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OF AUSTRALIA
Business Law Section

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Via email: Julia.muse@treasury.gov.au

30 January 2017

Dear Ms Muse,

Australian Competition Law Review: Response to Interim Review

I have pleasure in enclosing a submission which has been prepared by the Competition and Consumer Committee of the Business Law Section of the Law Council of Australia.

Under cover of a letter dated 19 December 2016, the ACL Review Secretariat was provided with a submission prepared by the Business Law Section's SME Business Law Committee and submissions prepared by the Australian Consumer Law Committee and the Not-for-profit Legal Practice and Charities Committee of the Law Council's Legal Practice Section. Any differences in the views expressed between the four Committees reflect the different areas of expertise, perspectives and experiences of the members of the respective Committees.

If you have any questions in relation to the attached submission, in the first instance please contact the Committee Chair, Fiona Crosbie, on 02-9230 4383 or via email: fiona.crosbie@allens.com.au

Yours sincerely,

Teresa Dyson, Chair
Business Law Section

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Submission of the Competition & Consumer Committee
Business Law Section
Law Council of Australia

Australian Consumer Law Review: Response to Interim Report

30 January 2017

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1 Introduction

The Law Council of Australia is the peak national body representing the legal profession in Australia.

The Competition and Consumer Committee (**Committee**) of the Business Law Section of the Law Council of Australia provides this submission in response to the Interim Report on the Australian Consumer Law Review (***Interim Report***).

Rather than addressing all questions raised in the Interim Report, the Committee has addressed those specific issues highlighted by Consumer Affairs Australia and New Zealand (***CAANZ***) as being of particular significance, being:

- consumer guarantees;
- product safety;
- unfair contract terms;
- unsolicited consumer agreements; and
- penalties and remedies.

Where appropriate, the Committee has referenced the relevant section or question of the Interim Report to which its response relates.

2 Consumer Guarantees

2.1 Introduction

The Interim Report calls for submissions on:

- whether issues about durability of goods can be addressed through further guidance and information;
- whether there are other areas of uncertainty raised by stakeholders that would benefit from further guidance;
- whether more can be done to encourage businesses to provide more information about the durability of their products.

The Committee submits:

- there is little benefit to a business in providing consumers information about the durability of its products (at least from a legal or regulatory compliance perspective);
- the introduction of ACCC guidance which states the ACCC's views on durability will ensure consumers and suppliers have a better understanding of their rights and obligations under the Australian Consumer Law (***ACL***);
- there should be a change in the law that allows for partial refunds;
- it is not appropriate or necessary to introduce industry-specific provisions; and
- the interaction of the concept of major failure and repairs or replacements warrants reconsideration in a number of respects.

2.2 What more, if anything, can be done to encourage businesses to provide more information about the durability of their products?

Currently, businesses have little incentive to provide information to consumers about the durability of their products. This is for two reasons:

- first, providing information about how long a good can be expected to last may be perceived by regulators as an attempt to limit consumers' rights under the ACL; and
- second, where businesses do supply such information, they cannot necessarily rely on these representations when assessing customer claims made in respect of products that have failed after the stated durability period has expired.

By way of example, in 2013 the ACCC raised concerns that the way in which Apple Pty Ltd applied its 12 month manufacturer's warranty may have misled consumers about their rights under the consumer guarantees. Apple subsequently gave a court enforceable undertaking to the ACCC that Apple would provide a two year warranty on its products with remedies equivalent to those set out in the ACL for at least 24 months from the date of purchase. In giving this undertaking, Apple had to acknowledge that the ACL may provide for remedies beyond 24 months for a number of Apple's products. This example demonstrates that even in circumstances where the ACCC effectively agreed to a minimum length of the remedies to be provided by Apple pursuant to an undertaking, none of Apple, the ACCC or consumers in fact had any certainty as to what duration would apply to Apple products under statute.

Accordingly, there is little benefit to a business in providing to consumers information about the durability of its products, at least from a legal or regulatory compliance perspective. However, it is possible that businesses may be more inclined to provide this information if further guidance were provided by the ACCC as to how long it expects goods to last as, while not binding, this would give businesses more certainty about the implications of disclosing such information.

2.3 What, if any, further guidance on durability is feasible while still allowing important differences between goods of a certain type to be recognised?

In its previous submission, the Committee expressed concern that the concept of 'durability' (incorporated in the definition of acceptable quality in the consumer guarantees) is not sufficiently clear and may be time consuming and costly for businesses to apply, potentially increasing costs for consumers.[1] The Committee acknowledges the benefits of having a flexible and principle-based approach to consumer remedies for faulty products. However, in the Committee's view, there is room to give more guidance for businesses and consumers without making the law unnecessarily prescriptive.

The Committee considers that the uncertainty inherent in the concept of 'durability' could be at least partially addressed through:

- ACCC guidance on how long it expects certain goods should generally last, which takes into account price variability between goods of the same type; and
- an amendment to the consumer guarantees remedies which allows suppliers to give partial refunds in circumstances where the consumer has benefited from the use and enjoyment of a product for a significant period before it failed.

