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Dear Secretary

INQUIRY INTO OLDER PEOPLE AND THE LAW

Thank you for your letter to me of 20 September 2006 regarding the inquiry being undertaken by the House of Representatives Standing Committee on Legal and Constitutional Affairs into *Older People and the Law*.

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to offer comments to assist the Committee's investigation into the adequacy of current legislative regimes in addressing the legal needs of older Australians. The comments in the attached submission reflect the terms of reference which are more salient to the ACCC's interest in the field of consumer protection, particularly fraud. The submission also outlines the ACCC's campaign to protect disadvantaged and vulnerable consumers, as 'old age' is a characteristic which the ACCC considers may identify a consumer as being at risk of being exploited in the marketplace.

The ACCC looks forward to receiving the Committee's report when it is tabled early next year, and envisages that the Committee's findings will contribute to the ACCC's ability to develop strategies that preserve and promote the consumer rights of older Australians.

Yours sincerely

Brian Cassidy
Chief Executive Officer

EXECUTIVE OFFICE





**Australian
Competition &
Consumer
Commission**

**SUBMISSION TO THE HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON LEGAL &
CONSTITUTIONAL AFFAIRS**

Inquiry into Older People and the Law

November 2006

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1. INTRODUCTION

The Australian Competition and Consumer Commission (ACCC) was established in 1995 by the Commonwealth Parliament to protect the rights of consumers and business. It does this by encouraging vigorous competition in the marketplace and enforcing the consumer protection and fair trading laws contained within the *Trade Practices Act 1974* (“TPA”).

As a national statutory authority, the ACCC has a responsibility to ensure that it provides older people with at least the same level of effective access to its services as other groups in Australia. The ACCC remains committed to developing and pursuing strategies which demonstrate an appreciation for the special needs of older people and the particular challenges which they may encounter in their interactions with both business and the ACCC.

The ACCC welcomes the opportunity to provide comments to assist the Committee’s investigation into the adequacy of current legislative regimes in addressing the legal needs of older Australians.

The first part of the submission (Sections 2 and 3) provides a general discussion of the ACCC’s campaign to protect the legal rights of disadvantaged and vulnerable consumers. For the purposes of this campaign, ‘old age’ is a characteristic which may identify a consumer as being at risk of being exploited in the marketplace.

The inquiry’s term of reference which most closely articulates with the ACCC’s administration of the TPA and its responsibilities in the field of consumer protection is ‘fraud’. The second part of the submission (Sections 4 and 5) emphasises the ACCC’s experience with regard to older consumers and scams, as ‘fraud’ encompasses consumer scams. Although scams target all types of people, older people are becoming particularly vulnerable via new technology such as the internet and the increasing sophistication of scammers’ techniques.

2. PROTECTING VULNERABLE AND DISADVANTAGED CONSUMERS

2.1 THE ACCC'S 'DISADVANTAGED AND VULNERABLE' CAMPAIGN

In 2003, the ACCC and its Consumer Consultative Committee ("CCC") - a consultative body consisting of consumer and community agencies - launched an ongoing campaign focusing on commercial and business practices that target or seek to exploit disadvantaged and vulnerable consumers.

Although protecting disadvantaged and vulnerable consumers has always been a priority for the ACCC, the campaign acknowledges that these consumers rarely complain to an agency like the ACCC. CCC members have confirmed that disadvantaged and vulnerable consumers are much more likely to complain to a shop front or community based organisation, if they complain at all.

In broad terms, the campaign recognises that consumers who experience some form of vulnerability or disadvantage may be especially at risk in the marketplace because they generally experience greater levels of information asymmetry, have fewer means to combat unfair behaviour and / or less money to cushion the impact of unlawful behaviour and often experience multiple forms of disadvantage or vulnerability.

For the purposes of the campaign, the phrase 'vulnerable and disadvantaged' refers to a person experiencing a vulnerability that places them at a significant disadvantage in their everyday business and commercial dealings (including their interactions with the ACCC). The campaign defines 'vulnerable and disadvantaged' by reference to:

- low income;
- culturally and linguistically diverse background;
- disability;
- illiteracy;
- indigenous origin;
- homelessness;
- remoteness;
- *old age* or youth; and
- serious or chronic ill-health.

