The Australian Industry Group
51 Walker Street
North Sydney NSW 2060
PO Box 289
North Sydney NSW 2059
Australia
ABN 76 369 958 788

6 June 2016

Mr Aidan Storer
Manager
ACL Review Secretariat, The Treasury
On behalf of Consumer Affairs Australia & New Zealand, The Legislative and Governance Forum on Consumer Affairs

Email: ACLReview@treasury.gov.au

Dear Mr Storer

AUSTRALIAN CONSUMER LAW REVIEW 2016

The Australian Industry Group (Ai Group) welcomes the opportunity to make a submission to the Consumer Affairs Australia & New Zealand's (CAANZ) consultation on its issues paper on the Australian Consumer Law (ACL) Review.

Ai Group's membership comes from a broad range of industries and includes businesses of all sizes. The input we received for this submission was mainly supplied by members involved in manufacturing, distribution and servicing of consumer electronics and home appliances, the provision of digital technology services and confectionary manufacturing.

Overall, our members are supportive of the ACL framework and consider that it is functioning well for the benefit of consumers. We are not proposing significant changes or further restrictions to the operation of the ACL. However, some aspects of the ACL are too broad and could be improved through further refinement and clarification.

Since the ACL was introduced, our members have observed that consumers have become more aware of their rights. However, many remain unclear about their rights and obligations under the ACL and further consumer education is still required. In some cases members maintain that the ACL has been incorrectly invoked by the consumer, and the balance has been skewed too heavily in favour of the consumer without an adequate consideration of the rights of businesses.

At this stage of the review our focus is on: returns and refunds; warranties; the meaning of "consumer"; infringement notices; unsolicited agreements; and emerging issues. We also look forward to providing further comments once the CAANZ's draft recommendations are available for consultation.

Returns and refunds

Our members have clear interests in maintaining positive relationships with retailers and consumers. For manufacturers, one important example is the handling of consumer claims about alleged failures of suppliers to comply with guarantees ("failure").[1]

With the introduction of the ACL, our members have noticed that it is now easier for consumers to return goods, as goods are returned at a higher rate. Consumers return goods for many reasons. These include: "reasonable" returns; instances where failure is not due to the actions of the manufacturer (e.g. the failure arises as a result of a third party good or service, or was caused by the actions of the consumer); and instances where no failure can been found.

[1] Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (ACL) section 259.

The Australian Industry Group
51 Walker Street
North Sydney NSW 2060
Australia
ABN 76 369 958 788

No failure found and manufacturer not responsible for failure

Our manufacturer members are of the view that a large proportion of returned goods either have no failure, or the failure was not caused by the manufacturer. In such circumstances, it would be reasonable for such goods to be returned to the consumer with no refund in accordance with the ACL.[2]

However, in practice, upon receiving a returned good from a consumer, some retailers simply replace the goods and return them to the manufacturers without investigating whether a failure actually exists or what its cause may be. The manufacturer may have no practical ability to return the goods to the retailer. And where there is a failure that was not due to the manufacturer, it is often not viable to repair returned goods, leading to an increase in the number of goods being sent to waste. These returns are a substantial and growing cost for manufacturers.

This experience raises a number of issues about the operation of the ACL:

- There is no incentive or obligation under the ACL for retailers to undertake an initial proper assessment to determine whether a failure exists with a returned good or, if there is a failure, the cause for the failure before the retailer makes the decision to return the good to the manufacturer. For certain retailers, the easiest option is to simply replace and return the goods by default, irrespective of whether a failure actually exists. Manufacturers have reported mixed results in returning goods back to certain retailers under these circumstances.

- There are no proper systems in place to manage the assessment of failures being claimed for returned goods, where a subsequent assessment of failures by the manufacturer is impractical.

- There is no incentive or obligation on consumers to only return goods to the manufacturer if they genuinely believe the failure was caused by the manufacturer. This leaves open the potential for disingenuous claims for returning goods and seeking refunds or compensation.

