



**AUSTRALIAN CONSUMER LAW: FAIR MARKETS -
CONFIDENT CONSUMERS**

THE AUSTRALIAN RETAILERS ASSOCIATION

SUBMISSION TO

**THE STANDING COMMITTEE
OF
OFFICIALS OF CONSUMER AFFAIRS**

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Australian Retailers Association

- Voice of the Retail Industry

The Australian Retailers Association (ARA) is the peak national retail association representing the interests of the largest employing industry in Australia. We provide leadership and solutions to improve the long-term viability and visibility of the retail industry by proactively dealing with government, media and other regulatory bodies on behalf of our members.

ARA members comprise a diversity of size and types of retailers reflecting the profile of the retail industry, ranging from large national chains to one-person operators throughout the nation.

The ARA provides a range of comprehensive services, advice and representation suited to both small and large retailers in the areas of employment relations, occupational health and safety, tenancy, consumer law and retail business solutions. This includes a range of retail specific training that supports best practice in retail.

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Background

Following the Productivity Commission's (PC) review of consumer policy framework and its conclusion that "while Australia's consumer policy framework has considerable strengths, parts of it require an overhaul" all Australian governments in October 2008 agreed to a new consumer policy framework, comprising a single national consumer law and streamline enforcement arrangements.

The new national consumer law to be called the ***Australian Consumer Law*** will be based on the existing consumer protection provisions of the Trade Practices Act but is to include provisions to regulate unfair terms in consumer contracts; new enforcement powers to enable more proportionate responses to consumer law breaches; a new national legislative and regulatory regime for product safety and an inter-governmental agreement between the Australian government and the governments of the State and Territories for amending consumer law and its administration.

The new Australian Consumer Law must be based on the best practice that exists in state and territory laws that augment and modify the existing generic consumer protection provisions of the Trade Practices Act. A new Inter-Governmental Agreement between the Australian Government and the governments of the States and Territories will provide the process for amending the national consumer law and the administration underpinning it.

The objectives of the Australian Consumer Law

The objective as agreed by the Ministerial Council on Consumer Affairs (MCCA) on 15 August 2008 was:

'To improve consumer well being through consumer empowerment and protection, fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers trade fairly.'

To achieve this objective six operational objectives for consumer policy have been set:

- to ensure that consumers are sufficiently well informed to benefit from and stimulate effective competition;
- to ensure that goods and services are safe and fit for the purpose for which they were sold;
- to prevent practices that are unfair;
- to meet the needs of those consumers who are most vulnerable or are at the greatest disadvantage;
- to provide accessible and timely redress where consumer detriment has occurred; and
- to promote proportionate risk-based enforcement.

The Standing Committee of Officials on Consumer Affairs (SCOCA) is suggesting that the Australian Consumer Law should have the following overarching objective in the legislation:

'The object of this Law is to enhance the welfare of Australians through the promotion of competition and fair trading, and the empowerment and protection of consumers.'

This proposed objective in SCOCA's views "reflects the existing objective of the Trade Practices Act (TPA) with some modification, reflecting the concern of MCCA for both empowerment and protection of consumers."

2. Executive Summary

The Australian Retailers Association (ARA) welcomes the initiatives of the Australian Consumer Law and seeks to comment on those areas relating to the retail industry sector.

Regarding the extension of the unfair contract terms to standard form of contract, there are a number of unfair terms in existing in standard retail leases for property causing a significant imbalance in the tenant's rights and obligations.

- The majority of retail shop leases stipulate the contract contains the whole of the agreement and that no other representations, collaterals or promise are implied or arise.
- Retail shop leases contain clauses that remove all warranty as to the suitability of the premises to be used for the purposes to which the tenant has leased the shop for.
- Clauses relating to bank guarantees are open ends to the benefit of only one party and allow for the landlord to draw down on those guarantees even when the amount is in dispute

Retail shop leases contain a clause requiring the tenant to supply sales figures. This clause serves no other purpose other than to give the landlord a superior bargaining position when it comes to renewing the lease. Given the level of minimum rent the tenant will never pay percentage rent. The clause is unfair and gives the one party a significant advantage.

