of "consumer" in section 3 should be amended so that whether a person is a consumer is not determined by **the kind** of goods or services they acquire, but by **the purpose** for which they acquire those goods or services.

The regime should be focussed on protecting individuals acquiring goods or services for the purpose of personal, domestic or household use or consumption, not persons acquiring good or services for the purpose of business use (even if the goods or services are of a kind ordinarily acquired for personal, domestic or household consumption).

The current door-to-door and telemarketing regimes in Queensland, Western Australia, Tasmania, ACT, NSW and Victoria are limited to purchasers who are individuals or not bodies corporate. In our view, commercial entities do not need the protection of the unsolicited selling regime and it should only apply in circumstances where the purchaser is an individual. This would also be consistent with the national unfair terms regime, which is limited to "individuals".

We also do not consider the acquisition of goods or services for business use require, or are intended to receive, the protection of the unsolicited selling regime (regardless of whether the relevant goods or services are of a kind ordinarily acquired for personal, domestic or household consumption). Contracts for the supply of goods or services for business use are already excluded from the WA, ACT and Tasmanian regimes and some of the other states also touch on this issue (although the approaches are varied).

Defining "consumer" by whether a good or service is of a kind ordinarily acquired for domestic, personal or household use could also lead to a great degree of uncertainty for both suppliers and consumers. For example, Blackberry handsets are traditionally used by businesses to enable staff to access work-related emails. Arguably, individuals acquiring a Blackberry handset for their personal use may not have the benefit of the unsolicited selling regime on the basis that Blackberry handsets are not of a kind ordinarily acquired for personal, domestic or household use.

Permitted hours for negotiating unsolicited consumer agreements

An area of concern for us is a statement in the EM related to the permitted hours for negotiating an unsolicited consumer agreement in section 73 of the Bill. The EM states that permitted hours are “default calling hours only and may be varied by State and Territory legislation applying the ACL”.

In our view, this goes against the very object of this new law which is to provide a uniform framework that will provide both certainty for businesses and consumers and greater confidence for those contracting across state borders. The concept of allowing modification to permitted calling hours at a State or Territory level is contrary to the policy intent underlying the ACL.

We also believe the adoption of the Queensland times as the default permitted hours for negotiating an unsolicited consumer agreement on weekdays is not appropriate. Currently, the other jurisdictions permit door-to-door trading to take place between 9am and 8pm on weekdays. This timeframe allows an opportunity for consumers who work outside of the home during business hours to receive calls or visits regarding products or services that may be of benefit to them, and also allows sellers more flexibility to schedule contacts outside of standard meal times. This approach is also consistent with the telemarketing industry standards.

The Bill also provides for additional protection for consumers in a door-to-door context so that dealers in all States and Territories will now be required to clearly advise prospective customers before any negotiations commence that the dealer is obliged to leave immediately on request. Dealers are also required to leave the premises immediately when requested to do so.

In our view, the permitted hours for door-to-door activities on weekdays should be consistent with the permitted hours for telemarketing and be allowed between at 9am and 8pm.

Informing Person of termination rights

Section 76(a)(ii) of the Bill requires that before an agreement is made, the dealer gives the person information as to the way in which the person may exercise their termination right.

Given consumers will have a number of ways they can communicate a termination request, it would not be practical or useful to a consumer, to have the supplier read out all of these cancellation options before an unsolicited consumer agreement is made. Rather, it should be sufficient for consumers making an unsolicited consumer agreement to be advised during the call of their right to termination, and provide them with detail as to how they may do so in the termination notice.

We believe that section 76(a)(ii) should be deleted.

Liability of suppliers for contraventions by dealers

Section 77 of the Bill provides that if a dealer contravenes the dealer specific obligations in sections 73 to 76 and they are not the supplier of the goods or services to which the agreement relates, the supplier is also taken to have contravened those provisions. The EM suggests that this is to prevent suppliers from relying on a “middle man” to avoid liability for certain conduct.

We have a number of concerns with this provision and its effect.