The Committee provides further detail about these suggestions below.

(a) ACCC guidance on how long certain goods should generally last

The introduction of ACCC guidance which states the ACCC's view on how long certain goods should generally last may help to ensure that consumers and suppliers have a clearer understanding of their respective rights and obligations under the ACL.

Stakeholders have raised concerns about the practical challenges of providing such guidance, particularly given the fact that new products are constantly coming onto the market, and there

[1] Law Council of Australia, Competition and Consumer Committee submission, 23 June 2016, p 40.

could be significant variances in terms of expected durability even within categories of goods – e.g. a $10 toaster may not be expected to last as long as a $200 toaster. While acknowledging these concerns, some members of the Committee consider that such challenges can be effectively managed.

Some members of the Committee consider that ACCC guidance could serve as an indication of the ACCC's view, although acknowledging that such guidance would not ultimately be binding. It would not need to cover the field of all possible products, nor would it need to cover all possible scenarios in which products are sold. Even in circumstances where a business's particular product is not listed, the business could use the guidance to obtain a ballpark indication of how long the ACCC would expect the product to last. The ACCC guidance could be limited to products which are sold new, as opposed to second hand (at least initially). However, the guidance could take into account price variations between goods of the same type, at least to some extent. For example, the ACCC could consider a product and price matrix guidance along the following lines:

Figure A – Example of guidance for new products

	Personal devices (personal computers, desktops, laptops, tablets, mobile phones)		Small electrical appliances (e.g. toasters, food blenders and processors, coffee machines, irons, vacuum cleaners)		White goods (e.g. fridge, washing machine, dishwasher, oven)		Passenger vehicles	
	Price range	Durability in years	Price range	Durability in years	Price range	Durability in years	Price range	Durability in years
Premium		e.g. 2 years (consistent with undertakings given to the ACCC by Apple, Optus and VHA)						
High end								
Mid-range								
Low end								

(b) Partial refunds

The Committee's view is that the above mentioned measures should be complemented by a change in the law that allows suppliers to provide partial refunds in circumstances where the consumer has previously used, consumed or enjoyed goods prior to the fault arising. This amendment would be particularly important if the ACCC's guidance on how long goods should last suggests that certain types of goods should last for several years.

Currently under the ACL a supplier is effectively obliged to provide a consumer with a full refund whenever a right to reject a good arises. The ACL does not make any adjustment to accommodate the rights of suppliers and consumers in circumstances where a consumer has already benefited from possession, use or enjoyment of the good in the period prior to the failure arising. This means a consumer who elects to receive a full refund is put in a better position than they would have been had there been no breach of a consumer guarantee.

The following example seeks to illustrate this issue. A hypothetical consumer purchased a new television in 2013 for $6000, which worked for 3 years without any problem. At the 3 year mark the screen went blank as a result of a major fault (or, as a result of a fault which is not major but was not repaired within a reasonable time). Assuming that under the ACL a $6000 television which stops working after 3 years is not of 'acceptable quality', the consumer would be entitled to a full refund of the purchase price of the television. This means that in 2016, the consumer has $6000 with which to purchase a *new* television. The new television would likely feature the improvements in technology which came onto the market in the intervening period and could cost less than the television bought in 2013.[2] By contrast, if there had been no failure, in 2016 the consumer would have a 3 year old television.

The concept of accounting for previous consumption and enjoyment is not new to the ACL. The remedies available in respect of services that fail to comply with the consumer guarantees (and for services that are connected with rejected goods) entitle a consumer to receive a refund which is limited to the extent that the consumer has not already consumed the services at the time the service contract is terminated.[3] Courts and tribunals have also previously accounted for previous use and enjoyment in the context of awarding damages for faulty goods.[4]

The Committee acknowledges that where a consumer good has failed within a short period after purchase, it may not be appropriate for any refund to be prorated. Accordingly, any pro rata refund scheme could provide that a customer is automatically entitled to a full refund in the first 30 days after purchase (similar to the position in the UK), and thereafter the supplier would be required to provide a partial refund which takes into account the time the consumer has been able to use the product versus the total expected life of the product. Alternatively, the full refund period could be defined as a percentage of the period that the good was expected to last.

2.4 Can issues about the acceptable quality of goods that are raised in particular industries be adequately addressed by generic approaches to law reform, in conjunction with industry-specific compliance, enforcement and education activities? What are the advantages and disadvantages of this approach?

The Committee agrees that it is preferable to ensure that the consumer guarantee provisions of the ACL apply generally to all industries. The Committee does not consider it would be appropriate or necessary to introduce industry-specific provisions. The objects of the ACL are of general application.