In relation to the scope for industry specific legislation to be included in Australian Consumer Law, the ARA strongly believes consideration should be given to harmonizing the unconscionable conduct provisions in the various retail lease legislation across the various state and territory jurisdictions and that consideration be given to the Productivity Commissions recommendation for a code for the shopping centre industry in its report into the *Market for Retail Tenancy Leases*.

The ARA welcomes the proposals for new product safety regulations and standards across all jurisdictions with the Australian government taking the lead role to enforce the framework.

The opportunity exists to standardise the lay-by regulations throughout Australia giving consumers more certainty and providing the national retailers significant savings in administration and compliance costs.

Dual pricing on single products has been an issue for both consumers and for suppliers over many years. The review also provides the opportunity for regulators, consumers and suppliers to set standards and guidelines removing a constant source of annoyance for many consumers.

3. Unfair Contract Terms

Part 2B of the Victorian *Fair Trading Act 1999* contains provisions prohibiting unfair terms in a consumer contract. The *Telecommunications Consumer Protections Code* in Chapter 5 contains a similar prohibition.

The Australian Consumer Law proposes to introduce a uniform prohibition on unfair terms in consumer contracts. The new legislation proposes to provide that a term is unfair if it causes a significant imbalance in the parties' rights and obligations arising under the contract, and is not reasonably necessary to protect the legitimate interests of the supplier. The prohibition will only relate to unfair terms in standard form, non negotiated contracts.

Further the Australian Consumer Law will ban the use of certain specified terms in consumer contracts on the basis that they are considered, in all circumstances, to be unfair. Such terms which might be banned could include clauses which:

- deny the existence of pre or post contractual representations
- purport to exclude or limit a supplier's liability "to the extent permitted by law"
- require a consumer to pay a fixed fee to terminate a contract early
- allow suppliers to retain, debit or set off amounts which are in dispute
- clause that let only the supplier decide whether to renew or not renew the contract

The majority of retail leases are standard forms of contracts that, apart from the commercial terms as to rent and the term of the contract, will not be altered by the landlord under any circumstances. This is especially so for those retailers who are located within shopping centres. In states such as New South Wales, the standard lease for most shopping centres is registered with the Office of Land and Property Information as a standard document. This is the document that the retailer must sign when he enters the contract.

Within those documents there a number of clauses that are unfair. One such clauses relates to the "Whole Agreement" which usually states:

"The terms and conditions contained in this lease comprise the whole agreement between the parties. No further or other terms and conditions are implied in this lease or arise between the parties by way of collateral or other agreement because of any promise, representation, warranty or undertaking given or made by any party to this lease to another on or before the execution of the lease."

In the event of a dispute this clause prevents the tenant from introducing into the dispute marketing documents, statements by leasing agents (as to the potential performance of the centre or anchor tenants who were going to sign up) that were relied upon in entering into the lease or were the inducements that led to the signing of the lease. It creates a significant imbalance in the contract.

Another clause that is in most standard form of a retail lease is “exclusion of warranties”:

“No promise, representation, warranty or undertaking is given regarding the suitability of the land, centre or shop for any use or for any business to be carried on in the shop”.

Again this is another clause in standard contracts in which a landlord can advertise a premise for lease to a retailer; have the retailer enter into the lease only to find out that under the zoning laws applicable to that premises it can not be used for a retail shop. Again the retailer having spent time money and effort in entering is not able to trade and has no claim for compensation from the landlords for any losses.

The clause relating to “Bank Guarantees” is another one that is seen to be unfair in many standard contracts. The standard contract is usually constructed as follows:

“The Lessee must on or before execution of the Lease arrange for the issue by a trading bank or other organization approved by the Lessor of a bank guarantee in favour of the Lessor for an amount equal to three months Annual Rent and Outgoings and on adjustment of either of these the Lessee must provide a replacement bank guarantee in an amount equal to three months as adjusted, and containing such terms and conditions as the Lessor may determine in its absolute discretion”.

The retailer is often faced with terms and conditions in the bank guarantee that are opened as to the finish date and allow for the landlord to draw down on the guarantee even when there may be a dispute as to the amount. The landlord having drawn down on the bank guarantee then requests the tenant to bring the bank guarantee up the amount required under the contract.