First, there are inconsistencies in how strict liability is applied in the context of civil and criminal penalty provisions. For example, if a dealer breaches section 76, this is also a criminal offence of strict liability for the supplier by virtue of section 173 of the Bill. However, section 208 provides a defence for the criminal offence provisions where:

(a) the contravention was caused by the dealer as a result of an accident or some other cause beyond the supplier's control; or

(b) the supplier took reasonable precautions and exercised due diligence to avoid the contravention.

An equivalent defence does not exist in relation to the civil pecuniary penalty provisions and it is unclear why this is the case. This discrepancy is problematic for a supplier who by virtue of section 77 is taken to have contravened a provision where they were not actually aware of the acts of the dealer and took reasonable precautions to avoid such contravention. In fact, a supplier could be liable for a civil pecuniary penalty under section 77 where a dealer deliberately ignores clear instructions from the supplier about the way in which they should be conducting door-to-door activities.

Secondly, this is also inconsistent with the unsolicited telemarketing calls regime set up in the Do Not Call Register Act 2006 (Cth). This Act prohibits a person to make, or cause to be made, unsolicited telemarketing calls to a number registered on the Do Not Call Register. This is also a civil penalty provision. However, it is a defence under section 11(5) of that Act if the person who made the call or caused the call to be made took reasonable precautions and exercised due diligence to avoid the contravention.

Accordingly, if the Committee considers there to be compelling policy reasons to adopt this provision in its current form, we believe that the defences available under section 208 of the Bill for criminal penalty provisions should also be applied to the civil penalty provisions.

Termination period

Under the Bill, section 82 provides that the consumer has the right to terminate the agreement (in other words, to cool off on their decision to enter into the agreement) during a termination period which will usually be 10 business days. This is a shift from the State and Territory regimes which provide for 10 days[1] or 5 clear business days[2].

In our view, the termination period should remain at 10 days and not be extended to 10 *business* days. This will bring it into line with most existing State and Territory legislation and will not impose additional costs and regulatory burdens on a significant number of businesses who would need to transform their current practices to comply with a longer termination period.

We also believe that extending the cooling off period to 10 business days will introduce an element of inconsistency as the length of the termination period that applies to a particular transaction will differ depending on when an unsolicited consumer agreement is made. The table below highlights this inconsistency (taking into account the public holidays throughout April).

[1] Fair Trading Act 1999 (Vic) ss 63(1), 67H(1), Fair Trading Act 1989 (Qld) s 57, Consumer Affairs and Fair Trading Act 1990 (NT) s 97, Door-to-Door Trading Act 1987 (WA) s 3, Door-to-Door Trading Act 1991 (ACT) Dictionary, Fair Trading Act 1987 (SA) s 13, Door to Door Trading Act 1986 (Tas) s 3.
[2] Fair Trading Act 1987 (NSW) s 40E(1)

Date on which unsolicited consumer agreement is made	Expiry of termination period	Effective length of termination period
Thursday, 1 April 2010	19 April 2010	18 days
Thursday, 8 April 2010	22 April 2010	14 days
Thursday, 15 April 2010	30 April 2010	15 days

We also note the effective termination period proposed by the Bill is significantly longer than the current State and Territory regimes. Extending the termination period could be more detrimental to consumers should the Bill not be amended to permit supply during the termination period.

While we appreciate the need for reform in some areas to ensure consumers are protected from unscrupulous door-to-door and telemarketing practices, we do not consider a longer termination period necessary to further protect consumer interests. We believe that 10 days provides sufficient opportunity for a consumer to exercise their cooling off rights.

Prohibition on supply during termination period and accepting consideration

Under section 86 of the Bill, a supplier is prohibited from supplying goods or services to consumers, or accepting or requiring consideration (including trade-in goods) during the 10 business day termination period. Any goods or services supplied during the termination period will be treated as unsolicited goods or unsolicited services.

While there is a clear policy rationale to prohibit suppliers from accepting or requiring consideration during the termination period in some circumstances, we do not believe there is a strong policy argument for prohibiting suppliers from supplying goods or services within this timeframe. There is no such prohibition in the NSW, Victorian or ACT regimes.

