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15th March 2009

SCOCA Australian Consumer Law Consultation
Competition and Consumer Policy Division
Treasury
Langton Crescent
PARKES ACT 2600
australianconsumerlaw@treasury.gov.au

Dear Sir/Madam,

RE: An Australian Consumer Law: Fair Markets - Confident Consumers - Consultation Paper

I make this submission on behalf of the Financial Counsellors' Association of Queensland (FCAQ).

FCAQ is the peak body for the Financial Counselling sector in Queensland. The association has 34 members located from Cairns to the Gold Coast and west to the Darling Downs.

Our membership's client base (depending on funding agreements) ranges from wage/salary earners, gamblers, and Centrelink recipients; self funded retirees, small business owners and primary producers. Financial Counsellors provide support to individuals or families experiencing financial difficulties. Support is tailored to each client and includes advocacy, budgeting, education, and empowerment. Referrals are made where necessary and appropriate to other services to further improve the situation of the client.

This submission is allowed to be put in the public domain.

FCAQ welcomes the opportunity to add to the debate in this area and makes comment on the questions presented in the Consultation Paper. Financial Counsellors, as part of their role is advocating for consumers welcome the concept of a national consumer law by the state and federal governments, and the key elements of the proposed reform.

Development of a national consumer law

We support the introduction of a national consumer law. This will allow suppliers of goods or services to have a consistent approach across the country in their contracts, training, and interactions with consumers. It will also allow consumers to know that all creditors have one set of laws to abide by, instead of the current approach of each jurisdiction having its own similar but different laws.

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As the Ministerial Council implements a national consumer law; we urge caution. At present with each jurisdiction having similar but different laws, some laws are effective in curtailing or stopping unconscionable or misleading conduct, while other laws make it easier to enter into unconscionable conduct.

We ask that the Ministerial Council ensures that, where there is a difference in jurisdictions in a particular area, the Council chooses the law that limits the greatest potential for unconscionable conduct. That is, uses the law/s that protects the consumer the most.

Our members see on a daily basis the effects of poor consumer law and how the rights of the consumer, although an intent of current laws, are not reflected in workings of those laws. Creditors have nothing to fear from stricter laws and enforcement of those laws if they have a clear intention to conduct business under those laws. FCAQ is only concerned about those creditors who deliberately seek to conduct business by disregarding consumer law where it suits their purpose.

We recognise the difficulty that creditors have in operating a national business in different jurisdictions with different legislation and compliance requirements. Having one set of rules is smart and welcomed by FCAQ.

Should the TPA be renamed? If so, what name should it have, if not the Competition and Consumer Act?

We have no problem with the TPA renamed as the Competition and Consumer Act.

Terms retaining title for suppliers in goods that cannot be removed from consumers' premises without damage; terms allowing suppliers to repossess such goods

Title retention clauses should be excluded in contracts for goods that once installed cannot be easily removed without damaging consumers' premises, and for goods that are not easily reusable after they have been uninstalled.

Terms denying the existence or validity of pre- or post-contractual representations made to consumers; 'entire agreement' terms; terms deeming something a fact

Agreed that contracts that deny facts before the contract was made can limit a consumer's right to seek redress in court.

Terms under which consumers acknowledge that they have read or understood the Contract

Agreed these terms can limit a consumer's right to seek redress in court.

Flat/fixed early termination fees and those requiring the paying out of the contract

Any fee paid that would reward the supplier more than what they would lose by having a contract paid out is unfair. Having a flat fee for early termination at any stage of the contract does not reflect an accurate cost to the supplier of such termination.

Terms requiring consumers to pay more than suppliers' reasonable enforcement costs reasonably incurred

Agreed there is no incentive for suppliers to be reasonable or efficient in the compiling of these costs.

Terms requiring consumers to pay deposits or pre-payments that do not leave a substantial amount of the price to be paid on delivery/installation/performance

Agreed excessive deposits or pre-payments can leave consumers vulnerable if a supplier goes bankrupt before the delivery or installation and can reduce the bargaining power of a consumer to rectify faults and or under performance of the supplier.

Terms allowing suppliers to retain, debit or set off disputed amounts

Agreed, terms should allow for amounts in dispute and for disputes over performance of the contract.

Terms mandating arbitration of disputes or otherwise inhibiting access to courts or Tribunals

Agreed, terms should not restrict the ability of a consumer to seek redress through the legal system and preclude a consumer from a dispute resolution process.

Are there reforms other than those covered in Chapters 10 and 11 that could be included in the Australian Consumer Law, based on existing best practice in existing state and territory laws?

As mentioned earlier FCAQ is not against businesses or creditors, however some businesses in our opinion do push the boundaries of the current legislation and appear to have a clear intent to not abide by the spirit of consumer laws.

We therefore ask the Ministerial Council, in determining which law/s will be included in the new framework and deciding which jurisdiction will be used as a guide, the highest dominator be used – that is whichever jurisdiction has the highest standard of protection for a consumer in a particular situation that that standard be used as the minimum for the new laws. This will ensure that the new framework will raise the bar and ensure that consumers in all jurisdictions will have better protection or in the least not less.

