



Knock it off!

Door-to-door sales and consumer harm in Victoria



consumer
action
law centre



loddon campaspe
community legal centre

WEstjustice

November 2017

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The report compiles case studies drawn from three community sector law service providers:

- Consumer Action Law Centre
- WEstjustice; and
- Loddon Campapse Community Legal Centre.

DISCLAIMER

This report highlights nineteen case studies from across Victoria, to illustrate the impact of unscrupulous unsolicited sales practices on vulnerable consumers.

All effort has been made to de-identify the consumers and businesses involved in the case studies. All case studies have been included with the consent of the consumers concerned.

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FOREWORD

This report contributes to years of work by Victorian community legal centres in the field of unsolicited sales. While the report focuses on the immediate policy debate, it draws on the collective experience of practitioners who have dealt with the harm done by unsolicited sales over the past few decades. The report has been informed and improved by that experience and seeks to capture the harm that all community sector lawyers know exists, and present it for the benefit of policy-makers. Accordingly, while much of the report speaks to the current political moment (a moment that will inevitably pass quite quickly), it is hoped that it will remain a useful resource over the medium to longer term—for any with an interest in the consumer experience of unsolicited sales.

Many community sector practitioners hold the view that the only way to prevent consumer harm in unsolicited sales is to ban the practice altogether. The combination of commission-based incentives, unsupervised sales staff and vulnerable consumers ill-equipped to resist the ‘hard-sell’ is simply too difficult to regulate effectively. Consumer advocates strongly argued this position throughout the recent Australian Consumer Law (**ACL**) Review, and were not successful in persuading Consumer Affairs Australian and New Zealand (**CAANZ**) of this view. While CAANZ acknowledged that consumer harm and pressure selling occur in at least some sectors, it also expressed concern about limited evidence of the extent and nature of unsolicited selling across the economy.

Mindful of the current policy dialogue and appetite for change, this report does not call for an outright ban on unsolicited sales. Such an outcome is politically unlikely, and—at least for now—unsupported by policymakers. While the community sector has more than enough evidence of consumer harm, in order to justify a ban it may also be necessary to show that unsolicited sales do *no good*—or at least, do so little good that banning the practice becomes the only logical policy response. One argument by supporters of unsolicited sales is that they provide important access to goods for people in remote communities. Accordingly, while consumer harm in such areas can be extreme, some people advise that banning the practice altogether would leave people in those communities without access to important or essential goods. While these views might be questioned in the age of online selling, it is hoped that the forthcoming economy-wide survey of unsolicited sales can more fully inform the policy debate on the desirability, or otherwise, of a ban.

In the meantime, this report demonstrates that consumer harm resulting from unsolicited sales is significant and ongoing. While a ban may not be the most practical response, some additional form of regulatory intervention certainly is. Further, it is obvious that at the time of writing the unsolicited sale of solar panels is causing significant consumer harm. Misleading and inappropriate sales of solar panels, including but not limited to vulnerable low-income consumers, has become systemic and requires an urgent, concerted and comprehensive policy response. It is also obvious that elderly and culturally and linguistically diverse (**CALD**) people are disproportionately affected by unsolicited sales. In designing any regulatory intervention, the needs and vulnerability of these consumers must be taken into account.

We hope that this report informs those with an interest in unsolicited sales and consumer harm, and is a useful contribution to the current policy debate. We have included numerous case studies in this report to provide a human face and voice for the issue, and to demonstrate that the harm caused by unsolicited sales is unacceptably high. Finally, we hope that this report will give readers pause to ask this question—how much harm do we accept, before we find it necessary to intervene?

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Victoria**

EXECUTIVE SUMMARY

In mid-2016 the Consumer Action Law Centre (CALC) applied to Consumer Affairs Victoria's (CAV) Tenancy Assistance and Advocacy (TAAP) and Consumer Assistance and Advocacy (CAAP) Innovation Fund grants program to undertake a research project examining unsolicited sales and consumer harm.

This report is the result of that project, and brings together casework from three key community legal centres participating in the CAAP.

The centres are:

- Consumer Action Law Centre, located in Melbourne CBD and operating as a phone advice and casework service.
- WEstjustice – Western Community Legal Centre, providing legal services in the Western Suburbs of Melbourne.
- Loddon Campaspe Community Legal Centre, located in Bendigo.

Collectively, these CAAP agencies provided nineteen de-identified case studies, which are presented in chapter 3 of the report. Of those nineteen, three case studies were also recorded as video case studies—and can be viewed at **consumeraction.org.au/knockitoffvideos**

The report has been written to contribute to the policy debate around unsolicited consumer agreements, specifically the protections needed to prevent consumer harm. This debate was flagged by Consumer Affairs Australia and New Zealand (CAANZ) in its recent review of the Australian Consumer Law (ACL), where CAANZ concluded it was:

***Aware of the level of consumer detriment caused by unsolicited selling in some sectors, [and] CAANZ remains concerned that some degree of additional intervention may be required.*¹**

Further, CAANZ stated that:

***The preferred approach at this time is to maintain the current balance of protections and initiate an economy-wide study of unsolicited selling to further inform policy consideration.*²**

At a Minister for Consumer Affairs Meeting (**CAF Meeting**) on 31 August 2017, Federal and State Consumer Affairs Ministers directed CAANZ to place the proposed economy-wide study on their forward work program, and required that the project commence in 2017-18. This report should inform the economy-wide study that CAANZ will soon be undertaking.³

In compiling the report, particular attention has been paid to developments in behavioural economics, and how these inform our understanding of unsolicited sales. Behavioural economics research shows that the effectiveness of cooling-off periods as a consumer protection is questionable, particularly for vulnerable consumers. Further, behavioural economics principles indicate that an 'opt-in' model may provide more effective consumer protection. The option of an 'opt-in' model for unsolicited sales was raised by CAANZ in their ACL Review Interim Report, and is likely to be prominent as the policy debate continues. Accordingly, this report examines potential benefits of replacing the cooling-off period with an opt-in model in some depth.

¹ CAANZ, *Australian Consumer Law Review – Final Report*, March 2017, p. 58. Available at: https://cdn.tspace.gov.au/uploads/sites/86/2017/04/ACL_Review_Final_Report.pdf

² Ibid.

³ Ministers for Consumer Affairs, *Communique*, 31 August 2017. Available at: <http://consumerlaw.gov.au/communiques/meeting-9-2/>

The report also identifies three “consumer harm hotzones”. The first is the solar panel retail industry—over half of the case studies presented in this report relate to the unsolicited sale of solar panels. It is clear that these sales are causing systemic consumer harm, and regulators must act to mitigate that harm. The report raises the possibility of an industry-specific trial of the opt-in model, to be applied to the unsolicited sale of solar panels. Given that the COAG Energy Council has recently announced its intention to develop an industry-led Code of Conduct for the sale of new energy products and services, the timing (and administrative machinery) for such a trial may be right. It should be noted that the energy sector generally has a long history of poor unsolicited sales practices—to the point where major energy retailers voluntarily chose to discontinue the practice in 2013 following significant public complaints.

The second consumer harm hotzone is remote indigenous communities, which have experienced a disproportionate amount of consumer harm from unsolicited sales over many years. Both Consumer Action and WEStjustice have a history of engagement with indigenous communities in Victoria concerning unsolicited sales. In Consumer Action’s case, this work has predominantly been in relation to supporting two regional communities with issues relating to consumer leases.

This report documents the launch of the ‘Do Not Knock Informed Town’ initiative in Yarrabah community, just outside of Cairns in far north Queensland—a visit that was facilitated by the Indigenous Consumer Assistance Network (ICAN). Yarrabah is the second community to launch the initiative—and more communities in far north Queensland are likely to follow. As an illustration of the harm that unsolicited sales can cause and the measures that are required to protect consumers from unscrupulous traders, the Do Not Knock Informed Town initiative is hard to ignore.

Third, the report discusses the consumer harm hotzone of ‘invited’ in-home sales, and other off-premises sales interactions. While not necessarily caught by the current unsolicited consumer agreement provisions of the ACL, the behavioural factors that apply in these transactions are very similar. The report raises the question of whether a protection for ‘off-premises’ contracts may be more effective than the current unsolicited consumer agreements protections (noting that such a construction already exists in the EU and the UK, and used to exist in Victoria prior to the enactment of the ACL).

Finally, the report presents its findings and recommendations in seven simple dot points. These are reproduced below:

- As identified by CAANZ in its review of the ACL, and as demonstrated by successful community initiatives such as Do Not Knock stickers and Do Not Knock informed towns, ***consumer detriment caused by harmful unsolicited sales is significant and persistent.***
- ***Vulnerable consumers*** including elderly consumers, CALD and Indigenous consumers ***appear to be disproportionately affected by harmful unsolicited sales.***
- ***The efficacy of the ‘cooling-off’ protection is highly questionable and it seems largely an ineffective consumer protection***—it is based on a false and now outdated understanding of human behaviour.
- ***An ‘opt-in model’ is preferable from a behavioural perspective—it restricts sales to where the purchaser clearly and intentionally chooses the product or service.*** Any impact on legitimate trade can be tested through a narrow trial of the model.
- ***Unsolicited retail sales of solar panels are currently causing significant consumer harm.*** This is driven by a number of factors including consumer anxiety over rising energy costs, limited understanding of the product and appropriate cost, and access to (often inappropriate) finance which makes the purchase achievable.

- ***An industry specific trial of the opt-in model may be useful*** to test the impact of such a model on both reducing consumer harm, and also the impact it has on legitimate trade. ***The solar panel industry seems the logical industry in which to conduct such a trial.***
- ***Consideration should be given to broadening protections so that they apply to all 'off-premises contracts', as is currently the case in the EU and UK.*** This would ensure that consumers who are subject to high-pressure sales tactics through invited in-home sales, or attending timeshare style presentations, are also protected. This is significant because the behavioural aspects of those interactions are often very similar to unsolicited sales, creating the same difficulties for consumers that the unsolicited consumer agreement protections are designed to counter. Further, emerging legal uncertainty in case law concerning some off-premises sales and whether they qualify as unsolicited could be addressed by such a reform.

"He's man way out there in the blue, riding on a smile and a shoeshine. And when they start not smiling back — that's an earthquake. And then you get yourself a couple of spots on your hat, and you're finished. Nobody dast blame this man. A salesman is got to dream, boy. It comes with the territory."

- Arthur Miller, *Death of a Salesman*.

"ABC. A, always. B, be. C, closing. ALWAYS BE CLOSING. Always be closing!"

- David Mamet, *Glengarry Glen Ross*.

1. Unsolicited consumer agreements: Why this project, and why now?

Throughout 2016 and into the early months of 2017, Consumer Affairs Australia and New Zealand (CAANZ)—the peak body for Australia's consumer protection regulators—conducted an extensive review of the Australian Consumer Law (ACL).

The ACL is Australia's foremost piece of consumer protection legislation, and sets out general protections applying to most consumer purchases, as well as more specific protections applicable to particular forms of commerce. CAANZ's review was not the result of any particular political pressure, but was mandated by an intergovernmental agreement as a sensible step to take after five years of operation of the ACL.⁴ The review drew on submissions from stakeholders across the spectrum, and was undertaken in an investigative style with no predetermined agenda.

In the wake of the review CAANZ recommended no immediate reform to the law concerning unsolicited consumer agreements. CAANZ did state, however, that they are:

Aware of the level of consumer detriment caused by unsolicited selling in some sectors, [and] CAANZ remains concerned that some degree of additional intervention may be required.⁵

In concluding their remarks, CAANZ clearly stated that any such intervention should only proceed on the basis of careful consideration, supported by evidence based research:

The preferred approach at this time is to maintain the current balance of protections and initiate an economy-wide study of unsolicited selling to further inform policy consideration.⁶

To contribute to this policy discussion, in mid-2016 the Consumer Action Law Centre (CALC) applied to CAV's TAAP & CAAP Innovation Fund grants program for funding to undertake a research project examining unsolicited sales and consumer harm.

This report is the result of that project, and brings together casework from three key community legal centres participating in the CAAP.

The centres are:

- Consumer Action (located in Melbourne CBD and operating as a phone advice and casework service)
- Westjustice, (located in Footscray, Werribee and Sunshine)
- Loddon Campaspe, (located in Bendigo).

The report is accompanied by three video case studies of affected consumers told in their own words (those case studies are also included as written case studies), and a brief interview with Indigenous Consumer Assistance Network (ICAN) Operations Manager Jon O'Mally, discussing the impact of unsolicited sales in the Indigenous communities of far north Queensland, and the Do Not Knock Informed Town initiative. The videos can be found online at **consumeraction.org.au/knockitoffvideos**

While community legal centres (CLCs) are not commonly in a position to provide definitive, economy-wide statistical data, they can and do provide a strong indicative measure of the practices occurring in the community—particularly those that affect vulnerable people. It is clear from the case studies in this report

⁴ COAG, *Intergovernmental Agreement for the Australian Consumer Law*, 2 July 2009, clause 51, Available at: http://consumerlaw.gov.au/files/2015/06/acl_iga.pdf

⁵ CAANZ, *Australian Consumer Law Review – Final Report*, March 2017, p. 58. Available at: https://cdn.tspspace.gov.au/uploads/sites/86/2017/04/ACL_Review_Final_Report.pdf

⁶ Ibid.

that the unsolicited selling of solar panels is currently causing serious consumer harm requiring essential regulatory action for its prevention.

That being said, we would caution against too narrow a focus, as experience has shown that consumer harm from unsolicited sales comes in waves and often migrates from product to product. While solar panels are the product of the moment, in the past we have seen unsolicited sales cause harm through the selling of mattresses, encyclopaedias, vacuum cleaners, educational software, energy contracts and a range of other products and services. Indeed, it is not difficult to envisage that the next “problem product” may well be home battery storage systems. The product itself is not the subject of this report—it is the method of selling, along with the need for a regulatory framework that will reduce harm caused by this method of selling.

Accordingly, this report anticipates policy discussion of the relative merits of an “opt-in” model for unsolicited consumer agreements versus the current “cooling off” approach. This discussion was foreshadowed by CAANZ’s ACL Review Interim Report in October 2016, and is likely to form part of the further policy consideration that CAANZ have flagged.

As this report makes clear, an opt-in model may well provide superior consumer protection than cooling off. Further, we suspect concerns that an opt-in model would infringe on legitimate trade are over-stated. We have arrived at these views through consideration of our casework experience, behavioural economics research, and the history of the cooling-off model—and its relative ineffectiveness as a consumer protection.

While this report can only theorise and provide arguments for our views on regulatory reform, a pilot program is recommended to test the practical effectiveness of an opt-in model and should form part of the economy-wide study that CAANZ have suggested. It may be opportune to conduct this trial in the solar panel industry, given the high degree of harm identified in that sector. Further, a recent announcement by the COAG Energy Council may provide the opportunity for such a trial. On 3 August 2017, the COAG Energy Council announced they are seeking industry groups to develop an industry-led Code of Conduct to provide consumer protection in relation to new energy products and services.⁷

This report briefly provides some background on the recent history of consumer protection in relation to unsolicited sales in Australia, and presents some options for reform. We are conscious that unsolicited selling has been a feature of retail trade for decades, and there is a danger that the harm it causes has been normalised, or somehow accepted as “the way things are”—and that the measures currently in place could be seen as the only way to deal with the problem. We do not believe that this is the case, and would say that measures taken to date have largely failed to prevent systemic consumer harm. This recent history clearly shows that unsolicited sales do cause significant problems and additional intervention is warranted—provided it is carefully considered and tested.

⁷ COAG Energy Council, *Energy Market Transformation Bulletin Update 5*, 3 August 2017, Available at: <http://www.coagenergycouncil.gov.au/publications/energy-market-transformation-bulletin-no-05-%E2%80%93-work-program-update>

1.1 Back to basics: What is an unsolicited consumer agreement?

Unsolicited consumer agreements are defined by section 69 of the Australian Consumer Law (ACL) as agreements made between a consumer and a trader at a place other than the trader's business premises, or by telephone, in circumstances where the trader has not been invited by the consumer to attend the place of negotiation or make the call.⁸

Put more simply, unsolicited consumer agreements are made between consumers and uninvited door-to-door salespeople, or through 'cold-calling' telemarketing. They also include circumstances where a consumer is approached by a trader in an unusual location, away from the trader's place of business—such as in a supermarket, or a carpark.

It can be contested that unsolicited sales include agreements made where consumers have been enticed to attend a presentation in an 'off-premises' location (as often happens with time-share arrangements, for example), although this is an arguable view – and depends on exactly how they were enticed. Section 69(1A), a late addition to the ACL text, states that a consumer is not to be taken to have invited a dealer to come to a place or make a telephone call merely because they have given their contact details for purposes *other* than entering negotiations relating to the supply of goods or services (e.g. attending a presentation, entering a competition or having an in-home demonstration) or have contacted the dealer following an unsuccessful attempt by the dealer to contact the consumer (e.g. returning a missed call from a telemarketer).

Fundamentally though, the significance of unsolicited sales is that they describe a situation in which the sales interaction is 'sprung' on the consumer by the trader, as opposed to being sought out by the consumer proactively approaching a trader. It should be noted that unsolicited sales do not include direct mail marketing. Direct mail is better characterised as a form of advertising, as it does not involve the presence of a trader either in person or over the phone, and does not therefore subject the consumer to a 'hard-sell' experience.

It is also worth noting that there is currently some legal uncertainty about the extent to which the sales interaction must be 'sprung' on the consumer, at least in relation to 'pop-up' style trading. In *Australian Competition and Consumer Commission v ACN 099 814 749 Pty Ltd* [2016] FCA 403, Reeves J found that this unequivocally required that it be the "dealer who has to initiate the negotiations with the consumer".⁹ By contrast, in the more recent *Australian Competition and Consumer Commission v Unique International College* [2017] FCA 727, Perram J found that:

⁸ It should be noted that sales of less than \$100 are excluded from the definition, which is reproduced in full below:

s69 Meaning of unsolicited consumer agreement

- (1) An agreement is an **unsolicited consumer agreement** if:
- (a) it is for the supply, in trade or commerce, of goods or services to a consumer; and
 - (b) it is made as a result of negotiations between a dealer and the consumer:
 - (i) in each other's presence at a place other than the business or trade premises of the supplier of the goods or services; or
 - (ii) by telephone;
 - whether or not they are the only negotiations that precede the making of the agreement; and
 - (c) the consumer did not invite the dealer to come to that place, or to make a telephone call, for the purposes of entering into negotiations relating to the supply of those goods or services (whether or not the consumer made such an invitation in relation to a different supply); and
 - (d) the total price paid or payable by the consumer under the agreement:
 - (i) is not ascertainable at the time the agreement is made; or
 - (ii) if it is ascertainable at that time--is more than \$100 or such other amount prescribed by the regulations.

⁹ *Australian Competition and Consumer Commission v ACN 099 814 749 Pty Ltd* [2016] FCA 403 at 134.

*"I do not agree that...the dealer must initiate negotiations. Section 69(1)(b) does address itself to the identity of the initiating party but only by providing that it must not be the consumer. It does not say that it must be the dealer. Indeed, it seems clear to me that the definition is explicitly addressing itself to the situation that neither party initiates the negotiation and declares that that situation is covered by the requirements of the Division."*¹⁰

This is a finer legal point, and refers to circumstances in which a trader has set themselves up for trade in a novel location, where they may encounter consumers. Under Perram J's construction, this can be a circumstance in which neither party can be regarded as having truly 'initiated' the sales negotiation.