The ACCC established an internal taskforce to enable it to undertake the following activities as part of the campaign:

- assess and fast-track complaints involving disadvantaged and vulnerable consumers received by the ACCC, including those referred to it by its CCC members and other consumer representatives;
- target enforcement action to stop illegal conduct;
- assist small and large businesses to identify, prevent and / or cease offending practices to ensure that their business practices are fair for all consumers; and
- to work with other government, business and consumer organisations to promote the campaign.

2.3 ENSURING THE ACCC IS ACCESSIBLE TO DISADVANTAGED AND VULNERABLE CONSUMERS

The ACCC recognises that an important aspect of encouraging the referral of appropriate complaints from consumer and community organisations is for its staff to do all they reasonably can to ensure that complainants' experience of dealing with the ACCC is a positive one – both at the time of referral and during any ensuing investigation. To this end, internal guidelines assist ACCC staff in their operational interactions with people who may be experiencing some form of vulnerability or disadvantage. This illustrates the ACCC's commitment to ensuring that barriers to older Australian consumers seeking the assistance of the ACCC are minimised.

2.4 REVIEW OF THE CONSUMER CONSULTATIVE COMMITTEE MEMBERSHIP

In the context of a campaign focussing on the needs and experiences of 'at risk' consumers, the close involvement of CCC members is considered important. CCC members not only have expertise to contribute, they offer valuable assistance to the ACCC in identifying areas of concern to vulnerable or disadvantaged consumers.

In order to ensure its communication and compliance strategies meet the needs of consumers, the ACCC maintains a dynamic CCC membership that best represents the diversity of consumer organisations and individuals working within the community. The ACCC is planning to commence its second formal review of the CCC membership early in 2007. The review of the CCC membership will provide organisations which are not currently members of the CCC with the opportunity to apply for membership. The ACCC welcomes nominations from any consumer or community organisation that has taken an interest in the activities of the ACCC and/or has a special expertise that is relevant to the ACCC's work.

Particularly against the background of the government's interest in ensuring that legislative regimes address the needs of older Australians, the ACCC is keen to encourage organisations that advocate the rights and needs of older Australians to apply for CCC membership. This will enable the ACCC to maintain its commitment to ensuring its own communication and compliance strategies meet the needs of older consumers.

3. DISADVANTAGED AND VULNERABLE CONSUMERS AND THE TRADE PRACTICES ACT

Many of the fair trading provisions in the TPA (including those discussed below) take into account the circumstances, including the characteristics, of the people affected. For this reason it may be easier for businesses to breach the law when dealing with disadvantaged or vulnerable consumers, including older Australians. The areas of the TPA outlined below are particularly relevant to vulnerable and disadvantaged persons. Section 4.4 of this submission contains a more explicit discussion of how scam (consumer fraud) activity may infringe the TPA.

3.1 UNCONSCIONABLE CONDUCT

Unconscionable conduct is proscribed by Part IVA of the TPA. It refers to conduct involving the exploitation by a stronger party of a weaker party which goes beyond normal hard commercial dealings, and offends good conscience. It refers to circumstances which involve the following:

- one party suffered from a special disability or disadvantage in dealing with the other party;
- the special disability was sufficiently obvious to the stronger party; and
- the stronger party took unfair advantage of its superior position or bargaining power to get a benefit or bargain.

Examples of special disabilities of weaker parties may include:

- ignorance of important facts the stronger party knows about;
- illiteracy or lack of education;
- inexperienced in business matters;
- poverty;
- significant sickness; and
- lack of help or explanations being given where these are necessary.

3.2 HARASSMENT OR COERCION

While a business has the right to market its goods or services and reasonably pursue a debt owed to it, when a sustained marketing or debt collection effort is unwarranted, unreasonable, excessive or too intense, it can constitute 'undue harassment' or 'coercion' and breach the TPA (section 60). A person is 'coerced' when they are made to do or not do something (for example, buy a product or sign a contract) by force or threat of force or other intimidation. Actions that may be reasonable for most consumers may distress or intimidate disadvantaged or vulnerable consumers.

