Review of the Australian Consumer Law

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1 INTRODUCTION

1.1 About this Submission

Financial Counselling Australia is pleased to have the opportunity to provide a submission to the Review of the Australian Consumer Law.

Financial counsellors assist low-income and vulnerable Australians who have financial problems, often involving issues with credit and debt. While these problems often arise due to inadequate income and/or life events, unfair consumer contracts and unfair practices by businesses also have a negative impact on our clients.

We support the submission to the Review, including all recommendations, by Consumer Action Law Centre (Consumer Action). We have focused on just three issues in our submission:

- door-to-door and unsolicited sales
- unfair commercial practices/business models
- penalties.

We have indicated in the headings the questions in the issues paper to which the section relates. Our submission explicitly responds to questions 1, 4, 9, 30, 31, 32 and 33.

1.2 About Financial Counselling Australia (FCA)

FCA is the peak body for financial counsellors in Australia. We support financial counsellors and provide a voice on national issues. We advocate on behalf of the clients of financial counsellors for a fairer marketplace that will prevent financial problems in the first place.

1.3 What Financial Counsellors Do

Community based financial counselling are free services that provide assistance, information and advocacy to people experiencing financial difficulty including problems with debt. Financial counsellors have knowledge of a range of areas of law and policy, including consumer credit law, debt enforcement practices, the bankruptcy regime, industry hardship policies and government concession frameworks. Financial counsellors are required to hold (or to obtain) a Diploma in Financial Counselling.

Financial counsellors also document their experiences and highlight issues that have a negative impact on their clients. Either individually, or through FCA, they consult with industry, government and other stakeholders and to encourage practices that prevent financial and consumer problems.

2 SELLING AWAY FROM BUSINESS PREMISES/UNSOLICITED SALES

2.1 Background

Problems experienced by financial counselling clients usually relate to low-income and life events. These problems however are often exacerbated by agreements that are unfair, or don't suit the client's needs, which often result from unfair selling techniques that take place away from trade premises.

For many years it has been recognised that certain types of selling can significantly disadvantage consumers and can lead some people into purchasing goods or services that they would not have done had they had the opportunity to think through the decision without any pressure.

While there have been significant changes in business practices and developments in technology over the past four decades, there are common elements to the problems of in-home-sales, unsolicited sales and some sales that take place away from business premises that remain relatively constant.

It is worth considering examples where problems have arisen for clients of financial counsellors with off-business-premises sales over the past 35 years. They include:

- Sale of video players and long-term video rental agreement packages in the home after consumers responded to a television advertising campaign;
- Sale of freezer and freezer food plans in the home after consumers responded to newspaper advertising;
- Sale of timeshares at seminars, or at timeshare resorts, which consumers often attended due to the offering of free-gifts or winning a prize;
- Sale of expensive vacuum cleaners in the home;
- Sale of house cladding in the home, often resulting from the consumer contacting the firm after seeing an advertisement;
- Sale of complex 'mortgage reduction schemes' in the home which often placed consumers in a much worse financial situation;

- Sale of mathematics software in the home, usually after the consumer agreed to a visit at a shopping centre or after entering a competition;
- Sale of energy contracts in the home by door-to-door sellers;
- Sale of expensive bedding that was promoted as helping with health problems, either in the home or a presentation (for example at a free meal) attended by the consumer;
- Property investment firms visiting the home after the consumer receives a telemarketing call offering advice to lower their tax;
- Sale of first aid kits, water coolers and photography packages by door-to-door salespeople in Aboriginal communities;
- Sale of tertiary courses in the home, often with the offer of a free gift, by a door-to-door salesperson;
- Sale of tertiary courses in the home after a telemarketing call offering the person thousands of dollars toward their education;
- Leases of whitegoods and furniture by door-to-door salespeople, often in Aboriginal communities;
- Telemarketing calls resulting in a sale 'on the spot'.

2.2 What is the problem we are trying to address?

The crux of the problem is that consumers enter into agreements, that are often not in their best interests, and that they would not have entered, had it not been for the selling techniques, the unsolicited contact and/or location. For financial counselling clients this can have a significant impact on their finances and their family budget.

2.3 "Instant" unsolicited sales (door-to-door)

Some of the sales examples described in Section 2.1 above involve contacting the consumer in the home (by telephone or in person) and engaging in a sales presentation leading to the consumer immediately entering into an agreement to purchase goods or services (traditional 'door-to-door' selling). While the sales process can involve misleading conduct or psychological sales techniques, a significant problem with these type of sales is that consumers are completely unprepared to engage with a salesperson or to consider the product or service.

