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9 December 2016

Mr Aidan Storer
Manager
ACL Review Secretariat, The Treasury
On behalf of Consumer Affairs Australia & New Zealand, The Legislative and Governance Forum on Consumer Affairs

Email: ACLReview@treasury.gov.au

Dear Mr Storer

INTERIM REPORT FOR AUSTRALIAN CONSUMER LAW REVIEW 2016

The Australian Industry Group (Ai Group) welcomes the opportunity to make a submission to the Consumer Affairs Australia & New Zealand's (CAANZ) consultation on its interim report on the Australian Consumer Law (ACL) Review. We also thank you for being provided with the opportunity to hear CAANZ's views about the interim report at a stakeholder roundtable held in Sydney on 3 November 2016.

1. General comment

Ai Group's membership comes from a broad range of industries and includes businesses of all sizes. The input we received during this review was mainly supplied by members involved in manufacturing, distribution and servicing of consumer electronics and home appliances, the provision of digital technology services and confectionary manufacturing.

Overall, we consider that the ACL framework is functioning well. We support minimum changes to the ACL that will improve and clarify its application, and provides a fair balance between the rights of consumers and businesses. We believe that our recommendations to improve the ACL strikes the right balance that will benefit both industry and consumers in the long term.

We note that the interim report proposes options for reform and seeks further evidence from stakeholders. We also understand from comments made by CAANZ representatives at the stakeholder roundtable that there is no commitment to any of the options, and that this review intends to recommend light-handed regulatory and/or legislative amendments.

We strongly recommend that, if CAANZ decides on an area for reform, further stakeholder consultation will be required including an assessment of the costs and benefits for regulatory or legislative change. At this stage, CAANZ's intended direction and the full implications of any proposed reforms are still unclear to industry. We look forward to working closely with policy makers, governments and regulators to address these in the near future.

2. Scope of our submission

We appreciate that the interim report attempts to provide more focused questions on particular issues with the ACL. However, the questions are still wide-ranging and explores various options for reform.

For the purpose of this submission, we have focused on issues that we have previously raised in our submission to CAANZ's issues paper in June, as well as elaborating further on ways to improve the current arrangements. These areas include: definition of consumer; consumer guarantees in general, and in relation to auction site sales and other online sales; mandatory notice for warranties against defects; extended warranties; product safety; cooling off periods for unsolicited agreements; unfair contract terms; price transparency in online shopping; and publication of consumer complaints data.

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3. Definition of consumer

The interim report proposes the option to increase the $40,000 threshold value for goods or services within the definition of "consumer" in the ACL.

As stated in our previous submission, the broad definition of "consumer" in the ACL creates too much confusion and uncertainty for suppliers and consumers. This includes the arbitrary monetary threshold value of $40,000 which is a very simplistic approach and clearly does not address the fact that any type of customer could purchase goods or services within that threshold, beyond the most disadvantaged customer.

CAANZ's proposal to significantly increase this arbitrary threshold (as well as its proposed option to index it by the Consumer Price Index) does not address the fundamental flaws in the application of the threshold, and potentially increases business compliance costs. We therefore do not support any proposed increase to this threshold.

For example, a consumer grade product sold to a regular consumer would be different to a more expensive and higher industrial (commercial) grade product sold to a business e.g. monitors, televisions and dish washers. The consumer grade product is designed for use by regular consumers as opposed to more intensive use by businesses. Therefore, only products purchased by natural persons should be covered under the definition of consumer.

Another example where the vague definition of consumer causes confusion is with respect to the regulation of public safety with respect to non-conforming building products. In particular, it is not clear whether a building product should be treated as a consumer product under the ACL.

For instance, products were discovered to be faulty with a potential risk to public safety wherever it was installed into homes. The ACCC took an interest in this matter as approximately 50% of the product was sold through a particular consumer outlet.[1] The issue was dealt with through a mandatory product recall. This regulatory approach contrasts to the experience of other stakeholders who have been told by consumer regulators that a building product is not a consumer product (even though these have been sold through consumer outlets) and therefore no action would be taken on the issue of non-conformance.[2] While we support the ACCC's approach in this matter, the different interpretations of what constitutes a consumer product between regulators in circumstances similar to the Infinity Cables case illustrates the need for policy makers to provide regulators with consistent guidance to the regulation of consumer products.