Failure to comply with guarantees relating to supply of goods

Where a failure to comply with a guarantee for a good is found, the ACL provides consumers with a number of options they can take against the manufacturer depending on the extent of the failure.[3]

However, manufacturers have identified a number of issues that have arisen in practice:

- There has been an increase in unreasonable claims by consumers, which has been burdensome for manufacturers to respond to.

- Other legislative instruments (e.g. the *Greenhouse and Energy Minimum Standards Act 2012* (Cth)) may require the design life (typically determined by testing) of a good to be disclosed by the manufacturer. In the absence of a definition for "durable" within the definition of "acceptable quality" under the ACL,[4] this design life may be inappropriately used to clarify its meaning. For example, the proposed Minimum Energy Performance Standard for receptacles of LEDs requires a design life of 25,000 hours to be marked on LED fittings. This design life could be misinterpreted by a consumer to mean that the LED light is expected to operate for at least 25,000 hours. In fact the 'design life' is the median life expectancy of the product. Half of all LEDs would be expected to fail before 25,000 hours, and half after. Therefore, design life is not relevant for the purposes of clarifying durability or acceptable quality under the ACL.

- When a good is directly returned from the consumer to the manufacturer, some manufacturers fully refund the retail price to the consumer. The ACL does not clarify how the manufacturer could seek monetary contributions from other participants along the supply chain (including the retailer) to

[2] Ibid section 262.
[3] Ibid section 260.
[4] Ibid section 54(2)(e).

The Australian Industry Group
51 Walker Street
North Sydney NSW 2060
Australia
ABN 76 369 958 788

share the costs. That is, some manufacturers in practice have covered the retailer margin. This problem is even worse where third party intermediaries may be involved such as rental companies, resellers and overseas sellers.

Underlying these problems is the lack of clarity for consumers and retailers on the definition of key ACL terms relating to returns and refunds: "major failure", "failure", "acceptable quality", "reasonable time" and "reasonable costs". However, clarifying the legislation itself will only solve part of the problem. Consumers and retailers need education on the appropriate circumstances for returning goods, and a solution is needed to address the situation where manufacturers provide consumers with full refunds.

Warranties

Overseas and online purchases

The increase in online and overseas purchases requires greater consumer awareness that warranties for such purchases only apply to the originating supplier, not the local supplier. In some circumstances, local suppliers have borne the cost of a good that has been purchased from overseas or online to protect their local brand and reputation, even though they are not obligated to do so.

Extended warranties

Our manufacturer members have seen retailers sell consumers extended warranties that appear to create no rights beyond manufacturers' existing obligations. Retailers should be required to clearly explain to consumers the specific additional value that they will provide under extended warranties.

Warranty for defects

The ACL currently requires mandatory text to be included in warranties for defects.[5] Further consideration needs to be given as to how that information is provided to consumers in light of changing consumer attitudes and expectations. In particular, consumers may now prefer to receive less documentation with a purchase and will look to suppliers' websites for detailed materials, such as user instructions and warranties.

In addition, the current mandatory text is only provided for warranties for defective goods, but does not refer to defective services. In the absence of a mandatory text requirement for warranties for defective services, consideration should be given to whether any requirement for mandatory text is necessary at all, especially in light of changing consumer expectations. Alternatively, consideration should be given to including a mandatory text requirement for defective services.

Meaning of "consumer"

When the Bill to introduce the ACL was tabled, the meaning of "consumer" was described as follows:[6]

> Many provisions of the ACL apply to all persons and are not limited to a defined class of consumers. However, some provisions of the ACL apply only to a defined class of ***consumer*** as it is not appropriate, in those cases, to extend protections afforded by the relevant provisions more broadly.

However, based on our members' experiences, the broad definition[7] of "consumer" in the ACL creates too much confusion and uncertainty for suppliers and consumers.

For instance, our manufacturer members have observed certain retailers making a claim as a consumer under the ACL in order to return goods. In some cases, manufacturers have rejected these claims.

