



Law Council
OF AUSTRALIA

Australian Consumer Law Review Interim Report

Consumer Affairs Australia and New Zealand

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2016 Executive as at 1 January 2016 are:

- Mr S. Stuart Clark AM, President
- Ms Fiona McLeod SC, President-Elect
- Mr Morry Bailes, Treasurer
- Mr Arthur Moses SC, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Michael Fitzgerald, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Business Law Section

The Business Law Section was established in August 1980 by the Law Council of Australia with jurisdiction in all matters pertaining to business law. It is governed by a set of by-laws passed pursuant to the Constitution of the Law Council of Australia and is constituted as a Section of Law Council of Australia Limited.

The Business Law Section provides a forum through which lawyers and others interested in law affecting business can discuss current issues, debate and contribute to the process of law reform in Australia, and enhance their professional skills.

The Section has a current membership of more than 1,100 members. The Section has 15 specialist Committees, all of which are active across Australia.

Current Office Holders on the Business Law Section's Executive Committee are:

- Ms Teresa Dyson, Chair;
- Ms Rebecca Maslen-Stannage, Deputy Chair; and
- Mr Greg Rodgers, Treasurer.

Legal Practice Section

The Legal Practice Section of the Law Council of Australia was established in March 1980, initially as the 'Legal Practice Management Section', with a focus principally on legal practice management issues. The Section's has since broadened its focus to include areas of specialist practices including Superannuation, Property Law, and Consumer Law.

The Section has a current membership of approximately 400 members. The Section has 8 specialist Committees, all of which are active across Australia.

Current Office Holders on the Legal Practice Section's Executive Committee are:

- Mr Philip Jackson SC, Chair;
- Ms Maureen Peatman, Deputy Chair; and
- Mr Michael James, Treasurer.

Introduction

The Law Council of Australia (**Law Council**) welcomes the opportunity to make a submission in response to the Consumer Affairs Australia and New Zealand (**CAANZ**) Australian Consumer Law Review Interim Report dated October 2016 (**Interim Report**).

This submission addresses a number of the discussion questions identified in the Interim Report which are of most importance to the Law Council.

The Law Council's submission has been prepared in three parts:

- **Part A** has been prepared by the SME Business Law Committee of the Business Law Section;
- **Part B** has been prepared by the Australian Consumer Law Committee (**ACL**C) of the Legal Practice Section; and
- **Part C** has been prepared by the Not-for-profit Legal Practice and Charities Committee (**NFP Committee**) of the Legal Practice Section.

About the Committees

SME Business Law Committee

The SME Business Law Committee has as its primary focus the consideration of legal and commercial issues affecting small businesses and medium enterprises (**SMEs**) in the development of national legal policy in that domain. Its membership is comprised of legal practitioners who are extensively involved in legal issues affecting SMEs.

Australian Consumer Law Committee

The practitioner members of the ACLC take an interest in legal developments affecting consumers in the areas of superannuation, banking and finance, insurance, public health, personal injury and accident compensation. The ACLC liaises with government and non-government bodies involved in consumer law. The ACLC has a particular interest in the harmonisation of consumer protection laws across Australia.

Not-for-profit Legal Practice and Charities Committee

The NFP Committee was established in March 2016. The primary objectives of the NFPCG Committee are to:

- engage with financial accountability and taxation laws and policies that affect NFP organisations;
- promote the administration of justice and the development and improvement of laws and policies affecting NFP organisations; and
- contribute to the implementation of the Law Council's international strategy.

Summary of Views

The views of the Committees are largely consistent, although there are some important differences which are summarised below.

The Law Council has not sought to reconcile any differences in the views of the Committees but would be happy to seek to do so if this would assist the Review.

There are two particular areas where the views of the SME Business Law Committee and the ACLC diverge - namely, Product Safety and Unsolicited Consumer Agreements.

Product Safety

The SME Business Law Committee does not support a general safety provision. It is the SME Business Law Committee's view that such a provision is likely to provide product safety regulators with too much discretion. Rather than establishing a new provision, the SME Business Law Committee submit that the existing specific product safety provisions be made more user-friendly, particularly for SMEs.

However, the ACLC notes that such a provision would align Australia with the world's best practice. The ACLC's view is that the current regimes leaves suppliers with the option of taking the risk that, even if a product is defective, no-one will be harmed and want to sue. The ACLC submits that a general safety provision would strengthen Australia's product safety regime by replacing the current, largely reactive, regime and establishing a more positive legal obligation on suppliers to consider the safety of their products across the supply chain, including design, production and distribution and ensure that the goods they are supplying at the end of that process are safe.

Unsolicited Consumer Agreements

The SME Business Law Committee considers the 'cooling off' period to be an appropriate remedy when sales are made from unsolicited interaction. The SME Business Law Committee favours regimes, such as the sale of financial services products, where 'cooling off' is allowed for a person after sale, allowing consumers to obtain further information after purchase and to cancel their purchase should they then wish to do so.

Conversely, the ACLC favours the development of an opt-in mechanism to replace the cooling-off period as proposed in the Interim Report. The ACLC supports the proposal in the Interim Report and considers that it should apply to unsolicited consumer agreements and other forms of non-business premises sales.

The ACLC submits that given that unsolicited consumer agreements are commonly made in instances of sales pressure, an opt-in mechanism would more likely allow for a consumer's genuine choice free of pressure-selling techniques and, unlike cooling-off periods, overcome the many inherent biases of human behaviour.

Part A

SME Business Law Committee

This part has been prepared by the Business Law Section's SME Business Law Committee. The Committee has sought to respond to each of the questions listed in the Interim Report.

Overarching questions:

Do any issues require legislative intervention, or is the status quo or a non-legislative approach appropriate?

In the SME Business Law Committee's experience, the level of compliance by large businesses with voluntary schemes and codes of conduct is often uneven and sporadic. Accordingly, the SME Business Law Committee supports the introduction of legislative changes as the best means of providing valuable ACL protections for the SME Business Law sector.

In particular, legislative changes would be required to include small to medium SMEs in the protections under the ACL.

Would the options be a proportionate response to the issues? How should they be designed? Are there better alternatives?

The SME Business Law Committee supports legislative changes which establish different obligations for large and small businesses. Currently, the same prohibitions and sanctions apply to both large and small businesses. For example, different maximum penalty regimes should apply to large and small businesses. Such a distinction already exists in relation to the maximum penalties which ACL regulators can impose in relation to an infringement notice.

The SME Business Law Committee notes the Productivity Commission is currently reviewing the regulation framework in terms of the overlapping roles of the various regulators, and the Commission's dealings with SME's should be examined.

What are the associated benefits and costs, including compliance costs? Would it require any transitional arrangements? Are there any unintended consequences?

In the SME Business Law Committee's experience, large businesses often exaggerate the anticipated compliance costs associated with proposed legislative changes. Furthermore, compliance costs arising from the ACL comprise a much small component of a large business's total compliance activity and costs when compared to other legislative requirements.

Questions re penalties and remedies:

Do any issues require legislative intervention, or is the status quo or a non-legislative approach appropriate?

As stated above, the SME Business Law Committee considers some thought should be given to having different maximum penalty and sanction regimes depending on whether the business is a small, medium or large business.

Would the options increase the deterrent effect of the ACL in a proportionate way? How should they be designed? Are there better alternatives?