This sales method offers no benefits to consumers. At best the contact is annoying, interrupting people in their own home where they should be free to enjoy personal and family time. At worst, consumers enter into agreements that are not in their best interests and which harm them financially. For low income consumers this can often mean a credit agreement they cannot afford, or being tied into an agreement (such as an energy contract) that doesn't suit their needs. The financial consequences can be severe, including not having enough money to pay for other essential items, such as food or rent.

This form of selling is also anti-competitive, because consumers are pressured into signing a contract without having considered any other similar offering. Businesses with a more ethical approach to marketing can lose business as competitors send salespeople to knock on doors.

Door-to-door selling particularly disadvantages vulnerable consumers – for example the elderly or those newly arrived in Australia – because they may find it more difficult to simply say "no" and shut the door. In some disadvantaged communities, door-to-door selling can lead to distrust within the community. Research on door-to-door sales in migrant communities in Melbourne's West, indicated that "door-to-door sales can cause migrants to fear or distrust strangers who knock on their door, which has a harmful impact on the Australian Government's efforts to promote and prioritise social inclusion"[1]

Door-to-door selling should be prohibited and any contracts entered into in this way should be unenforceable.

2.4 Others sales away from trade premises ("multiple contact unsolicited sales")

Even when consumers have some initial contact with the sales company prior to the visit to their home (or other non-business location), the lead-up to the contact is often designed to illicit some commitment (even agreement to a home visit) from the consumer which is used to the seller's advantage.

These sales involve:

- High pressure selling that takes some advantage of the location of the sales presentation (such as the home, a seminar or holiday resort) and often:
    - the initial contact is unsolicited;

[1] Laura Berta, Gerard Brody, Cynthia McKenzie, *Strangers are calling! The experiences of door-to-door sales in Melbourne's refugee communities*, Footscray Community Legal Centre, 2014, 22.

- an ‘invitation’ is obtained from the consumer based on representations that are either misleading, or don’t fully explain the purpose of the presentation;
- the consumer lacks familiarity with the product/service and has no idea of the possible cost;
- the price is withheld until the end of the presentation as a sales tactic.

It is rare in these situations for the consumer to have a clear understanding about the product being offered or to have a clear idea of the potential cost before the sales visit.

2.4.1 Illustrative case study

The case study below concerns property investment and an “invitation” to visit the consumer’s home. The case study illustrates the issues with these type of sales techniques, including high pressure selling. It also is an example of how a prohibition on unfair trading would be beneficial (see Section 4 and question 15).

> In October 2015 Peter (pseudonym) answered a telephone call. Peter was on the do not call register, but that was ignored. The caller said he was representing the Australian Government and was doing a survey to check eligibility for a little known program that could save on tax. The caller immediately asked Peter for personal financial information such as salary, house value, mortgage value and ownership status. The caller then said that Peter was eligible for a free financial plan that could save him tens of thousands of dollars in tax. The caller asked if someone could visit Peter, and Peter agreed.
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> The person who visited represented a property investment company. Peter's wife was not home and the person would not disclose any information about the plan unless his wife was also there. After a short discussion the person left. Subsequently another meeting was arranged about a week later. Over the course of an hour in the subsequent meeting the salesperson presented information about how negatively geared investing could be tax advantageous and arranged a further meeting at the office of [Business].
>
> This next meeting took the form of a sales pitch giving access to investment properties before they came on to the market at a discounted price, in what were said to be carefully selected growth areas within a 10km range of the city. Peter and his wife agreed to inspect some property and were driven to Craigieburn, about 40km north of Melbourne. Glossy brochures were provided of properties not yet constructed, and representative properties were shown in a drive-by tour. The properties were not physically inspected. The locations and

style of property were inconsistent with the type of properties that had previously been presented as ideal investment opportunities they would be able to access.

Financial plans were drawn up showing expenses and depreciation and instruction given on how to complete a Withholding Tax Adjustment. Peter and his wife were pressured into making a $1,000 down payment on a "Membership Fee" of around $5,990, with the remainder payable a month later. This Membership was to give Peter 12 months to purchase a property with [Business].

After reflection Peter tried to cancel the agreement but the company refused. Peter had an email agreement from the director of [Business] that the payment would be held. Peter advised [Business] that he would not be proceeding with any purchase however [Business] demanded that the remaining $5,000 of the fee be paid. This was not paid. This was subsequently passed to a debt collection agency who continued to call and send letters of demand.

