



Submission on Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010

Submission by the Australian Communications Consumer Action Network
to the Senate Economics Committee



April 2010



The Australian Communications Consumer Action Network (ACCAN) is the peak body that represents all consumers on communications issues including telecommunications, broadband and emerging new services. ACCAN provides a strong unified voice to industry and government as consumers work towards availability, accessibility and affordability of communications services for all Australians.

Consumers need ACCAN to promote better consumer protection outcomes ensuring speedy responses to complaints and issues. ACCAN aims to empower consumers so that they are well informed and can make good choices about products and services. As a peak body, ACCAN will activate its broad and diverse membership base to campaign to get a better deal for all communications consumers.

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Introduction

ACCAN welcomes the opportunity to provide comments in relation to the *Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010* (the Bill). Our comments on the Bill are in two parts. The first expresses our great disappointment at the failure with these reforms to provide consumers with regulation that addresses current and future consumer issues in the digital economy. In the second part, we deal with the specifics of the Bill. We support the introduction of nationally consistent consumer protection laws, and for this reason are particularly concerned about the potential carve-out of consumer guarantees from telecommunications services.

We have provided comments in relation to the issue of *informed* consent in the context of unsolicited selling dealt with in Chapter 4, Division 2 of the Bill, and on the importance to further extend consumer protections with the introduction of unfair conduct rules. We also would like to see the duties on Australian suppliers to disclose information concerning serious consumer product related accidents raised to meet international best practice.

This submission includes the following recommendations to improve the Bill:

- **That reforms address consumer issues and concerns in the digital economy**
- **That section 65, of the Bill carving out telecommunications services from consumer guarantees, be removed**
- **That a requirement be added that consent to unsolicited services must be informed.**
- **The introduction of a prohibition on unfair conduct**
- **The introduction of stronger duties on Australian suppliers to disclose information concerning serious consumer product related accidents.**

Response to Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010

1. Reforms fail to address future consumer issues and concerns

ACCAN is very disappointed that the sum-total of the timid reforms proposed is a business-as-usual approach, essentially limited to the creation of nationally consistent consumer laws. Even important reforms, such as Unfair Contract Terms, are only bringing Australian law in line with reforms introduced overseas almost 20 years ago. As we move further into the 21st century, and with technological innovation increasing exponentially, reforms to consumer law



should be visionary and forward-looking, anticipating the social, cultural and technological environments to come. There are issues with economy-wide implications that these reforms fail to address, including questions around rights and responsibilities for user-generated content, as well as cyber-fraud and identity theft.

ACCAN believes this reform process provides the opportunity to create a paradigm-shift in how consumer protection is regulated. The premise for these reforms should be to equip, enable and encourage consumers to act in their own interests, and where they can't, to act on their behalf. Consumer laws when properly understood, create effective and vigorous competition, in which as a result of consumer action, supply responds to consumer demand, rather than consumers adapting their demands to supply. The paradigm-shift is also required when considering what kind of regulation is desirable. Rather than saddling ourselves with the code versus black-letter-law duality, we should embrace principles-based law. This would see regulation through the creation of laws that set out general principles, and which government can use to design detailed enforcement, codes and compliance models.

Even the modest goal of creating nationally consistent consumer laws across Australia, is likely to be undermined as the new laws come into effect. First, there is the potential carve-out of telecommunications, gas and electricity, as outlined further below at point 2, which we strenuously oppose. Then, in the energy sector, there is the proposed National Energy Customer Framework driven by the Ministerial Council on Energy, which will again undermine the potential for consumers to understand their rights, and consequently, their ability to act concertedly in their own interests. ACCAN hopes that the current opportunity reform is grasped to truly reform the consumer protection landscape.

2. ACCAN opposes the carve out of consumer guarantees from the telecommunications sector

ACCAN is very concerned by Section 65 of the Bill, which allows for consumer guarantees not to apply to telecommunications services, if the telecommunications services are specified in the regulations. The consumer guarantees that would not apply in this case includes the most basic of consumer rights, including that a service should be carried out with due care and skill and should be fit for purpose¹.

As we understand it, s65 has been included to provide flexibility so that if the Minister wishes to make regulations, s/he may do so for industries in which some form of self/co-regulation is already part. According to the explanatory memorandum, the telecommunications, gas and electricity industries are unique as these services are crucial to many areas of human activity such that the consequential losses experienced by consumers can in some instances be substantial². Indeed, the losses are often serious and substantial and are further magnified in the telecommunications industry due to the sector's abysmal record in providing consumers with basic protections, as statistics from the Telecommunications Industry Ombudsman (TIO) indicate. For this reason, rather than allowing telecommunications services to be exempted, they should be subject to the full-weight of basic consumer protections.