The SME Business Law Committee considers that the size of the penalties available under the ACL is likely to create over-deterrence in the micro and small business sector and under-deterrence amongst large businesses, particularly listed corporations. Many small businesses are simply terrified of the size of the maximum penalties available under the ACL, which may result in them avoiding particular activities for fear of breaching the ACL. The fact that small businesses often do not seek preventative legal advice means that the over deterrence effect of the ACL penalties is magnified.

What are the impacts for businesses and consumers? Are there any unintended consequences?

In the SME Business Law Committee's view the large maximum penalties under the ACL are likely to be a deterrent to pro-competitive activity in the small business sector.

1.2 Scope and coverage of the ACL (pages 12-33)

1.2.3 Fundraising activities and the ACL

1. Would further regulator guidance on the ACL's application to the activities of charities, not-for-profits and fundraisers help raise consumer awareness and provide greater clarity to the sector?

It is the SME Business Law committee's view that the application of the ACL to charities, not-for-profits and fundraisers is essential to seeking to achieve the overarching objective that emphasises confident consumers, effective competition and fair trading.

Consequently regulator guidance on the ACL's application would help raise consumer awareness and provide greater clarity to the sector, which often assumes commercial compliance obligations should not apply to it given the lack of profit element. This is particularly important given the context in which charities, not-for-profits and fundraisers elicit funds and other donations from consumers.

- **If so, what should be included in this guidance?**

Guidance from ACL regulators should include clear information and examples of when the ACL applies to charities, not-for-profits and fundraisers.

2. Are there currently any regulatory gaps with regard to consumer protection and fundraising activities?

The SME Business Law Committee notes that under the Australian Constitution the ACL is constrained to apply to 'trade or commerce'. As such it has been considered that many of the activities where charities, not-for-profits and fundraisers interact with consumers are not 'trade or commerce' with the consequence that the ACL would not apply to those activities.

If so:

- **What is the extent of harmful conduct or consumer detriment that falls within these regulatory gaps or 'grey areas', and does it require regulatory intervention?**

As noted in Part C below, the Law Council is a supporter of Justice Connect's *#fixfundraising* campaign. The SME Business Law Committee supports the position put by Justice Connect in its submission that this constraint distinction makes it unclear for consumers when dealing with charities, not-for-profits and fundraisers and it would be preferable if legislation clearly applied the ACL to all activities of charities, not-for-profits and fundraisers where they interact with consumers.

- **Would generic protections, such as the ACL, provide the level of regulatory detail necessary to address identified areas of detriment? What would be the benefits and costs of this approach?**

The SME Business Law Committee considers that a degree of regulatory detail may be required to ensure that charities, not-for-profits and fundraisers are clearly made aware of their obligations to comply with the ACL when conducting fundraising activities.

- **Would there be any unintended consequences, risks and challenges from extending the application of the ACL to address regulatory gaps for fundraising activities? If so, how could they be addressed?**

The SME Business Law Committee notes that care should be taken to ensure state and territory fundraising regulations that apply to charities, not-for-profits and fundraisers are repealed if need be so as not to duplicate the requirements of the ACL.

3. Would extending the ACL to all fundraising activities be necessary or desirable to facilitate potential reforms of state and territory fundraising regulation?

The SME Business Law Committee notes that should the ACL be extended to all fundraising activities of charities, not-for-profits and fundraisers, there may no longer be a need for state or territory fundraising regulation as it would be preferable for such regulation to be standardised across states and territories under the ACL.

1.2.4 Who is protected under the ACL?

4. Should the \$40,000 threshold for the definition of 'consumer' be amended? If so, what should the new threshold (if any) be and why?

The SME Business Law Committee considers that as this threshold has been in place for many years, it would be appropriate to increase this threshold to the current equivalent amount, which would be \$100,000. There should also be allowances for appropriate equivalent increases by way of indexation in this threshold each year.

5. What goods or services would be captured that are not already?

The SME Business Law Committee considers that on-line and digital services provided from overseas to Australian consumers and SMEs should be included for protections under the ACL.

1.2.5 Exemptions under the ACL

6. Are there other priority exemptions that are not discussed in this chapter that should be considered? If so, what are these and why should they be considered?

The SME Business Law Committee takes the view that all providers of goods and services to consumers and SMEs should be included under the ACL so as to seek to achieve the overarching objective that emphasises confident consumers, effective competition and fair trading.

1.2.6 Interaction between the ACL and ASIC Act

7. Should the ASIC Act be amended to explicitly apply its consumer protections to financial products?

The SME Business Law Committee's position is that inclusion under the ASIC Act of specific ACL protections for consumers and SMEs would improve the experience of financial services customers.

8. What would suppliers of financial products need to change to achieve compliance, and what benefits or impacts would there be for businesses and consumers?

From the experience of the SME Business Law Committee, suppliers of financial products should already be conducting their businesses and issuing their products in compliance with ACL to maintain customer engagement and support their requirements for positive reputational customer experiences. The introduction of specific ACL obligations under the ASIC Act should accordingly not require excessive additional compliance resources or changes to processes and products.

9. Are there any unintended consequences, risks or challenges in doing so?

ASIC as the financial services regulator under the ASIC Act may need to increase its skill levels in ACL application to financial services and products.

2.1 Consumer guarantees (pages 43-69)

2.1.2 'Acceptable quality' for goods

10. Could the issues about the durability of goods be addressed through further guidance and information?

The SME Business Law Committee is aware that there is a concern amongst SME's is the period of time that a product will be considered to be free from defects for the purposes of the consumer guarantee laws. The current test is a reasonableness test based on the value and nature of the relevant product. The Committee notes that there may be some benefit setting some specific timeframes for popular consumer goods as has been done in New Zealand.

- 11. Are there other areas of uncertainty raised by stakeholders that would benefit from further guidance? For example, the cost of returning rejected goods, including what may constitute 'significant' cost?**

The SME Business Law Committee believes that the laws are working effectively and that there are no major areas of uncertainty.

- 12. If they are not suited to this approach, why not? For example, do the issues (such as the costs of technicians or returning a good) require further legislative clarification, or should the status quo remain to ensure a high level of flexibility?**

See earlier response.

- 13. What more, if anything, can be done to encourage businesses to provide more information about the durability of their products? What, if any, further guidance on durability is feasible while still allowing important differences between goods of a certain type to be recognised?**

The SME Business Law Committee notes that businesses often have their own internal guidelines about the durability of the products which they sell and considers that businesses could be encouraged to make these internal guides transparent to their customers.

2.1.4 Lack of clarity about 'major failures' & 2.1.5 Industry-specific concerns

- 14. Can issues about the acceptable quality of goods that are raised in particular industries be adequately addressed by generic approaches to law reform, in conjunction with industry specific compliance, enforcement and education activities? What are the advantages and disadvantages of this approach?**

As stated above, the SME Business Law Committee believes that the consumer guarantee laws are working well. The SME Business Law Committee would not support potential changes which departed from the generic application of the current laws.

- 15. What kinds of industry specific compliance and education activities should be prioritised in the context of finite resources?**

Based on the experience of Committee members, new and used car retailers do not have a good understanding of consumer guarantee laws.