Customers should be able to receive their goods or services prior to the end of the termination period, if they so wish. In fact, many customers will want or need to receive their goods or services as soon as possible and not need to wait the lengthy timeframes highlighted in the table above.

Utilities, such as electricity, gas or telephone are good examples where customers could suffer detriment if forced to wait to receive their service. This is particularly so if, for example, the customer agrees during an outbound telemarketing call to recontract an existing service for another term, and the service then has to be suspended until the termination period expires.

Some suppliers could also face consequences if the provision of a service is delayed. For example, we are subject to a range of legislation and regulation which prescribes certain timeframes for the provision of telephone services. These requirements are not technology neutral in that they extend beyond the provision of a landline. For example:

- As the Universal Service Provider, we are obliged to ensure that all people in Australia have reasonable access to standard telephone services. A standard telephone service at its simplest, is a service that provides voice telephony. It does not have its basis in any particular technology. We are required to submit to the regulator a plan that describes how we will fulfil our obligation as the Universal Service Provider. That plan highlights that we fulfil our obligations using a range of technologies such as satellite, fixed, wireless and mobile services.

- We are subject to the *Telecommunications (Consumer Protection and Service Standards) Act 1999* and *Telecommunications (Customer Service Guarantee) Standard 2000* which prescribe minimum connection timeframes for phone services and provide financial compensation (in the form of a customer service guarantee ("**CSG**") payment) to customers when these standards are not met.

  CSG legislation requires us to connect phones generally within 2 working days in metropolitan areas. If a customer is telemarketed and requests a new fixed line service to be connected, we may be in breach of the CSG standard and be required to pay compensation to the customer if we wait until the end of the termination period before connecting the service.

  In addition, the CSG legislation requires us to contact the customer and offer them an interim telephone service (eg mobile or satellite service) where we are unable to connect a standard telephone service or repair a standard telephone service within prescribed timeframes. These contacts may inadvertently be caught by the Bill and prevent the supply of temporary services within the CSG timeframes. Customers in remote areas may be particularly impacted.

- Under our Carrier License, we are required to provide a Priority Assistance service to residential customers with a person living at their home who has a diagnosed life threatening medical condition and whose life may be at risk without access to a fully operational phone service. If these customers need to connect their first standard telephone service or if there is a fault on their nominated line and their residence does not have any other working standard telephone service, the connection or fault must be attended to with the highest level of service practicably available at that time. This may also include provision of a temporary interim service (such as a mobile or satellite service) if the connection or fault cannot be completed quickly. Again, these contacts may inadvertently be caught by the Bill and prevent the supply of important services.

Moreover, many customers will want to use this period to evaluate the goods or services in deciding whether or not to terminate the agreement (for example, consumers may want to check if the mobile phone they have purchased is compatible with their personal computer at home). Accordingly, this provision may hinder rather than help protect consumer interests.

If the Committee considers there to be compelling policy reasons to adopt the provision in its current form, in our view contracts for services that are supplied to the consumer on a *continuing basis,* such as gas, electricity and telecommunications services should be exempt from this prohibition. This is discussed further below.

Also, in circumstances where a supplier needs to, or is otherwise permitted to, provide continuing services immediately, we believe that suppliers should be allowed to charge and recover *reasonable* fees for those services provided during the cooling off period. This would achieve a fair balance between a consumer's desire to have services delivered immediately but be able to exit contracts; and business' right to recover reasonable expenses for use of the services supplied quickly.

Termination notices (including oral and written notices)

Section 82(6) of the Bill does not impose any requirements in relation to the form or content of a customer's oral or written notice to terminate during the termination period. In our view, all forms of customer termination should give the supplier a minimum level of information in order to enable the supplier to give effect to that termination.

Accordingly, we recommend customers be required to provide the same information usually required in a termination notice when providing an oral or written notice of termination. Otherwise, it will be very difficult for suppliers to know with certainty whether the customer is actually wanting to cancel their contract (for example, a person pretending to be the customer may ring a supplier and purport to cancel another person's contract) or which contract the customer wishes to cancel should they have purchased multiple goods or services from the supplier at that time. In addition, requiring this information should not inconvenience the customer as only minimal information will be required and by this stage customers will have received the termination notices with the agreement documents.

