

# Australian Consumer Law Review

Submission to the Issues Paper

June 2016

## Introduction and overview

NSW Business Chamber (NSWBC) thanks Consumer Affairs Australia and New Zealand for the opportunity to make a submission to the *Australian Consumer Law Review Issues Paper* (Issues Paper).

As you may be aware, NSWBC is one of Australia's largest business support groups, with a direct membership of more than 19,000 businesses and providing services to over 30,000 businesses each year. NSWBC works with businesses ranging in size from owner operators to large corporations, and spanning all industry sectors from product-based manufacturers to service provider enterprises.

At the outset NSWBC would like to note its view that the Australian Consumer Law (ACL) is broadly working well and that it has been a successful initiative between the Commonwealth and the states and territories to reduce the complexity of consumer law across Australia. In its current form the ACL broadly balances the needs of businesses and consumers, is relatively well understood by businesses and legal practitioners, and should therefore continue to be the foundation for consumer policy in Australia.

In the light of the above, NSWBC favours an approach that is limited to 'fine tuning' the ACL rather than wholesale changes that could potentially disrupt the delicate balance that the ACL currently achieves. Key areas where NSWBC considers some improvements could be made include (and covered by this submission):

- more formally recognising the role of businesses in enhancing consumer welfare;
- considering how to expand the scope of protections afforded to businesses, including to the extent limited by the \$40,000 threshold that forms part of the definition of a consumer;
- getting rid of the mandatory text required when providing information about a warranty against defects;
- relaxing restrictions on accepting payment during the cooling off period for unsolicited sales; and
- implementing the deregulatory measures contained within the *Competition and Consumer Amendment (Deregulatory and Other Measures) Bill 2015* (which has subsequently lapsed).

NSWBC also welcomes the extensiveness of the consultation process outlined in the Issues Paper which, if followed, should provide ample opportunity for stakeholders to comment on any specific proposals that may emerge.

That said, NSWBC emphasises the importance of ensuring that eventual policy proposals appropriately balance the costs and benefits of change. In this regard any decisions made by the COAG Legislative and Governance Forum on Consumer Affairs should be informed by proper and robust regulatory impact analysis. Indeed, the formation of a decision in the mind of policymakers should be based on the Regulation Impact Statement (RIS) rather than the other way around. The COAG two-stage RIS process should be followed for any changes that impose new regulatory burdens on Australian businesses.

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## Objective of consumer law in Australia

The Issues Paper asks whether the overarching and operational objectives remain relevant appropriate. While the objectives set out in the *Intergovernmental Agreement for the Australian Consumer Law* (IGA) may be only tangential to the ACL, they offer useful insight into the way that consumer policy is conceived among policy makers and regulators.

NSWBC would like to note the important role of market incentives in regulating the behaviour of participants. In this respect the vast majority of Australian businesses operate in a manner that is compliant with the ACL not because of any legislative imperative but because the ACL is broadly consistent with what is required to attract and retain customers. That said, NSWBC acknowledges that the market may sometimes give rise to circumstances where it is difficult for consumers to protect their own interests.

It is for this reason that NSWBC encourages policy makers to conceptualise consumer law as a minimum set of behaviours that would be expected from market participants in efficient and competitive markets. It should not, for example, be overly prescriptive or restrict mutually beneficial trade between buyers and sellers — consumers are a better judge than government as to how they can maximise their welfare within the market.

Similarly, among both the overarching objective and the operational objectives, there is very little regard for the needs of and what is good for business. Some of the sentiments identified as part of the RIS that accompanied the ACL — particularly with regards to business participation in national markets and compliance cost savings — would better balance how a national consumer law can benefit the community. Explicit recognition of the positive role that businesses play in improving consumer welfare would discourage the notion that consumers and businesses are natural opponents.

### Recommendation 1

*Consumer policy should not be prescriptive or restrict mutually beneficial trade between buyers and sellers. Greater recognition of the positive role that businesses play in improving consumer welfare should be included in the national objectives for the ACL.*

## Structure of the ACL and definition of a consumer

The Issues Paper invites comments on the structure and clarity of the ACL. NSWBC accepts designing policy (and legislation) can present trade-offs between simplicity and good policy design. Blanket rules may be easy to interpret, understand and apply; however they may not always deliver good policy outcomes. Issues associated with simplicity and clarity are better dealt with through effective and easy to understand guidance on how the law applies in particular circumstances.

