Business Council of Australia

SUBMISSION

Submission to the Australian Consumer Law Review

JUNE 2016

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Business Council of Australia ABN 75 483 216

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

About this submission

This is the Business Council of Australia's submission to the Australian Government Consumer Affairs Australia and New Zealand's (CAANZ) consultation on the Australian Consumer Law (ACL) Review.

The ACL is a single national consumer protection law that commenced on 1 January 2011. It is jointly administered and enforced by federal, state and territory consumer law regulators (the 'single law multiple regulator' model). The 2009 *Intergovernmental Agreement for the Australian Consumer Law* requires the ACL to be reviewed within seven years of implementation. The ACL Issues Paper is the start of this process and seeks stakeholder views on:

- the effectiveness of the ACL and whether it is operating as intended
- whether the national consumer policy framework meets its objectives of delivering the best outcomes for Australian consumers and businesses
- the flexibility of the ACL to respond to new and emerging issues so it remains relevant as an overarching consumer framework in the future.

The Review's interim report will be released in the second half of 2016, with the final report to be provided to the Legislative and Governance Forum on Consumer Affairs by March 2017.

This submission comments on selected issues raised in the ACL Issues Paper.

Key recommendations

The Business Council supports the current, national approach to consumer law and its regular review. The Business Council makes the following recommendations to the ACL Review team:

1. More clarity and certainty is needed in some areas covered by the ACL, for example the duration of guarantees. This could be achieved by regulators working with industry sectors to provide guidance.

2. Business should be given more opportunity to rectify a 'major failure' before being required to issue a refund.

3. Reporting requirements should be examined to make them more efficient and effective by:

    3.1 Proceeding with reforms to exclude food from the ACCC mandatory reporting regime and remove duplication with state and territory regulation.

    3.2 The current two-day time frame for mandatory reports is very short. Consideration should be given to extending it.

4. There should be a nationally consistent approach to product safety regulation.

5. A prohibition against the general supply of unsafe goods, as raised in the ACL Issues Paper, is not supported as a more detailed proposal is needed to assess whether it is warranted.

6. A prohibition against unfair commercial practices, as raised in the ACL Issues Paper, is not needed. There is insufficient evidence of an existing or foreseeable regulatory gap, nor of the merits of an economy-wide prohibition.

7. The experience of businesses implementing the recently legislated extension of unfair contract terms to small businesses should be examined within this review. The review should monitor implementation costs and identify any changes to the unfair contract terms provisions that will avoid unintended consequences and unnecessary costs from the new law.

Principles of regulation

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

As with all business regulation, best practice consumer protection regulation is clear, efficient and proportionate to the risk.

1. Good regulation is **clear**: it is drafted in plain English and reflects the policy intent and the problem it is addressing, so the community and business can understand the regulation and apply it consistently.

2. Good regulation is **efficient**: it achieves its objectives at least cost and does not unnecessarily distort decision making by businesses and consumers. Regulations should be consistent and not overlap or be duplicative across governments.

3. Good regulation is **proportionate**: regulatory powers should be designed to be proportionate to the problem being managed. Regulation should only be introduced if there is no alternative lower-cost means of achieving a policy objective. If regulation is necessary, a light touch or non-regulatory approach that addresses the policy problem, market issue or community concern is preferable to overly prescriptive regulation. In some cases, self-regulation and co-regulation can be effective in producing good outcomes for all parties involved, without the compliance and administrative costs of government imposed regulation.

Poor regulation can reduce the competitiveness of businesses, limit their capacity to adjust to changing market conditions and increase the cost of doing business. The community is ultimately affected by poorly designed and administered regulation through less consumer choice and higher prices. It is important that regulatory interventions do not become a barrier to resources flowing to areas and activities where they can be put to best use. This can contribute to worse consumer outcomes as well as less investment, lower wages and reduced job creation.

Key issues

The elements of the ACL which the Business Council considers could be improved when assessed against the principles of best practice regulation are set out below.

Unclear or uncertain terms

There is a need for more clarity and certainty in some parts of the ACL, which could be achieved through issuing more guidance to industry. Many of the rules are principles-based and subject to interpretation, which can create uncertainty for businesses and consumers and add to costs.

The 2016 ACL survey estimates the total cost for businesses to resolve consumer problems has fallen to $18 billion per annum,[1] from $21.6 billion before the introduction of the ACL.

The decrease in overall cost is because the number of consumer related issues has fallen. However, the time spent dealing with each problem is estimated to have increased – an average of 3.2 hours per issue compared to 2.5 hours in 2011. It is likely that the uncertainty of the law is contributing to the increase in time to resolve individual issues.

A prime example of uncertainty is guarantee periods (Part 3-2, Division 1, Subdivision A).