- 16. In what circumstances are repairs and replacement not considered appropriate remedies? Or put another way, are there circumstances that are inherently likely to involve, or point to, a 'major' failure? If so:**

- **What are these circumstances, and should they be defined, or deemed, to be major failures? For example, should there be discretion for courts to determine the number of 'non major failures' or type of safety defect that would trigger a 'major failure'?**

In the SME Business Law Committee's view, businesses need to understand that some defects which they do not consider to be a major failure, would be considered to be a major failure by the consumer. For example, some computer manufacturers would not consider the failure of a motherboard to be a major failure, and as such would opt to

replace this component rather than providing the consumer with the option of seeking a refund. Consumers often have a different view about the failure of a motherboard.

- **Are there any relevant exceptions or qualifications?**

Not that the SME Business Law Committee is aware of.

- 17. What are the costs associated with businesses providing refunds in circumstances that are above the costs associated with existing business policies on refunds? What impacts would this have on consumers?**

The SME Business Law Committee does not have the knowledge to comment on this issue.

- 18. Are there any unintended consequences, risks or challenges that need to be considered? For example, how would they affect current business policies regarding refunds?**

The SME Business Law Committee does not perceive that businesses have changed their existing refund policies in response to the consumer guarantee legislation. Generous refund policies, such as full refunds for change of mind, are seen as an important point of difference from a marketing perspective.

2.1.6 Disclosure of rights under the ACL

- 19. Is there a need to amend current requirements for the mandatory notice for warranties against defects? If so:**

- **how should the text be revised to ensure that consumers are provided with a meaningful notice about the consumer guarantees?**
- **would it, in practice, reduce ongoing costs for business or were they largely incurred when the requirement was introduced?**
- **would it require any transitional arrangements and, if so, what are the preferred arrangements and why?**

The SME Business Law Committee discussed this issue at some length in its initial submission dated 23 June 2016. We repeat our earlier submissions in support of amendments to the current requirements in relation to mandatory notice for warranties against defects.

- 20. Are there other and more effective ways to notify consumers about their consumer guarantee rights? Could these potentially replace the mandatory text requirements.**

SME Business Law Committee members do work for a range of medium and large global businesses. The general view amongst these clients is that Australian consumers are amongst the best educated, if not the best educated, consumer in the world in terms of their legal rights, particularly in relation to their consumer guarantee rights. The ACL Regulators are to be commended for their educational initiatives.

21. Is there a need for greater regulation of extended warranties? If so:

- **is enhanced disclosure adequate or is more required?**
- **what are the costs of providing general and specific disclosure for businesses? Would disclosure change, in practice, outcomes for consumers?**
- **what has been the experience of consumers and traders in jurisdictions where enhanced disclosure applies (such as in New Zealand)?**

The ACCC has sought to focus on the issue of extended warranties as part of its current enforcement strategy. The SME Business Law Committee believes that it would be prudent for government to await the flow on effect of these enforcement actions on industry practice before considering further enforcement action.

22. What guidance and transition arrangements would businesses need?

See earlier response.

23. Are there any unintended consequences, risks, or challenges that need to be considered?

See earlier response.

24. Are there other ways to address the stakeholder concerns raised, without removing choice and flexibility for consumers?

The SME Business Law Committee believes that consumers are quite rightly sceptical about the benefits of purchasing an extended warranty for goods, particularly in the light of the existing protections provided under consumer guarantee laws.

2.2 Product safety (pages 70-104)

2.2.3 General safety provision

25. What are the key principles for an effective product safety regime?

The SME Business Law Committee considers that the key principles of an effective product safety regime should be standards which are easy to understand and apply and a practical enforcement of product safety standards. Some of the current standards are very complex both in terms of how they are written and the tests which have to be applied. From the Committee's experience these standards are very difficult for small businesses to follow. Also, product safety regulators could take a more practical approach to some standards. In some cases, product safety regulators do not appear to have interpreted the standard properly which has resulted in costly recalls.

26. Would a general safety provision in the ACL better meet those principles? Why, or why not?

The SME Business Law Committee does not support a general safety provision as it is likely to provide product safety regulators with too much discretion. The SME Business Law Committee would prefer that the existing specific product safety provisions be made more user-friendly, particularly for the SME segment.

27. Would a general safety provision provide an effective and proportionate response to concerns raised about the current regime?

- **What costs would it impose on business, for example, what processes or practices would need to be changed?**
- **What impacts would it have on safety outcomes for consumers?**
- **What, if any, transitional arrangements would be required for businesses?**
- **Are there any unintended consequences of a general safety provision?**

The SME Business Law Committee believes it is arguable that there already exists a general safety provision in the ACL under the consumer guarantee provisions. The SME Business Law Committee believes that an unsafe product would not be of acceptable quality and as such the consumer would have rights for a refund, repair or replacement.

28. Are there any current overseas models, or features of models, that should be considered in any general safety provision? If so, why? Would adaptation be required for the Australian context?

SME Business Law Committee members are not familiar with the product safety regimes which apply overseas. Having said that, SME Business Law Committee members are aware from some of their global clients that they view Australian product safety laws as amongst the most actively enforced, if not the most actively enforced, product safety laws in the world.

2.2.8 Performance-based approach to compliance with standards

29. Should a 'performance based' approach to product safety standards be introduced?

- **What changes would businesses need to implement, and what are the associated costs? What impacts would a 'performance based' approach have for consumers?**
- **Are there any unintended consequences, and how could these be addressed?**

SME Business Law Committee members are aware of some cases where product safety regulators have taken highly technical approaches to product safety laws. For example, the standard for bunk beds requires that the slats on the base of the upper bunk be secure and the distances between the slats be smaller than a child's head. The purpose of this standard would appear to be to prevent injuries which may arise from a child jumping on the mattress on the lower bunk bed and getting their head caught in the slats. However, one case, a product safety regulator demanded a costs recall of a model of bunk bed where there was no lower bunk but rather a built in desk. In the Committee's view this was not an appropriate application of the relevant standard.

30. How could the approach be designed? For example:

- **Are there any current domestic or overseas models, or features of models, that should be considered?**
- **How would it interact with other elements of the current regime, or with a general safety provision?**
- **What, if any, transitional arrangements would be required for businesses?**

The SME Business Law Committee does not have the knowledge to comment on this issue.

2.2.10 Mandatory reporting requirements

31. Should the mandatory reporting triggered be clarified? If so:

- **How should this be achieved?**
- **What changes would businesses need to implement to their current reporting processes, and what impact would this have on their compliance costs?**
- **How would this affect the information that is available to regulators, and product safety outcomes for consumers?**

The SME Business Law Committee considers that the mandatory reporting provisions of the ACL have been a highly successful and important reform. The SME Business Law Committee does not believe that there is any need to amend these provisions at this time.

32. Should the current timeframe for making a mandatory report be extended? If so:

- **What time period should apply?**
- **Should it be accompanied by other requirements, for example, immediate notification?**
- **What changes to businesses processes would be needed, and what would be the impact on compliance costs?**
- **What, if any, transitional arrangements would be needed?**
- **Are there any unintended consequences, and how could these be addressed?**

The SME Business Law Committee believes that there may be an argument for shortening the time frames from 48 hours to 24 hours. Given the seriousness of the issues, 48 hours could often be too long a period to advise the relevant products safety regulator of an injury or death arising from the use of a product

2.2.12 Product bans and recalls

33. Should a statutory definition of a voluntary recall be introduced? Would this address the concerns raised? If so:

- **How should a voluntary recall be defined?**
- **What factors or criteria should be included?**

The SME Business Law Committee does not see the need to create a statutory definition of a voluntary recall.