---

[5] *Competition and Consumer Regulations 2010* (Cth) reg 90(2).
[6] Supplementary Explanatory Memorandum and Corrections to the Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010 (Cth), 5 [1.2].
[7] ACL section 3.

The Australian Industry Group
51 Walker Street
North Sydney NSW 2060
Australia
ABN 76 369 958 788

Another scenario is with respect to goods or services that can be provided to different types of customers, ranging from disadvantaged customers to businesses. Currently, the ACL includes an arbitrary monetary threshold value of $40,000 for goods or services within its definition of "consumer".[8] This is a very simplistic approach and clearly does not address the fact that any type of customer could purchase goods or services within that $40,000 threshold, beyond the most disadvantaged customer.

We recommend the CAANZ consider more appropriate overseas approaches to defining the "consumer". For example, as noted in the CAANZ's issues paper, in the United Kingdom the consumer is defined to be a natural person that excludes companies or small businesses. Another option would be to maintain the current arbitrary threshold of $40,000, but exclude contracts with customers who supply an ABN, or at least incorporated companies and government entities. This amended definition for consumer would be extended to unsolicited agreements as discussed below.

There are also issues associated with the meaning of "consumer" in the context of product safety. We intend to elaborate further on this in a supplementary submission.

Unsolicited agreements

The current ACL does not allow for consumers to receive their good or service until after the cooling off period expires under unsolicited agreements.[9] For suppliers that offer such agreements, some consumers have requested to receive their good or service sooner, but were unable to do so because of this cooling off period. To bypass this problem, these consumers have chosen to terminate their unsolicited agreements and entered into new agreements for the same good or service.

This suggests that the current requirements for unsolicited agreements are inflexible to the needs of consumers. One solution could be providing consumers with the choice to waive off the cooling off period under unsolicited agreements. Another option could be to allow the supplier to provide goods or services during the cooling off period, on the condition that the supplier could only receive payment from the consumer where the contract is not cancelled during the cooling off period.

Infringement notices

The ACCC can currently issue infringement notices where it has reasonable grounds to believe that the ACL has been contravened.[10] The circumstances for the ACCC to invoke this regulatory power should be more transparent and proportionate to the problem, for example when there is a clear and obvious breach of the ACL, as opposed to reasonable grounds of belief.

Removal of mandatory reporting for food

In March 2015, the Selection of Bills Committee referred the *Competition and Consumer Amendment (Deregulatory and Other Measures) Bill 2015* to the Economics Legislation Committee for inquiry and report. The purpose of the Bill was in response to the Government's commitment to removing regulatory burden and cutting red tape.

The Bill sought to amend the ACL to remove the requirement for reporting food related death, serious injury or illness to the Australian Competition and Consumer Commission (ACCC). This was a deregulatory measure about resolving duplication and not a compromise to food safety.

---

[8] Ibid sections 3(1)(a)(i) and 3(3)(a)(i).
[9] Ibid section 86.
[10] *Competition and Consumer Act 2010* (Cth) section 134A(1).

The Australian Industry Group
51 Walker Street
North Sydney NSW 2060
Australia
ABN 76 369 958 788

In its submission to the Economic Legislation Committee, the food regulatory agency Food Standards Australia New Zealand (FSANZ) noted that:[11]

> Since mandatory reporting commenced in 2011, there is no evidence that the reports have provided the state and territory enforcement agencies with information on food-related injuries, illnesses and death that they were not already aware of or would have been aware of via other sources. The reports have also not provided an early alert to a national food safety issue. The vast majority of reports are associated with alleged food poisoning that if investigated, would be very unlikely to be associated with the food being reported. Many reports also do not contain sufficient information to enable the relevant enforcement agency to undertake further investigations.
>
> FSANZ, therefore, supports the removal of this requirement for food from the Australian Consumer Law as it does not add value to existing reporting systems.

At that time, FSANZ had received approximately 4,750 food related mandatory reports since the reporting requirement commenced in January 2011.

