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9 December 2016

By electronic lodgment

Mr Garry Clements  
Chair  
Consumer Affairs Australia and New Zealand

Your Ref  
Our Ref ZM MDL  
File No. 011585488

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Dear Mr Clements

## Submission on Australian Consumer Law Review – Interim Report

- 1 We refer to the Interim Report that was released by Consumer Affairs Australia and New Zealand (**CAANZ**) as part of its review of the *Australian Consumer Law (ACL)*.
- 2 We welcome the opportunity to make a submission in response to the Interim Report, following our previous submission dated 27 May 2016 in response to the Issues Paper (copy enclosed).
- 3 In our previous submission, we raised the following issues:
  - (a) The need for the ACL to apply to suppliers based overseas, so Australian suppliers do not face unfair competition from cheap, poor-quality imports that do not comply with the legal requirements which Australian suppliers must meet.
  - (b) The fact that the limitation period for misleading or deceptive conduct, unlike other causes of action under State limitation of actions legislation, has no extension for conduct that was facilitated or concealed by fraud. This means that fraudsters may escape liability for misleading or deceptive conduct if they succeed in concealing their wrongful conduct for a sufficient period of time, and victims of such conduct may have their rights to seek compensation extinguished before they even become aware that they have been wronged.
  - (c) Allowing commercial parties to “contract out” of the prohibition on misleading or deceptive conduct, as they are in New Zealand under s 5D of the *Fair Trading Act 1986* (NZ), subject to an overriding test that it is fair and reasonable for the them to do so.
  - (d) Uncertainty surrounding the operation of the unfair contracts regime. The importance of this issue has only increased with the extension of the regime last month to include contracts with small businesses.

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- 4 For the reasons set out in our previous submission, we remain of the view that these issues should be addressed by CAANZ in the Final Report.

#### **Application of the ACL to overseas suppliers / general safety provision**

- 5 A significant portion of the Interim Report is devoted to consumer guarantees (section 2.1) and product safety (section 2.2). The Interim Report (p 72) identified the following as having driven significant changes to the market for consumer goods since the 2006 *Review of the Australian Consumer Product Safety System*:

- *“globalisation*
- *the emergence of online shopping*
- *the proliferation of low-cost products manufactured overseas.”*

- 6 In this regard, the Interim Report also noted one submission that highlighted *“the trend towards direct sourcing of less expensive products from overseas by retailers of ‘Fast-Moving Consumer Goods’ (goods that sell quickly for a relatively low cost).”* The same submission noted the *“challenges for individual businesses trying to ensure safety as a ‘voluntary measure’.*”

- 7 The Interim Report then goes on to consider whether the *“abnormally high rate of product recalls in Australia may, in part, be driven by the absence of a general safety provision”* (quoting the submission by CHOICE).

- 8 The proposal that the ACL contain a further prohibition does not, in our submission, adequately address the issue.

- 9 There are many Australian businesses who are already subject to the ACL and who are acting responsibly to ensure the safety of their products. However, they are competing in the Australian market against other suppliers, based overseas, who are not subject to the ACL, and do not incur the costs of compliance.

- 10 This situation leads to unsafe products being supplied into Australia by overseas businesses, and putting consumers at risk. It also distorts the market because the unfair competition from cheap, unsafe products makes it harder for Australian businesses, who want to do the right thing, to operate profitably and survive.

- 11 An additional general safety provision in the ACL will not apply to overseas businesses who are not subject to the ACL.