3.3 FALSE, MISLEADING OR DECEPTIVE CONDUCT

Sections 52 and 53 of the TPA prohibit conduct which is false, misleading or deceptive. Section 52 also prohibits conduct which is *likely* to mislead or deceive. This type of conduct can include:

- leading someone to a wrong conclusion;
- creating a false impression;
- leaving out or hiding important information; and

- making false claims about products or services.

This applies to all interactions with the public—from the overall impression created in by advertising to one-on-one sales situations.

3.4 ACCC ENFORCEMENT ACTIVITY

The ACCC focuses its enforcement activities on areas of widespread consumer detriment and where it believes its actions will improve overall compliance with the TPA. When it comes to consumer protection, disadvantaged and vulnerable consumers remain a priority. This is a broad area of enforcement and it incorporates everything from door-to-door salesmen exploiting people with intellectual disabilities to selling products that consumers do not need or cannot afford, to those preying on the sick and elderly with false promises of health cures.

Enforcement action has been taken on a range of matters that target disadvantaged and vulnerable consumers, including the elderly. For example, the ACCC has looked at a number of complaints relating to unauthorised transfers of telecommunications services; investment schemes targeting retirement savings, and miracle cancer treatments.

Two examples of successful enforcement action taken in respect of behaviour specifically targeting older Australian are discussed below.

While it uses enforcement action to obtain compliance, the ACCC's preferred option is to show business how to take preventative steps to ensure that contraventions do not occur.

Telephone door-to door sales often targeting elderly

The unauthorised transfer of a consumer's telephone service – a practice known in the industry as 'slamming' – is an unlawful business practice often targeted at disadvantaged and vulnerable consumers, particularly older Australians.

In 2002, the ACCC brought action in the Federal Court against door-to-door and tele-marketing sales companies, Benchmark Sales Pty Ltd and Axxess Australia Pty Ltd alleging breaches of the TPA when trying to obtain customers for telephone companies. The ACCC alleged that these agents had illegally obtained signatures and verbal 'authorities' from consumers by, inter alia, unconscionably signing up the elderly, visually and/or hearing impaired people.

Benchmark and Axxess were required to contribute \$60,000 to a fund established by the ACCC for the purpose of raising awareness of consumer rights when obtaining phone services. Justice Marshall also ordered injunctions restraining Benchmark and Axxess from engaging in a range of misleading and deceptive conduct.

(Refer: Media Release 058/02)

Vitalcall alarm systems for older people

In 2001, the Federal Court found that Chubb Security Australia Pty Ltd had engaged in false, misleading and deceptive conduct following action initiated by the ACCC. A radio and print advertising campaign claimed that Chubb's Vitalcall personal response system cost about \$1 a day. However, customers wanting to connect to Vitalcall had to pay an initial installation fee of between \$80 to \$279, with a continuing monitoring fee is between \$1.16 to \$1.26 per day.

The Vitalcall system is specifically targeted towards people over 75 years of age or people with a disability aged between 65-74 years. The Court made a series of orders, including ordering Chubb to undertake a corrective advertising campaign. The outcome sent a clear message to other companies not to mislead elderly consumers.

(Refer: Media Release 195/01)

3.5 ACCESSING THE ACCC

The ACCC has a network of offices in all capital cities and Townsville to handle public complaints and inquiries. Staff can provide advice to consumers (and businesses) about their rights and obligations under the TPA and can assist in resolving a dispute by directing parties to appropriate complaint resolution options. The ACCC's website (www.accc.gov.au) and its Infocentre hotline (1300 302 502) ensure that the ACCC is accessible to all consumers with concerns. As discussed in Section 2.3, internal guidelines assist ACCC Infocentre staff in their operational interactions with people who may be experiencing some form of vulnerability or disadvantage.

For the period 1/9/2005 to 29/11/2006, just over 50,000 inquiries or complaints were received by the ACCC's Infocentre. About 11% were made by consumers who reported their age as 55 and above. Although not all complainants report their age, typical complaints reported by older consumers concerned misleading and deceptive conduct (including scams, pricing, and advertising); and retail issues such as warranties and contractual issues.