The open ended contract terms are unfair in the imbalance that it provides one party. The open ended terms of the bank guarantee required by many landlords will see the landlord fail to release the bank guarantee for often up to nine months after the tenant has vacated and returned the premises to the landlord in a fit and proper condition. The bank will not release the guarantee with the tenant being forced to continue to pay bank charges associated with the provision of the guarantee.

All states and territories have some form of legislation or regulation covering retail lease, as a result of the complaints and disputes over the years associated with leasing retail premises. There is a significant imbalance in the shopping centre industry bargaining power with landlords as a result of the protection they have received through the planning laws in Australia.

For certain type of retail formats, the retailer has no other alternative but to trade from within a shopping centre. As stated earlier these centres all have a standard form of contract form which the landlord will not depart. The philosophy is one of “take it or leave it”, which leaves the retailer with little or no choice if they wish to do business in a particular catchment.

Since the mid 1980s the various state and territory governments have introduced legislation or regulations covering retail leases throughout Australia. In recent times we have seen section 51AC of the Trade Practices Act covering unconscionable conduct

drawn down into much of the state legislation. This has changed the behaviour to some extent but there a number of issues that still have not been resolved, including:

- Contract renewal
- Disclosure of turnover

The matter of the renewal of the contract especially for a small tenant, who has never been in breach of the contract, and has invested substantial sums in the business often in excess of \$300,000.00 for fixtures, fitting and stock is a major concern. Many will have their contract renewed but it is always at the behest of the landlord. A number will not have their contract renewed and without a satisfactory reason.

Linked to the renewal of all leases for specialty stores in shopping centres, is the provision that the retailers sales or turnover figures must be provided to the landlord. This provision is on the basis that all standard shopping centre leases for specialty shops stipulate the retailer will pay a *percentage rent* of sales that are in excess of the minimum rent. This provision is on the basis that all standard shopping centre leases for specialty shop stipulate the retailer will pay an amount of *percentage rent* of sales that are in excess of the minimum rent.

In *Urbis JHD's Retail Averages* it is reported the average occupancy cost for all specialty shops in regional shopping centres is in excess of 15 percent. A retailer in regional shopping centre paying a minimum rent of \$100,000.00 per annum would have sales of \$666,667.00 per annum. The majority of leases containing a *percentage rent* clause as in the range of six - eight percent which would require the retailer to achieve sales between \$1,250,000.00 and \$1,666,667.00 depending on the percentage before the additional rent would apply. There is absolutely no likelihood of the retailer ever paying *percentage rent*.

The collection of these sales figures gives the landlord a significant imbalance in the negotiations when it comes to the lease being renewed. The knowledge of the income of the business allows the landlord to demand a rent that would be well in excess of what would be obtained in an open market where the landlord had no knowledge of the sales.

In all of the reviews of various retail lease legislation over the past ten years throughout Australia, the ARA has recommended disclosure of turnover clause is omitted. This move have been opposed vehemently by the landlords on the basis they are important for the landlord to monitor the performance of the centre. The figures are not shared with the majority of the tenants on the basis they are confidential to the landlord. All landlords when asked to remove the clause form the contract refuse to do so

Any suggestion made by the retailer to have the figures collected by an independent third party by industry category and made available to all has been refused. It is interesting to note that the landlords who are operating in North America make the figures available freely to retailers when they are entering into a new lease or renewing a lease.

It is the ARA's view that the collection of individual retail sales figures is unfair and used against the retailer when renewing a lease. This has been one of the major areas of dispute in lease negotiations.

4. Other reforms to be considered for inclusion

The retail sector has industry specific retail lease legislation across all jurisdictions. The legislation was introduced to address the imbalance between the landlords and the tenants. Whilst the intent was for similar legislation there are still significant differences between the jurisdiction and this is in spite of attempts to harmonise the legislation during the various reviews that have taken place. The unconscionable conduct provision is one area that could be addressed and uniformity reached across all the jurisdictions so those retailers trading across the various state and territory borders have the same provisions apply to unconscionability.