34. Should the penalty for a failure to notify a recall be increased and, if so, to what amount?

The SME Business Law Committee believes that the penalties for failure to notify a voluntary recall are too low at \$16,650 for a corporation and \$3,300 for an individual. Having said that, the first step may be for product safety regulators to take enforcement action against corporations and individuals which fail to report a voluntary recall. As far as the SME Business Law Committee is aware such enforcement action is very rare.

35. Should current processes for implementing product bans and recalls be streamlined? If so:

- **How should they be streamlined?**
- **What would be the associated benefits and costs?**
- **Are there any unintended consequences, risks or challenges that need to be considered?**

The SME Business Law Committee believes that the current processes for implementing product bans should be amended to place exclusive jurisdiction with the ACCC and the Commonwealth Minister, rather than the States having jurisdiction to issue interim bans.

2.2.13 Public information about unsafe products

36. Is there scope to improve the quality of information available to consumers on safety risks? If so:

- **What are the benefits of increased information, and what costs, risks or challenges need to be considered?**
- **What information is most helpful to consumers, and how should it be used? In a context of finite resources, what information should be prioritised?**
- **How could this be achieved? For example, in what format should information be provided?**

The SME Business Law Committee considers that there is scope for improving the quality of information available to consumers on safety risks. While product safety regulators have been focusing on this issue, the quality of information could be enhanced by encouraging greater interagency cooperation and coordination.

2.3 Unconscionable conduct and unfair trading (pages 105-116)

2.3.2 Are the provisions working effectively?

37. Is allowing the law on unconscionable conduct to develop an appropriate and proportionate response to the issues raised, and to future issues that may arise?

The SME Business Law Committee is aware that for a number of years, the law on unconscionable conduct under the ACL and the TPA was not developing in an appropriate manner. In the Committee's, a number of court decisions did not apply the legislation in the way it was intended to operate and limited the effectiveness of the laws by importing irrelevant considerations such as special disadvantage and the existence of moral obloquy. However, the Full Federal Court decision in Lux rectified many of the earlier problems with the interpretation of the law and set unconscionable conduct on a more appropriate path.

38. What are the consequences, risks and challenges of maintaining the status quo, compared with changing the law or codifying existing principles? Are there any better approaches that would address the issues raised while allowing concepts to develop in a flexible way?

The SME Business Law Committee does not support changing the law or codifying existing principles as this may have the effect of confusing the existing law and potentially restricting its application.

2.3.3 Unconscionable conduct and publicly listed companies

39. Is it appropriate to continue to exclude publicly listed companies from the unconscionable conduct provisions and, if so, why?

The SME Business Law Committee does not think it remains appropriate to exclude publicly listed companies from benefitting from the unconscionable conduct provisions.

40. Should the unconscionable conduct provisions be extended to publicly listed companies?

The SME Business Law Committee considers the unconscionable conduct provisions should be extended to publicly listed companies.

- **What are the benefits for publicly listed companies?**

As with non-publically listed companies, publically listed companies are entitled, in the SME Business Law Committee's view, to be able to deal with other parties on fair grounds, which means being able to avail themselves of the unconscionable conduct protections under the ACL.

- **What changes would other business need to make to their existing business practices and what are the associated costs?**

The SME Business Law Committee considers that businesses that do not undertake unconscionable conduct would not need to make any changes to their existing practices, nor incur any additional costs. Even if some changes and associated costs were necessary,

publicly listed companies are likely to have the resources to be able to absorb any minimal costs.

- **Should the protections be extended to all publicly listed companies, or are some exceptions appropriate?**

It is the SME Business Law Committee's position that the protections should be extended to all publically listed companies with no exceptions.

- **Are there any unintended consequences, and how could these be addressed?**

The SME Business Law Committee is not aware of any unintended consequences.

2.3.4 Unfair trading

- 41. Are there any other benefits and disadvantages to a general unfair trading prohibition that should be considered?**

The SME Business Law Committee does not believe that a case has been made for the introduction of a general unfair trading prohibition.

- 42. Is there further evidence of a gap in the current law that justifies an economy wide approach?**

Not that the SME Business Law Committee is aware of.

2.4 Unfair contract terms (pages 117-132)

2.4.2 Unfair terms in insurance contracts

- 43. Should the ASIC Act's unfair contract terms protections be applied to contracts regulated under the Insurance Contracts Act?**

It is the SME Business Law Committee's position that the unfair contract term protections should also apply to policies covered by the Insurance Contracts Act.

The SME Business Law Committee notes that this issue has been raised and discussed over some years and in a number of reports with a view to supporting the Government's objective of protecting consumers against unfair diminution of rights under contractual arrangements developed in the absence of genuine negotiation so as to ensure consumers have appropriate remedies when they suffer detriment as a result of unfair contract terms.

If so:

- **How should it be designed? For example, should it apply to all types of insurance contracts, or are some exemptions appropriate?**

The SME Business Law Committee considers that the unfair contract term protections should apply to all types of standard form insurance contracts with no exemptions. They should apply for policies issued to consumer or SME policy holders, as well as for large commercial policyholders, with a view to making the market place more competitive by removing unfair provisions and practices.

- **Would any changes to the definition of 'main subject matter' be required?**

The SME Business Law Committee recognises that in order to ensure there are no unfair terms, the exemption of 'main subject matter' should be removed for insurance contracts.

- **Would the same types of terms be considered 'unfair'?**

The SME Business Law Committee notes that the assessment of what constitutes an 'unfair' term under an insurance contract, as with other standard form contracts, would ultimately be made by a court in light of the circumstances existing between the parties.

- **Would this result in any likely changes to the insurance contracts that are offered to consumers? For example, to what extent would this option address the issues or examples of unfair terms raised by stakeholders?**

The SME Business Law Committee is aware from experience that when unfair contract term provisions were included in non-insurance contracts both with regard to consumers and more recently with regard to small businesses, insurers in practice reviewed their policy terms and revised them to remove any potential unfair terms.

- **What would be the compliance costs of changing insurance contracts, and how would these affect consumers?**

From the SME Business Law Committee's experience, and based on the exercises done for non-insurance policy contracts, the compliance costs to insurers to implement policies without unfair terms would not be significant.

- **What, if any, transitional arrangements would be required?**

The SME Business Law Committee notes that it may be necessary to allow insurers to retain unfair terms in policy documents already on issue, but perhaps to apply the unfair contract provisions to any actions under such policies from the date the legislation introduces the requirements for insurance contracts.

- **Are there any unintended consequences, and how could these be addressed?**

See previous answer.

2.4.6 Monetary penalties

44. Should the use of terms previously declared 'unfair' by a court be prohibited?

If so:

- **What should be the extent of the prohibition? For example, would it only apply to identical or similar standard form contracts, within a particular sector, or more broadly?**
- **Would this increase the deterrent effect of the unfair contract terms provisions?**
- **What penalties and remedies should apply?**
- **What, if any, transitional arrangements would be required? How should business be made aware of contract terms that have been declared 'unfair'?**

- **Are there any unintended consequences, challenges or risks that need to be considered?**

It is the SME Business Law Committee's position that as terms declared 'unfair' are assessed as such dependent upon a courts view of the circumstances of the parties to the contract, it is not appropriate to prohibit such declared 'unfair' terms as they may not be unfair in different circumstances.

