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Consumer Affairs Australia and New Zealand
Australian Consumer Law Review

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Submission: Australian Consumer Law Review

About Tony Davis & Associates

Tony Davis & Associates is a legal practice specialising in all forms of direct sales, including but not limited to unsolicited sales, telemarketing, networking and multilevel marketing. With over 40 years experience in the industry, Tony Davis & Associates has advised well over 1000 direct sales companies.

The following submissions are based on our industry experience, as well as direct questions we have posed our current direct sales clients.

(1) Legal Framework

(A) ACL Specific Protections – Unsolicited Sales (Part 3-2, Division 2)

Discussion points:

(1) Are the provisions flexible enough to deal with emerging business models e.g. pop up stores in shopping centres?

In our view, the provisions have the potential of capturing emerging business models including pop up stores (on the basis that those stores are not generally seen as the normal trade premises of the pop-up business).

We consider the ambit excessively wide. Most consumers who visit shopping centres do so with the view of engaging in solicited sales. It seems arbitrary that a pop up store should have to treat its sales as unsolicited.

Further clarification of the current requirement that sales take place away from ‘business or trade premises’ is desirable, especially in light of the move away from typical brick and mortar occurring in many industries. For example sales made from shows/markets and public displays should be excluded from the wide ambit. While such locations could be seen to be ‘away from normal business or trade premises’, when sales occur at such locations, it is normally the consumer approaching the vendor.

(2) Is it appropriate to maintain the distinction between solicited and unsolicited sales?

Yes. However, we note that the distinction is increasingly becoming blurred. This has been caused in part by the unsolicited sales provisions (i.e. unsolicited sales potentially being made stalls in shopping centres) and due to advances in technology (allowing for ‘in home’ visits via Skype or other similar software).

(3) Should the unsolicited sales provisions also apply to business consumers?

Yes. Since the introduction of the ACL, we have seen an increase in unsolicited business-to-business sales. The same concerns about vulnerability or disadvantage arise in unsolicited business-to-business sales as typically the same high-pressure tactics are used as in unsolicited consumer transactions.

(4) Is the exemption allowing goods up to the value of \$500 to be supplied during the cooling-off period is appropriate? Should the exemption be extended to permit the supply of services during the cooling off period?

We consider the exemption inappropriate on the following grounds:

(a) Unnecessary burden on small Australian business.

Clause 69 ACL is the statutory provision that contains the definition of ‘unsolicited consumer agreement’. Amongst other requirements, in order to amount to ‘unsolicited sales’, goods or services must generally be valued over \$100. Where a sale is unsolicited, the sale is generally subject to a 10-business day cooling off period under section 86, unless an exemption applies.

Regulation 95, Competition and Consumer Regulations 2010 contain an exemption to the section 86 (1) (a) prohibition on supplying goods within the 10-business day cooling off period. Provided that the goods are valued under \$500, regulation 95 allows a consumer to take immediate delivery or to ‘test’ the good before they pay for it. However, regulation 93 does not exempt a business from the prohibition on accepting or requesting payment under section 86 (1) (b) and (c).

Goods valued at over \$100 but under \$500 are typically consumables such as health products and cosmetics. Our clients have commented that the combined effect of cl 69 (d) (ii) and regulation 95 means they are ‘stuck between a rock and a hard place’ – while goods under \$500 can be immediately delivered, a unsolicited sales business cannot receive payment for 10 business days. Effectively, the unsolicited sales business is taking all the risk that the consumer may consume the goods, change their mind and return what’s left of it before the expiry of the cooling off period, which can leave small Australian businesses out of pocket. We note that while it could be argued that the consumer would be liable for depreciation in value, in practice, it makes little economic sense for a business to take legal action at considerable cost to recover losses that are under \$500.

Conversely, if a unsolicited sales business refuses to deliver goods until after the expiry of the 10 business day cooling off period, then our clients tell us that consumers get annoyed (and rightly so) that they can not quickly receive the goods they want to purchase. This can (and has) lead to loss of sales for the direct sales business.

We consider the combined effect of cl 69 (d) (ii) and regulation 95 places an excessive burden on Australian small businesses and has the potential to continuously erode the viability of this marketing style. This is because:

- (i) The legislation increases the potential loss to business;

- (ii) Many direct sales businesses are run under ABN, and are often part time home based businesses;
- (iii) Compliance with Part 3-2, Division 2 is costly – direct sales agents require specialist training as well as legal advice to draft documents compliant with clause 79 ACL.
- (iv) We have since the introduction of the ACL seen a steady decline in the number and growth rate of unsolicited sales businesses.

This is of course not good for the Australian economy and consider that this implication was an unintended side effect of the legislation.