2.4.2 High pressure selling

High pressure selling is not necessarily aggressive selling but selling techniques are designed to make it very difficult for the consumer to say “no”. In fact, it may not be the aggressive high pressure selling which is likely to cause the greatest problem, but the salesperson who engages as a ‘friend’ and uses more sophisticated selling techniques. These techniques aim to obtain small ‘commitments’ from the consumer (starting with the consumer’s ‘invitation’ to the visit).

According to a research report by Consumer Action and Deakin University “(s)uccessful marketing relies on moving the customer through incremental steps towards purchase” and “the act of inviting a person to their home, and allowing them to undertake a demonstration while the family is present, is likely to activate both the consistency and commitment heuristic”.[2]

The consumer’s statements, or simple agreements with the salesperson, can be ‘thrown back’ at them if they start to ‘back away’ from the sale, and can be used to discourage a consumer from cancelling the agreement or from raising a dispute.

[2] Paul Harrison, Marta Massi and Kathryn Chalmers, *Shutting the Gates: an analysis of the psychology of in- home sales of educational software – a joint research project by Deakin University and Consumer Action Law Centre* (Deakin University, 2010), 5.

Filling in a form or agreeing to a sales visit makes it easier, and more likely that the consumer will commit to further requests. The in-home location places the interaction in a private sphere changing the dynamics from business to personal, increasing the level of trust the consumer has in the sales person.

Asking someone to leave your house after you have invited him or her appears to be substantially more difficult than walking out of a retail store. The consumer is not simply saying "I am not interested" and walking away as they might in a store setting. They must ask someone whom they may like (or their ego has told them they like, because (i) they have invited them into their home, and (ii) they perceive they will help them to solve a problem), trust or see as an authority figure, and whom they have entered into a personal transaction with, to leave after originally having invited them.[3]

The salesperson might avoid discussion of price until the end where the "low- ball" technique might be enacted; gaining commitment and then increasing the cost.[4] Physically and psychologically exhausted, psychologically consistent action is the only way to act – so the consumer finally agrees to the contract.

A key part of the selling technique appears to be the withholding the cost until the end of a sophisticated presentation, which can sometimes take an hour or two. The difference in price is often substantially different that the consumer may have envisaged, for example a consumer might expect two CDs of maths software to cost less than $100, or $1,000 whereas these were sometimes sold for $10,000, and a consumer who had bought vacuum cleaners in the past for hundreds of dollars may have no expectation that one could cost many thousands of dollars. Even when the cost is disclosed, the nature of the product, or complexity of the payment arrangements, can mean that it is difficult for the consumer to weigh up the cost/benefit. For example, this is the case with changing a utility provider, but it was also the case with long-term video library membership, life-long timeshare memberships (with the purchase price paid on credit and additional maintenance fees), and leases for mathematics software.

2.4.3 What goods or services are currently being sold via multiple contact unsolicited sales?

While educational software was probably the most common product sold in this way until recently, it appears that the 'market' has been exhausted and complaints have decreased significantly. This is not surprising given that about 3% of Australians had received an in-home demonstration of educational software.[5]

[3] ibid 24.
[4] ibid 25.
[5] ibid 86.

Currently solar panels appear to be sold in this way where the first contact is made via a telemarketing call and consumers are sometimes confused, or misled, about the cost. It also appears that property investment services and advice is also increasingly being offered in-home, after the consumer responds to questions in a telemarketing call.[6]

2.4.2 Who is caught out by unsolicited/off-trade-premises sales?

Our experience is that the people who are most vulnerable to these techniques tend to be people on lower incomes, and from non-English speaking backgrounds. We believe that some groups such as public housing residents or Aboriginal communities are specifically targeted by sales people.

It would be wrong however, to assume that consumer protections relating to door-do-door or unsolicited selling would only protect these particularly vulnerable consumers. While these sales methods have a more serious impact on low-income consumers, we believe that all consumers are vulnerable to these techniques. There is some evidence for this. Over a period of about seven years, Consumer Action Law Centre received many calls about the sale of expensive mathematics software in the home. Almost all the centre's clients were on low incomes, and had entered into credit agreements to pay for the software that their children never, or rarely, used. It was assumed for some time that disadvantaged consumers were targeted.

However, while research found that 30% of the consumers who had an in-home demonstration signed up to purchase the software, "there was no significant relationship between education level, income, age or profession, and the decision to sign up for the software package".[7] Only 13% of respondents reported feeling "no pressure at all" from the sales person.

