


Working for business.
Working for Australia



Australian Chamber of Commerce and Industry - Submission to ACL Review Issues Paper

17 June 2016



Australian
Chamber of Commerce
and Industry

**WORKING FOR BUSINESS.
WORKING FOR AUSTRALIA**
Telephone 02 6270 8000
Email info@acci.asn.au
Website www.acci.asn.au

CANBERRA OFFICE

Commerce House
Level 3, 24 Brisbane Avenue
Barton ACT 2600 PO BOX 6005
Kingston ACT 2604

MELBOURNE OFFICE

Level 2, 150 Collins Street
Melbourne VIC 3000
PO BOX 18008
Collins Street East
Melbourne VIC 8003

SYDNEY OFFICE

Level 15, 140 Arthur Street
North Sydney NSW 2060
Locked Bag 938
North Sydney NSW 2059

ABN 85 008 391 795
© Australian Chamber of Commerce and Industry 2016

This work is copyright. No part of this publication may be reproduced or used in any way without acknowledgement to the Australian Chamber of Commerce and Industry.

Disclaimers & Acknowledgements

The Australian Chamber of Commerce and Industry has taken reasonable care in publishing the information contained in this publication but does not guarantee that the information is complete, accurate or current. In particular, the Australian Chamber is not responsible for the accuracy of information that has been provided by other parties. The information in this publication is not intended to be used as the basis for making any investment decision and must not be relied upon as investment advice. To the maximum extent permitted by law, the Australian Chamber disclaims all liability (including liability in negligence) to any person arising out of use or reliance on the information contained in this publication including for loss or damage which you or anyone else might suffer as a result of that use or reliance.

Summary of recommendations

Recommendation 1: Objectives

Ensuring that the laws are proportionate and risk based should be a key consideration of Consumer Affairs Australia and New Zealand during the review process and a key decision making criteria for Consumer Affairs Ministers in considering any changes.

Recommendation 2: Definition of consumer purchases

The Australian Chamber supports further consideration of the appropriateness of the \$40,000 threshold, including with regards to the costs and benefits for business.

Recommendation 3: Consumer guarantees

The Review should provide further analysis on whether the consumer guarantees framework appropriately maximises flexibility for consumers and provides the right level of protection against defects.

Recommendation 4: Unfair contract terms

The Australian Chamber recommends that Consumer Affairs Australia and New Zealand closely monitor the implementation of the extension of unfair contract terms to small business to ensure that the reform is operating as intended.

Recommendation 5: Product safety

The Australian Chamber supports allowing trusted international standards to be directly used as the basis for a mandatory safety standard, without first preparing a corresponding Australian Standard.

However, the declaration of an international standard should still be subject to proper consultation and regulatory impact assessment.

Recommendation 6: Multiple regulator model

The Australian Chamber supports more streamlined administration of the ACL and supports-in-principle a carefully managed transition to a single regulator model.

Recommendation 7: Unsolicited sales

Rather than seeking to expand the scope of unsolicited sales provisions, the review should consider how they could be better targeted so that they do not impact legitimate business models.

Recommendation 8: Best practice regulation

Any proposed measures to strengthen consumer protections must take into account compliance costs for business and be subject to rigorous cost benefit analysis.

Table of Contents

1	Introduction	6
2	The Australian Consumer Law is working well	6
2.1	Objectives	6
2.2	Definition of consumer purchases	7
2.3	Consumer guarantees	8
2.4	Unfair contract terms	9
2.5	Product Safety	9
2.6	The multiple regulator model	11
2.7	Unsolicited sales and selling away from business premises	11
3	Best practice regulation	12
4	About the Australian Chamber	13

1 Introduction

The Australian Chamber of Commerce and Industry welcomes the opportunity to provide a submission to the review of the Australian Consumer Law (ACL) issues paper.

The Australian Chamber considers that the ACL is working well and provides an appropriate balance between the needs of consumers and business.

The implementation of the ACL represents a successful reform, replacing 17 existing Commonwealth, state and territory laws and providing a single generic national consumer protection law.

The ACL has provided businesses with an aligned system of consumer protection across the country, reducing business' compliance costs and allowing for a consistent approach across jurisdictions.

The law supports the operation of efficient, well-functioning markets. It encourages economic activity by increasing levels of trust, reducing information asymmetries and ensuring that consumers can be confident that goods and services are safe and fit for purpose.

