RODAN+FIELDS

1. Introduction

1.1 Rodan + Fields, LLC (**R+F**) is a direct selling company offering dermatology-inspired skincare products, based in the United States. R+F will commence business in Australia in 2017 through Rodan & Fields Australia Pty Ltd.

1.2 For further information relating to the R+F business model, please refer to our previous submission in response to the *Australian Consumer Law Review Issues Paper* (**Issues Paper**). A copy of this submission is annexed to this Submission.

1.3 R+F welcomes the opportunity to lodge this submission in response to the *Australian Consumer Law Review Interim Report* (October 2016) (**Interim Report**).

1.4 Our submission will focus on the unsolicited consumer agreement provisions contained in the Australian Consumer Law (**ACL**), together with the proposed amendments relating to unfair trading and pyramid schemes.

2. Unsolicited Consumer Agreements

2.1 As a company operating a direct selling business model, the regulation of Unsolicited Consumer Agreements (**UCAs**) by the ACL will inevitably impact on the manner in which R+F conducts business in Australia.

2.2 In the Interim Report, Consumer Affairs Australia and New Zealand (**CAANZ**) considers how best to regulate UCAs under the ACL and puts forward four options for reform of UCA regulation for consideration by stakeholders, to which we respond in turn below.

Option 1 – Maintain the current balance and breadth of existing Unsolicited Consumer Agreements (UCA) framework

2.3 R+F does not support the proposal to maintain the UCA framework in its existing form, as it would operate as a disproportionate and unjustified restriction on R+F's Australian business (along with the businesses of other direct selling companies).

2.4 In our submission in response to the Issues Paper, we proposed the existing UCA provisions should be amended such that:

(a) the value of products which can be supplied during the cooling-off period be increased from $500 to $1000; and

(b) the prohibition on accepting or requiring payment during the cooling-off period be repealed.

2.5 R+F supports CAANZ's observation in the Interim Report that any amendments to the UCA provisions should be supported by clear and robust evidence of a gap in the current legislative framework which necessitates the change in question. R+F considers that our proposed amendments to the ACL are supported by clear evidence of the discriminatory effect the UCA provisions on direct selling companies. We refer, in particular, to the submission of Direct Selling Australia to the Issues Paper (**DSA Submission**), which highlights the regulatory uncertainty occasioned by the UCA provisions for direct selling companies and the unique consequences that these provisions have for direct selling transactions.

2.6 By contrast, Rodan + Fields is unaware of any evidence which demonstrates actual consumer vulnerability in the context of UCAs to support any of the options proposed by CAANZ.

Option 2 – Replace the cooling off period with an "opt-in" mechanism

2.7 In the Interim Report, CAANZ queries whether the existing cooling off period should be replaced by an "opt-in" mechanism. R+F does not support this proposition for the reasons set out below.

2.8 First, there is insufficient evidence to demonstrate consumer vulnerability in the context of UCAs caused by the existing cooling off period requirement.

2.9 Secondly, there is no clear evidence that indicates the consumer benefit that would result from the introduction of an "opt-in" mechanism in preference to a cooling off period requirement.

2.10 The Comparative Analysis of Overseas Consumer Policy Frameworks Report prepared by the Queensland University of Technology (**QUT Report**) did not find any precedent internationally for the use of an "opt-in" mechanism. R+F is not aware of any such requirement. It is clear that a "cooling off period" is the preferred mechanism used to regulate UCAs in comparable jurisdictions, as compared to the introduction of an "opt-in mechanism".

2.11 R+F considers that this provision should remain, particularly in the absence of any consumer detriment arising from the current "cooling-off period" mechanism and the lack of clear consumer benefit arising from the introduction of an "opt-in" mechanism.

2.12 To the extent that the merits and practicality of the "opt-in" mechanism are unknown, the introduction of a mandatory requirement for that mechanise to be made available would likely create regulatory burden and uncertainty for business.

Options 3 and 4 – Introduce additional rights and protections for enduring service contracts and high-risk transactions

2.13 CAANZ has proposed introducing additional rights and protections surrounding enduring service contracts and high-risk transactions.

2.14 R+F does not consider that additional rights and protections are required in relation to enduring service contracts and high-risk transactions.

2.15 The introduction of concepts such as "enduring service contracts" and "high-risk transactions" will serve only to complicate further the existing regulatory regime in relation to UCAs and will result in undue regulatory burden on businesses.

2.16 Also, the distinction between "high-risk" and "low-risk" transactions for the purposes of risk-based regulation lacks certainty and may be unfairly discriminatory of direct selling companies.

2.17 In relation to Option 4 (high-risk transactions) specifically, CAANZ has sought submissions relating to the adoption of a risk-based approach to UCA protections generally.

2.18 R+F is not generally supportive of any risk-based approach to regulation and consumer protection. This is on the basis that any distinctions between "high" and "low" risk transactions which is based purely on the value of the sale (as suggested in the Interim Report) is arbitrary and will further increase the regulatory burden on businesses. In this regard, R+F shares CAANZ's concern that introducing a risk-based legislative distinction in relation to sales will add unnecessary complexity to the law.