- 12 In our submissions to the Competition Policy Review (also known as the **Harper Review**), we proposed extending the extra-territorial application of the ACL to cover conduct that damages competition in markets in Australia regardless of whether the contravening firm is a resident,

incorporated or “carrying on business” in Australia. Our proposal was endorsed by the Harper Review in its Final Report.<sup>1</sup>

- 13 The Government also recognised the importance of this issue in its response to the Harper Review.<sup>2</sup> As we explained in further detail in our previous submission in response to the Issues Paper, we consider the Government’s apparent concern about the ACL applying extra-territorially could be addressed by providing that the ACL apply to a supplier that is not residing, incorporated or carrying on business in Australia provided that the supplier was supplying goods to the Australian market or specifically targeting the potential customers in Australia through the supplier’s marketing activities.
- 14 As we also stated in our previous submission in response to the Issues Paper, we support the Harper Review’s recommendation to remove the requirement for private parties to seek ministerial consent before relying on extra-territorial conduct in private actions. The Government supported this recommendation in its response to the Harper Report, but the recommendation has not yet been enacted.<sup>3</sup>

#### **Limitation period for misleading or deceptive conduct that was fraudulently concealed**

- 15 This issue was not addressed in the Interim Report.
- 16 For the reasons set out in our submission in response to the Issues Paper, there is no good reason in principle why, unlike for other legal claims,<sup>4</sup> there should not be an extension of the limitation period for misleading or deceptive conduct in cases of fraudulent concealment.
- 17 The current situation is fundamentally unjust. It denies compensation to deserving plaintiffs and rewards those who commit the worst kind of misleading or deceptive conduct — that is, deliberately misleading or deceiving someone — for successfully concealing their wrongdoing for such a long time.
- 18 It seems incongruous that CAANZ does not consider this issue, and yet is prepared to consider (in section 3.2.6 of the Interim Report) monetary penalties for misleading or deceptive conduct in breach of s 18 of the ACL, even though such conduct may not involve an intention to mislead or deceive. (We note that CAANZ ultimately did not endorse monetary penalties for breach of s 18 (p 185).)
- 19 We repeat the comments regarding the limitation period that we made in our previous submission in response to the Issues Paper.

<sup>1</sup> Competition Policy Review, *Final Report* (2015) recommendation 26.

<sup>2</sup> Australian Government, *Australia Government Response to the Competition Policy Review* (2015) 22.

<sup>3</sup> Competition and Consumer Amendment (Deregulatory and Other Measures) Bill 2015, which lapsed on 15 April 2016.

<sup>4</sup> Eg, *Limitation of Actions Act 1958* (Vic) s 27.

### **The enforceability of agreements not to bring a claim for misleading or deceptive conduct**

- 20 This issue was also not addressed in the Interim Report.
- 21 We repeat the comments that we made in our previous submission in response to the Issues Paper.

### **Uncertainty regarding the scope of the unfair contract terms regime**

- 22 Unfair contract terms are addressed in section 2.4 of the Interim Report.
- 23 We do not agree that the unfair contract regime is sufficiently clear or certain.
- 24 As we explained in our submission in response to the Issues Paper, the unfair contract terms regime is drafted in the ACL in a very open-ended manner. The courts are given a significant degree of latitude to decide what is, or is not, an unfair term. This has the potential to create considerable uncertainty and confusion for businesses.
- 25 We agree with CAANZ (p 124) that the unfair contracts regime should not be extended so that a contract as a whole could be declared void on the basis that the contract is generally unfair. As we said in our submission in response to the Issues Paper, the regime should apply only to unfair ancillary provisions in standard form contracts. The regime should not involve courts making assessments about whether a product sought by a consumer is or is not valuable to the consumer — a concern we raised in relation to the Federal Court's decision in *ACCC v Chrisco Hampers Australia Limited* [2015] FCA 1204.
- 26 The proposal to ban contracts that are generally unfair would undermine freedom of contract and business certainty. It would also create practical problems in terms of the parties' rights under contracts that had been partly performed, or relied on before being declared void.
- 27 In relation to the possible extension of the unfair contract regime to insurance contracts, the Interim Report raises the issue of whether guidance on the "main subject matter" of an insurance contract would be required (p 123). The Interim Report cited (fn 368) our submission in response to the Issues Paper, whilst noting that our concern with the definition of "main subject matter" was not limited to insurance contracts.
- 28 As we explained in that submission, there is no explanation in the ACL of what is meant by the "main subject matter of the contract". According to the guide to the unfair contracts regime produced by the ACCC and other regulatory agencies,<sup>5</sup> the main subject matter of the contract refers to "*the goods or services (including land, financial services or financial products) that the consumer is acquiring under the contract*" and "*may also include a term that is necessary in order for the product or service to be supplied*".