Similarly, the Issues Paper invites discussion on how the ACL defines a consumer noting that the ACL does so in different ways depending on the provision and nature of the issues that it concerns. 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 determining what activities are covered by consumer law, a first step should be to consider whether there are any particular vulnerabilities that warrant additional protection for any of the parties involved. For example, when purchasing a microwave it may not matter whether it is purchased for use at home or for use in an office kitchen — in both cases it is reasonable for the buyer to expect the microwave to work as described.

The Issues Paper asks whether the \$40,000 threshold applying to the definition of a consumer remains appropriate, noting that it has not changed since 1986.

Unlike other areas of policy (such as taxation), the monetary threshold applying to the definition of a consumer need not be adjusted on a regular basis (for example through indexation) to achieve its intended policy objective. This is because the monetary threshold is sufficiently high that, in practice, very few transactions are excluded (and even then it is only those involving goods or services not ordinarily acquired for personal, domestic or household consumption). In addition a static threshold can provide greater certainty among market participants to which the threshold may apply. For this reason, NSWBC favours stability in the threshold.

However, this is not to suggest that the threshold should never change or be subject to periodic review. The fact that it has not changed since 1986 is not by itself a compelling enough reason to adjust the threshold — it would need to be established that the sustained increase in prices over this time has excluded transactions that ought to be included and an increase at this point is justified.

On the face of it, it would appear possible that a large number of business transactions that were captured in 1986 are no longer regarded as consumer transactions. If the threshold kept pace with the consumer price index, it would need to be more than \$100,000. If the last quarter before the ACL came into effect (December 2010) was the reference period, the threshold would need to be around \$45,000. However NSWBC has only limited visibility on the extent to which this is impacting on businesses and the number of transactions that are actually affected.

As a general proposition NSWBC is supportive of expanding the scope (and simplicity) of redress for businesses transacting at amounts above the \$40,000 threshold. This is because business and consumer needs are not sufficiently dissimilar to warrant a different approach while, owing to inflation, a declining number of transactions are subject to protections such as the consumer guarantee framework.

However, further work is needed to better assess which transactions in the marketplace are likely to be affected by an increase in the threshold and how they would be impacted (depending what alternative threshold is proposed). For example, issues to consider include:

- how an increase may affect customised products that would not otherwise be captured and their capacity to be remarketed by a seller if rejected;
- how an increase would impact on compliance costs and prices; and
- whether alternative protections afforded under contract law (or otherwise) are sufficient to afford redress in circumstances where it is not a consumer transaction.

These issues could be considered in more detail as part of the interim report based on the feedback of other stakeholders or further investigation. This would then provide a more informed basis for considering the appropriateness of the threshold and the extent to which it should increase, if at all.

## **Recommendation 2**

*The interim report should consider how to optimise consumer law as it applies to business-to-business transactions, including whether this could be achieved by expanding the definition of a consumer to include more business transactions. In considering the \$40,000 threshold, the interim report should consider which transactions are likely to be affected and how.*

## **Usefulness of other consumer frameworks**

Stakeholders are invited to comment on whether international consumer law frameworks can offer a guide for Australian consumer policy. While NSWBC is supportive of Australia leveraging off international best practice when it comes to policy areas such as the adoption of international standards, NSWBC suggests that a cautious approach is required when benchmarking how specific provisions of the ACL compare with those of overseas frameworks

Given NSWBC's view that the ACL in its current form is the appropriate foundation for consumer policy in Australia, it follows that overseas frameworks are unlikely to offer any great insights on its structure as well as specific issues such as the definition of a consumer. Holistically the ACL affords protection to consumers in a variety of ways and the fact that an overseas framework has different protections is in many cases simply a different means to the same end. Comparisons between the ACL and alternative frameworks should not be made to identify deficiencies in the law.

That said, international frameworks may offer a guide when considering individual proposals identified throughout the consultation process, including with regards to compliance costs. Overseas frameworks may also offer useful insights as to how to respond to emerging consumer policy issues.

## **General protections of the ACL**

### **Misleading and deceptive conduct**

The Issues Paper raises whether the general protections of the ACL are working effectively. NSWBC supports the manner in which the ACL establishes norms of conduct by prohibiting certain behaviours through a principled, economy-wide approach.