The Committee understands that the rationale for an industry-specific provision is not to provide a different level of protection to consumers, but rather to clarify the circumstances in which occurrences in specific industries will trigger the various rights provided by the ACL. However, the Committee considers that this should be addressed by guidelines, either from the ACCC or another body, rather than industry-specific legislation. This approach will ensure consumers and businesses in all industries are subject to the same law and, at the same time, understand how the ACCC considers the law applies in their industry. Another advantage of this approach is the increased flexibility it provides. That is, the ACCC will be able to update the guidelines to reflect changes in technology, or changes in the understanding of the general law, for example through decisions of courts. Such an approach is considerably easier than amending legislation.

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[2] There has been continued price erosion for digital and smart TVs attributable to increasing competition across the segment. IBIS World, 'Industry Report G4221a: Domestic Appliance Retailing in Australia' (October 2016) p 8.

[3] ACL s 269(3) and s 265(3).

[4] For example, see *Peters v Panasonic Australia Pty Ltd* (Civil Claims) [2014] VCAT 1038 where the Tribunal reduced the applicant's damages to take into account the benefit the applicant had received from the good for the years that it was in working condition.

2.5 In what circumstances are repairs and replacement not considered appropriate remedies? Or put another way, are there circumstances that are inherently likely to involve, or point to, a 'major' failure?

The Committee considers that the interaction of the concept of 'major failure' and repairs or replacements warrants reconsideration in a number of respects.

First, it may be appropriate to reconsider the definition of 'major failure', as the current definition is too uncertain and potentially too broad. The Committee is concerned that the current definition over-captures faults, because no consumer would choose a particular good if he or she were aware it was faulty (regardless of the magnitude of the fault). One way of rectifying this issue, while retaining consistency with the purposes of the consumer guarantee provisions, would be to define a major failure by reference to the ability of the supplier to remedy the failure. If a consumer purchases a good that is subsequently found to have a fault, the supplier or manufacturer should be given the opportunity to repair or replace the good, before the fault is deemed to be 'major'. If the supplier or manufacturer is not able to fix the fault or provide a faultless replacement in a reasonable time, then the fault should be deemed 'major'. This could be achieved by amending the definitions of major failure in the ACL (ss260 and 268). Subsection (a) of each of those definitions should be repealed and replaced with the following wording:

> *(a) the consumer has required the supplier to remedy the failure within a reasonable time and the supplier has not done so;*

This proposed amendment may necessitate consequential amendments to, for example, s259.

Second, the Committee agrees with CAANZ that the ACL should be amended to clarify that a series of 'minor' faults could constitute a 'major' fault. As CAANZ observed, such amendment may be necessary to overcome some decisions that suggest this is not the case. While there may be some merit in defining the number of minor faults that give rise to a major fault, the Committee does not consider this is advisable, as the number may vary between goods. For example, cars have many more opportunities for minor faults that do not fundamentally affect the functioning of the product than many other goods. Determining whether a series of minor failures amounted to a major failure would be undertaken by reference to the general definition of a major failure.

In the Committee's view, this should be complemented by a pro rata refund scheme as discussed in section 2.3(b) above. This is because, in circumstances where a series of minor failures can amount to a major failure, it is likely that consumers will benefit from the use and enjoyment of the product over a significant period of time before the product is deemed to have a major failure.

3 Product Safety

3.1 Introduction

The Interim Report assesses the effectiveness of the current product safety regime and calls for submissions on whether the introduction of a 'general safety provision' in the ACL is necessary.

The Committee considers that the principles expressed in 'Table 3: Principles for a product safety regime'[5] of the Interim Report appropriately describe the key principles for an effective product safety regime.

However, having regard to those principles, the Committee considers that there is no need for the introduction of a prohibition on the supply of unsafe goods because the existing provisions relating to non-compliance with safety standards, consumer guarantees and defective goods actions, are appropriately comprehensive.

3.2 General Safety Provision in the ACL

A 'general safety provision' may result in unnecessary duplication and an increased compliance burden for businesses, without any increase in protection for consumers. As the Productivity Commission observed in its 2006 report,[6] the overall benefits of a general safety provision are likely to be limited, (among other things) because it would only change behaviour in a small subset of businesses but would not change anything for those already complying and those that will never comply.

Further, what definition might be given to 'safe' or 'unsafe' is critical to an assessment of the utility and likely effect of a general provision as to safety. The EU General Product Safety Directive and UK legislation include a reference to 'under normal or reasonably foreseeable conditions of use' as well as features including the characteristics and presentation (labelling, instructions) of goods. This is arguably narrower than requirements for recall action under the ACL and could lead to duplication or confusion with other parts of the ACL product safety regime.