<sup>5</sup> ACCC et al, *Unfair contract terms – A guide for businesses and legal practitioners* (2016) 9.

- 29 To reduce this uncertainty, we reiterate that the ACL should provide that a term defines the “main subject matter of the contract” to the extent that it provides for the supply or acquisition of any of the goods or services being supplied under the contract, and is not one of the types of terms listed in s 25 of the ACL.

### **Conclusion**

- 30 We would welcome the opportunity to provide further comment on the issues raised in this submission as CAANZ’s review of the ACL progresses.
- 31 We look forward to the progress of the review and to receiving the Final Report.

Yours sincerely



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Partner

Enc

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27 May 2016

By electronic lodgment

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Dear Mr Clements

## Submission on Australian Consumer Law Review – Issues Paper

- 1 We refer to the Issues Paper dated March 2016 that was issued by Consumer Affairs Australia and New Zealand (CAANZ) as part of its review of the *Australian Consumer Law (ACL)*.
- 2 We welcome the opportunity to make a submission in response to the Issues Paper and to raise a number of issues that we consider warrant CAANZ's consideration as part of the review.
- 3 The ACL is of fundamental importance to commercial practice in Australia. Its provisions are directed at a wide range of commercial activities that have a significant impact on business' day-to-day operations. The ACL contains a remarkably wide range of rules, including:
  - (a) standards of behaviour required of businesses – such as the prohibitions on misleading or deceptive conduct, unconscionable conduct and harassment;
  - (b) specific types of problematic commercial conduct – for example, the activities of door-to-door salespersons and call centres, unfair contract terms in standard form contracts, pyramid schemes and bait advertising;
  - (c) product labelling requirements (including country of origin representations), product quality requirements (the mandatory consumer guarantees) and product safety issues.
- 4 Increasingly, the ACL applies not only to commercial dealings between a business and a consumer, but also to commercial dealings between two or more businesses – in particular, commercial dealings between a large business and a small business. This is demonstrated by the prohibitions of misleading or deceptive conduct, unconscionable conduct (as it has recently been reinterpreted by the courts) and the forthcoming extension of the unfair contract terms regime to contracts with small businesses.

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- 5 This submission raises the following issues which we believe should be addressed by CAANZ in the review:
- (a) The need for the ACL to apply to suppliers based overseas, so Australian suppliers do not face unfair competition from cheap, poor quality imports that do not comply with the legal requirements those Australian suppliers must meet.
  - (b) The fact that the limitation period for misleading or deceptive conduct, unlike other causes of action under State limitation of actions legislation, has no extension for conduct that was facilitated or concealed by fraud. This means that fraudsters may escape liability for misleading or deceptive conduct if they succeed in concealing their wrongful conduct for a sufficient period of time, and victims of such conduct may have their rights to seek compensation extinguished before they even become aware that they have been wronged.
  - (c) Whether commercial parties - in particular, large and sophisticated businesses - should be able to agree that they will not bring a claim for misleading or deceptive conduct under the ACL, and whether the courts should uphold such an agreement, as they do in New Zealand following recent amendments to the law in that jurisdiction, subject to an overriding test of fairness and reasonableness.
  - (d) Recent case law on the unfair contracts regime highlights, in our view, the risk of judges basing decisions on their perception of whether it was provident for the consumer to enter into the transaction the subject of the contract. In other words, the regime is not confined to unreasonable ancillary provisions in standard form contracts. This is of considerable concern as the regime is to be extended in November to include contracts with small businesses.