¹ Section 60, 61, Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010

² 7.65 of the Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010, at http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4335_ems_8a3cd823-3c1b-48929e7-081670404057/upload_pdf/340609.pdf;fileType=application%2Fpdfhttp://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4335%22#ems



ACCAN believes that co-regulation in telecommunications industry has a role. However, we do not believe that this role is to provide fundamental consumer protections. We note that until now, despite existing co-regulation for certain aspects of the telecommunications services, consumer warranty rights (the precursor to the Bill's consumer guarantees) contained in the *Trade Practices Act 1974* (and equivalent state consumer protection laws) have applied to telecommunication services.

In the Productivity Commission's "Review of Australia's Consumer Policy Framework" in the fifth chapter³, its opening paragraph states:

..the generic provisions of the Trade Practices Act (TPA) and the Fair Trading Acts are frequently supplemented by consumer regulations specific to a particular market or industry

This makes clear that industry specific regulation is premised on the existence of generic and basic consumer protections in the fundamental consumer legislation – until now the *Trade Practices Act 1974*. Consumer guarantees are one of the bedrocks of consumer protection. We believe that any industry-specific regulation should be additional to these fundamental consumer protections. ACCAN strongly supports the use of co-regulation to enhance consumer protections *already* provided under the general law.

Once created, exemptions, such as the one exempting insurance contracts from the application of unfair contract term regulation, have proved notoriously difficult to remove. ACCAN is concerned that creating exemptions for the telecommunications industry will be similarly difficult to reverse. The intention of the new Australian Consumer Law, according to Minister Emerson, is to provide Australian consumers with the laws they deserve, making clear their rights clear and consistent and protecting them wherever they live⁴. Supplanting basic consumer guarantees in the ACL with industry-specific regulation flies in the face of this notion and should be removed.

Recommendations:

- **That section 65 of the Bill is removed.**
- **If Section 65 is not removed, that it is amended to state that consumer guarantees provided for in that division will only not apply where the Minister tables in Parliament evidence demonstrating that the industry-specific regulation provides equivalent, or greater, protections, to those provided in the division.**

3. Unsolicited Selling and Informed Consent

ACCAN welcomes the introduction of standard national laws regulating unsolicited sales practices. A major concern for ACCAN generally, and which arises particularly in the context of unsolicited selling, is the issue of informed consent. Section 175 of the Bill lists details of

³Chapter 5, Industry-specific consumer regulation, page 81, Review of Australia's Consumer Policy Framework, Productivity Commission Inquiry Report, April 2008, available at: http://www.pc.gov.au/_data/assets/pdf_file/0008/79172/consumer2.pdf

⁴ Minister Emerson, TRADE PRACTICES AMENDMENT (AUSTRALIAN CONSUMER LAW) BILL (NO. 2) 2010 - Second Reading - House of Repts Hansard - 17 March 2010, available at [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=:db=:group=:holdingType=:id=:orderBy=:page=:query=BillId_Phrase%3Ar4335%20Title%3A%22second%20reading%22%20Content%3A%22I%20move%22%7C%22and%20move%22%20Content%3A%22be%20now%20read%20a%20second%20time%22%20\(Dataset%3Ahansardr%20%7C%20Dataset%3Ahansards\);querytype=:rec=0;resCount=](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=:db=:group=:holdingType=:id=:orderBy=:page=:query=BillId_Phrase%3Ar4335%20Title%3A%22second%20reading%22%20Content%3A%22I%20move%22%7C%22and%20move%22%20Content%3A%22be%20now%20read%20a%20second%20time%22%20(Dataset%3Ahansardr%20%7C%20Dataset%3Ahansards);querytype=:rec=0;resCount=)

what an agreement must contain, in order, ultimately, for a consumer to consent. However, it does not require that the consent is informed.

As highlighted in our *Informed Consent: Research Report*⁵, of all consent-related telecommunications complaints, informed consent complaints represented the highest volume. The introduction in this Bill of a national standard for unsolicited selling provides a good opportunity to redress this situation.

A principle requiring dealers to have regard to informed consent, perhaps around s175, would highlight to the industry the need to consider whether the consent they are likely to receive is informed. The ACCC would also be able to provide guidance about informed consent, to help business adequately address the issue.

