

Submission 013



Australian Government

The Treasury

House Standing Committee on Social Policy and Legal
Affairs

Inquiry into the Do Not Knock Register Bill 2012

Submission by the Australian Treasury

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EXECUTIVE SUMMARY

The key points in the Treasury's submission are summarised below:

- Treasury recognises that there is a level of community concern about the tactics of some door-to-door salespeople and that this Bill in part responds to community concern.
- However, Treasury is not convinced that there is an adequate case for the Bill at this time.
- The Australian Consumer Law already contains a number of important protections for consumers, including by regulating unsolicited selling, prohibiting businesses from engaging in unconscionable conduct in trade or commerce and providing statutory cooling-off periods. The efficacy of this framework needs to be considered before determining whether any new measures are required.
- Treasury also has a number of specific concerns in relation to the Bill. In particular, the Bill may be difficult to implement in practice for businesses and create disproportionate compliance costs. It is likely to have a significant budgetary impact and simple measures such as the prominent placement of “do not knock” stickers may be more effective.

INTRODUCTION

This submission provides an overview of the *Do Not Knock Register Bill 2012* (the Bill) and outlines some of the key factors that are relevant when considering further regulation of the unsolicited selling industry. In particular, it provides background to the current consumer protection provisions available under the Australian Consumer Law, which forms Schedule 2 of the *Competition and Consumer Act 2010*.

On 21 May 2012, the Hon Steve Georganas MP, the member for Hindmarsh, introduced the Bill in the House of Representatives as a Private Member's Bill. The Bill establishes a framework to regulate unsolicited marketing to Australian residential and government addresses by:

- establishing a "Do Not Knock Register";
- prohibiting unsolicited marketing at addresses included on the register for a period of three years;
- providing for a penalty regime; and
- establishing a complaints mechanism.

The Bill permits unsolicited marketing from certain organisations and individuals, such as government bodies, charities, religious organisations and politicians and political candidates.¹

The Bill allows any person to make complaints to a Registrar about a contravention of the provisions of the Bill. The Registrar may institute proceedings for civil penalties and injunctions in the Federal Court of the Federal Magistrates Court. The Bill provides for penalties of up to \$1.1 million for salespeople and companies who visit an address listed on the Register.

The Bill is based on the Do Not Call Register, established under the *Do Not Call Register Act 2006*. It was referred to the House Standing Committee on Social Policy and Legal Affairs on 24 May 2012.

BENEFITS AND HARMS ASSOCIATED WITH UNSOLICITED SELLING

The door-to-door unsolicited selling industry makes an important contribution to the Australian economy and to creating jobs. According to the Australian Competition and Consumer Commission (ACCC), there were over a million door-to-door sales in 2011. They also note that on average, the sector employed 3,400 Australians at any one time in 2011.

Door-to-door selling provides an avenue for suppliers to directly engage consumers, to alert them to, and demonstrate, their products. It can also improve consumers' awareness of product offerings and assist them to find the best product for their needs.

However, there is a level of community concern about the tactics of some door-to-door salespeople and this Bill, in part, responds to these community concerns. However, further consideration of the actual incidence of adverse behaviour in this industry suggests that the level of community apprehension is not proportionate to the actual incidence of complaints to authorities by consumers.

The ACCC notes in its recent report into the unsolicited sales sector² that between January 2011 and March 2012, it received 187 complaints in relation to door-to-door sales. This made up 0.3 per cent

¹ Explanatory Memorandum to Do Not Knock Register Bill 2012, page 3.

of all complaints received by it. More broadly, it notes that complaints about door-to-door sales in New South Wales, Victoria, Queensland and South Australia amounted to less than 2,000 in total and made up less than 3 per cent of complaints about sales practices over 2010 and 2011.

Treasury notes that the door-to-door selling industry is already regulated, primarily under the Australian Consumer Law, which is the principal consumer protection law in Australia. The efficacy of this framework should be considered before any further proposal to regulate this industry. Further, any new regulatory measures should be cost-effective and proportionate to the level of consumer detriment.

CURRENT CONSUMER PROTECTIONS

The door-to-door selling industry is currently regulated primarily under the Australian Consumer Law. There is a separate regulation for unsolicited supply of financial products under the *Corporations Act 2001* (Cth).

The Australian Consumer Law, which commenced on 1 January 2011, harmonised twenty national, state and territory consumer laws with one law. The underpinning rationale of the Australian Consumer Law is to have a single, national, generic consumer law, which applies in the same way to all sectors and in all Australian jurisdictions.

The unsolicited selling and unconscionable conduct provisions of the Australian Consumer Law are relevant to the conduct of participants in the unsolicited selling industry, including door-to-door salespeople. These laws are discussed in greater detail below. Treasury considers that the policy settings under the Australian Consumer Law are rigorous and balanced and provide an adequate level of protection for consumers. We are not convinced that further regulation is needed in relation to the conduct of door-to-door salespeople.