At a meeting for Ministers of Consumer Affairs (**CAF Meeting**) on 31 August 2017, State and Federal Consumer Affairs Ministers agreed that threshold requirements for unsolicited sales needed to be clarified to ensure that they unequivocally apply to interactions in public places, but also capture suppliers in their negotiations with consumers when consumer contact details have been obtained from a lead generator. These will be welcome reforms, resulting directly from recommendations made by CAANZ through the ACL Review.¹¹

These issues, and the problem of 'invited' in-home sales, are discussed more fully later in this report. (Refer to *Consumer Harm Hotzone #3 – Letting the Vampires In: The Problem of 'Invited' In-home Sales* at page 64).

Suffice to say, it is unequivocal that unsolicited sales *do* encompass door-knocking and cold-calling, and these sales techniques form the main basis of our discussion.

Unsolicited consumer agreements are problematic because they often involve unfair, high-pressure sales practices which result in inappropriate or unaffordable purchases—often by people experiencing vulnerability who are ill equipped to withstand such tactics, and least likely to assert their rights in the event of a bad deal. Aggressive, manipulative, confusing, misleading and persistent sales tactics are not uncommon. Very often, goods are bought simply to get the salesperson to leave, or so as not to seem impolite. As is generally acknowledged, a power imbalance exists that needs to be addressed by regulation.

This acknowledgment is by no means restricted to Australia. The European Union (EU), the United Kingdom (UK), the United States of America (USA), Canada and Singapore have all legislated cooling off periods to counter the potential harm of unsolicited sales, the earliest of which dates back to 1964 with the introduction of the *Hire Purchase Act* in the UK.

The *Hire Purchase Act* cooling off protection was suggested by the Final Report of the UK Committee on Consumer Protection, which, in language of the era, acknowledged that the intention of sales staff is not always pure—and the capacity of consumers is not always high:

*"...with the realisation that the persons to be protected are usually ignorant and credulous and the opposite party lacking in scruple, it is not easy to design the form of the protective device. It must not be overlooked that the overbearing salesman may be as willing to deceive the finance house concerning the correct sequence of events and the attitude and acts of the hirer as he is to beguile the latter."*¹²

¹⁰ *Australian Competition and Consumer Commission v Unique International College* [2017] FCA 727 at 742.

¹¹ Ministers for Consumer Affairs, *Communique*, 31 August 2017. Available at: <http://consumerlaw.gov.au/communiques/meeting-9-2/>

¹² *Final Report of the Committee on Consumer Protection*, 244 *Parl Deb.*, H.L. 605 (5th ser.) (1962) at p. 172.

1.2 Rewind: Current measures and initiatives, a brief recap

Over the course of its ten-year history the Consumer Action Law Centre (Consumer Action) has seen harm resulting from unsolicited sales of energy contracts, vacuum cleaners, mattresses, encyclopaedias, solar panels, medical equipment, education software, and a number of other products.

Over time, the problematic nature of unsolicited consumer agreements has precipitated a range of regulatory, industry, and community responses.

- **Legislative protections**

The ACL currently stipulates a number of specific consumer protections applicable to unsolicited consumer agreements.

These include:

- **Clear disclosure requirements** for traders: to say who they are, what they're there for and to advise the consumer that they will leave if asked to do so.¹³
- **A requirement to leave if requested**, and not return for at least 30 days.¹⁴
- **Restrictions on allowable operating hours** to make unsolicited sales approaches, including no contacts at all on Sundays or public holidays, or before 9am or after 6pm on other days (5pm on Saturdays).¹⁵
- And perhaps most crucially, a **mandatory 10 day cooling off period**, during which the consumer may choose to terminate the agreement without penalty, no questions asked.¹⁶ Again,

¹³ **s74 Disclosing purpose and identity**

A dealer who calls on a person for the purpose of negotiating an unsolicited consumer agreement, or for an incidental or related purpose, must, as soon as practicable and in any event before starting to negotiate:

- (a) clearly advise the person that the dealer's purpose is to seek the person's agreement to a supply of the goods or services concerned; and
- (b) clearly advise the person that the dealer is obliged to leave the premises immediately on request; and
- (c) provide to the person such information relating to the dealer's identity as is prescribed by the regulations.

¹⁴ **s75 Ceasing to negotiate on request**

- (1) A dealer who calls on a person at any premises for the purpose of negotiating an unsolicited consumer agreement, or for an incidental or related purpose, must leave the premises immediately on the request of:
 - (a) the occupier of the premises, or any person acting with the actual or apparent authority of the occupier; or
 - (b) the person (the **prospective consumer**) with whom the negotiations are being conducted.

¹⁵ **s73 Permitted hours for negotiating an unsolicited consumer agreement**

- (1) A dealer must not call on a person for the purpose of negotiating an unsolicited consumer agreement, or for an incidental or related purpose:
 - (a) at any time on a Sunday or a public holiday; or
 - (b) before 9 am on any other day; or
 - (c) after 6 pm on any other day (or after 5 pm if the other day is a Saturday).

s82 Terminating an unsolicited consumer agreement during the termination period

- (3) The period during which the consumer may terminate the agreement is whichever of the following periods is the longest:
 - (a) if the agreement was not negotiated by telephone--the period of 10 business days starting at the start of the first business day after the day on which the agreement was made;
 - (b) if the agreement was negotiated by telephone--the period of 10 business days starting at the start of the first business day after the day on which the consumer was given the agreement document relating to the agreement;

disclosure plays a part here, traders are required to clearly inform consumers of the cooling off period and how to exercise their right to terminate.¹⁷

To ensure these protections are effective every consumer protection agency in Australia allocates resources towards providing information and materials for consumers, advising them of these rights in relation to unsolicited sales, and what to do if those rights are infringed.

Despite these legislative measures, regulators, particular industries, the community sector and certain contained communities have found it necessary to take additional, non-legislative steps to counter harm caused by unsolicited sales.

- **The energy sector**

In the energy sector, major participants AGL, Origin and EnergyAustralia have acknowledged the potential for harm from unsolicited sales by choosing not to engage in the practice at least in terms of door-to-door marketing.

These decisions were taken following a number of high profile actions taken by the Australian Competition and Consumer Commission (ACCC), which resulted in significant fines for energy retailers on the basis of misleading and deceptive sales conduct and breaches of the unsolicited sales provisions of the ACL. At least some of the industry recognised that it was too difficult to ensure salespeople complied with regulatory requirements and that the conduct of outsourced sales companies risked substantial reputation concerns for the businesses.

Energy Australia CEO, Catherine Tanna, has since stated:

*"EnergyAustralia stopped door knocking in 2013 because it was the right thing to do. There's no good reason for the practice and we'd like to see all retailers do the right thing and stop door-to-door sales."*¹⁸

- **Public perception, regulator response and community initiatives.**

Unsolicited sales are also known to be unpopular, and regarded by many as a nuisance.

In 2016 Consumer Action conducted an online poll of 1,045 participants, which found that 81.3 percent of Australians hold a negative view of unsolicited sales, and 77.7 percent supported banning the practice altogether. This is a strong indication of how unpopular the practice is in the community.

¹⁷ **s76 Informing person of termination period etc.**

A dealer must not make an unsolicited consumer agreement with a person unless:

- (a) before the agreement is made, the person is given information as to the following:
 - (i) the person's right to terminate the agreement during the termination period;
 - (ii) the way in which the person may exercise that right;
 - (iii) such other matters as are prescribed by the regulations; and
- (b) if the agreement is made in the presence of both the dealer and the person--the person is given the information in writing; and
- (c) if the agreement is made by telephone--the person is given the information by telephone, and is subsequently given the information in writing; and
- (d) the form in which, and the way in which, the person is given the information complies with any other requirements prescribed by the regulations.

¹⁸ Robbins, Brian. *Call to halt door knocking energy sales rebuffed*, Sydney Morning Herald, 29 August 2016. Available at: <http://www.smh.com.au/business/energy/call-to-halt-door-knocking-energy-sales-rebuffed-20160826-gr1vxk.html>

For people who do wish to head unsolicited salespeople 'off at the pass', the Do Not Knock sticker is available for display at their residence, and the Do Not Call Register can be used to avoid telemarketers.

- **The Do Not Knock sticker**

The Do Not Knock sticker is a small sticker that can be placed on a front door or a letter box, advising salespeople that they are not welcome at the residence—and if they approach, that their approach is unlawful.

Consumer Action first promoted the sticker in 2007. The initiative has been incredibly popular, and Do Not Knock stickers can be ordered by mail or collected from a network of 110 community sector organisations and MP electoral offices around the country.¹⁹ While initially opposed to the idea, consumer affairs and fair trading agencies also now distribute the stickers. This change was perhaps influenced by the 2012 Federal Court decision that a Do Not Knock sticker constituted a 'request to leave' under the ACL—and therefore any salesperson ignoring such a sticker is indeed in breach of the law.²⁰



- **Do Not Knock Informed towns**

In Far North Queensland, unsolicited sales have been so problematic that Indigenous communities at Wujal Wujal and Yarrabah have designated themselves as "Do Not Knock Informed" towns.

This initiative is a good measure of how unwanted the sales practice has become with some residents, and how much harm it has caused in remote Indigenous communities.

Under the initiative, large warning signs are erected at the community entrance to inform door-to-door traders that, amongst other things, if a home displays a Do Not Knock sticker they are not to approach that residence. This initiative is discussed in more detail later in this report (see section 5. *Consumer Harm Hotzone #2: Remote Indigenous Communities, Far North Queensland* at page 60) and mentioned here as an indication of the ongoing harm caused by unsolicited sales, and the resources deployed in attempting to mitigate this harm.

- **The Do Not Call Register**

The Australian Communications and Media Authority (ACMA) administers the "Do Not Call Register".²¹ This is an easy online service which enables consumers to opt out of receiving unsolicited calls by registering their phone number (or numbers) as 'off-limits'. The Do Not Call Register has been overwhelmingly popular, and gives a strong indication of how unpopular cold calling is with the public. At the time of writing ACMA reports that approximately 10.9 million phone numbers are on the register.²² Government support of the Do Not Call

¹⁹ See: <http://donotknock.consumeraction.org.au/take-action/get-the-sticker-2/>

²⁰ **Australian Competition and Consumer Commission v Neighbourhood Energy Pty Ltd [2012] FCA 1357 (30 November 2012)**

²¹ See: <https://www.donotcall.gov.au/>

²² See: <https://www.donotcall.gov.au/home/about-the-do-not-call-register/>

Register has strengthened over time, and since April 2015 regular listings on the register have been permanent - rather than being subject to the previous eight year expiry period.²³

Putting all these measures together, it is striking that a number of approaches have been taken to counter the systemic harm caused by unsolicited sales—over and above the already existing legislative protections.

Despite these measures, community legal centres continue to see people who have been induced into undesirable transactions through unsolicited sales approaches, often causing significant financial harm and distress.

Currently, every consumer protection agency in Australia expends notable resources informing the community of their rights concerning unsolicited sales. Avoidable disputes between consumers and traders cost both sides unnecessary time, money and energy.

These indicators suggest that current legislative protections are still insufficient, and additional intervention is warranted.

1.3 Fast Forward: The ACL Review

In its October 2016 Interim Report, CAANZ described the rationale for the unsolicited consumer agreement protections in the following terms (emphasis added):

*"The ACL includes specific protections for unsolicited sales made away from the supplier's business or trade premises. It recognises that, when a consumer is in a situation where they are not expecting to enter into an agreement to purchase a good or service, they can be more vulnerable to unfair sales practices."*²⁴

The Interim Report then went on to outline several potential reform options:

- **Option 1:** Maintain the current balance and breadth of the provisions, noting the current gap in available data about the industry and the incidence of consumer problems.
- **Option 2:** Replace the cooling-off period with an 'opt-in' mechanism. An 'opt in' mechanism would allow the consumer to confirm the sale, without further contact by the trader, within a certain time period.
- **Option 3:** Introduce additional rights and protections for consumers entering into enduring service contracts. While stakeholders did not generally put forward mechanisms to help consumers cancel enduring service contracts, the ineffectiveness of the current cooling-off right for these agreements was a common theme.
- **Option 4:** Enhance protections for high-risk transactions while reducing regulations for low-risk transactions. This option explores whether there are more effective ways to protect consumers when making decisions about significant transactions, free from the pressure of a salesperson, while addressing industry concerns about over-regulation of low-risk transactions.

For example, this option could involve adopting Option 2 or 3 in relation to 'high-risk transactions' (such as goods and services over \$500) or to enduring service contracts, while easing the restriction on payment for low-risk transactions, such as goods and services under \$500.

²³ ACMA, *Numbers on Do Not Call Register Now Permanent*, Media Release, April 26 2015. Available at: <https://www.donotcall.gov.au/media-releases/permanent-registration/>

²⁴ CAANZ, *Australian Consumer Law Review – Interim Report*, October 2016, p 133. Available at: <https://cdn.tspace.gov.au/uploads/sites/86/2016/12/ACL-Review-Interim-Report.pdf>

As already discussed, in their Final Report released on 19 April 2017, CAANZ chose Option 1, finding that (emphasis added):

"While there was a wide range of views on the effectiveness of the protections for consumers and the compliance burdens for traders, CAANZ is convinced that pressure selling and consumer detriment occurs in at least some industry sectors. Given the impacts of pressure selling on vulnerable and disadvantaged consumers, the core protections should not be diluted.

Aware of the level of consumer detriment caused by unsolicited selling in some sectors, CAANZ remains concerned that some degree of additional intervention may be required. *That said, while harm is occurring in some sectors, there is little existing information about the extent to which other sectors use unsolicited selling techniques. Accordingly, it is not clear whether other sectors experience similar problems. This makes it difficult to assess the impacts of any economy-wide reforms on legitimate, rather than problematic, traders.*

The preferred approach at this time is to maintain the current balance of protections and initiate an economy-wide study of unsolicited selling to further inform policy consideration.

*In the interim, there is a case for clarifying definitions in the provisions to ensure they operate as intended. CAANZ will also continue to liaise with relevant communications agencies to support greater transparency for unsolicited telephone sales."*²⁵

As previously noted, CAANZ have now been directed by the CAF Ministers to undertake the proposed economy-wide study in 2017-18. The remainder of this report is dedicated to presenting case studies gathered in the process of our research, and to weighing the merit of Option 2, the most significant potential reform flagged by CAANZ in their Interim Report.

1.4 What are 'cooling off' periods? Why do we use them, and do they work?

From their inception, cooling off periods have been adopted on the basis that they "protect consumers from the so-called 'hard sell'".²⁶ During the cooling off period, a consumer who has agreed to a contract has a right to cancel that contract, without incurring any penalty. In a sense, the cooling off period is a 'get out of jail free card', for having made a regrettable decision. And in theory, enabling people to rescind unwanted contracts *should* protect them from the overbearing and sometimes uncomfortable sales process. If, in hindsight, the consumer decides against the purchase then they can simply cancel it—away from the distorting influence of the salesperson.

Cooling off periods can also be justified on competitive terms. While unsolicited sales tend to 'capture' the consumer, a cooling off period provides some breathing space to do some market research, assess alternative offers, and then decide if the product they've purchased is really the one they want.

On the face of it, this logic seems reasonably sound and has been prominent in implementing cooling off periods to counter high-pressure unsolicited sales across various jurisdictions.

In the EU, Chapter III Article 9 of the *Consumer Rights Directive* (CRD) provides a 14-day cooling off period for an off-premises contract; in the UK regulation 29 of the *Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013* (CCR) also provides a 14-day cooling off period.

²⁵ CAANZ, *Australian Consumer Law Review – Final Report*, March 2017, p. 58. Available at: https://cdn.tspace.gov.au/uploads/sites/86/2017/04/ACL_Review_Final_Report.pdf

²⁶ Sovern, Jeff. *Written Notice of Cooling-Off Periods: A Forty-Year Natural Experiment in Illusory Consumer Protection and the Relative Effectiveness of Oral and Written Disclosures*, University of Pittsburgh Law Review, Spring 2014, p. 337.

In Canada, the *Direct Sellers Harmonization Agreement* echoes the Australian protection by providing for a 10-day cooling off period, while in Singapore, regulation 4(2) of the *Consumer Protection (Fair Trading) (Cancellation of Contracts) Regulations 2009* provides for a cooling off period of five days.

In 2003, when enacting their Fair Trading Act, Singaporean parliamentarians specifically described the Act as being for the purpose of safeguarding '*small consumers who lack the expertise and resources to fend for themselves against unfair practices*'.²⁷ In addition, the Act clearly drew inspiration from other jurisdictions—it was noted that it would '*boost consumer confidence among consumers, especially tourists, who come from countries where Fair Trading Acts exist such as the UK, US, Australia or New Zealand*.'²⁸

Even in the USA, surely the home of the 'hard-sell', a Federal Trade Commission rule (*Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations*, or 'the Cooling-off Rule, for short) has provided for a three-day cooling off period for door-to-door sales since 1971.

The cooling-off period was first implemented in the UK *Hire Purchase Act* in 1964. From the very beginning, it was couched as a way to protect "*usually ignorant and credulous*" consumers from the "*overbearing salesman*" who may well be "*lacking in scruple*", and may even "*deceive*" or "*beguile*" them.

With the logic of the cooling off period being so irresistible, it is not surprising that it spread so quickly and for the past half a century has been regarded as the "go to" legislative protection to shield people from the hard sell.

It should also be noted that the use of cooling off periods is not limited solely to unsolicited sales.

For example, while their 'unsolicited' nature can sometimes be disputed, timeshare arrangements in Australia are still subject to cooling off requirements. The Australian Securities Investments and Commission (ASIC) *Regulatory Guide 160* provides that a consumer is entitled to a cooling off period of seven days, or fourteen days—depending on whether the trader is an industry body member, or has been advised by ASIC that they must use the fourteen-day period.²⁹ In a similar vein, cooling off periods also apply to some financial products, including insurance products.³⁰

Even in the EU and UK where cooling off periods apply to unsolicited sales, they are caught by applying to '*off-premises contracts*', which may be unsolicited—or may not be, depending on the circumstances. The point being, the effect of making the contract *away from the trader's usual place of business* is regarded as the central fact, not so much the unsolicited nature of the interaction. This distinction is discussed later in the report (see section 6. *Consumer Harm Hotzone #3 – Letting the Vampires In: The Problem of 'Invited' In-home Sales* at pg. 64), and may well provide justification for a broader overhaul of unsolicited consumer agreement protections than proposed by the CAANZ Interim Report. This distinction also applied in Victoria through the *Fair Trading Act 1999 (VIC)*, prior to the enactment of the ACL.³¹

Either way, it is clear that cooling off periods are a well-established and widely used form of consumer protection, and that the logic used to rationalise them is uniform across jurisdictions. What is less clear is whether the cooling off protection actually works. Are cooling off periods used because they have become accepted regulatory practice, based on a rationalisation that hasn't properly been revisited since 1964? Or are they used because they're effective?

