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Consumer Affairs Australia and New Zealand
Via www.consumerlaw.gov.au.

Re: Response to Interim Report for Australian Consumer Law Review

The Retail Council welcomes the opportunity to provide feedback on the Interim Report for the Australian Consumer Law Review (ACL Review). The Retail Council has been a keen participant in this process including making an initial submission to the Issues Paper, and meeting with CAANZ representatives twice, once before the release of the Interim Report and once afterwards.

The Retail Council was pleased to note that many of the issues raised in our initial submission were addressed in the Interim Report. There were, however, further questions raised around some of these matters, which this correspondence will respond to and which we hope CAANZ finds useful as the Final Report is completed.

The Retail Council is comfortable with the overall key high-level finding of the interim report, that:

Most stakeholders viewed the introduction of the ACL as a positive development in providing a consistent set of rights and responsibilities that applies nationally and across industries. This has helped reduce regulatory complexity, duplication and overlap.

There was also a broad level of agreement that the ACL is generally functioning well, but some stakeholders indicated areas where they consider the ACL could be clarified or strengthened to address regulatory gaps and evidence of consumer detriment.¹

The Retail Council agrees that the ACL is largely working well. Nevertheless, retailers see an opportunity to improve the operation of the ACL by reducing friction points around the interaction between retailers and their customers.

Retailers are largely at the coal-face of the implementation of the ACL. Retailers want happy customers and, for the most part, common issues around the ACL are resolved at the store level in a quick timeframe to the satisfaction of all parties. But this does not always happen and it is these instances where customers and retailers cannot agree on an appropriate solution that we are keen to further minimise by additional enhancements to the operation of the ACL.

Reducing these disagreements between retailers and customers does not always need a regulatory response. Increased guidance and education can play an important role. The ACCC and other regulators provide a lot of information about consumer rights and responsibilities and we welcome the improvement in this area in recent years. But more could be done, including looking at other

¹ CAANZ (2016) *Australian Consumer Law Review, Interim Report* p. 8

communication channels such as apps and social media to spread the word wider and/or direct more consumers and businesses to a website where more detailed information is available.

The Retail Council encourages CAANZ to consider these non-regulatory responses as a 'first option' when deciding how best to improve the operation of the ACL, rather than immediately looking to regulatory solutions.

Major, minor failures and acceptable quality and durability

Redressing minor/major failures and determining durability or acceptability quality matters is one of the largest areas that retailers are involved in the implementation of the ACL.

In our initial submission, the Retail Council recommended that:

The ACCC should provide additional consumer information regarding what constitutes a minor failure and what constitutes a major failure.

The ACCC should work with manufacturers and retailers to reduce confusion around what constitutes a reasonable time within which different products should be considered to have failed under the ACL.

The Retail Council welcomes the recognition of these concerns around major/minor failure and durability of goods in the Interim Report, in particular the comment that:

Regulators will be well placed at the end of this review process to enhance regulator guidance on acceptable quality, based on the feedback received. While there are practical implementation issues with estimating the lifespan of goods, CAANZ notes that there may be scope to expand guidance material with further examples of the key factors to consider.²

The Retail Council supports a continuation of the generic approach to consumer guarantees, rather than product specific which, by its nature, is likely to be prescriptive and add to compliance costs.

As a non-regulatory solution, any additional guidelines that regulators can provide to assist retailers and consumers to resolve issues would be welcomed.

We note that the Interim Report raises some specific questions about whether a set number of minor failures should automatically constitute a major failure. When considering whether further regulation is needed, we would urge CAANZ to consider the role that competitive or market forces can play in these situations. Retailers want happy customers, which they will not have if customers are constantly having to send goods away for repair. The desire to deliver quality products and have satisfied customers will play a role in a retailer's decision to treat a repeat failure as a major failure that constitutes a full refund or replacement. We acknowledge that the extent to which this occurs will depend on the relationship between manufacturer and retailer, but regulators should be aware that retailers will not be unresponsive to an unhappy customer.

Product safety issues

Retailers understand they have a role in ensuring that any unsafe products are removed from shelves quickly. As outlined in our initial submission, however, there is an opportunity to improve this aspect of the ACL. The Interim Report raised several additional questions around product safety which this follow-up submission addresses.

² CAANZ (2016) *Australian Consumer Law Review, Interim Report* p. 44

The Retail Council recognises that one of the current weaknesses of the ACL is that it responds to product safety issues after the problem has emerged, rather than explicitly preventing unsafe products to be sold. The Interim Report asks for views on the introduction of a general prohibition of supplying an unsafe product.

The Retail Council has some concerns about the proposal to introduce a general prohibition on supplying unsafe goods due to the asymmetry of information that exists. Manufacturers of products have more information about the likely safety of products than a retailer has. Any general prohibition about providing unsafe products would need to take this into account when apportioning responsibility for making sure that unsafe products do not reach shelves. One way to address this would be to allow retailers to rely on safety standards – both Australian Standards and International Standards – when deciding if a product is safe or not.

The Interim Report also raises a number of suggestions to improve the mechanism of reporting product failures. The Retail Council supports steps that involve increased regulator guidance, increasing the mandatory reporting timeframe, streamlining the process of implementing product bans and improving the quality of information made available to consumers about safety risks.

General unfair commercial practice term

The Retail Council does not support the inclusion of a general unfair commercial practices term. This view was put forward in our initial submission to this Review.

The Retail Council would not support such an approach and instead prefers the current approach used in consumer law in Australia, which is to exclude specifically defined behaviours.

The experience of the European Union highlights the problems of adopting a broad prohibition such as unfair commercial practice. After the general prohibition of unfair commercial practice was introduced in the EU, an additional 31 specific practices had to be listed as part of the prohibition – highlighting the practical challenges of trying to use a single, catch-all prohibition.

The EU experience was re-enforced by the Productivity Commission's analysis of the usefulness of a general prohibition against unfair commercial practices. They found that while such an approach may sound legislatively appealing, it would face significant practical implementation problems.

In short, Australia has a comprehensive suite of consumer protection laws that should not be replaced by a vague and broad prohibition such as unfair commercial practice.

In addition to reiterating these points, the Retail Council also argues that supporters of a general unfair commercial practices term have failed to identify a gap in the current law which would justify such a significant economy-wide approach.

The Retail Council once again thanks CAANZ for the opportunity to contribute to this review of Australian Consumer Law and we hope that our perspectives have been useful. If we can be of further assistance, please contact our Sydney office on (02) 8823 3515.

Kind Regards



Steve Wright
Acting CEO