This post implementation review provides a timely opportunity to ensure that the ACL is operating as intended and to improve the workability of the laws.

This Australian Chamber submission focusses on the high level operation of the ACL and comments on a number of broad issues. We expect that many of our members will be making submissions focusing on more specific sectoral issues.

The Australian Chamber considers that the review should not seek to make significant changes to the ACL framework. Rather it should focus on improving the accessibility, workability, awareness and efficiency of the ACL, and on reducing compliance costs.

Any proposed measures to strengthen consumer protections must take into account compliance costs and be subject to rigorous cost benefit analysis.

2 The Australian Consumer Law is working well

2.1 Objectives

The issues paper asks whether the consumer law's operational objectives remain relevant and what changes could be made.

The Australian Chamber considers that consumer laws should specify a minimum set of behaviours that would be expected from market participants in efficient and competitive markets. They should not be overly prescriptive or restrict mutually beneficial transactions between buyers and sellers.

Consistent with the principle of proportionate regulation, the Australian Chamber recommends that the review looks at ways that the ACL can be streamlined to ensure that consumer protection objectives can be achieved while imposing the minimum cost on business.

It is important to recognise that consumers themselves are ultimately the losers if excessive protections result in unnecessary costs that increase prices or reduce choice by forcing businesses to leave the market.

Of the operational objectives outlined in the issues paper, the Australian Chamber recommends greater emphasis be placed on consumer laws “promoting proportionate, risk based enforcement”. This could be done by expanding this objective to apply to the development and design of the laws as well as to their enforcement.

Recommendation 1: Objectives

Ensuring that the laws are proportionate and risk based should be a key consideration of Consumer Affairs Australia and New Zealand during the review process and a key decision making criteria for Consumer Affairs Ministers in considering any changes.

2.2 Definition of consumer purchases

The issues paper invites discussion on how the ACL defines a consumer. Importantly, the definition of a consumer has ramifications for who has access to protections afforded under the ACL as well as in what circumstances conduct is regulated by the ACL.

In particular, the paper asks whether \$40,000 is still an appropriate threshold for consumer purchases noting that the \$40,000 threshold was introduced in 1986 and has not changed since that time.

Increasing the threshold would broaden the application of the ACL, particularly with regards to business to business transactions above the threshold. However, an increased level of protection would need to be balanced against increased compliance costs for selling businesses.

Key considerations for Consumer Affairs Australia and New Zealand should be:

- Whether significant consumer harm is occurring in relation to transactions above the current threshold.
- Whether alternative protections are available for such transactions under contract law
- The extent of compliance costs for businesses that would result from a higher threshold.
- The implications of a higher threshold to sellers of customised, or built to order products (i.e. specialised machinery), that would be difficult to remarket if returned to a seller under rights conferred to buyers under the ACL.

Recommendation 2: Definition of consumer purchases

The Australian Chamber supports further consideration of the appropriateness of the \$40,000 threshold, including with regards to the costs and benefits for business.

2.3 Consumer guarantees

The system of consumer guarantees was a key aspect of the reforms introduced under the ACL. Despite significant investments in education, substantial uncertainty still exists regarding key concepts such as ‘major failure’, ‘acceptable quality’ and the length of time a good should last.

The Australian Chamber recognises that some uncertainty is inevitable given the consumer guarantee framework must be principles based to provide the flexibility needed to adapt appropriately to transactions involving different goods and services.

However, it is important to examine whether the current framework provides the best way to achieve flexibility and protect consumers.

The consumer guarantee framework helps to ensure that exchanges are mutually beneficial by drawing on the concept of what a reasonable consumer would find acceptable. However, it is important to recognise that different consumers have different expectations and the concept of a representative reasonable consumer is just a necessary legal fiction.

In some cases, greater flexibility to set the terms of consumer guarantees through agreement and disclosure may result in better outcomes.

Flexibility to contract out is unlikely to be appropriate for all aspects of consumer guarantees. For example, contracts that specify technical details on what constitutes a major and minor fault are unlikely to provide much help to consumers in making informed decisions.

However, some concepts are more straightforward for consumers to understand. For example, it should be relatively easy for a consumer to understand an explicit disclosure regarding the length of time good is guaranteed to last. Relying on explicit disclosure is much more likely to result in the length of the guarantee period matching consumer expectations than relying on precedent established through litigation.

