

16 December 2016

Consumer Affairs Australia and New Zealand

Email: ACLReview@treasury.gov.au

Dear Consumer Affairs Australia and New Zealand,

RE: The review of the Australian Consumer Law

We write regarding the current review of the Australian Consumer Law (ACL). Indigenous consumers' voices need to be heard as a part of this review, but many organisations working with Indigenous consumers do not have the resources to make individual submissions. Consequently, we are writing this joint letter to bring your attention to a specific consumer issue – unsolicited sales - that has a disproportionate and detrimental impact on Indigenous consumers and their communities.

The problem – systematic exploitation

The existing ACL provisions governing unsolicited sales fail to address systematic exploitative conduct targeting Indigenous consumers. Problems are often only brought to light when consumers seek advice from financial counsellors or community legal services. Establishing if a company selling goods or services by door-to-door sales has breached the ACL has proved difficult for a number of reasons. These include that witnesses sometimes struggle to tell their stories in a way that meets the evidentiary requirements of the law, face language barriers and may feel embarrassed about what has happened. There is also often a long time between the sale and the issue being raised and documentation may not be available. Unscrupulous door-to-door sellers deliberately take advantage of these factors to the detriment of Indigenous consumers.

The solution – ban unsolicited sales

The most straight-forward way to prevent ongoing misconduct and evident consumer detriment through this review process would be to introduce a ban on unsolicited sales. However, if unsolicited sales are not banned, the review should pursue measures that will benefit those currently most harmed by unscrupulous sales practices.

Another approach: give legal force to community decisions to ban or restrict unsolicited sales

Some Indigenous communities have made clear that they want to restrict or ban unsolicited sales and they have taken action to empower community members. An example is the Wujal Wujal

Aboriginal community which has created Australia's first "Do Not Knock Town" to assist local community people to combat consumer exploitation occurring via door-to-door trading. Under the "Do Not Knock Town" initiative, signage was placed at both entrances into the Far North Queensland Indigenous community, reminds door-to-door traders they have legal obligations to consumers and can't approach houses displaying do-not-knock notices. It is also hoped that the signage helps to empower Wujal Wujal residents to understand and assert their rights under the Australian Consumer Law.

More could be done to support communities like Wujal Wujal.¹ For example, actions such as these could be given further legal weight, with penalties for companies that act against the directions of a local community.

Local governments should also be able to pass local laws restricting the activities of door-to-door sales; this could include banning sales or requiring businesses to apply to council for permission to operate within that community for a specified period and purpose.

This would require legislative change at a national, state and local level. Amendments to the ACL will be required, but in conjunction with changes to other laws. This would need to be a coordinated approach, involving consultation with regulators, various levels of government, and community groups.

The approach suggested is to:

- Seek legal advice to confirm that local governments are able to pass laws to restrict or ban unsolicited sales under the Local Government Act (2009), QLD, or equivalent state or territory legislation.
- Amend the ACL so that an unsolicited sales agreement formed in a contravention of a local law is invalid and requires the goods to be forfeited, all amounts paid to be immediately refunded, and provides that the seller commits an offence attracting a penalty. The penalty should be set at the same amount for other unsolicited contracts offences. This robust enforcement regime would strongly encourage compliance.
- In addition to any penalty imposed for committing the offence above any amount collected within that community in contravention of the Act could be forfeited to a community group within that community to be nominated by the community council.

¹ This initiative was facilitated by the Queensland Indigenous Consumer Taskforce, a collaboration between community group, the Indigenous Consumer Assistance Network and State and national consumer regulatory bodies. The Taskforces uses a collaborative framework, involving a range of agencies and services, to address systemic civil law issues at a regional level in innovative ways.

- Produce materials to help local councils understand what options they have to create local laws that would ban or restrict unsolicited sales in their area. This should include draft legislation to make it as easy as possible for all local governments that wish to participate to take action.

While local communities would control any laws related to unsolicited sales in their area, they have very restricted resources. Rather than expect local councils to take action if the law is breached, there should be a simple way for communities to report a possible breach and for a state Fair Trading body or the ACCC or ASIC to investigate and take enforcement action. This would ensure that the bodies that specialise in consumer matters are able to address problems. This approach would give communities control and allow for effective action against unsolicited sales that cause the greatest consumer detriment.

The “Do Not Knock Town” initiative demonstrates that a collective approach can be an effective way to identify and address systemic issues experienced by remote Indigenous communities. It is our view that it is time to try an approach that incorporates legislative change and the threat of penalties – a blanket ban on unsolicited sales would be one way to achieve this through the ACL review, but the approach outlined above is a targeted, strategic method for specifically addressing the problems door-to-door sales cause Indigenous consumers.

A further enhancement - ensure that fundraising is captured by any measure

Any changes should also allow communities to restrict unsolicited fundraising. There have been cases where charity fundraisers working for commissions have targeted Indigenous communities.² Low-income consumers have been signed up to recurring payments through tactics used in classic high-pressure door-to-door sales.

We recognise that the review is considering whether all fundraising activities are or should be captured by the ACL. It should be made clear that the ACL applies to fundraising and communities should be able to restrict unsolicited fundraising alongside of sales. If this does not occur, then state laws that apply to charities should be amended. For example, in Queensland, the required actions would be to:

- Amend the Collections Act 1966 to require prospective charitable organisations to obtain a permit from the council for that community to carry out collection activities within a community for a specified period and purpose.

² <http://www.abc.net.au/7.30/content/2014/s4009413.htm>

- Amend the Collections Act 1966 to create an offence for a charitable organisation failing to obtain a permit from an indigenous community council prior to carrying out collection activities.

Unsolicited sales – defining the scope

In remote Indigenous communities, what traders might deem a ‘place of business’ (and what the rest of us would call an unsolicited sale away from business premises) is often more ambiguous than say, a trader’s booth set up at a shopping centre. In the case of the shopping centre setting, a trader would have paid a fee to establish the booth as a ‘place of business’, so any sales do not fall under the term ‘unsolicited sales’. In the case of a trader setting up a booth in a remote Indigenous community, a trader:

- a) May pay a fee to the local Council to set up a booth to sell goods (often conducted in a centralised location in the community). Once the fee is paid, a ‘place of business’ has been established and operates on the same terms noted in the shopping centre example; or
- b) May not pay a fee to set up a booth to sell goods (in a centralised location in the community) but may have been granted permission from the local Community Council to trade. It can be argued that permission alone does not prevent from the sale being ‘unsolicited’. The ACL interaction with local law can here determine how an unsolicited sale is dealt with, i.e., where no permit for trading in the community has been issued.

Another example of ambiguous unsolicited sales practices can occur where a trader has been granted permission from the local Council to set up a booth to sell goods, but then leaves the booth to sell at different locations – down the road, at the beach, or door-to-door, for example.

The ‘place other than the business or trade premises of the supplier’³ could be better defined for remote Indigenous community settings, so as to better understand what may constitute an ‘unsolicited sale’ in these settings. There are several possibilities for how this could be better defined including within the ACL itself, as it pertains specifically to remote Indigenous community context, or within local legislation, so as to be determined by community councils themselves (i.e. added to the draft legislation to be made available to councils).

For further information please contact Sarah Agar from CHOICE at sagar@choice.com.au

Yours sincerely,
The undersigned

³ Australian Consumer Law, s69(1)(a)(i).