For this reason NSWBC supports the current prohibition on misleading and deceptive conduct in its current form and considers that it should continue to apply universally (to the extent that the conduct has taken place in trade or commerce). Any attempt to capture more specific conduct would risk diluting the general proposition that businesses should not act in a manner that induces, or is capable of inducing error, in an ordinary reasonable person.

As noted in the Issues Paper, the current prohibition is capable of capturing conduct that is misleading or deceptive by silence or omission. The Issues Paper also notes that pecuniary penalties apply to breaches of the specific protection against false and misleading representations (s29), but not the general prohibition on misleading and deceptive conduct (s18).

Because the prohibition on false and misleading representations relies on a representation being made, a consequence is that pecuniary penalties do not apply in circumstances where misleading conduct does not involve a representation, such as due to an act of silence or omission.

If penalties were extended to the prohibition on misleading and deceptive conduct, a consequence would be to capture acts of silence or omission (to the extent captured in the provision). This would create considerable uncertainty for businesses in doubt as to what information should be provided to a consumer. While it should be relatively apparent whether a representation is false or misleading, such an assessment becomes a much more complex task if also required to consider representations that haven't been made (and whether the absence of such a representation is misleading).

Even if penalties were only applicable in the most obvious of cases, some businesses may seek to ensure compliance by providing more information than is optimal for consumers (in the

sense that there is such a thing as too much information from the consumer's perspective). This may serve to exacerbate some of the issues raised in part 4.4.2 of the Issues Paper.

Because most other forms of misleading conduct are already covered in the prohibition on false and misleading representation or elsewhere (and are therefore already subject to penalties), there does not appear to be a strong argument for extending penalties to the prohibition on misleading and deceptive conduct.

It is for these reasons that NSWBC considers the current approach to penalties to be appropriate.

### **Recommendation 3**

*Maintain the current principles-based approach to s18 of the ACL as well as the current approach to penalties in terms of the scope of conduct to which they apply.*

### **Unfair practices**

The Issues Paper also raises a number of theoretical questions around whether it is possible for the general protections of the ACL to cover conduct that could be described as 'unfair'.

This includes:

- whether the prohibition on misleading and deceptive conduct should extend to prohibit specific forms of 'unfair' commercial conduct;
- whether unfair commercial practices in the general sense should be prohibited given that unconscionable conduct does not capture all conduct that could be judged as being 'unfair'; and
- whether a contract as a whole can be considered as 'unfair' as opposed to an individual term as per the unfair contract term provisions.

If a universally understood notion of 'unfair' could be established then it would be possible to give more thorough consideration to these issues. A basic starting point may be to ask what forms of conduct should be prohibited that aren't currently. The Issues Paper refers to business models that rely on some form of disadvantage on the part of the consumer (for example where consumers are uninformed). But these examples do not clarify specifically how existing protections are incapable of applying and specifically why the conduct should be prohibited.

### **Recommendation 4**

*The ACL does not require additional measures to protect against unfair commercial practices. Even if specific gaps in the law can be identified, a starting point should be to address those gaps rather than fundamentally reshaping the ACL.*

## **Specific protections of the ACL**

### **Consumer guarantees**

NSWBC notes that a key reform introduced as part of the ACL was to replace the existing system of implied conditions and warranties of the former *Trade Practices Act 1974* with a new system of consumer guarantees. While the consumer guarantees framework did not substantially alter the rights and responsibilities of consumers and sellers, it simplified and clarified the rights of a consumer in the event that a product does not function as intended.

NSWBC notes the considerable amount of effort and resources that has gone into educating consumers and businesses about their rights and responsibilities, including the consumer guarantees framework. While there is still work to do, fundamentally altering the framework would undermine these efforts.

The Issues Paper raises whether further clarity is needed around certain features of the framework including what constitutes a major failure, concepts such as acceptable quality and the length of time a good should last (among others). Given that the ACL takes a principles-based approach it is inevitable that there will be a degree of uncertainty as to how the law applies in specific circumstances. But a more prescriptive approach would increase uncertainty and complexity for buyers and sellers.