We recommend that CAANZ consider more appropriate overseas approaches to defining the "consumer" that provides more certainty and clarity, and reduces compliance costs to businesses and consumers, as we have previously suggested. For example, as noted in CAANZ's issues paper, in the United Kingdom the consumer is defined to be a natural person that excludes companies or small businesses. Another option would be to maintain the current arbitrary threshold of $40,000, but exclude contracts with customers who supply an ABN, or at least incorporated companies and government entities. This amended definition for consumer would be extended to unsolicited agreements.

4. Consumer guarantees in general

The interim report puts forward the option to include industry-specific approaches around consumer guarantees.

One of the main issues raised in our previous submission relates to the handling of consumer claims about alleged failures of suppliers to comply with guarantees ("failure").[3] Our consumer electronic and home appliance manufacturer members report that a large proportion of returned goods either have no failure, or the failure was not caused by the manufacturer. In such circumstances, it would be

[1] Economics Reference Committee Non-conforming building products 13 November 2015, p. 47.
[2] The Quest for a level playing field: the non-conforming building product dilemma 2013, p. 56.
[3] Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (ACL) section 259.

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reasonable for such goods to be returned to the consumer with no refund in accordance with the ACL.[4] However, in practice, a number of manufacturers are unable to do so.

In instances where a failure does exist, there has also been an increase in consumers making unreasonable claims.

The following are specific examples of problems, which have been reported by our members:

- Upon receiving a returned good from a consumer, some retailers simply replace the goods and return them to the manufacturers without investigating whether a failure actually exists or what its cause may be. Once this occurs, the manufacturer may have no practical ability to return the goods to the retailer.

- When a retailer returns a good to the manufacturer, care is not given to the handling of the good. For example, there have been instances where goods have not been properly packaged (e.g. inadequate or no protective packaging) and, as a consequence, damaged in transit. Some of these returned goods have missing parts. There appears to be an assumption by certain retailers that returned goods from consumers should be automatically treated as damaged, even though the manufacturer has not had the opportunity to assess whether any major or minor failure exists.

- When a good is directly returned from the consumer to the manufacturer, some manufacturers fully refund the retail price to the consumer. The ACL does not clarify how the manufacturer could seek monetary contributions from other participants along the supply chain (including the retailer) to share the costs. That is, some manufacturers in practice have covered the retailer margin. This problem is even worse where third party intermediaries may be involved such as rental companies, resellers and overseas sellers.

- On occasion, retailers offer discounted sales on goods (including second hand and damaged goods) and with this understanding consumers purchase these discounted goods at the point of purchase. Following the purchase of these goods, certain consumers have immediately sought a warranty claim from the manufacturer to repair the good. In this example, the manufacturer should not be forced to repair or refund the good. Instead, it should be returned to the retailer or seller who received money for such a purchase.

These problems have been in part due to the lack of incentive or obligation in the ACL framework for: the retailer to initially assess whether a failure exists; and the consumer to only return a good that it genuinely believes was a failure caused by the manufacturer. There are also no proper systems in place to manage the assessment of failures.

Underlying these problems is the lack of clarity for consumers and retailers on the definition of key ACL terms relating to consumer guarantees: "major failure", "failure", "acceptable quality", "durable", "reasonable time" and "reasonable costs".

We appreciate that the above issues relating to consumer guarantees may be unique to specific industries and even products e.g. the definition for durability of goods may vary by the type of product. Therefore, industry-specific guidelines could be a solution. Development of such guidelines will need further consultation with industry.

However, clarifying definitions and processes through industry-specific guidelines will only partly solve the above issues. Amongst other things, education awareness programs for consumers and retailers could also complement these guidelines.

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[4] Ibid section 262.

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5. Consumer guarantees in relation to auction site sales and other online sales

We note that the interim report only focuses on whether the sale-by-auction exemption for consumer guarantees should be amended with regards to sales by online auction sites. However, we consider that there is also a separate and broader question relating to consumer guarantees in relation to online purchases (in particular parallel imports) that should also be addressed.

5.1 Online sales

With the increasing presence of online retailers, consumers now have a range of choices including whether they purchase from local or overseas suppliers. Some consumers may choose to purchase a product from overseas because they consider there is a price saving. However, consumers need to be aware that the benefit of purchasing locally (whether online or in store) is that the local price covers the local supplier's costs for doing business in Australia, including meeting local compliance costs (e.g. Australian product safety standards), providing parts for local models (as opposed to overseas models), and maintaining local service and support to consumers.

This is an important reason a brand sourced from overseas is priced differently to the same brand purchased locally. This is also why policy makers and regulators need to be conscious of the legitimate distinction between the trading name and the brand name.