3. Unfair Trading

3.1 In the Interim Report, CAANZ considers whether a prohibition in relation to "unfair trading" practices should be introduced into the ACL.

3.2 R+F does not believe there is sufficient evidence of a gap in the law to justify or necessitate the introduction of an "unfair trading" prohibition.

3.3 The existing provisions in the ACL surrounding "unconscionable conduct" provide significant legal consumer protection measures to address unfair trading practices. R+F considers that these legislative provisions essentially render an "unfair trading" prohibition redundant. Additional consumer protection measures are provided by the ACL through, for example:

(a) prohibitions relating to misleading and deceptive conduct (section 18) and false representations (section 29);

(b) consumer guarantees under Part 3.2, Division 1 of the ACL, including guarantees relating to quality and fitness for purpose; and

(c) prohibitions relating to the participation in pyramid schemes (section 44) and the use of referral selling (section 49).

3.4 Accordingly, an "unfair trading" prohibition would only serve to complicate the existing consumer protection framework in the ACL and should not be introduced.

3.5 R+F acknowledges that other jurisdictions such as the EU have introduced an express "unfair trading" prohibition. However, it is of considerable doubt whether a similar "unfair trading" prohibition would be consistent with the existing ACL framework. In any event, additional legislative protection in the ACL should only be introduced if it addresses a gap in the protection afforded by in the existing ACL.

3.6 Indeed, the Interim Report refers to the likelihood of a "substantial degree of overlap" between the existing consumer protection provisions under the ACL and any provision that is introduced to implement the "unfair trading" prohibition adopted in other jurisdictions, as referred to in the QUT Report.

3.7 For the reasons set out above, R+F does not consider that an "unfair trading" prohibition would fit within the ACL. Rather, it would simply impose unnecessary and burdensome regulatory compliance costs and uncertainty for businesses.

4. Pyramid Schemes

4.1 In the Interim Report, CAANZ also seeks submissions in relation to whether the definition of "pyramid scheme" should be broadened to capture multi-level marketing where there is no realistic prospect of successful return. This broadening of the definition was proposed by the Consumer Action Law Centre (**CALC**) in its submission to the Issues Paper.

4.2 R+F considers that the existing definition of "pyramid scheme" is sufficient and has been subject to extensive judicial consideration. This has the result that stakeholders understand the regulatory restrictions associated with "pyramid schemes", as currently defined, in the ACL. Further, we do not consider that case law or legal commentary on "pyramid scheme" regulation in Australia suggest that any evidence exists to justify this new definition.

4.3 Further, the concepts of "successful return" and "realistic chance" which are contemplated by this new definition are excessively subjective and ambiguous in nature. Until these concepts are

clarified by case law, there will exist considerable and unnecessary uncertainty for businesses as to the scope of any revised definition.

4.4 By contrast, the well-understood concept of "pyramid scheme" as set out in the ACL will result in more effective consumer protection outcomes than the new definition (as evidenced by extensive case law under section 45 of the ACL).

4.5 Finally, multi-level marketing is a legitimate (and very widely used) mechanism for the facilitation of the wholesale and retail distribution of goods and services for direct selling companies such as R+F. In making this comment, we refer to the DSA Submission, which provides an insightful background to the direct selling industry and the key features of direct selling business models.

4.6 R+F considers that any possible extension of the definition of "pyramid scheme" along the lines suggested in the CALC submission, would create a false impression that direct selling companies engage in illegal commercial practices. This is unjustifiable and would give rise to irreparable reputational harm and prejudice against direct selling companies.

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Annexure 1 – Rodan + Fields Submission to ACL Review Issues Paper

Rodan + Fields Summary

Introduction and Business Model

1. Rodan + Fields, LLC (**R+F**) is a direct selling company based in the United States which offers dermatology-based skincare products created by dermatologists Dr Katie Rodan and Dr Kathy Fields. R+F was founded in 2002 and currently conducts business in the United States and Canada.

2. R+F is a member of the US Direct Selling Association.

3. R+F will commence business in Australia in 2017. The business operation will be conducted through Rodan & Fields Australia Pty Ltd.

4. R+F was initially launched as a department store brand in 2002. Today, R+F is a social commerce brand, which operates through Independent Consultants who have the opportunity to run their own business and build a personal sales teams.

5. Our compensation plan provides for commissions on sales made by Independent Consultants and their personal teams, as well as performance bonuses for reaching milestone achievements.

6. R+F welcomes the opportunity to lodge a submission in response to the *Australian Consumer Law Review Issues Paper* (March 2016).

7. Our submission will focus on the unsolicited consumer agreement provisions contained in the Australian Consumer Law.

Unsolicited Consumer Agreements

8. R+F operates under a direct selling business model. As a result, negotiations may be commenced by an Independent Consultant away from any business or trade premises owned or operated by R+F. In these circumstances, any agreement for the purchase of products or regimens will be classified as an "unsolicited consumer agreement" ("**UCA**") and must comply with the requirements for UCAs set out in the *Australian Consumer Law* ("**ACL**").