²⁷ Professor Stephen Corones et al, *Comparative Analysis of Consumer Policy Frameworks*, Queensland University of Technology, April 2016, p. 69. Available at: <https://eprints.qut.edu.au/95636/1/95636.pdf>

²⁸ Ibid.

²⁹ ASIC *Regulatory Guide 160* RG 160.2 Available at: <http://download.asic.gov.au/media/1240832/rg160-published-15-november-2013.pdf>

³⁰ Corporations Act 2001 (Cth), s 1019B. Available at: http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s1019b.html

³¹ See Fair Trading Act 1999 (VIC) Part 4. Available at: [http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/483E227C3EF9222FCA256E5B00213D8B/\\$FILE/99-016a.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/483E227C3EF9222FCA256E5B00213D8B/$FILE/99-016a.pdf)

A 2014 article by Professor Jeff Sovern in the University of Pittsburgh Law Review, *Written Notice of Cooling-off Periods: A Forty-year Natural Experiment in Illusory Consumer Protection and the Relative Effectiveness of Oral and Written Disclosures*, concludes that there are:

*"...doubts about whether cooling-off periods benefit consumers or whether they provide only illusory protection."*³²

Professor Sovern, a noted consumer law expert, draws on three different studies attempting to assess the extent to which consumers use cooling off periods, and whether cooling off periods have a significant impact on business.

Two studies were conducted in 1981, and the third was conducted by Professor Sovern himself for the purpose of the article.

The first study was a survey conducted by the Public Sector Research Group (PSRG), which surveyed over 1,400 consumers, 16.4 percent of which reported having bought something from a door-to-door salesperson in the previous year. In addition, 31.4 percent had purchased something at a 'product party' and 12.4 percent had purchased something from a workplace sales visit (to their own workplace), and thus could take advantage of the cooling off period if they so wished. The PSRG found that not a single consumer used the cooling off period, even though 8.3 percent described themselves as being "not at all" satisfied with their purchase. That being said—the outcomes of this study were clouded by the fact that only a small proportion of consumers actually received their product before the three-day cooling off period had elapsed.

The second study was commissioned by the Federal Trade Commission and conducted by private research firm Walker Research, Inc. In this study, 112 executives of door-to-door sales companies were surveyed. Tellingly, only 2 percent stated that the Cooling-Off Rule had increased cancellations, and 18 percent stated no customers at all had cancelled contracts within the three-day period. Collectively, the respondents estimated that only 0.3 percent of all their direct sales contracts were cancelled, indicating that the extent to which consumers utilised the cooling off period was very low. Of those who did report cancellations, the average cancellation rate was 6 percent.

Professor Sovern's own survey was conducted in 2010, and required three research assistants to call 1,875 businesses thought to be subject to cooling off periods. Of those, 200 agreed to answer questions—although this did not, unfortunately, include "pure door-to-door sellers", so any impact of the cooling-off period on door-to-door sales must be made by inference—at least by this survey.³³

In the survey, 35 percent reported that buyers never cancel within the three days, and another 29 percent claimed that fewer than 1 percent of consumers cancelled. Another 8 percent stated that *"at least 1 percent but not more than 2 percent"* cancelled. Only 3 percent of respondents claimed that 10 percent or more of buyers cancelled, and only 1 percent (equating to two respondents) reported a rescission rate of at least 20 percent.

As Professor Sovern states,

*"These numbers show such a low rate of rescission that they raise serious questions about the effectiveness of cooling-off periods."*³⁴

In addition to the surveys cited and conducted by Professor Sovern, advances in behavioural economics have also cast doubt on the effectiveness of the cooling off model.

³² Sovern, Jeff. *Written Notice of Cooling-Off Periods: A Forty-Year Natural Experiment in Illusory Consumer Protection and the Relative Effectiveness of Oral and Written Disclosures*, University of Pittsburgh Law Review, Spring 2014, p. 333.

³³ Sovern, Jeff. *Written Notice of Cooling-Off Periods: A Forty-Year Natural Experiment in Illusory Consumer Protection and the Relative Effectiveness of Oral and Written Disclosures*, University of Pittsburgh Law Review, Spring 2014, p. 354.

³⁴ Sovern, Jeff. *Written Notice of Cooling-Off Periods: A Forty-Year Natural Experiment in Illusory Consumer Protection and the Relative Effectiveness of Oral and Written Disclosures*, University of Pittsburgh Law Review, Spring 2014 p. 355.

Behavioural economics is broadly defined as "*a method of economic analysis that applies psychological insights into human behaviour to explain economic decision-making*".³⁵ While it did not exist as a formal field of study when cooling off periods were first legislated, the discipline is fast gaining currency in policy-making circles, including consumer protection.

For current purposes, behavioural economics is extremely useful in examining the dynamics at play during an unsolicited sales interaction. In explaining why the cooling off concept may be under-used by consumers, behavioural economic concepts such as "*the endowment effect*", "*the status quo effect*" and "*cognitive dissonance*" all shed light on how the cooling-off concept operates—or doesn't.³⁶

Recent research in behavioural economics also shows very clearly that the *context* of a sales process (both whether it is unsolicited or not, and the location where it takes place), has a significant impact on the dynamic between the trader and the consumer and ought to be considered when devising consumer protections.

Finally, behavioural economics research also shows disadvantaged consumers are particularly vulnerable to unfair unsolicited sales practices, due to the measurable cognitive impacts of poverty. This in turn has implications for the ACL, which under the Intergovernmental Agreement for the Australian Consumer Law is required to:

"...meet the needs of those consumers who are most vulnerable, or at greatest disadvantage."³⁷

In addition to Professor Sovern's article and additional research into the cognitive impact of poverty, this report draws on recent research commissioned by Consumer Action through Deakin University's Centre for Employee and Consumer Well-Being.

Rather than examining the impact of unsolicited sales, this research focused on the relative behavioural merits of a cooling off period *versus* an opt-in model for the purposes of consumer protection, and is relevant to the economic study proposed by CAANZ. This study is discussed in detail later in this report (see section 2.4 "*Don't call me, I'll call you.*" - Cooling off periods vs. Opting-in: A behavioural economics analysis at pg. 28).

1.5 What is the 'opt-in' model? And how is it meant to work?

Under the current cooling-off model, a consumer is entitled to terminate an unsolicited consumer agreement within 10 days. This is designed to enable consumers to change their mind away from the immediate influence of the salesperson.

By contrast, an opt-in model would work by requiring the consumer to proactively confirm a purchase decision after a certain period following trader contact (perhaps 48 hours), and would require the trader not to contact the consumer during that time.

While still allowing the consumer to make their decision away from the influence of the salesperson, the opt-in model differs in that the consumer does so *without having already made any form of binding commitment to purchasing the good*. From a behavioural perspective, these protections are quite distinct, which may have important implications for their relative efficacy.

A counter-argument to the opt-in model, however, is that it may be "too effective"—and may result in legitimate trade being curbed because consumers who actually do want to make a purchase simply fail to confirm, either through apathy or poor management. This view needs to be tested. Useful policy initiatives

³⁵ Oxford English Dictionary online: https://en.oxforddictionaries.com/definition/behavioural_economics.

³⁶ Sovern, Jeff. *Written Notice of Cooling-Off Periods: A Forty-Year Natural Experiment in Illusory Consumer Protection and the Relative Effectiveness of Oral and Written Disclosures*, University of Pittsburgh Law Review, Spring 2014, pp. 363 -367.

³⁷ *Intergovernmental Agreement for the Australian Consumer Law* (2 July), paragraph C. Available at: www.coag.gov.au/sites/default/files/IGA_australian_consumer_law.pdf.

are too often sunk by the often spectral fear of “unintended consequences”. It should be remembered—as noted by Professor Sovern—that early opponents of the cooling off protection predicted then that it would be disastrous for business, yet in practice it appears to have little impact.

“Early opponents of cooling-off periods were often vehement in their opposition. Indeed, some complained that cooling-off periods were “contrary to fundamental business concepts, “designed to undermine the foundation of the law of contracts”, “discriminatory in the worst way and probably unconstitutional”, “would make contracts ‘a mere illusion’”, “leave [consumers] in greater jeopardy than the 10 percent of our society that is out to take [consumers]”, would “invite bad faith contracts” and that cooling-off period rules were “class legislation”. It was said that cooling-off periods would occasion “agony” for consumers.”³⁸

Of course, these views have altered radically since the 1960s and 70s. When in 2009 the FTC called for submissions in review of the Cooling-Off Rule, only six stakeholders bothered to make one—suggesting that it has not, in fact, ushered in a commercial apocalypse. In fact, the Direct Selling Association stated that *“the Rule serves a valuable purpose for consumers”*.³⁹

As Sovern identifies:

“The only merchant objection to the Rule came from a seller of fresh fish that complained that the Rule permitted buyers to cancel sales and by the time that seller could reclaim the fish, several weeks would have passed and so buyers could keep the fish for free.”⁴⁰

For what it’s worth, fishmongers in Australia have so far been silent on this dilemma.

The point is raised to highlight the potential for objections to the opt-in concept to be over-stated, or even catastrophized. Opt-in models have been shown to serve their intended purpose well in a data collection/privacy context, and have recently been implemented in the vocational education and training (VET) sector, where rampant mis-selling (much of it unsolicited) resulted in billions of public sector dollars wasted.

In the VET sector, since January 1 2016, providers have been prohibited from accepting a request for a VET loan form unless two business days have passed from the date and time the person enrolled.⁴¹ A Commonwealth Department of Education Training Fact Sheet designed to explain this reform stated:

“This will ensure students have had time to fully understand the details of their course enrolment and consider the fee payment options available to them.”⁴²

Given the known harm that unsolicited sales cause, and given that CAANZ have acknowledged the existence of that harm, it would seem prudent to at least test the potential of an opt-in model—rather than assume its effect would be negative.

As the case studies in this report highlight, the unsolicited selling of solar panels currently constitutes a consumer harm “hot spot” (see section 4. *Consumer Harm Hotzone #1: The Solar Panel Industry* at page 58) which may provide a useful opportunity to run a discrete trial to test the real world impact of applying the opt-in model to unsolicited sales.

³⁸ Sovern, Jeff. *Written Notice of Cooling-Off Periods: A Forty-Year Natural Experiment in Illusory Consumer Protection and the Relative Effectiveness of Oral and Written Disclosures*, University of Pittsburgh Law Review, Spring 2014, p. 375.

³⁹ Sovern, Jeff. *Written Notice of Cooling-Off Periods: A Forty-Year Natural Experiment in Illusory Consumer Protection and the Relative Effectiveness of Oral and Written Disclosures*, University of Pittsburgh Law Review, Spring 2014, p. 376.

⁴⁰ Sovern, Jeff. *Written Notice of Cooling-Off Periods: A Forty-Year Natural Experiment in Illusory Consumer Protection and the Relative Effectiveness of Oral and Written Disclosures*, University of Pittsburgh Law Review, Spring 2014, p. 376

⁴¹ See *VET Student Loan Rules* s.10. Available at: <https://www.legislation.gov.au/Details/F2017C00602>

⁴² Australian Government - Department of Education and Training Factsheet, *VET-FEE HELP Reform*, Last Updated July 2016, p.2. Available at: https://docs.education.gov.au/system/files/doc/other/160901_vet_fee-help_reform_factsheet.docx_higher_ed.pdf

Sales of solar panels are particularly troubling due to the frequent provision of so called 'interest free' finance by unlicensed creditors to facilitate the sale. Although by no means limited to solar panels (medical equipment and mattresses are other products that have been found to be sold using this form of finance), the practice is commonplace in the solar panel sales sector.

This is problematic because the finance is not subject to credit licensing requirements, which would provide robust consumer protections. The finance often involves significant sums which causes serious financial detriment for consumers if the purchaser defaults because repayments are unaffordable. The availability of finance is often instrumental in facilitating these sales, and putting vulnerable people into financial hardship.

Other “consumer harm hot-spots” identified and examined by this report are:

- the impact of unsolicited sales on Indigenous communities; and
- the impact of ‘off-premises’ sales, whether unsolicited or ‘invited’—normally generated from an initially unsolicited contact.

2. The Human Factor: Behavioural economics and the inter-personal dynamics of unsolicited sales.

Behavioural economics is invaluable to the design of robust consumer protection because it explains how people *actually* behave in an economic context, as opposed to how they are *supposed* to behave.

Where traditional economics assumes that consumers will always act objectively in their own unwavering self-interest, behavioural economics reveals that decision making is seldom purely rational, and is affected by any number of behavioural and psychological factors. By studying these factors and examining the manner in which consumers actually make their decisions, policies can be devised that not only improve economic outcomes—but also prevent consumer harm.

The argument for consumer protection in unsolicited sales rests on the notion that people are uniquely vulnerable to unfair sales tactics in unsolicited sales negotiations, and are often persuaded, bullied or deceived into making decisions against their own self-interest. Indeed, the 'hard-sell' conduct that may seem standard in door-to-door sales would often be considered completely excessive in a traditional store—and may well prompt the consumer to leave. This is not only because the sales interaction occurs in a setting where the salesperson is not subject to direct managerial oversight (although that is a factor), but is also due to the psychological elements of an unexpected sales negotiation occurring away from a usual place of business.

In a typical solicited sales approach, the consumer approaches the trader after the consumer has identified their own want or need, and decided to take action to satisfy that want or need—generally with at least some awareness of the potential cost involved (and often after having done some research into potential options). This puts the consumer in a relatively strong position to choose to give their business to a trader, or decide not to. The consumer, in this type of sales process, is generally in control of the outcome. If they don't like what they see they can simply leave the store.

Unsolicited sales negotiations short-circuit this process.

Uninvited traders persuade people to buy products that they may not have previously thought they wanted or needed, or even considered. The sales process itself seeks to instil that want or need in the consumer and then immediately satisfy it.

In our casework experience, we have encountered 'hard-sell' unsolicited sales techniques which include bullying, harassment, deliberate obfuscation, and outright deceit. Often these behaviours are able to take place because the salesperson is not being observed by third parties and is very often operating on a commission basis—incentivised to make a sale at "any cost" with no sense of obligation or responsibility to the consumer. In these circumstances salespeople can use 'hard-sell' techniques to persuade sometimes unwilling consumers to buy, or even trick them into making purchases they are not aware of.

While these are obviously unfair sales tactics, more nuanced behavioural factors also apply. These do not rely on particularly poor trader conduct—but still place the consumer at a psychological disadvantage, and make them more likely to enter an undesirable transaction.

2.1 The foot in the door

"Foot in the door" technique is a well-known compliance tactic which has been extensively researched by social psychologists and takes its name from door-to-door sales—the idea being that once a salesperson has

their foot in the door, you can't close it on them.⁴³ The technique was first studied by two Stanford researchers in 1966 and written up in the *Journal of Personality and Social Psychology* under the title *Compliance Without Pressure: The Foot-in-the-Door Technique*.⁴⁴

Rather than being a literal, physical, foot in the door, the technique describes a process whereby a person is induced into complying with a significant request by first agreeing to a smaller request, or number of smaller requests. The more the subject complies with the requester the more likely they are to continue complying with the requester, despite the potentially large or demanding nature of the final request—which is the requester's intended goal from the beginning.

The technique is effective due to the behavioural concept of "successive approximations", which dictates that the subject is likely to feel obligated to continue in an attitudinal direction once it has been established. This can be explained in social terms because the initial small agreement, or series of agreements, generates a bond between the requester and the subject. This is true no matter how insignificant the initial request, which may only have been agreed to out of politeness. The subject will then justify further compliance on the basis that they do not want to seem inconsistent and may mistake this internal justification for a genuine bond between them and the requester—or convince themselves that the request is genuinely in their own interest.

Foot in the door technique can be used to first engage the consumer and then build rapport through a number of smaller requests. These can include very simple requests like, "May I have a few moments of your time?", "Can I show you something?", "Excuse me, could I ask you a question?". Innocuous in themselves, acquiescence with these smaller requests establishes an attitudinal direction in which the consumer feels compelled to continue, and which requires cognitive effort to resist.

This is particularly true if the person is otherwise stressed or vulnerable, and lacks the energy or wherewithal to resist—sometimes described as "self-regulatory resource depletion".⁴⁵

2.2 Social norms, politeness and the commercial advantage of familiarity

The act of asking a person to leave your front door, closing the door on them, or hanging up the phone requires greater psychological resources than simply walking away, as a consumer may do in a store setting. Social norms of behaviour dictate that it is acceptable to decide nothing in the store is for you and to simply leave. No-one need feel offended or affronted in that context, or awkward for having taken that action.

By contrast, an unsolicited sales approach requires the consumer to take what some might feel is a confrontational action by pro-actively severing the interaction. Further, if the salesperson is particularly persistent, strong-willed or pushy they can make this process even more difficult for the consumer by diverting the conversation, refusing to leave, or simply not taking no for an answer—as we have seen in some of our case studies.

Severing contact is particularly difficult if the consumer is conflict averse, or bound by social standards of conduct which make them feel impolite for not hearing a salesperson out. If the sales interaction is lengthy, or the person feels a strong rapport has been established, this process may reach a stage where it feels impolite to say no to the transaction—whether the product is wanted or not.

⁴³ Patel, Neil. *Foot in the Door technique: How to get people to seamlessly take action*, Forbes, 13 Oct 2014. Available at: <https://www.forbes.com/sites/neilpatel/2014/10/13/foot-in-the-door-technique-how-to-get-people-to-take-seamlessly-take-action/#7f874d8e7d9e>

⁴⁴ Freedman, J. L., & Fraser, S. C. (1966). *Compliance Without Pressure: The Foot-in-the-Door Technique*. *Journal of Personality & Social Psychology*, 4(2), 195–202.

⁴⁵ Dr Paul Harrison et al. *Shutting the Gates: An Analysis of the Psychology of In-home sales of Educational Software*, Deakin University and the Consumer Action Law Centre, March 2010, p. 24.

The home context particularly blurs the nature of a sales interaction, because home is where we usually engage in interactions with people we know personally. Sales representatives leverage this to create what feels like a personal relationship with the individual, and can win their trust more fully than they might in a store setting. Simply put, in a store setting, the customer always knows that they're being sold to and can manage the interaction accordingly. In the home setting, the line between a commercial and a personal interaction is blurred—which makes it harder to say no. Research shows that people prefer to say yes to people they like, perceive as similar to them, or regard as being in authority.⁴⁶

The current ACL protections acknowledge the contextual element of door-to-door sales by requiring salespeople to advise consumers that they may ask them to leave, and then promptly leaving if asked to. This is intended to 're-set' the power balance between the parties and overcome the potential awkwardness of feeling impolite. While useful and well-intentioned, it is difficult to measure compliance with this protection—and even if compliance is high, the measure does not fully overcome the blurring of the line between a sales interaction and a personal one. The home context of the interaction means that the consumer can never really be on the same psychological footing as if they had walked into the trader's place of business, knowing they can leave at any point without feeling awkward or causing offence.

This effect was acknowledged by CAANZ when they stated in their Interim Report:

***"...when a consumer is in a situation where they are not expecting to enter into an agreement to purchase a good or service, they can be more vulnerable to unfair sales practices."*⁴⁷**

When considering these factors, it's important to note that what may merely seem like "strong" sales tactics to one person, can feel more like bullying or harassment to another. This means that some people are more susceptible to hard-sell tactics than others.