Therefore, if the consumer chooses to purchase a product from an overseas source, local suppliers and distributors should not be held accountable for consumer guarantees of products purchased from an overseas supplier. The ACL should be clarified that any warranty for a product (including service and support) is provided from the originating place of purchase rather than assuming that it is always the responsibility of the local supplier or distributor just because of the brand name.

5.2 Auction site sales

With respect to online auctions, consumers should be advised of "buyer beware" when purchasing second hand products. In this case, the product should not be covered under warranty. Similar to the requirement for mandatory notice of warranties against defects, the ACL or guidelines should require online auctioneers to include a mandatory disclaimer for "buyer beware".

6. Mandatory notice for warranties against defects

The ACL requirement to include a mandatory notice for warranties against defects for goods is very impractical for suppliers to manage as well as consumers. For example:

- including the required text may be too large for placing on warranty cards;
- while manufacturers of goods are required to include such warranties, this has not been a requirement for resellers; and
- manufacturers are unable to control obsolete products still being sold by retailers (this includes old warranty cards in packaging that would have expired over the course of the product's lifecycle).

If the mandatory notice for warranties against defects for goods remain a requirement for suppliers in the ACL, consumers may prefer to receive less documentation with a purchase and will look to suppliers' websites for detailed materials, such as user instructions and warranties. Exploring this option further, website and contact information regarding warranties can be referred to in a user's purchase receipt.

7. Extended warranties

We maintain our previous view that it would greatly assist consumers if retailers clearly explained to consumers the specific additional value that they are providing in addition to the current obligations required of manufacturers. Amendments to the ACL may likely be required, including clarifying the period for which a standard warranty applies.

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Consumers would likely expect that extended warranties operate beyond the requirements of the ACL for standard warranties, with the retailer providing a particular service such as repair. There would also likely be an expectation that the repair service provided by the extended warranty is conducted to the standard of service of a licenced repairer.

8. Product safety

8.1 General safety provision

The interim report proposes the option to introduce a general safety provision in the ACL.

Currently, regulation requires that all products sold in Australia must be safe, and declared articles must also be certified by a relevant body or authorised external approval scheme. An underlying problem with the current arrangements is the challenge for regulators to engage with relevant suppliers of unsafe products, and having the capacity to properly administer and enforce safety regulations.

We consider that introducing a general safety provision will be unlikely to address current fundamental problems around the regulator's capacity to administer and enforce the ACL against non-complying suppliers. Instead, it will create an additional regulatory burden and red tape on suppliers who are complying with the existing arrangements. If CAANZ decides to recommend the introduction of a general safety provision, we would welcome the opportunity to explore further the cost and benefits of how such a provision would operate and how allocation of product safety risk is dealt with.

8.2 Other product safety issues

In our supplementary submission to CAANZ in September, we also made comments about the following issues on product safety under the ACL:

- the definition of consumer products (discussed earlier in this submission);
- the effect of trusted international standards;
- access to regulated standards;
- the effectiveness of the current approach to product recalls and remedies; and
- regulators' management of unsafe products under the ACL and specialist regulatory regimes.

We note that these issues may be relevant to CAANZ's questions regarding a performance-based approach to compliance with product safety standards, and product bans and recalls. We therefore encourage CAANZ to review our comments, included in Appendix A to this submission.

In addition, we would also like to bring to CAANZ's attention that Standards Australia has recently circulated a proposal to adopt two international standards which is being driven by the ACCC: ISO 10393:2013 Consumer product recall – Guidelines for suppliers; and ISO 10377:2013 Consumer product safety – Guidelines for suppliers. CAANZ should consider what impact these standards will have on its review.

9. Unsolicited agreements

9.1 Cooling-off periods

In our previous submission to CAANZ, we provided an example where the current ACL does not allow for consumers to receive their good or service until after the cooling-off period expires under unsolicited agreements.[5] For some consumers who wish to access this good or service sooner, they have been unable to do so and have found a workaround which involves terminating their unsolicited agreements and entering into new agreements for the same good or service.

We have suggested that this could be solved in the ACL by simply providing consumers with the choice to waive off the cooling-off period. Alternatively, the supplier could be permitted to provide goods or services during the cooling-off period, subject to the condition that the supplier only receives payment

[5] Ibid section 86.

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from the consumer where the contract is not cancelled during this period. We consider that this is a more effective and proportionate response for the benefit of consumers to a currently inflexible requirement.