The ACCC has a wide range of publications dealing with its functions and the legislation for which it is responsible. Some are general while others address specific aspects of the law or the ACCC's administration of it. Some of the publications which are most relevant to its disadvantaged and vulnerable consumers campaign are outlined below. The ACCC actively seeks opportunities to disseminate information to interested individuals and stakeholder groups – for example, it contributes a bi-monthly article to the publication 'Over 50s'. Consumer education and awareness remain priorities for the ACCC.

Don't take advantage of disadvantage: A compliance guide for businesses dealing with disadvantaged or vulnerable consumers

Guide to unconscionable conduct: this guide explains how the unconscionable conduct provisions of the TPA apply in the dealings between businesses, and between businesses and consumers.

How to comply with the Trade Practices Act: a guide for small business: a brochure setting out the basic elements of a trade practices compliance program.

Advertising and selling: a guide to the consumer protection provisions of Part V and VC of the TPA. These provisions contain simple rules to ensure that businesses trade fairly with consumers. The guide also contains a brief explanation of Part IVA (unconscionable conduct) provisions.

ACCC/ASIC debt collection guideline: a guideline reflecting the ACCC's and ASIC's view of how relevant provisions of the TPA and the ASIC Act apply to debt collection conduct. It covers significant recent developments in industry practices, case law, jurisdictional changes and the level and substance of complaints made to the ACCC and ASIC.

4. CONSUMER FRAUD AND SCAMS

4.1 SCAMS AS A GROWING PROBLEM

Scams are a growing global problem and target people of all backgrounds, ages and income levels. Potential victims can be those who use computers and the internet, mobile phone users, small business, investors, and ordinary consumers. Older people are becoming particularly vulnerable to fraud via new technology such as the internet and the increasing sophistication of scammers' techniques.

4.2 AUSTRALASIAN CONSUMER FRAUD TASKFORCE

As part of a whole-of-government approach to combat consumer fraud and scams targeted at consumers, the Australasian Consumer Fraud Taskforce (ACFT) was established in March 2005 and comprises 18 government regulatory agencies and departments in Australia and New Zealand who have a remit for consumer protection in relation to frauds and scams. The ACFT seeks to enhance the Australian and New Zealand Governments' enforcement activity against frauds and scams, to involve the private sector in the fight against frauds and scams, and to generate interest in research on consumer frauds and scams.

4.3 THE ACCC'S COMMITMENT TO FIGHTING SCAMS

The ACCC is aware of the devastating effects which scams can have on people. Combating consumer fraud through education is a high priority for the ACCC and its ACFT partners and the ACCC is actively working on a range of outreach strategies, prevention strategies and research aimed at changing consumers' behaviour before they get caught out.

The ACCC recently launched its revamped SCAMwatch website (www.scamwatch.gov.au). The site aims to warn consumers about common scams, and to give consumers advice on how to recognise, avoid and report scams. The new website includes more detail on different types of scams, as well as new scams that have come to fore with the increased use and abuse of technology. Victim stories are also available, from a range of people who have been approached by scammers or stung by scams. There is also a "report it" function where visitors to the site can choose to report a scam they have been stung by or even one that they have seen but not acted on; and visitors can be kept up to date with scams on the SCAMwatch radar through the email alert system.

SCAMwatch offers consumers a first-stop resource and includes a list of other Commonwealth, state and territory consumer protection agencies which may be able to assist. SCAMwatch will also continue to be the campaign portal for the ACFT, which will be running another Scams Awareness Month in 2007.

4.4 SCAMS AND THE TRADE PRACTICES ACT

The parts of the TPA that are directly relevant to scams fall within Part V (including misleading and deceptive conduct, false representations and pyramid selling).

Misleading or deceptive conduct

Section 52 of the TPA is designed to stop corporations engaging in conduct which is misleading or deceptive, or which is likely to mislead or deceive. Generally, sellers are required to tell the truth or refrain from giving an untruthful impression. This provision is the one most likely to apply to scams in general. However there are some more specific sections of the TPA which could apply.

