Business Council of Australia

SUBMISSION

Submission on the Interim Report of the Australian Consumer Law Review

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Contents

The Business Council of Australia is a forum for the chief executives of Australia's largest companies to promote economic and social progress in the national interest.

About this submission

This is the Business Council submission on the Interim Report of the Australian Consumer Law (ACL) review. The review is being conducted by Consumer Affairs Australia and New Zealand (CAANZ) and will report to Consumer Affairs Ministers in March 2017. The Business Council made an earlier submission in June 2016 in response to the Issues Paper.

Recommendations

- Any recommendations to Ministers to change the law in the Final Report need to clearly demonstrate how best practice regulation principles have been applied.
  - That is, there needs to be a clearly defined problem, regulation is only applied where necessary and the benefits of regulation exceed the costs.
- The Interim Report contains no policy recommendations for stakeholders to comment on, so any final recommendations arising from the review process should be subjected to a further round of consultation with stakeholders.
- Given the absence in the Interim Report of a clear problem with the current product safety laws or a compelling case for change, a general prohibition on the supply of unsafe products should not be recommended by the review.
- The removal of duplicate food reporting regulation across Commonwealth, State and Territory jurisdictions should be achieved by excluding food from the ACCC's mandatory reporting regime.
- The option to extend mandatory reporting periods for product safety incidents is supported as it will allow for more accurate and meaningful reporting.
- There is a need for more clarity on what amounts to 'serious illness or injury' requiring immediate notification.
- The review should not recommend expanding the scope or powers of the Unfair Contract Term provisions for business-to-business contracts before the new law has had time to operate and without clear evidence of problems that need to be addressed.
- Terms that have been found unfair by a court should not automatically be banned from future usage.
- Any consideration of the proposal to apply 'follow-on' provisions to admissions of fact must include the likely adverse impact on settlement of enforcement proceedings.
- If there is to be a change in the threshold for defining a consumer transaction it should not exceed the historical rate of growth in the CPI.
- The review should recommend the provision of greater clarity on the appropriate duration of consumer guarantee periods.
- The definition of what constitutes a 'major failure' should be clarified and businesses given more opportunity to rectify a 'major failure' before being required to issue a refund.

General comments on the Interim Report

Well-designed consumer protection regulation ensures businesses trade fairly and it empowers consumers to confidently participate in markets. It can support effective competition which drives greater choice, better services and lower prices for consumers.

In considering the effectiveness of the current law it is very important that this review takes into account the importance of good regulatory design so that business innovation is not impeded and business is not unduly burdened.

As a general rule, regulation must address an identified problem and only be used where necessary. It must be clear, efficient and proportionate to risk. It needs to be flexible and applicable to both existing and new business and economic models, such as the sharing economy, but not be so burdensome as to work against their development.

Consumer law and technological disruption

Central to this review is that globalisation and technological change are giving rise to the empowered consumer. Consumers are better informed, have access to more product options from Australia and overseas, have the ability to compare quickly and easily terms and conditions, and even the performance of the provider as judged by other consumers. As noted in the Interim Report, awareness of the ACL is high, with consumers experiencing a lower incidence of problems and feeling empowered to resolve disputes.

Disruptive technologies will continue this trend. Innovators are swiftly moving to fill unmet consumer needs through the use of different technology platforms, providing services and filling gaps in ways that are shifting and creating new markets. The consumer's ability to monitor and comment on the performance of provider through social media and other platforms is imposing new levels of discipline on providers. Consumer empowerment is leading to significant disruption in business models with intermediary businesses especially under tremendous pressure.

This review needs to carefully assess these trends and the role that an effective consumer law should play. Where possible, it should put forward changes that maintain consumer protection but reduce the ever-growing regulatory burden on Australian businesses and lift business competitiveness, because this is ultimately in the best interests of consumers.

Interim Report

The Business Council makes two general comments on the Interim Report and the approach taken so far in the review.

First, the Interim Report contains no clear findings nor recommendations on how the consumer law should be changed. It instead mostly continues the approach in the Issues Paper of asking questions or floating options for change. Many of the questions and options tend towards increasing the scope of regulation.