This is in contrast to the interim report's proposed option to replace the cooling-off period with an opt-in mechanism, whereby the consumer would be required to confirm the sale within a limited time without contact from the trader before payment and supply could be made. The proposal appears to be an impractical and sub-optimal approach, and makes assumptions about consumer behaviour, by placing a requirement on the consumer to remember to opt-in. This also does not benefit the consumer as there is a risk that it could further delay a consumer in receiving access to a service because they have not confirmed the sale (and would not be reminded by the trader to do so).

9.2 Pop-up stores

In our previous submission to CAANZ, we identified an emerging issue where sales made through pop-up stores could be classified as an unsolicited agreement under section 69 of the ACL. We pointed out that a pop-up store that professionally operates at a location that is not traditionally commercial in nature should not create a different customer experience to traditionally located stores and therefore should not be treated differently under the ACL.

We also suggested there could be a distinction drawn between staff operating at the location of the pop-up store and staff leaving the vicinity of the pop-up store to engage with customers. This scenario could be akin to unsolicited agreements.

There may be benefit to clarify the operation of pop-up stores under the ACL through guidelines.

10. Unfair contract terms

We do not have substantive comments about unfair contract terms. However, there are two particular points that CAANZ should consider in its review.

The interim report raises questions about whether terms previously declared unfair by a court should be prohibited and whether the "grey list" of examples of unfair contract terms should be expanded. It is worthwhile noting that whether these terms are unfair depends on the context of the particular issues in question which may turn on the facts of the case. There is also a likelihood that unfair contract terms will be different if the relationship is between businesses or between a business and a natural person.

11. Price transparency in online shopping

The interim report asks whether measures should be adopted to address pre-selected options during booking or payment processes in online shopping.

In our previous submission to CAANZ, we identified an area of confusion for consumers where the ACL requires the seller to advertise the total minimum price for bundled goods or services.[6] As the majority of consumers may not pay the amounts appearing in the advertisements, we recommended that it would be clearer for the price of the add-on product to be advertised with a sufficiently prominent explanation that the optional product is only available with the purchase of another product. We consider this would be a proportionate solution to our identified problem.

Other options posed in the interim report include prohibiting pre-selected options altogether. In this respect, we consider that this can have unintended consequences by curtailing business models that enable consumers the ability to purchase a bundle of pre-selected options (e.g. products that include "bolt-ons" or "add-ons").

[6] Ibid section 48.

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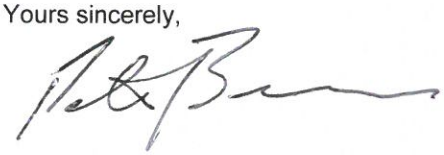
Should CAANZ be interested in discussing our submission further, please contact our adviser Charles Hoang (02 9466 5462, charles.hoang@aigroup.com.au).

Yours sincerely,



Peter Burn
Head of Influence and Policy

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12. Publication of consumer complaints data

NSW Fair Trading has recently established a public consumer complaints register, which we understand is for the purpose of using complaint data to deliver better customer service and assist customers to make more informed decisions. The interim report refers to this register as part of its discussion about CAANZ's national project which is aimed to "prevent consumer detriment and reduce demand on the resources of ACL regulators by identifying the businesses that are the subject to the most numbers of complaints and enquiries received by ACL regulators, engaging with them to improve their customer service practices, and facilitating a coordinated national response".

While we support the rationale for the NSW scheme, we have a number of concerns with its design which we do not consider reflects best regulatory practice and creates a disproportionate outcome. This design gives rise to broader issues with respect to a process that lacks procedural fairness, creates the potential for increased abuse of process and an unnecessary regulatory burden (including resourcing issues) on both the regulator and affected businesses, and unfairly causes reputational damage to businesses over frivolous and vexatious claims.

Particular elements of the scheme that give rise to our concerns include:

- There is no recourse for an organisation to dispute the validity of a complaint.
- The threshold for making consumer complaints is low (ten complaints from a natural person with a proof of purchase) – it does not limit complaints to reasonable and legitimate claims.
- There is no evidence required of the consumer to support an alleged problem.
- Complaints reporting are misrepresented by omitting additional and relevant information e.g. total number of sales, customer enquiries, and trading company name involved.
- Local distribution companies are being incorrectly held accountable for actions of third party importers and other third parties.
- Definitions in the ACL are currently ambiguous.

Compounded with our above concerns, the register has inadvertently become a "naming and shaming" enforcement mechanism in the eyes of the public. This tool has the potential to be very damaging to businesses' reputations. Reputation is invaluable and difficult to repair if it is damaged – policy makers and regulators should not underestimate this. This means that the need to adhere to the fundamental principles of procedural fairness in the design and administration of the register becomes even more critical.