A classic example of this is to consider the time period for which a consumer good should function. Even if different time periods were classified for different types of goods there would be significant variances within those categories — for example, should a \$10 toaster be expected to last as long as a \$200 toaster? While it can be argued that the concepts of 'major' and 'minor' failure and the subsequent implication for whether a consumer has the right to demand a refund is confusing, it is not clear that a better approach exists.

### **Consumer guarantees — regulation 90**

The Issues Paper invites stakeholders to comment on disproportionate or unnecessary costs on business. NSWBC strongly urges for the interim report to consider the usefulness of the mandatory statement of consumer rights provided for by regulation 90(1). NSWBC notes the considerable implementation costs as well as the ongoing costs for businesses that must comply.

Warranties against defects should be seen for the positive role that they play in supporting consumers. While the concern appears to be about circumstances in which a warranty provides a lower level of protection than is required by the ACL; NSWBC notes that in many circumstances a warranty against defects will either match or exceed what is required. In the latter case, a warranty against defects can play a supportive role in facilitating consumer redress; while in the former case there are sufficient regulatory tools to ensure they do not mislead consumers.

NSWBC considers it likely that the costs of the mandatory statement exceed any benefits afforded to consumers. To begin with, the text required by the regulation is itself confusing, lengthy and unlikely to result in much benefit for consumers in understanding their rights:

*'Our goods come with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to a replacement or refund for a major failure and compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure'*

It is unreasonable to expect consumers, from this statement, to be able to ascertain what is meant by the concept of a 'major failure' and in what circumstances they are entitled to a refund, replacement or repair.

Even if simpler wording could make it easier to understand for consumers, the need to include mandatory text is a significant compliance burden. Costs are likely to be higher in circumstances where goods are imported and require a retrofitted solution, where there are additional printing costs, where stickers are required to ensure aged inventory is compliant, and in circumstances where it is otherwise difficult to provide notice of the mandatory text (for example where warranty details are provided orally).

While the individual cost to a seller will depend on a range of factors, NSWBC considers it plausible that the annual cost of this regulation could be in the tens of millions of dollars across the economy. For example, if the average cost were just half a cent<sup>1</sup> per product, then NSWBC estimates that the annual cost to the Australian economy would be more than \$10 million.<sup>2</sup> This estimate increases dramatically as less conservative estimates of the cost are considered. Irrespective of this, higher compliance costs for businesses most affected (even if these costs can be averaged out to be low across the economy) should be sufficient to warrant reconsideration of the requirement.

## **Recommendation 5**

*Abolish the mandatory statement of consumer rights required by regulation 90(1).*

### **Consumer guarantees – other issues**

The Issues Paper also raises a number of specific issues including:

- whether consumer guarantees should apply to goods and services sold at auction;
- whether unsafe products should be deemed to have a 'major' defect;
- whether the consumer guarantee framework is appropriate to deal with digital content;
- the need for any additional requirements relating to extended warranties; and
- the need for 'lemon laws' specifically applying to motor vehicles.

The exemption for goods and services sold at auction recognises that in some circumstances it is appropriate for goods and services to be sold, as is, with the buyer bearing a greater share of the risk in circumstances where a good's condition is unknown. Auctions provide such a circumstance as buyers are able to assess the price they are prepared to pay in knowledge of the risks posed.

NSWBC would welcome further analysis, for example as part of the interim report, on whether the consumer guarantees framework allows for the rejection of goods beyond which was initially intended or is reasonable. This includes 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.

The Issues Paper also raises a number of interesting theoretical questions around how consumer guarantees would apply in the case of digital goods. NSWBC urges a cautious approach — it is not clear that consumer policy has a role in shaping how goods and services evolve over time. This includes where products that were once regarded as a 'good' are now better described as a 'service'. The existing consumer guarantee framework should be capable of dealing with circumstances where digital services are not provided as a reasonable consumer would expect (and prices are capable of adjusting to compensate for a lower standard of property rights where physical goods have become a digital service).

Regarding extended warranties (taken to provide rights in excess of consumer guarantees), that there is a market for them demonstrates that there is a consumer preference for them. It is difficult to conceptualise why extended warranties should be subject to different protections

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<sup>1</sup> Equivalent to around 1 second of labour time.