We consider an appropriate solution would be to amend cl 69 (d) (ii) so that unsolicited consumer agreements are those where goods or services are supplied over the value of \$500. We are further of the opinion that in light of the above points, that this approach is preferred over simply extending exemption in regulation 95 to enable suppliers of goods valued at under \$500 to accept or require payment. However, if the legislature is of the opinion that increasing the monetary threshold in cl 69 (d) (ii) is inappropriate, then we consider that the above amendment to regulation 95 would relieve some of the burden placed on unsolicited sales businesses. If that approach were taken, we are of the view that regulation 95 should be expanded to include permission to supply services during the cooling off period.

(b) Regulation 95 does not apply to goods valued over \$500

As regulation 95 does not apply to goods valued over \$500, clause 86 (1) (a) prohibits suppliers supplying to the consumer under the agreement the goods or services to be supplied under the agreement.

The inability to supply goods or services over \$500 during the cooling off period is nonsensical - many unsolicited sales businesses sell electronic products including water purifiers and vacuum cleaners, or educational programmes valued at thousands of dollars. Often, goods valued over the \$500 threshold are linked to services – for example, under-sink water purifiers must be installed by plumbers.

It makes far more practical sense for a consumer be able to test goods (and associated services) during the cooling off period and determine if they want to proceed with the sale. As the legislation is currently drafted (and unless extended termination rights apply), once delivery occurs after the expiry of the cooling off period a consumer has typically lost their legal right to rescind the contract.

Our clients have expressed to us consumer frustration and dissatisfaction with this situation. Consumer feed back further illustrates that consumers also find the threshold confusing (as well as the cooling off period, which is discussed below).

We consider that this situation may be addressed by one of the following two methods:

- (i) Amend regulation 95 to cover goods/services valued at a much higher amount (say \$5, 000)

In our experience, there are few unsolicited sales that would exceed a \$5, 000 threshold. Those that do are typically offers made in relation to finance, solar power, mortgage brokers etc. Unsolicited sales over the \$5, 000 threshold should be required to be subject to independent advice.

- (ii) Amend clause 86 (1) by deleting clause 86 (1) (a).

We consider that deleting clause 86 (1) (a) is the preferred choice as it protects consumer's interests by allowing them to 'test drive' goods/services and enables consumers to change their minds during the cooling off period. Under this option there still remains commercial risk to the unsolicited sales business in that if the product were to be return used, as it would need to be sold as used goods.

Deleting clause 86 (1) (a) will further benefit unsolicited sale business by reducing administration and delivery costs. In a large number of unsolicited sales businesses, the sales person is personally responsible for delivering goods. This means in practice, that section 86 (1) (as currently drafted) requires a sales person can be required to make at least 2 visits – first to 'pitch' the product/service, and secondly to deliver the product after the cooling off period. Conversely, if clause 86 (1) (a) were removed, the product could be left on the day of the sale, with return only required if the customer changed their mind during the cooling off period. The suggested amendment would thus lower administration and delivery costs.

(5) Should suppliers be allowed to accept payment for goods (and services) during the cooling off period.

Yes. This approach:

- (i) Reduces business administration cost and risks associated with leaving unpaid for goods/services;
- (ii) Encourages the viability of the unsolicited sales industry by removing unnecessary 'red tape';
- (iii) Is an appropriate response to consumer frustrations in that it encourages businesses to deliver goods within the cooling off period;

Protection of consumer interests can be achieved by replacing existing clauses 86 (1) (a) – (c) with a clause enabling consumers to be repaid after the cooling off period if they change their mind, or otherwise to opt in, discussed below.

As an alternative to full payment, suppliers should be able to request a consumer to make a deposit to be paid during the cooling off period (where goods/services are delivered).

(6) Should consumers be required to 'opt in' within a specific time (without further contact from the supplier) to confirm their decision to enter into the sales agreement?

Yes. The consumer should have the right to make payment the following day if they wish for immediate delivery and the vendor prohibited from contacting the consumer during the cooling off period.

(7) Calculation of the 10-business day cooling off period.

We further submit that the method of calculation of the cooling off period should be reviewed. Pursuant to clause 86 (1) (d) – (3), 10 business days is calculated:

[...]

- (d) if the agreement was not negotiated by telephone--at the start of the first business day after the day on which the agreement was made; or

- (e) if the agreement was negotiated by telephone--at the start of the first business day after the day on which the consumer was given the agreement document relating to the agreement.

This means that the actual length of the cooling off period can vary depending on whether the contract was entered on a Friday and if public holidays must be taken into account. This means that there is no certainty in the calculation – unsolicited sales businesses are forced to carry calendars to calculate when the cooling off period begins and finishes, and consumers are confused as to when they will receive their goods/services.

We submit that any cooling off period should simply commence on the day following receipt of the agreement and continue for a period of 12 normal days.

A standard cancellation notice should also be prescribed to lower costs on small Australian businesses.

Sincerely,

Tony Davis & Kelly A. Tudhope
Barristers/Solicitors
Tony Davis & Associates

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