False or misleading representations

Section 53 of the TPA prohibits making false or misleading representations. This includes claims about the age, quality, sponsorship, approval, price or benefits of the good or service. For instance, many scams trying to sell 'miracle cures' may make false representations about the benefits of their product. This would be likely to breach the TPA.

Statements about future events

For certain scams, such as prize or merchandise offers, online auction scams, 'free' offers on the internet, betting scams and some office supply scams, section 51A of the TPA might apply. This section relates to representations about the happening of any future event, where the corporation does not have reasonable grounds for making the representation. For instance, a betting software scam that offers you guaranteed winnings might breach the TPA as it is not possible to accurately predict the outcome of an event that is based on chance.

Offering goods without intending to supply them

Some scams, like office supply scams, some psychic scams and online pharmacy scams might breach section 58 of the TPA. This section makes it unlawful to accept payment for goods or services if there is no intention to supply them. A prize scam might also breach section 54 of the TPA, as it is unlawful to offer gifts, prizes or other free items in connection with the supply of goods or services if the company does not intend to, or does not, provide them as offered.

Pyramid schemes

It is illegal for a corporation to promote or participate in a pyramid selling scheme under Division 1AAA of the TPA.

4.5 ENFORCING THE TRADE PRACTICES ACT

Many scams, if tested in court, may be breaches of the above laws. However, due to the 'fly by night' nature of many scammers, it is extremely difficult to track them down and take action against them. Also, the ACCC may not be able to take action against the many scammers that are based outside of Australia, as they are may not be within the ACCC's jurisdiction. For these reasons, Australian authorities may not be able to take action against many scams.

The purpose of the SCAMwatch website is to help consumers recognise a scam and avoid it where possible. Self-defence is the best defence.

5. EMPIRICAL EVIDENCE OF ACCC'S RECENT EXPERIENCE WITH SCAMS AND OLDER PEOPLE

The following observations regarding scam allegations are drawn from data collected by the ACCC's Infocentre from 1 January 2006 to 31 October 2006. Please note that age data was only supplied for around half or less of the total scam complaints. The ACCC considers that many scams go unreported. Furthermore, the ACCC is only one of the many government agencies that receives reports about scams and frauds. Consequently, the ACCC considers that the observations discussed below represent only a small sample of older Australians' experiences with consumer scams and fraud.

5.1 SUMMARY

The ACCC received a total of 468 complaints about alleged scams from consumers who gave their age as 55 or above. Of these, 62 people indicated that they had lost or paid money to a scammer, ranging from \$5 to \$16,000. The average amount paid was \$2,469 and the median was around \$900. The total loss reported by consumers over the age of 55 was \$153,103.

5.2 AGE

Consumers who gave their age as 55-64 made 279 complaints; a complaint number which roughly corresponds with population shares. The loss reported by this age category is around \$84,000.

Consumers who gave their age as 65+ made 189 complaints. This age group tends to complain less than their share of the population would suggest. 65+ year olds reported total losses of around \$69,000.

5.3 GENDER

While the data suggests that females are more likely to report a loss than males, it appears that of those who report a loss, males tend to report larger amounts at both the 55-64 and 65+ brackets. 38 female consumers reported that they had lost or paid a total of \$77,501 (at an average of \$2,039.50) compared to the 24 males who reported a total of \$75,602 (at an average of \$3,150).

5.4 MOST COMMONLY REPORTED SCAMS

The most commonly reported scams by consumers over 55 (but which did not necessarily involving money being paid or lost) are discussed below.

Fake lotteries

- 174 complaints, which represented approximately 37% of total scam complaints for those aged over 55.

A consumer receives an email or letter from an overseas lottery or sweepstakes company advising that they have won a lot of money or fantastic prizes - in a lottery or sweepstakes competition that they did not enter. The consumer will usually be asked to pay some fees to release the winnings. Scammers will often say these fees are for insurance costs, government taxes, bank fees or courier charges.