The operation of the Australian Consumer Law (including the unsolicited selling and unconscionable conduct provisions) is expected to be reviewed by Australian Consumer Agencies from 2015. This may be an ideal forum to consider whether further measures are required.

In terms of other laws, unsolicited selling is prohibited under the *Corporations Act 2001* (Cth) in relation to certain products. Section 992A of the Act prohibits the hawking of certain financial products and section 736 prohibits the hawking of securities. These amendments reflect particular concerns around unsolicited supply of financial products, including that the consequences for consumers from unconscientious practices in the supply of financial products can be far more serious than with other products. These considerations justify stronger intervention in the case of certain financial products.

Unsolicited selling provisions of the Australian Consumer Law

The Australian Consumer Law includes a single national law covering unsolicited sales practices, including door-to-door selling, telephone sales and other forms of direct selling which do not take place in a retail context.

The national unsolicited consumer agreement law is provided in Chapter 3, Part 3-2, Division 2 of the Australian Consumer Law and contains the following key rules:

² Frost & Sullivan 2012, *Research into the Door-to-Door Sales Industry in Australia*, ACCC, Canberra, viewed 22 August 2012, <<http://www.accc.gov.au/content/item.php?itemId=1070526&nodeId=9244ae9eca6a60727f3c75ff507124cc&fn=Research%20into%20the%20door%20to%20door%20sales%20industry%20in%20Australia%20%E2%80%93%20August%202012.pdf>>.

- supplier obligations about the way in which consumers are approached;
- supplier disclosure obligations about the making of contracts;
- consumer rights, including a 10 day cooling-off right and the right to terminate a contract after the 10-day cooling-off period in various circumstances; and
- supplier obligations about post-contractual behaviour.

This law regulates the making of unsolicited offers to supply goods and services to a consumer and the agreements arising from such offers. The provisions apply to all forms of unsolicited selling which take place in a non-retail, face-to-face context, regardless of whether a supplier has a traditional ‘bricks and mortar’ business or trade premises. This includes selling on the doorstep, from trucks or out of car boots.

The unsolicited selling law sets out express obligations about the way in which consumers are approached, including by requiring a dealer to leave the premises immediately at any time if requested by the occupier of the residence (section 75 of the Australian Consumer Law) and requiring the dealer to provide the consumer information about the consumer’s right to terminate the agreement and the way in which the person can exercise that right. In particular, under section 73 of the Australian Consumer Law, a dealer must not call on a consumer at any time on a Sunday or public holiday, or before 9 am or after 6 pm (5pm on a Saturday) on any other day.

The unsolicited selling law also contains express consumer rights, including a 10-day cooling-off right and the right to terminate an agreement after the 10-day cooling off period in various circumstances, as well as provisions outlining how consumers may exercise their termination rights.

Contraventions of the Australian Consumer Law can attract a range of penalties, including injunctions, damages, compensatory orders and non-punitive orders. The provisions are also subject to civil pecuniary penalties (with maximum penalties of \$50,000 for a body corporate and \$10,000 for a person other than a body corporate).

The rationale for this approach is to provide a level of protection for consumers against unconscientious conduct, while minimising the impact on businesses that are behaving appropriately.

Unconscionable conduct under the Australian Consumer Law

The Australian Consumer Law prohibits businesses from engaging in common law unconscionable conduct (i.e. from unconscientiously taking advantage of another’s special disadvantage or vulnerability) in trade or commerce. It also includes a broader prohibition of unconscionable conduct in relation to the supply or acquisition of goods or services in trade or commerce.

For example, the Australian Consumer Law provides that a court may have regard to a number of matters in determining whether there has been unconscionable conduct in relation to the supply or acquisition of goods or services in trade or commerce. These include:

- the relative strengths of the bargaining position of the supplier and customer;
- whether the customer could understand documents relating to the supply or possible supply of goods or services;
- whether any undue influence or pressure was exerted on, or any unfair tactics used against, the customer, by or on behalf of the supplier; and
- the extent to which the customer/supplier acted in accordance with good faith.

The prohibition against unconscionable conduct applies across the economy, including to the conduct of businesses involved in the unsolicited sales industry. Businesses need to ensure that they comply with this requirement when they approach consumers in a door-to-door sales context.

Recent ACCC actions

In late March 2012, the ACCC instituted proceedings in relation to door-to-door sales in two matters. Both proceedings seek to test the legal effect of a “do not knock” notice. Section 75 of the Australian Consumer Law requires a salesperson to leave premises immediately on the request of the occupier. The pleadings allege that a visible “do not knock” notice constitutes a request to leave the premises, and therefore, that calling on premises displaying such a notice is in contravention of section 75.

