



Response to the
Standing Committee of Officials on
Consumer Affairs consultation
paper

*An Australian consumer law: fair
markets, confident consumers*

Brotherhood of St Laurence
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Brotherhood of St Laurence
67 Brunswick Street
Fitzroy Vic. 3065

ABN 24 603 467 024

www.bsl.org.au

For further information or to discuss this submission, please contact:

Gerard Brody
Senior Manager, Financial Inclusion
Brotherhood of St Laurence
Email: gbrody@bsl.org.au
Ph: (03) 9445 2425

Background to the Brotherhood of St Laurence's interest in consumer policy

The Brotherhood of St Laurence is an independent non-government organisation with strong community links that has been working to reduce poverty in Australia since the 1930s. Based in Melbourne, but with a national profile, the Brotherhood continues to fight for an Australia free of poverty, guided by principles of advocacy, innovation and sustainability. Our work includes direct service provision to people in need, the development of social enterprises to address inequality, research to better understand the causes and effects of poverty in Australia, and the development of policy solutions at both national and local levels.

The Brotherhood welcomes the consultation paper from the Standing Committee of Officials of Consumer Affairs (SCOCA), *An Australian consumer law: fair markets – confident consumers*, and the Australian Government's renewed focus on effective consumer policy. The Brotherhood believes that all Australians have a right to fair and affordable access to basic services. Fair and affordable access to essential services helps disadvantaged and low-income people by enabling them to be part of Australia's mainstream society, and by ensuring corporate, government and community sectors all take responsibility for addressing social problems.

As part of our wider efforts to promote social inclusion, the Brotherhood develops and demonstrates effective financial literacy and asset building programs for disadvantaged people to address financial exclusion. Given this area of expertise, this submission seeks particularly to give a voice to the experiences of low-income people as consumers in the market for financial services. Our comments do extend to a number of other areas raised by the consultation paper, in particular:

- unfair contract terms
- door-to-door and telesales
- lay-by sales
- enforcement issues.

An Australian consumer law

The Brotherhood strongly supports the proposed Australian consumer law being enacted nationally and in each of the states and territories by means of an application law scheme. We agree that most product and service markets, especially those for essential services, are national in character and that consumers deserve consistent protection wherever they live. The Brotherhood also supports the name of the new law being the *Consumer and Competition Act*, replacing the *Trade Practices Act*. We agree that consumer protection legislation should be named in a way that ensures that the broad community can understand what it relates to.

SCOCA suggests that the Australian consumer law have the objective, 'to enhance the welfare of Australians through the promotion of competition and fair trading, and the empowerment and protection of consumers'. The Brotherhood supports this objective, but notes that the Productivity Commission (2008, p.41) recommended a number of supporting operational objectives for consumer policy. These operational objectives included some important goals from the point of view of disadvantaged consumers, including:

- to prevent practices that are unfair
- to meet the needs of those consumers who are most vulnerable or are at the greatest disadvantage.

Including these consumer policy operational objectives as statutory objectives would ensure that the law was interpreted and enforced in a way that protects the needs of disadvantaged and vulnerable consumers.

The Brotherhood also agrees that the generic consumer protection provision in credit and financial services law (i.e. the *Australian Securities and Investments Commission Act 1999* (Cth)) should be kept consistent with the corresponding provisions in the new Australian consumer law. Due to the special nature of credit and financial services, however, these sectors do require additional regulation. We note that a separate process is dealing with harmonisation of consumer credit laws and we will participate in that process in due course.

Unfair contract term laws

Recent research by the Brotherhood of St Laurence and Griffith University recommended that the Australian Government should prohibit unfair terms in consumer contracts and empower a regulator to review consumer contracts for compliance with an unfair terms law (Sheehan et al. 2008). Accordingly, the Brotherhood strongly welcomes the proposal to include a provision regulating unfair contract terms in the new consumer law.

The research, which involved discussions with low-income Victorians who had recently signed a credit contract with a bank, credit cooperative or fringe lender, found that contractual disclosure did not enable consumers to make an informed choice about the signing of contracts. The research found that many consumers signed contracts that included terms that were unfair, because either they did not understand the contract or they felt that they had limited options and were powerless in their relationship with the lender.

To illustrate, a consumer felt powerless in relation to a term that allowed a lender to change the terms of the loan contract without consent:

That would be a problem. During a loan in particular—like if you're actually paying it off at the time and all of a sudden it went bank, up a bit higher from what it was the previous week for example: it'd be a shock wouldn't it? ... I suppose you have less options, it's less options because your income is low ... I suppose I do know that with these kinds of loans, because they are easy, you are probably are going to have stuff like this in your contract (Sheehan et al. 2008, p.15).