We also recommend section 82 be amended to allow suppliers to direct oral notices to particular numbers or locations nominated by the supplier that are readily accessible by consumers and that oral terminations be limited to those numbers and locations. This is important to ensure large organisations that have a multiplicity of customer-facing points are able to effectively direct customer terminations to dedicated areas where they can be appropriately captured and implemented.

Finally, we are concerned that the operation of sections 84(2) and 79(d)(iv) of the Bill would exclude the use of PO boxes to provide termination notices. For large organisations, a PO box is a more effective means of collecting such notices and ensuring they are directed to the area responsible for implementing the request. Adding a PO box option will also give customers an additional and trusted means of providing termination notices. While we recognise that some customers may prefer to physically deliver the cancellation notices to a supplier, we are concerned that sections 82(4)(a) and (b) will allow customers to provide/send the written notice to the supplier's registered business address (if this address is the business address stated on the termination notice), which will not be an effective address to send such notices for large organisations. For example, we currently do not have a shop front at our registered business address. This will be the same for many large organisations. Accordingly, we recommend that section 82(4)(b) is amended to clarify that a supplier is able to nominate an alternate physical address on the termination notice (such as a PO Box) where customers should send their written notice of termination.

Parity in timing

While section 82(5) of the Bill provides customers with a safeguard against postal failures or delays (ie a customer's notice of termination is taken to have been given at the time of posting), suppliers are afforded no such protection in relation to the obligation to provide the agreement to a customer (where there is a telephone sale) within 5 business days.

Pursuant to section 160 of the *Evidence Act 1995*, a prepaid mailed item is presumed to have been received on the fourth working day after being posted. As a result, suppliers are left with only 1 business day to process the sale, generate, and send out the relevant agreements and notices to purchasers to be confident they comply. For larger suppliers who may use external sales agents across the country, this timing is extremely tight and unrealistic. It leaves no room at all for unexpected delays.

Given failure to comply with section 78 is also subject to pecuniary penalties and criminal sanctions under section 174, we believe suppliers should be afforded similar protection to consumers.

Accordingly, we recommend the supplier's obligation to give the customer the agreement within 5 business days be amended so the obligation is met when the supplier **initiates** the sending of the agreement and notices (via delivery, post or emailing) within 5 business days.

By removing the concept of "giving", this recommendation will not be detrimental to the customer's termination rights as the relevant termination period will continue to only commence when the customer receives the agreement.

Exemptions via Regulations

In determining the workability of the unsolicited selling regime, it will be important to also consider the proposed regulations, which have not been released. At this stage it is unclear what the Government intends to include in the regulations and what provisions it intends to adopt from the State and Territory regimes.

There are a number of provisions in the State and Territory regulations that exempt certain contracts from the State and Territory door-to-door sales and/or telemarketing regimes (or provisions within those regimes) that we believe are essential to avoid significant detrimental consequences to consumers, and should be adopted. Many of those regulations represent "best practice" and have been incorporated and relied on by a significant number of Australian businesses in their selling practices.

Ideally these exemptions would be incorporated into the body of the Bill, for ease of understanding and use by suppliers and consumers. However, if that is not feasible, they should be included in national regulations.

The key exemptions which already exist in some States and Territories and which we think are essential to a workable regime are as follows:

- **Exemption for the same kind of goods or services**

  If a contract for the supply of goods or services exists between a consumer and a supplier, a contract between the consumer and the supplier for the supply of goods or services that are the same kind as or similar to those supplied under the existing contract, should be exempt from the unsolicited selling regime. Provisions of this kind are currently in place in NSW, Victoria and the ACT.[3]

  We believe that where a supplier has an existing contractual relationship with a consumer and subsequently enters into a new contract for the supply of similar goods or services, this indicates preparedness on the part of the consumer to continue to deal with the supplier for those types of goods or services. Customers in this situation already have an established relationship with their supplier and should be permitted to contract freely for additional goods or services of the same, or closely related kind, and not risk having the delivery of their service interrupted.