The Interim Report, and a number of submissions referenced in the Interim Report, also suggest that Australia has had a high number of recall actions because of the absence of a general prohibition against unsafe goods .[7] However, reliance on a comparison of recall rates between the UK and Australia[8] for that proposition without regard to the basis on which that recall action was taken is inappropriate. Both the UK's *General Product Safety Regulations 2005*[9] and the EU's General Product Safety Directive[10] refer to the taking of recall action to be for 'dangerous products' and 'as a last resort'. The UK legislation provides that a recall notice may be served by an enforcement authority where it has reasonable grounds for believing that a product is a dangerous product and that it has already been supplied or made available to consumers.[11] Accordingly, the threshold is comparatively high.

On the other hand, recall action taken in Australia may be voluntary (usually supplier-initiated, and required to be notified under s128 of the ACL) or compulsory (initiated by the Minister, under ss122 to 127 of the ACL). Voluntary or compulsory recall action may also be taken in Australia

[5] Consumer Affairs Australia and New Zealand, Australian Consumer Law Review: Interim Report, p 80 – 81.

[6] Consumer Affairs Australia and New Zealand, Australian Consumer Law Review: Interim Report, p 75.

[7] See, for example, section 2.2.2 of the Interim Report

[8] Consumer Affairs Australia and New Zealand, Australian Consumer Law Review: Interim Report, Table 2, p 73.

[9] See *General Product Safety Regulations 2005* (UK) ss 7(3), 15.

[10] General Product Safety Directive (GPSD) 2001/95/EC. See articles 2(g), 3(4), 5(1) and 6(f)).

[11] See *General Product Safety Regulations 2005* (UK) s 15.

because a reasonably foreseeable use *or misuse* of consumer goods will or may cause injury to a person as well as where a safety standard is not complied with. The relevant threshold in Australia triggering a recall is therefore somewhat lower than that in the UK or Europe. In such circumstances it is possible that companies in Australia take a more conservative approach to recall action, rather than it being used as 'a last resort'.

The Committee therefore reiterates is position that there is no need to introduce a general safety provision in the ACL.

4 Unfair Contract Terms

4.1 Should the ASIC Act unfair contract terms regime be extended to contracts regulated by the Insurance Contracts Act?

(a) Rationale for current exemption

The national unfair contract terms regime established by the ACL and the *Australian Securities and Investments Commission Act 2001* (Cth) (***ASIC Act***) applies to standard form contracts in almost all sectors of the Australian economy, including capturing most contracts for financial products and services except insurance contracts regulated under the *Insurance Contracts Act 1984* (Cth) (ICA).

According to the Interim Report, the rationale for exempting insurance contracts regulated under the ICA from the unfair terms regime in the ASIC Act 'has generally been that the Insurance Contracts Act contains its own protections for consumers and that insurance contracts may have unique characteristics that make them unsuited to the unfair contract terms protections.' The exclusion has been seen as a reflection of the unique nature of insurance contracts and their terms.

(b) ICA consumer protections

The majority of insurance contracts are governed solely by the ICA, which provides the following protections for consumer policyholders:

- ss13 and 14 requires both the insurer and the insured to act towards each other, in respect of any matter arising under or in relation to it, with the utmost good faith. The duty of good faith applies from the pre-contractual stage to the post-contractual stage (the making and handling of claims). Being a contractual term, damages are allowed to the innocent party in case of a breach;
- s37 mandates that insurers bring to the consumer's attention any term that would not typically be included in such a contract of insurance;
- s53 prevents insurers from varying the terms of an agreement which would prejudice the insured; and
- s54 details the specific scenarios where an insurer may not refuse to pay out in respect of claim based on the conduct of the insured.

Based on the submissions made to the ACL review[12] and previous public considerations of this issue, stakeholders disagree on whether the ICA provides sufficient consumer protection. In particular, consumer groups have argued that these provisions do not go far enough to protect the interests of consumers while insurers and insurance industry groups consider the existing provisions of the ICA to be adequate in protecting consumers.

(c) Previous reviews

In 2008, as part of its Review of Australia's Consumer Policy Framework, the Productivity Commission recommended that 'a new national generic consumer law' should be implemented, which 'should apply to all consumer transactions, including financial services' (subject to a few matters which are not material to insurance contracts).[13] The Commission also recommended the incorporation of an unfair terms regime in the single generic consumer law. Although the

[12] See Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review: Interim Report* (October 2016), pp 120-121.

[13] Productivity Commission, *Review of Australia's Consumer Policy Framework* (April 2008), vol 2 p xv-xvi.

Commission did not specifically consider the applicability of the proposed national regime to insurance contracts, this would be consistent with the Productivity Commission's recommendations.

