Caravan & Camping INDUSTRY ASSOCIATION NSW

Manufactured Housing INDUSTRY ASSOCIATION NSW

Land Lease Living INDUSTRY ASSOCIATION NSW

12th December 2016

Consumer Affairs Australian and New Zealand
Australian Consumer Law Review

Submitted online: www.consumerlaw.gov.au

SUBMISSION IN RESPONSE TO THE AUSTRALIAN CONSUMER LAW INTERIM REPORT, October 2016

The Caravan, Camping & Touring Industry & Manufactured Housing Industry Association of NSW (including Caravan & Camping Industry Association, Manufactured Housing Industry Association and Land Lease Living Industry Association) is this State's peak industry body representing the interests of caravan and holiday parks, manufacturers and retailers of recreation vehicles (RVs) (motorhomes, campervans, caravans, camper trailers, tent trailers, 5th wheelers and slide-ons) and camping equipment, residential land lease communities and manufacturers of relocatable and manufactured homes.

We currently have, as members, over 700 businesses representing all aspects of our industry. More than 400 are operators of holiday parks and residential land lease communities (residential parks, including caravan parks and manufactured home estates) in New South Wales (NSW) and over 200 are manufacturers, retailers and repairers of RVs and accessories.

Following on from our 27th May 2016 submission in response to the Australian Consumer Law Review Issues Paper March 2016 (Issues Paper), we welcome the opportunity to provide feedback on the issues and options presented in the Australian Consumer Law Interim Report as relevant to our industry.

1. SMALL BUSINESS

We support the view that small business stakeholders should have similar protections as consumers under the Australian Consumer Law (ACL), due to their tendency to resemble the level of resources and sophistication of individual consumers.[1] As such, amendments to the legislation that support small business consumers and improve their ability to access swift and cost effective remedies in Courts and Tribunal should be made, including any necessary increase to the $40,000 threshold.

We also agree that there are opportunities for guidance material on the ACL to be further tailored to accommodate the needs of time-poor businesses in a general sense and to help address industry-specific issues. As the peak body for the caravan and camping industry in NSW, we would be happy to facilitate this process by providing industry data and connecting regulators directly with industry participants for the purpose of research and education.

[1] *Submission from WA Small Business Development Corporation, p 37, Australian Consumer Law Interim Report October 2016.*

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2. CONSUMER GUARANTEES

A 'Major' Failure

We have previously raised the issue that clarity is needed on what constitutes a 'major' failure, however we do not support Option 1, as proposed on pages 45 and 62 of the Interim Report, that the ACL could specify that "*a safety issue will trigger a 'major failure, or will do so if it is not resolved by a repair or replacement"* and "*multiple 'non-major failures' can trigger a 'major failure.'*.

Such an approach could have damaging consequences for particular businesses. For example, caravans and motorhomes are complex and sophisticated units. They are:

- often bespoke items, custom designed and hand made to order,
- comprised of goods produced by other manufacturers (i.e. air-conditioners, fridges, stoves, televisions, etc),
- made up of many moving parts and integrated parts,
- likely to be subjected to difficult Australian terrain and environmental conditions, and
- taken to remote areas of the country.

We and the Caravan Industry Association of Australia have also outlined the nature of the RV repair industry and delays in repairs beyond the control of traders.

The framework of the ACL should remain principles-based in order to be flexible and respond appropriately to transactions in different industries. Clarity on the issue of what constitutes a 'major' failure is therefore more appropriately addressed in guidance materials and direction from regulators.

Reasonable Durability

For the same reasons, we submit that the test for durability should remain flexible and principles-based to account for different goods and services in different industries. As such, we support CAANZ's suggestion on page 49 of the Interim Report that *"there may be opportunities to enhance the reach and efficacy of existing guidance materials without being overly prescriptive…together with more examples and visual aids."* We reiterate that clarification on factors for determining a reasonable time for providing a remedy are also important, particularly for the caravan and camping industry.

Non-disclosure Agreements

We oppose CHOICE's suggestion for banning non-disclosure agreements for settlement that do not offer more than existing ACL rights. Such agreements do not equate to 'contracting out of' the ACL and the ability for traders to settle disputes through confidential and mutual agreement with consumers is fundamental to swift and cost effective dispute resolution for both parties. If CHOICE's concern is really about the availability of information for regulators, then the solution lies in appropriate legislative disclosure and immunity provisions, as set out in Box 5 on page 52 of the Interim Report.

Lemon Laws

It is our position that the ACL is sufficiently robust and flexible enough to deal with issues of defective goods and that industry-specific regulation is not necessary. Should strong evidence emerge that suggests otherwise, we agree with the submission of the Queensland Law Society on page 60 of the Interim Report that *"if any additional protection against the*

purchase of 'lemons' is proposed to be introduced, those protections should apply broadly rather than to specific industries."

Nevertheless, we reiterate our submissions above that RVs are usually bespoke items and custom built by hand. Defects across a model of car in the broader vehicle industry is an issue distinguishable to defects in custom built RVs. This needs to be taken into account in any introduction of a 'lemon' law.