The ACL provides product guarantees that goods will be of acceptable quality (section 54), depending on the nature of the good or service purchased. It lists a range of factors that must be taken into account when determining the guarantee, but is silent on the actual duration of the guarantee period. This can be difficult to interpret for different categories of goods. For example, there is no guidance on the typical guarantee period for particular goods, such as refrigerators, mobile phone handsets, or gaming consoles.

The uncertain nature of the guarantee period gives rise to two material cost impacts on businesses. Businesses incur higher costs from:

- additional time needed to train frontline staff to ensure a consistent, ACL compliant approach across the business
- a higher rate of refunds due to many businesses erring on the side of caution when complying with an uncertain and wider guarantee duration.

These potential costs are considered to be high in Australia relative to jurisdictions with clearer consumer protection regimes. Any approach that provides greater clarity and improves business efficiency, while also delivering regulated consumer protections, should result in lower costs and, ultimately, consumer prices.

One option to deliver greater clarity around the duration of consumer guarantees is to develop a regime where industry associations develop guidance, which could then be assessed and where appropriate endorsed by a regulator such as the ACCC.

[1] This is an estimate of the value of the time spent by businesses dealing with consumer problems, not the direct costs to repair or replace products. EY Sweeney was commissioned to conduct the survey by the Australian Treasury, on behalf of CAANZ.

Remedies for ‘major’ failures

As mentioned, the current legislation provides consumers with a range of guarantees, including that goods will be of acceptable quality, fit for a specified particular purpose, and match the description, sample or demonstration model.

Where a good or service does not meet a consumer guarantee, remedies are available. Who chooses the remedy depends on whether the failure is ‘major’ or ‘minor’:

- if a consumer experiences a minor failure with a product or service, the *business can choose* to give the consumer a free repair instead of a replacement or refund (section 259)
- if a consumer experiences a major failure with a product or service, the *consumer can choose* between a replacement, refund or compensation for the fall in value caused by the problem while keeping the good (section 259). A major failure is one where a reasonable consumer would not have bought it had they known about the nature and extent of the failure (section 260).

Many businesses would prefer to repair or replace an item than provide a refund. In many cases where there is a major failure, a replacement product can resolve the issue, so a refund is not necessary. The ACL Review should examine increasing opportunities for businesses to rectify a failure before the consumer can ask for a refund, in particular in cases where:

- the good is clearly not a ‘lemon’
- the consumer has had the good for a long period of time.

The major failure test (section 260) is arguably too restrictive and could be enhanced to be a two pronged rule before the consumer can choose the remedy – that a reasonable person would not have bought it *and* it cannot be resolved by repair or replacement.

There are also problems with refunding digital goods, like electronic computer software or games purchased and downloaded over the internet. If a refund is sought by the consumer, it can be difficult to ensure the consumer will not continue to have access and use of the working elements of the product that have not suffered from major failure (for example, the product may still be stored on their computer).

Reporting requirements

Mandatory reporting requirement for food

The ACL mandates that suppliers of consumer goods (including food) report to the Commonwealth Minister (section 131) if the supplier becomes aware that the consumer goods caused, or may have caused, a death, serious injury or illness.

Food does not lend itself to the ACCC mandatory reporting regime in the same way as other consumer goods:

- It is often not clear when a particular item of food has led to a serious illness or injury, in contrast to other types of consumer goods.
- There are already extensive state and territory based notification processes – the mandatory reporting requirement merely duplicates those processes and does not lead to increased consumer safety.

This is not a new issue, but it is yet to be addressed as the *Competition and Consumer Amendment (Deregulatory and Other Measures) Bill 2015* lapsed after Parliament was prorogued in April 2016. This Bill proposed to remove the mandatory reporting requirement in relation to food. The Explanatory Memorandum to the Bill indicated that the ACCC and Australian food safety regulators considered the current reporting requirement 'did not support the food regulation system, was duplicative and placed a disproportionate cost on industry'.[2]

The subsequent Senate Economics Legislation Committee report[3] found that the current mandatory ACCC reporting requirements:

- are unnecessary and add to the compliance burden on business and regulators without delivering actual safety outcomes
- duplicate the reporting regimes of the states and territories that are already adequate.

There are around 100 food-related notifications issued every month[4], placing a burden on businesses who prepare these reports and regulators who receive them. In particular, for 'clusters' of incidents, such as the recent issues with frozen berries, businesses must continue to prepare and lodge a large number of mandatory reports even after the outbreak has been brought to the attention of the relevant regulators and the public.

There should be renewed consideration of mandatory reporting in the food context with a view to food being excluded from the ACCC regime, as there is adequate state and territory regulation.

Time frame for mandatory reporting

The current two-day time frame for mandatory reports is very short (section 131). Consideration should be given to extending it.