The Senate Economics Legislation Committee considered the issue in 2009, and in its report titled *Trade Practices Amendment (Australian Consumer Law) Bill 2009 [Provisions]*, made the following observations:

- The duty of utmost good faith contained in section 13 of the ICA provides "a platform from which to protect insurance consumers from unfair contract terms".
- There is 'no argument' that insurance contracts should not necessarily be subject to both industry-specific legislation and general consumer protection laws, and many other industries are subject to industry-specific regulation as well as general consumer laws.[14]

The Committee ultimately concluded that the existing law did not provide consumers with adequate protection in insurance contracts, and recommended that the government address insurance contract legislation to ensure that the ICA provided an equivalent level of protection for consumers to that provided by the then *Trade Practices Amendment (Australian Consumer Law) Bill 2009*.[15]

In an April 2012 report on a different issue, the Productivity Commission noted that the proposed application of unfair contract terms legislation to general insurance "could improve outcomes for consumers, with generally modest costs for insurers".[16]

In 2013, the *Insurance Contract Amendment (Unfair Terms) Bill 2013* proposed to amend the ICA to introduce specific unfair terms provisions for standard form consumer contracts of general insurance. The Bill lapsed before it was enacted.[17]

(d) Extension?

While there may be some benefit to extending the application of the ASIC Act unfair terms regime to insurance contracts regulated under the ICA, the Committee does not believe that there is a compelling reason to increase the regulatory burden.

A number of consumer protection provisions do exist in the ICA regime. Further, as was recognised in the recent Harper Review of Australian competition law, regulation should be as 'light touch' as possible, with the costs of increased regulatory burdens and constraints offset against the expected public benefits to be gained.[18] No clear and compelling public/consumer benefit or regulatory 'gap' seems to have been identified to justify taking the relatively onerous step of enacting legislative amendment along with the potential increased regulatory burden and cost.

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[14] Senate Economics Legislation Committee, *Trade Practices Amendment (Australian Consumer Law) Bill 2009 [Provisions]* (September 2009), p 68.

[15] Senate Economics Legislation Committee, *Trade Practices Amendment (Australian Consumer Law) Bill 2009 [Provisions]* (September 2009), p 68. The Committee left open whether this should be achieved by extension of the Trade Practices Amendment (Australian Consumer Law) Bill 2009 to insurance contracts or by amending the *Insurance Contracts Act 1984.*

[16] Productivity Commission, *Barriers to Effective Climate Change Adaptation Inquiry Report* (April 2012) 319.

[17] See Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review: Interim Report* (October 2016), p 120.

[18] Harper Committee, *Competition Policy Review – Final Report*, March 2015 available at http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf.

4.2 Should any additional terms be added to the 'grey list' in section 25 *ACL*?

The Committee does not consider that additional terms should be added to the grey list in s25 of the ACL as there is currently no compelling justification for expanding the list and we do not consider that legislative change should occur unless it is clearly justified.

The grey list provides examples of the kinds of terms that may be unfair. However, the list does not purport to be exhaustive, and ultimately the fairness of a term must always be tested against the requirements of s24 ACL. The addition of further examples to the grey list would therefore have no material effect.

The grey list may play a role in informing consumers and other stakeholders about the kinds of terms that may be characterised as 'unfair' under the ACL. However, education on unfair terms can more readily and widely be achieved through public guidance issued by the ACCC rather than through legislative amendment. Further, given the limited role of the grey list, court judgments on the application of the unfair terms regime would provide better, more meaningful and significant guidance on the operation of the unfair contract terms provisions than any addition of possible examples to the grey list. Adding further examples to s25 of the ACL risks increasing the complexity of the unfair terms regime. It may also confuse some consumers if the grey list is so long as to seem exhaustive.

However, if any terms were to be proposed for addition to the grey list, they should be the subject of a separate inquiry to allow stakeholders to put forward their views on any proposed new clauses and allow more fulsome and specific debate and consideration.

5 Unsolicited Consumer Agreements

5.1 Introduction

The Interim Report asks whether the current balance and breadth of the provisions in the ACL relating to unsolicited consumer agreements should be maintained.

The Committee considers that the current provisions are generally operating effectively, and should be maintained in their current form subject to consideration of a small number of potential adjustments summarised below.

5.2 Restriction on supplies during cooling off period

The Committee refers to section 2.5.4 of the Interim Report,[19] which discusses restrictions during the cooling-off period. The Committee considers that the restriction on supplies during the cooling off period should be lifted and suppliers should be permitted (at their discretion) to offer customers the option of receiving goods or services within the 10 day cooling off period, with no fees or charges payable in relation to that supply if the customer subsequently exercises their cooling off right.

This change would benefit both suppliers and consumers by:

- allowing consumers to receive supplies without delay, without the risk of being locked into a contractual arrangement or having payment obligations if they identify during the cooling off period that the contract or supply would be unsuitable; and
- allowing suppliers to demonstrate the benefits of their products and services to consumers, without that process diluting the rights consumers have under the current regulatory regime.

5.3 Clarification of the term 'business or trade premises'

Section 69(1) of the ACL defines an ‘unsolicited consumer agreement’ as an agreement that (amongst other things) is made as a result of negotiations between a dealer and the consumer at a place other than the 'business or trade premises' of the supplier.