#### Application of the ACL to overseas suppliers

- 6 In our submissions to the recent Competition Policy Review (also known as the **Harper Review**), we proposed extending the extra-territorial application of the ACL to cover conduct that damages competition in markets in Australia regardless of whether the contravening firm is a resident, incorporated or "carrying on business" in Australia. This would help Australian businesses facing competition from cheap and unsafe overseas imports, as well as misleading or deceptive conduct by overseas businesses.
- 7 Our proposal was endorsed by the Harper Review in its Final Report.<sup>1</sup> The Government also recognised the importance of this issue in its response to the Harper Review but the Government did not support the

<sup>1</sup> Competition Policy Review, *Final Report* (2015) recommendation 26.

specific legislative amendment proposed by the Review, stating that it would consider how best to effectively capture such conduct.<sup>2</sup>

- 8 We consider this to be an important issue that should be addressed urgently by amendments to the legislation.
- 9 We understand the Government was concerned about the prospect of the ACL applying extra-territorially. However, the legislation could provide that the ACL applies to a supplier that is not residing, incorporating or carrying on business in Australia provided that the supplier was supplying goods to the Australian market or specifically targeting the potential customers in Australia through the supplier's marketing activities. This would provide an appropriate "territorial nexus" and ensure the ACL does not apply to every supplier of goods or services carrying on business anywhere in the world.
- 10 We also support the adoption of the Harper Review's recommendation to remove the requirement for private parties to seek ministerial consent before relying on extra-territorial conduct in private competition law actions. The Government supported this recommendation in its response to the Harper Report, but the recommendation has not yet been enacted.<sup>3</sup>

#### **Limitation period for misleading or deceptive conduct that was fraudulently concealed**

- 11 The ACL should provide that the limitation period for misleading or deceptive conduct claims is extended in the situation where that conduct was fraudulently concealed. That would bring the ACL into line with the limitation periods that apply, under State statutes of limitation, for claims in contract and tort.<sup>4</sup>
- 12 Under the ACL as it currently stands, a claim for damages or compensation as a remedy for misleading or deceptive conduct must be brought within six years of the accrual of the cause of action.<sup>5</sup> The cause of action accrues once damage is suffered – and it may not be until much later that the victim realises the wrong that has been committed, particularly if the victim has been misled or deceived.
- 13 The High Court has previously stated that 'to compel a plaintiff to institute proceedings before the existence of his or her loss is ascertained or ascertainable would be unjust'.<sup>6</sup> This is all the more so when the wrongdoer has fraudulently concealed his or her wrongdoing. As Weinberg J (as his Honour then was) put it:<sup>7</sup>

<sup>2</sup> Australian Government, *Australia Government Response to the Competition Policy Review* (2015) 22.

<sup>3</sup> Competition and Consumer Amendment (Deregulatory and Other Measures) Bill 2015, which lapsed on 15 April 2016.

<sup>4</sup> Eg, *Limitation of Actions Act 1958* (Vic) s 27.

<sup>5</sup> ACL ss 236(2) and 237(3).

<sup>6</sup> *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 527.

<sup>7</sup> *Energex Limited v Alstom Australia Ltd* [2004] FCA 575, [193].

"it hardly lies in the mouth of those who have engaged in serious and persistent misconduct to say that, having managed to keep their nefarious deeds secret for a sufficiently long time, they are entitled to take the benefit of a limitation defence."

