
Australian Consumer Law Review – Significant reforms proposed

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In brief

Consumer Affairs Australia and New Zealand (**CAANZ**) has published recommendations for reform of the Australian Consumer Law (**ACL**), which if adopted by Commonwealth, State and Territory Ministers, would have significant implications for many businesses and consumers subject to the ACL.

The most far reaching legislative reform proposals are:

- Introduction of a short-term consumer right to seek a refund, replacement or repair for minor failures of consumer guarantees.
- A new statutory obligation which will require traders to ensure the safety of a product before it enters the market.
- Increased penalties for failure or refusal to notify a voluntary recall to the regulator.
- Unfair contract terms regime to be applied to insurance contracts.
- Disclosure of all additional fees or charges within the headline price in the online shopping environment.
- The threshold value for consumer transactions is to be increased from \$40,000 to \$100,000.
- Maximum financial penalties payable under the ACL to be substantially increased to align with competition law penalties.

In detail

Significant reform proposals

Time limited consumer right to claim a refund, replacement or repair for minor failures

CAANZ has recommended the introduction of a new time-limited consumer right to claim a refund, replacement or repair where a good fails to comply with consumer guarantees within 30 days of the date of purchase, including where only a minor failure is present, unlike the current law where the trader selects the remedy for minor failures. This new right is likely to increase the number of consumer refund requests received by manufacturers and retailers and encourage consumers to raise product defect issues

early, as the existing distinction between remedies for major and non-major failures will continue to apply outside this specified period. There is also a proposal for multiple minor failures to amount to a major failure.

General safety provision to ensure safety of a product before it enters the market

A new safety provision is proposed which will require traders to ensure their products are safe prior to the product entering the market. This new obligation will be supported by a 'safe harbour' defence (see below) with a penalty regime for breaches that will be consistent with other ACL penalties.

Businesses will need to make greater upfront investments in safety management, design, testing and record keeping across their product range to ensure compliance, with the shift in responsibility for managing product safety from government to traders intended to enable regulators to take pre-emptive action without the need for a product to have caused an injury.

CAANZ suggested a potential 'safe harbour' defence for traders who have complied with requirements of an appropriate product safety standard. If there is no mandatory standard introduced with the provision, traders could choose the most appropriate way to comply with the general provision through best-practice development, a risk assessment, or a compliance plan using Australian standards and appropriate international standards.

CAANZ also recommended strengthening the Australian Competition and Consumer Commission's (ACCC) powers to obtain information about product safety, to apply to any person (including a consumer) likely to have relevant information. Businesses should be aware that this proposal could give the ACCC the power to investigate even where a non-disclosure or binding confidentiality agreement is in place with a consumer or third party.

Increased penalties for a failure to notify a voluntary recall to the regulator

Traders are currently obliged to inform the regulator of voluntary recalls. Under the proposed reform, there will be a statutory definition introduced for the term 'voluntary recall' and increased penalties for non-notification, proportionate to other ACL penalties (see also proposed increase in maximum ACL penalties below). Businesses will need to be vigilant in their reporting processes for any voluntary recall actions made.

Unfair contract terms applied to insurance contracts

Currently the unfair contract term regime under the ASIC Act does not apply to insurance contracts. The *Insurance Contracts Act 1984* (Commonwealth) does not offer consumers with the same level of protection as that available under the ACL. Stakeholders from the insurance industry have emphasised that applying unfair contract terms protections to standard form insurance contracts could affect the scope of insurance policy coverage, due to uncertainty around the terms that would be captured, and the availability of reinsurance due to greater exposure to future liability. Such a change could increase premiums for consumers as insurance companies would take on a higher risk.

Disclosure of all additional fees or charges within the headline price in online shopping

CAANZ has recommended that price transparency in online shopping be enhanced by requiring that any additional fees or charges associated with pre-selected options be included in the headline price. If adopted, businesses will need to review their websites and pricing displays to ensure the headline price is accurate. Foreign online vendors may face challenges and increased oversight from the ACCC if the proposal were to be legislated, as they may be required to comply with price transparency requirements if their online products and services are offered in Australia.

The scope of consumer transactions to be expanded

The proposal recommends that the monetary threshold in the definition of consumer be increased to include all transactions priced up to \$100,000, rather than the present threshold of \$40,000. Businesses may face additional costs in cases where they are required to provide remedies for faulty goods or services that they would not otherwise have needed to provide under the lower threshold of \$40,000.

Increase the maximum financial penalties under the ACL

The proposal is to increase the maximum financial penalties available under the ACL to a level which aligns with the penalty regime under competition provisions of the *Competition and Consumer Act 2010* (Commonwealth).

For companies, the recommended maximum financial penalty for an ACL breach would be the greater of:

- a) up to \$10 million,
- b) three times the value of the benefit the company received from the act or omission, or
- c) if the benefit can't be determined, then 10 per cent of the company's annual turnover in the preceding 12 months.

For individuals, the maximum financial penalty for an ACL breach would be \$500,000.

The Productivity Commission similarly concluded in its Final Report on the parallel review of consumer law enforcement and administration, released last month, that 'there is a strong case for increasing maximum financial penalties for breaches of the ACL'.