<sup>2</sup> Calculated by summing relevant categories within the ABS household final consumption expenditure series (including *clothing and footwear*; *furnishings and household equipment*; and one quarter of *other goods and services*) and assuming an average product cost of \$40.



as other goods and services valued by consumers. That said, consumers should not be misled about the need for extended warranties (as well as their benefits) and so it is appropriate that the existing protections apply.

NSWBC notes that the incidence of vehicles sold that would commonly regard as being a 'lemon' (certainly among new vehicles) is very low and that there may be more value in educating consumers about their existing rights than complicating matters by devising a new scheme tailored to motor vehicles. NSWBC is not aware of any systemic issues that warrant a new system of 'lemon laws' that would tip the balance in favour of consumers relative to the protections afforded by the consumer guarantee provisions.

## **Recommendation 6**

*The consumer guarantee framework should be retained in its existing form however the interim report should provide further analysis on whether it allows for the rejection of goods beyond which was initially intended or is reasonable.*

## **Unsolicited sales**

The Issues Paper raises a number of issues regarding the unsolicited selling provisions of the ACL.

Arguments in favour of the current unsolicited selling restrictions appear to be based on the premise that some consumers are vulnerable in circumstances where they are approached without invitation. However, this interpretation does not recognise that there are many circumstances in which a consumer approached uninvited would not be subject to the kind of vulnerabilities that the unsolicited selling provisions are intended to protect against.

As the 2012 ACCC report referenced in the Issues Paper noted, door-to-door sales can be an effective mechanism for new businesses to enter the market due to their low set-up costs. Indeed, as the Issues Paper alludes, emerging business models may operate in a 'grey area' where it is unclear whether the restrictions apply. Given this, a framework that does not allow businesses to accept payment for goods or services (prior to the conclusion of the cooling off period) is likely to be an impediment to many new and existing businesses that rely on traditional and emerging sales channels.

NSWBC shares concerns about business models that rely on targeting disadvantaged groups and selling products, sometimes at vastly inflated prices, and considers that there should be regulatory tools to tackle these practices. However the interim report should consider whether the existing provisions strike the right balance with a view to ensuring any restrictions do not wipe out non-threatening business models while targeting protections appropriately.

In part 4, the Issues Paper also considers selling away from business premises as an emerging consumer policy issue. The Issues Paper considers how an evolving market has resulted in situations that blur the line between solicited and unsolicited consumer agreements and whether alternative approaches should be considered. The UK approach of providing additional rights for sales made at a place other than the business premises of the trader would appear to vastly expand the scope of transactions covered. For example, requiring all online sales to be subject to additional protections and cooling off periods would represent considerable costs for business relative to any consumer benefits. It also begs some of the same questions as to how online sales (or indeed any made outside of business premises) are sufficiently different to one made in a bricks and mortar environment.

NSWBC strongly warns against adopting an approach that broadens the scope of these protections, and reiterates the need for them to be better targeted to where the problems are actually occurring.

### **Recommendation 7**

*The interim report should consider how unsolicited selling protections can be targeted better, including to ensure non-threatening business models are not impacted. In this regard the UK model, which captures online sales, should not be adopted as it expands (rather than better focusses) the scope of regulated activities. Restrictions on accepting payment during the cooling off period should be relaxed.*

### **Product safety**

The Issues Paper invites comments on the product safety regime. While NSWBC does not have any specific comments or recommendations on the regime, it notes that the interim report could consider:

- the degree to which political interference hampers the ability for the regime to deliver appropriate risk-based product safety for consumers;
- whether Australian producers or manufacturers face a disadvantage, due to their need to comply with Australian standards, relative to other businesses such as parallel importers; and
- the practicality of mandatory reporting (for example the scope of incidents that should be reported and how internal processes affect reporting periods).

NSWBC notes that the *Competition and Consumer Amendment (Deregulatory and Other Measures) Bill 2015* — which would have removed the requirement for businesses to report serious injuries, illnesses or deaths associated with food products (in recognition of alternative frameworks that apply) — has subsequently lapsed. This Bill should remain a priority for the new parliament.