In its submission on the issues paper, the Victorian Automobile Chamber of Commerce (VACC) raises particular concerns about the operation of the consumer guarantees in relation to motor vehicles. In particular, VACC argues that second-hand car dealers are unfairly forced to take responsibility for faults caused by vehicle manufacturers.

VACC suggests current provisions within the ACL relating to motor vehicle sales and repairs should be further defined and developed, and that specific provisions for second hand cars would provide greater certainty and quicker and fairer outcomes for consumers and businesses.

While flexible general provisions are desirable, taking a more tailored approach for individual industries should not be ruled out without fully considering the merits of the specific proposals.

The NSW Business Chamber (NSWBC) uses its submission to raise whether the standard at which unsafe products can be rejected is too low. For example, if a defect that renders a product to be unsafe can be easily fixed (such that it is no longer unsafe), then it would be an undesirable consequence if a consumer were able to reject the good. NSWBC notes that some interpretations suggest that the “reasonable consumer” test would protect against such circumstances. NSWBC would welcome clarification on this issue.

NSWBC also raises concerns about the cost effectiveness of the mandatory statement of consumer rights provided for by regulation 90(1).

Recommendation 3: Consumer guarantees

The Review should provide further analysis on whether the consumer guarantees framework appropriately maximises flexibility for consumers and provides the right level of protection against defects.

2.4 Unfair contract terms

The Australian Chamber has previously supported extending unfair contract term protections to small business.

With this extension coming into force after 12 November 2016, it is important that the Australian Consumer and Competition Commission (ACCC) continues to prioritise compliance and enforcement of the new provisions and to provide appropriate support to small and large businesses to transition to the new protections.

To ensure compliance, businesses will need to review their standard form contracts to ensure they do not contain unfair terms. Small businesses will also need to familiarise themselves with the new provisions so that they can take advantage of the protections.

Recommendation 4: Unfair contract terms

The Australian Chamber recommends that Consumer Affairs Australia and New Zealand closely monitor the implementation of the extension of unfair contract terms to small business to ensure that the reform is operating as intended.

2.5 Product Safety

The current product safety system relies on specific protections (in the form of prescribed standards) rather than a general protection against unsafe products. In effect, the ACL prohibits non-compliance with a safety standard, but does not prohibit the supply of unsafe goods without a relevant standard.

The issues paper seeks views as to whether there should be a general prohibition against the supply of unsafe goods (as well as against non-compliance with a safety standard or a ban) similar to that in place in the European Union.

The current product safety regime provides consumers with redress if goods have a safety defect and also provides a framework for identifying and removing unsafe consumer goods from the market.

The Australian Chamber considers that the current product safety regime provides an appropriate level of protection for consumers and that an additional general protection against unsafe products is not required.

The issues paper also highlights a number of issues regarding the approach to adopting and managing product safety standards and asks whether there are ways to improve the processes for adopting voluntary standards and ‘trusted’ international standards.

The Australian Government has stated in its Industry Innovation and Competitiveness Agenda that if a system, service or product has been approved under a trusted international standard or risk assessment, then Australian regulators should not impose any additional requirements, unless there is a good and demonstrable reason to do so.

The Australian Chamber supports this policy which will reduce costs and delays for businesses, increase the supply of products into the Australian market and allow regulatory authorities to focus on higher priorities.

However, as noted in the issues paper, there is not currently a mechanism for a trusted international standard to be used as the basis of a mandatory safety standard without preparing a corresponding Australian Standard or incorporating the international standard into regulation.

There are also some potential downsides to the use of international standards which should be carefully considered.

First and foremost, there must be a formal process to involve business in the decision about whether a standard should be made enforceable. While the Standards Australia process may be cumbersome, it allows conflict or complications with related Australia laws and standards to be addressed.

Often standards cost money to access. Making a standard enforceable can therefore add to business costs in situation where there is already substantive compliance with the standard. Moreover, by making a standard enforceable, the ACCC would be granting a monopoly right to the standard maker, which potentially further adds to the cost faced by business.

The declaration of a standard as enforceable should be subject to a proper regulatory impact assessment, and then opened for public comment.

As with other regulatory changes, the declaration of any new standard should be supported by information for affected businesses and subject to appropriate lead in periods.

Recommendation 5: Product Safety

The Australian Chamber considers that the current product safety regime provides an appropriate level of protection for consumers and that an additional general protection against unsafe products is not required.

