Appco Group Australia

Submission to the Competition Policy Review

June 2014

Introduction

Appco Group Australia (**Appco**) is a leading global direct sales and marketing company, based on five continents in 26 countries. We operate in over 800 locations and engage individual marketing companies which separately engage independent contractors to deliver more than one million Human Commercials™ every day. Our clients include not-for-profit (**NFP**) charities and sports associations, including Surf Life Saving Australia, UNICEF, WWF, Mater Foundation, and CanTeen Australia, and providers of services that involve more complex ongoing arrangements, such as home efficiency and telecommunication providers. Australia was the founding country of Appco Group in 1987, then known as the Cobra Group.

The direct marketing sector is an important and valuable contributor to the Australian economy. Annual sales through direct selling are approximately $1.4 billion, with around 400,000 individuals engaged to some extent in the sector (including telemarketing)[1]. Of these, the Australian Competition and Consumer Commission (**ACCC**), has estimated that there were over a million door-to-door sales in 2011, employing on average 3,400 people as door-to-door sales agents at any one time[2] with many more employed in back-office and support roles.

Direct marketing is an important contributor towards NFP revenues in Australia, where around 10 per cent of the sector's income is generated from philanthropic sources[3].

The ability for our clients to engage directly with consumers is not only critical to their survival, but is an important part of a robust and competitive economy; offering choice to consumers and directly contributing to market competition. Businesses, NFPs, and consumers have much to gain when direct marketing is used in a responsible manner.

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[1] The Direct Selling Association of Australia at: http://www.dsaa.asn.au/research-statistics.asp

[2] Frost and Sullivan, Research into the Door-to-Door Sales Industry in Australia. Report for the ACCC. Available at:http://www.accc.gov.au/system/files/Research%20into%20the%20door%20to%20door%20sales%20industry%20in%20Australia%20August%202012.pdf

[3] Productivity Commission Contribution of the Not-for-Profit Sector pg 53.
At http://www.pc.gov.au/__data/assets/pdf_file/0011/94556/08-chapter4.pdf

Accordingly, a critical objective for Appco Australia is to ensure that consumers remain satisfied and, by extension, become loyal customers. To this end, Appco Australia is keenly interested in maintaining a competitive market environment, and ensuring that regulations affecting the sector do not impede competition, but rather assist in maintaining confidence and trust in the sector.

Appco Australia welcomes the Competition Policy Review as an opportunity to clarify and resolve a number of issues that impede the efficient interaction between businesses and consumers.

Executive Summary

Overview

- The direct marketing sector makes an important contribution to the Australian economy, employing over 3,400 Australians as door-to-door sales agents (with many more employed in back-office and support roles) at any one time (in 2011), and providing an important avenue for suppliers to directly engage with consumers, in a personalised way, which in particular benefits the NFP sector.
- Appco Australia meets a need in the market by bringing clients and consumers into contact in situations that would be difficult to achieve using traditional sales methods. Its approach is well suited to fundraising activities which benefit from a more personal approach.
- A competitive and accessible market, which enables straight forward and open engagement with the community, is critically important to Appco Australia and its clients. Equally important is maintaining loyal and satisfied consumers.
- Appco Australia recognises the importance of maintaining consumer confidence and trust in the direct marketing sector, and supports responsible and appropriate regulation of the direct marketing industry, which balances community concerns with competition considerations.

Overarching Regulatory Impediments to Competition

- Direct marketers are subjected to a much greater degree of regulation than other sales channels. Multiple layers of commonwealth, state and territory regulation, aimed at different aspects of the industry, and across different sectors, have emerged.
- Legislation and layers of regulation, including across states and territories, have become complex and difficult to understand, creating confusion, making compliance difficult and unnecessarily adding to business costs.
- Available data on the incidence of adverse behaviour in the direct marketing industry suggests that the level of community apprehension is not proportionate to the actual incidence of complaints to authorities by consumers.