9. Accordingly, R+F wishes to comment on the UCA provisions contained in the ACL because the provisions will likely apply to some of the circumstances in which Consultants may make sales to customers.

10. In summary, R+F considers that the UCA restrictions referred to in this submission will likely operate as a disproportionate and unjustified restriction on the operation of R+F's Australian business, particularly by reference to other retailers in the Australian market.

<u>Prohibition on Supply and Accepting Payment during the Cooling-Off Period</u>

11. The UCA provisions prohibit any supply of products where the sale exceeds $500 and accepting payment during the 10 business day cooling-off period pursuant to section 86 of the ACL.

12. If a sale agreement is a UCA (for example, resulting from the circumstances outlined above), then the following applies (among other matters) during the cooling-off period:

    (a) Products may be supplied if the value of the sale is less than $500.

(b) Payment cannot be accepted or demanded.

13. R+F considers these restrictions during the cooling-off period on the supply of products exceeding $500 and on accepting or demanding payment are unjust and disproportionate to the object of consumer protection under the ACL.

14. We believe that the consumer protection provided by section 84 of the ACL renders the prohibition on accepting payment during the cooling-off period redundant.

15. Specifically, section 84 of the ACL would require R+F to immediately refund any payment made by the consumer under the UCA if the consumer terminates the UCA during the cooling-off period. Failure to comply with the requirement to immediately refund or return consideration paid is a strict liability offence under section 178, which includes a pecuniary penalty of $50,000 (for a company).

16. As there is a refund requirement and an offence provision for a failure to refund, R+F considers that the section 86 prohibition on accepting payment during the cooling-off period is unnecessary, draconian and goes beyond what is required to protect consumers' interests.

17. Further, R+F has a Customer Satisfaction Guarantee. If for any reason a customer or Independent Consultant is not satisfied with an R+F product, the unused portion may be returned within 60 days of the order being placed for a 100% refund (less shipping and handling costs). This Customer Satisfaction Guarantee provides a consumer with rights which well exceed those available under the UCA provisions and are in addition to those provided under the statutory consumer guarantees regime provided in the ACL.

18. When compared to the regulation of UCA's in other jurisdictions, R+F considers the UCA supply and payment prohibitions to be unnecessary and anti-competitive to the extent that it imposes an unfair disadvantage on direct selling companies as compared to traditional retailers.

19. For example, we understand that neither the New Zealand *Fair Trading Act 1986* (**FTA**) nor the EU Directive on Consumer Rights adopt the policy underling the ACL UCA provisions insofar as they both allow suppliers to accept payment during the cooling-off period.

20. R+F submits that section 86 should be amended such that:

(c) the prohibition on the supply of products exceeding $500 during the cooling-off period is increased to $1000; and

(d) the prohibition on accepting or requiring payment during the cooling-off period is repealed.

Supply of Goods

21. We consider the current $500 threshold too low.

22. We anticipate that the prohibition on supplying products exceeding the value of $500 during the cooling-off period will very likely place R+F at a distinct disadvantage when it enters the Australian market compared to:

(e) retailers (with retail stores and/or online stores) who are immediately able to provide skincare products of any value when contracted to do so; and

(f) other direct sellers that supply individual products with a value of less than $500, who are able to supply those products during the cooling-off period.

23. R+F's products are sold both individually and, more commonly, as comprehensive skincare regimens featuring a number of products. Typically, in the United States and Canada, customers may purchase a regimen range (which comprises a number of products) and additional products to complement this regimen, such as serums and eye creams. We expect this to be the case in Australia too. As a result, we expect that sale agreements will likely meet or exceed the $500 threshold in many circumstances.

Payment

24. R+F considers that the payment prohibitions imposed on direct selling companies under the UCA provisions are anti-competitive and pose undue restrictions on the conduct of business in Australia for three key reasons.

25. First, whereas instore and online retailers are able to provide goods and accept payment at the time of entry into the sale agreement, direct selling companies are unable to deliver the same immediate service. This imposes an unjustified disadvantage on direct selling companies such as R+F and impedes competition between companies selling similar products.

26. Further, in light of the refund requirements imposed by section 84 of the ACL, R+F considers that the current restriction on accepting payment during the cooling-off period is not necessary.

27. Finally, payment processors impose terms and conditions on retailers which are incongruent with the UCA payment prohibition. Specifically, credit card payments must be processed within a narrow time frame after the sale agreement is entered into. In addition, R+F and other direct selling companies would not be permitted to store the credit card details of customers pending the conclusion of the cooling-off period. As such, R+F would be required to contact each customer at the end of the cooling-off period in order to obtain the credit card details necessary for payment. In light of the practical difficulties arising from the UCA payment prohibition, R+F considers the policy of permitting payment during the cooling-off period in other jurisdictions is a preferable approach to the current prohibition under section 86, as it does not produce a discriminatory and anti-competitive result to direct selling industry organisations.

Conclusion

28. In conclusion, R+F submits that section 86 of the ACL should be amended as follows:

> the value of products which can be supplied during the cooling-off period should be increased from $500 to $1,000; and
>
> the prohibition on accepting or requiring payment during the cooling-off period should be repealed.