Recommendation 5: Trusted International Standards

The Australian Chamber supports allowing trusted international standards to be directly used as the basis for a mandatory safety standard, without first preparing a corresponding Australian Standard.

However, the declaration of an international standard should still be subject to proper consultation and regulatory impact assessment.

2.6 The multiple regulator model

The ACL operates under a single law, multiple regulator arrangement which means that the law is jointly administered and enforced by the ACCC and state and territory consumer affairs agencies.

Concurrent to this review, the Australian Government asked the Productivity Commission to undertake a study of the enforcement and administration arrangements underpinning the ACL.

The objective of this study is to examine the effectiveness of the 'multiple regulator' model in supporting a single national consumer policy framework and to make findings on how this model can be strengthened.

The Australian Chamber notes that for businesses operating in multiple Australian jurisdictions, the multiple regulator model can result in inconsistencies between the administration of the ACL by different state and territory regulators.

For example, Australian Chamber member the VACC has had reports from its members of inconsistency in the interpretation of the ACL between the ACCC and state based bodies such as the Victorian Civil and Administrative Tribunal and Consumer Affairs Victoria.

Recommendation 6: The multiple regulator model

The Australian Chamber supports more streamlined administration of the ACL and supports-in-principle a carefully managed transition to a single regulator model.

2.7 Unsolicited sales and selling away from business premises

In some circumstances, consumers are vulnerable in circumstances where they are approached without invitation. The ACL seeks to address this by providing specific rights where a seller approaches a consumer outside of their place of business uninvited.

The issues paper discusses the UK approach to this issue, which distinguish between sales made on or off a business's premises rather than whether the sale was solicited or unsolicited.

Adopting the UK approach in Australia would drastically expand the scope of transactions captured by the existing unsolicited selling provisions. Instead, the review should consider how they could be more tightly targeted so that they do not impact legitimate business models.

Recommendation 7: Unsolicited sales

Rather than seeking to expand the scope of unsolicited sales provisions, the review should consider how they could be better targeted so that they do not impact legitimate business models

3 Best practice regulation

It is vital that any proposed strengthening of consumer protections proposed by the review be subject to a best practice regulatory development process, including thorough cost benefit analysis through a regulatory impact statement process.

A best practice approach to regulatory design involves:

1. Problem identification.
2. Identification of clear objectives for government policy.
3. Consideration of policy options, including both regulatory and non-regulatory options.
4. Comprehensive cost benefit analysis.
5. Consultation on the proposed approach.

While the Australian Chamber acknowledges that a Council of Australian Governments regulatory impact statement would need to be prepared for any significant proposed changes to the ACL, we recommend that a best practice regulatory framework also be used by Consumer Affairs Australia and New Zealand in the initial development of any proposed changes.

For example, section 86 of the ACL prohibits taking payment and supply (for goods worth more than \$500) for goods during the cooling-off periods that apply to unsolicited sales. Prior to the introduction of the ACL, this prohibition applied in the smaller states, but not in NSW or Victoria. Treasury justifies the inclusion of this provision in the ACL with reference to 2009 Consumer Affairs Victoria report on cooling off periods.¹ The report referred to the possibility that it may be more difficult for consumers to enforce their rights under cooling off periods after supply and payment has occurred. However, no substantive evidence is provided. There also appears to have been no effort to quantify the costs this rule imposes on industry. Thus the introduction of the rule appears inconsistent with an evidence based approach to policy.

¹ See <http://www.aph.gov.au/DocumentStore.ashx?id=7e1f5420-f7ef-4e71-8ed2-f691db91dd60#page=35>

Recommendation 8: Best practice regulation

Any proposed measures to strengthen consumer protections must take into account compliance costs for business and be subject to rigorous cost benefit analysis.

4 About the Australian Chamber

The Australian Chamber of Commerce and Industry speaks on behalf of Australian business at home and abroad.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses also get involved through our Business Leaders Council.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, making us Australia's most representative business organisation.

