

➤ Australian Consumer Law Review – proposed reforms

In brief: On 19 April 2017, Consumer Affairs Australia and New Zealand released its [final report](#) on the review of the Australian Consumer Law (ACL), recommending a range of reforms to strengthen protections for consumers and businesses. We take a look at the proposed reforms and the implication to your business if they are accepted by the Federal Government.

CONSUMER GUARANTEES



- Enable consumers to obtain a refund or replacement without needing to prove that there has been a 'major failure' when a good fails within a short specified period of time (eg. 30 days).
- Specify that multiple non-major failures can amount to a major failure.
- Work with stakeholders on additional guidance for what 'reasonable durability' means for the consumer guarantee of acceptable quality (including reasonable timeframes for certain goods within specific price ranges).
- Enhance disclosure requirements and introduce a cooling-off period for extended warranties.

IMPLICATIONS:

- Expanding consumer protections for goods that fail quickly will introduce additional complexity to the consumer guarantees and will increase compliance costs for businesses.
- Additional guidance on the concept of 'durability' is welcome and will reduce some uncertainty for businesses and consumers in applying the guarantee of acceptable quality.
- Businesses offering extended warranties will need to update their procedures and train staff on the enhanced disclosure requirements and the ability of consumers to cancel the warranty during the cooling-off period.

PRODUCT SAFETY



- Introduce a general safety provision that would require traders to ensure the safety of a product before it enters the market. This would include:
 - a 'safe harbour' defence for traders that have complied with an appropriate product safety standard; and
 - a pecuniary penalty for a failure to comply, consistent with other ACL penalties.
- Introduce a statutory definition of 'voluntary recall' and increase penalties for failure or refusal to notify a voluntary recall, proportionate to other ACL penalties.
- Update guidance on mandatory reporting obligations to address the meaning of 'serious injury or illness' and 'use or foreseeable misuse'.

IMPLICATIONS:

- Places a clear obligation on traders not to supply unsafe products, which a regulator will be able to enforce without the need for a product to have caused an injury.
- Increases the range of conduct that will trigger the requirement to notify a voluntary recall.
- Further guidelines on mandatory reporting obligations are unlikely to have any practical effect, given there is no proposal to change the statutory definition of 'serious injury and illness' and no definition of what constitutes 'the use or foreseeable misuse' of consumer goods.

PENALTIES



- Increase the maximum financial penalties for contraventions of the ACL by aligning them with the penalty regime under the competition provisions of the *Competition and Consumer Act 2010 (CCA)*.
- For companies, the maximum penalties would increase from \$1.1 million to the greater of \$10 million, three times the benefit obtained from the conduct or 10 per cent of annual turnover for the last 12 months.
- For individuals, the maximum penalties would increase from \$220,000 to \$500,000.
- Penalties should not be introduced for contraventions of s18 (misleading or deceptive conduct).

IMPLICATIONS:

- Signals that contraventions of the ACL are regarded as seriously as contraventions of the competition law provisions of the CCA.
- 2016 Federal Court decision to increase the fine imposed on Reckitt Benckiser from \$1.7 million to \$6 million for ACL contraventions suggests existing regime already has potential for large fines.
- ACCC Chairman Rod Sims has recently stated that the ACCC will be seeking higher penalties in ACL enforcement action.

UNFAIR
TRADING



- > Investigate the value of introducing a general unfair trading prohibition.
- > Allow regulators to use existing information-gathering powers to obtain information and evidence to determine whether a term of a standard form contract is unfair.
- > A broad prohibition of terms previously declared unfair by a court should not be introduced. It is appropriate that terms should only be declared unfair and void on a case-by-case basis.

IMPLICATIONS:

- Regulators will have an enhanced ability to investigate terms which are potentially unfair in standard form contracts.
- The unfair contract terms regime for consumer and business-to-business contracts will largely remain unchanged.
- CAANZ will assess whether a new general unfair trading prohibition should be introduced as a priority project in 2018–19.

(SMALL) BUSINESS
PROTECTIONS



- > Increase the threshold in the definition of ‘consumer’ goods and services from \$40,000 to \$100,000.
- > Extend unconscionable conduct protections to publicly-listed companies.
- > Extend the unfair contract terms regime to insurance contracts.

IMPLICATIONS:

- These proposals will significantly expand the scope of ACL protections available to businesses.
- Higher financial thresholds in the definition of ‘consumer’ significantly broadens the business purchases that will be subject to the consumer guarantees.
- All classes of consumers, including well-resourced publicly-listed companies, will now be able to rely on the unconscionable conduct protections.

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