[3] See Fair Trading Regulation 2007 (NSW) reg 104(1)(f), Fair Trading Regulations 2009 (Vic) reg 7(b) in relation to telephone marketing agreements, Door-to-Door Trading Regulation 2009 (ACT) schedule 2 item 2.

In addition, should customers decide they do not wish to be contacted by their existing service provider for marketing purposes, they already have the ability to opt out of such contact under Privacy legislation.

Specific examples of how the absence of such an exemption can be detrimental to customers are set out below:

1. During a telemarketing call to an existing customer who is having difficultly paying their bill, we identify that there is a less expensive plan more suited to the customer and will save them money. Unfortunately, the customer will need to continue to pay the higher charges for another 2-3 weeks, as this change to the same kind of service can't be provisioned before the end of the termination period.

2. A consumer who agrees to have a second phone line installed so their teenage children can use it for calls would have to wait 2-3 weeks for the service to be provisioned, despite the fact that the consumer is very aware of the terms of the contract from their existing relationship.

3. An existing mobile customer nearing the end of their contract term agrees to recontract for another term. If this new contract for the same or similar service is subject to a termination period, the customer's mobile service will need to be suspended for 2-3 weeks while the termination period ran its course, then reconnected.

A note to the NSW regulations suggests that an unsolicited selling regime is more suited where there is "cold calling" of potential customers and that this is not generally applicable where there is an existing contract between the supplier and the consumer unless the new contract relates to different kinds of goods or services to those supplied under an existing contract.

- **Exemption for maintaining or making a minor change to goods or services**

If a contract for the supply of goods or services exists between a consumer and a supplier, a contract between the consumer and the supplier for the purposes of maintaining the goods or services under the existing contract or making a minor change to the terms of the existing contract should be exempt from the unsolicited selling regime.

As noted above, consumers with existing contracts will generally have a preparedness to deal with the supplier further, especially in the case of their existing goods or services. Contracts for the maintenance of goods or services provided pursuant to an existing contract or for the minor modification for such contracts are currently exempt in NSW and exempt from the telemarketing regime in Victoria[4]. Moreover, it is better for the customer if suppliers can contact them to discuss the maintenance of goods or services they already have (for example, by making sure they are on a mobile plan that suits their usage and lifestyle, or allowing them to add on features / optional extras without the underlying service being interrupted).

[4] Fair Trading Regulation 2007 (NSW) reg 104(2), Fair Trading Regulations 2009 (Vic) reg 7(c).

We do not believe minor changes to an existing service are the intended focus of the Bill, which intends to address “high pressure sales”.

Specific examples of how the absence of such an exemption can be detrimental to customers follow:

1. A customer who lost their home in a bush fire is called and offered call diversion on their fixed line to their mobile service. The customer would have to wait 2-3 weeks for this “minor change” to be activated on their service.

2. During a door to door visit, a customer mentions that she is heading overseas on a week’s holiday and is concerned about how to easily stay in touch with family at home. She is offered international roaming on her mobile, a Telecard, and an International Value Pack option for her home phone so family can call her economically, but these minor changes can’t take effect until 2-3 weeks, and she will be home by then.

3. To ensure mobile customers are fully benefiting from their service, we may call certain customers who may have experienced unusually high call drop outs to determine the underlying cause. This may result in an offer of an enhancement to their service (eg. external antenna, swap out of handset). Customers experiencing difficulty who are advised there is an easy fix to their issues will not be happy if they must wait 2-3 weeks in order to receive the relevant equipment.

4. If, during an unsolicited outbound telemarketing call, a home phone customer agrees to purchase MessageBank® or wants to place call barring on their service to prevent another person in the household from running up their bill, they would need to wait 2-3 weeks before this change took effect.

5. If, during an unsolicited outbound telemarketing call, a mobile customer agrees to purchase a data pack to help reduce their data usage charges, they would need to wait 2-3 weeks before this change took effect.