2.3 The cognitive impact of poverty

Some people are less likely to assert themselves and more likely to agree to an undesirable transaction than others. It is not unrealistic to assume that over time, salespeople identify consumer groups which yield particularly good results—and then target those groups to maximise profits.

Counterintuitively, this may involve targeting people on lower incomes, who behavioural economists have identified as having depleted cognitive resources and therefore less capacity to resist the hard-sell—precisely *because* they are poor. This is not a judgement of those who are experiencing poverty, rather a description of the cognitive impact that poverty has on *anyone*—whatever their background or previous circumstances.

Research into the impact of poverty on cognitive capacity is widely known and should inform the reform debate around unsolicited sales. For example, high profile multi-institutional research⁴⁸, published in *Science* on August 30, 2013 hypothesised that:

*"The poor must manage sporadic income, juggle expenses, and make difficult trade-offs. Even when not actually making a financial decision, these preoccupations can be present and distracting. The human cognitive system has limited capacity. Preoccupations with pressing budgetary concerns leave fewer cognitive resources available to guide choice and action."*⁴⁹

⁴⁶ Dr Paul Harrison et al. *Shutting the Gates: An Analysis of the Psychology of In-home sales of Educational Software*, Deakin University and the Consumer Action Law Centre, March 2010, p. 23.

⁴⁷ CAANZ, *Australian Consumer Law Review – Interim Report*, October 2016, p 133. Available at: <https://cdn.tspace.gov.au/uploads/sites/86/2016/12/ACL-Review-Interim-Report.pdf>

⁴⁸ Authors of the study were from the University of Warwick, Harvard University, Princeton University and the University of British Columbia respectively.

⁴⁹ Mani, Anandi; Mullainathan, Sendhil; Shafir, Eldar; and Zhao, Jiaying, *Poverty Impedes Cognitive Function*, *Science*, Vol 341, 30 August 2013, p. 976.

Through their laboratory studies, the researchers determined that this hypothesis was correct:

"The data reported here suggest a different perspective on poverty: Being poor means coping not just with a shortfall of money, but also with a concurrent shortfall of cognitive resources. The poor, in this view, are less capable not because of inherent traits, but because the very context of poverty imposes load and impedes cognitive capacity. The findings, in other words, are not about poor people, but people who find themselves poor.

How large are these effects? Sleep researchers have examined the cognitive impact (on Raven's) of losing a full night of sleep through experimental manipulations. In standard deviation terms, the laboratory study findings are of the same size, and the field findings are three quarters that size. Put simply, evoking financial concerns has a cognitive impact comparable with losing a full night of sleep. In addition, similar effect sizes have been observed in the performance on Raven's matrices of chronic alcoholics versus normal adults and of 60-versus 45-year-olds. By way of calibration, according to a common approximation used by intelligence researchers, with a mean of 100 and a standard deviation of 15 the effects we observed correspond to ~13 IQ points. These sizable magnitudes suggest the cognitive impact of poverty could have large real consequences.*

This perspective has important policy implications."⁵⁰

Given the high cognitive resources required to resist unsolicited sales approaches, it is not surprising that people on low incomes are particularly susceptible—while at the same time being least able to afford undesirable transactions.

Further, it is not surprising that the current protections in the ACL—even when complied with—are not sufficient to protect people experiencing vulnerability from harm arising out of unsolicited sales.

In order to provide effective consumer protection, the ACL should, as far as possible, place the individual consumer in the psychological position of having made the initial approach or inquiry (i.e. a typical solicited sale). If this could be achieved, it would empower consumers to metaphorically 'walk away from the store' without any sense of awkwardness or any great cognitive effort—just as occurs in a real store.

In fact, the current cooling-off protection is designed to achieve exactly that effect.

Theoretically, the cooling-off protection *should* empower consumers to terminate an undesirable agreement once they are no longer under the direct influence of the salesperson—and do so without great difficulty. Under the law, unsolicited sales representatives are required to inform consumers of their right to terminate, and the process for doing so. This *should* place the consumer in a strong position to rethink and cancel an undesirable transaction before they experience detriment. If consumers conformed to the construct of the "rational economic man", then the cooling-off period would probably be effective.

As it happens, consumers do not behave like the "rational economic man", the cooling-off period does not work, and behavioural economics can again explain why. Further, behavioural economics can also theorise why the proposed opt-in model would be significantly more effective: in behavioural terms, the opt-in model would psychologically place the consumer in the position of having made the initial approach. This makes it easier to metaphorically "walk away from the store".

* NB: 'Raven's' is a reference to Raven's Progressive Matrices, also known as Raven's test. Raven's test is a common component in IQ tests and is used to measure "fluid intelligence", the capacity to think logically and solve problems in novel situations, independent of acquired knowledge.

⁵⁰ Mani, Anandi; Mullainathan, Sendhil; Shafir, Eldar; and Zhao, Jiaying, *Poverty Impedes Cognitive Function*, Science, Vol 341, 30 August 2013, p. 980.

2.4 “Don’t call me, I’ll call you.”– Cooling off periods vs. Opting-in: A behavioural economics analysis.

In 2016 Consumer Action commissioned research by Dr Paul Harrison, (assisted by Dr Josh Newton) to examine the relative effectiveness of cooling off and opt-in models from a behavioural economics perspective. Dr Harrison is a professor of marketing and co-Director of the Centre for Consumer and Employee Wellbeing at Deakin University in Melbourne, and has since released the headline results of his research. Full results will be published in a report at a later date.

For the purposes of the research, Dr Harrison devised an experiment which was undertaken by 759 participants who were asked to select from one of two reward options.

The options were to:

- Receive \$2 immediately; or
- Receive \$1 immediately plus a chance to win \$25.

The 240 participants who chose the latter option were then randomly allocated to one of four study conditions, of 60 participants each.

The groups were:

- Control
- Cooling off
- Double opt-in, with the provider contacting the consumer.
- Double opt-in, with the consumer contacting the provider.

In the control group, participants automatically received their chosen reward (\$1 plus a chance to win \$25).

In the cooling off group, participants were given a 48-hour window to revert to the alternative reward choice (\$2) if they chose to do so.

In the double opt-in, “provider contacts group” participants were contacted within 48 hours via email and asked to confirm their choice. If they did so, they received their initial chosen reward. If they didn’t confirm or respond then they received the alternative reward (\$2).

The final group required participants to proactively opt-in within 48 hours to confirm their choice by email. Those who did not respond or confirm then received the \$2 reward.

The findings were statistically significant and showed that:

- 100 percent of participants who were offered a ‘cool-off’ option (i.e. they were required to make active contact to change their mind) **did not change** their initial decision. Not one participant chose to take the \$2 reward.
- 100 percent of participants who were offered the ‘opt-in’ option (i.e. they were required to make active contact to confirm their decision) **also did not change their initial decision**, even though doing so would have provided them with the same choice as the ‘cooling off’ group;
- 70 percent of participants who were contacted and asked to ‘opt in’ to receive the same choice as the cooling-off group (\$2), did not change from their initial choice.

Dr Harrison concluded that the findings are explained by the behavioural concept of consumer “inertia”. This concept dictates that those who make a decision are **very unlikely** to use their cooling off rights to change their mind. Similarly, people are **highly unlikely** to confirm an initial decision if they are required to opt-in to it at a later time. Even if they are prompted to opt-in by the provider, the research shows that most people (in the study, 70 percent) stick with an initial decision—although this was the only category in which active confirmation behaviour was observed (at a rate of 30 percent).

The study overwhelmingly found that passivity is the dominant behavioural trait when faced with either a cooling off or opt-in option—and indicates that people, perhaps ‘irrationally’, become attached to an initial decision.

When discussing his research in online publication *The Conversation*, Dr Harrison explained that consumers are behaviourally pre-disposed **not to use** cooling off periods. This can be explained by the fact that people become attached to their initial decision, and there is cognitive effort in changing your mind:

“The problem with the current cooling-off periods is that they operate after a customer has taken ownership of something or signed an agreement. Our research finds cooling-off periods simply don’t overcome many of the inherent biases of human behaviour.

Dr Josh Newton and I, from Deakin University’s Centre for Employee and Consumer Wellbeing, tested how 759 consumers responded when presented with cooling-off and opt-in alternatives as part of an online survey.

A number of behavioural theories, such as the endowment effect, the status quo bias and consistency theory, show that once a person “owns” something, they value it more and are less likely to give it up – at least in the short term. This is particularly the case if they have put mental, physical or social effort into their decision.”⁵¹

These concepts were also identified by Professor Sovern in his article, although he described “consistency theory” with an alternative term—“cognitive dissonance”.⁵²

To elaborate further, these concepts are defined below:

- **Endowment effect:** The endowment effect describes a circumstance in which an individual values something which they already own more than something which they do not yet own. Sometimes referred to as divestiture aversion, the perceived greater value occurs merely because the individual possesses the object in question. Investors, therefore, tend to stick with certain assets because of familiarity and comfort, even if they are inappropriate or become unprofitable. The endowment effect is an example of an emotional bias.⁵³
- **Status quo bias:** Is the human tendency to like things to stay relatively the same. The current situation is taken as the reference point, and any change from that baseline is perceived as a loss. Assumptions of longevity (long lasting), goodness and inertia (resistance to change) are said to be contributing factors to status quo bias.

Status quo bias is not the same as a rational preference for the state of affairs, such as is the case when the current situation is objectively better than the available alternatives. Status quo bias also differs from a situation with insufficient or incorrect information. This type of cognitive bias in judgment and decision making is similar to anchoring bias and confirmation bias.⁵⁴

- **Consistency theory:** Is a psychological theory that proposes that humans are motivated by inconsistencies and a desire to change them. Cognitive inconsistencies cause imbalance in individuals and the tension from this imbalance motivates people to alter these inconsistencies. The tension arises when thoughts conflict with each other and this tension creates a motivation to change and correct the inconsistency. When this tension is reduced balance is achieved in the individual.

⁵¹ Harrison, Paul. *Cooling off periods for customers don’t work: study*, *The Conversation*, November 28 2016. Available at: <https://theconversation.com/cooling-off-periods-for-consumers-dont-work-study-69473>

⁵² Sovern, Jeff. *Written Notice of Cooling-Off Periods: A Forty-Year Natural Experiment in Illusory Consumer Protection and the Relative Effectiveness of Oral and Written Disclosures*, *University of Pittsburgh Law Review*, Spring 2014, p. 363 -367.

⁵³ Definition taken from: <http://www.investopedia.com/terms/e/endowment-effect.asp>

⁵⁴ Definition taken from: http://www.mbabrief.com/what_is_status_quo_bias.asp

The three main components of this theory state that people anticipate consistency, inconsistencies create imbalance and dissonance in individuals, and that tension motivates the individuals to create consistency in order to achieve balance.⁵⁵

Taken together, it is not difficult to see that once someone has been induced to make a purchase from an unsolicited sales approach then the odds of them utilising the cooling off period to cancel the agreement (assuming they're even advised of that right in the first place) are extremely low.

To do so requires the individual to overcome a sense of loss (the endowment effect), as well as a natural tendency to stick with the status quo, and be inconsistent in their decision making (consistency theory). Changing your mind in this context literally creates discomfort—it is far easier to stick with your initial decision even if you're not entirely comfortable with it, or it seems slightly irrational. If your self-regulatory resources are depleted through the cognitive impact of poverty, then utilising the cooling off period is likely to be even more difficult. Not only are you more likely to be sold an undesirable purchase—you're also less likely to take advantage of the cooling off period to cancel it. The fact that your life may also be quite chaotic creates another barrier—you are less likely to use the cooling off period purely due to the administrative burden involved, however light that may seem to an outsider.

By contrast, the opt-in model works by not requiring the individual to commit to a decision at the time of the sales interaction, avoiding the sense of the good being “owned” (and therefore the endowment effect). The impact of consistency theory is also nullified. As a decision has not yet been made, there is no pattern of decision making for the individual to remain consistent with—the ball is still in their court, so to speak. In terms of status quo bias, they are left in the position they would be in if they walked into a store. They may choose to disrupt the status quo if their want or need for the good on offer is strong enough—and if it isn't, then they can walk away without loss of face. And in terms of administrative burden, while the effort required is not great—it is enough so that only those who genuinely want the good are likely to confirm the sale.

When considered from a behavioural economics perspective, it seems clear that an opt-in model *should* be a significantly more effective consumer protection than the current cooling-off provision. It would be surprising if the opt-in model did not act to reduce consumer harm, saving time, money and energy for consumers, traders, community legal centres and administrative tribunals alike.

In short, the opt-in model should act to ensure that less goods and services are mis-sold through the unsolicited sales process - and more of those purchased by the consumer are genuinely wanted, and represent a legitimately worthwhile and affordable purchase.

That being said, it is possible that an opt-in model may have an impact on commerce, and the degree to which the model may impact legitimate trade needs to be carefully considered.

2.5 The opt-in model: How would it affect legitimate traders?

CAANZ have signalled that:

*The preferred approach at this time is to maintain the current balance of protections and initiate an economy-wide study of unsolicited selling to further inform policy consideration.*⁵⁶

⁵⁵ Definition taken from: <https://www.alleydog.com/glossary/definition.php?term=Cognitive%20Consistency>

⁵⁶ CAANZ, *Australian Consumer Law Review – Final Report*, March 2017, p. 58. Available at: https://cdn.tspace.gov.au/uploads/sites/86/2017/04/ACL_Review_Final_Report.pdf

In undertaking the proposed study, CAANZ will need to consider the impact an opt-in model may have on legitimate traders.

In his research, Dr Harrison identified that participants were highly unlikely to confirm a sale through the opt-in process, and that inertia was the dominant behavioural trait—affecting both the cooling-off model and the opt-in model. This does raise the concern that imposing an opt-in requirement on unsolicited sales may in fact inhibit legitimate commerce, and otherwise appropriate and mutually beneficial transactions may be lost due to consumer inertia.

In response to this concern, it is worth noting that the experiment conducted by Dr Harrison involved very limited sums (\$1 or \$2 respectively—with the chance to win a maximum \$25), and although it effectively measured behaviour in that context, the increased reward of a good or service that the consumer genuinely wants may well act to improve the take up under the opt-in model. On that basis, there are grounds for a ‘real world’ trial of the concept. The Harrison study should not be taken as a definitive statement of how consumers will behave, but as an indication that requires testing.

Harrison’s findings do give sufficient cause for concern that the trial should be narrow and contained. A trial of the opt-in model for the unsolicited sale of solar panels may be a useful place to start, as this is an area where consumer detriment is currently high—and where the unsolicited sales model is being used extensively by a sector whose participants can be easily identified and corralled for the purposes of a trial.

As stated earlier in this report, it is important not to dismiss the opt-in model on the grounds of potential unintended consequences. Apart from anything else, such objections were vociferously raised in the US in objection to the cooling-off model back in the 60s and 70s, and proved to be illusory.

Further, the recent local example of applying an opt-in model to the sale of vocational education courses has shown that opt-in models do not necessarily stem all trade—but do act as an effective filter to ensure that consumers are making their purchases willingly, with full knowledge of the consequences, and are not being pressed into a decision through high-pressure sales tactics.

Intuitively, if a consumer genuinely wishes to buy something, then surely they can be trusted to do so away from the direct influence of the salesperson, and *should* make the minimal effort necessary to confirm a sale. If they do not do so, perhaps they don’t really want the good. If the transaction would only be entered into under the direct influence of a sales approach, who is to say whether it is genuinely wanted, or whether the consumer has simply ‘fallen’ for a sales pitch?

There would still be considerable value for traders in making unsolicited approaches to market their wares, particularly in an increasingly ‘noisy’ marketing environment, where all of us are constantly subject to advertising through multiple platforms. As a marketing exercise, unsolicited approaches still have the benefit of raising consumer awareness of the good, engaging them in the market and providing access for purchase—if they wish to do so.

In theory, the opt-in model *should* allow legitimate commerce to thrive—while nullifying the consumer harm caused by high-pressure sales tactics.

A major benefit of the approach would be to remove the influence of sales staff on a final purchase decision. Even if the sales conduct is poor and consumers are not properly advised of their rights under the law (as often occurs), the opt-in model would continue to act as an effective protection—whether the salesperson complies with the law or not. As pessimistic as it may sound, this may well be a more effective and realistic policy intervention than attempting to improve the conduct of sales staff.

To explore this further, it is necessary to examine current employment practices in unsolicited selling.

2.6 Common training and remuneration practices in the door-to-door sales industry

In 2012 the Australian Competition and Consumer Commission (ACCC) commissioned a comprehensive research report titled *Research into the Door-to-door Sales Industry in Australia*, compiled by consultancy firm Frost and Sullivan.

The Frost and Sullivan report drew on primary and secondary sources, and included a significant amount of qualitative research which highlighted common industry practices. The research included interviews with 15 individuals who had recently worked in door-to-door sales. The report found that in most cases companies engage a service provider to undertake door-to-door sales on their behalf, which can make it difficult to “achieve consistency in the customer experience of door-to-door sales”.⁵⁷

Put more plainly—the report found that the conduct of door-to-door sales people can vary radically, and is often out of the control of the traders whose goods the salespeople are peddling.

“This is due to recruitment and remuneration issues in the sales industry, including the temporary nature of many sales people and the remuneration structure which may drive a strong focus on making sales, and the fact that traders appear to prefer to outsource the door-to-door selling functions.”⁵⁸

Implementing an opt-in model is unlikely to change the out-sourced or temporary nature of employment in unsolicited sales. Unsolicited selling is notoriously difficult, gruelling work and is noted for being a ‘burn and churn’ industry. Constant rejection, repetitive work, exposure to the elements, uncertain remuneration and high physical demands mean that employees seldom stay in unsolicited sales for long.

However, without being able to ‘close’ a sale at the time of the sales interaction, sales staff would become more of an advertiser than a fully-fledged salesperson. The effort required to coerce a consumer into buying a good would become pointless—and potentially counteractive—if there is no capacity to finalise the deal on the spot. Even if the salesperson did engage in high-pressure tactics, they would not be able to ‘seal the deal’ at the time of the interaction.

So while an opt-in model may not necessarily stabilise the workforce and improve “consistency in the consumer experience”, it may at least mitigate the potential for harm caused by the “strong focus on making sales.”

Certainly, as things currently stand the culture of door-to-door selling is defined by a strong focus on making sales, leading to a particular employee ‘type’ that thrives in the industry:

“In all but the most unorganised/informal set ups there is some tracking mechanism whereby performance is monitored. This is usually through the achievement of sales targets. Management encourages those with strong results and there may be ceremonial events to celebrate high achievers internally. Such encouragement may include formal announcement of performance, ringing of bells in the office, special bonuses, name printed on a high achiever board etc. At the other end of the scale, not meeting sales targets is reflected in pay received (and in some cases, this could be no pay at all), pressure from management to perform or at worst ostracising from the group or termination.

“In the office we had a big bell and a gong and basically if you got a PB (personal best) or made more than 3 sales you got to ring the bell so everyone would know you did well. If you made more than 5 sales you got to smash the gong and put your name on the back of the gong. It was a confidence boost and makes you feel better about yourself.” (Respondent 1)

⁵⁷ Frost & Sullivan, *Research into the Door-to-door Sales Industry in Australia*, August 2012, p. 11. Available at: <https://www.accc.gov.au/system/files/Research%20into%20the%20door%20to%20door%20sales%20industry%20in%20Australia%20August%202012.pdf>

⁵⁸ Ibid.