### **Recommendation 8**

*The measures contained within the Competition and Consumer Amendment (Deregulatory and Other Measures) Bill 2015 should remain a priority for the new Parliament.*

## **Administering and enforcing the ACL**

### **NSW Fair Trading complaints register**

NSWBC notes that the NSW Government has authorised (via amendment to the *Fair Trading Act 1987*) for NSW Fair Trading to publish information on complaints relating to the supply of goods and services. At this stage NSWFT proposes that the complaints register will:

- publish complaints (defined as where the complainant expects action from NSWFT);
- screen vexatious complaints;
- list businesses with more than 10 complaints per calendar month;
- list historical data for up to 24 months; and
- include information on the name of the business, the number of complaints received and the product groups complained about.

NSWBC agrees completely that businesses shouldn't get ahead by ripping off customers. Indeed, this only serves to disadvantage businesses that do the right thing. However, the NSW complaints register will not include information on:

- what the complaint related to;
- what law is alleged to have been breached (so that a user can make an assessment about the seriousness of the complaint);
- how big or small a business is and how many customers it has served (so that a user can assess what the rate of complaints is for a given business); or
- whether a complaint was resolved to the complainant's satisfaction.

NSWBC has engaged with NSW Fair Trading on concerns regarding the design of the register, noting that while consumer empowerment through open data is a desirable objective, the manner in which the register presents information to consumers may have a number of unintended consequences.

In particular, the possibility that third parties (such as media outlets) could republish data in the form of league tables was noted as a particular concern. This is because the number of complaints received is not necessarily a good proxy for customer satisfaction (in recognition that 10 complaints about minor issues could be more than offset by many more consumers that are very satisfied). Importantly, the register also misses an opportunity to report on regulator performance.

Other complaints registers by industry-specific regulators (such as the Telecommunications Industry Ombudsman) are able to represent complaints as a proportion of connections and so are able to contextualise the information.

NSWBC supports the current approach of publicly naming traders that are particularly egregious, but warns against expanding complaints register-type schemes on the basis that it provides unfocussed information to consumers. Until some of the more fundamental issues are resolved, it would be premature to expand such schemes.

## **Recommendation 9**

*Complaints register-type schemes should not be implemented or expanded unless fundamental design issues are resolved.*

## **The multiple regulator model for the ACL**

The Issues Paper presents some of the more positive aspects of the multi-regulator model for the ACL, however does not consider in any detail the costs associated with this approach. This raises a degree of concern that Commonwealth, state and territory consumer regulators and policy makers do not appreciate the potential advantages that could be realised in pooling resources and taking a centralised approach to consumer policy enforcement.

Indeed in many jurisdictions, consumer regulators are also the chief source of consumer policy advice. This raises a question of competing interests on the question of how regulatory responsibilities should be handled. NSWBC notes that the Productivity Commission has been provided with terms of reference to study the multiple regulator model for the ACL. While this review will provide an in depth and independent source of analysis on the merits of the current model, there would appear to be a strong argument for doing things once but effectively, rather the same thing many times in a haphazard manner. This would simplify things for consumers and businesses, and could potentially deliver regulatory (and government) savings in the order of magnitude as the introduction of a single national consumer law.

NSWBC notes that the NSW Government is implementing some of its own reforms to the way its regulatory functions are delivered. This includes how regulatory functions are delivered across economic regulators (and the scope for shared services) as well as how policy can be adjusted to enhance savings under initiatives currently being pursued by Service NSW. These initiatives demonstrate the potential improvements that can be delivered by thinking outside the square but should not prejudice the pursuit of further efficiencies by consolidating consumer regulatory responsibilities at the national level.

### **Recommendation 10**

*Productivity Commission recommendations about reforming the multi-regulator model for the ACL should be implemented in full.*

### **International reach of the ACL**

The Issues Paper discusses the international application of the ACL, noting that Ministerial consent is required for private action to be taken where it relies on extraterritorial conduct.

In practice this requirement represents a considerable compliance burden for private litigants that wish to enforce their rights under the ACL. Given that virtually no legal systems specifically authorise conduct that is in breach of the ACL, it seems redundant to require private litigants to go through the process of obtaining Ministerial consent (and the subsequent processes that are required to ensure procedural fairness for parties involved).

For this reason NSWBC supports the intent of the *Competition and Consumer Amendment (Deregulatory and Other Measures) Bill 2015* which would have removed this requirement. As previously noted, this Bill should remain a priority for the new Parliament.