In *ACCC v Neighbourhood Energy Pty Ltd and (its former marketing company) Australian Green Credits Pty Ltd*, the ACCC alleges that the companies contravened sections 18, 74 and 75 of the Australian Consumer Law. On 18 May 2012, Justice Marshall ordered by consent that the matter be referred to mediation. Mediation before Registrar Caporale commenced on 3 August 2012.

The ACCC has also instituted proceedings against AGL Sales Pty Ltd, AGL South Australia Pty Ltd and (its marketing company) CPM Australia Pty Ltd. The ACCC alleges contraventions of section 18, 74 and 75 of the Australian Consumer Law against AGL South Australia Pty Ltd and alleges contraventions of sections 18, 29, 74, 76 and 79 of the Australian Consumer Law against AGL Sales Pty Ltd. On 1 June 2012, Justice Middleton ordered the parties to attempt to resolve the matter by private mediation. This mediation will be conducted on 28 August 2012, and a directions hearing is scheduled for 28 September 2012.

On Friday 17 August 2012, the ACCC launched a research report on the door-to-door sales industry and new, practical tools to help consumers manage this problematic sales approach. In particular, the ACCC launched a consumer guide, *Knock! Knock! Who’s There? Door to door sales — a guide for consumers*, which provides consumers with information about their rights.

They also released a “do not knock” sticker that consumers can place on their front door to let door-to-door salespeople know that the resident does not want them to knock on their door. Consumers can download the sticker from the ACCC’s website.

These important initiatives provide a level of practical support for consumers who may be concerned by the conduct of door-to-door salespeople, while avoiding imposing unnecessary costs on compliant businesses.

PRACTICAL IMPACT OF THE PROPOSED REFORMS

Practical difficulties with implementing the Bill

A more stringent compliance regime for door-to-door salespeople will impose greater compliance costs on business, as they would be required to comply with the unsolicited selling provisions of both the Australian Consumer Law as well as the requirements under this Bill. Particular features of this industry make it likely that the burden on businesses to comply with this proposal may be significant. For example, door-to-door salespeople will need to access addresses listed on the register in a non-office or telemarketing environment. They will also be required to consistently monitor the Register for details of new addresses that have been entered.

Treasury is not convinced that the Bill appropriately weighs the costs and benefits of this particular regulation, particularly given that unconscientious conduct by door-to-door salespeople is already regulated and simple methods such as the prominent display of “do not knock” stickers may be

more effective in practice. There also appears to be only a relatively low, anecdotal level of evidence at present around consumer detriment in this industry.

Appropriate regulator for the Do Not Knock Register

The Bill does not specify who the responsible Registrar would be for collecting and maintaining addresses that are not to be approached by door-to-door salespeople under the framework. Rather, the 'Registrar' is defined as an APS employee appointed by the Minister as the Registrar.

It is unclear which Minister would be responsible for administering the Do Not Knock Register Act (if the Bill is passed), and consequently which Commonwealth agency would be responsible for overseeing the operation of the Register, including investigating breaches of the Act and undertaking enforcement actions.

As these issues go to the enforceability and administration of the Bill, they need to be considered carefully.

Budgetary impact of the Do Not Knock Register

The Bill is based on the Do Not Call Register 2006. The Do Not Call Register was established in May 2007 under the *Do Not Call Register Act 2006* in response to community concerns about unsolicited telemarketing calls. The Do Not Call Register is regulated by the Australian Communications and Media Authority (ACMA), a statutory authority within the portfolio of the Department of Broadband, Communications and the Digital Economy.

The Do Not Call Register enables Australians to opt-out of receiving unsolicited commercial telemarketing calls by listing their fixed line, VOIP, satellite and mobile telephone numbers that are used or maintained exclusively or primarily for private or domestic purposes.

Funding of \$33.1 million over four years was allocated to establish the Do Not Call Register. Around half of the total cost of operation (\$15.9 million) was expected to be cost-recovered from the telemarketing industry through fees to access the register. It was expected that ongoing costs to ACMA to maintain the Register would be less than \$8 million after the first two years.

While Treasury is not in a position to provide specific costing in relation to this proposal, we expect that it is likely that a Do Not Knock Register would have at least the same budgetary impact cost as the Do Not Call Register, given the complexity of setting up and maintaining such a register.

CONCLUSION

Treasury is not convinced that there is an adequate case for the measures outlined in the Bill at this time.

Treasury considers that the Australian Consumer Law provides an adequate and balanced level of protection to consumers from unconscientious unsolicited selling practices in the door-to-door sales context. Treasury is concerned that both the budgetary impact of the proposed reforms outlined in the Bill and the cost to businesses to implement the Bill are disproportionate to the level of consumer detriment experienced. There also appear to be practical issues, including how the Bill will be applied and enforced.

Treasury considers that the upcoming review of the application of the Australian Consumer Law may provide the best forum to discuss this in an evidence-based way.