Other reform proposals

Other reform proposals identified by CAANZ include the following:

- Enhanced disclosure requirements for extended warranties, including:
 - agreements for extended warranties should be clear and in writing,
 - additional information should be provided to consumers about what the ACL offers in comparison to the extended warranty, and
 - a cooling-off period of 10 working days (or an unlimited time if the supplier has not met their disclosure obligations) should be disclosed orally and in writing.

These increased disclosure requirements for extended warranties will involve an increase in compliance costs. Traders will need to develop and provide additional information with their products as per mandatory text requirements proposed and warranty documents will need to be updated. Traders must also be prudent in ensuring that the compulsory comparisons made between the extended warranty proposal and the ACL do not mislead consumers about the existence of consumer rights in the ACL.

- The legislation should clarify mandatory text requirements, under regulation 90 of the *Competition and Consumer Regulations 2010*, for warranties against defects through inclusion of specific text on services and services bundled with goods.
- The legislation should clarify the scope of the exemption from the consumer guarantees for the transport or storage of goods where the goods are damaged or lost in transit. As a result, traders might be able to shift some of the risk to transportation or storage service providers, and service providers should review their practices to ensure they continue to meet the consumer guarantee of due care and skill.
- Extension of ACL and ASIC Act unconscionable conduct protections to listed companies.
- Regulators should be allowed to use their existing investigative powers to obtain information and to better assess whether a term is unfair or not.
- Provisions dealing with unsolicited consumer agreements will clarify that the provisions apply to public spaces, and capture suppliers in their negotiations with consumers where the suppliers obtain the consumer's contact details or permission to be contacted from a third party.
- Consumer guarantees are to apply to all online auctions, regardless of whether the auction is conducted by an agent on behalf of the trader.

- The ASIC Act is to be amended to clarify that all ACL-related consumer protections that apply to financial services are to also apply to financial products.
- Amendment to the definition of 'unsolicited services' in section 2 of the ACL to enable false billing provisions (sections 40 and 162) to apply to false bills for services not provided.
- Amendment to section 12DC of the ASIC Act to ensure the provision refers to 'supply or possible supply' of a financial product, to ensure consistency of the section with other consumer protection provisions of the ASIC Act which mirror the ACL's consumer protections.
- Amendment to section 76 of the ACL or the regulations, to clarify that disclosure of cooling-off rights in unsolicited consumer agreements do not apply to certain exempt agreements, i.e. for new supplies of electricity or gas services.
- Introduction of an expanded 'follow-on' provision which will enable private litigants to rely on admitted facts from earlier proceedings.
- Regulators to be allowed to apply to a court for a community service order which would enable third parties to give effect to a community service order where the trader in breach is not qualified or trusted to do so.

Non-legislative recommendations

Non-legislative recommendations made by CAANZ include:

- The legislature should continue to work with stakeholders (including tribunals) to provide more specific guidance on 'unsafe' goods and 'reasonable durability'.
- On product safety, clearer traders' mandatory reporting obligations are required through regulator guidance relating to existing reporting requirements (including timeframes), and reporting triggers on the meaning of 'serious injury or illness' and 'use or foreseeable misuse'.
- CAANZ will explore options for streamlining processes for implementing product bans and compulsory recalls, taking into account the findings of the Productivity Commission's review of consumer law enforcement and administration and initiatives by other regulatory regimes. Such an exploration would involve granting powers to regulators to issue an 'administrative order' to initiate product safety action and injunctive relief, to reduce or remove Ministerial decision or intervention. CAANZ suggested an exemption for interim bans and compulsory recalls from the Australian Government's regulatory impact assessment requirements, however reiterated that permanent product bans would continue to be assessed under existing regulatory assessments.

Future opportunities for development of the ACL

CAANZ identified the following opportunities for further development of the ACL:

- CAANZ requested that consumer guarantees be reviewed to ensure they are fit for purpose for digital products, enduring service contracts, issues with returning goods, certain market practices and emerging technologies.
- CAANZ will explore ways to collect and publish product safety data, including de-identified data on injuries and illness collected by ACL regulators, hospitals and specialist regulators in workplace, food and product safety.
- With regards to unsolicited consumer agreements, CAANZ, the regulators and legislature will look into undertaking an economy-wide study on unsolicited selling in Australia from 2017-2018, to inform future public policy development.
- CAANZ will investigate whether a ban on unfair trading would increase protections beyond those in the ACL, and how it would be implemented in Australia.
- CAANZ will work closely with charities, Not for Profits and fundraisers to develop regulatory guidance on the current application of the ACL to the sector.

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- ACL exemptions not covered by the above legislative proposals are to be reviewed by CAANZ with a view to removing those that aren't in the public interest.

Next steps in the reform process

Commonwealth, State and Territory consumer affairs ministers and their governments will individually consider CAANZ's Final Report before meeting to vote on the proposed changes later in 2017. We will continue to monitor any developments in this area.

The takeaway

Overall the proposed reforms are significant and will require careful consideration by the business community. Widened scope of the ACL, increased ACL penalties, changes to consumer guarantee provisions, product safety, and online shopping disclosures all have the potential to increase business risk for traders and vendors through increased consumer-led dispute resolution and ACCC oversight

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

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