As noted in the Interim Report at Part 2.5.6,[20] the term 'business or trade premises' is not defined, and there is a lack of case law on its meaning in the relevant context. Accordingly, there is some uncertainty as to whether the provisions may in practice capture certain arrangements arising from interactions at temporary business premises such as pop-up stalls and kiosks (on the basis those stores are not generally seen as the supplier’s normal business or trade premises).

The Committee considers that additional clarity on this issue would be beneficial, particularly considering the proliferation of pop-up stalls and kiosks.

Specifically, the Committee would support amendments to the provisions that ensure that the term 'business or trade premises' is understood to include any temporary retail premises established by the supplier, and readily recognisable by consumers, as being for the conduct of business with members of the public.

To ensure that pop-up stalls and kiosks are excluded without also providing loopholes for businesses engaging in activities such as door-to-door sales to easily avoid the provisions, consideration could be given to using a definition of 'business or trade premises' which would assist to distinguish between:

[19] Consumer Affairs Australia and New Zealand, Australian Consumer Law Review: Interim Report, p 141.

[20] Consumer Affairs Australia and New Zealand, Australian Consumer Law Review: Interim Report, p 151.

- an ‘established’ (even if temporary) retail location; and
- a retail location that may be argued to only exist for a brief moment of time because a sale happens to be conducted there (i.e. a sales conversation on a private doorstep),

with only the former falling within the definition.

The types of factors or criteria the definition could have reference to include whether there was prominent business signage at the location, whether the business staff were in uniform and displayed staff identification, and whether product information and related documentation was readily available to consumers.

5.4 Removal of the value threshold from the definition of a 'subsequent agreement of the same kind'

Under Part 6 of the *Competition and Consumer Regulations 2010* (Cth), any 'renewable agreement of the same kind' or 'subsequent agreement of the same kind' is excluded from the definition of an unsolicited consumer agreement.

A 'renewable agreement of the same kind' arises where a consumer and a supplier are already parties to a supply agreement, and subsequently enter into another agreement for supply of goods or services of the same kind. A 'subsequent agreement of the same kind' is similar, except that supply under the initial agreement must have already occurred, and the subsequent agreement(s) for the supply of goods or services of the same kind must arise within 3 months of that initial supply and have a total value of $500 or less.

The Committee believes that the $500 threshold should be removed from the definition of 'a subsequent agreement of the same kind'. Consumers in both situations already have an established relationship with their supplier and should be permitted to contract freely for additional goods or services of the same kind, and not risk having the delivery of their service delayed or interrupted. The Committee does not consider it is warranted to differentiate 'subsequent agreements of the same kind' simply because the value of the agreement that is struck between suppliers and consumers with an established relationship is beyond a specified threshold.

5.5 Application of the provisions to public places

An unsolicited consumer agreement can only arise if a relevant negotiation has taken place away from a supplier’s business or trade premises and the consumer did not invite the dealer there. The Interim Report notes that comments made in a recent Federal Court decision[21] suggest that that this requires that the negotiation have taken place in a location where an invitation is normally needed, such as a consumer’s home, rather than a public area.

As noted in the Interim Report,[22] the Explanatory Memorandum for the ACL explicitly refers to the provisions applying to ‘suppliers who do not have an established place of business’, such as those ‘trading in public places’. Accordingly, the Committee agrees that an interpretation of the relevant ACL provisions that limits the application of those provisions to where a relevant agreement had been negotiated in a location where an invitation is normally needed, such as a consumer’s home, would be contrary to the intent of the legislation.

The Committee does not consider that this would be a natural and proper interpretation of the relevant provisions, and accordingly does not believe that any changes to those provisions are required to ensure the law is operating as intended. The Committee considers that the correct

[21] See the comments of Justice Reeves in *ACCC v ACN 099 814 749 Pty Ltd* [2016] FCA 403 at [137].

[22] Consumer Affairs Australia and New Zealand, Australian Consumer Law Review: Interim Report, Part 2.5.6, p 150.

interpretation of the provisions is one that would give the law its intended effect in capturing a range of public places.

5.6 Extending the provisions to business contracts

The Committee does not believe that it would be appropriate to extend the scope of application of the provisions to capture more business contracts.

Presently, business contracts for goods or services not usually for personal, domestic or household use or consumption will not qualify as unsolicited consumer agreements.

This reflects that the provisions are intended to protect consumers who may be vulnerable or are at a disadvantage during a sales conversation that is conducted in the circumstances highlighted in s69 of the ACL. It is appropriate that the focus of the provisions remain on the consumers most likely to need such protection, and to be wary of the risk of over-capture in this context given that broader application of the provisions can increase transaction costs and complexity for business.

Unless there is an identified harm to businesses who choose to enter into unsolicited agreements that is not being addressed under the existing laws, there is no reason to amend the law.

5.7 Documenting telephone sales

Express disclosure obligations and other obligations about the making of agreements is set out in s78 of the ACL.