- There is a lack of practical, plain English, and easily implementable educational information provided by regulators. The result is increased costs to business – particularly felt by small business – who often need to engage external consultants at high costs to assist with the interpretation of, and compliance with, regulations.

The Australian Consumer Law

- The implementation of the Australian Consumer Law (ACL) (as set out in Schedule 2 of the *Competition and Consumer Act 2010*) in 2011 has resulted in a high level of uncertainty and caused unintentional adverse outcomes that have restricted competition in the market, particularly with respect to fundraising activities. While there are a large number of key impediments to the direct marketing model caused by the ACL, the three broad areas that require immediate clarification or amendment are:
  - the definition of 'Unsolicited Consumer Agreements' as they apply to NFPs;
  - restrictions on permitted hours of calling and 'call backs'; and
  - regulations around the sale of goods.

Unregulated Impediments to Competition

- A range of unregulated impediments have recently emerged – particularly 'Do Not Knock' stickers, which have the unintended consequence of restricting competition (particularly for NFPs) in their traditional sales medium.

Recommendations

1) That regulators provide businesses with simple, brief and accessible information on their compliance obligations.
2) That regulations are made under section 69(4) of the ACL to clearly specify that Unsolicited Consumer Agreements apply only to commercial activities.
3) That section 73 of the ACL is amended to enable the consumer to request a 'call back' after hours while in the presence of a dealer.

Overarching Regulatory Impediments to Competition

At a glance:

1) Direct marketers are subject to a greater degree of regulation than other sales channels. This has been exacerbated by the introduction of the ACL in 2011.
2) Legislation and layers of regulation, including across states and territories, have become complex and difficult to understand, creating confusion, making compliance difficult, and unnecessarily adding to business costs.
3) The focus of the current legislative framework is on protecting the most vulnerable, creating a harsh environment for businesses to operate in. There is a need to balance community concerns with competition considerations.
4) There is a lack of clear, consistent, practical and plain English communication from Regulators on business compliance obligations.

Appco Australia recognises the importance of maintaining consumer confidence and trust in the direct marketing sector, and the need for regulation that balances community concerns with competition considerations. However, the number of regulations imposed on direct marketers, the duplication and lack of harmonisation across layers of Government, and a lack of easily implementable education materials from Regulators has produced serious adverse consequences for Appco Australia and its clients.

Direct marketers are subject to a greater degree of regulation than other sales channels

Appco Australia considers that legislative restrictions on the direct marketing sector are excessive in relation to what they are designed to achieve, severely impacting the ability of its clients to undertake fundraising (in particular) for the NFP sector.

The ability for our clients to engage directly with consumers is not only critical to their survival, but is an important part of a robust and competitive economy; offering choice to consumers and directly contributing to market competition. Businesses, NFPs, and consumers have much to gain when direct marketing is used in a

responsible manner. As a direct marketer and fundraiser, we offer a unique form of marketing that enables businesses and NFPs to communicate directly with the customer. Our marketing model is particularly suited to organisations that require a straight forward and open engagement with the community, such as with NFPs, and businesses that do not normally attract clients through a traditional retail presence. Due to its personalised approach, it is also suited to sales involving complex service transactions and long-term contracts (such as utilities and telecommunications sales), where detailed and specific product knowledge is required by consumers. In these circumstances consumers benefit from being able to ask direct questions and find the best products to suit their needs.

Accordingly, a critical objective for Appco Australia is to ensure that consumers remain satisfied and, by extension, become loyal customers. To this end, Appco Australia is keenly interested in maintaining a competitive market environment, and ensuring that regulations affecting the sector do not impede competition, but rather assist in maintaining confidence and trust in the sector.

The Australian Chamber of Commerce and Industry's (ACCI) 2012 National Red Tape Survey found that almost one-half (42.2%) of businesses reported that they spent more than $10,000 to comply with government regulatory requirements, with 26.1 per cent of respondents indicating they spent up to $50,000 on compliance. Complying with such expansive regulations restricts competition in the market by acting as a barrier to entry, and an incentive to leave.[4] The introduction of the Australian Consumer Law in 2011 has further exacerbated the degree of regulation imposed upon the direct marketing sector and the associated costs of compliance.

