

Submission to Review of Australia’s Consumer Policy Framework

Dr Leslie Cannold, President of Reproductive Choice Australia is a medical ethicist who has published widely in scholarly journals on issues of autonomy and informed decision-making.

Ms Lesley Vick. LLB, MA is an academic legal researcher who specializes in the law and medical ethics and the law applicable to health professionals. She is an active member of Reproductive Choice Australia

Reproductive Choice Australia is a National Coalition of over 20 organizations including Children by Choice, the Public Health Association of Australia, the Australian Women’s Health Network, the Women’s Electoral Lobby, and all state-based pro-choice groups. It is dedicated to ensuring that Australian women’s reproductive rights are protected and enhanced.

Conformity of Evidence to Inquiry’s Reporting Requirements

As per the aims of the current inquiry, our intention is to bring to the attention of the Commission gaps in the consumer policy coverage (page 12, Issues Paper), and to suggest improvements in the existing framework that will “assist and empower consumers, including disadvantaged and vulnerable consumers, to operate effectively in increasingly complex markets”. (p. 7, Issues Paper)

The Trade Practice Act’s Protection from Deceptive and Misleading Conduct

- Section 52 is the most widely-used consumer protection provision of the TPA. It protects the right of citizens to make informed choices about the goods they accept, or services they engage.
- Well-informed consumers “spur efficient provision of goods and services” (p. 7).
- Policies that “exclude rogue traders increase consumer confidence to the benefit of legitimate business operators”. (p. 12)

The Moral Underpinnings of Section 52: The role of informed decision-making in the prevention of autonomy theft

- Liberal, pluralist democratic societies with diverse populations accept that citizens may and have a right to disagree about what is in their own best interest and that of society.
- As long as their decisions to do not harm others, it is consistently argued by governments of all persuasions – including our current Liberal/National government – that the role of the State is not to take sides, but to enable citizens to make choices based on their own needs and values, even if others are offended by such choices or see them as mistaken

- Informed decision-making is a well-accepted mechanism for the protection of an individual's capacity to exercise autonomy through such choices.
- Only substantially informed and voluntary decisions enable decision-makers to express their values, and to act to meet their needs.
- Deceptive and misleading advertising subverts the capacity of decision-makers to make informed decisions, robbing them of their autonomy.
- Deceptive and misleading advertising through its promotion of ill-informed decisions, denies the decision-maker the freedom to make choices consistent with his or her own values and preferences by tricking them into making choices consistent with the preferences and values of the false advertiser
- Some decision-makers may be particularly vulnerable to autonomy theft. The young, those from non-English-speaking backgrounds, the poorly-educated, the time-poor or those at a time of crisis may be less critical in their reading of deceptive and misleading advertising and, as a consequence, more likely to make decisions reflective of the values and preference of the false advertiser, rather than their own.
- There can be no more serious charge in a liberal, pluralist democracy than stealing the autonomy of others.
- Greed for money is not the only human motive for individuals and organizations to engage in autonomy theft. The desire to control others, or to satisfy the requirements of one's religious or political ideology are others that motivate human behaviour

The Problem: Australia's Existing Consumer Policy Framework Does Not Protect Non-Fee Paying Consumers from Deceptive and Misleading Advertising

- Section 52 of the FTA prohibits a corporation, in trade or commerce, from engaging in "conduct that is misleading or deceptive or is likely to mislead or deceive".
- Sec 52 of the FTA offers no protection to Australian citizens who procure goods or services without paying a fee. It enables non-corporate entities, or corporate entities not involved in trade or commerce to engage in deceptive and misleading advertising free from legal consequence.
- The law as it stands allows the following acts of autonomy theft:
 1. The marketing of pregnancy counselling services by pro-life organizations to women facing the crisis of an unintended pregnancy in ways that suggest the services described will support and refer for all three options: abortion, adoption, parenting. The attached advertisement, sent to every GP's surgery in Australia, is actually advertising for Pregnancy Counselling Australia, which shares a mailing address with Right to Life Australia;

2. Church groups advertise free meals, but when the hungry arrive to claim them, find they must first attend a service or a bible study class;

3. Sporting clubs advertise “try-outs” at specific times and places for children’s sporting teams that children can easily join at a later date without submitting themselves to a high-stress “selection” process.

These examples show:

- ✓ That motives for autonomy theft are not always fiscal, but may be ideological/religious and/or status-oriented.
- ✓ That both corporate and non-corporate entities can and do take advantage of gaps in the law to gain advantage in relation to disadvantaged or vulnerable citizens: women facing the crisis of an unplanned pregnancy, the indigent and children. Such vulnerable groups are poorly served with regard to autonomy theft by the current consumer protection framework.

Remedies: Amending the FPA or Public Funding for a Consumer Advocacy Body

Among potential ways of ensuring all consumers of goods and services, not just those who pay a fee, are protected from deceptive and misleading advertising are the following:

1. Amend the FPA. Currently Section 52 applies only to corporations engaging in trade or commerce that is deceptive. The Act should be amended to prohibit all legal entities from deceptive and misleading conduct with regard to the provision of all goods or services, regardless of whether or not a fee is paid.
2. Follow the lead of the UK and pursue a non-regulatory solution to the problem by establishing an overarching consumer advocacy body with the power to make findings and provide remedies in relation to deceptive and misleading conduct in the provision by legal entities of all goods or services, whether or not a fee is paid.

Conclusion

If autonomy theft is wrong when a fee is paid for a service, it is hard to see how it becomes acceptable when no fee is paid.

It is likely that most Australians believe existing laws protect them from deceptive and misleading advertising.

The Commission has an obligation to either promote the legal changes necessary to bring consumer laws in line with that perception, or to ensure

Australians are aware that it is *caveat emptor* when it comes to advertising for goods and services offered free of charge.