2.4.7 Representative actions by regulators

45. Would empowering ACL regulators to compel evidence from a business to investigate whether a term is unfair be appropriate enforcement tool?

The SME Business Law Committee considers that ACL regulators should have power to compel evidence.

If so, what should be the scope of this power?

The SME Business Law Committee believes that the power should not be used by ACL regulators as a 'fishing exercise' and should be given with clear parameters for its use.

46. Are there any unintended consequences, challenges or risks that need to be considered?

The SME Business Law Committee believes that ACL regulators would need to be cognisant of the sensitivities of SMEs particularly when dealing with arrangements with their suppliers so as such compulsion does not result in an unproductive response from a supplier.

2.4.8 Legislative examples of unfair terms

47. Should the 'grey list' of examples of unfair contract terms be expanded?

If so:

- **What examples should be added?**
- **Would this help address systemic issues or provide greater clarity for businesses and consumers?**
- **Are there any unintended consequences, risks or challenges that should be considered?**

The SME Business Law Committee considers that there is no need to expand the 'grey list' of unfair contract terms given each situation should be assessed on its own circumstances. However, as determinations are made, the SME Business Law Committee considers it could be helpful for ACL regulators to publish (anonymously) circumstances where unfair contract term was assessed by a court to exist.

2.5 Unsolicited consumer agreements (pages 133-152)

2.5.4 Concerns about the level of regulation & 2.5.5 Concerns about vulnerable and disadvantaged consumers

48. What are your views on maintaining the current unsolicited selling provisions?

From the SME Business Law Committee's experience the current unsolicited selling provisions can be challenging for businesses to comply with while allowing a free flow of conversation and interaction with a consumer when the engagement is face to face or over the telephone. Although on-line unsolicited interactions allow information to be provided on screen, and the interaction then continues once the consumer has touched a box (albeit probably not having read the information), the Committee appreciates that if the provision of prior information is to be maintained as the process, nothing may change.

Is there another approach that would provide a more effective and proportionate response? If so, how?

The SME Business Law Committee notes that there are regimes, such as the sale of financial services products, where 'cooling off' is allowed for a person after sale, allowing consumers to read information after purchase at their leisure, and if they decide they shouldn't have bought the product, to cancel their purchase.

49. Are there any unintended consequences, risks or challenges that should be considered?

The SME Business Law Committee is not aware of any unintended consequences.

50. Should the cooling-off period be replaced with an opt in mechanism?

If so:

- **How should it be designed? For example, should it apply to all unsolicited sales or only high risk sales? How should 'high risk' sales be defined?**
- **What would be an appropriate length of the opt in period?**
- **Should there be any exemptions?**
- **What is the likelihood that consumers would exercise an 'opt in' right? What impact would this have on sales across all sectors that engage in unsolicited selling, and what difference would this make to consumers?**

As answered in 48 above, the SME Business Law Committee considers 'cooling off' to be an appropriate remedy when sales are made from unsolicited interaction.

51. Should additional rights and protections apply to the unsolicited sale of enduring service contracts? If so:

- **How should it be designed? For example, what rights should apply? How would 'enduring service contract' be defined? Are there any appropriate exemptions to consider?**
- **What should be the length, for example, of an extended cooling off period? When should a termination right cease to apply?**

- **What, if any, transitional arrangements would be required, and which industries engaging in unsolicited selling would be most affected?**
- **Are there any unintended consequences, and how could these be addressed?**

The SME Business Law Committee does not support changes to the unsolicited sale laws. The SME Business Law Committee believes that such laws are working effectively. Indeed, SME Business Law Committee members are aware of some businesses which have decided to cease all unsolicited sale activities due to the high risks of non-compliance, particularly where such work is outsourced to third party providers.

52. Should an enhanced 'risk based' approach to unsolicited consumer agreement protections be adopted? If so:

- **How should it be designed? For example, what would differentiate low risk from high risk sales? What different set of rights and protections would apply?**
- **What impacts would this have on sales across all sectors that engage in unsolicited selling, as distinct from direct selling?**
- **How would this affect outcomes for consumers?**

See response above.

53. Can these matters be addressed through further guidance or is legislative change warranted?

The SME Business Law Committee does not support further legislative change in this area, as the relevant laws are already quite complex.

3.1 Implementing the Australian Consumer Law and its objectives (pages 153-172)

3.1.3 Barriers to accessing information

54. What enhancements to existing communication channels would be most useful, and what is the level of consumer need? In a context of finite resources, what should be prioritised?

The SME Business Law Committee believes that the most important enhancement is to encourage greater cooperation and coordination amongst ACL Regulators in terms of the information which they are providing to consumers.

55. To what extent would a standalone version of the ACL be used by consumers and businesses? How should it be formatted, and what additional information (if any) should it contain?

The SME Business Law Committee believes that a stand-alone version of the ACL would not provide businesses or consumers with any advantages.

56. Are there other ways to enhance the accessibility of the ACL and related guidance material that should be considered?

The SME Business Law Committee believes that the ACL and ACL related material is highly accessible to consumers. The ACCC in particular has been preparing a wide range of informative and user-friendly resources to explain the ACL, including a wide range of videos. As stated above, a greater degree of cooperation and coordination between ACL Regulators would be beneficial.

3.1.4 Access to remedies

57. What are your views on an expanded 'follow on' provision, and the extent to which it would assist private litigants?

The SME Business Law Committee considers that while follow on provisions would assist private litigants, the financial risks of pursuing legal action are often too great for all but the largest actions. Relief from costs orders or damage uplift provisions may be necessary to develop a stronger private action culture in relation to the ACL.

58. What, if any, unintended consequences, risks and challenges should be considered? For example, would this option affect the extent to which businesses are prepared to make admissions of fact?

The SME Business Law Committee believes from experience that it is apparent that if the follow-on provisions are enhanced then businesses will be less willing to make admissions of fact. This could create problems for ACL Regulators who often rely on admissions in order to obtain a larger pecuniary penalty from the Court.

59. Are there any other ways that ACL regulators can support private litigants, noting the existence of other review processes?

The SME Business Law Committee considers that one alternative would be for ACL Regulators to broaden the scope of remedies which they seek in their enforcement actions to include damages for small businesses and consumers who have been damaged by illegal ACL conduct. It is not immediately clear to the SME Business Law Committee why ACL Regulators generally seek pecuniary penalties in their ACL actions but rarely if ever seek damages for victims, particularly in the light of s 213 of the ACL which states that the Court is required to give preference to compensation for victims.

3.1.6 Access to consumer transaction data

60. What kind of evidence base is required for future policy development, and what is the most useful way to engage stakeholders about future research and data needs?

The SME Business Law Committee believes that the most effective evidence base for future policy development is engagement with legal practitioners and compliance professionals who are able to explain where the ACL is working effectively and where it is not. It is also important to identify stakeholders who are willing to provide honest and forthright advice which reflects market realities.

61. Are there other ways that ACL regulators can support stakeholder engagement in policy development?

From the SME Business Law Committee's experience often the best source of information can be obtained from former ACL Regulator staff who have moved into the private sector. Such individuals will have insights into both the way in which ACL Regulators operate and the various challenges which such regulators are dealing with, as well as a practical understanding of how the ACL is operating in markets.