### **The enforceability of agreements not to bring a claim for misleading or deceptive conduct**

- 14 Although contained in the ACL, the law on misleading or deceptive conduct can be invoked by businesses - including large and sophisticated businesses - even where they have agreed not to bring such a claim. This is so even where agreements were carefully drawn with the assistance of experts, and the parties agreed, as part of their overall transaction, that one of them would bear a particular risk.
- 15 For example, consider the situation where an Australian business is purchased by a large multinational conglomerate. Assume the vendor provides extensive due diligence to the purchaser, which has a sophisticated and professional team of advisers who can (and do) give detailed advice on matters disclosed in the due diligence. In negotiating the purchase price, the parties agree that the purchaser will bear the risk of certain events occurring (for example, future profits being lower than forecast by the purchaser's management team at the time of the sale).
- 16 In that situation, if the relevant event occurs, the large multinational purchaser can generally allege that the vendor engaged in misleading or deceptive conduct because it should have done more to alert or inform the purchaser of the likelihood of the event occurring. The misleading or deceptive conduct laws would not prevent this. It may be difficult for the purchaser to prove that it relied on the alleged misrepresentations by the vendor or its staff, rather than relying on the purchaser's own due diligence and expert advice, but the issue of reliance is usually only tested at trial.
- 17 We note that in New Zealand, from 2014, s 5D of the *Fair Trading Act 1986* (NZ) allows parties to "contract out" of the prohibition on misleading or deceptive conduct in s 9 of the same Act. However, this only applies where both parties are in trade and it is fair and reasonable that those parties are bound by their agreement.
- 18 In considering this issue, it may not be necessary to apply the same approach to large and sophisticated businesses as for small businesses, which arguably may have a greater need for protection under the misleading or deceptive conduct laws. However, there may be advantages for large businesses in being able to commit themselves not to bring a claim for misleading or deceptive conduct.
- 19 Even if large and sophisticated commercial parties were able to validly commit not to bring a claim for misleading or deceptive conduct, that would not prevent such parties from bringing a claim of fraud against a counterparty if there were grounds for such a claim.

## Uncertainty regarding the scope of the unfair contract terms regime

- 20 The unfair contract terms regime is drafted in the ACL in a very open-ended manner. The courts are given a significant degree of latitude to decide what is, or is not, an unfair term. This has the potential to create considerable uncertainty and confusion for businesses.
- 21 This issue is of considerable concern to businesses as the unfair contract terms regime will be extended in November 2016 to cover contracts with small businesses, not just consumers.
- 22 As noted above, in our view, recent case law on the unfair contracts regime highlights the risk of judges basing decisions on their perception of whether it was provident for the consumer to enter into the transaction the subject of the contract.
- 23 In the recent case of *ACCC v Chrisco Hampers Australia Limited* [2015] FCA 1204, the ACCC successfully challenged a term of a contract that automatically renewed the original service — the ability to pay for a Christmas hamper by periodic instalments — even though the customer could opt out of the renewal and get a refund. The term in question was not one of the examples of potentially unfair terms listed in s 25 of the ACL. It was not hidden in the agreement, although it was printed in a small font and the court considered the language used could have been clearer. On our reading, the court seemed concerned that the service that was being renewed — the ability to pay for Christmas hampers by instalment — was not a valuable service because the consumers were essentially providing interest free loans to the supplier. However, that was the very same service that consumers had chosen to acquire for the current year — presumably because they otherwise had difficulty budgeting throughout the year to save for a Christmas hamper.
- 24 The making of assessments about whether a product is or is not valuable to consumers is not how we understood the unfair contract terms regime was intended to operate. Rather, the regime should apply only to unfair ancillary provisions in standard form contracts.
- 25 Section 26(1)(a) of the ACL provides that the unfair contract terms regime does not apply to a term of a consumer contract to the extent that that term defines “the main subject matter of the contract”. However, there is no explanation in the ACL of what is meant by the “main subject matter of the contract”. According to the guide to the unfair contracts regime produced by the ACCC and other regulatory agencies,<sup>8</sup> the main subject matter of the contract refers to “the goods or services (including land, financial services or financial products) that the consumer is acquiring under the contract” and “may also include a term that is necessary in order for the product or service to be supplied”.
- 26 In our view, there would be value in seeking to address, at least to some degree, the uncertainty of the unfair contract terms regime by including in the ACL an express meaning of the expression “main subject matter

<sup>8</sup> ACCC et al, *Unfair contract terms – A guide for businesses and legal practitioners* (2016) 9.

of the contract". This could be done by providing that a term defines the "main subject matter of the contract" to the extent that it provides for the supply or acquisition of any of the goods or services being supplied under the contract, and is not one of the types of terms listed in s 25 of the ACL.

### Conclusion

- 27 We would welcome the opportunity to provide further comment on the issues raised in this submission, as CAANZ's review of the ACL progresses.
- 28 We look forward to the progress of the review and to receiving the Interim Report.

Yours sincerely



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