In recommendation five of the Productivity Commission's report on *The Market for Retail Tenancy Leases in Australia* in March 2008 states:

State and Territory governments in conjunction with the Commonwealth should facilitate the introduction, by landlords and tenant organizations in the industry, of a voluntary national code of conduct for shopping centre leases that is enforceable by the ACCC. The code should:

- *include provisions for standards of fair trading, standards of transparency, lodgement of leases, information provisions and dispute resolution; and*
- *avoid intrusions on normal commercial decision makings such as minimum lease terms, rents level,"*

The Productivity Commission went on further to say that the new streamlined regulatory framework could potentially lower transaction, compliance and administrative costs of operating in the retail tenancy market.

Consideration should be given by the Australian Consumer Law to the recommendation of the Productivity Commission in respect of the voluntary national code for shopping centre leases.

5. Product Safety

The current model provides for consumer product safety regulation within the Trade Practices Act and this generally applies to corporations whose activities are trading goods and services across state and territory borders or goods that are traded internationally including imported goods. Each state and territory has its own product safety laws that apply to goods traded within its borders and for goods sold by sole traders and unincorporated businesses.

The new model announced in May 2008 by the MCCA and endorsed by COAG in July 2008 will simplify and streamline product safety regulation in Australia. The model, underpinned by national application legislation, will be enforced by the ACCC and the various state and territory consumer regulators.

The ARA supports the ACCC being responsible for the recommendation of permanent bans imposed by the Australian Government Minister for Competition Policy and Consumer Affairs and the state and territory governments being able to impose only temporary bans of no more than sixty days within their own jurisdictions. Further, any extension of the temporary ban must be a matter for the Australian Government Minister.

The reformed product safety enforcement framework under the Australian Consumer Law will see a single new product safety law implemented in each of the jurisdictions reflecting the agreed reforms. The national enforcement will oversee laws relating to interim and permanent bans on products, the extension of state and territory bans, the ordering of compulsory product recalls and the mandating of product standards. These standards continue to be based on the existing voluntary Australia/New Zealand published standards or international standards where appropriate.

The State or Territory will be able to impose an interim ban within their border and refer mandatory bans and standards to the ACCC.

6. Lay-by Sales

Lay-by sales have been a part of the retail industry for at least six decades. Going back before hire purchase and the introduction of the credit card it provided low income consumers with a method of purchasing higher priced goods through an instalment plan over a fixed period of time. It was used especially for the acquisition of presents at Christmas time and the purchase of new season's apparel.

With the advent of hire purchase, and later the introduction of the credit card, use of the lay-by began to fall away. However, it was still used widely with some retailers especially for the purchase of children's wear - this is certainly the case with the recent baby boom. Expecting parents use the lay-by system for items such as prams, cots, change tables as well as infants wear. Many take out a number of lay-bys over a period of five months leading up to the birth of the child to ease the burden on their normal budget. It is also used extensively for new season's clothing both in winter and summer.

In recent times consumers are returning to lay-by with many consumers are at their limit with their credit cards and, more importantly, paying the high interest charges still applying to the outstanding balances on those cards. This was evident with a number of retailers at Christmas 2008 especially for such items as bicycles, sporting goods, recreational items, gifts and fine jewellery.

The majority of national retailers operating across state boundaries have reported an increased usage in lay-by as a method of purchasing more expensive goods. The younger generation has returned to this form of purchase in apparel especially at the commencement of a season when new stock first enters the store.

These retailers are confronted with two states and one territory that have legislation covering lay-by sales while the other states and territory have guidelines. While the principles are similar they contain subtle variations preventing retailers from operating the same system for lay-by sales across Australia adding to the cost of doing business and confusing staff who have to ensure each state complies with either the guidelines or the legislation.

Lay-by definitions

New South Wales and Victoria both have a section for lay-by sales in their Fair Trading Act whilst the ACT has specific legislation in their Lay-by Sales Agreement Act 1963.