62. Are there further ways for stakeholders to contribute and share their research and data with the wider community?

The SME Business Law Committee believes that one valuable practice could be for ACL Regulators to look at sharing aggregated complaint data about a particular business with that business. Businesses would find such information invaluable in terms of developing their compliance program and making enhancements to their complaints handling systems.

3.2 Penalties and remedies (pages 173-187)

3.2.3 Maximum financial penalties

63. Are the current maximum financial penalties adequate to deter future breaches of the ACL? Would an increase be an appropriate response to the issues raised?

- **If so, what approach should be adopted?**

The SME Business Law Committee notes that should the maximum penalty increase, the regulators should assist SME's in terms of understanding the applicability of these maximum penalties.

64. Are there alternative approaches to addressing the issues raised?

As stated in our earlier submission, the SME Business Law Committee believes that consideration could be given to having larger penalties for criminal prosecutions under the ACL, as opposed to civil proceedings. Also, as stated above, different maximum penalties could be introduced depending on the size of the relevant business, as already applied in relation to infringement notices.

65. Are there any unintended consequences, challenges or risks that should be considered?

The SME Business Law Committee believes that one likely consequence of having larger fines for criminal prosecutions is that ACL Regulators, particularly the ACCC, will take a larger number of such cases.

3.2.5 Effectiveness of non-punitive orders

66. Should traders be allowed or required to use third parties to give effect to a community service order? If so

- **How should this arrangement be designed? For example, under what circumstances would it apply? Which third parties should be allowed to give**

effect to a community service order? What requirements should be placed on them?

- **What would be the benefits of such an arrangement for the party in breach, and for consumers?**
- **Are there any unintended consequences, challenges or risks that need to be considered?**

The SME Business Law Committee believes it is appropriate for traders to allow third parties to give effect to a community service order where the trader does not have the relevant expertise.

67. Are there other types of non punitive orders to which this could apply?

The SME Business Law Committee is unable to identify any other types of non-punitive orders to which this could apply.

4.1 Purchasing online (pages 188-202)

4.1.5 Pricing and safety information

68. Are current measures sufficient to ensure price transparency in online shopping?

The SME Business Law Committee believes that existing measures are sufficient to ensure price transparency. SME Business Law Committee member have been advised by their clients that Australian laws in relation to price transparency are likely to be the strictest laws anywhere in the world.

69. Should measures to address pre selected options during booking or payment processes be adopted? If so:

- **How should these be designed? For example, should pre selected options be prohibited, or should any associated fees or charges be required to be included in the upfront price?**
- **Are the changes that would be required for websites and booking processes significant? What would be the costs of such changes? What transitional arrangements, if any, would be required?**
- **Are there any unintended consequences, and how could these be addressed?**

The SME Business Law Committee does not support the use by businesses of pre-selected options.

4.1.6 Application of the consumer guarantees in the online environment

70. Should the sale by auction exemption for consumer guarantees be amended with regard to sales by online auction sites?

It is the Committee's position that, given on-line auction sales have become a common method for consumers to purchase goods, it is now appropriate for consumer guarantees to be amended to apply to such sales.

If so:

- **How should this be designed? For example, should the exemption be clarified, narrowed or removed altogether?**

In the SME Business Law Committee's view the exemption should be removed altogether.

- **Would it require online auction sites to change their existing processes and policies substantially, and if so, what are the costs of doing so and any transitional arrangements that may be required? What are the impacts for consumers?**

The SME Business Law Committee does not have the knowledge to comment on this.

- **Are there any unintended consequences, and how could these be addressed?**

The SME Business Law Committee does not have the knowledge to comment on this.

Contact

The SME Business Law Committee would be happy to discuss any aspect of this feedback. Please contact Coralie Kenny, the Chair of the SME Business Law Committee, on 0409 919 082 if you would like to do so.

Part B

Australian Consumer Law Committee

This submission is made on behalf of the Law Council of Australia Legal Practice Section Australian Consumer Law Committee (**the ACLC**).

The submission provides comment on the following aspects of the Interim Report:

- Application of ACL to financial services and products
- Unfair contract terms and insurance
- Expanded 'follow on' provisions
- Consumer guarantees
- General safety provision
- Unsolicited sales agreements

Application of ACL to financial services and products

The Interim Report proposes as an option on page 13 that the ACL expressly apply all consumer protections for financial services to financial products in the *Australian Securities and Investments Act 2001* (**ASIC Act**). The ACLC submits that ACL protections should apply to financial services and products. Such services and products have potential for great long term financial impact on consumers.

The ACLC would also encourage simplification of the definitional provisions relating to financial product and service. In this respect, we note the comments of Rares J in *Wingecarribee Shire Council v Lehman Brothers Australia (In Liq)* [2012] FCA 1028 relating to the current statutory regime in relation to misleading or deceptive conduct:

The repealed, simple and comprehensive s 52 of the Trade Practices Act 1974 (Cth) that prohibited corporations engaging in misleading or deceptive conduct in trade or commerce has been done away with by a morass of dense, difficult to understand legislation. Those Acts, that now deal with misleading and deceptive conduct, apply differently depending on distinctions such as whether the alleged misleading conduct is in relation to "a financial product or a financial service" (s 1041H(1) of the Corporations Act 2001 (Cth)) or "financial services" (s 12DA(1) of the Australian Securities and Investments Commission Act 2001 (Cth)). Those apparently simple terms are nothing of the sort. A "financial product" is defined in mind-boggling detail in 7 pages of small type in Div 3 of Pt 7.1 of the Corporations Act while a "financial service" takes another 6 pages to be defined in Div 4 of Pt 7.1. The ASIC Act only takes about 4 pages to define "financial service" in s 12BAB. Obviously, there are differences in what each of these Acts and definitions cover – but why? The cost to the community, business, the parties and their lawyers, and the time for courts to work out which law applies have no rational or legal justification. The Parliament should consider returning to a simple clear two line long

universal norm of conduct, as was contained in s 52, if it considers that misleading and deceptive conduct in trade or commerce ought be prohibited.

While as a matter of regulatory practice, the ACCC and ASIC share delegations to enforce the other's legislation (see eg, *Australian Competition and Consumer Commission v CLA Trading Pty Ltd* [216] FCA 377 regarding a Europcar contract being considered a financial product), this complexity can make it challenging for individual consumers to exercise their rights at small claims tribunals and courts.

Unfair contract terms and insurance

The ACLC supports the option proposed by CAANZ to apply the unfair contract term provisions in the ACL and the *Australian Securities and Investments Act 2011* (Cth) to contracts regulated under the *Insurance Contracts Act 1984*.

The ACLC notes that at least three reviews have supported the extension of the unfair contract terms regime to insurance contracts.¹ Further, the ACLC notes the CAANZ intention that generic consumer protections, such as the unfair contract term regime, apply widely across the economy.

At the time of its consultation, the ACLC supported the *Insurance Contracts Amendment (Unfair Terms) Bill 2013*, which would've applied a slightly modified regime to general insurance contracts. Noting the significant consultation that went into the development of that Bill, the ACLC would support that Bill being revisited should the provisions of the ASIC Act not be extended to insurance. It would be more desirable, however, for the regimes to be uniform so that, among other things, the jurisprudence which has developed to date will be relevant to consideration of the new regime

Noting concerns about exclusions in life insurance contracts², the ACLC would encourage the unfair contracts terms regime to apply to both general and life insurance.