6. If, during an unsolicited outbound telemarketing call, an internet customer agrees to upgrade their plan to a faster one or downgrade their plan to a more affordable one (that may or may not result in a minimum term restarting) or change how their service is delivered (eg. from dial up to broadband), they would need to wait 2-3 weeks for these minor change to take effect.

- **Exemption for the supply of services supplied on a continuing basis**

  As set out above, a contract for services that are supplied to the consumer on a continuing basis (such as a phone service or electricity) should be exempt from the prohibition of accepting payment during the termination period. This type of provision exists in the NSW and Victoria regimes.[5]

In addition, the exemption should extend to contracts for services and *associated goods* supplied to the consumer on a continuing basis.

Such contracts should be exempt from the prohibition of accepting payment during the termination period as well as the prohibition of supplying goods or services.

In our view, adopting these types of exemptions in the Bill or via national regulations (along with the other exemptions currently set out in State and Territory regimes), will not cause detriment to consumers because these exemptions work to the benefit of consumers. Not including these exemptions will also cause unnecessary cost and disruption to legitimate business activities and will increase cost of doing business, ultimately to the detriment of consumers.

Consumers expect timely service from companies with which they have a relationship and generally do not appreciate delays. We believe these exemptions are in the interests of consumers as they provide them with flexibility to adjust their existing service to suit their needs without the inconvenience of having the service halted during a termination period or waiting for delivery of documentation before they can proceed with these enhancements.

We believe this approach is also consistent with the broad policy goal behind the telemarketing provisions, which are to restrict companies that engage in unfair or overly aggressive sales practices, or persist with unwanted and uninvited calls. High volume, unwelcome and unexpected solicitations are not likely to be present when calling an existing customer and where only minor changes to the customer's services are considered.

We would welcome the opportunity to provide our views more fully on these important issues.

4 Consumer Guarantees

General comments

We have some concerns about the consumer guarantees regime put forward in the Bill because of the potentially overreaching effect and unintended consequences of some provisions and terms, namely:

- the automatic termination of goods or services that are "connected" with rejected goods or services; and

- the use of new, undefined and ambiguous concepts without proper legislative guidance.

[5] See Fair Trading Regulation 2007 (NSW) reg 105(1)(b), Fair Trading Regulations 2009 (Vic) reg 9 in relation to telephone marketing agreements. Some contracts for continuing services, such as new landline telephone services, are exempt under schedule 1 of the Door-to-Door Trading Regulation 2009 (ACT).

Termination of "connected" goods or services

While we appreciate the policy rationale behind sections 265 and 270 of the Bill, we are concerned the broad drafting of these sections will have unintended consequences and cause great uncertainty to suppliers and consumers.

As presently drafted, if a customer notifies "a supplier of goods" that they are rejecting those goods and elects a refund, *and* "a person" (who may not be the supplier of the rejected goods) supplies services to the consumer that "are connected" with the rejected goods, then pursuant to section 265, the contract for the supply of services is automatically terminated at the time the customer elects a refund for the rejected goods and the consumer is entitled to a refund from the supplier of the terminated services. According to the EM, in the mobile phone context, "a refund might include money paid for access to a mobile telephone network from the time that a mobile telephone failed to function."

Similarly, if a customer terminates a contract for the supply of services and "a person" (who may not be the supplier of the terminated services) has supplied goods to the consumer that "are connected" with the terminated services, then pursuant to section 270, the goods are automatically rejected at the time the services are terminated, *and* the consumer is entitled to a refund for the rejected goods (subject to returning the goods in most cases).

The concept of "connection" is of critical importance under sections 265 and 270 but is not defined in the Bill. In addition, the EM is unhelpful in a practical sense, providing that, "[w]hether goods are automatically rejected or not depends on how closely the goods are connected to the services" and "[t]here is scope for many different degrees of 'connection' in arrangements between consumers and suppliers and each case would need to be considered on its merits".

We are concerned about how sections 265 and 270 would be applied in situations where:

- the supplier of the goods and services are different; or
- a customer independently chooses to use a good in conjunction with a service (rather than it being mandatory that the consumer use a good in conjunction with a service due to the nature of the offer).