For a retailer operating in New South the definition of a lay-by is:

- (1) A lay-by is the supply of goods on terms (expressed or implied) which provide that:
 - (a) the goods will not be delivered to the consumer until the whole of the price has been paid, and
 - (b) the price is required or allowed to be paid by three or more instalments (for this purpose a deposit is considered to be an instalment).
- (2) The fact that the purchase price is allowed to be paid by less than 3 instalments does not prevent there being a lay-by, so long as the payment by 3 or more instalments is allowed.

- (3) A supply of goods which would be a lay-by except for the fact that the price is required to be paid by less than 3 instalments is taken to be lay-by if the supplier has described, represented or advertised it as being a lay-by.
- (4) The goods need not be in existence or in the supplier's possession when the lay-by is entered into.

However for the same retailer who is also operating in the ACT a lay-by sale agreement means:

- (a) a sale of goods; or
- (b) an agreement to sell goods;
under which it is agreed expressly or implied that –
 - (c) the goods will not be delivered to the buyer until the purchase price or specified part of the purchase price is paid, whether or not any charge is payable for the storage of the goods; and
 - (d) the purchase price or, if a deposit is paid, the balance of the purchase price –
 - (i) is to be paid by instalments, whether the number of instalments or the amount of all or any instalments is fixed by the agreement or is left to the option of the buyer; or
 - (ii) is to be paid at the end of a fixed period with an option, expressed or implied, for the purchaser to make payments in relation to the purchase price during that period, but does not include an agreement to which section 18 applies.

In addition to the definition in the ACT section 4 of the Act also provides for Agreements for lay-by sales of goods not in the seller's possession. The section provides:

- (1) Subject to this section, a person shall not agree to sell goods under a lay-by sale agreement unless the goods are in his or her possession at the time when the agreement is entered is made.
- (2) A person may agree to sell under a lay-by sale agreement goods not in his or her possession at the time when the agreement is made if the agreement provides that –
 - (a) the seller shall not accept any payment, other than a deposit not exceed 1/5 of the purchase price of the goods, until the goods have been received into the possession of the seller, and have been inspected and approved by the buyer; and
 - (b) any time fixed for the payment of the purchase price (other than the deposit) shall begin to run as from the day when the goods are so inspected and approved by the buyer.

- (3) The seller shall hold the money received in relation to a lay-by sale agreement of goods referred to in subsection (2) exclusively for the benefit of the buyer to be disbursed as he or she directs.

For the same retailer in Victoria he is confronted with the following definition:

Lay-by means the supply of goods ordinarily used for personal use, household or domestic purposes on terms (express or implied) which provide that –

(a) the goods will not be delivered to or available for collection by the purchaser until the whole of the price has been paid; and

(b) the price is to be paid by 3 or more payments –

whether or not the goods are in existence or in the supplier's possession when the terms and conditions are agreed upon.

The other states and territory do not have legislation but do have guidelines. Only Western Australia in their guidelines defines a lay-by as being a “contract between the retailer and a customer in which the retailer agrees to hold the goods until they have paid the total selling price in instalments within a fixed period”. The other jurisdictions are silent on a definition.

Lay-by agreements, written contracts and records

All jurisdictions speak of a written statement or contract and what it should contain. New South Wales requires a written statement to be given that contains the terms or a summary of the terms of the lay-by. It must be given to the consumer when the lay-by is entered into and must be clearly legible, readily understandable and written in English or another language if the consumer understand that language.

The statement would contain the following:

- the purchase price of the goods
- any deposit paid and the outstanding balance
- the dates on which the instalments are due
- any cancelation charge payable
- the date by which the final instalment must be paid

In the ACT the lay-by agreement must be reduced to writing the terms and conditions at the time the agreement is entered into. The seller is required to keep prescribed records which must contain the following:

- the name and address of the buyer of the goods
- the description of the goods
- the purchase price of the goods
- the date when the lay-by agreement was made
- the amount of each payment made and the value of the consideration provided to complete the purchase of the goods
- the date when the goods were inspected and approved by the customer
- a number for the lay-by agreement

- the record is to be kept for twelve months

If the same retailer has a store in Victoria the written statement must comply with the following:

- must be in clear and legible handwriting or print or type size no less than 10 point
- must be written in English or a language understood by the purchaser
- must contain a description of the goods, including any brand name or model number
- the purchase price
- the first payment made on the goods and the balance outstanding
- a method of determining when any payments to be made on the goods are due and dates by which any such payments are to be made
- if any charge is payable under the lay-by for the cancellation of the lay-by, the amount of the cancellation charge or method of calculation of the charge and this must be in bold writing
- any other terms
- the purchaser's right to cancel and the procedure to be followed should the purchaser wish to cancel
- the full name and business address (not being a post box) of the supplier
- the statement must be signed by both parties
- the statement must be given to the purchaser at the time the lay-by is entered into.