Not all of the necessary information can always be collated within 48 hours, meaning that reports are sometimes incomplete, leading to additional work on the part of regulators who then need to request additional information. In particular:

- The current time frame can be especially problematic on weekends and when responding to social media complaints, resulting in lower quality reports.
- The workload for the ACCC can be increased as it sometimes receives unnecessary reports. A longer reporting period would allow for more investigation to take place. This may reveal that the consumer goods did not cause the serious injury or illness, meaning that no report was required.

[2] *Competition and Consumer Amendment (Deregulatory and Other Measures) Bill 2015*, Explanatory Memorandum, paragraph 1.7.

[3] Senate Economics Legislation Committee Report on the *Competition and Consumer Amendment (Deregulatory and Other Measures) Bill 2015,* May 2015.

[4] As reported in the Food Standards Australia and New Zealand submission to the Economics Legislation Committee Inquiry into the *Competition and Consumer Amendment (Deregulatory and Other Measures) Bill 2015*.

Product safety

Different approaches to product safety

There should be a nationally consistent approach to product safety regulation in Australia. As the product safety regime in Australia is implemented by federal and state regulators, there can sometimes be inconsistencies in the approach. This leads to different outcomes for the states and territories and increases compliance costs for businesses. Further inconsistencies arise as different regulators are responsible for different aspects of product safety.

Unsafe goods prohibition

The ACL Review Issues Paper raised the issue on page 30 of whether there should be a general prohibition against the supply of unsafe goods, as well as against non-compliance with a safety standard or ban. It referred to a case study of the European regime, however a more detailed proposal, including a clearer description of the problem to be solved, needs to be provided for stakeholders to comment on.

Unfair commercial practices prohibition

The Business Council considers that, overall, the ACL adequately achieves its legislated objective of promoting fair trading and consumer protection and does not require substantial change. The ACL promotes these goals as it:

- has a range of general and specific protections
- distinguishes between consumers and businesses
- is flexible enough to adapt to the needs of the situation and society
- provides broad remedies to support its protections as well as offences to deter and punish more serious conduct.

The ACL Review Issues Paper seeks views on whether a general prohibition against unfair commercial practices is warranted. As highlighted in the Productivity Commission's 2008 *Review of Australia's Consumer Policy Framework*, there must be *strong evidence* that a provision against unfair commercial practices is warranted, otherwise its usefulness is limited in practice. The Business Council considers that insufficient evidence has been put forward of an existing or foreseeable regulatory gap in the current law.

Further, the existing protections in the ACL are flexible enough to address various situations from the perspective of the consumer. For example, the prohibition on misleading or deceptive conduct considers the effect the conduct would have on a reasonable or ordinary consumer, while the consumer guarantee that goods be of acceptable quality depends on what a reasonable consumer considers acceptable in the circumstances.

The protections are also flexible enough to adapt to changes in technology and societal values, particularly through judicial interpretation. For example, the prohibition on false or misleading testimonials is useful for consumers relying on customer review websites when making purchasing decisions. Also, the protection for unconscionable conduct has been

interpreted by the courts by 'reference to the norms of society' which are 'permeated with accepted and acceptable community values.'[5]

The introduction of an economy-wide, catch-all provision, without sufficient evidence to justify its necessity and appropriateness, has the potential to generate uncertainty and cost for consumers and business. Businesses may become overly cautious when trying to avoid violating such a regulation, and exit or not even enter certain markets. This could have a detrimental impact on the economy through lower innovation and investment, and deliver worse outcomes for consumers.

If a problem can only be demonstrated in a few narrow cases, other regulatory or policy options will be more appropriate than an economy-wide, uncertain prohibition. For example, if there is a particular industry with a problem involving systematic unfair trading, this could be adequately addressed through a code of conduct, which is a common practice to address and rectify clearly identifiable problems.

The ACL has been appropriately drawn to achieve its aims and is generally regarded as doing so by consumers and businesses.[6] The Business Council does not consider there to be sufficient evidence to justify consideration of a prohibition against unfair commercial practices.

Small business extension to unfair contract terms

As outlined in our previous submissions, the Business Council is concerned that the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* could give rise to unintended consequences and unnecessary costs on business (these changes will be inserted into sections 23 to 28 of the ACL).

The Act will take effect from 12 November 2016. The Regulatory Impact Statement accompanying the changes forecast a compliance cost of only $50 million across all businesses. This ACL Review is an opportunity to collect information on the actual costs that businesses are incurring in the implementation of the unfair contract terms regulations, and any unintended consequences arising from the new laws. This information should be used to identify possible changes to the law that will reduce costs on business, without compromising the fundamental objective of removing unfair contract terms from business-to-business standard form contracts.

[5] *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90, at paragraphs 23 and 41.

[6] The 2016 ACL survey found that 91 per cent of businesses and 54 per cent of consumers believe the ACL adequately protects the rights of consumers.

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