Respondents allude to a particular style or personality type that succeeds in the door-to-door sales industry. Typically those who had ascended to management roles are:

- Charismatic
- Persuasive
- Competitive and high achievers
- Goal driven and highly motivated
- Tough and resilient
- Well presented
- Articulate
- Decisive and uncompromising (at worst, lacking compassion and ruthless); and
- Young and male.”⁵⁹

Given these characteristics, it is unsurprising that vulnerable consumers are often persuaded into purchases they do not really want.

Further, the remuneration structure of door-to-door selling is almost a perfect recipe for consumer harm:

“The two most common models for remuneration are:

- 100 percent commission only (no base): where income is only achieved if sales are made, irrespective of hours worked or training undertaken; and
- A relatively low base wage with additional commissions: i.e. workers will receive some income if no sales are made, but this income may be minimal.

Roles at companies offering 100 percent commission (which include many of the major service providers, although some may pay workers for initial training) may have uncapped earning potential, so may result in the worker earning \$5,000 per week or more, if they are highly successful at making sales (and have a large team of motivated sellers below them too). This remuneration package is ideally suited to those who are highly driven at selling door-to-door and often have the personality characteristics described above in the previous section on management.”

Service providers train their sales staff in behavioural techniques designed to elicit compliance—and it seems that there is at least some targeting of lucrative and often vulnerable consumers:

“We had tip sheets and on there you would have nearly every type of stereotypical person and tips on how to talk to them...You would use certain dialogue for elderly people through to what to do with people who wouldn’t even open the door and shouted through the window, telling you to leave” (Respondent 2)

Looking and acting professional, using appropriate tone and employing body language techniques such as mirroring, repeating key words, copying language used by the customer etc are all important. One technique used by a few respondents interviewed in different states is G.I.F.T.S. This acronym stands for:

- **G = Greed** – appeal to the customer’s sense of greed. Continually mention the benefit to them (usually a discount percentage or a dollar value of the potential saving to them if they take up the offer). Some believe this worked particularly well with those from less affluent areas or ironically, wealthier households;
- **I = Indifference** – couch the conversation so that it sounds like there is no end benefit to the door-to-door salesperson, irrespective of whether the customer buys or does not buy the service or product. This laid back approach has been mentioned as working quite well at weekends (when householders are generally more relaxed). It usually includes such comments as, “it makes no difference to me if you take up the offer, but...”;

⁵⁹ Frost & Sullivan, *Research into the Door-to-door Sales Industry in Australia*, August 2012, pp. 56-57. Available at: <https://www.accc.gov.au/system/files/Research%20into%20the%20door%20to%20door%20sales%20industry%20in%20Australia%20August%202012.pdf>

- **F = Fear of loss** – indicate (whether factual or otherwise) that the customer was missed on the last run of the neighbourhood and the salesperson has now come back as a final check. Alternatively, it may be implied that the salesperson is only working in this area today, thus the householder may act impulsively, fearing potentially missing out;
- **T = The Jones theory** – Mention (whether fabrication or truthful) that all of their neighbours have already signed up to the deal or discount, implying everyone is gaining a great deal, thereby creating a sense of pressure for some to follow the herd; and
- **S = Sense of urgency** – Imply (whether fabrication or truthful) that the promotion is strictly limited, or even a one day offer and that they must act immediately to gain the benefit or else they will miss out. This technique may also be accompanied by the salesperson acting like they are in a hurry to leave.⁶⁰

What is striking about the G.I.F.T.S approach is the degree to which misleading statements can be built into the sales pitch. Telling consumers that “everyone else is doing it”, that the deal is “for a limited time” and that this is their “last chance” are all seen as acceptable statements—whether they’re true or not.

Given the apparent ubiquity of this approach, can these techniques be considered legitimate commerce; or are they misleading and deceptive?

Perhaps more material to the issue at hand—is it possible to prevent this kind of conduct occurring in a sales interaction? Or is it more pragmatic to create a gap in time during which the consumer can consider their purchase without acting on a false sense of urgency? Taking it even further—if a gap in time were put in place, would salespeople be tempted to create that false sense of urgency in the first place?

Certainly, some of the comments by former sales staff raise serious concerns about trader conduct, and provide impetus for at least trialling a consumer protection designed to remove sales conduct from the consumer’s final decision-making process.

“We had a target range. Older people, single parents and the young ones who were just in their first house – don’t ask me how they got the list because I have no idea – but I went to a lot of Centrelink people and young people who were all attracted to the bright lights of the offers and we had to feed them all a whole bunch of garbage but I didn’t find out it was a bunch of garbage until later...we preyed on the vulnerable...we were given a list of streets for the vulnerable such as housing commissions, older people...they (employer) weren’t gonna write any of this down though because they aren’t stupid” (Respondent 8) ⁶¹

“The best clients are the ones with a lack of power like the older person. They don’t know what you are on about or what you represent...For some clients, you are never going to change them unless you trick them...And it depends on the (employee) too. Once they walk out that door they are on their own and you could make all the rules in the world and they can be ignored by the salesperson (to do what they like without fear of retribution)” (Respondent 14) ⁶²

“I was just lying to people...on good days you just got another sucker...and they (employer) didn’t care because they just want the sale and they are a big company!” (Respondent 8) ⁶³

⁶⁰ Frost & Sullivan, *Research into the Door-to-door Sales Industry in Australia*, August 2012, pp. 60-61. Available at: <https://www.accc.gov.au/system/files/Research%20into%20the%20door%20to%20door%20sales%20industry%20in%20Australia%20August%202012.pdf>

⁶¹ Frost & Sullivan, *Research into the Door-to-door Sales Industry in Australia*, August 2012, pp. 61. Available at: <https://www.accc.gov.au/system/files/Research%20into%20the%20door%20to%20door%20sales%20industry%20in%20Australia%20August%202012.pdf>

⁶² Frost & Sullivan, *Research into the Door-to-door Sales Industry in Australia*, August 2012, pp. 61-62. Available at: <https://www.accc.gov.au/system/files/Research%20into%20the%20door%20to%20door%20sales%20industry%20in%20Australia%20August%202012.pdf>

⁶³ Frost & Sullivan, *Research into the Door-to-door Sales Industry in Australia*, August 2012, p. 63. Available at: <https://www.accc.gov.au/system/files/Research%20into%20the%20door%20to%20door%20sales%20industry%20in%20Australia%20August%202012.pdf>

"You just use the word 'government' as many times as you can...so then it feels like you are working for the government (implying trust). You would use similar language or techniques of the intelligence industry or you could just tell them lies like I am not going to gain any advantage by selling this as I am not on commission – it is all very psychological what you are doing and there are neuroscience techniques...You may keep using the word 'agree' (suggestively, over and over). It is really just bullying." (Respondent 14) ⁶⁴

At this point it would be remiss not to make mention of Sales Assured,⁶⁵ an industry driven initiative designed "to ensure the best practice in face to face marketing for customers". Sales Assured describes itself in the following terms:

With a commitment to improving the customer experience, Sales Assured has established guidelines to increase service standards. These include standards in recruitment, training, accreditation and ongoing monitoring of sales agents. In this way, customers can be confident when buying face to face at their door, at a kiosk or for their business.

Those companies which choose to be Members are demonstrating their commitment to improving the standards of face to face marketing across many industry sectors.

The robust standards can apply for energy, telcos, Pay TV, energy efficiency, registered training organisations, charities and more.

Whilst recognising that there are laws, such as the Australian Consumer Law, that govern face to face sales, Sales Assured aims to lift the bar further and ensure the strictest compliance and most ethical practices by sales agents when dealing with customers face to face.⁶⁶

Sales Assured is a member based organisation, with members across the direct selling and energy industries. It imposes a high standard of conduct on sales agents, and has the power to take disciplinary action where those standards are breached (emphasis added):

It is a self-regulated scheme to monitor and improve face to face marketing standards. It seeks to improve compliance to promote consumer confidence and reduce complaints.

It includes:

- *A national scheme to ensure sales agents are recruited, trained and assessed in a consistent manner*
- *A central register of sales agents that includes the accreditation history for more than 22,000 sales agents*
- *Monitoring sales agent behaviour such that **a breach of the standards may result in disciplinary measures and deregistration of the sales agent for five years.**⁶⁷*

While Sales Assured is a positive initiative, it's true to say the organisation focuses on individual breaches and ensuring that 'bad apples' are forced out of the industry—rather than tackling systemic issues around high-pressure selling, and the consumer harm it causes. To date these efforts have not been sufficient to shift the prevailing culture of unsolicited selling.

Common attitudes of unsolicited sales staff (and some of the behaviours described above) can be clearly seen in the case studies compiled in section 3.

⁶⁴ Ibid.

⁶⁵ For more information see: <http://www.salesassured.com.au/>

⁶⁶ <http://www.salesassured.com.au/>

⁶⁷ <http://www.salesassured.com.au/>

3. CASE STUDIES

What follows is a series of de-identified case studies gathered by Consumer Action, WEstjustice and Loddon Campaspe for this project.

While the people in these case studies have generally had positive outcomes, this is only because they have had assistance from a community legal centre. These case studies represent a very small, indicative sample of the harm that is caused by unsolicited sales. It is fair to assume that a high degree of consumer harm occurring in the community does not receive the benefit of community legal centre assistance. In fact, the most vulnerable consumers are often the least likely to seek assistance in the first place - so they will often fly under the radar.

Although community legal services cannot provide statistical data covering the entire market, we have collated the data represented by these case studies and can make the following observations.

1. **The solar panel industry is prominent in the sample.** In 10 of the 19 case studies (i.e. 52.6 percent), the good being sold was solar panels. This was not isolated to any one of the three community legal centres participating in the report. Solar panel case studies were provided by all three centres.
2. **Elderly consumers are prominent in the sample.** Nine of the case studies (i.e. 47 percent) involve elderly consumers. This may be partly due to the fact that elderly consumers are more likely to be at home when door knockers call, but may also be indicative of vulnerability and the capacity to be bullied by high pressure sales tactics. Whatever the case, it is clear that elderly consumers disproportionately fall foul of poor unsolicited sales practices – and are possibly targeted by traders as ‘soft touches’.
3. **CALD consumers are prominent in the sample.** Of the 19 case studies, six involve CALD consumers (i.e. 31.5 percent). Limited English skills are a common theme in these case studies, with consumers often being signed up for purchases that they do not fully understand, and clearly being taken advantage of by unscrupulous sales staff. Again, these consumers may be specifically targeted by salespeople who are prepared to bully and mislead.

While not represented in this sample, the impact of unsolicited sales on remote Indigenous communities is also well documented, as discussed in section 5. *Consumer Harm Hotzone #2: Remote Indigenous Communities, Far North Queensland*, at page 60 of this report.

Taken together it is clear that vulnerable consumers including the elderly, CALD and those in remote Indigenous communities are particularly at risk of consumer harm caused by unscrupulous practices in unsolicited selling.

It is not difficult to imagine that an opt-in model may well provide a far more effective protection for those consumers than the current cooling-off model. The same behavioural factors that make vulnerable consumers susceptible to being signed up to inappropriate deals (and unlikely to utilise the cooling-off protection) should also mean they are unlikely to proactively opt-in, unless they genuinely wish to make a purchase. In that way the opt-in model could act as a regulatory filter to prevent the worst kinds of abuses in unsolicited sales—while not inhibiting legitimate commerce.

This would seem sufficient justification to at least trial the concept.

CASE STUDY #1 – “John”

When salespeople won't take 'no' for an answer

Product: Solar panels

Location: Rural Victoria

Sales Process: Door knocking

Customer: Elderly pensioner

Note: This case study has also been recorded as a video case study

John is a 72 year-old aged pensioner who lives alone in an old weatherboard miner's cottage in a small rural town about four hours north-east of Melbourne. He has no income, and no savings. John often sits out on the front verandah of his small cottage, and refers to it as his “lounge-room”.

One day, a salesperson for a Solar Panel Company came up John's front drive and started talking to him about solar panels. John said that he was not interested but the salesperson was insistent, and let himself into John's home.

John followed the sales representative into the house. They then sat at John's kitchen table for at least an hour as the salesperson talked John through various features of the panels, and how they could reduce his energy costs. The salesperson was insistent that John could make big savings.

John continued to advise that he did not want solar panels, but became increasingly intimidated by the salesperson. John describes himself as “shaking and shivering” and did not know how to handle the situation. John asked the salesperson to leave – but the salesperson would not. He continued to refuse to take no for an answer, and continued to talk John through the paperwork relating to the sales.

John did not understand the technical details of what was being offered to him. The salesperson continued with his pitch, and offered John a finance contract to pay for the solar panels.

John said he could only afford \$25 per week.

The salesperson arranged the paperwork and then rang the Finance Company on John's behalf. John never spoke to the Finance Company himself.

John eventually signed up for a 3KwH solar panel system, including 12 panels, at a cost of \$8,695.00. John said that he signed up to get rid of the salesperson and that he felt stupid, but it sounded like a good deal.

Shortly afterwards, John received a letter saying that he must make 87 fortnightly payments of \$103.87 per fortnight (with the first monthly payment adding a \$3.50 account fee) to the Finance Company. John found the repayments to the Finance Company difficult to repay, as he could not afford it. He would often have no money left for food at the end of the fortnight. John didn't try to cancel the arrangement because he did not know there was a cooling off period.

After a period of time, John's sister - who lives next door to him - contacted a community legal centre on John's behalf. The community legal centre found that the Solar Panel Company contract did not comply with any of the notice requirements for unsolicited consumer agreements required by the Australian Consumer Law.

Despite the salesperson's claims, John was not saving much on his energy usage at all, and certainly not the amount that the salesperson said he would.

Outcome

After brief negotiations, the legal centre was able to retain a full refund for John of approximately \$3,000—the amount he had paid by that stage. He also retained the panels.

CASE STUDY #2 - “Casey”

Caught unawares, with persistent follow-up

Product: Vocational training course

Location(s): Supermarket carpark and client’s home, suburban Melbourne

Sales Process: Door knocking

Customer: Single mother, carer, CALD

Casey is a single mother with four dependent children, is a Karen refugee, speaks very limited English and is illiterate.

Casey was approached by a man in a supermarket carpark. The man told her that she was entitled to a free laptop from the government to assist with her English studies. He asked for her address and told her that she would receive a free laptop in the mail.

A few days later, Casey was door-knocked by the same man.

The man told her that in order to get the free laptop she would have to provide a tax file number and a copy of her passport. The man told Casey that she would not have any problems accepting the laptop. He asked her to sign multiple documents which Casey did not understand. He also told her to make a phone call to a number, during which he coached her to say yes and no to particular questions.

The man was quite intimidating and Casey felt scared to ask the man to leave her home or to tell him that she did not want to sign the documents.

A month later, the same man came to Casey’s home.

Casey hid in her room and her nephew answered and told him that she was not home. Later that day, the same man returned and told Casey she could have another free laptop, but that she had to sign more documents. Casey signed the documents, and then told the man that she did not want any more visits as she did not know what was occurring. Casey was told that she needed to study in the courses that she had signed up to. Casey said that she did not know about the courses and could not study.

Casey came to a community legal centre after receiving two VET FEE-HELP loans in her name for two separate diploma courses, amounting to over \$26,000.

The legal centre wrote a letter of demand to the college requesting that Casey’s enrolment be cancelled without any penalties. The legal centre also contacted the Department of Education and Training to seek confirmation but did not receive an answer in a reasonable time. The community legal centre then lodged a complaint to the Commonwealth Ombudsman after contacting the Department of Education.

Outcome

Through the complaints process the Department confirmed that the college reversed the two VET-FEE-HELP debts. They also advised the legal centre that Casey had another VET FEE-HELP debt recorded with the ATO from a different private training college. The Department indicated that her personal information was most likely used inappropriately by a third party.

The community legal centre was able to also have this debt remitted. As such, Casey saved over \$26,000.

CASE STUDY #3 - “Margie”

Obstructing the cooling-off period

Product: Energy contract

Location(s): Suburban Melbourne

Sales Process: Door knocking

Customer: CALD

Margie is an Ethiopian refugee who has basic English and literacy skills. In 2012 a door-to-door salesperson from an energy company came to her home. The salesperson obliged her to let him into her home and pressured Margie to sign up to an agreement.

When she signed up, the salesperson told Margie that she could cancel the agreement if she changed her mind and would not incur any penalties.

Six days after the salesperson came to her home, Margie called the energy company and informed them that she regretted her decision in signing up and requested that her agreement be cancelled. The person on the phone told her that this cancellation was accepted.

Four years later, Margie received a letter from a debt collector, which stated that they were seeking to recover over \$450 in relation to debt owed to the aforementioned energy company.

In assisting Margie with this matter, the community legal centre discovered that the bill relating to this debt continued to accrue after the period that Margie had cancelled the service and moved out of her property.

Outcome

The legal centre lodged a complaint with the Energy and Water Ombudsman of Victoria (EWOV) to dispute the validity of the debt.

As a result, the energy company waived the amount charged to Margie.

CASE STUDY #4 - “Cara”

Invasive conduct - when salespeople go too far

Product: Energy contract

Location(s): Suburban Melbourne

Sales Process: Door knocking

Customer: Single mother, CALD

Cara is a 28 year-old Sudanese refugee who speaks limited English. She is a single mother of 7 children and her sole income is from Centrelink.

Cara was visited by door-to-door sales people multiple times. Two different men visited her at different times in relation to her energy bills.

One man came to her home and asked her which energy company she was with. As Cara was unsure, she showed him her bills. The man took down some notes and then left.

Another time, a man came to Cara’s house when Cara was in the shower—so one of her children answered the door. The man let himself in and when Cara came out of the shower, he was in Cara’s house, taking photos of Cara’s utility bills. Cara asked the man why he was taking photos and he told her that he wanted to know how much she was paying for her bills.

Following these visits, a Finance Company contacted Cara alleging that she owed around \$1,500 to an energy company.

Cara received multiple threatening calls from them seeking to recover this money. Even though Cara disputed this debt, Cara felt pressured by the Finance Company to enter into a payment plan with them, paying \$40 a fortnight.

Outcome

The community legal centre sought cancellation of the alleged debt and was able to remove the default listing from Cara’s name.

As a result, Cara saved close to \$1,500.

CASE STUDY #5 - “Rajesh & Shifa”

When salespeople leverage public funds - and claim to be ‘from the government’

Product: Vocational training course

Location(s): Suburban Melbourne

Sales Process: Door knocking

Customer: CALD

Door-to-door salesmen came to Rajesh and Shifa’s house, claiming that they were representatives of the government.

The salespeople offered them free laptops. Unbeknownst to them, the couple were signed up to a TAFE online course. As Rajesh and Shifa received free laptops they told their friends, Rajnita and Edwardo about this opportunity too and facilitated an introduction with the same salesmen. The salespeople also told Rajnita and Edwardo that they were representatives from the government.

Rajnita and Edwardo told the salespeople that they only required one laptop—but were persuaded to take two. They were shown the VET fee help booklet and were told that per page 25, they were only required to pay for the laptops if either of their salaries exceeded \$54,126.