We have outlined our above concerns in a letter to NSW Fair Trading, as well as suggested constructive ways to improve the design and administration of its complaints register.[7] We have also brought this matter to the attention of the Productivity Commission in its study of the enforcement and administration arrangements underpinning the ACL. While discussions are still ongoing, we hope that NSW Fair Trading will provide a practical and workable solution to address our concerns.

There are also broader implications should our concerns with the NSW consumer complaints register not be sufficiently resolved. We understand that other Australian jurisdictions could adopt a similar approach to NSW or potentially use it as a model for a national database. This has been also alluded to in the Productivity Commission's study. However, given our strong concerns with the NSW approach, we consider that the current NSW register should not be considered as a model for adoption in other jurisdictions or nationally, without proper industry consultation and improvements made to it.

[7] Further details about our concerns with the NSW Consumer Complaints Register are covered in Appendix B to this submission.

Appendix A – Ai Group supplementary submission to CAANZ on ACL Review on product safety

07 September 2016

Mr Aidan Storer
Manager
ACL Review Secretariat, The Treasury
On behalf of Consumer Affairs Australia and New Zealand
The Legislative and Governance Forum on Consumer Affairs

By Email: ACLreview@treasury.gov.au

Dear Mr Storer,

AUSTRALIAN CONSUMER LAW REVIEW 2016 – SUPPLEMENTARY SUBMISSION ON PRODUCT SAFETY

The Australian Industry Group is providing this supplementary submission to the issues paper for the Australian Consumer Law (ACL) Review with respect to product safety. It follows from our submission of 6 June 2016 to this review. We have addressed below selected issues outlined in the issues paper.

Definition of Consumer Products

In our submission to the issues paper in June, we identified an issue with the broad definition[8] of "consumer" in the ACL, which creates too much confusion and uncertainty for suppliers and consumers.

Further to our previous submission, we wish to highlight another situation where confusion with the definition of consumer has impacted on the regulation of public safety with respect to non-conforming building products. In particular, it is not clear whether a building product should be treated as a consumer product under the ACL.

Infinity Cables' products were discovered to be faulty with a potential risk to public safety wherever it was installed into buildings. The ACCC took an interest in this matter as approximately 50% of the product was sold through a particular consumer outlet[9]. The issue was dealt with through a mandatory product recall. This regulatory approach contrasts to the experience of other stakeholders who have been told by consumer regulators that a building product is not a consumer product (even though these have been sold through consumer outlets) and therefore no action would be taken[10] on the issue of non-conformance.

Ai Group supports the approach taken by the ACCC in the Infinity Cables matter where a consumer product is defined as one that is sold through a consumer outlet. However, the different interpretations of what constitutes a consumer product between regulators in circumstances similar to the Infinity Cables case illustrates the need for policy makers to provide regulators with consistent guidance to the regulation of consumer products.

Trusted international standards

Ai Group notes that the trusted international standards regime has been developed as part of the Government's Industry Innovation and Competitiveness Agenda, with the objective to reduce duplicative domestic regulation and red tape. Under the regime if a system, service or product has been approved under a trusted international standard or risk assessment, then Australian regulators would not impose any additional requirements, unless there is a good and demonstrable reason to do

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[8] ACL section 3.
[9] Economics Reference Committee Non-conforming building products 13 November 2015, p. 47.
[10] The Quest for a level playing field: the non-conforming building product dilemma 2013, p. 56.

so.[11] These standards may be referenced in Australian regulation as deemed-to-comply solutions or as technical documents.

While Ai Group strongly supports the Government's agenda to reduce red tape, we are concerned that automatically embracing trusted international standards risks the removal of a critical element in Australia's regulatory framework. This element encompasses the participation of a balanced group of diverse stakeholders in a consensus-based environment to develop standards.

As a consequence, the regulator may choose a standard developed by an international organisation that has not had any Australian input or has not properly consulted with Australian stakeholders on the appropriateness of the standard in accordance with a set of predetermined criteria. In other words, the use of trusted international standards moves stakeholders from participating in a ***consensus-based model*** to a ***consultative-based model***, which significantly reduces the opportunity for the appropriate Australian industry expertise to shape the outcome for the benefit of the Australian market and consumers.