There is a lack of regulatory harmonisation amongst the layers of Government

Despite the intention to harmonise laws under the ACL, the industry remains overregulated and subject to overlapping laws and regulations which vary across jurisdictions, covering the same or similar issues. Unsolicited selling hours by

[4] ACCI, National Red Tape Survey, October 2012, p.7 <http://www.acci.asn.au/getattachment/caea26ac-b3a5-4eb6-9d45-8488e882d6a2/ACCI-National-Red-Tape-Survey>

jurisdiction, for example, are addressed under one guise or another under five different regulations across Australia, making compliance confusing – particularly for businesses operating across state borders.

Queensland's current system of state appeals (*Collections Act 1966* and the *Collections Regulation 2008*, applied by the Office of Fair Trading), is a further example of regulation that is applied inconsistently across state borders and consequently severely restricts the fundraising activities of the majority of charities operating in the state, as well as the number of small businesses that support them. In effect, the laws require direct marketers collecting for NFPs to cease operating during state wide collection campaigns.

As a result of the restrictions associated with state appeals, marketing companies are forced to relocate intermittently interstate. However, as more and more appeals are granted, this tactic is no longer viable and many marketing companies (which are privately owned businesses based in Queensland) are now considering relocating permanently. Given the number of charities operating in Queensland and the popularity of door-to-door appeals and street collections, it is unsurprising that approximately 19 weeks of 2014 have already been allocated to state appeals, bringing with them, restrictions for other charitable organisations.

Queensland's law is inconsistent with every other State and Territory in Australia and it is unlikely that the effect of the law was contemplated by legislators. Harmonisation of legislation such as this would allow more charitable organisations to continue their normal operations while still ensuring that the public are afforded appropriate protections.

A further example is the *Charitable Fundraising Regulation* (NSW) *2008* which requires direct marketers to wear an identification card or badge when engaging in fundraising activities. However, it has been determined by investigators from the Fair Work Ombudsman and the Australian Tax Office that wearing identification is an indication of an employee/employer relationship. This is not the framework under which direct marketers operate (these marketing companies are small business owners who engage independent contractors). The lack of harmonisation increases the cost and time dedicated to regulatory compliance.

Regulatory considerations need to balance with community concerns

Appco Australia considers that a competitive and accessible market, which enables straight forward and open engagement with the community, is critically important to its clients and consumers. Implicit in this, is the need to maintain loyal and satisfied consumers who have confidence and trust in direct marketers and fundraisers.

Appco Australia recognises that there is a level of community concern about the tactics of some unscrupulous operators, and that an appropriately regulated and monitored market is essential in maintaining ongoing confidence and trust in the sector, to the benefit of all participants and the broader community that benefits from fundraising activity.

However, it is important that regulation does not result in unintended and adverse consequences, unnecessarily inhibiting fundraising and stifling competition to the detriment of all market participants. It is also important that regulation is easily understood and complied with in practice, and that costs of compliance are not disproportionate to its benefits.

Closer examination of the actual incidence of adverse behaviour in the door-to-door sector suggests that the level of community concern is not proportionate to the actual incidence of complaints to the ACCC by consumers.

In its August 2012 Report, the ACCC noted that between January 2011 and March 2012, it received a total of 63,109 consumer complaints related to provisions in the ACL. Of these, only 187, or 0.03 of a per cent, were in relation to door-to-door sales. This correlated closely with complaints received in New South Wales, Victoria, Queensland and South Australia, which 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[5].