Should the Australian Consumer Law include a provision regulating door-to-door sales? If so, having regard to the principles of best practice regulation, what aspects of current regulation should this provision reflect? What other approaches might be used?

We ask that the Victorian model be used as the basic minimum and incorporate into the new laws any jurisdictional legislation that increases consumer protection greater than the Victorian model.

Do businesses operating in multiple jurisdictions incur additional compliance costs as a result of different telemarketing regulation? If so, please provide evidence of this. Should the Australian Consumer Law include a provision regulating telemarketing? If so, which aspects of current regulation should this provision reflect? What other approaches might be used?

The new consumer laws should contain provisions regulating telemarketing and include cooling off periods, increased penalties for companies that do not abide by the Do Not Call register and what documents must be supplied before the cooling off period ends.

Bearing in mind the principle that the Australian Consumer Law should apply to transactions in any sector of the economy, is there a need to augment the current scope of sections 53, 53A and 53B of the TPA with regard to the approaches outlined above?

Is the scope of sections 53, 53A and 53B of the TPA sufficiently broad to cover these issues?

As mentioned earlier we ask that any jurisdictional legislation that gives consumers the best protection be used as the basic minimum. The new consumer laws should build on the best protection now in place and offer protection to all consumers.

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Is section 64 of the TPA effective in its current form? How could it be improved for inclusion in the Australian Consumer Law by reference to existing state and territory approaches or otherwise?

The new consumer laws should use Victorian and New South Wales law as a minimum and build on them to ensure greater protection is offered to consumers.

Should the Australian Consumer Law include a provision regulating third-party trading schemes? If so, should this provision reflect the current regulatory approaches used in state and territory laws and, if so, how?

Agreed.

Should mock auctions continue to be prohibited? If so, should the Australian Consumer Law include a provision prohibiting mock auctions? If so, should this provision reflect the current regulatory approaches used in state and territory laws and, if so, how?

Agreed, mock auctions should be included.

Does the level of complaints about lay-by sales received by such businesses vary across jurisdictions depending on the existence of regulation? Should the Australian Consumer Law include a provision regulating lay-by sales? If so, should this provision reflect the current regulatory approaches used in NSW, Victoria and/or the ACT? p91

Agreed, there should be provision for lay-by sales. The Victorian model should be used as the minimum protection.

Should the Australian Consumer Law modify the existing form of section 54 of the TPA along similar lines to section 16 of the Victorian FTA? If an approach like that in section 16 of the Victorian FTA were adopted, should a 'reasonable time' be defined? If so, what would a reasonable time be?

Agreed that there should be inclusions regarding the offering of gifts and prizes. A period of 14 days would be an acceptable time to receive the gift or prize. The Victorian FTA should be used as the basic minimum.

Should the provisions in section 51A of the TPA be extended to include presumptions in relation to 'false', 'misleading' or 'deceptive' representations for inclusion in the Australian Consumer Law?

Agreed.

Should the provisions of section 51A of the TPA be amended to further clarify their relationship with the accessory liability provisions of the TPA?

Agreed.

Are the current pyramid selling provisions in the TPA effective? How could they be improved?

Current provisions could be tightened by using Victorian laws as minimum protection.

Is there a need to introduce a specific provision into the Australian Consumer Law to provide that a supplier must not sell goods to which more than one price is appended at a price that is greater than the lower or lowest of the prices?

Agreed.

Should the Australian Consumer Law include a provision providing for minimum standards for consumer documents? If so, what should these standards be?

Agreed a minimum standard for consumer documents should be included using the Victorian model as the minimum.

Should the Australian Consumer Law include a provision relating to the disclosure of a supplier's address in documents, statements or advertisements?

Agreed.

Should the Australian Consumer Law include a provision relating to the provision of an itemised bill on request?

Agreed.

Should the Australian Consumer Law include a provision requiring a supplier to return replaced parts along the lines of section 162 of the Victorian FTA?

Agreed.

Should the Australian Consumer Law extend the current application of section 65 of the TPA to services?

Agreed.

We ask all consumer products have greater disclosure of the product or service being presented to the consumer. Fines for non-disclosure or non-compliance need to be at a level that is a deterrent to those who choose to disregard the law in these matters.

Financial Counsellors are not against suppliers of goods and services however from our experience some consumers are "enticed" into making poor investment decisions by glossy brochures or fast talking salesmen. By having the appropriate regulations in place, unscrupulous operators once identified are more able to be prosecuted.

FCAQ is not in favour of making it harder for companies to do business but we firmly believe that it is in the public good to ensure that the disadvantaged in our community are protected and that consumer protection laws are uniform throughout Australia both at a state and national level.

Further we ask that any current jurisdictional self regulations of codes of practice be incorporated in to the new legislation. Despite the best intentions of self regulation those who choose to do the wrong thing can and do so without fear of prosecution.

Yours sincerely,

David Lawson
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