Queensland in their guidelines suggests that the retailer should give the consumer a copy of the lay-by contract which clearly sets out the conditions of the lay-by. It should include:

- a description of the goods
- the date of the transaction
- the lay-by number
- a record of the deposit or payments made
- the period of time over which payments are to be made
- when the final payment is due and the goods handed over
- what happens if the customer fails to pay on time or does not meet conditions of contract
- the procedure you will follow to cancel the contract
- the customer's name, address and telephone number
- the lay-by number

South Australia suggests a lay-by agreement or docket be used that clearly sets out the terms and condition of the lay-by and a record kept with the following details:

- a description of the goods
- a date of the transaction
- a number to identify the sale
- the amount of deposit paid
- the maximum duration of the lay-by
- the instalments to be paid and the due date
- balance owed
- what happens if the contract is cancelled

- customers name, address an telephone number

Tasmania in their guidelines indicates the customer should be given a copy of the contract which clearly sets out the conditions of the contract: It should include:

- a description of the goods
- the date of the transaction
- identification mark or number
- details of the deposit and instalments paid
- the period over which the instalments are to be made
- the date by which the lay-by is to finalized
- penalties which may be imposed for either a late payment, cancellation or variation of the agreement
- when ownership of the goods passes
- who is responsible for insurance
- customers address and contact details

The Northern Territory only suggests that most shops will provide lay-by terms and conditions in writing on a lay-by docket and the retailer has a sign in the shop stating the terms and conditions of the lay-by.

Cancellation by the consumer

The jurisdictions with legislation all provide for a cancellation process by either party. For the consumer New South Wales allows for the consumer to cancel a lay-by at any time before the goods are delivered and if the retailer will not accept the cancellation in person or by telephone then the consumer should put the cancellation in writing.

In Victoria a consumer may cancel the lay-by contract before the goods are delivered or if the goods are damaged. If the retailer will not accept a verbal cancellation then the retailer must provide the consumer with a cancellation form that complies with the Act and clearly sets out;

- the purchase price
- cancellation fee payable
- total amount paid on the lay-by
- amount owing to the retailer or the amount due back to the consumer
- or print a copy of the Consumer Affairs Victoria's Lay-by Cancellation Form

In the ACT a buyer may determine the lay-by sale agreement by giving a written notice to the retailer at the place of business. The retailer having received the notice must provide the buyer within seven days a statement signed by the retailer containing:

- the purchase price
- the amount of storage charge if any
- the total amount of monies paid
- the amount the retailer estimates is sufficient to recoup the selling costs in relation to the lay-by agreement plus any loss in value.

Other jurisdictions provide advice for consumers cancelling or terminating the lay-by agreement and provide some advice on the refund and retaining monies associated with the costs incurred with the lay-by.

Cancellation by the retailer

Most of the jurisdictions provide terms for the retailer to cancel the lay-by agreement. In New South Wales the retailer may cancel the lay-by if the consumer does not honour the agreement. The consumer must be notified in writing and given seven days to rectify the fault. The retailer cannot demand payment in full before the date set down in the lay-by statement. Cancellations fees apply and this amount must be specified in the statement. The amount should not exceed an amount sufficient to recover selling expenses including storage and administrative expenses and any loss in the value of the goods.

In Victoria the retailer may cancel the lay-by contract if the consumer fails to meet the requirements of the contract. The retailer must give the consumer a written notice to rectify the failure and give them 14 days to do so. If the consumer fails to rectify the fault the retailer can cancel the lay-by, charge the agreed cancellation fee and deduct it from the refund of any monies already paid and refund the balance within 14 days.