At question 43, the Interim Report asks questions about the design of the regime as it may apply to insurance. It is the ACLC's view that it will be important that the definition of 'main subject matter' is not drafted broadly such that the regime will be rendered meaningless. In the insurance context this definition has special significance because if key conditions or exclusions within a policy are exempt from review on the basis that they form part of the main subject matter, then consumers will not have the level of protection they need in insurance policies.

It is clear that unfair terms protections should not apply where consumers do have power to negotiate terms of a contract. This is why the unfair terms protections only apply to standard form contracts, and why they do not apply to the upfront price and the main subject matter. For insurance contracts, the ACLC considers that the main subject matter should be limited to the type of insurance. For example, for comprehensive car insurance, the main subject matter definition should cover terms that relate to the fact that the policy covers a motor vehicle and it is a comprehensive policy. These are terms that a

¹ Senate Economics Legislation Committee, *Report into the Trade Practices Amendment (Australian Consumer Law) Bill 2009*, 2009, [10.13]; *Natural Disaster Insurance Review, Inquiry into flood insurance and related matters*, September 2011, Recommendation 37; House of Representatives Standing Committee on Social Policy and Legal Affairs, *In the Wake of Disasters—Volume One: The operation of the insurance industry during disaster events*, February 2012, [7.22],

² Adele Ferguson, 'Money for Nothing', ABC Four Corners, 7 March 2016.

consumer must necessarily have agreed to before entering the contract. A consumer will not have considered each individual contract term or exclusion.

Expanded follow-on provisions

The interim report sought submissions at Question 58 as to whether the existing 'follow-on' provisions in the *Competition and Consumer Act 2010* (Cth) (**CCA**) should be amended, and if so, what the potential effects on consumers might be. Specifically, the Report sought submissions regarding the extent to which private litigants would be assisted by expanded 'follow-on' provisions in the Australian Consumer Law (**ACL**).

Section 83 of the CCA currently allows for *findings* of fact made by a court to be prima facie evidence of that fact in subsequent 'follow-on' proceedings. By way of example, a finding of any fact made by a court in an ACCC proceeding against a corporation may then be used as prima facie evidence of that fact in a follow-on proceeding brought by consumers against that same corporation.

Currently, the relevant provision of the CCA has been interpreted in a number of Federal Court decisions³ to only apply to findings, not admissions, of fact.

For example, the court in *ACCC v Monza Imports Pty Ltd*⁴ expressed the view that a 'finding of fact by a court' meant a finding made after a hearing; and Goldberg J in *ACCC v Leahy Petroleum Pty Ltd (No 3)*⁵ held that facts which have not been the object of critical analysis should not be available as prima facie evidence in related proceedings. Justice Kiefel in *ACCC v Dataline.Net.Au Pty Ltd*⁶ agreed with that this was the correct approach to s 83.

This poses challenges for private litigants in circumstances where a matter is resolved through settlement between the relevant corporation and the ACCC.

A number of stakeholders have asserted that the existing "follow-on" provisions in the competition and consumer legislation require expansion in the ACL to extend to *admissions* of fact.⁷ The Law Council supports the introduction of this amendment to the CCA.

Benefits of extending the current provisions

The current s 83 provision is an effective mechanism by which costs and complexity are reduced in consumer litigation. This provision is an important means by which barriers to private enforcement proceedings are reduced for private litigants.

A key hurdle for private litigants in the context of Part IV of the CCA is the lack of access to information, particularly in cartel cases. The documentary trail of evidence in such matters, coupled with the fact that plaintiffs do not have the information gathering powers of the ACCC (or the power to offer immunity) mean that private litigants face great difficulty in establishing liability.

³ The Review cites the following cases in this regard: *ACCC v Apollo Optical (Aust) Pty Ltd* [2001] FCA 1456, [24]; *ACCC v ABB Transmission and Distribution Limited (No. 2)* [2002] FCA 588, [51]; *ACCC v Leahy Petroleum Pty Ltd (No 3)* [2005] FCA 265, [118]; *ACCC v Dataline.net.au Pty Ltd* [2006] FCA 1427, [107].

⁴ [2001] FCA 1455, 20-28.

⁵ [2005] FCA 265, 118.

⁶ [2006] FCA 1427, 105-106.

⁷ CHOICE Australia, *Competition Policy Review Submission to the Draft Report*, 17 November 2014, p 29.

The CCA includes provisions which allow both the ACCC⁸ and private litigants⁹ to pursue compensation for loss or damage arising from conduct in breach of Pt IV (or Part IVB,¹⁰ s 60C or s 60K¹¹) of the CCA. Although these provisions exist, very few consumer actions have been brought in Australia in relation to loss and damage arising from cartel conduct.

Extending the current provisions to admissions of fact in follow-on consumer litigation would produce a host of benefits for consumers, businesses and the broader court system. The proposed amendment would assist in easing the evidentiary burden for private litigants, reduce complexity in consumer proceedings, and diminish the overall cost-burden of litigation by virtue of increased efficiency.

One example of the utility of the proposed amendment lies in the scope of discovery being reduced. Consumers and businesses would no longer be required to adduce evidence to satisfy the court of certain facts where admissions or findings of fact had been made in previous proceedings. This would considerably reduce the amount of time, resources and money expended by private litigants on the review and production of documents seeking to establish such facts at trial.

More generally, the expansion of the current follow-on provisions would fundamentally promote access to information, thereby increasing access to justice for private consumer litigants and small businesses. The expansion of these provisions would provide a number of benefits to both consumers and the courts - most significantly, a tangible reduction in the overall cost-burden of litigation to consumers.

Deficiencies in proposed amendments

Despite the clear benefits presented by the proposed amendments, issues may arise relating to the effect such amendments could have on the willingness of defendants to cooperate in cartel investigations. Alternatively, the amendments might result in an increased inclination for defendants in regulator proceedings to more readily settle disputes due to their increased exposure to follow-on proceedings and possible consequential liability should admissions of fact be made during trial.

The Final Report of the Competition Policy Review (**'The Harper Review'**) noted that the broader impacts flowing from such amendments might involve some degree of compromise to the effectiveness of regulator enforcement of the code.¹²

Extending the coverage of the current provisions to admissions of fact may deter defendant efforts to settle proceedings, and may prove to be a disincentive for defendants to make admissions at first instance.

The scope of the impact of the proposed amendments on the effectiveness of regulator proceedings is yet to be characterised, and may not be discernible without further investigation into the effects of implementation.

⁸ CCA s 87.

⁹ CCA s 82.

¹⁰ Provisions relating to Industry Codes.

¹¹ Provisions relating to the Carbon Tax.

¹² Harper, Anderson, McClusky, O'Bryan, *Competition Policy Review: Final Report*, March 2015.

Proposals

Despite the issues outlined above, and on consideration of the significant benefits to private litigants, the Law Council supports the proposal that s 83 provisions be introduced to the ACL to allow admissions of fact to also be relied upon as prima facie evidence in 'follow-on' proceedings.

The intention of s 83 is broadly to facilitate consumers in bringing efficient private proceedings following earlier regulator proceedings, and seeks to narrow issues in contention at trial. Regularly, ACCC proceedings resolve upon the defendants' admissions establishing the contravention in question.

This proposal seeks to reduce cost and complexity barriers facing private litigants in harnessing the consumer law to redress loss or damage arising from contravention of the consumer protection provisions of the ACL against often deep-pocketed and well-resourced defendants.