For example, the provisions could extend to situations where a customer purchases a Nokia handset from an online supplier through the Trading Post and then chooses to connect that phone to a Telstra service. The decision to connect to the Telstra service is made independently of the purchase of the mobile handset but, as the customer uses the goods in connection with the Telstra service, the mobile phone and service could be construed as being "connected." If the mobile phone does not comply with a guarantee and the consumer rejects the goods, then the consumer may also be taken to have terminated the mobile phone service and we could be obligated to refund monies paid for the service. This does not appear to be the intended outcome of the proposed provisions.

There is no policy justification for the "connected" good to be rejected or the "connected" service to be terminated when supplied by a different supplier, and the resulting uncertainty for businesses is unjustified. This is especially so in circumstances where the supplier of a service has no knowledge that the consumer has rejected goods which are "connected" to that service.

Accordingly, the merits of these provisions should be reconsidered. If there is a compelling policy reason for retaining these provisions, the regime should include a definition of the requisite level of connection or the Government or regulators should be asked to issue guidance about the requisite level of connection.

In our view, goods and services should be considered to be "connected" only where the goods and services are acquired from the same supplier, and due to the nature of the offer, it is mandatory for the customer to use a particular good with a particular service and vice-versa.

Limitation on amounts refunded

As presently drafted, a supplier's obligations to pay refunds in respect of rejected goods and terminated services appears to cover the full amount paid by the consumer. In our view, this is not reasonable for services such as mobile phone plans where the consumer has used the mobile service without issue for a period before the failure occurred. Accordingly, for services we believe the obligation to provide refunds be limited to the amount paid by the consumer for services "that have not been used" by the consumer. For example, if a consumer has paid for a month of a mobile phone service in advance and the service fails after week 2, the customer would be entitled to a refund of the 2 weeks that they have paid for, but not been able to use their service, rather than a refund of the amounts paid to date for the mobile service.

Greater clarity in relation to new concepts

The consumer guarantees regime introduces new concepts into this area of law. In our view, this is an area of the ACL that requires guidance, either in the legislation or through national regulator guidance that is subject to broad public consultation (similar to the proposed unfair contract terms national regulator guidance).

Examples of concepts that require clarification are:

- "acceptable quality", which replaces the concepts of "merchantable quality" – guidance will be critical to consumers and businesses alike because "acceptable" does not mean "merchantable". Indeed, the "significant differences" between these two concepts have been recognised by the New Zealand Court of Appeal when deciding a case under the New Zealand consumer guarantees regime (under the Consumer Guarantees Act 1993 (NZ))[6]. Moreover, there is very little guidance given in the EM about what "acceptable quality" means and although this guarantee is based on the New Zealand equivalent, the Australian provision is not identical;

- "major failure" – while this term is defined in section 260, it is defined by use of terms that are new and in respect of which there is no jurisprudence. For example, when would a consumer be "fully acquainted" with the nature

[6] In Nesbit v Porter [2000] 2 NZLR 465, the Court of Appeal stated that, "There is a significant difference between the tests of merchantable quality in s 16(b) of the Sale of Goods Act 1908 and acceptable quality in s 7 of the Consumer Guarantees Act. Goods are of merchantable quality if of use for any purpose for which goods which complied with the description under which they were sold would normally be used; if fit for any such purpose they are regarded as saleable under that description…In contrast…goods are of acceptable quality only if fit for all purposes for which goods of the type in question are commonly used and they meet the other standards referred to in s 7(1)…This test is quite dissimilar to the test in s 16(b) of the Sale of Goods Act, and it therefore does not follow from the Judge's finding of merchantable quality that there was no breach of the warranty of acceptable quality."