While higher income consumers are less likely to seek help from financial counsellors or community agencies, it is likely that they may choose not to go through the trouble, or embarrassment, of making a complaint or raising a dispute with the seller. Low-income people don't have this choice because the financial loss has an impact on their ability to afford to pay for necessities.

[6] See Blog Post by Carolyn Bond at https://thenaysayer.net/2016/02/25/telemarketing-do-not-call-and-the-the-property-investment-link/
[7] Paul Harrison et al, above n2, 92.

3 HOW EFFECTIVE IS THE CURRENT LAW (Q 4)

In our experience, many businesses that use various ploys to elicit an invitation to a consumer's home, or who offer a demonstration or an obligation free quote, don't comply with the current law.

A significant problem with the current legislation is the lack of clarity regarding the types of contracts that are covered. For example, the legislation attempts to narrow what is meant by "an invitation to enter into negotiations for a supply", by excluding consumer invitations for purposes other than to negotiate a contract (such as an invitation to quote a price or entering a competition). The legislation needs to be much clearer, for example by excluding invitations that are elicited from consumers for the purposes of an in-home demonstration.

We believe it should be possible for particular sales processes, or the practices of a particular business or industry, to be declared to be unsolicited consumer agreements for the purpose of the legislation. We propose that the ACCC should be given such a power so it can act to prevent problems before they arise. We note that regulations could be developed to clarify what are, and are not, unsolicited consumer agreements however we are concerned that this could be a complex and time-consuming process and would not keep up with industry practices. It is clear that cooling off periods do not adequately prevent the harm caused by these agreements - "cooling-off periods are under-utilised, as they require cognitive effort for the consumer to initiate the withdrawal, resulting in a rejection of previous choices, and high ego costs".[8]

The experience of our financial counselling clients is that they often take some time to realise the impact of what they have signed. Anecdotally, consumers tend to be optimistic that while they may have some discomfort about what they have signed, they seem reluctant to believe that the "nice person" who visited them in their home has "ripped them off". The complexity of some products and complex pricing and credit arrangements, can mean that it could be six months or more before the consumer realises the full impact and cost.

A more effective response would be a requirement that the consumer must contact the business to opt-in to any unsolicited/off-business premises sale within 24-48 hours, without any contact by the seller during that period, otherwise any agreement would lapse. For agreements which usually cost thousands of dollars, this is a small requirement to ensure that the consumer wants to proceed.

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[8] ibid, 7

An alternative, or additional approach, would be the introduction of provisions relating to "pressure selling". This could make the legislation more relevant to the actual experience of consumers and would take into account the way that consumers – and businesses – behave. The definition of pressure-selling would take into account psychology and behavioural research and would identify particular factors that are likely to contribute to a pressure-selling situation. For example, one factor would be based on the way the sales people related to individuals in their homes (even if there was a clear invitation), and another would be the difference in the consumer's expectation about the product details and price, and how the marketing might promote ignorance and how this is used in the selling situation.

4 SHOULD THE ACL PROHIBIT CERTAIN PRACTICES OR BUSINESS MODELS? (Q 15)

FCA supports the prohibition of unfair commercial practices or business models.

4.1 Credit repair

The vast majority of financial counselling clients are experiencing problems paying debts and bills. They are often faced with losing assets such as a home or car, leading to them experiencing high levels of stress. They are therefore particularly vulnerable to services that offer to solve their problems. These services range from those offering Part IX Debt Agreements and debt consolidation loans, to those offering to fix the consumer's credit report.

While we have concerns about the way many of these businesses market their services, we don't argue that all these business models should be prohibited. Some of these business models however, offer very little, if any benefit, to consumers. They take advantage of a consumer's often desperate situation and cause further financial loss that they are unable afford.

Credit repair organisations often charge significant amounts to consumers who are led to believe their credit report will be fixed. In most cases the organisations do nothing more than the consumer could do themselves. Harm is caused by a combination of the marketing strategy, the types of consumers targeted, up-front payment before the consumer understands what the service will do and the fact that the service provided is poor value for the cost. It is in these circumstances where the harm results from the entire process, rather than an individual element, where a prohibition on unfair models or practices would be of most assistance to consumers.

4.2 Businesses targeting Aboriginal consumers and other vulnerable groups

In some cases, businesses target particular groups of consumers because they identify a particular vulnerability (for example low literacy or age) and take unfair advantage of this. For example, in some cases agents selling college courses focused their sales on people living in housing estates with high levels of disadvantage. They do not take into account the capacity of the customer to undertake the course.