Based on this information Rajnita and Edwardo signed the paperwork presented to them. They were unaware that they had signed up to study a Diploma of Business Administration.

After sharing their story to a friend who could read English, she became suspicious, and after reading the emails that they had been sent the friend told them what they had signed up to.

Outcome

The community legal centre contacted the education provider on behalf of both couples requesting the enrolments be cancelled without any penalty. Both couples were withdrawn from the college and moreover, the Operations Manager advised us that the salespeople involved in this sale were terminated.

CASE STUDY #6 - “Liam”

Creating a sense of urgency – the “very limited offer”

Product: Solar panels

Location(s): Suburban Melbourne

Sales Process: Door knocking

Customer: Serious health issue

Liam was on chemotherapy suffering from bowel cancer. He was visited by an unsolicited sales representative who was selling solar panels. Liam informed the sales representative that he was unwell, on chemotherapy and was worried about paying high prices.

The sales representative insisted that his company were offering a very low price for that day only, making multiple calls to his manager to lower the price. The sales representative also promised that Liam would receive “substantial savings” on his electricity bills after the installation of solar panels and was told that he would receive a 66 cent feed-in tariff.

The representative was in Liam’s house for many hours, and Liam felt pressured to sign a contract.

The contract stated that the price of installation would be \$11,500 and further that he could only obtain 60 cents in feed-in tariff.

Liam later obtained alternative quotes for comparative panels which amounted to \$6,000 less than what he had paid.

Outcome

A community legal centre assisted Liam in lodging a VCAT application on the grounds that the energy company engaged in misleading and deceptive conduct.

As a result the trader offered to settle the matter before the hearing, refunding Liam \$6,000.

CASE STUDY #7 – “Sarah”

Door knocking to book an “invited” in-home appointment - complete with rubbery numbers

Product: Solar panels

Location(s): Suburban Melbourne

Sales Process: Door knocking

Customer: Elderly pensioner

Note: This case study has also been recorded as a video case study

Sarah is a pensioner who lives with her husband in the outer south-west of Melbourne. They are both concerned by the increasing cost of electricity. Sarah makes sure that all her appliances are turned off unless they are absolutely needed.

One Saturday afternoon a salesperson knocked on Sarah’s door to talk about a solar panel system. He was a young man in his 20s and he provided all the relevant identification. Sarah was wary as she does not like door knockers—but she was also curious about solar panels, and asked about the price.

The salesperson said he didn’t know about the cost and how many panels she needed. He could, however, leave Sarah with a voucher for a \$2,000 government rebate to be used if she made a purchase. Other than that, all he could do was arrange a call with someone to talk to Sarah in more detail. Sarah consented to receiving a follow-up call.

The following Monday at about 9am, Sarah received a phone call from the Solar Panel Company. They were delighted that she was interested in the offer, and tried to arrange for someone to come out that day and talk it through. Sarah was unable to meet that day so a time was made for Wednesday instead.

On the Wednesday a female salesperson arrived to talk Sarah and her husband through the offer. Initially the salesperson identified that Sarah would need twelve solar panels to cover her energy use, based on what Sarah was currently using.

Sarah queried this, as other people in her street had up to ten solar panels - and some only five. In a small house with only two people, it didn’t make sense to Sarah that she should need twelve panels.

The lady said she had never seen a bill from Sarah’s supplier before, so was unclear on how to read it in order to determine Sarah’s use. After a phone call to the supplier, the salesperson then agreed with Sarah that ten panels would probably be enough. The lady also advised that the panels could be paid for through an interest free finance plan, which appealed greatly to Sarah and her husband.

After well over an hour and - in Sarah’s words, “I don’t know how many coffees” - the negotiations finally arrived at pricing. Sarah balked as she knew it was far too expensive for her. For the ten panels, she was quoted \$7,400 to be paid in 87 fortnightly instalments of \$88.99, with a monthly administration fee of \$2.95.

The salesperson was persistent, and queried why Sarah couldn’t afford the price. In her view it should have been within Sarah’s means. Sarah explained that she had a mortgage, and was a pensioner. It was simply too expensive.

According to Sarah, the salesperson lit up at this and said “Why didn’t you tell me you were a pensioner!” She then advised that Sarah would be able to access a special pensioner’s payment plan, which amounted to \$38.99 per fortnight, plus an administration fee of \$2.95 per month - to be paid “for as long as it takes” to pay off. At which point, they would then be completely free of electricity bills.

Sarah and her husband were delighted, as it made financial sense for them to save on energy costs in the meantime and then be completely free of costs once the panels were paid off.

After another call back to the Finance Company the salesperson happily congratulated Sarah on the approval of her finance plan. Sarah has since noted that conversations with the Finance Company were conducted

over the phone by the salesperson and Sarah cannot be sure of what was said at the other end of the line – if anything at all.

The contracts were then signed, and shortly afterwards the panels were installed on the roof.

It was then that Sarah received an email from the Finance Company advising her of her payment plan – which was set at \$88.99 a fortnight, with a *fortnightly* administration fee of \$3.50. The 'pensioner payment plan' clearly did not exist.

Upon re-checking her contracts, Sarah says she immediately rang the Finance Company to advise that the terms were different from her contract. She says she was abruptly advised that if that were the case, her finance plan was no longer approved.

Sarah's husband insisted that they immediately contact a Legal Aid lawyer and Sarah was then referred through to a community legal centre.

Outcome

Throughout the negotiation period, Sarah says the solar company continued to contact Sarah to "do a deal". They asked her repeatedly "what do you want?". Sarah advised them to speak to her lawyer – to which they replied that they had no intention of answering the lawyer's letters. The Solar Panel Company told Sarah they had been through this before – that they would win any dispute, and that legal action was going to end up costing her a lot of money.

Sarah nevertheless persisted, and with the assistance of the community legal centre was successful in having the panels removed and the contract cancelled.

CASE STUDY #8 – “Desmond”

Door knocking, solar panels, faulty goods and altered contracts

Product: Solar panels

Location(s): Rural Victoria

Sales Process: Door knocking

Customer: Unemployed, welfare dependant

Desmond is 58 and lives alone in an isolated rural town. One day in October 2013 a salesman for a solar panel system attended his home and sold Desmond a solar energy system for over \$9,000. He was signed up to a 3-year payment plan through a Finance Company. At the time, Desmond was working but earning a low income. He was not advised of a cooling off period, nor was notification included in any of the paper-work.

From the time they were installed, Desmond’s Energy Retailer failed to recognise the panels – they did not seem to be connected to the grid. At the same time, Desmond could not determine if this was the fault of the retailer or the Solar Panel Company.

Frustrated with this situation, Desmond ceased paying for the panels in early 2015. By this stage he had already paid nearly \$2,500 for the system.

He instructs that around this time the Solar Panel Company advised him that the cost of the panels was \$12,990, as opposed to \$9,640. Desmond believes that the order forms had been altered after he had signed them – to include a \$3,350 government rebate and a series of charges for the finance.

Desmond subsequently made a complaint to EWOV, and in June 2016 his system was finally connected to the grid.

The Solar Panel Company then requested full payment of the original \$9,640 purchase price – but Desmond maintained that the system was *still* not generating any energy, or providing any energy back to the grid.

In October 2016, the Solar Panel Company commenced proceedings against Desmond in VCAT.

Outcome

A community legal centre assisted Desmond, and the Solar Panel Company subsequently withdrew its VCAT proceedings. The Finance Company refunded the payments he had made up to that stage, and Desmond was able to keep the panels.

CASE STUDY #9 – “Henry and June”

Door knocking, solar panels and inappropriate finance

Product: Solar panels

Location(s): Rural Victoria

Sales Process: Door knocking

Customers: Disability support pension dependant

Henry and June are both disability support pensioners. They live in a small town about a three and half hour drive north-west of Melbourne. A salesperson came to their home selling solar panels.

When told of the price, Henry and June were concerned that they could not afford the solar system—but the salesman assured them they would no longer receive energy bills if they installed the panels, and they could pay using third-party finance.

Henry agreed to try and apply for the finance—not believing that he would get it because he was on the Disability Support Pension. Copies of the signed paperwork were not left with them.

Henry and June say they later learned the salesman had subsequently completed the contracts, (without their knowledge), and incorrectly indicated one of them was employed.

In addition, Henry and June were not told about the cooling-off period on unsolicited sales.

Henry and June were eventually rejected for finance once the third-party discovered they were both pensioners. However, in the meantime, the panels had been fully installed and Henry and June had no capacity to pay for them.

The Solar Panel Company subsequently engaged debt collectors to recoup the \$15,000 cost of the panels, and successfully obtained default judgement against Henry and June in March 2016.

A community legal centre assisted Henry and June to have the judgment set aside for a re-hearing.

As part of that process, the centre conducted research which showed the solar panels should have cost around \$6,000 to \$7,000 (as opposed to the \$15,000 they were charged).

Outcome

The matter was settled prior to a final hearing.

CASE STUDY #10 - “John”

Cold calling and dubious consent. What was said?

Product: Telephone contract

Location(s): Suburban Melbourne

Sales Process: Cold calling

Customer: Elderly pensioner, CALD

John is a 70 year-old refugee from Burma. He set up his home line and internet bundle with a major telecommunications company. He spoke to numerous people on the phone and also had a technician come to his home and set it up. After setting up this service John began receiving bills from both his telecommunications company and another company. Both bills were for the same home line and internet service.

John contacted the other company he had not set up his phone bundle with and informed them that he did not understand why he was receiving bills from both companies and he had never signed up to a home line and internet service with their company. The company told him that John was mistaken, that he had signed up with them; and that if he wanted to cancel the service he would have to pay a cancellation fee.

After he came to them for help, a community legal centre requested the company give John access to all records in relation to his alleged account - but the company denied this access. The community legal centre then lodged a complaint with the Telecommunications Industry Ombudsman (TIO). During negotiations the telecommunications company confirmed that the sale was made over the phone with John. Whilst the company agreed to provide the legal centre with all documentation that was sent to John, they still refused to provide access to the phone recording of the sale.

Outcome

The company agreed to cancel John's contract without any penalty, waive the outstanding costs and provide John with a full refund on the condition that he has no access to the phone records. Based on John's instructions, the community legal centre accepted this offer to settle. As such John saved approximately \$700.

CASE STUDY #11 – “Debbie”

False promises – illusory health benefits and ‘miracle’ products

Product: Massage products

*Location(s): Shopping centre, consumer’s home
(suburban Melbourne)*

Sales Process: Pop-up booth, follow-up in-home visit

Customer: Elderly pensioner

In 2016, Debbie, a 75 year-old pensioner approached a sales representative at Coles who was selling portable at-home massage products. The sales representative informed Debbie that she could arrange for someone to demonstrate the products at Debbie’s home. A time was organized for a representative to visit.

Later that month, a sales representative from the company visited Debbie’s home. At the time, Debbie’s husband Dimitri, who is 83 years old and suffers from arthritis, was also present.

The sales representative initially told Debbie and her husband that the products were good for low blood pressure as they helped blood circulation. He stated that the products would cost Debbie and Dimitri close to \$5,000, at which point Dimitri refused.

Debbie then told the sales representative that as both she and her husband suffered bad arthritis the products would only be worth purchasing if they helped alleviate the arthritis. The sales assistant then sold the products based on this, stating that they would also alleviate the pain of the arthritis.

Debbie and Dimitri signed an agreement as they were under the impression that she was to pay an initial \$500 deposit and then pay the remaining balance in 30 days, when the products would be delivered. However, Debbie and Dimitri were debited the entire amount of close to \$5,000.

The products never relieved any pain or symptoms of arthritis.

Outcome

A community legal centre assisted Debbie and Dimitri by sending a letter of demand to the company who sold the products to them.

In response, the company agreed to refund the full amount paid upon the return of the products. As such, Debbie and Dimitri were refunded the full amount they had paid.

CASE STUDY #12 – “Ferdinand”

Selling \$5000 adjustable beds – in a public housing estate

Product: Bed

Location(s): Suburban Melbourne

Sales Process: Cold calling, follow-up in-home visit

Customer: Elderly pensioner, intellectual disability

Ferdinand is a single 76 year-old man who lives in public housing. He has an intellectual disability and has never worked. He can hardly read or write. Ferdinand doesn't sleep well and suffers from arthritis.

In August 2015, Ferdinand was cold-called by a woman who said, “I'm just down in your street”. The woman asked if she could come up to talk about beds. Ferdinand agreed.

Ferdinand signed a contract with the Company for an adjustable bed and reclining chair. The price of the goods was given as \$7,495 but a rebate (the details of which are unclear) of \$1,500 was applied, reducing the price to \$5,396.

Ferdinand paid a deposit of \$599, with the balance to be paid via the Finance Company at a rate of \$86.89 per fortnight. By May, he had paid a total of \$1,650.91 and still owed \$3,996.84.

Additionally, there was an account establishment fee of \$60, and a payment processing fee of \$2.95. Under the contract, the Finance Company could also charge late payment fees of \$15 and collection fees of \$30.

Ferdinand maintained payments with the help of a friend. But at a certain point, the friend decided they didn't want to help anymore as it was too expensive.

Outcome

With the assistance of a community legal centre, Ferdinand was released from further liability under the contract and retained the bed.

CASE STUDY #13 – “Jenny”

Creating scarcity – ‘available for ten properties only!’

Product: Solar panels

Location(s): Suburban Melbourne

Sales Process: Door knocking

Customer: Disability support pensioner

Jenny is 58 years-old and her only income is the Disability Support Pension. Jenny lives alone, with her daughter occasionally residing with her to provide care.

In June 2016, a man came to Jenny's door and said he had a special offer that was available for only 10 properties in her suburb. The deal was for solar panels that were very cheap due to this special deal, and the \$2,500 Government rebate. The salesperson asked Jenny if he could return at a later date to explain the deal to her in full.

Jenny agreed.

When the salesperson returned, he was in Jenny's home for three hours and talked her into buying a 2Kw solar panel system.

Jenny says in the course of three hours at her home the salesperson said a number of things that weren't correct. Jenny diligently budgets to make sure that she covers all of her expenses. She allocates \$50 per fortnight for her electricity and then when the bill arrives, she makes up the difference.

Jenny was told there was no deposit on the system, the instalments would be \$58 per fortnight to the Finance Company and there would only be \$20 left on her bill to pay when it arrived. Jenny repeatedly clarified this with the salesperson.

This turned out to be untrue. Jenny was given an unexpected connection fee and her electricity bill did not reduce, leaving her \$58 per fortnight worse off.

On top of that—the “special discounted deal” was not a very good one. Jenny contracted to pay \$5,950 for the panels, while according to the solar panel index the average market price for the same product was \$3,990 to \$4,290.

The salesperson did not advise Jenny of a cooling off period, nor was it noted in the paperwork. Jenny also advised that the salesperson failed to leave the terms and conditions of the agreement at Jenny's home.

On 24 November 2016 a community legal service wrote to the Solar Panel Company on Jenny's behalf. They advised that Jenny would stop paying due to the misrepresentation about the price, and that the company could come and take the solar panels back.

Outcome

Jenny's matter was referred to another community legal centre, who negotiated on Jenny's behalf. The Finance Company agreed to provide a full refund and Jenny retained the solar panels.

CASE STUDY #14 – “Philomena”

Solar panels, without a cooling off period

Product: Solar panels

Location(s): Rural Victoria

Sales Process: Cold calling

Customer: Elderly pensioner

Philomena is 72 years old and lives in a rural country town in Victoria. One day she received a call from a Solar Panel Company, to canvass her interest in a solar energy system. Philomena instantly told the representative that she was not interested and could not afford it. However, she was then talked into allowing a representative to come to her house to provide more information.

Subsequently, a representative from the Solar Panel Company visited Philomena's property to discuss solar energy options. A number of representations were made about the cost of installing the system and the amount of money it would save. Philomena was told the system would cost \$102 per fortnight and would be large enough (in terms of kW output) to save close to \$100 per fortnight on her electricity bill. Philomena was told she would not receive an electricity bill as a result of all the savings. Philomena believed these representations and relied on them when she signed the contract for the purchase of a system at a value of \$10,130. She was not provided with a copy of the contract.

The next day, Philomena was contacted by the company who stated that due to a cancellation they were able to install the system the following day. Of course, next day installation of an unsolicited consumer agreement is a breach of the Australian Consumer Law (as it does not allow for a cooling-off period).

The community legal centre identified other breaches as well:

- Misrepresentation as to the adequacy of the system (a larger system would be required to cover the entire requirements of the household, so that there would be no monthly electricity bills).
- Misrepresentation of the monthly costs that would be debited out of the clients account, (expected cost was \$116.00, but cost debited per month was \$144.45).
- Failure to provide a quote /disclose cost of the installation of a new metre box prior to installation, to afford the client the opportunity to make a reasoned decision as to the appropriateness of the system and total cost.
- The sales representative claimed Philomena would receive no further electricity bills as her solar unit would cover her home energy use. This statement was a material inducement into the purchase, and falsely represented the capacity of the unit.

In fact, Philomena received an electricity bill from her Energy Retailer in the amount of \$1,364.84. This unexpected cost was attributed to the hot water services operation at night. (The Solar Panel System cannot store energy and doesn't accrue enough energy to cover the costs while energy trickles back in during the day when unused.)

The Solar Panel Company was notified of their mistake and failed to rectify it.

Outcome:

Direct negotiations with the Solar Panel Company failed to elicit a response, so the community legal centre proceeded to VCAT. The matter has been decided in VCAT twice, however the company has for the second time asked for a review of the decision due to non-attendance. The matter is likely to be subject to another request for review.

CASE STUDY #15 – “Hugo”

Solar panels (again). And again, without a cooling off period

Product: Solar panels

Location(s): At the client's workplace, regional Victoria

Sales Process: Door knocking

Customer: CALD

Hugo is an immigrant that arrived in Australia some 9 years ago. His comprehension of written and spoken English is very limited.

In early 2015, whilst at his former workplace, Hugo was approached by two door-to-door salespeople from a Solar Panel Company.

Just a few days later, one of the salespeople returned uninvited to Hugo's former workplace. During this visit Hugo was presented with the Sale Contract that was financed by a Finance Company to purchase solar panels and have them installed on his property. The door-to-door salespeople from the Solar Panel Company took advantage of Hugo's CALD background, he did not understand the contract as it was not translated or explained to him in his native language, but he signed it. In addition to his inability to understand English, Hugo also had a very low income and didn't understand the long-term contract he was entering into nor the financial hardship this would cause.

Hugo was not given a copy of the terms and conditions of this contract, nor was it explained to him that he had a 10 day cooling off period. The solar panels were installed at Hugo's home before the end of this 10 day cooling off period.

Hugo then fell into financial hardship and defaulted on payments to the linked credit provider. At the point that he defaulted on his payment, he had an outstanding debt of \$6,738.95. This resulted in the Finance Company issuing proceedings against Hugo in the Magistrates' Court of South Australia.

Outcome:

After being given the authority to act for the client, the community legal centre emailed the Finance Company to inform them that it would be filing a defence on their client's behalf. Once the defence was filed, the Finance Company's Legal Officer forwarded this to their Director of Legal and Compliance.

After the matter had been escalated further with the Finance Company, they filed a Notice of Discontinuance with the South Australian Magistrate's Court. The legal centre was then able to negotiate a favourable out-of-court settlement for Hugo.