Considering one of the fundamental policy objectives of the ACL is the advancement and protection of consumer rights, this proposal fundamentally increases the efficiency of discovery and litigation process, increases consumer access to justice through the reduction of costs, and diminishes the evidentiary burden on private litigants.

Consumer guarantees

Question 16 of the Interim Report asks about the remedies of repair and replacement when goods breach the consumer guarantee of acceptable quality. The ACLC considers that in circumstances where goods fail to operate properly or a defect manifests itself after the goods have previously been repaired or replaced by the supplier, further repair or replacement may not be an appropriate remedy, and a consumer should have the right to reject the goods. This circumstance inherently points to a 'major failure'.

A failure to comply with the guarantee of acceptable quality will often be a major failure simply because, in many cases, a reasonable consumer would not likely acquire goods if they were fully acquainted with the nature and extent of the failure, such as that the goods are not as fit for purpose or free from defects as a reasonable consumer would regard as acceptable. However, this will not always be the case.

To take a simple example, goods will not be of acceptable quality if the battery is missing or does not charge. However, if the supplier can easily supply a new battery so that the goods function properly, it may be that a reasonable consumer would still have acquired the goods knowing that a new battery will need to be, but can easily be, supplied.

However in cases where a consumer returns goods to a supplier for repair or replacement, and the same or another failure arises, this points strongly to the goods being of such unacceptable quality that a reasonable consumer fully acquainted with the nature and extent of the failures would not have acquired them.

Although a supplier might reasonably say that each individual failure can be remedied by repairing or replacing the goods, the ACLC considers that it is not reasonable to expect a consumer to have to tolerate the need for multiple repairs or replacements. A consumer may reasonably have lost faith in the quality of the goods and/or the ability of the supplier to adequately repair or replace them. It is to be expected that a reasonable consumer would not generally have been prepared to acquire goods knowing that they would need to be repaired or replaced on multiple occasions.

The ACLC considers that this situation is not adequately and clearly dealt with in the ACL due to the use of the singular expressions 'A failure' in s 260 and 'the failure' in subparagraph (a). We consider this situation leads to a lack of clarity for consumers and businesses. Although it is possible to interpret the singular references as encompassing the plural, and this may be the correct interpretation, consumers and businesses reading the provision will understandably be unsure. The ACLC considers that the ACL should be amended to put the matter beyond doubt and provide clarity and certainty for consumers and businesses. A suitable amendment may be to insert the words 'or failures' after 'A failure' and 'the failure'.

The ACLC considers that an amendment is also necessary to address the situations covered by paragraphs (c) and (d) of s 260 - where goods are unfit for their common or a disclosed purpose - and where after the goods have been remedied once, it then becomes apparent that they remain unfit for purpose. In such a circumstance a supplier may say that they can still (again) 'easily and within a reasonable time' remedy the goods to make them fit for purpose. For example, a supplier may say that a different remedy can be applied that they believe will make the goods fit for purpose.

The ACLC considers that a consumer should not have to give a supplier a second opportunity to remedy the goods, and should be entitled to reject them. A suitable amendment may be to insert, as a second alternative to the condition that 'they cannot, easily and within a reasonable time, be remedied to make them fit for such a purpose', the condition that 'the supplier has previously attempted to remedy the goods to make them fit for such a purpose'.

As an alternative, the ACLC notes that the former s 75A of the TPA allowed greater protection and fairness by enabling rescission (return of the good) for the breach of a condition (implied term). If a good fails to comply with a consumer guarantee per se, then the consumer should be entitled to immediate rescission (if so desired). The supplier in turn has recourse under the ACL to indemnification by the manufacturer to the extent it has suffered loss as a result of the defective good.

Another issue in relation to remedies under the ACL pertains to the ability of a consumer to easily and fully recover all payments made in respect of the purchase of a defective good. Say, for example, a consumer purchases a fridge and pays for its delivery. If the fridge is defective and the supplier accepts its return and provides a refund to the consumer, it is unclear whether the consumer is automatically entitled to a refund of the delivery fee. Section 259(4) provides for damages "by action against the supplier", however the delivery fee may not be recoverable against the supplier. Section 263 does not appear to provide a direct or immediate refund of the delivery fee, either.

Product safety

The Interim Report includes an option to introduce a general prohibition against the supply of unsafe goods, and questions 26 and 27 relate to whether a general safety provision is appropriate for the ACL.

The ACLC submits that such a provision would strengthen Australia's product safety regime, and align it with the world's best practice. Further, a more positive legal obligation on suppliers to ensure that the goods they are supplying are safe will result in less consumer harm—and will therefore act as a more effective consumer protection than the current, largely reactive, product safety regime.

Currently, the consumer guarantee regime leaves suppliers with the option of taking the risk that, even if a product is defective, no-one will be harmed and also want to sue. A general safety provision would provide an incentive for all suppliers to consider the safety of their products across the supply chain, including design, production and distribution.

Question 31 of the Interim Report considers the mandatory reporting regime that supports the product safety law. The ACLC submits that the reporting requirements should be triggered where there is an apparent foreseeable safety issue, and not just when injury or death has occurred. The emphasis should be on prevention in the public interest; particularly so when dealing with unsafe motor vehicles. Sections 131-132A should be amended to suppliers being required to report incidents within their knowledge that have a reasonable risk of resulting in death, serious injury or illness of any person.

Unsolicited consumer agreements

The Interim Report proposes an option to replace the cooling-off period with an opt-in mechanism requiring consumers to confirm the sale within a limited time before an agreement is valid. The ACLC supports this proposal and considers that it should apply to unsolicited consumer agreements and other forms of non-business premises sales.

The ACLC notes the research undertaken by Deakin University and commissioned by Consumer Action Law Centre that suggests that cooling-off periods do not effectively operate after a customer has taken ownership of something or signed an agreement.¹³ The research finds that cooling-off periods do not overcome the many inherent biases of human behaviour, such as the powerful effect of inertia.

Particularly given that unsolicited consumer agreements are commonly made in instances of sales pressure, an opt-in mechanism would more likely allow for a consumer's genuine choice. The consumer would be able to make their choice free of pressure-selling technique.

Contact

The ACLC would welcome providing additional information to the Review.

Please contact Mr Ben Slade, the Chair of the ACLC on (02) 8267 0914 or at BSlade@mauriceblackburn.com.au if you would like to do so.

¹³ Dr Paul Harrison, *Cooling-off periods for consumers don't work: study* (29 November 2016) The Conversation <<http://consumeraction.org.au/cooling-off-periods-consumers-dont-work-study/>>.

Part C

Not-for-profit Legal Practice and Charities Committee



The Law Council of Australia, through its Legal Practice Section's Not-for-profit Legal Practice and Charities Committee (**NFP Committee**) is a proud supporter of Justice Connect's *#fixfundraising* campaign which seeks '[c]larification and minor amendments to the Australian Consumer Law (ACL) to ensure application to fundraising activities is clear and broad'.¹⁴ The NFP Committee therefore endorses the submission made by Justice Connect in response to the Interim Report.

Please contact Ms Jennifer Batrouney QC, NFP Committee Chair on (03) 9225-8528 or at Jennifer_Batrouney@vicbar.com.au if further information is required.

¹⁴ Justice Connect, *#fixfundraising* <<https://www.justiceconnect.org.au/fundraisingreform>>.