The Economics Legislation Committee reported in May 2015 that, despite concern when legislation proposes to remove what is deemed to be a health and safety reporting obligation, it could not see any impediment to the passage of the proposed legislation and recommended the Bill be passed.[12]

The Committee reported that the evidence before it indicated strongly that the current mandatory reporting requirements to the ACCC were unnecessary and added to the compliance burden on businesses.[13] The reporting regimes of the States and Territories were considered adequate, and the reporting obligations to the ACCC duplicated the work of the States and Territories and did not add value.[14]

The Bill has now lapsed with the dissolution of Parliament.

Without improved food safety outcomes for consumers, our confectionery manufacturer members consider that an amendment to remove the mandatory reporting requirement for food should be instigated through this review process. The removal of regulatory duplication should not compromise public health and safety and should enable government and industry resources to be redirected to more effective purpose.

Emerging issues

Bundled goods or services

The current ACL requires the total minimum price for bundled goods or services to be advertised by the seller. [15] However, this requirement can unintentionally confuse consumers. In some circumstances, the majority of consumers may not pay the amounts appearing in the advertisements. In those cases, it would be clearer for the price of the add-on product to be advertised with a sufficiently prominent explanation that the optional product is only available with the purchase of another product.

---

[11] Food Standards Australian New Zealand, Submission to the Competition and Consumer Amendment (Deregulatory and Other Measures) Bill 2015 (Cth), 10 April 2015.
[12] Senate Economics Legislation Committee, Report on Competition and Consumer Amendment (Deregulatory and Other Measures) Bill 2015 (Cth) [Provisions], May 2015, 21 [2.68].
[13] Ibid 20[2.65].
[14] Ibid.
[15] ACL section 48.

The Australian Industry Group
51 Walker Street
North Sydney NSW 2060
Australia
ABN 76 369 958 788

Third parties

Third party consumer goods and services such as apps are now often offered on incumbent platforms such as smart TVs. With an increase in these third party goods or services, there may be a potential for new failures of consumer guarantees. In these circumstances, more clarity would be welcomed on which parties should be responsible for resolving these failures.

Innovation

The ACL should not be changed or operate in such a way that would constrain further product development and innovation. In relation to the new online environment, the ACL is currently working well. Imposing further restrictions could result in unnecessary and disproportionate costs on businesses, and may impede innovation.

Pop-up stores

An emerging issue for the unsolicited agreements regime relates to pop-up stores. Section 69(1)(b)(i) of the ACL includes the term "a place other than the business or trade premises of the supplier of the goods or services". When read in conjunction with the other provisions under section 69 of the ACL, requirements under the unsolicited agreements regime can be interpreted to extend to pop-up stores. A pop-up store that professionally operates at a location that is not traditionally commercial in nature should not create a different customer experience to traditionally located stores and therefore should not be treated differently under the ACL. However, there could be a distinction drawn between staff operating at the location of the pop-up store and staff leaving the vicinity of the pop-up store to engage with customers. The latter scenario could be akin to unsolicited agreements.

Other reviews

This review should avoid any overlaps in scope with other current reviews. For instance, the Productivity Commission (PC) is currently undertaking an inquiry into data availability and use, including the benefits and costs of making public and private datasets more available and examining options for collection, sharing and release of data. Further, we note that consumers are presently entitled to access their personal data under the *Privacy Act 1988* (Cth). With these in mind, the CAANZ should avoid making recommending changes which would result in a separate regime with the attendant additional regulatory burden for businesses.

The PC is also undertaking a separate research study of the enforcement and administration arrangements underpinning the ACL. We encourage the CAANZ and the PC to work closely together to avoid duplication of effort either for themselves or for stakeholders.

Product safety

Given the importance of product safety, we are in the process of consulting with our members and intend to make a supplementary submission on the associated issues.

Should CAANZ be interested in discussing our submission further, please contact our adviser Charles Hoang (02 9466 5462, charles.hoang@aigroup.com.au).

Yours sincerely,

Peter Burn
Head of Influence & Policy