An Ai Group member made the following observation:

> *"In my limited experience with the development of overseas standards I have found that there is a significant difference between the consensus based / declaration of conflict approach taken within Standards Australia (and rigidly enforced by peers) and the approach taken in North America where we have seen clauses written into standards that clearly benefit limited numbers of manufacturers without genuine technical merit. I should point out that we are not talking about specific safety issues but it concerns me that the process is not as impartial as I have experienced in Australia."*

Ai Group believes that it is important that if trusted international standards are to be referenced in regulation the following criteria should be adhered to:

- widely accepted principles for developing standards are used;
- appropriate public consultation processes are observed;
- they must improve regulatory coherence and technical convergence (it cannot be assumed that because a standard is trusted internationally that it will automatically fit within the Australian regulatory and technical context); and
- Australia complies with its obligations under the World Trade Organization Technical Barriers to Trade (WTO TBT) Agreement, which requires Australia to influence and adopt international practice where possible to avoid introducing "Australian Specific" requirements where they add unnecessary costs or complexity.

Ai Group also recommends that a balanced group of stakeholders constituted in a working group or committee be assigned with the responsibility to review any international standard that is to be adopted under a "trusted international standards" regime.

Access to regulated standards

Ai Group notes the arguments that standards specifically referred to in regulation should be freely available and the suggestion that this would result in improved access and use of standards and improved quality and safety for consumers and the broader community. Clearly there are costs associated with the development and distribution of standards and we understand the need for the developers and distributors to be appropriately compensated for their efforts and expertise.

Ai Group notes the decision by the Australian Building Codes Board to provide the National Construction Code (NCC) free of charge (for electronic copies) from 2015 onwards. This decision was taken to increase the use and knowledge of the NCC by practitioners. In this case the states and territories have agreed to offset the revenue lost as a result of this decision. In our view this is an appropriate source of funding given the wide dispersal of the benefits across the community.

Ai Group also notes the report from the Western Australian Government *Joint Standing Committee on Delegated Legislation – Access to Australian Standards Adopted in Delegated Legislation* which

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[11] Australian Government, *Industry Innovation and Competitiveness Agenda: An Action Plan for a Stronger Australia* (14 October 2014).

argued that standards called into legislation should be free. Clearly while standards may be made free to users, the costs of their development and distribution will still need to be met.

The effectiveness of the current approach to product recalls and remedies

Ai Group believes that the current approach to voluntary and mandatory recalls does work well however there are improvements that can be made.

Members differentiate between recalls involving installed and non-installed products.

For installed products (e.g. building infrastructure components installed by professionals such as switches and sockets, cables, protection devices, and fixed lights) the recall process is particularly complex and expensive as it requires the capacity to engage the entire electrical industry, from contractors to wholesalers and end-users.

Below is an extract of a member's experience with the ACCC's Consumer Product Safety Recall Guidelines (that outlines 13 supplier recall principles):

> *"the product safety framework provides a single national approach to issuing and enforcing recalls products. Recalls key action is to remove the product quickly and in optimised number from the market. Its effectiveness should be assessed and reported at every stage. For products of installation my feeling is that the results are questionable (at various stages):*
>
> - *remove the unsafe product from the marketplace:* ***Comment:*** *not effective or very difficult in most cases (few exceptions from reputable players) Rate of return generally low*
> - *notify the public:* ***Comment****: challenging*
> - *notify others in the domestic supply chain:* ***Comment:*** *challenging*
> - *facilitate the return of recalled products from consumers:* ***Comment:*** *not effective or very difficult in most cases (few exceptions from reputable players)*

The member's issues with some of the recall responsibilities (as outlined above) highlight the important need for industry and regulators to work together to ensure that non-conforming installed products along supply chains are identified and removed quickly. Ai Group also recommends that each of the 13 supplier recall responsibilities in the ACCC's guidelines be reviewed by consumer regulators to identify and profile leading practice examples from industry that can be encapsulated in a guideline.

Members encountering a recall for the first time have reported that there is inadequate guidance provided by regulators to assist them on whether they are required to embark on a recall for a product that has questionable safety attributes. Members have reported that the

> *"ACCC appears to be more concerned with fining people than actually giving assistance to companies that are in the position of having to initiate a recall."*

Ai Group recommends that consumer product regulators provide guidance, including in the form of case studies of organisations' experiences in the recall process.