Under the settlement Hugo was released of the obligation to pay the outstanding \$6,738.95, and received a refund of the \$2,147.77 he had already paid. In addition, Hugo retained the solar panels and all legal proceedings against him were withdrawn.

CASE STUDY #16 – “Eustace”

Unsolicited sales and poor quality goods

Product: Massage chair

Location(s): Rural Victoria

Sales Process: Door knocking

Customer: Elderly pensioner

Eustace is elderly and lives in a rural country town. In April 2014 she was approached by a door-to-door salesperson from a Furniture Company. Eustace entered into an arrangement (signed on that day) for the purchase of a mobility focused (synthetic) leather massage chair for approximately \$3,000 on a financial payment plan through a Finance Company at \$38.63 per fortnight. It would take an estimated 3 years to payoff.

By April 2015 it had become apparent that the synthetic leather upholstery was not of acceptable quality, as the leather had started to split and large sections of material were peeling away from the cushions. A \$3,000 chair should be durable enough to last longer than 12 months, and as a result Eustace was offered and accepted a replacement model.

Twelve months later, this replacement model also showed the same poor quality and was not in a reasonable condition.

At this point Eustace sought the removal of the chair and a cessation of the payment plan, and for the Furniture Company to pay out the remaining balance of their contract with the Finance Company (\$1,049.68). This request was refused. The Furniture Company instead maintained that they satisfied their requirements to remedy consumers under the ACL by providing a replacement only.

In May 2016 the Community Legal Centre lodged an application to VCAT seeking a full refund of the purchase amount.

The Furniture Company have left Eustace without a suitable mobility assisted chair and an unsuitable level of debt for the quality of product she received. The ongoing legal dispute has lasted over 2 years and has caused a great deal of stress for Eustace and her husband.

Outcome:

An action has been pursued at VCAT on the basis that the client has received goods of unacceptable quality (under section 54 of the ACL).

Unfortunately, the claim is unable to capture the true nature of the inequitable dealings of the Furniture Company and limits Eustace's entitlement to certain remedies. In this matter, replacements have only prolonged the issue and associated stressors—the ACL has been unable to free Eustace from an onerous financial and legal burden arising from unsolicited sales.

CASE STUDY #17 – “Marcus”

The offer ‘too good to refuse’

Product: Coffee machine

Location(s): Suburban Melbourne

Sales Process: Cold calling

Customer: Sole trader

Note: This case study has also been recorded as a video case study

Marcus received a cold call from a company selling coffee machines, making an offer ‘too good to be true’. The company offered a coffee machine for a once off payment of \$59—with sample coffee—in the hope that the consumer would continue to purchase coffee from the coffee machine company. Marcus is not a coffee drinker nor is his wife, but because the deal was so good he agreed to the purchase. He reasoned that he could give the machine to his daughter—who had just moved out of home, and is a coffee drinker.

After the machine arrived, a second payment came off Marcus’ credit card. Not long after that, a third payment was deducted. Believing there must be some mistake, Marcus contacted the coffee machine company only to be told that he still had another seven payments to make. Marcus contested this, as he had clarified multiple times during the sales call that the first payment was a ‘once off payment’. Marcus also requested to hear the recording of the sales call (which he was told had been made) but the company refused to allow him access to the recording.

Marcus contacted his bank and cancelled any further payments from his credit card. He then told the company they could collect the machine after they refunded him. In response, the company offered to make a partial refund—claiming that Marcus had by that stage already had use of the machine. In order to receive this refund, the company insisted that Marcus would first have to return the machine. Marcus refused this offer, countering that the machine has only been used once (to test if it worked).

Marcus has since received multiple contacts from a debt collector seeking full payment for the machine, and one letter in particular which he found very threatening and which ‘seriously scared’ his wife. As a result, she suggested they just pay the amount to be rid of the whole issue. Marcus refuses to budge, and is adamant that he was ‘scammed from the start’. The only documentation Marcus ever received was an invoice which arrived with delivery of the coffee machine, which did not reflect the terms agreed to in the initial phone call.

When Marcus contacted the fraud division of his bank to cancel the payments they did so immediately—noting that ‘this happens all the time.’

Marcus maintains that the company can still have the machine back—but first they must provide him with a full refund. The saga has been going on for over a year.

CASE STUDY #18 – “Geraldine”

The illusory \$7,000 rebate

Product: Solar panels

Location(s): Suburban Melbourne

Sales Process: Cold calling

Customer: Elderly pensioner

Geraldine is an aged pensioner who cares for her husband. They own their home but survive on a low income. After repeated cold calls from a Solar Panel Company, Geraldine agreed to a salesperson attending her home to give her a quote for solar panels.

The salesperson was at Geraldine's home for almost three hours. Geraldine says she thought the government was backing the Solar Panel Company, as they continually emphasised the rebate available to her—although these representations were only ever made verbally, never written down.

Geraldine understood that a \$7,000 government rebate would be deducted from the \$10,990 she eventually agreed to, and signed up to a payment plan on the spot. However, the rebate never happened and she was signed up to the full amount.

Geraldine says that the only explanation the salesperson ever gave her was that her account would be debited fortnightly, and that the arrangement was interest free. Geraldine struggles to make the fortnightly payments of \$117, and says she feels foolish for having agreed to the deal. She attempted to cancel the contract but was outside the cooling-off period, and now feels trapped.

CASE STUDY #19 - “Harold”

The \$200 solar panel deal

Product: Solar panels

Location(s): Suburban Melbourne

Sales Process: Door knocking

Customer: Elderly pensioner

In October 2015 Harold received a visit from a door knocker. The salesperson, a well-spoken young English woman, advised him that he should think about solar panels. Harold replied that he didn't want them, and didn't have much money. She responded they would only cost about \$200. At that, Harold indicated that maybe it was worth thinking about. Two of his near neighbours have solar panels, and he knows from one of them (who have had panels since 2011), that they have been receiving a significant feed-in tariff.

A few days later, a gentleman named Richard knocked on Harold's door. Richard was from the Solar Panel Company. He was there to talk Harold through the product and discuss pricing.

Richard told Harold that the first salesperson had made a mistake – the cost would be more like \$2,000, as opposed to \$200. Then Harold took Richard out into his backyard and pointed out his neighbours' homes, which have 16 panels each. Richard said that Harold would need the same number of panels – but this would cost more like \$6,000.

For that cost though, Harold says that Richard promised Harold would no longer receive an electricity bill—he would 'do better' than his neighbours. He told Harold he would never get another electricity bill again. He also told Harold that finance could be arranged through a Finance Company, and that Harold had a cooling off period of 8-10 days if he happened to change his mind.

Harold signed the contract, but Richard didn't leave a copy behind—or any other documents. Just his business card with his phone number on it, and an empty folder.

After Richard had left, Harold thought again about the deal. He decided he couldn't afford it and decided to cancel. He rang Richard that night, but the phone wasn't answered. Harold rang the next day, and the day after that. Eventually Harold learned that Richard didn't work with the company anymore, and that there was no-one else Harold could talk to.

Harold persisted, and managed to find the number for the office of the Solar Panel Company. He rang within the 10-day cooling off period—but was told that he was too late and was no longer able to cancel.

Not long after that, a van arrived at Harold's home. Two men got out, and showed him 16 solar panels that they said they were there to install. Harold reluctantly agreed, figuring that he had lost his chance to cancel.

Several months after the installation, Harold realised that he wasn't getting any discount on his energy bills—even though he now had the panels. Reasoning that there must be something wrong with the system, Harold decided to have a look at the panels himself. On inspecting the panels, however, he found that there were only 8 on his roof—not the promised 16.

Harold then rang the Solar Panel Company to complain, saying he was receiving no discount on his electricity bills—and only had 8 panels, not 16. Harold told them he wasn't going to pay anymore until it was sorted out, and that he wanted a copy of the contract. They assured him they would send him one, but no contract ever arrived.

On 1 June 2016, Harold stopped making payments to the Finance Company.

Shortly afterwards, Harold received a call from the Finance Company. The man advised him never to call the Solar Panel Company again saying, 'you talk to me now'. By this stage, Harold had paid \$1,500, but still owed approximately \$4,500.

Not long after that, Harold received a call from a debt collector. Indignant that he only had half the panels requested, Harold offered to pay 50 percent of the cost. He then revoked that offer, and reduced it to 25 percent. The debt collector did not accept that offer.

Harold then received a communication from Consumer Affairs Victoria (CAV) advising that the Solar Panel Company was under investigation, and that he should not pay anything more. Harold has since advised the debt collector of this, and relayed the advice given to him by CAV directly.

Since that time, Harold has been back in touch with the Solar Panel Company. He managed to obtain a copy of their contract by pretending that he wanted new panels. When the salesperson arrived, Harold was told the cost would be \$6,000 for 12 panels but that he would have to pay \$2,000 upfront, because the Finance Company 'takes 50 percent'. Harold thought this was odd, as he believed that the finance was interest free. Harold cancelled the contract the same day, but has retained the contract for his records.

As far as he is aware, the Solar Panel Company is still under investigation—although Harold has been unable to clarify this with CAV.

4. CONSUMER HARM HOTZONE #1 – THE SOLAR PANEL INDUSTRY

Through the course of this project it has been difficult to ignore the large volume of case studies which concern the unsolicited sale of solar panels, and the common features which those case studies share.

Solar panels are frequently sold on the illusory (or at the very least, grossly over-stated) promise that they will save the consumer significant amounts on their electricity bill. Often it is falsely stated that once the consumer has paid off the panels, they will have no further electricity bill at all.

There is an intrinsic appeal for low-income and often welfare dependent consumers in being able to limit their energy costs, and salespeople frequently leverage growing anxiety over rising energy costs in order to facilitate a sale. Salespeople are also advantaged by the technical nature of the product (and the energy market generally), which means that consumers are unable to fully grasp the deal being offered, and instead find themselves having to trust the salesperson—and inclined to believe the promises being made. Very often this trust is misplaced, as the complex and technical nature of the product frequently results in poor or failed performance. The promises made are seldom kept.

The fact that the correct price for solar panels is not widely known also means that consumers are vulnerable to over-charging, and have little market intelligence to fall back on when assessing the deal. Consumers generally do not understand how solar panels work, how many they are likely to need, and what the actual impact on their energy costs will be. At the same time, the desire to future proof against rising energy costs is strong. This plays into the hands of unscrupulous sales staff.

The frequent (in our experience, almost universal) use of ‘interest free’ finance to fund the panels only adds to the obfuscation, and leaves people vulnerable to unjustified mark-ups. Certegy Ezy-Pay (a product of ASX-listed FlexiGroup) appear to be by far the most prominent player in this market. While Certegy’s finance product is not limited to solar panels, it is very often relied on for these transactions. FlexiGroup’s 2016 annual report states that Certegy Ezy-Pay has over half a billion dollars worth of goods under finance.⁶⁸ It has even attracted financing from the Federal Government’s Clean Energy Finance Corporation.⁶⁹ Often, the finance offered by Certegy is integral to the sale being made. The ‘interest free’ nature of the product is crucial in closing the sale and enticing consumers to commit.

Unfortunately, very often the payment plan offered by Certegy is unaffordable for the consumer and appears to be made without any rigorous assessment of their capacity to pay. Furthermore, because Certegy’s product is ‘interest free’, it is not caught within the scope of the *National Consumer Credit Protection Act 2009* (Cth) and is exempt from the usual protections that apply to the provision of credit. These include licensing, responsible lending provisions, and the requirement to belong to an external dispute resolution scheme.

The Clean Energy Council (CEC) administers a “*Solar Retailer Code of Conduct*” (“Code”) which requires compliance with the ACL protections on unsolicited sales, and sets a high bar for trader conduct. The provisions include certain pre- and post-sales requirements which are designed to ensure sales representatives act ethically at all times during marketing campaigns and when dealing with customers. Unfortunately, the Code is a voluntary industry code which provides very little coverage.

⁶⁸ FlexiGroup, *Annual Report 2016*, p. 4. Available at: <http://news.iguana2.com/flexirent/ASX/FXL/979320>

⁶⁹ Drummond, Shaun. *FlexiGroup first to issue ‘green securitised bond’ to fund solar financing*, Sydney Morning Herald, 22 April 2016. Available at: <http://www.smh.com.au/business/banking-and-finance/flexigroup-first-to-issue-green-bond-to-fund-solar-financing-20160421-gocg8q.html>. See also CEFC media release: *CEFC supports Australian green bond market with investment in innovative securitisation*, 22 April 2016, available at: <https://www.cefc.com.au/media/files/cefc-supports-australian-green-bond-market-with-investment-in-innovative-securitisation.aspx>

At the time of writing, the CEC website shows that only 43 solar retailers are officially identified by the CEC as “Approved Solar Retailers”—which means that they have undertaken to comply with the Code.

To give a sense of the limited extent of this coverage, a December 2016 independent review of the Code found:

The CEC estimates that there are currently 4,000 to 5,000 retailers in Australia. Whilst there has been a steady flow of applications to the CEC to become Code signatories, it remains the case that less than 1 percent of retailers are Code signatories. These retailers are estimated by the CEC to account for about 3 percent of PV system installations.⁷⁰

This is significant not only for the fact that 43 out of 4-5,000 isn’t much, but also that the industry is essentially made up of small to medium sized businesses which seem to exhibit high degrees of variance in terms of professionalism, operating style and legal compliance. Attempting to set standards for such an industry through the auspices of an industry body like the CEC, while laudable, is a quixotic task. Comprehensive oversight of a diffuse sector is likely to be only achieved through specific industry regulation.

In the context of this report, the solar panel industry seems a logical industry in which to trial an opt-in requirement for unsolicited sales. This could be done for a limited period or in limited jurisdictions in order to gauge the effectiveness of the protection—not just in terms of preventing consumer harm, but also in terms of how much impact it has on legitimate commerce—if, in fact, it has any impact at all.

As previously noted, on 3 August the COAG Energy Council released a media release stating that they were concerned existing consumer protections were insufficient to protect consumers of new products and services, and requesting that industry devise a Code of Conduct to protect those consumers. The media release stated in part:

Ministers noted that while current consumer protections provided by the National Energy Customer Framework and Australian Consumer Law are generally sufficient for behind the meter (BTM) products, they considered an industry-led Code of Conduct would support consumer protections for customers acquiring new energy products and services.

Ministers agreed to write to representative industry groups asking industry to lead the development of a Code of Conduct for new energy products and services. While there are clear benefits in industry taking the lead, ministers may reconsider whether further regulatory intervention is required in the future.⁷¹

Exactly how this potential code will relate to the CEC Solar Retailer Code of Conduct is currently unclear, but it may present an opportunity for incorporating an opt-in model into the unsolicited retail sale of solar panels. At the very least, the reference group formed between the COAG Energy Council and identified industry groups may provide a useful forum to discuss, and potentially implement a trial of the opt-in model.

⁷⁰ Cameron Ralph Navigator, *2016 Independent Review: Solar Retailer Code of Conduct*, December 2016, p. 7.

⁷¹ COAG Energy Council, *Energy Market Transformation Bulletin Update 5*, 3 August 2017, Available at: <http://www.coagenergycouncil.gov.au/publications/energy-market-transformation-bulletin-no-05-%E2%80%93-work-program-update>

5. CONSUMER HARM HOTZONE #2 – REMOTE INDIGENOUS COMMUNITIES, FAR NORTH QUEENSLAND

Both Consumer Action and WEstjustice have a history of engagement with indigenous communities in Victoria concerning unsolicited sales. In Consumer Action's case, this work has predominantly been in relation to supporting two regional communities with issues relating to consumer leases. In order to highlight this area of unsolicited sales Consumer Action observed the launch of the "Do Not Knock Informed Town" initiative in the Yarrabah Aboriginal Shire community, approximately 50 kilometres by road east of Cairns in far north Queensland. This visit was facilitated by the Indigenous Consumer Assistance Network (ICAN).

Yarrabah is the second Indigenous community in Far North Queensland to adopt the initiative. The first was the Wujal Wujal Aboriginal Shire community, a much smaller and more remote community 30 kilometres north of Cape Tribulation, which became a Do Not Knock Informed Town in April 2016.

The "Do Not Knock Informed Town" campaign is a community-led initiative coordinated by the North Queensland Indigenous Consumer Taskforce. The Taskforce, led by the ICAN, involves a range of consumer regulatory agencies and community services organisations, to address systemic civil law issues at a regional level in innovative ways.



ICAN staff Sandy Rosas, Carmen Daniels and Jon O'Mally with the Do Not Knock Informed Town sign in Yarrabah.

The initiative is a community engagement campaign, which involves erecting a large sign at the entrance to the communities followed by regular and ongoing community engagement. The sign, and the Do Not Knock informed project more broadly seek to communicate three key messages:

1. Door-to-door traders are not to approach residences displaying a 'Do Not Knock' notice;
2. Door-to-door traders must comply with the relevant provisions contained within the Australian Consumer Law; and
3. Community members have an ongoing relationship with regulators and an awareness of their consumer rights which they will enforce by reporting unlawful conduct.

On May 9, 2017, officials from the North Queensland Indigenous Consumer Taskforce, including: ACCC, Queensland Office of Fair Trading (**QLD OFT**), ICAN, and ASIC attended the community to assist in launching the Yarrabah Do Not Knock-Informed campaign. The Mayor of Yarrabah, Ross Andrews, officially launched the campaign, followed by speeches from all of the participating agencies. The launch, covered by local print, radio and television media, saw a complementary community barbecue operating throughout the event which facilitated many a yarn between agency representatives and community members. 'Do Not Knock' stickers were freely distributed to those who wished to have them.



Michael Dowers, North Queensland Regional Director, ACCC addresses radio and TV media



Yarrabah is a large and geographically disparate community (about 2,500 people over an area of 158.8 square kilometres) so it is difficult to gauge what proportion of the community attended the barbecue over the course of four or five hours. Suffice to say, 360 sausages, 90 eggs, 10 kg of onions, 60 minute steaks and 30 loaves of bread were consumed.



Yarrabah Aboriginal Shire Council Mayor Ross Andrews with Brian Bauer (QLD OFT Executive Director) and Jon O'Mally (ICAN Operations Manager).



Yarrabah Aboriginal Shire Council Mayor Ross Andrews launched the Yarrabah Do Not Knock-Informed Town initiative after a welcome to country by Gwen Schrieber, Elder and Traditional Owner.

While the launch was an important event, it's also true that awareness of the initiative is likely to spread gradually over time, primarily through word of mouth. This will be aided by school briefings to local students and distribution of Do Not Knock stickers through community hubs – such as the local health centre, where ICAN provides regular financial counselling outreach.

It's important to note that access to goods and services is a genuine challenge for some remote communities, and many argue there is a genuine place for unsolicited salespeople to fill that need. It is not seen by the community as desirable to ban unsolicited sales outright, or seek to prevent salespeople from entering the town altogether.



ICAN Operations Manager, Jon O'Mally, conducting a sausage symphony.

At the same time, the Do Not Knock Informed Town initiative has evolved as a response to persistent harm that has been caused to Indigenous communities over a number of years by unsolicited salespeople, often signing people up to agreements which are not properly explained, or fully understood. Remote Indigenous communities represent potentially 'rich pickings' for unsolicited salespeople, as they are self-contained and therefore represent a 'captive market' of sorts.

