

**SCOCA Australian Consumer Law Consultation**

Competition and Consumer Policy Division

Treasury

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19 March 2009

**'An Australian Consumer Law' consultation paper**

Dear Standing Committee members,

Thank you for the opportunity to respond to the consultation paper, 'An Australian Consumer Law: Fair markets – confident consumers.'

**About the Federation**

The Federation of Community Legal Centres (Vic) is the peak body for 51 community legal centres across Victoria. We lead and support our member centres in pursuing social equity and challenging injustice.

Community legal centres (CLCs) are independent community organisations that provide free legal services to the public. CLCs provide free legal advice, information and representation to more than 100,000 Victorians each year. CLC activities integrate assistance for individual clients with community legal education, community development and law reform projects that are based on client need and that are preventative in outcome.

CLCs' experience within their communities distinguishes us from other legal providers and enables us to respond effectively to the needs of our communities as they arise and change. We are committed to collaboration with government, legal aid, the private legal profession and community partners to ensure the best outcomes for our clients and the justice system in Australia.

The work of CLCs commonly entails assisting people who are disadvantaged, vulnerable or marginalised. Our clients are predominantly low-income, and include many young, elderly and culturally and linguistically diverse (CALD) Victorians.

**Our comments**

The Federation's client base is disproportionately affected by unfair and improper business practices. Due to their limited purchasing power, low-income consumers are rarely in a position to negotiate the terms on which they buy essential goods and services. Those who are isolated or marginalised, such as older people or recent immigrants, are also more likely to be targeted by predatory operators. For these reasons, the Federation strongly supports measures to afford greater legal protection to vulnerable consumers.

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The Federation wishes to comment on the following three areas:

- regulation of contact sales under the *Fair Trading Act 1999* (Vic);
- unfair terms in standard contracts; and
- financial services and consumer credit.

## 1 Contact sales

*Question (p 72): 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 consider that the *Fair Trading Act 1999* (Vic) ('the FTA') represents current best practice in Australia with regard to door-to-door sales regulation (s 60). Part 4 Division 2 of the FTA applies to contracts formed as a consequence of door-to-door selling, where the total consideration is over \$50, or is not ascertainable. It restricts each visit to one hour, with 30 minute extensions permitted where the consumer gives written consent. Like most equivalent state and territory legislation, the Act imposes a 10 day cooling-off period for all door-to-door sales, and extends this to six months if the seller does not inform consumers of the cooling-off period at the time of the sale.

Importantly, the FTA also provides for an extension of the cooling-off period if the seller does not inform consumers of the one-hour time limit on visits, the seller's obligation to leave the premises immediately on request, or other specified matters. Failure to comply with any of these duties to inform may extend the cooling-off period for up to three months.

The Federation believes that the new Australian Consumer Law should reflect these provisions as closely as possible, imposing penalties for any failure to inform consumers of their rights.

In our view the Victorian provisions also represent best practice in providing these door-to-door sales consumer protections for all agreements made at a consumer's home, regardless of whether or not the consumer invited the seller to the home (sub-s 60(1)(i)). This recognises that it is the act of selling at or in a person's home that can make a consumer vulnerable to hard-selling practices, regardless of how the seller came to be there. It also ensures that a consumer who 'invites' a seller to his or her home for a particular purpose, and who is then persuaded to purchase other unrelated goods or services, has the benefit of these protections.

## 2 Unfair terms in standard contracts

### **a Proscribed terms**

*Question (p 35): Please set out any views on whether the types of terms described in this Chapter should be banned in the initial text of the Australian Consumer Law.*

The Federation considers that Part 2B of the FTA should serve as a model for the unfair terms provisions of the Australian Consumer Law. Section 32W contains a

broad definition of 'unfair terms', while s 32X sets out a non-exhaustive list of unfair contract terms. These include terms that give the supplier exclusive rights to vary, limit, renew, terminate, breach or determine prices under a contract. Part 2B also provides for specific terms to be prescribed as unfair terms and s 32Z essentially bans their use in standard form consumer contracts.

Like s 32W, the Australian Consumer Law should confer broad discretion on regulators and tribunals in determining whether or not contract terms are unfair. However a non-exhaustive list of examples, modelled on s 32X of the FTA, would provide valuable guidance to consumers seeking to ascertain their rights.

In addition, we agree that certain types of terms might be considered unfair in all circumstances and thus could be banned under the Australian Consumer Law. This feature of the FTA has not yet been used, meaning the FTA does not provide guidance in this regard.

#### **b Remedies**

As noted above, Part 2B of the FTA creates extensive remedies for unfair contract terms. Section 32Y renders an unfair term void, while permitting the contract to remain in force where practicable. Section 32Z imposes penalties for seeking to employ or enforce a prescribed unfair term in a contract. Sections 32ZA-D confer significant powers on the Director of Consumer Affairs Victoria, including the capacity to seek a declaration from the Victorian Civil and Administrative Appeals Tribunal (VCAT) that a term is unfair, and an injunction, against any person, forbidding its use. The Director may also request an advisory opinion from VCAT as to whether or not a particular term is unfair.

These remedies allow Consumer Affairs Victoria to give full effect to the unfair terms provisions of the FTA, to the benefit of vulnerable consumers. They provide valuable protection to consumers facing illegitimate debt recovery and contract enforcement actions. At the same time, they are sufficiently flexible to avoid unduly harsh consequences for suppliers in less serious cases.

The Federation strongly believes that the Australian Consumer Law should retain these remedies in its unfair contract provisions.

### **3 Financial services and consumer credit**

The Federation notes that Australia's financial services and consumer credit laws are currently undergoing reform. We welcome the Australian Government's pledge to ensure consistency between its proposed consumer credit laws and the Australian Consumer Law.<sup>1</sup>

Consumer credit contracts frequently contain terms that create imbalance between the rights of suppliers and consumers. Examples include terms that reserve banks' rights to vary the services they provide, or to impose unilateral fees or fee increases. Such terms operate to the clear detriment of consumers, particularly unsophisticated consumers who have difficulty navigating complex banking contracts. Pending the full implementation of the National Consumer Credit Action Plan, we strongly urge the Government to bring consumer credit contracts within the

scope of the unfair terms provisions of the Australian Consumer Law. This may be done directly or through mirror provisions with the Australian Securities and Investments Commission as the relevant regulator, as has been done with current federal consumer protection laws preventing misleading and deceptive and unconscionable conduct in relation to financial services including consumer credit.

Thank you again for inviting comments on the consultation paper. If you wish to discuss any aspect of these comments, please contact me on (03) 9652 1512.

Sincerely

A handwritten signature in black ink, appearing to read 'Lucinda O'Brien', with a long horizontal flourish extending to the right.

**Lucinda O'Brien**  
Policy Officer

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<sup>1</sup> 'An Australian Consumer Law – Fair Markets, Confident Consumers' Discussion Paper, 17 February 2009, p 24.