Warranties Against Defects

We acknowledge stakeholder comments regarding the mandatory notice for warranties against defects being specific to Australia and support a more streamlined approach to disclosure and reducing compliance costs for manufacturers. A generic statement could be developed that allows use across multiple jurisdictions, while still providing consumers with a meaningful notice about their consumer rights. An example might be:

> *"You may be entitled to remedies against defects in our goods beyond those offered under our warranty. This may include repair, replacement, refund and compensation for loss or damage. Find out about your rights here: link to relevant website for further information."*

Extended Warranties

It is important to highlight that consumers can generally access remedies easily and efficiently under extended warranties, as acknowledged by the Australian Retailers Association and CHOICE on page 66 of the Interim Report. With this in mind, extended warranties should be encouraged by not increasing the compliance burden for traders.

To address the issue of consumers assessing the value of extended warranties, generic information at the point of sale, such as a standard notice about the ACL, would likely suffice and not impose requirements on retailers more burdensome than those imposed on manufacturers for warranties against defects. Other suggested requirements, such as a summary of key terms and comparisons between the extended warranty, are too burdensome and unnecessary and we agree that a cooling-off period may create complexities in terms of coverage.

3. PRODUCT SAFETY

General Safety Provision

We agree that the introduction of a general product safety provision would offer limited consumer benefit, as outlined by the Productivity Commission on page 75 of the Interim Report and would likely result in increased and disproportionate costs for businesses. Product safety is addressed by the ACL, but also a number of other laws and regulations.

Businesses that wish to remain in the market have an intrinsic interest in producing products that are safe. We agree that the introduction of a general safety provision would not change this for business that already comply and would have no impact on businesses that will never comply. Further, it is likely that innovation of new products would be negatively impacted as businesses struggle to be certain that pre-market controls have been executed to capture all possible safety issues that may arise.

Product Safety Standards

We support stakeholder suggestions that Australia should rethink its approach to product safety standards and adopt performance-based compliance, rather than a prescriptive approach. The 'hierarchy of measures' proposed by Master Electricians Australia (page 88 of the Interim Report) is worth exploring further. Providing businesses with a choice of complying with a voluntary standard, or a comparable means of compliance, where no mandatory standard exists could create a flexible and responsive regulatory framework that still encourages product innovation and competition.

A similar model to Australia's work healthy and safety regime may also be worth considering, however this suggests the need for a general safety provision (to form the general duty placed on persons conducting a business or undertaking), which we do not support. There may also be a greater level of uncertainty as businesses would be required to make their own and varied assessments on risk and product safety.

Mandatory Reporting Requirements

We agree with stakeholders' views on page 91 of the Interim Report that the ACL's definition of 'serious injury or illness' requires amendment so that injuries and illnesses receiving only minor treatment do not trigger the need for a mandatory report.

However, we also note CAANZ's comments on page 92 of the interim report that *"the definition of 'serious injury or illness' was inserted into the ACL in order to capture all serious injuries and illnesses regardless of where treatment was received"* and that *"a narrower test of 'hospital admission' may not capture all relevant injuries and illnesses to which a reporting requirement should attach."*

Perhaps a balanced approach could be achieved through narrowing the definition to incidents that involve hospital admission, as stakeholders suggest, in addition to prescribing other types of injuries or illnesses. As an example, such an approach has been taken in section 36 the *NSW Work Health and Safety Act 2011*:

> *"**Work Health and Safety Act 2011 No 10***
>
> *36 What is a "serious injury or illness"*
>
> *In this Part, serious injury or illness of a person means an injury or illness requiring the person to have:*
>
> *(a) immediate treatment as an in-patient in a hospital, or*
>
> *(b) immediate treatment for:*
>
> *(i) the amputation of any part of his or her body, or*
> *(ii) a serious head injury, or*
> *(iii) a serious eye injury, or*
> *(iv) a serious burn, or*
> *(v) the separation of his or her skin from an underlying tissue (such as degloving or scalping), or*
> *(vi) a spinal injury, or*
> *(vii) the loss of a bodily function, or*
> *(viii) serious lacerations, or*
>
> *(c) medical treatment within 48 hours of exposure to a substance,*

and includes any other injury or illness prescribed by the regulations but does not include an illness or injury of a prescribed kind."

While mandatory reporting times do require review, we so not support the suggestion of immediate notification (with basic information provided) followed by a more fulsome report during the required timeframe (pages 95-96 of the Interim Report). Supplementing a short timeframe with duplication would not be an improvement to the law.

In light of the options put forward for increasing the mandatory reporting timeframe on page 95 of the Interim Report, perhaps 5 business days is an appropriate balance and would provide sufficient time for business to allocate staff resources, make contact with the consumer, undertake appropriate due diligence and provide a useful report to the regulator.

4. UNCONSCIONABLE CONDUCT AND UNFAIR TRADING

Unconscionable Conduct

We agree with CAANZ's view that a case has not yet been made for amending the unconscionable conduct provisions in the ACL. As currently drafted, the law can evolve in response to emerging consumer issues, changing values and new ways of doing business. We therefore support Option 1 on page 111 of the Interim Report to maintain the existing unconscionable conduct provisions and allow the case law to develop.