Unexpected prizes

- 94 complaints (approximately 20%)

An unexpected or fake prize scam will tell a consumer that they have won a prize or a competition. There are often costs involved with claiming the prize, and even if the consumer does receive a prize it may not be what was promised to them.

Advanced fee (including Nigerian scams)

- 55 complaints (approximately 12%)

An upfront payment scam is a scam which asks consumers to send money upfront for a product or 'reward' later. The 'reward' may be in the form of a pre-approved loan or credit card application, a prize or a holiday. The consumer may be asked for bank account details or to pay fees to gain access to what the scammer is offering. Most consumers find that they receive nothing in return, or don't get what they expected.

A 'Nigerian' scam is a form of upfront payment or money transfer scam. They are called Nigerian scams because the first wave of them came from Nigeria, but they can come from anywhere in the world. The scammers usually contacts the consumer by email or letter and offers them a share in a large sum of money that they want to transfer out of their country. Scammers ask consumers to pay money or give them bank account details to help them transfer the money.

Computer prediction software (betting)

- 35 complaints (approximately 7.5%)

Computerised gambling systems are software which promise to accurately predict results, usually of horse races, other sports or even share market movements. Scammers can charge a lot of money for this software, ranging from around \$1,000 up to \$15,000 or even more. The software promises huge returns based on past results and trends. However, once purchased the systems do not work as promised, and buyers can't get their money back.

Chain letters / pyramid selling schemes

- 34 complaints (approximately 7.5%)

Chain letters are a type of pyramid scheme that are spread through the post or email. Typically, the letter will ask a consumer to send a small amount of money to everyone listed in the letter. The consumer is then instructed to add their name to the list and send out copies of the letter to as many people as possible. The letter claims that by doing this, the consumer will receive a large amount of money in a short space of time. Money is lost to the scammer who sent the consumer the letter, and also through photocopying and postage.

*-Comment-

The data suggests that older people are more likely to report lottery scams. As noted above, 37% of total scam complaints from consumers who gave their age as over 55 were in relation to lotteries. This compares to around 20-25% for all consumers. Lotteries were the only scam category in which older people were clearly over-represented.

5.5 SCAMS WHICH RESULTED IN THE BIGGEST LOSSES OR AMOUNTS PAID

The following table illustrates the scams reported by consumers who gave their age as over 55 which were associated with the largest losses or amounts paid over the period.

Scam type	Number of complaints	Number of losses reported	Size of loss reported (only where loss reported)			
			Average	Median	Max.	Min.
Computer prediction software	35	12	\$5,100	\$6,200	\$8,000	\$695
Lotteries and sweepstakes	174	7	\$5,400	\$7,000	\$11,000	\$22
Advanced fee fraud	55	5	\$6,700	\$5,000	\$16,000	\$1,600
Unexpected prizes (mostly holidays)	94	30	\$609	\$650	\$1,300	\$14

5.6 ORIGIN OF SCAMS

Over 90% of alleged scammers reported to the ACCC appear to be based overseas. Alleged scammers with an Australian presence mostly relate to computer prediction software, mobile phone scams and false billing.

5. CONCLUSION

The ACCC looks forward to receiving the Committee's report when it is tabled next year, and envisages that the Committee's findings will contribute to the ACCC's ability to develop strategies that preserve and promote the rights and needs of older Australians.

Although protecting the rights of older consumers who may be 'at risk' of being exploited in the marketplace has always been a priority for the ACCC, the ACCC will continue to ensure that its 'disadvantaged and vulnerable consumers' campaign addresses the changing needs of older Australians.

The upcoming review of the CCC membership presents a timely opportunity to encourage organisations that advocate the rights and needs of older Australians to apply for CCC membership. This will enable the ACCC to maintain its commitment to ensuring its communication and compliance strategies meet the needs of older consumers in today's environment.

Enhancing the role of government and the private sector in reducing the impact of consumer-related frauds and scams is an important objective for the ACCC and its ACFT partners. The ACCC is actively working on outreach strategies, fraud prevention strategies and research, and has committed significant resources towards promoting awareness of scams in the community, including the recent launch of its new SCAMwatch website.