The ACT allows the retailer to cancel if the consumer fails to make regular payments or breaks some other condition of the lay-by agreement by giving 14 days notice in writing stating the amount already paid; what the consumer must pay to obtain the goods and what costs the consumer will incur if the agreement is not completed

In Queensland the lay-by contract can be cancelled if the terms of the contract are not met. This must be done in writing, stating the intention to cancel within a specified time and advise of the cancellation fees that were set down in the contract.

Tasmania suggests that 10 days notice in writing be given where the consumer fails to meet the terms and conditions of the contract. Again the retailer is allowed to recover expenses from the instalments already paid provided the customer was advised of those terms and conditions when they entered into the contract.

Retailers are not able to use a standard form of lay-by contract across Australia as there are subtle variations within those jurisdictions that have legislation, as well as differences within the guideline issued by those jurisdictions that don't have lay-bys included in their legislation.

Complaints

In those states where there is regulation, ARA members report that the level of complaints about lay-by sales is much less than in those states where there is none. In New South Wales members of the ARA have operated with a standard form of agreement, designed in consultation with the Office of Fair Trading, for the past ten years.

Since the form was introduced the complaints have been minimal and usually relate to a consumer changing their address and failing to notify the retailer. This has resulted in the consumer not receiving advice that they are in default as to payment or the time for the agreement has expired.

Anecdotal evidence from retailers is that they have more complaints in those jurisdictions that have no regulations and the retailers are unable to use a standard form of agreement because of the variations in the guidelines

Recommendation

Given its wide spread use by consumers of the lay-by method of purchase and the increasing numbers in the currently returning to the method of purchase, the Australian Consumer law should contain a provision regulation for lay-by sales. The provision would then allow for a standard form of agreement or contract to be used across all states and territories reducing compliance costs to retailers and providing consumers with a standard form of contract.

7. Dual Pricing

Currently New South Wales has a provision in its Fair Trading Act that regulates a retailer selling goods with more than one price attached. Under section 40 of the Act a retailer may not sell goods, which have more than one price attached, at a price that is greater than the lower or lowest of the prices. For the purposes of the section 'attached price' is further defined as:

- a price annexed or affixed to, or printed, stamped or otherwise located on the goods;
- appears on a display or stand for the goods;
- is encoded on the goods
- is published in any catalogue available to the public (unless the catalogue can reasonably be regarded as out of date)
- in any other way represented as a price applicable to the goods.

The aim of this legislation was to avoid misleading consumers into purchasing goods at a price higher than the lowest marked price. Dual priced goods may not have the prices directly on the goods as the second price could be on shelf prices, display prices on a poster or, in the case of garments, there could be two swing labels.

The ARA in conjunction with the major supermarkets introduced the Voluntary Code of Practice for Computerised Checkout Systems for supermarkets and is charges with the administration of that code. The ARA would average two to three enquiries a day as to the operation of the Code.

Many relate to supermarkets who are not signatories to the Code and this is a source of frustration to the consumer who clearly understand the Code and are looking for a remedy to the complaint. The complaint is always that the price at the checkout was greater than the price of the shelf label. Under the Code the first item scanned at a greater price than the shelf price is free and the other items are to be charged at the lower price.

There is a feeling among consumers, when told that the Code does not apply to those organizations selling general merchandise and use computerised checkout, that it should and these complaints are becoming increasingly common. Many of these organisations are related to the supermarkets who have signed the voluntary code.

However, it needs to be recognised that the Code that applies to supermarkets and does not have the same application in the general merchandise area. In a general retail outlet: there is not the same level of uniform barcode; there are significant price differences; and, for the smaller retailer, there is not the same sophistication in the technology being used.

There is little doubt the Code does function effectively and has reduced the incidents of complaints especially in some categories and in respect of the supermarkets that participate. When considering the number of products scanned, the number of complaints is small and usually relate to human error where the system has not been adjusted to reflect the shelf price.

Further, the courts have ruled on a number of occasions the representation of before and after price must be accurate and the previous price must have been the true price for a reasonable period of time.

Recommendation

The introduction of the new Australian Consumer Law provides the opportunity on a national basis to address the issue of dual pricing.