[5] Frost and Sullivan, Research into the Door-to-Door Sales Industry in Australia. Report for the ACCC. Available at:http://www.accc.gov.au/system/files/Research%20into%20the%20door%20to%20door%20sales%20industry%20in%20Australia%20August%202012.pdf

Given that there are 8,425,000 million households in Australia, and that 1,308,000 door-to-door sales occurred in 2011[6], the above data suggests the vast majority of consumers have no concerns with engaging directly with businesses and fundraisers. Hence, it is important to ensure that legislation targeted at direct marketers is not excessive in proportion to the potential detriments it is attempting to address.

Regulators do not provide adequate practical and plain English educational material on regulatory requirements

Regulators should strive to provide simple, brief and accessible educational material to business on their compliance obligations. These characteristics will help to ensure that businesses will be better informed about the regulations that affect them and will help to prevent small business owners leaving the industry as a result of the time, effort, cost and stress involved in a poor regulatory engagement experience. Overall, direct marketing companies have expressed their concerns with regards to this point as follows:

- Regulators fail to communicate their requirements simply and clearly.
- Regulators sometimes provide poor quality advice that is often inconsistent, erroneous, and lacking in specificity.
- Small businesses experience difficulty in locating and understanding regulatory requirements on websites.
- There is information overload without ever achieving a goal of practical and plain English educational material.

It is noted that New Zealand is a good example of a Regulatory framework that provides simple fact sheets on regulatory compliance updates, which assist business owners to meet their obligations without the need for external assistance.

Accordingly, in Australia, it is difficult for small businesses to compete in the market when they lack sufficient resources to assess, monitor and meet their regulatory obligations.

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[6] Frost and Sullivan, Research into the Door-to-Door Sales Industry in Australia. Report for the ACCC. Available at:http://www.accc.gov.au/system/files/Research%20into%20the%20door%20to%20door%20sales%20industry%20in%20Australia%20August%202012.pdf

Recommendation

That Regulators provide businesses with simple, brief and accessible information on their compliance obligations

The Australian Consumer Law

At a glance:

1) The implementation of the ACL in 2011 has resulted in a high level of uncertainty and caused unintentional adverse outcomes that have restricted competition in the market, particularly with respect to fundraising activities. Appco Australia has expended significant time, effort and financial resources to seek clarity on many aspects of the ACL, which to date have yielded no response.
2) The key issues requiring immediate resolution to enhance competition in the direct marketing sector are:
    - specifying the types of fundraising activities that are not UCA's; and
    - amending the 'call back' requirements of the legislation.

The Australian Consumer Law is a stark example of the regulatory concerns raised in the previous section, namely that:

- direct marketers are subject to a greater degree of regulation than other sales channels;
- legislation and layers of regulation have become complex and difficult to understand, creating confusion, making compliance difficult and unnecessarily adding to business costs;
- the focus of the current legislative framework is on protecting the most vulnerable, creating a harsh environment in which businesses can operate; and
- there is a lack of clear, consistent, practical and plain English communication from Regulators on business compliance obligations.

Appco Australia endorsed the implementation of the ACL in 2011 as a positive step in reducing business costs and complexity by harmonising and replacing various state and territory laws on direct marketing. However, its practical implementation has had a significant detrimental effect on businesses and fundraising capabilities, generated a high level of uncertainty, and is causing unintentional adverse outcomes, particularly in respect to fundraising activities. Appco Australia understands that a review of the ACL is due to occur prior to 2016, and accordingly, has chosen to highlight three key issues requiring urgent attention in the meantime.

It should be noted that Appco Australia has spent significant time and financial resources trying to resolve these issues over the past four years and to date, has not received a response to its concerns.

The definition of Unsolicited Consumer Agreement is unclear, resulting in a number of unintended consequences for NFP organisations

The ACL has introduced new provisions to regulate unsolicited and direct selling transactions – referred to as "unsolicited consumer agreements" (UCAs). The provisions are contained in Sections 69 to 95 of Schedule 2 to the ACL.

The overarching issue for the NFP sector is that the ACL fails to differentiate adequately between the activities of private commercial organisations and NFP organisations. Accordingly, it is difficult for NFPs to determine whether or not their activities constitute an UCA.