A member has raised the issue of capacity to pay for recalls:

> *"The biggest factor in recalls is the "capacity to pay" for the repercussions of a defective product, particularly when the cost of remediation is far in excess of the original cost of the product. Is there a way of insuring against this? Should a portion of sales tax be accrued for such circumstances, and should this tax rate be varied in accordance with the "risk rating" of a supplier? For example, a small company that has been trading for less than 5 years is a higher risk than a company in service for 50 years. The size of the company is a factor. The prior history of the company's product failure rate is a factor. The insurances and coverage paid by a company is a factor. The type of product sold could be deemed to vary the "risk" factor. A number of criteria could form the basis of the risk factor that ultimately determines what tax is contributed to the "recall fund" that is then administered in the event of a defect. "*

We recommend that a cost-benefit assessment be undertaken:

1. To consider risk sharing schemes such as that outlined above including recall insurance;
2. To consider the inclusion of a requirement in the ACL for the manufacturer to disclose details of their recall insurance (if any) to improve transparency.

Ai Group also recommends that a guide to recall insurance should be written as a joint initiative between Government and industry. This guide should outline the key elements that suppliers should look for when examining recall insurance.

Regulators' management of unsafe products under the ACL and specialist regulatory regimes

The Infinity Cable recall matter is an example of an issue falling within the scope of specialist electrical regulators and ACL regulators. Ai Group deals with a number of specialist regulators covering: electrical products, building products, plumbing products, work health and safety, and border protection to name a few.

A member stated:

> *"Specialist regulatory schemes are designed with good intention. However, they often create bureaucracy for those that have integrity and want to comply, whereas those that don't have integrity will always slip through."*

Ai Group believes that, where there is overlap between the remit of these specialist regulators and ACL regulators, consideration should be given to establishing publicly available protocols that govern the operation of regulators.

Ai Group reiterates the need for both specialist and general regulators to be engaging in rigorous surveillance and check testing so that the market remains free of non-conforming products.

Should CAANZ be interested in discussing our submission further, please contact Mr James Thomson, Senior Adviser Standards and Regulation on 02 4925 8313 or at James.Thomson@aigroup.com.au.

Yours sincerely

PETER BURN
Head of Influence and Policy

Appendix B – Ai Group letter to NSW Fair Trading on Complaints Register

01 July 2016

Mr Rod Stowe
Commissioner
NSW Fair Trading
PO Box 972
Parramatta
NSW 2124

By email: commissioner@finance.nsw.gov.au

Dear Mr Stowe

Ai Group has become aware of NSW Fair Trading's scheme for a *public* Complaints Register. We support the rationale for the scheme and understand that the prudent use of complaint data can deliver better customer service and assist customers make more informed decisions. We believe that a company that is focussed on their customer's need by acting on feedback such as complaints is more likely to be sustainable in the long term. We do, however, have a number of concerns with the scheme.

Ai Group would like to meet with you to discuss our concerns as detailed below.

Ai Group enjoys an excellent working relationship with governments and regulators and our experience has shown that good policy outcomes can be achieved when regulatory initiatives are appropriately calibrated through robust consultation with stakeholders including industry. Disappointingly neither Ai Group nor the Consumer Electronics Supplier Association (CESA) where consulted during the development of this initiative. Between the two organisations our members represent 80% plus of the supply to the consumer electrical and electronic market.

Ai Group understands that the key points on the operation of the Complaints Register scheme are:

- a complaint is defined by AS/NZS 10002-2014
- only complaints made to NSW Fair Trading are recorded
- only businesses attracting more than 10 complaints per month will be published
- complaints will be logged against the recognisable "trading" or "brand" name
- only complaints made by a real person with a real interaction with the business in question will be recorded
- scheme commences on 1 July 2016
- there are no mechanisms for the business to dispute the validity of a complaint being made against them

Ai Group notes that there is likely to be significant media coverage when the scheme launches. Ai Group questions the fairness of the scheme given the risk to an organisation's brand from this initiative when there is no recourse to dispute the validity of a complaint – the process lacks procedural fairness.

The threshold for making consumer complaints is low – it does not limit complaints to reasonable and legitimate claims. In particular, the process for making a consumer complaint does not include an obligation for the consumer to provide any evidence of an alleged problem. This can open up the flood gates to frivolous and vexatious claims, leading to increased abuse of process by consumers and creating an unnecessary regulatory burden on the regulator and affected businesses.

Ai Group attended a meeting on 16 June 2016 in Sydney with one of our members, NSW Fair Trading and Consumer Affairs Victoria to discuss the operation of the Register and current

complaints data sets held. This meeting, along with other member consultations, has led Ai Group to form a view that the initiative could deliver improved and fairer outcomes with a number of changes.