In a community with a high percentage of people in receipt of Centrelink benefits, there is also the risk that the Centrepay system can be abused by unscrupulous traders - particularly those selling consumer leases or funeral insurance. While the use of Centrepay to pay funeral insurance is (thankfully) now recent history, the consumer lease industry remains problematic.

The recent Federal Court case of *ASIC v Channic Pty Ltd (No 4) [2016] FCA 1174 ("Channic")* provides a good illustration of the predatory tactics that some traders apply to Indigenous communities, and involved a number of residents of Yarrabah (seven of the ten witnesses came from the community).

In *Channic*, Cairns based lender and broker, Mr Colin Hulbert, (the sole director of both Channic Pty Ltd and Cash Brokers Pty Ltd) was found to have breached consumer credit protection laws when providing car loans for the purchase of second hand cars from Super Cheap Car Sales – which he also owned.

ICAN first took complaints on this matter in 2008. By 2009, it had built a case of 8-10 complaints, and commenced work with QLD OFT and ASIC on the matter. Additionally, in the wake of cyclone Yasi, Mr Hulbert clearly sensed an opportunity, descending on Yarrabah where a number of households had received emergency relief grants. Mr Hulbert proceeded to leverage this influx of capital by selling loans for the purchase of vehicles at 48% interest (the maximum allowable interest charge under credit law), plus brokerage fees of either \$550 or \$990 - without assessing whether the loans were affordable, or suited to the consumers' requirements. Of course, they generally were not.

Unsurprisingly the Federal Court found that Channic had engaged in unconscionable conduct and that the loans were unjust transactions.

Crucially, the court stated:

*"It must have been obvious...that having regard to the educational qualifications of the consumers, their background, their financial circumstances and their lack of commercial experience, that they would not have comprehended the content, in a meaningful way, of the loan contracts."*⁷²

The factors raised by the court in *Channic* also make many Indigenous community members vulnerable to unscrupulous unsolicited sales practices. For that reason, the Wujal Wujal and Yarrabah Aboriginal communities have both chosen to take a stand against poor door-to-door trading practices, and limit the harm they have historically caused in their communities. More Indigenous communities in Far North Queensland are likely to join the initiative in the near future.

Some examples of successes flowing from the Do Not Knock initiative are:

- Shortly following the launch of Wujal Wujal as a Do Not Knock Informed town, a group of door-to-door traders selling photography packages entered the town. They were met by the local Community Justice Group Coordinator and reminded of their obligations. The traders acknowledged having seen and understood the sign, and left town without making a sale. Their visit was reported, and QLD OFT was able to warn surrounding communities in turn.
- In May 2017, around the same time as Yarrabah became a Do Not Knock Informed town, a company selling air-conditioners signed up a number of people. Following a referral from ICAN, the QLD OFT investigated the company and found they had breached consumer law door-to-door trading rules by failing to advise consumers of their cooling-off period rights and failing to provide cancellation notices. They were fined \$10,800 by the QLD OFT.⁷³

The Taskforce has enabled state and federal agencies to come together with the community sector and the communities themselves to drive this initiative. It is an admirable example of inter-agency cooperation that efficiently accesses resources and expertise across agencies to tackle complex unsolicited sales issues in an Indigenous community context.

⁷² *ASIC v Channic Pty Ltd (No 4)* [2016] FCA 1174 at 1837.

⁷³ QLD OFT 28/7/17 <https://www.qld.gov.au/law/laws-regulated-industries-and-accountability/queensland-laws-and-regulations/fair-trading-services-programs-and-resources/fair-trading-latest-news/media-statements/office-of-fair-trading-turns-the-heat-up-on-door-to-door-air-conditioning-sales>

6. CONSUMER HARM HOTZONE #3 – LETTING THE VAMPIRES IN: THE PROBLEM OF ‘INVITED’ IN-HOME SALES.

During this project, the issue of ‘invited’ in-home sales and other off-premises sales practices inevitably came to light.

The ACL’s definition of unsolicited consumer agreements (and therefore the specific protections that apply to them) exclude agreements made where the consumer has invited the trader to attend the place where the transaction occurs.

Section 69(1)(c) states that an agreement can only be considered unsolicited if (emphasis added):

*(c) the consumer did not **invite** the dealer to come to that place, or to make a telephone call, for the purposes of entering into negotiations relating to the supply of those goods or services (whether or not the consumer made such an invitation in relation to a different supply);...*

While this is a logical construction (‘unsolicited’ does literally mean ‘unasked for’, after all), it does create the problem whereby a subsequent arranged visit from an *initially* unsolicited sales contact is arguably exempt from the protections applicable to unsolicited agreements.

In the case of solar panels, for example, an initial unsolicited door knock or cold call can be used to arrange a subsequent in-home sales visit, during which the consumer is still subject to many of the disadvantages identified earlier—and which continue to be explored by behavioural economists. Indeed, the *location* of the sale (and all of the social, psychological and behavioural elements that go along with an in-home visit) may well be more material, placing the consumer at greater disadvantage, than the fact that the consumer was not anticipating the interaction.

It should be noted that section 69(1)(a) does partially address the problem of ‘invited’ sales. This provision states:

[No invitation to dealer] The consumer is not taken, for the purposes of subsection (1)(c), to have invited the dealer to come to that place, or to make a telephone call, merely because the consumer has:

(a) given his or her name or contact details other than for the predominant purpose of entering into negotiations relating to the supply of the goods or services ...; or

(b) contacted the dealer in connection with an unsuccessful attempt by the dealer to contact the consumer.

This provision means that if someone provides their information to a trader for the purpose of, for example, receiving a quote or having an in-home demonstration, and a sale subsequently takes place, the consumer will not be considered to have invited the salesperson and the unsolicited sales provisions will apply. The protections will not apply, however, if the person does invite the salesperson to their home—thus vulnerable consumers remain susceptible to, and poorly protected from, high-pressure in-home sales.

In his 2010 report, *Shutting the Gates: An analysis of the psychology of in-home sales of educational software*, Dr Paul Harrison found that in relation to in-home sales (IHS) of maths software (emphasis added):

During this sales process, a number of key psychological and social processes are activated or employed to increase the likelihood that certain consumers will sign up to contracts for educational software (often with related finance) that can result in financial stress.

*Our research found that the key factors influencing consumers during the IHS process are **consistency, trust, scarcity, reciprocity**, and the activation of **anxiety**.*

These variables are influential because they facilitate (or advance) the likelihood of automatic behaviour, or behaviour that requires little cognitive effort and rational thought.⁷⁴

Even sales interactions that are conducted at premises not in-home but at a place other than the traders usual place of business, (and to which the consumer has been invited—or otherwise induced to attend) could place the consumer at a disadvantage.

Consumer Action has been conscious for a number of years of systemic consumer harm caused by the sale of timeshare holiday accommodation. Typically, these are sold through lengthy presentations at shopping centres, hotels and other ad hoc venues. It is not uncommon for consumers to be offered a cash reward or some other inducement to attend such presentations. The presentation will then, very often, turn out to be extremely lengthy and will often involve high-pressure sales tactics.

In January 2017 Consumer Action and the Financial Rights Legal Centre (FRLC) made a submission to ASIC, who at the time of writing are reviewing their class orders applicable to time-share schemes. Currently, timeshare operators are required to provide consumers with a cooling off period of seven days if they are a member of the Australian Timeshare and Holiday Ownership Council (ATHOC), or fourteen days if they are not a member (or have otherwise been advised by ASIC that they must provide fourteen).

The submission argued that the cooling-off protection was ineffective, and that an opt-in model would provide stronger consumer protection—for many of the same reasons outlined in this report.

"Many parallels can be drawn between the high-pressure sales tactics employed by the operators of time share schemes, and those who seek to sell their products using door-to-door sales. The two methods are inherently uncompetitive and anachronistic. They are uncompetitive because they 'capture' the consumer with the one option being offered, directly working against the rational choice ideal of consumers making well-informed, autonomous consumer choices in an open and competitive market. They are anachronistic because traders have so many avenues and platforms through which to reach consumers (online, TV, radio, print). It really shouldn't be necessary to have consumers take time out of their holiday to be subjected to these practices."⁷⁵

In relation to the opt-in model, the submission states:

"...an opt-in arrangement would minimise the number of consumers who might otherwise be caught up in these costly transactions as a result of high-pressure, unconscionable or misleading conduct. It would also minimise the need of these consumers to resort to resource intensive dispute resolution avenues such as external dispute resolution schemes, tribunals and courts to resolve their disputes."⁷⁶

To illustrate common practices in the timeshare industry, two brief case studies from that submission are reproduced below:

⁷⁴ Dr Paul Harrison, *Shutting the Gates: An analysis of the psychology of in-home sales of educational software*, Deakin University & Consumer Action Law Centre, March 2010, pp. 4 -5. Available at: <http://consumeraction.org.au/wp-content/uploads/2012/04/Shutting-the-Gates.pdf>

⁷⁵ Consumer Action Law Centre and Financial Rights Legal Centre, Submission in response to Consultation Paper 272 – Remaking ASIC class orders on time-sharing schemes, pp. 6 -7. Available at: <http://download.asic.gov.au/media/4215122/cp272-submissions-ca.pdf>

⁷⁶ Consumer Action Law Centre and Financial Rights Legal Centre, Submission in response to Consultation Paper 272 – Remaking ASIC class orders on time-sharing schemes, p.7. Available at: <http://download.asic.gov.au/media/4215122/cp272-submissions-ca.pdf>

Sarah's Case

Context: High pressure, misrepresentation

Problem: Sarah is a female in her late 20s. While holidaying in Queensland in late 2015, Sarah attended a one hour timeshare sales presentation. She claims that at this presentation they were told that they could (a) exit the contract at any time for 'good reason' and (b) sell off holiday credits to friends. She purchased a membership in the timeshare program, took out finance of \$25,000 and committed to yearly payments of \$800. Since then, Sarah has discovered she can neither exit for good reason, nor trade credits with friends.

Carlos' Case

Context: High pressure sales, misrepresentation, change in circumstances, subsequently identifying product is unsatisfactory.

Summary: Carlos is a male in his mid-twenties with dependent children. Carlos attended a seminar in late 2015 provided by a timeshare company after receiving an email. At that seminar, the company made an aggressive sales pitch. Carlos claims that he was told that the timeshare product guaranteed two weeks of holiday per year and that 'all smart people' sign up. He also claims that the sales representative said they needed a decision then and there, that the special offer would expire if he did not sign up straight away, and that if he delayed he would not have a right to roll-over points. Carlos signed up for 10,000 credits and applied for a loan as well. In a short interview the company checked his expenses and income. After the purchase, Carlos discovered that the program was only worth a few days a year. He claims this is not the product he signed up for and the loan repayments are causing financial pressure as he has another baby on the way.

The issue of in-home sales and off-premises sales such as those which commonly occur in the timeshare industry are raised to highlight areas where behavioural factors very similar to unsolicited sales are at play, yet the transactions may not always be caught by the ACL's current construction of unsolicited consumer agreements (or at least, the point may be arguable either way).

Given this, there may be merit in examining the current construction of unsolicited sales—and considering whether 'off-premises' may be a more useful descriptor. If framed correctly, this may enable the specific protections currently applicable to unsolicited sales to also apply to in-home sales and timeshare style off-premises sales. Prior to the implementation of the ACL, Victoria had such a protection through Part 4 of the *Fair Trading Act 1999* (VIC),⁷⁷ but it was lost in the drive to create a nationally uniform consumer protection law. At the time, requirements for telemarketing and door-to-door selling were identified by the Productivity Commission as one area where inconsistencies existed across jurisdictions.⁷⁸ In the current context, it would seem that this was a significant loss for consumer protection and warrants serious reconsideration. 'Off-premises' may well count for more than 'unsolicited', and may more effectively capture trader misconduct.

Strong international precedent exists for taking such an approach, perhaps most notably in the EU, where paragraph 21 of the Directive on Consumer Rights states (emphasis added):

An off-premises contract should be defined as a contract concluded with the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader, for example at

⁷⁷ See:

[http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/483E227C3EF9222FCA256E5B00213D8B/\\$FILE/99-016a.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/483E227C3EF9222FCA256E5B00213D8B/$FILE/99-016a.pdf)

⁷⁸ Productivity Commission, *Review of Australia's Consumer Policy Framework: Productivity Commission Inquiry Report, Volume 2 – Chapters and Appendices*, 30 April 2008, p. 19. Available at: <http://www.pc.gov.au/inquiries/completed/consumer-policy/report/consumer2.pdf>

the consumer's home or workplace. In an off-premises context, the consumer may be under potential psychological pressure or may be confronted with an element of surprise, **irrespective of whether or not the consumer has solicited the trader's visit.**

The definition of an off- premises contract should also include situations where the consumer is personally and individually addressed in an off-premises context but the contract is concluded immediately afterwards on the business premises of the trader or through a means of distance communication.

The definition of an off-premises contract should not cover situations in which the trader first comes to the consumer's home strictly with a view to taking measurements or giving an estimate without any commitment of the consumer and where the contract is then concluded only at a later point in time on the business premises of the trader or via means of distance communication on the basis of the trader's estimate. In those cases, the contract is not to be considered as having been concluded immediately after the trader has addressed the consumer if the consumer has had time to reflect upon the estimate of the trader before concluding the contract. Purchases made during an excursion organised by the trader during which the products acquired are promoted and offered for sale should be considered as off-premises contracts.⁷⁹

This definition is replicated by the UK Consumer Contracts (Information, cancellation and Additional Charges) Regulations 2013, which eschews editorialising while containing the same essential elements:

"off-premises contract" means a contract between a trader and a consumer which is any of these—

(a) a contract concluded in the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader;

(b) a contract for which an offer was made by the consumer in the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader;

(c) a contract concluded on the business premises of the trader or through any means of distance communication immediately after the consumer was personally and individually addressed in a place which is not the business premises of the trader in the simultaneous physical presence of the trader and the consumer;

(d) a contract concluded during an excursion organised by the trader with the aim or effect of promoting and selling goods or services to the consumer.⁸⁰

In both cases, 'off-premises contracts' are subject to 14-day cooling-off periods, and are the mechanism by which consumers in those jurisdictions are protected against unscrupulous unsolicited sales.

As previously noted, there is also some uncertainty in our own case law as to how essential the 'surprise element' is to deeming a sale 'unsolicited' under the ACL. In *Australian Competition and Consumer Commission v ACN 099 814 749 Pty Ltd* [2016] FCA 403 Reeves J found that for a sale to be unsolicited, it unequivocally required that the "dealer ... initiate the negotiations with the consumer".⁸¹

However, in another more recent Federal Court matter, (*Australian Competition and Consumer Commission v Unique International College* [2017] FCA 727), Perram J found that:

⁷⁹ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 para 21. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0083&rid=1>

⁸⁰ *The Consumer Contracts (Information, cancellation and Additional Charges) Regulations 2013*. Available at: <http://www.legislation.gov.uk/ukxi/2013/3134/regulation/5/made>

⁸¹ *Australian Competition and Consumer Commission v ACN 099 814 749 Pty Ltd* [2016] FCA 403 at 134.

*"I do not agree that...the dealer must initiate negotiations. Section 69(1)(b) does address itself to the identity of the initiating party but only by providing that it must not be the consumer. It does not say that it must be the dealer. Indeed, it seems clear to me that the definition is explicitly addressing itself to the situation that neither party initiates the negotiation and declares that that situation is covered by the requirements of the Division."*⁸²

This is of interest in the current context in that it addresses 'pop-up' style sales which can sometimes exist in a grey area, and can be difficult to determine as unsolicited or otherwise. More fundamentally though, the judgement opens up the discussion around what constitutes the essential element of the interaction which places the consumer at a disadvantage—and determines that the element of surprise, in which the dealer foists themselves on the consumer, is not the sole (or even the most important) factor to consider in these interactions.

In addition to trialling the opt-in model as a potentially more effective protection than a cooling-off period, consideration should also be given to adopting the notion of the 'off-premises contract' as a broader alternative to 'unsolicited consumer agreements.' The rationale for doing this—as flagged by the EU—is that consumers can be subject to:

*"...potential psychological pressure or may be confronted with an element of surprise, **irrespective of whether or not the consumer has solicited the trader's visit.**"*⁸³

The findings of this report, the legislative history of the issue and the current uncertainty in case law suggest that a review could be extremely worthwhile. As Perram J appears to indicate in the *Unique* matter, the current understanding of unsolicited consumer agreements may well be too narrow—one which fails to protect consumers in very similar circumstances, subject to very similar behavioural factors, and who clearly require protection.

As behavioural economics continues to develop and elucidate real world human behaviour in an economic context, we may find that a number of consumer protections designed on the basis of the 'rational consumer' require considered revision. In the end, protecting people on the basis of how they actually behave should take precedence—and yield better economic outcomes—than adherence to any form of ideological or economic doctrine.

⁸² *Australian Competition and Consumer Commission v Unique International College* [2017] FCA 727 at 742.

⁸³ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 para 21. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0083&rid=1>

CONCLUSION

In conducting research and collating case studies, this report concludes the following concerning unsolicited sales.

- As identified by CAANZ in its review of the ACL, and as demonstrated by successful community initiatives such as Do Not Knock stickers and Do Not Knock Informed towns, ***consumer detriment caused by harmful unsolicited sales is significant and persistent.***
- ***Vulnerable consumers*** including elderly consumers, CALD and Indigenous consumers ***appear to be disproportionately affected by harmful unsolicited sales.***
- ***The efficacy of the 'cooling-off' protection is highly questionable and it seems largely an ineffective consumer protection***—it is based on a false and now outdated understanding of human behaviour.
- ***An 'opt-in model' is preferable from a behavioural perspective—it restricts sales to where the purchaser clearly and intentionally chooses the product or service.*** Any impact on legitimate trade can be tested through a narrow trial of the model.
- ***Unsolicited retail sales of solar panels are currently causing significant consumer harm.*** This is driven by a number of factors including consumer anxiety over rising energy costs, limited understanding of the product and appropriate cost, and access to (often inappropriate) finance which makes the purchase achievable.
- ***An industry specific trial of the opt-in model may be useful*** to test the impact of such a model on both reducing consumer harm, and also the impact it has on legitimate trade. ***The solar panel industry seems the logical industry in which to conduct such a trial.***
- ***Consideration should be given to broadening protections so that they apply to all 'off-premises contracts', as is currently the case in the EU and UK.*** This would ensure that consumers who are subject to high-pressure sales tactics through invited in-home sales, or attending timeshare style presentations, are also protected. This is significant because the behavioural aspects of those interactions are often very similar to unsolicited sales, creating the same difficulties for consumers that the unsolicited consumer agreement protections are designed to counter. Further, emerging legal uncertainty in case law concerning some off-premises sales and whether they qualify as unsolicited could be addressed by such a reform.

The community legal centres participating in this report would like to express their sincere thanks to the people who were prepared to tell their stories and make this report possible.

It is our hope that these stories will contribute to the case for sensible law reform, and prevent further harm being caused by unsolicited sales.



Consumer Action Law Centre

Our vision: a **just marketplace** where
people have power and **business plays fair**

Level 6, 179 Queen Street
Melbourne VIC 3000
AUSTRALIA
consumeraction.org.au