Specific examples of the confusion caused by the failure to differentiate adequately between the NFP sector and private commercial organisations include the following:

- Donations to charity (including donations received by a third party contractor on the charity's behalf) are deemed not to be unsolicited consumer agreements. However, if goods or services worth $100 or more are supplied on behalf of a charity to a supporter in return for the donation, this is deemed to be an UCA.[7] A very significant proportion of fundraising occurs in situations where supplies of goods or services in excess of $100 value are made in return for donations, including, for example, donations to raffles, charity dinners and fundraising auctions.

- Further difficulty arises under section 69 in relation to what constitutes a 'business premises' which requires an agreement to have resulted from negotiations in person at a place other than the business or trade premises of the supplier. The ACL *Guide for businesses and legal practitioners* indicates that a sale made at a shopping centre kiosk or stall is unlikely to be a UCA where the kiosk is the operator's business premises and the sales person remains within the kiosk.

[7] Sales practices: A guide for businesses and legal practitioners

However, the following scenarios present grey areas, making it difficult to comply with the law:

- If a sales person approaches or intercepts a consumer and negotiates a sale outside of the kiosk or stall, would this constitute a UCA?
- If the kiosk or stall is only temporary, does this alter the outcome?
- What if the kiosk or stall owner is operating on behalf of another trader – would this mean that the kiosk is not the operator's own business or trade premises?
- Regulators have noted that a kiosk or stall that is partly or fully enclosed, or marks out an area, is more likely to be seen as a business premises[8]. However, if there is a lease in place, why is the structure itself a determining factor for what constitutes a business premises – some stalls have only limited enclosures in, for example, shopping centres. Is this considered a 'premises'?

- Yet more confusion arises under section 69 in relation to the total price payable. This section requires the total price payable by the consumer under the agreement to be unascertainable at the time the agreement is made or, if it is ascertainable, is more than $100 (or such other amount prescribed by the regulations). 'Price' is broadly defined under the ACL and means 'the amount paid or payable (including any charge of any description) for their acquisition'. This requires many suppliers to develop separate procedures for transactions depending on whether their value is more or less than $100 which creates an arbitrary and burdensome imposition for NFPs that conduct fundraising activities.

- Another consequence of such charitable arrangements being considered as UCAs is that they then also become subject to a 'termination' or 'cooling off' period of 10 business days from when the agreement is executed. While Appco Australia does not oppose the cooling off period in principle, its application to charitable collection activities which are deemed to be UCAs continues to have adverse consequences. In relation to raffles and lotteries, the application of a

[8] Definition of Services section 2 ACL

cooling off period will impact the potential sale of tickets as sales will have to be closed 10 days before the draw to allow for cancellations.

Appco Australia submits that the application of the ACL to NFP businesses causes significant confusion, increased compliance burden in the form of time and cost, and anticompetitive behaviour where a lack of clarity results in different businesses interpreting the legislation differently, thereby resulting in an uneven playing field.

Recommendation

That regulations are made under section 69(4) of the ACL to clearly specify that particular types of fundraising activity (including donations and pledges) are not Unsolicited Consumer Agreements.

The ACL inhibits direct marketing during the hours most convenient to consumers and makes the 'call back' process difficult for business and consumers

Permitted hours of calling and arrangements to visit outside of permitted hours (section 73 ACL) affect the competitive process by making direct marketing unavailable to consumers at the times most convenient to them.

Section 73 of the ACL states that:

(1) permitted hours for direct marketers approaching a person face-to-face (Monday to Friday 9am to 6pm and Saturday 9am to 6pm); and
(2) the arrangements to visit a consumer outside of the permitted hours (referred to in the industry as 'call back').

The permitted calling hours under the ACL are clear. However, there is confusion regarding whether some states have chosen to vary the "default" calling hours (highlighting further the lack of harmonisation of regulation amongst layers of government).