The consultation paper states that the unfair contract terms provisions should allow for private and regulator-led representative actions for damages by a class of consumers detrimentally affected by unfair contract terms. There will also be scope to ban certain types of terms that are, in all circumstances, considered to be unfair. While the Brotherhood supports these proposals, we think that the law should not solely rely on individual consumers to take action to challenge unfair terms. Our experience is that disadvantaged consumers do not often report their experience when they are affected by an unfair contract term. Rather, they sometimes feel pressured to comply with the term even if it impacts upon them unfairly. In cases where they do object, the power imbalance between a business and low-income consumer can operate so that their rights are not recognised.

Considering this, the law should ensure that the consumer regulator is charged with proactively reviewing consumer contracts for compliance with the unfair terms law, and resources should be provided to the consumer regulator to allow them to do this. This would mean that consumers are protected from unfair contract terms from the outset, and not be required to seek legal redress on their own should they be subject to unfairness.

SCOCA states that the provision will exclude the up-front price of the good or service, using the approach currently adopted in regulation 6(2) of the United Kingdom's Unfair Terms in Consumer Contracts Regulation 1999. We acknowledge that, generally, consumers readily understand up-front prices and it would be inappropriate to challenge them on the basis of unfairness. There are some forms of contract, however, that do not clearly state the overall cost to the consumer. Consumer leases, for example, usually state a price per month without clearly identifying the overall cost. The overall cost of many consumer leases, including those for essential household items such as fridges and washing machines, is often far in excess of the cost of direct purchase. In

contrast to purchasing an item with credit, a consumer lease does not allow easy identification of the cost of the credit.¹ Where an up-front price of a consumer contract is not clear, it should be able to be challenged on the basis of unfairness.

The Victorian *Fair Trading Act 1999* provides some additional protection relating to consumer contracts, which we also think should be picked up in the new harmonised consumer law. Section 163 requires consumer documents to be easily legible, of a minimum font size and clearly expressed. The Brotherhood – Griffith University research found that language and length were key barriers to consumers understanding loan contracts (Sheehan et al. 2008, pp.10–11). Considering this finding, efforts should be made to ensure that businesses provide contracts are clear, concise and easy to understand. A legislative requirement along the lines of the Victorian provision could enable this.

Specific unfair practices

(a) Door-to-door, telemarketing and distance selling

The Brotherhood of St Laurence continues to be concerned about aggressive door-to-door sales and telemarketing, which are often targeted towards low-income and disadvantaged consumers.

In assessing applicants for our Progress Loans program,² we have met many low-income people who have entered into expensive and inappropriate contracts from door-to-door sales that have resulted in an adverse credit record, excluding them from mainstream finance. These have included contracts for the purchase of products as diverse as water coolers, alarm systems and saucepans. Living on a low income can mean that people are forced to make some very difficult decisions about spending priorities. For some low-income people, paying for a water cooler, alarm system or saucepans means that important daily needs such as food, rent and bills cannot be met.

We are also aware of some low-income households being targeted by multiple door-to-door sellers of energy contracts. Many disadvantaged consumers sign up to these contracts under pressure, resulting in irregular and large bills from energy companies. High or irregular billing can result in financial hardship, adverse credit records and even disconnection from supply, all of which prevent disadvantaged people from participating in mainstream economic life.

For these reasons, we support very strong consumer protections relating to door-to-door and telesales, along the lines of the current Victorian laws. We note that the primary protection in this area is the cooling-off period. While we support cooling-off periods in such contracts, our experience is that low-income and disadvantaged people are often reticent to exercise cooling-off rights. This is not only because it is often not clear how to do so, but also exercising cooling-off requirements requires a level of confidence and empowerment that low-income people might not have. Behavioural economic analyses confirm this conclusion: the confirmation bias can operate so that people reassure themselves that they have made the right decision (such as purchasing from a door-to-door salesperson), in opposition to evidence to the contrary.

We think there should be strong up-front protections for door-to-door and telesales, including provisions relating to:

- the times of the day that salespeople may visit or call
- the length of time salespeople may visit a home (not more than half an hour)
- the content and detail in contractual document
- suppliers' duties when negotiating door-to-door or telesales

¹ Uniform Consumer Credit Code, section 15, which requires the cost of credit (fees and interest) to be disclosed in credit contracts. There is no corresponding provision in relation to consumer leases.

² Progress Loans is a partnership between the Brotherhood of St Laurence and the ANZ bank, providing small personal loans of \$500 to \$3000 for the purchase of household goods.

- a requirement for telesales to be recorded (with consent)
- a requirement for salespeople to show identification
- a requirement for salespeople to honour ‘no door knocking’ signs
- extended cooling-off periods and penalties, where a supplier does not comply with requirements.