The Committee believes that amendments could be made to this section to better accommodate current technology being used to make transactions and communications easier for consumers and businesses alike. For example, the section currently requires that following an unsolicited sale by telephone, a copy of the agreement must be given to the consumer – however this can only be an electronic copy if the customer expressly consents.

This aspect is outdated in the modern business and consumer environment. Where customers have provided a valid email address as an agreed method for receiving electronic communications relating to their purchase, suppliers should have the right to send the agreement document to this email address without the requirement for obtaining additional consent from the customer. It is easier to confirm electronic delivery of documents and it also gives suppliers greater capacity to comply with timeframes.

Further, given that cooling off does not commence until the consumer receives the agreement, the Committee suggests that some additional flexibility could be introduced in relation to the timeframes afforded for provision of a copy of the agreement to customers. For example, the provisions could be amended to accommodate dispatch of the agreement within five business days of the negotiations, rather than to require delivery within that five day period. This has the potential to lower transaction-related costs without compromising protections for the consumer.

The Interim Report also notes that when an unsolicited telephone call is not recorded in full, it can be difficult to verify concerns about consumers being misled about a product or service they contracted to acquire on the call. The Interim Report notes that one way of addressing this may be to include a presumption that the consumer's version of what was said over the telephone will stand unless the business can prove otherwise.

It could be expected that this would have the effect of spurring many companies to consider recording all relevant calls in full and retaining these recordings for a significant period. This would mean all outbound marketing calls, for example, would need to commence with a request for consent to this practice, which might deter many customers from continuing the call in

circumstances where it was unsolicited and they may not yet be clear about what it relates to. The change would also potentially impose significant new costs on the business sector.

In this context, and noting:

- the broad scope of the other protections hardwired into the unsolicited consumer agreement provisions, such as the requirement for customers to be given a copy of the agreement setting out the terms in full (s79) and the cooling off / opt-out rights of consumers; and
- the proposal would involve a significant deviation from established rules and norms of evidence,

the Committee believes that a very strong case would need to be made to justify any change in this area.

5.8 Replacement of the cooling off period

The Interim Report asks whether the cooling-off period should be replaced with an opt-in mechanism requiring consumers to confirm the sale within a limited time before an agreement is valid for some or all agreements. The opt-in mechanism canvassed in the Interim Report would involve allowing a consumer to confirm the sale without further contact from the potential supplier, within a certain time period.

The Committee notes that introducing an opt-in mechanism would have real potential for material adverse impacts for businesses and consumers. For example:

- it places an extra obligation on the consumer during the sales process to proactively contact a supplier to opt-in after purchasing the product or service and there is a genuine risk that the consumer would simply forget to opt-in by the specified date. Once the specified time lapses, the sales process will need to commence again, the onus also being on the consumer to instigate this second sale;
- it places extra obligations on suppliers to ensure that they have the resources to manage incoming contact from customers who decide to opt-in to a sales contract. These resources would be in the form of sales representatives, or in-store staff, as well as resources managing any documentation that forms the basis for the sales contract with the consumer, both human and electronic resources would invariably be required; and
- the opt-in mechanism immediately creates uncertainty regarding timing of implementation of a sales contract. Under the current cooling off regime, suppliers have an ability to set up the supply chain process for any given sale in line with the timing requirements set out in the legislation so as to comply with the specified cooling off period. Not knowing when a consumer may decide to opt-in means that these processes need to be delayed, only to commence once the consumer opts-in. Further delays may lead to dissatisfaction among consumers.

Taking into account these factors, the Committee does not believe that replacing the cooling-off period with an opt-in mechanism would advance consumer interests or is necessary to address any demonstrated consumer harm from the current regulatory approach.

5.9 Enhancing protections for high-risk transactions and enduring service contract

The Interim Report asks whether additional rights and protections for consumers entering into high-risk transactions (such as those involving high-value goods and services over $500, or enduring service contracts) should be introduced. Examples of additional rights and protections noted in the Interim Report include:

- extended cooling-off period, and
- a right to terminate agreements within a specific time without incurring a cancellation fee.

The Interim Report notes this could be balanced by reducing regulation for low-risk transactions, such as by removing the current restrictions on businesses seeking or accepting payment for low-risk transactions (such as goods and services under $500).

The Committee does not believe this is necessary. Neither the type nor value of supply that is made has a connection to the risk of aggressive sales practices that the legislation is designed to safeguard against. Nor is it the case that consumers of higher value goods and services, or services with a minimum contract term, are more vulnerable or disadvantaged than consumers who are parties to contracts of lesser value or shorter commitment periods.

The points raised in the Interim Report suggest concerns may arise with respect to the sales conversation itself. However, the Committee believes that the following sections of the ACL provide a robust enforcement toolkit for addressing risks with the sales process:

- s18 of the ACL, which prohibits misleading and deceptive conduct in trade or commerce;
- s21 of the ACL, which prohibits unconscionable conduct and has, at its core, the goal of protection of the vulnerable from exploitation or conduct not done in good conscience; and
- s29(m) of the ACL, which prohibits false or misleading representations concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

The Committee is of the view that additional regulation to that outlined above in respect of enduring service contracts will only make the ACL environment more complex, while not addressing the root cause of the problems put forward in the Interim Report. This would be an undesirable result.