More pressing, however, is the requirement of sub-section 73 (2) that a direct marketer is not present at the time of receiving consent to 'call back'. This requirement is both impractical and unnecessary and wastes time for the business and consumer. The provision impedes consumers from exercising their rights and inhibits the competitive process. Further, it appears to be contrary to the intention of the ACL which (in his second reading speech), the Minister for Competition Policy and Consumer Affairs stated:

> *...Australian businesses deserve simple, national consumer laws that make compliance easier.*[9]

It is easy to see a whole range of circumstances where it would be more convenient for the consumer to receive a 'call back' outside of the specified hours, and to arrange this face-to-face. Between 60%-70% of requests to call back are after 6 pm and accordingly, amending this provision would greatly assist competition for this sector.

Recommendation

That section 73 of the ACL is amended to enable the consumer to request a 'call back' after hours while in the presence of a dealer.

[9] House of Representatives Hansard, 17 March 2010 at p2718

Unregulated Impediments to Competition

At a glance:

1) Unregulated initiatives, particularly 'Do Not Knock' stickers, are severely impacting the ability of the NFP sector to fundraise through their traditional sales channel

Do Not Knock stickers

In addition to the layers of regulation faced by the direct marketing sector, there are a number of unregulated initiatives that have further impacted Appco Australia's clients' (particularly in the NFP sector) ability to compete in the market. The evolution of the industry led *Do Not Knock* stickers provides an excellent and recent example.

Recent fines imposed by the ACCC on energy retailers have seen them withdraw from door-to-door canvassing in the residential market and *Do Not Knock* stickers have been used by these retailers to protect their consumer base and restrict competition within the energy market. The stickers omit to advise the consumer that placing a sticker on their front door may revoke the right of *any* individual to knock on their door. While the legal application of these stickers to the activities of the NFP sector has not been explicitly tested, the confusion and uncertainty that has been created has had the effect of removing the competitive right of other businesses, industries, and charitable organisations that have interacted through this medium for many years with consumers to build their businesses, without issue. This is both undesirable and anti-competitive behaviour.

The use of generic non-government Do Not Knock stickers around the country has significantly impacted the fundraising activities of charities by substantially reducing the number of potential donors or consumers that may be approached. In a great many cases, people who have a Do Not Knock sticker up at their home do so because they want to avoid energy salespeople rather than representatives of charities or local community organisations and businesses. However, people are

unable to convey this intention, as the stickers they are provided with do not allow for a nuanced approach to door-to-door interactions.

The choice to exclude people from door-to-door marketing should be an informed and conscious choice made by a resident and not an unintended consequence of the *Do Not Knock* stickers promoted by energy retailers seeking to protect their market share. While the legal basis for this exclusion may not have been fully examined, the confusion and uncertainty that has been created within the NFP sector is affecting the activities of charities across the country.

Case Study – Business growth through door-to-door selling

In 2006 Appco commenced work with a new company looking to establish itself in an already competitive industry, through the use of direct marketing and door-to-door selling. Over a six year period from the time it entered the market and engaged Appco, this company was able to achieve rapid and consistent growth, peaking at over 350,000 customers at the time it was sold to one of its largest competitors.

The ability of this company to engage in door-to-door selling was a significant factor in the growth of its customer base. This demonstrates the effectiveness of the door-to-door industry in facilitating the development and expansion of Australian businesses and its contribution to increasing productivity and growth in the economy.

Summary of Recommendations

1) That Regulators provide businesses with simple, brief and accessible information on their compliance obligations.
2) That regulations are made under section 69(4) of the ACL to clearly specify that particular types of fundraising activity (including donations and pledges) are not Unsolicited Consumer Agreements.
3) That section 73 of the ACL is amended to enable the consumer to request a 'call back' after hours while in the presence of a dealer.

We look forward to engaging with the Government in an attempt to achieve a fair, practical and balanced outcome to the issues we have raised.