and extent of the failure? When does a good "depart significantly" from its description? The EM gives the example of a red bicycle, stating that a red bicycle might depart significantly from a green bicycle. Is the fact the bicycle actually works properly not relevant to whether there is a "significant departure" or not? If a handset includes all major functions (eg you can make calls and SMS) but is missing an ancillary function that is referred to in the technical specification for the handset, such as a news or weather shortcut or application, would that be a "significant departure"? In whose view does there need to be a "significant departure"? Is the assessment quantitative or qualitative?" Questions such as these need to be clarified and are of critical importance so that consumers and businesses are able to readily assess whether a failure is major or not major, as it will dictate the appropriate remedies and redress; and

- "reasonable time" – where a failure is not major, the supplier is required to remedy the failure within a "reasonable time", which is not defined in the regime. The EM is not meaningful in a practical sense, stating that, "[w]hat is reasonable will vary depending on the circumstances. For example, reasonable time to remedy a problem with an essential good such as a hot water system would be much shorter than for a games console" and "[r]easonable time to remedy a problem with a haircut would be much shorter than the reasonable time to remedy a problem with a landscaping project", but this provides little tangible help or guidance.

Finally, as the ACCC will be empowered with the ability to take representative action in relation to the new consumer guarantees, we believe the ACCC and consumer regulators should issue national guidance in relation to the new consumer guarantees to ensure regulators, consumers and businesses have a consistent understanding of the new rights and responsibilities created under this regime.

Termination of a contract

Section 269 of the Bill provides that termination of a contract for the supply of services for breach of a consumer guarantee takes place:

(a) at the time the termination is made known *to the supplier* of the services (whether by words or by conduct indicating the consumer's intention to terminate the contract); or

(b) if it is not reasonably practicable to communicate with the supplier of the services - at the time the consumer indicates, by means which are reasonable in the circumstances, his or her intention to terminate the contract.

We recommend there be a provision which allows the supplier to direct customers to make such terminations to particular contact points (such as a telephone number, email address and physical address) and that the termination not be valid unless the customer uses a nominated contact point. This is particularly important to enable large organisations that have hundreds or thousands of customer-facing staff to effectively capture such terminations. The contacts the supplier can nominate should be readily available to the customer.

5 Information Standards

The Bill also makes some changes to the information standards provisions currently contained in the Trade Practices Act. Specifically, section 65E of the Trade Practices Act gives power to the Minister to declare that certain standards are “consumer product information standards” in respect of goods of a kind specified in the notice for the purposes of section 65D. Section 65D prohibits a corporation from supplying goods of a kind in respect of which a consumer product information standard has been prescribed, unless the corporation has complied with that standard where the goods that are supplied *are intended to be used, or are of the kind likely to be used, by a consumer...”.*

However, sections 136 and 137 of the Bill do not limit the equivalent prohibition in section 65D to goods or services intended to be used, or likely to be used by consumers. There is no explanation in the EM as to the reasons for which this prohibition has been extended beyond consumer goods. We submit that the policy supporting the product information standards regime is to protect consumers, and that sections 136 and 137 should be amended to reflect this underlying intent.

6 Unfair Practices

We have previously made submissions to the Standing Committee on Consumer Affairs in relation to the proposed “best practice” provisions. We maintain these views.

Sensis Pty Ltd, our wholly-owned subsidiary, has prepared a submission to the Committee in relation to the proposed provisions relating to unsolicited entries and advertisements and we fully endorse that submission.

We wish to make an additional comment in relation to the new dual pricing provisions. We are concerned about the prescribed method for retracting pricing errors in catalogues and advertisements, particularly national catalogues and advertisements. According to section 47(5) of the Bill, retractions must be published “in a manner that has at least a similar circulation or audience as the catalogue or advertisement.” The EM gives the example of a national catalogue that incorrectly states $10 instead of $100, stating that the incorrect price could be retracted by placing a notice “in newspapers, provided the circulation is at least similar to that of the catalogue.” Contrary to the views put forward in the EM, it will be very costly for the business community to retract catalogue prices in the prescribed way. Accordingly, we recommend that section 47(5) be removed and businesses be allowed to retract catalogue prices by means that are reasonably effective in the circumstances. For example, a retraction in a different newspaper to the original advertisement but which circulates in generally the same area should be sufficient, as should in-store notices.

Telstra Corporation Ltd
16 April 2010