6 Penalties and Remedies

6.1 Introduction

The Interim Report calls for submissions on:

- whether the current financial penalties under the ACL are adequate to deter future breaches or should be increased;
- whether there are any alternative approaches to addressing the issues raised; and
- whether there are any unintended consequences, challenges or risks that should be considered.[23]

The Committee submits that:

- there has been insufficient time to conclude that the current level of penalties are not acting as a deterrent; however
- based on the limited case law to date, the range of remedy and offence provisions appear to be sufficient to deter future breaches.[24]

6.2 Are the current maximum financial penalties sufficient?

The Committee acknowledges that civil penalties are an important enforcement tool for ACL regulators to discourage unlawful behaviour. However, financial penalties of $1.1 million for civil contraventions of consumer protection provisions were only introduced six years ago. At the time they were introduced, the increased penalties for contraventions of Part IV of the *Competition and Consumer Act 2010* (Cth) were already in place.

There have been a number of decisions imposing civil pecuniary penalties since 2011. This includes two Full Court decisions concerning the appropriateness of the penalties awarded by the trial judge.[25] However, the Committee considers that there has been insufficient time in which to conclude definitively that the current maximum financial penalties are not adequate to deter future breaches.

The Committee also submits that any assessment as to whether the current financial penalties are adequate to deter future breaches should not focus solely on the prescribed maximum penalties for contraventions of the ACL. The assessment needs to take into account the fact that the payment of a pecuniary penalty is one of a range of tools available to the regulators and the courts. In addition to the possibility of pecuniary penalties and significant reputational damage, the other remedies that companies may be subject to in the event of a contravention of the ACL include:

- the ability of a court to fashion a non-punitive order - which has the potential to require a business to make substantial changes to the manner in which it conducts itself;[26]
- being required to publish corrective or adverse material;[27]
- in more limited circumstances, the potential risk for individuals of being disqualified from managing corporations;[28] and

[23] Consumer Affairs Australia and New Zealand, 'Australian Consumer Law Review: Interim Report', p181.

[24] *ACCC v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181.

[25] See *ACCC v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181.

[26] ACL s 246.

[27] ACL s 246(2)(d) and s 247.

- the ability of a court to declare terms of standard form consumer contracts void risks causing significant disruption to business practices, potentially requiring the business to enter into new contracts with its customers.[29]

These non-monetary orders, coupled with the ability to levy substantial pecuniary penalties, are sufficient to deter companies from engaging in contravening conduct. The current enforcement regime is effective and there is no need for additional remedies or an increase in the severity of existing penalties.

The Committee also considers that there is merit in reviewing the appropriateness and effectiveness of Part 4 of the ACL, namely the criminal offence provisions. The offences created by this part are generally for conduct that should be considered less egregious than, for example, cartel conduct. Further, the penalties available for contraventions of the offence provisions generally mirror those available for contraventions of the non-criminal prohibitions in the ACL. In these circumstances, the Committee questions the merit in continuing a separate enforcement regime, particularly given the higher burden of proof applicable to the criminal prohibitions.

6.3 Approach to assessing multiple contraventions

The Federal Court's decision in the ACCC v Reckitt Benckiser case has been referred to in support of the argument that the current maximum financial penalties are inadequate. In that case, the trial judge awarded an overall penalty of $1.7 million. However, since the Interim Report was published, the Full Court has delivered judgment in the appeal brought by the ACCC challenging the adequacy of the penalty.

On appeal, the Full Court agreed with the ACCC that the penalty awarded by the trial judge was inadequate. The Full Court set aside the trial judge's decision and awarded a penalty of $6 million. Key aspects of the decision include:

- the Full Court affirmed that the essential purpose in ordering the payment of civil penalties is to achieve deterrence. In this case, there was a clear need to achieve that objective, having regard to the potential gains made by the respondent in inducing consumers to buy a more expensive product with no additional benefit and further, the potential distortion of competition in the market by gaining an unfair advantage over competitors;
- the Full Court considered that the 'theoretical maximum [penalty] was in the trillions of dollars' as there were some 5.9 million contraventions, each of which had a maximum penalty of $1.1 million;[30] and
- given that there was no meaningful overall maximum penalty utilising this approach, the Full Court determined that the right decision was for the sanction for the conduct to be substantial relative to the possible gain made by the respondent. In this regard, the Full Court considered that the potential gain to the respondent was at least $20 million. Therefore, the appropriate penalty had to be not less than $6 million ($6 million being at the bottom of the appropriate range proposed by the ACCC).

[28] ACL s 248.

[29] ACL s 250.

[30] *ACCC v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181 at [157].