Unsolicited door-to-door or telesales of financial products, securities and managed investments are banned under the anti-hawking provision of the *Corporations Act 2001* (Cth).³ This protection recognises that consumers feel significant pressure to buy products when salespeople attend their homes or workplaces uninvited, which is not the right environment for making informed decisions about complex financial products. In our view, credit contracts are also complex products and a similar protection should be in place in relation to unsolicited sales of credit. The new national consumer law should ensure there are harmonised protections across all financial services, including credit.

(b) Lay-by sales

Our experience is that lay-by sales are particularly popular among low-income people, many of whom do not have access to mainstream credit. We have met some low-income people who have not understood the terms of lay-by agreements and have lost deposits or have been charged significant cancellation fees when they change their mind. For that reason, the new consumer law should include clear consumer protections in relation to lay-by agreements, including a requirement for businesses to notify customers if they have missed scheduled payments before cancelling contracts, and a requirement that instalments are set at a level that is affordable for a consumer. Regulation of lay-by contracts should not be so cumbersome, however, that businesses are discouraged from offering lay-by arrangements. For many low-income people, lay-by is an important alternative to high-cost lenders, as a way of paying for purchases in instalments.

(c) Debt collection and hardship

The main provision in generic consumer laws relating to the collection of consumer debts is the prohibition against harassment and coercion.⁴ It is disappointing that the consultation paper did not discuss this provision in any detail, or consider developments in some specific industry consumer protections relating to consumer debt.

In the utilities sector (energy and water), businesses are required to develop hardship policies which provide for flexible mechanisms to collect payments from consumers experiencing financial difficulties.⁵ These policies have been very successful, protecting consumers on limited and fixed incomes from disconnection of supply. The policies recognise that energy and water services are essential for health and wellbeing, and are a prerequisite for ensuring people can participate in social and economic life. They also ensure businesses operate in a way that respects the needs of low-income and disadvantaged people, rather than excluding them from services.

The operation of hardship policies should be extended to other industries and market sectors, such as telecommunications, financial services and credit. While some banks and credit providers have voluntarily adopted hardship policies, the experience with the energy sector demonstrates that it is desirable to have legislative backing which allows a regulator to monitor compliance and ensure policies operate in a way that is promised.

In harmonising the prohibition against harassment and coercion, we encourage consideration of the Victorian provision, which includes a number of examples about inappropriate conduct relating to

³ See sections 736, 992A and 99AA.

⁴ *Trade Practices Act 1974* (Cth), section 60.

⁵ See, for example, *Electricity Industry Act 2000* (Vic), Division 6 – hardship policies.

the collection of debts.⁶ While the ACCC–ASIC guideline in relation to debt collection also goes in to some detail about the conduct that is expected, its status as a guideline means that an independent regulator has insufficient power to monitor business conduct and ensure that debtors are only required to enter into affordable repayment arrangements.

Enforcement

The Brotherhood strongly supports the proposed extension of enforcement powers, including the ability for regulators to issue substantiation notices and public warning notices. For public warning notices to be effective in warning all consumers, they need to be published more widely than in mainstream newspapers. Consideration should be given to how public warning notices can be disseminated, particularly among low-income and disadvantaged groups.

We also support the proposal for a regulator to seek non-party redress. However, this should not be limited to situations where a large number of consumers suffer similar, identifiable detriment. As outlined above, disadvantaged consumers are reticent to participate in regulator-led actions. This is due to a number of reasons, including the fact that many disadvantaged consumers do not understand their rights and are not in a position to make a complaint to a regulator. The Brotherhood–Griffith research found that when asked about their rights as consumers, most participants were only able to focus on lender’s expectations. Given this, where regulators identify consumer detriment, particularly as it relates to disadvantaged consumers who are not in a position to seek redress, there should be an obligation for them to take action on the consumer’s behalf.

Unfair trading

The Brotherhood supports a general prohibition against unfair trading, a provision that is not considered by the consultation paper. Unfair trading prohibitions operate in the US, UK and other European Union nations, and have proven to be a valuable addition to consumer protection laws, by providing regulators with the ability to respond quickly to innovative unfair market conduct.

The Senate Economics Committee (2008, p.43) recently noted that the need for an unfair trading prohibition should be examined in the context of the current consultation and it is disappointing that it has not been considered. Such a prohibition would specifically assist vulnerable and disadvantaged consumers, who are often targeted by unfair trading practices that are not ‘misleading’ or ‘unconscionable’ under the *Trade Practices Act*. For example, payday lenders target vulnerable consumers who are excluded from mainstream finance, charging exorbitant interest rates. The Brotherhood believes that these lenders are taking advantage of a vulnerable consumer’s economic circumstances; however it is unlikely that this conduct could be considered unconscionable.

References

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Sheehan, G, Wilson T & Howell, N 2008, *Coming to grips with credit contracts*, Brotherhood of St Laurence, Fitzroy, Vic.

⁶ *Fair Trading Act 1999* (Vic), section 21.