1. Recognising the linkage between trading context and complaints

The *NSW Fair Trading Complaints Register Guidelines (pg7)* makes the statements:

"*Larger businesses may attract greater numbers of complaints due to the larger number of transactions undertaken.*"

"*Certain types of business may generate more complaints than others due to the nature of the products or services offered.*"

Ai Group agrees with these statements but notes that we do not see any mechanism in this scheme for taking these facts into account for larger organisations in terms of the publication threshold of 10 complaints per month. Ai Group believes that companies should be given the right to provide to NSW Fair Trading data that provides a trading context (e.g. sales volume, number of customer enquiries) that should be taken into account in the publication threshold. We recommend that a tiered approach to a publication threshold would better reflect the increased risk of complaints due to high sales volume. We note that not all companies may be comfortable providing trading information however those that are willing should be given the right to do so.

Member perspective:

If a member was receiving contacts from customers at say 50,000 per month, with actual complaints being only a very small percentage of this number, then why should the customer complaint rate to NSW Fair Trading be compared to a company that only has 500 customer contacts per month.

2. Brand / trading name does not always reflect the business structure

Companies should be given the right to make a case to NSW Fair Trading on what "trading" or "brand" names should be used for complaint logging purposes on the basis of business structure and / or ownership.

Many companies may share a brand but have independent operations and supply/distribution chains in Australia. Whilst a consumer may only discern a single brand there maybe no ability for the organisations that operate under the brand umbrella to collectively control variables such as product quality that can result in complaints.

3. Recourse for invalid complaints

Companies should be given the right to *challenge* the validity of a complaint when it relates to:

i. Parallel imports

Organisations may choose not to import certain products available to them from the parent company for a variety of reasons including compatibility with local conditions. They should not be held accountable for complaints made about these product if third party importers bring these same products into Australia.

Member perspective

We "may have chosen not to sell a particular product for a variety of reasons including for safety e.g. compatibility with local electrical requirements. However we cannot stop retailers, without our knowledge, purchasing product through international distributors. It should not be our responsibility to provide a warranty on a product where we have had no control of its distribution."

ii. Actions by a third party

Organisations should not be held accountable for complaints made in relation to the actions of third parties not controlled by them. These third parties may include installers, service agents and the like.

Member perspectives

"... products are often serviced by non-authorised agents. Subsequent failures or dissatisfaction (where the agent walks away) can then result in disputes between the Company and owner. NSW Fair Trading should make sure the complaint is properly allocated to the agent, and not the Company that has been dragged in after the event"

"Consumers who experience problems with our air conditioner products make the assumption that the fault is due to the performance of our product. It is not uncommon for us to spend considerable time and effort investigating and responding to consumer complaints only to find that the problem is due to the actions of an independent installer who we have no control over."

"From time to time we receive complaints about our TV and Recorder products failing to work. Upon our investigation we discover that the fault has nothing to do with our product but rather is due to changes made by Broadcasters. The consumer doesn't consider this, they see our brand name on the front of the TV and blame us for a problem not of our making."

iii. Ambiguity in the Australian Consumer Law

Ai Group, in our submission in the Australian Consumer Law (ACL) review, made the statement that there *"... is a lack of clarity for consumers and retailers on the definition of key ACL terms relating to returns and refunds: "major failure", "failure", "acceptable quality", "reasonable time" and "reasonable costs"*. Against this backdrop the likelihood of a dispute between a consumer and a supplier is high increasing the chances of a complaint.

As a result of this initiative members are now having to resolve complaints with consumers even when they do not believe that they have an obligation to so. This results in an unnecessary cost burden to business.

4. Inclusion of a qualifier for published complaints

Ai Group believes that consumers may misunderstand the circumstances in which an organisation is listed on the Register. For example they may think that the organisation is named due to a legal breach or other regulatory action. Ai Group recommends (not withstanding our concerns) that a qualifier is included with the publication of any organisation's name that notes that:

- the listing does not imply that there has been any breach by or regulatory action against the organisation;
- the organisation may have resolved the complaint; and
- there may have been other circumstances that have resulted in the complaint that are not within the control or the fault of the organisation.

Ai Group noted in our ACL submission that:

"Since the ACL was introduced, our members have observed that consumers have become more aware of their rights. However, many remain unclear about their rights and obligations under the ACL and further consumer education is still required. In some cases members maintain that the ACL has been incorrectly invoked by the consumer, and the balance has been skewed too heavily in favour of the consumer without an adequate consideration of the rights of businesses"
Ai Group recommends that the *NSW Fair Trading Complaints Register* scheme is urgently reviewed to ensure that there is fairness for all parties.

I would welcome the opportunity to discuss this important issue with you further.

Yours sincerely

Mark Goodsell
Head NSW