### **Recommendation 11**

*The requirement for Ministerial consent to rely on extraterritorial conduct should be abolished in accordance with the Competition and Consumer Amendment (Deregulatory and Other Measures) Bill 2015.*

## **Emerging consumer policy issues**

### **Online shopping**

The Issues Paper notes a number of issues within the online environment including clarity in prices, the provision of information, and around comparator websites, online reviews and testimonials.

Consumers should be able to expect that representations about the price of a good or service is accurate and that they will not need to pay more than is advertised. This does not mean that businesses shouldn't be able to offer product enhancements or additional complementary items that add value to a transaction at the point of sale. This is a standard practice on both the online and bricks and mortar selling environments. From a consumer policy perspective, there is no reason to consider that this practice causes consumer harm noting that a consumer can always say no in circumstances where it does not suit their needs.

The existing component pricing provision and general prohibition on misleading and deceptive conduct ought to be sufficient to deal with circumstances where prices are not represented in a clear and transparent manner. That said, there is a need to ensure these requirements are

properly enforced so that consumers are not misled and that businesses that do the right thing are not put at a disadvantage compared with those that do not.

The Issues Paper canvasses whether businesses should be required to provide greater information, including disclosures regarding the online shopping environment regarding consumer rights and product safety. The regulatory costs of imposing such requirements should be front of mind for policymakers. Online shopping is an international marketplace and implementing more onerous requirements on Australian retailers may have amplified impacts in terms of their competitiveness. Even if the requirements technically apply to foreign retailers selling to Australian consumers, there are likely to be enforcement challenges (as noted in the Issues Paper) that in effect leave Australian businesses at a disadvantage. For this reason NSWBC encourages a conservative approach such that any disclosure requirements required of online retailers must be justified on very strong grounds.

Issues relating to online reviews, testimonials and comparator websites are of equal importance to consumers and the business community. Consumers and businesses share an interest in ensuring they are accurate and do not mislead consumers. A business' goodwill should not be subject to destruction by fake or exaggerated reviews, while consumer choices influenced by misinformation are unlikely to reflect their needs. Despite this it is not clear that any silver bullets exist. For these reasons NSWBC welcomes continued regulator efforts to ensure that these platforms help rather than hinder consumer decision making.

### **The sharing economy**

The Issues Paper is correct to recognise that the sharing economy cannot be regulated using the approach taken to the traditional economy. However, it must also be made clear that the growing diversity of industries and businesses that have embraced 'sharing' as part of their business model has made redundant any efforts to study the 'sharing economy' as a singular homogeneous entity. A 'one size fits all' approach will neither effectively nor efficiently address the issues associated with the sharing economy, or the concerns of consumers.

It is therefore difficult to discuss the adequacy to which the ACL currently serves consumers of businesses operating in the 'sharing economy'. To help address current and future challenges presented by the rise of the sharing economy, NSWBC developed a paper, [Policy principles to foster the sharing economy in NSW](#) recommending a set of policy principles that governments should follow when developing regulatory frameworks for the sharing economy.

Although the paper was developed to address issues faced by the visitor economy (particularly accommodation and transport), the core principles are equally relevant to the purposes of this review:

- regulation should encourage the growth of commercial activity, not restrict it;
- the opportunity should be taken to reduce overall regulation across the visitor economy;
- self-regulation should be encouraged before government intervenes;
- a cross-governmental approach is required to develop an efficient regulatory framework; and
- regulatory responses should be designed based on strong empirical evidence.

### **Open data**

The concept of open data requires more detailed definition and clarification as it can mean different things to different people. Open data also raises questions around privacy, and whether data, is or ought to be able to remain, commercial in confidence. Requiring commercial entities to provide data also raises considerable questions around the regulatory burden of such a requirement.

Regarding greater access to government data, NSWBC notes that open data is not the same thing as open government. While the provision of data on selected topics may superficially imply open government, it is not truly open government unless it provides greater insight and accountability to government decision making. This emphasises the need for any changes to consumer policy to undergo proper and robust regulatory impact analysis.

As a general proposition there is also a strong need to ensure that the release of government data is properly contextualised. Again, NSWBC would like to emphasise its concern at NSW Fair Trading's plan to publicly release consumer complaints, and in particular that it may actually serve to hinder consumer decision making (or at best potentially cause significant damage to individual businesses without benefits to consumers).

The Productivity Commission inquiry into the use of public and private sector data will allow for these issues to be explored in more detail.