The Privacy Commissioner's guidelines provide an example of how the term might be usefully defined. It states⁶:

Informed consent

If an agency wants to use [relevant consent exceptions to privacy principles] they must be able to show that the person the information is about:

- is accurately informed of what they are consenting to, or
- can reasonably be assumed to understand what they are consenting to, at the time they consent.

As stated in *Informed Consent: Research Report*⁷, a basic test for informed consent might contain the following requirements:

- Consent must be voluntary. The individual must have a genuine opportunity to provide or withhold consent – that is, they must be able to say 'yes' or 'no' without pressure or disadvantage.
- Consent must be informed. The individual must know what it is they are agreeing to. The individual needs to be aware of the implications of providing or withholding consent, having received the information in a way meaningful to them and appropriate in the circumstances. This may require additional confirmation of consent (e.g. double opt-in) for some products and services.
- The individual must have the capacity to provide consent. The individual must be capable of understanding the issues relating to the decision, forming a view based on reasoned judgment and communicating their decision. Organisations must consider best practice guidance on obtaining consent from specific consumer categories (e.g. young people and consumers with an intellectual disability).
- Consent must be recorded. A clear record of the consent must be made and retained by the organisation. Where consent is obtained orally, the conversation should be recorded or confirmed by subsequent written consent.

Recommendations:

- **That in Part 4, Division 2 of the Bill, a requirement be added that consent to unsolicited services must be informed.**

⁵ Informed Consent: Research Report, available at http://accan.org.au/research_full.php?id=15

⁶ Plain English Guidelines to Information Privacy Principles 8, available at:

<http://www.privacy.gov.au/materials/types/download/8700/6538>

⁷ Informed Consent: Research Report, page 29, available at http://accan.org.au/research_full.php?id=15

4. Unfair Conduct provision still needed

ACCAN welcomes the introduction of national consistency to consumer protections. However, the inadequacy of the protections offered by unconscionable conduct action requires those concerned with comprehensive consumer protections to look elsewhere.

A prohibition on unfair conduct would provide a more stable and common sense basis for protecting all consumers, and would side-step many of the complex issues which have resulted in unconscionable conduct becoming a weak consumer protection in recent years. In ACCAN's view, further work on reforming the unconscionable conduct provisions is not justified, as the provisions are rarely used due to their limited application, high cost and poor track record of success. The test for unconscionable conduct has become overly complex and uncertain. It is an extremely detailed and over-prescriptive set of interconnected requirements, that has been dragged from an ancient common law concept into a modern consumer law framework. Unconscionable conduct is increasingly detached from the real world challenges faced by ordinary consumers.

ACCAN therefore proposes to reform Australia's consumer laws by inserting a new prohibition on unfair conduct into Section 52 of the Trade Practices Act (and all legislation that mirrors Section 52). This would result in Section 52 prohibiting 'conduct that is unfair or misleading, or conduct that is likely to mislead or be unfair'.

This substantial reform of Australia's consumer protection laws would remove the need for consumers to rely on the narrow protection offered by the prohibition on unconscionable conduct.

Recommendations:

- **Introduction of a prohibition on unfair conduct to the Australian Consumer Law**

5. Better product safety standards

ACCAN supports improved product safety standards. In particular, we endorse the submission provided by Associate Professor Dr Luke Nottage of Sydney University. We are disappointed that the new obligations in the Bill do not meet contemporary international best practice in relation to duties on Australian suppliers to disclose information concerning serious consumer product-related accidents.

Recommendation:

- **That the Committee revise the relevant product safety provisions along the lines of Dr Nottage's submission, in relation to duties on Australian suppliers to disclose information concerning serious consumer product related accidents.**

Conclusion

We encourage senators to seize this opportunity to create real reform that comprehensively addresses future consumer concerns, including key digital rights issues. The introduction of a prohibition on unfair conduct, a reform which we believe is long overdue, would be one step in providing comprehensive, future-looking consumer protection.

The introduction of nationally consistent consumer protection laws is an important step in improving the lives of Australian communications consumers. While there is much to recommend the *Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010* (the Bill), ACCAN is very concerned that basic consumer guarantees may be excluded from applying to telecommunications services, thereby leaving consumers guarantees to industry-specific regulation. As telecommunications providers have a history of failing to protect the customers, we believe that it is not appropriate for consumer guarantees not to apply to them.

In relation to the unsolicited sales provisions, we see this process as an exciting opportunity to embed more robust protections that promote informed-consent processes. We also encourage consideration of more robust product-safety disclosure standards on suppliers.