The Australian Chamber strives to make Australia a great place to do business in order to improve everyone's standard of living.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We also represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

Australian Chamber Members

AUSTRALIAN CHAMBER MEMBERS: BUSINESS SA CANBERRA BUSINESS CHAMBER CHAMBER OF COMMERCE
NORTHERN TERRITORY CHAMBER OF COMMERCE & INDUSTRY QUEENSLAND CHAMBER OF COMMERCE &
INDUSTRY WESTERN AUSTRALIA NEW SOUTH WALES BUSINESS CHAMBER TASMANIAN CHAMBER OF
COMMERCE & INDUSTRY VICTORIAN' CHAMBER OF COMMERCE & INDUSTRY **MEMBER NATIONAL INDUSTRY**
ASSOCIATIONS: ACCORD – HYGIENE, COSMETIC & SPECIALTY PRODUCTS INDUSTRY **AGED AND COMMUNITY**
SERVICES AUSTRALIA AIR CONDITIONING & MECHANICAL CONTRACTORS' ASSOCIATION **ASSOCIATION OF**
FINANCIAL ADVISERS ASSOCIATION OF INDEPENDENT SCHOOLS OF NSW **AUSTRALIAN SUBSCRIPTION**
TELEVISION AND RADIO ASSOCIATION AUSTRALIAN BEVERAGES COUNCIL LIMITED AUSTRALIAN DENTAL
ASSOCIATION AUSTRALIAN DENTAL INDUSTRY ASSOCIATION AUSTRALIAN FEDERATION OF EMPLOYERS &
INDUSTRIES AUSTRALIAN FEDERATION OF TRAVEL AGENTS **AUSTRALIAN FOOD & GROCERY COUNCIL**
AUSTRALIAN HOTELS ASSOCIATION **AUSTRALIAN INTERNATIONAL AIRLINES OPERATIONS GROUP**
AUSTRALIAN MADE CAMPAIGN LIMITED **AUSTRALIAN MINES & METALS ASSOCIATION** AUSTRALIAN PAINT
MANUFACTURERS' FEDERATION **AUSTRALIAN RECORDING INDUSTRY ASSOCIATION** AUSTRALIAN RETAILERS'
ASSOCIATION AUSTRALIAN SELF MEDICATION INDUSTRY AUSTRALIAN STEEL INSTITUTE **AUSTRALIAN**
TOURISM AWARDS INC AUSTRALIAN TOURISM EXPORT COUNCIL **AUSTRALIAN VETERINARY ASSOCIATION**
BUS INDUSTRY CONFEDERATION **BUSINESS COUNCIL OF CO-OPERATIVES AND MUTUALS** CARAVAN
INDUSTRY ASSOCIATION OF AUSTRALIA **CEMENT CONCRETE AND AGGREGATES AUSTRALIA** COMMERCIAL
RADIO AUSTRALIA **CONSULT AUSTRALIA** CUSTOMER OWNED BANKING ASSOCIATION **CRUISE LINES**
INTERNATIONAL ASSOCIATION DIRECT SELLING ASSOCIATION OF AUSTRALIA **ECOTOURSIM AUSTRALIA**
EXHIBITION AND EVENT ASSOCIATION OF AUSTRALASIA **FITNESS AUSTRALIA** HOUSING INDUSTRY
ASSOCIATION **HIRE AND RENTAL INDUSTRY ASSOCIATION LTD** LARGE FORMAT RETAIL ASSOCIATION **LIVE**
PERFORMANCE AUSTRALIA MASTER BUILDERS AUSTRALIA **MASTER PLUMBERS' & MECHANICAL SERVICES**
ASSOCIATION OF AUSTRALIA MEDICAL TECHNOLOGY ASSOCIATION OF AUSTRALIA **NATIONAL DISABILITY**
SERVICES NATIONAL ELECTRICAL & COMMUNICATIONS ASSOCIATION **NATIONAL EMPLOYMENT SERVICES**
ASSOCIATION NATIONAL FIRE INDUSTRY ASSOCIATION **NATIONAL RETAIL ASSOCIATION** NATIONAL ROAD
AND MOTORISTS' ASSOCIATION **NSW TAXI COUNCIL** NATIONAL ONLINE RETAIL ASSOCIATION **OIL INDUSTRY**
INDUSTRIAL ASSOCIATION OUTDOOR MEDIA ASSOCIATION **PHARMACY GUILD OF AUSTRALIA** PHONOGRAPHIC
PERFORMANCE COMPANY OF AUSTRALIA **PLASTICS & CHEMICALS INDUSTRIES ASSOCIATION** PRINTING
INDUSTRIES ASSOCIATION OF AUSTRALIA **RESTAURANT & CATERING AUSTRALIA** SCREEN PRODUCERS
AUSTRALIA **VICTORIAN AUTOMOBILE CHAMBER OF COMMERCE**