Secondly, the evidence base supporting the questions and options is weighted heavily towards stakeholder views rather than empirical evidence of a problem with the current law. On page 7 CAANZ lists the sources of evidence as: views on the Issues Paper, face-to-face consultations with stakeholders across Australia, a national survey of consumers

and businesses and a study of overseas consumer policy frameworks. These are valid sources of evidence, but they need to be complemented by substantive empirical research into whether genuine problems exist and warrant change. These might include actual data on the incidence and nature of any problems, case studies, academic studies or legal opinion.

The *Australian Government Guide to Regulation* sets out a number of requirements for policymakers. The first two questions that policymakers should ask themselves according to the Guide are:

1. What is the policy problem you are trying to solve?

2. Why is government action needed?

These two fundamental questions need to be addressed ahead of making any final recommendations. Otherwise the risk is that recommendations could be made that unduly add to the regulatory burden or hold back economic growth without clear evidence of the need for change.

The final report (and any draft report) should clearly demonstrate how the best practice regulation principles in the *Australian Government Guide to Regulation* have been applied to the report's findings and recommendations. The review team might also consider applying the Business Council's principles for rule-making to its recommendations (see Box 1).

More concern needs to be paid to the cumulative compliance costs of introducing the broad range of new measures that are being contemplated. Excessive or poorly considered regulation reduces the competitiveness of businesses, weighs on their capacity to adjust to changing market conditions and significantly increases the cost of doing business. The community is ultimately affected by poorly designed and administered regulation, through less consumer choice and higher prices.

Consistent with the *Guide*, the Business Council recommends that the final report should prioritise non-regulatory actions wherever possible that can make the current law work better, rather than additional intervention. The lack of clarity around parts of the law, raised as a key issue by business (e.g. consumer guarantees), can be remedied without changing the law itself.

Box 1: The Business Council's principles of a high-performing regulatory system[1]
The problem to be solved is well understood: before government seeks to regulate, it must understand the problem or policy priority in depth and test the case for regulation, along with the risks and consequences of not regulating a particular activity.
New regulation is subject to cost–benefit analysis: the costs of new regulation are thoroughly assessed and tested with the community through cost–benefit analysis, which includes an explicit understanding of the costs to the community including business.
Regulation achieves its objectives at least cost: regulation is carefully targeted to achieve its stated objectives and minimise the cost impacts on the community including business.
Regulators perform efficiently: regulation is administered by regulators in the most efficient manner possible to facilitate economic progress.
Regulation is constantly reviewed: existing regulation is constantly reviewed from first principles through new regulatory impact assessments, with regulations amended or removed if it cannot be established that they are appropriately targeted to an ongoing risk or problem.

Product safety

As the Interim Report says, Australia already has two complementary sets of laws to govern product liability: the product safety regime and the defective goods regime. The review is inviting comment on the possible introduction of a general prohibition against the supply of unsafe goods.

The Business Council considers that the current laws are well-established and understood and that the Interim Report does not advance a compelling argument for a general prohibition by demonstrating that the current law is inadequate.

Given there would be costs and uncertainty from introducing a general prohibition, but questionable benefits, our position remains that a general prohibition is not warranted. This was essentially the conclusion the Productivity Commission reached when it considered a general prohibition in 2006. Costs include changes to regulatory compliance systems and the negative effects on business activity that occur from regulatory uncertainty due to a new law requiring development of jurisprudence.

1. Business Council of Australia, *Policy Essentials: Standards for Rule Making*, September 2012, p. 7.

If the CAANZ review decides to give further consideration to a general prohibition, it is essential that it does not duplicate current regulatory requirements. Any new regulation should be offset with a reduction in the regulatory burden elsewhere in the system.

The Business Council continues to support a nationally consistent approach to product safety regulation. Different rules across the states and territories increases compliance costs for businesses.

Mandatory reporting

The final report should adopt the Business Council's recommendation to exclude food from the ACCC mandatory reporting regime and remove duplication of national regulation with state and territory regulation.

This is not a new issue, but it is yet to be addressed as the *Competition and Consumer Amendment (Deregulatory and Other Measures) Bill 2015* lapsed after Parliament was prorogued in April 2016. The Bill proposed to remove the mandatory reporting requirement in relation to food. The final report should recommend the Bill be reintroduced.

The Business Council supports the option in the Interim Report for the mandatory reporting extension to 4 days or more (page 71). Not all of the necessary information can always be collated within 48 hours, meaning that reports are sometimes incomplete, leading to additional work on the part of regulators who then need to request additional information. Moreover, immediate notification requirements already apply in some cases where there is serious injury or illness.

