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The Chair
Australian Consumer Law Review
Consumer Affairs Australia and New Zealand

Dear Sir or Madam,

Australian Consumer Law - Part 3-2, Division 2: Unsolicited Consumer Agreements

We are concerned that Part 3-2, Division 2 of the *Australian Consumer Law*, which regulates unsolicited consumer agreements, unintentionally applies to conventional consumer transactions in circumstances where the transaction cannot be seen as having been instigated by an unsolicited approach by the *dealer* (who is not also the supplier of the good or service)¹.

Background

Agreements which are the subject of Part 3-2, Division 2 of the *Australian Consumer Law* are subject to rules which control hours of access,² require pre-contractual disclosure and regulate the agreement's form and content³. Furthermore, the taking of a deposit and the supply of the good or service is postponed by at least 10 business days from when the agreement is reached⁴.

Failure to comply with the *Australian Consumer Law* requirements exposes the person contravening the relevant section to civil and criminal pecuniary penalties and to the application of other extensive enforcement powers and remedies which extend to such things as injunctions, damages, compensation orders and disqualification from managing a corporation⁵. The offences are of strict liability with limited defences⁶.

Depending on the type of failure to comply with the pre-contractual disclosure or form and content requirements, the consumer can have up to 6 months in which to terminate the unsolicited consumer agreement⁷, which rights of termination are in addition to the prescribed 10 business day cooling off period⁸.

Reach of the provisions

It is how the provisions apply to *dealers* who are not *suppliers*, which in our view cause the provisions to overreach and to have unintended consequences.

¹ See the meaning of "dealer" in s.71 *Australian Consumer Law* (ACL).

² s.73 ACL.

³ s.76, 79 and 80 ACL.

⁴ s.86(1) ACL.

⁵ Part 4-2, Division 2 and Part 5.2 Divisions 1,2 and 3 ACL.

⁶ s.207 and 208 ACL.

⁷ s.82(3)(c) and (d) ACL.

⁸ s.82(3)(a) and (b) ACL.

A key element in determining whether an agreement will be an unsolicited consumer agreement⁹ is whether the negotiations between the *dealer* and the consumer occurred at a place other than the business or trade premises of the *supplier* of the goods or services¹⁰.

Another key element is that the consumer did not invite the dealer to come to the place which is not the business or trade premises of the *supplier* for the purposes of entering into negotiations¹¹.

This means that where the *dealer* is not the *supplier*, the provisions apply even where the consumer approaches the *dealer* to buy the goods or services of the *supplier* and the negotiations occur at the *dealer's* premises. And it is difficult to see how a consumer attending the *dealer's* premises could ever be seen as being an invitation by the consumer to the *dealer*.

Transactions caught by the provisions

We have set out below examples of transactions which we think are unintentionally caught by the unsolicited consumer agreement provisions. We say they are unintended because in our examples neither the *supplier* nor the *dealer* has approached the consumer, but the unsolicited consumer agreement provisions are engaged because the consumer is dealing with the *dealer* at the *dealer's* premises and not at the *supplier's* premises.

1. Supply of consumer goods such as refrigerators, washing machines, dryers and other large electrical goods: It is now common for retailers to act as agents for the supplier of such goods. The retailer (*dealer*) does so by engaging with the consumer at the retailer's premises; the retailer concludes the sale of the goods as agent for the supplier (and so is a *dealer*); and the retailer either arranges, or enables the consumer to arrange, for the supply of those goods to the consumer's home. In those circumstances, the retailer does not obtain title to the goods and does not sell the goods to the consumer, but its role means it is a *dealer*.
2. Holiday travel, holiday accommodation and tours arranged by a travel agent: The agent is the *dealer* and not the *supplier* of those services. Typically the negotiations for those services will occur at the travel agent's premises but with the contract for the travel, accommodation or tour being with the travel, accommodation and tour providers direct with the consumer.
3. Telephone, internet and other communication services: They are arranged by *dealers* for the communication companies with the consumers from retail premises. It is the communication services companies which contract with the consumers and they supply the services to the consumers.
4. A retailer may supply one product and arrange for the supply of another product or service: Examples are:
 - The sale and installation of carpet where the carpet retailer supplies the carpet and organises an installer to be engaged by the consumer to install the carpet. The carpet retailer will be the *dealer* for the purposes of the installation contract.
 - The provision of medical services where the general medical practitioner arranges for the patient to be referred to a specialist, with the specialist's services being provided and charged directly to the patient. The general medical practitioner is the *dealer* for the referred services.
 - A solicitor engaging a barrister for a client (where it is not a "business contract"). The solicitor will be the *dealer*.
5. The negotiation of a contract of sale of residential real estate by a real estate agent on behalf of the developer vendor can be an unsolicited consumer agreement. This is so because:
 - the supply of residential real estate by developers is the supply of a "service" as "services" include "any rights (including rights in relation to, and interests in, real or personal property),

⁹ s.69(1) ACL which sets out the elements which make an agreement an *unsolicited consumer agreement*.

¹⁰ s.69(1)(b)(i) and the definition of "*dealer*" in s.71 ACL.

¹¹ s.69(1)(c) ACL.

*benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce; ...*¹²;

- contracts of sale are typically negotiated by licensed real estate agents who will be *dealers*; and
- those negotiations do not occur at the developer vendor's business or trade premises, but at the display suite, the real estate agent's office, or the consumer's home.

We are unsure whether it was intended that sale contracts for residential property were to be caught by the unsolicited consumer agreements provisions as, for example such contracts were excluded by the *Fair Trading Act 1999 (Vic)*¹³ and in Victoria, have a separate legislative regime dealing with disclosure, warnings and cooling off¹⁴.

Remedy

If the issue we have identified is an unintended consequence, it could be remedied if section 69(1)(b)(i) of the *Australian Consumer Law* was amended to read:

"in each other's presence at a place other than the business or trade premises of ~~supplier~~, dealer of the goods or services; or ..."

This change would mean that the negotiations can occur at the *dealer's* business or trade premises without engaging the unsolicited consumer agreement provisions.

For completeness, unsolicited hawking of securities, managed investment schemes and other financial products to the extent governed by s.736, 992AA and 992A of the *Corporations Act* are not regulated by the unsolicited consumer agreement provisions¹⁵, nor is the supply by finance brokers of residential loans and by financial advisers of financial products, such as life and travel insurance¹⁶.

Furthermore, the unsolicited hawking of securities, managed investment schemes and other financial products (where governed by s.736, 992AA and 992A of the *Corporations Act*) provide for different wording to that in s.69(1)(b)(i) of the *Australian Consumer Law*. For example, the prohibition in s.992AA(1) is narrower and reads:

"A person must not offer financial products for issue or sale in the course of, or because of, an unsolicited meeting with another person."

We look forward to hearing from you.

Yours faithfully

¹² See s.2 ACL definition of "services".

¹³ s.59(e) *Fair Trading Act (Vic)*.

¹⁴ See *Sale of Land Act (Vic)* s.9AA(1A) (off the plan sale notice) s.31 (cooling off notice and rights) s.32, 32A to 32J (disclosure).

¹⁵ s.95 ACL.

¹⁶ s.131A(1) of the *Competition and Consumer Act 2010*.