Unfair Trading

We do not support the introduction of a general unfair trading prohibition and agree with stakeholders' views that a case should first be made that unfair or 'predatory' practices, such as those identified on pages 113 – 114 of the Interim Report, cannot be address by the existing provisions of the ACL.

5. UNFAIR CONTRACT TERMS

In relation to unfair contract terms, we submit that the current provisions are adequate. We do not support an ability for regulators to compel evidence from businesses to investigate whether or not a term may be unfair. Changes suggested by some stakeholders, particularly in relation to contracts as a whole and provisions to deal with specific systemic unfair terms, face practical challenges and are at this stage unnecessary.

Further, because the unfair contract terms provisions have only just been extended to small business contracts, we submit the law should be given time to development before expanding the legislative examples of unfair terms.

6. ADMINISTRATION AND ENFORCEMENT

Access to Information

We agree that the six operational objectives of the ACL remain appropriate, however we support the call for guidance material on the ACL to be more tailored to accommodate the needs of target audiences, such as time-poor businesses and industry sectors with distinguishing products, services or circumstances.

The RV industry faces consumer issues that are distinguishable from the broader motor vehicle industry and because an RV can be a high value item for a consumer, more clarity

from regulators around party rights and obligations and sample outcomes could be beneficial to this growing market.

Reviewing the structure and formatting of the ACL would also assist in making it more accessible to a layperson.

Access to Remedies

We reiterate the need for a 'triage system' in the NSW Civil and Administrative Tribunal (NCAT) for proceedings under the ACL, as raised in our submissions to the Issues Paper.

We also support the comments of the NSW Small Business Commissioner on page 39 of the Interim Report regarding the lack of clarity about when a business consumer can access the NCAT to make a claim under the ACL and the jurisdiction of the local court restricting their access to sufficient remedies.

The suggestion of establishing a Retail Ombudsman similar to that in the UK is unnecessary in Australia given this role is already undertaken by alternative dispute resolution schemes and state regulators. The opportunity lies in streamlining the process across jurisdictions to ensure that individual and business consumers, no matter where they are in Australia, have efficient and cost effective access to dispute resolution. We note that issues relating to the processes of courts and tribunals are being considered in other reviews, however this should not be done in isolation.

In relation to more narrowly-defined ways in which the ACL could help private litigants in the existing justice system, we suspect that extending the follow-on provisions to apply to admissions of fact, as well as findings of fact, may result in initial proceedings becoming protracted, as businesses seek to avoid any admissions of fact.

However, in relation to enhancing the evidence base for the future development of consumer policy we support initiatives for targeted and meaningful stakeholder engagement. In addition to public consultations, regular and open communication with peak industry bodies, as well as seminars, forums, workshops and round-table discussions that offer direct contact with industry players are effective means of engaging with stakeholders about future research and data needs.

7. PENALTIES AND REMEDIES

Maximum Financial Penalties

We agree that the ACL contains an appropriate mix of penalties and remedies to rectify consumer harm and ensure proportionate, risk-based enforcement.

As such, we submit that the current maximum penalties are adequate and agree with the submission from Allens (on page 178 of the Interim Report) that non-punitive orders, such as requirements to establish compliance programs, undertake staff training and publish correctional advertising, can significantly impact business conduct and reputation – probably more so than a financial penalty.

Non-punitive Orders

On the issue of non-punitive orders, we support the proposal to allow businesses to contract a third party to give effect to community service orders or review or update compliance

programs, particularly where the business is not qualified to do so. This would no doubt result in a better outcome for the community.

However, given potential high costs involved, this option should remain a choice for the business to pursue with leave of the Court, as opposed to the introduction of a Court power to make a relevant order.

Misleading or Deceptive Conduct

We submit that no changes should be made to section 18 of the ACL that results in a criminal sanction or financial penalty for all the reasons identified by stakeholders on pages 184 – 185 of the Interim Report.

We reiterate that prohibitions exposing a person to penalty must be expressed in specific terms. As the prohibition against misleading and deceptive conduct should remain a general term to be effective there is no fair or practical way for penalties to be attached, particularly given that acts of silence or omission are also captured.

Including a Penalty of Imprisonment in the ACL

Finally, despite the availability of imprisonment for breach of the ACL under NSW law, we agree with CAANZ's comments on page 187 of the Interim Report that the differences in how ACL penalties and remedies are applied in each jurisdiction would create practical challenges for introducing a penalty of imprisonment.

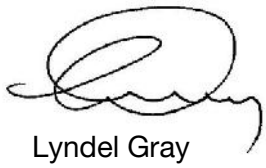
CONCLUSION

As an important stakeholder in relation to the application of the ACL in NSW we are keen to continue to participate in any further discussions on the issues we have raised or any other relevant issues raised by others. We request we be noted as a stakeholder and continue to be included in all future communications and meetings on this important review of the law and practice.

Thank you for your consideration of the issues we have raised.

Should you wish to meet and/or discuss any aspect of this submission please contact Bob Browne, General Counsel on (02) 9615 9920 or email bob.browne@cciansw.com.au.

Yours sincerely



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