There is a need for clarity on what amounts to 'serious illness or injury' requiring immediate notification, to avoid triggering reporting requirements unnecessarily for lower grade incidents. The Business Council supports the suggestion that hospitalisation should determine whether an injury or illness is serious enough to trigger the requirement (as discussed in the submission to the Issues Paper by Baker & McKenzie).

Unfair Contract Terms

The Interim Report asks a series of questions about expanding the coverage of the unfair contract term protections. Expansion of the provision for business to business contracts should not be recommended as the law only came into effect on 12 November 2016 and it has not operated for long enough to reveal any significant deficiencies.

The Business Council does not support the extension of regulator powers to compel business to provide information regarding the use of potentially unfair contact terms. Such compulsory information-gathering powers are unnecessary because the matters which a regulator bears the onus of proving, in order to establish that a term is 'unfair', do not require it to access information which will be exclusively held by the business. The matters which a regulator bears the onus of providing can largely be established by referring to the terms of the contract and relying on evidence of harm suffered by consumers. Hence, the burden that the powers would place on business is unjustified.

The Business Council is also concerned about the suggestion that terms that have been found unfair by a court should automatically be banned from future usage (Option 2, page

128). This would be overly prescriptive. Whether a term is deemed 'unfair' turns on the facts of a particular case, so court rulings should only be used as guidance.

The Business Council agrees that a post-implementation review of the unfair contract terms protections would be beneficial.

Access to remedies: 'follow-on' provisions

The Business Council is concerned that the proposal to apply 'follow-on' provisions to admissions of fact (Option 2, p168) will have an adverse impact on settlement of enforcement proceedings. Agreed admissions or statements of fact are presented to a court by parties to reduce the costs and uncertainties of litigation. However, agreed admissions will be substantially less appealing to respondents if they are used to facilitate private litigation, including class actions, by constituting prima facie evidence in these subsequent actions.

The additional advantage that might be gained by applying 'follow-on' provisions to admissions of fact is not worth jeopardising the clear benefits of swift settlement of enforcement proceedings.

Proposed increase in $40,000 threshold for defining a consumer

The review team has asked whether the threshold for defining a consumer should be increased from $40,000. The Business Council considers the arguments expressed in the Communications Alliance submission to be a strong rationale for retaining the threshold at the current level. That is, consumers purchasing products over $40,000 are 'commonly in a position where they can freely negotiate the terms of their purchase and understand the implications of their contractual arrangements'.

However, if an increase is recommended, then any increase should not exceed the historical rate of growth in the CPI, to avoid unduly expanding the scope of the law. There would also need to be greater consideration of the impacts on suppliers prior to any change to the threshold.

Unconscionable conduct

The Business Council is pleased with the indication in the Interim Report that there is no 'gap' to warrant a general prohibition on unfair trading.

> CAANZ notes that greater clarity on unconscionable conduct is anticipated as the case law develops, and that is not clear that there is a current regulatory gap that warrants the introduction of a general and economy-wide prohibition against unfair trading.' (Interim Report, p106)

This is consistent with our views above that there needs to be a clear articulation of the problem to be solved prior to implementing additional regulation.

The exemption for publicly listed companies should be extended to subsidiaries of publicly listed companies, on the basis that they are equally likely to be capable of genuine negotiation on a level playing field, in order to fairly protect their commercial interests.

Consumer guarantees

The Business Council reiterates the position from our earlier submission that consumer guarantee provisions require more clarity on the appropriate duration of guarantee periods, and the definition of what constitutes a 'major failure'. The Interim Report suggested that one option could be that the ACL could specify that:

> a safety issue will trigger a 'major failure', or will do so if a repair or replacement does not resolve the issue (given that some safety issues may not pose immediate risks).

This option may provide some clarity, provided any draft report and the final report includes clear and specific wording for stakeholders to assess. Further, members of the Business Council believe that businesses should have the opportunity to offer to resolve a consumer issue by repair or replacement, before an item is said to have a major failure.

In our submission to the Issues Paper we proposed that the major failure test (section 260) could be enhanced to be a two-pronged rule before the consumer can choose the remedy – that a reasonable person would not have bought it and it cannot be resolved by repair or replacement.

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