Some businesses target consumers in Aboriginal communities. While access to goods and services at a reasonable price is important for these consumers, the goods and services offered are often designed to appeal to the consumers but are sometimes of little use (for example expensive first aid kits), are unfair in the way they are marketed or they are sold at very high cost (compared to what could be purchased elsewhere). It is common for some of these sales to trap consumers in unmanageable levels of debt. As well as causing harm to consumers, if these practices are allowed to continue, they reward businesses for unethical conduct and disadvantage competitors who avoid acting unethically and may provide more suitable and affordable goods and services.

Lynda Edwards is a Wangkumara woman from Wilcannia in New South Wales. Lynda works for FCA for four days per fortnight coordinating our financial capability community of practice, a network of people working often with people in remote Aboriginal and Torres Strait Islander clients.[9] For the remaining six days per fortnight, she works for Centacare Wilcannia-Forbes. This service provides financial literacy and financial counselling for Aboriginal clients.

Lynda says that various businesses target products to Aboriginal people, and design the products and sales techniques in a way that exploits these consumers.
She advises that Aboriginal people generally find it very difficult not to speak to someone who comes to their door, because culturally they feel they must listen to what the person has to say unless the person has done something very wrong. Many companies are offering inducements to members of the community, such as free laptops or money to sign up family members, who then sell over-priced products within the community such as first-aid kits and computers.

[9] Financial capability workers provide financial literacy education to individuals and groups. Many financial capability workers operate in remote Indigenous communities.

The sale of family photography packages has caused financial hardship for many Aboriginal people. Lynda explained that mementos such as photos are very important to Aboriginal people. Businesses offer to take photographs of family members initially at little or no cost, but then send one photo back with an account to pay for the remaining photos. These photos can cost between $400 - $500 each.

Many Indigenous people find it hard to say "no" to paying for a number of these photographs once they have seen the set, and would try to avoid these photographs being taken away and (probably) destroyed. Many consumers can find themselves in financial hardship as a result of this practice. The funds are often paid direct from pensions and benefits via the Centrepay system. The photographs are more expensive than similar photographs that could be obtained from other photography businesses.

Another issue causing problems for some Aboriginal people are Christmas hamper lay-by plans. These offer a solution for community members who are often concerned about providing food for their wider family at this time but come at a very high cost. The food is more expensive than is available in local stores, a monthly payment is agreed to which can leave the individual in financial hardship, and the food is often delivered in October/November meaning that little is left at the time it is needed most. Lynda is also concerned that these businesses are now offering household goods and alcohol. These plans make it difficult for consumers to compare prices given that the food and goods are sold as a package, and the cost is spread over fortnightly payments.

The ACCC has previously taken action against Chrisco, the major company operating in this market, with the Federal Court finding the company's lay-by agreements contained an unfair contract term. The agreement allowed the company to continue to receive payment even after the consumer had fully paid for their goods.[10]

5 PENALTIES (QUESTION 18)

We are concerned about the impact of the penalty provisions in the ACL on large businesses that breach the law to the detriment of consumers.

The benefits to very large businesses from a breach of the ACL can be greater than the value of the fine imposed. We support the view that the penalty regime that applies to breach of the competition provisions should be applied to breaches of consumer protection provisions, so that a court can base the penalty on a multiple

[10] See https://www.accc.gov.au/media-release/federal-court-finds-chriscos-lay-by-agreements-contained-unfair-contract-term

or proportion of the business' turnover, or the profit made as a result of the breach. This would also have a very important deterrent effect.

6 RECOMMENDATIONS

- Section 69 should be amended so that an invitation merely for a ***demonstration or presentation*** in the home should also be "not taken, for the purposes of subsection (1)(c) to be an invitation to enter into negotiations for supply".
- Pressure selling should be defined in the legislation to take into account factors known to have an impact on consumer decision-making, and consumers should be required to opt-in to such agreements.
- The ACL should give the ACCC the power to determine whether the sales processes adopted by a particular business, or a particular selling process, is an unsolicited consumer agreement.
- The cooling-off period in relation to unsolicited sales should be replaced by an opt-in provision, which requires that the consumer confirms the agreement within 24 hours to 48 hours after the visit.
- Door-to-door selling should be prohibited and any contracts entered into in this way should be unenforceable.
- A general unfair trading prohibition should be introduced.
- Courts should be able to award penalties for breaches of the ACL as a multiple/proportion of the business' profit from the breach or the business' annual turnover.